

COMMENTS

The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities

INTRODUCTION

Fruit and vegetable growers began to experience economic difficulties during the first quarter of this century. Consumers experienced alternating periods of excess supply and shortages. The quality of fruits and vegetables varied widely. Unfair and discriminatory trade practices developed in the absence of federal and state laws prohibiting such practices.¹

In an effort to gain control of their markets, producers formed voluntary associations. These associations proved ineffective, however, largely because farmers who refused to participate as members of the associations were able to enjoy the benefits of controls without having to bear any of the restrictions that membership imposed.²

These conditions and the Great Depression of the 1930's created an economic crisis for the nation's farmers. The economic devastation experienced by farmers threatened the recovery and long-term stability of the United States economy. It also undermined the ability of the agricultural sector to meet a growing nation's need for a dependable and

¹ Leon Garoyan, *Marketing Orders*, 23 U.C. DAVIS L. REV. 697, 698 (1990); B.C. French, *Fruit and Vegetable Marketing Orders in the United States, 1937-1987, a Review*, 223 ACTA HORTICULTURAE 48, 49 (1988).

² This became known as the "free rider" problem. French, *supra* note 1, at 49.

economic supply of food and fiber.³

New Deal efforts to control the free market forces that were perceived, at the time, to adversely affect farmers culminated in the Agricultural Marketing Agreement Act of 1937 (AMAA).⁴ Marketing orders became part of the attempt to push prices up to "parity price"⁵ levels based on farmers' profit margins during the period 1910 to 1914—otherwise referred to as the "golden days of American agriculture"⁶

Courts have generally recognized protection of the purchasing power of farmers as a significant focus of the AMAA.⁷ However, Congress also recognized consumer interests, for parity was to be achieved through gradual commodity price increases "in the public interest and feasible in view of the current consumptive demand."⁸

³ Garoyan, *supra* note 1, at 698.

⁴ Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.). For insight into the AMAA, see John H. Vetne, *Federal Marketing Order Programs*, in 1 AGRICULTURAL LAW 75, 75-181, §§ 2.01-2.58 (John H. Davidson ed., 1981 & Supp. 1989); Marvin Beshore, *Agricultural Marketing Agreement Act of 1937*, in 9 NEIL E. HARL, AGRICULTURAL LAW 70-1, 70-1 to 70-63, §§ 70.01-70.07 (1993 & Supp. 1994).

⁵ "Parity price" for any agricultural commodity is determined by multiplying the adjusted base price of the commodity by the parity index, all at a prescribed date. 7 U.S.C. § 1301(a)(1)(A) (1994). The "adjusted base price" is the average of the prices received by farmers for the particular commodity, during a time period determined by the Secretary of Agriculture [hereinafter Secretary], divided by the ratio of the general level of prices received by farmers for agricultural commodities during such period to the general level of prices received by farmers for agricultural commodities during the period January 1910 through December 1914. *Id.* § 1301 (a)(1)(B). The "parity index" is the ratio of the general level of prices for articles and services that farmers buy, wages paid hired farm labor, interest on farm indebtedness secured by farm real estate, and taxes on farm real estate, all for a prescribed calendar month, to the general level of such prices, wages, rates and taxes during the period January 1910 through December 1914. *Id.* § 1301 (a)(1)(C). "Parity," as applied to income, is that gross income from agriculture that will provide the farm operator and his family with a standard of living equivalent to that afforded persons dependent upon other gainful occupations. *Id.* § 1301 (a)(2). See Beshore, *supra* note 4, § 70.01, at 70-5 & n.16.

⁶ Doug Bandow, *Why 2 Billion Oranges Will Rot in the Fields*, WASH. POST, Aug. 9, 1985, at A23. At the time his comments were published, Mr. Bandow was a senior fellow at the Cato Institute and had served as Special Assistant to the President for Policy Development in the Reagan Administration.

⁷ A declared policy of the AMAA is to promote parity prices for farmers. See, e.g., *Stark v. Wickard*, 321 U.S. 288, 303 (1944); *United States v. Rock Royal Coop.*, 307 U.S. 533, 549-50 (1939); *Rasmussen v. Hardin*, 461 F.2d 595 (9th Cir. 1972), *cert. denied*, 409 U.S. 933 (1972).

⁸ 7 U.S.C. § 602(2). In *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985), the Ninth Circuit Court of Appeals granted the Secretary broad authority to balance other

Although some marketing orders influence the supply and price of commodities with cartel-like precision, marketing orders have been granted antitrust immunity by Congress.⁹ The Great Depression brought an end to most of the federal cartel-setting schemes. Notable exceptions are marketing orders, which have continued despite the end of what Congress referred to as an "acute economic emergency."¹⁰

Marketing orders have generated intense debate for more than six decades. The debate's underlying theme has focused on whether marketing orders serve the best interests of farmers and the consuming public. On one hand, agricultural cooperatives¹¹ and their member producers have benefitted directly from the high commodity prices that marketing orders, particularly those that regulate the flow of product to market, have fostered. Understandably, cooperatives have zealously protected their dominance of the marketplace.¹² On the other hand,

policy goals against the pursuit of parity. The court held that it was sufficient if an order "tended" to promote parity. "[P]arity" is a goal toward which the Secretary must strive, rather than the process of setting an objective, fixed price." 765 F.2d at 830. *See* Schepps Dairy, Inc. v. Bergland, 628 F.2d 11 (D.C. Cir. 1979).

⁹ The antitrust provisions of the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), and the AMAA, ch. 296, § 1, 50 Stat. 246 (codified as amended at 7 U.S.C. § 608b), followed earlier legislation pertaining to cooperatives. The Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1994), 29 U.S.C. § 52 (1994)), exempted nonprofit cooperatives from the provisions of antitrust statutes. The Co-operative Marketing Associations (Capper-Volstead) Act, ch. 57, 42 Stat. 388 (1922) (codified at 7 U.S.C. §§ 291-292), authorized corporate cooperatives and permitted them to engage common marketing agencies. *See* Lawrence Shepard, *Cartelization of the California-Arizona Orange Industry, 1934-1981*, 29 J.L. & ECON. 84 n.6 (1986) (noting that the statutory and common law bases for the antitrust immunity of agricultural marketing programs are analyzed in LOUIS B. SCHWARTZ & JOHN J. FLYNN, *ANTITRUST AND REGULATORY ALTERNATIVES* 471, 861 (1977)). *See also* Shepard, *supra* at 89-90 & nn.23, 24 (noting that the resemblance of marketing orders to private cartels is addressed in John A. Jamison, *Marketing Orders, Cartels, and Cling Peaches: A Long-Run View*, in 6 STAN. FOOD RES. INST. STUD. 117 (1966)).

¹⁰ Bandow, *supra* note 6.

¹¹ Examples include Sunkist Growers, Inc. (formerly California Fruit Growers Exchange), headquartered in Sherman Oaks, California, which controls 70% of the supply of domestic lemons (David Drum, *Marketing Orders: Putting the Squeeze on Lemons* 15 CAL. J. 237, 238 (1984)), and Blue Diamond Growers, Inc. (formerly California Almond Growers Exchange), located in Stockton, California, which accounts for 92% of all almonds sold in United States grocery stores under its Blue Diamond label (JAMES BOVARD, *THE FARM FIASCO* 194 (1989)). At the time Mr. Bovard's book was published, he was an associate policy analyst with the Cato Institute and the Competitive Enterprise Institute in Washington, D.C.

¹² Jeffrey H. Birnbaum, *Crop Controversy: Farm, Budget Officials Clash on Supply Curbs By Marketing Boards*, WALL ST. J., Dec. 7, 1982, at 1.

consumer advocacy groups,¹³ large independent growers,¹⁴ the United States Department of Justice and the United States Small Business Administration (SBA) have generally sought either to substantially alter the provisions of certain marketing orders, or to achieve outright elimination of the orders. These entities have contended that, without marketing orders, the supply of fresh fruits and vegetables would readily meet demand, while consumer prices would decline and producers' net profits would increase over the long term.¹⁵

The debate has been particularly intense with regard to the California-Arizona citrus marketing orders. Although the citrus marketing orders have been terminated, the debate is far from over. The ultimate results of the debate are likely to have profound effects on the availability and cost of not only oranges and lemons, but an assortment of fresh fruits and vegetables. On a global scale, the debate's outcome is likely to influence the ability of many of the nation's farmers to compete effectively in world markets.

This comment focuses on the underlying theme of this continuing debate by first reviewing the policies and legislation underlying marketing orders. Attention is then directed to the alternative methods encompassed by marketing orders to effectuate the regulatory process. From this foundation, the comment focuses on the California-Arizona marketing orders pertaining to navel and Valencia oranges and lemons. The comment explores the economic implications of the citrus marketing orders and identifies some of the abuses and economic anomalies that the orders produced. The comment concludes by noting that the California-Arizona citrus marketing orders failed to meet the legislative policy objectives of achieving orderly marketing conditions while maximizing returns to growers at minimum burden to consumers.

¹³ Examples include the Consumers Union and the Community Nutrition Institute.

¹⁴ Examples include Frank "Tokkie" Elliott, a tree-fruit grower and packer with Cutler, California, based Wileman Bros., Elliott & Kashiki, Inc.; Dan Gerawan, an independent tree-fruit producer and general manager of Reedley, California, headquartered Gerawan Farming; Thomas Hampson, an owner of Senora Citrus Co., a Yuma, Arizona, lemon packinghouse; Cloyd Angle, an independent almond grower and owner of Cal-Almond, Inc. located near Modesto, California; Robert Saulsbury of Saulsbury Orchards, a San Joaquin Valley almond handler; Edgar L. Cochran, a Royal City, Washington, spearmint farmer; and now-deceased Carl A. Pescosolido, Jr., a former Exeter, California, navel orange producer and owner of Sequoia Orange Co.

¹⁵ Birnbaum, *supra* note 12. See BOVARD, *supra* note 11, at 179-347.

I. POLICIES AND LEGISLATION UNDERLYING MARKETING ORDERS

Marketing orders have their roots in the actions of local and state jurisdictions that sought to protect the health, safety and welfare of their citizens by establishing milk-quality standards.¹⁶ Responding in 1933 to the financial strain experienced by farmers during the Great Depression, Congress enacted the Agricultural Adjustment Act (AAA).¹⁷ Soon thereafter, a federal regulation promulgated under the National Industrial Recovery Act was challenged on constitutional grounds. The Supreme Court, in *Panama Refining Co. v. Ryan*, held that the regulation was invalid and unenforceable because provisions of the regulatory statute were overly broad, resulting in a prohibited congressional delegation of legislative authority to the executive branch.¹⁸ In view of the Court's decision, Congress began immediately to consider legislation to cure apparent deficiencies in the AAA. In the midst of congressional deliberations, the Supreme Court handed down its decision in *Schechter Poultry Corp. v. United States*, which reinforced the Court's earlier holding that the code-making authority that the National Industrial Recovery Act sought to confer on the President represented an unconstitutional delegation of legislative power.¹⁹

Reacting to the Court's ruling, Congress amended the 1933 legislation by adopting the Agricultural Adjustment Act of 1935.²⁰ Although Congress specifically intended to rectify the legislative deficiencies that led to the Court's decision,²¹ the constitutionality of the AAA continued under attack. In *United States v. Butler*,²² a cotton milling corporation challenged an AAA provision that authorized the levy of floor-stock and processing taxes. The Court's holding that regulation and control of agricultural production were beyond the federal government's delegated powers, and that the AAA invaded the reserved powers of the states, spurred Congress to remove any doubt as to the lawfulness of the program.²³ In adopting the AMAA, Congress in essence reenacted the

¹⁶ Vetne, *supra* note 4, § 2.02, at 78 & n.12 (citing *Adams v. Milwaukee*, 228 U.S. 572 (1913); *St. John v. New York*, 201 U.S. 633 (1906); *Fisher v. St. Louis*, 194 U.S. 361 (1904)).

¹⁷ Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-605, 607-623 (1994)).

¹⁸ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414-33 (1935).

¹⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935).

²⁰ Act of Aug. 24, 1935, ch. 641, 49 Stat. 750.

²¹ See H.R. REP. NOS. 952, 1241, 1757, S. REP. NO. 548, 74th Cong., 1st Sess. (1935).

²² 297 U.S. 1 (1936).

²³ See H.R. REP. NO. 468, S. REP. NO. 565, 75th Cong., 1st Sess. (1937) (each

1935 amendments to the AAA regarding marketing agreements and orders. In doing so, Congress confirmed its earlier policy to "secure fair exchange value for farm products"²⁴ by establishing and maintaining "orderly marketing conditions"²⁵ so that parity could be established for farmers.²⁶

A. Agricultural Marketing Agreement Act of 1937

To counter the difficult economic environment experienced by agriculture in the 1930's, Congress initially established minimum price supports. Later, Congress adopted acreage allotments for grains and certain other crops, which were defined as basic commodities. Congress conceived the marketing order program as a stabilizing mechanism for fresh fruits, vegetables, dried fruits, nuts and specialty crops, which were not addressed by the federal stabilization programs that applied to basic commodities.

Marketing orders were viewed as a unique mechanism through which the federal government could assist the nation's farmers:

Congress broke new ground in several ways upon enactment of the AMAA. The AMAA established precedence for an industry to adopt self-imposed regulations under terms established by Congress and administered by a federal agency. It granted partial exemption from several anti-trust laws for a commodity group operating within the terms of the AMAA. It established the means for Congress to establish and for a federal agency to administer a program having both a commodity interest and a public interest. In subsequent years, case law established the authority of the United States Department of Agriculture (USDA) to administer the AMAA in accordance with the USDA's interpretation of Congressional intent. (Footnotes omitted.)²⁷

referring to *Butler* as the primary stimulus for legislative action).

²⁴ See S. Rep. No. 1011, 74th Cong., 1st Sess. 1 (1935).

²⁵ 7 U.S.C. § 602 (1) (1994). The primary purpose of the AMAA is to ensure the orderly marketing of agricultural commodities. The Congress anticipated that "orderly marketing conditions" would generate increased returns to producers without unduly burdening consumers. See *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). The USDA has not attempted to define "orderly marketing conditions" for purposes of the California-Arizona citrus marketing orders. However, in response to comments filed with regard to proposed volume regulations for the 1990-91 navel orange season, the USDA appeared to equate the avoidance of unreasonable fluctuations in supplies and prices with orderly marketing conditions. See 55 Fed. Reg. 50,162 (Dec. 5, 1990).

²⁶ See H.R. REP. NOS. 952, 1241, 1757, S. REP. NO. 548, 74th Cong., 1st Sess. (1935).

²⁷ Garoyan, *supra* note 1, at 699 & nn.7, 8 (citing 7 U.S.C. § 608b; *United States v. Rock Royal Coop.*, 307 U.S. 533, 574-77 (1939) (approving delegation of authority to

Marketing orders were designed in part to promote the sale of agricultural products.²⁸ Although one of the primary objectives of the AMAA is to promote parity prices for farmers, the statute expressly directs the Secretary to achieve this requirement while taking into account the interests of consumers.²⁹ Marketing orders are also intended to regulate the quantity and quality of agricultural commodities sold in the marketplace.

Of the 46 marketing orders currently contained in the *Code of Federal Regulations* to control fresh fruits, vegetables, dried fruits, nuts and specialty crops,³⁰ most authorize mandatory assessments on growers to fund research and development and product advertising.³¹ Most also incorporate grade, size, packing and container standards.³² Although the purpose of such standards is not to influence the quantity of a regulated commodity to reach the market during periods of excess supply, the standards "may have that effect and thereby strengthen the market and prices."³³

Since the early 1980's, public opinion and some regulatory officials have been increasingly critical of marketing orders as the preferred means of addressing aberrations in the marketplace. In part because of such sentiment, the total number of marketing orders has declined slightly during the last 15 years.³⁴ Several years ago hops growers acted to terminate their marketing order after United States Department of Agriculture (USDA) Secretary John Block stripped it of its key sup-

the Secretary)).

²⁸ French, *supra* note 1, at 48. See *supra* note 7 and accompanying text.

²⁹ 7 U.S.C. § 602(2) (1994). In determining "crucial facts and conclusions, [the Secretary] cannot be guided solely by deference to industry desires." *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971). See *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 766 (D.C. Cir. 1971).

³⁰ 7 C.F.R. pts. 904-908, 910-913, 915-919, 921-932, 945-948, 953, 958-959, 966-967, 971, 979, 981-982, 984-985, 987, 989, 991, 993, 998 (1994). The code contains 26 marketing orders pertaining to fresh fruits; 11 concerning vegetables; and 9 regarding dried fruits, nuts and specialty crops. However, some of these 46 marketing orders are not effective at the present time; see *infra* notes 34-38 and accompanying text. Additionally, the code contains 40 marketing orders governing milk.

³¹ See *supra* note 30. See also Vetne, *supra* note 4, § 2.07, at 89-90.

³² See *supra* note 30. See also Vetne, *supra* note 4, § 2.07, at 89-90.

³³ Garoyan, *supra* note 1, at 701.

³⁴ Between 1980 and 1995, the number of marketing orders pertaining to fresh fruits remained constant at 26, the number of orders concerning vegetables declined from 13 to 11, the number of orders regarding dried fruits, nuts and specialty crops grew from 8 to 9, and the number of milk marketing orders declined from 47 to 40. See *supra* note 30. See also Vetne, *supra* note 4, § 2.07, at 89-90, § 2.16, at 100.

ply-control provision.³⁵ In recent years, marketing orders for Florida grapefruit were abandoned because they were not being utilized by growers.³⁶ The tart cherry marketing order faded into history when producers failed to muster the necessary votes to continue it.³⁷ In 1991 the plum order was terminated, and in 1994 the Secretary terminated the California-Arizona citrus marketing orders that applied to navel and Valencia oranges and lemons in an effort to bring an end to years of legal wrangling.³⁸

B. Relationship Between Federal and State Marketing Orders

The AMAA does not vest in the Secretary exclusively the authority to obtain orderly marketing objectives. Rather, it encourages state programs designed to operate in conjunction with, or separate from, federal marketing orders.³⁹

In *Parker v. Brown*, which involved a California state raisin program developed with the assistance of the USDA, the Supreme Court concluded that the AMAA's provisions⁴⁰ encouraged the development of state marketing regulations "either with or without the promulgation of a federal program by order of the Secretary."⁴¹ Clearly, "Congress did not intend to preempt the field of commodity marketing controls to the exclusion of state regulations, but in fact encouraged complementary state regulation."⁴² However, courts have held that a state program will be preempted if it "'stands as an obstacle to the accomplishment of the full purposes and objectives [of the federal regulatory scheme].'"⁴³ Additionally, the Supreme Court has struck down state

³⁵ Jonathan Rauch, *Hidden in the Grocery Aisle*, 19 NAT'L J. 2479, 2481 (1987).

³⁶ *Id.*

³⁷ *Id.*

³⁸ The USDA's decision to terminate the citrus marketing orders grew out of the holdings in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (9th Cir. 1993), and *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669 (E.D. Cal. 1994). Commenting on the government's decision to terminate the orders, Deputy Secretary of Agriculture Richard Rominger stated: "There's just so much dissention in the industry that we felt this was the only way to get some consensus We just didn't see an end to the litigation, short of what we're doing." Michael Doyle & Sanford Nax, *Citrus Moves to Free Market*, FRESNO BEE, May 17, 1994, at A1.

³⁹ Vetne, *supra* note 4, § 2.57, at 175.

⁴⁰ 7 U.S.C. § 610(i) (1994).

⁴¹ *Parker v. Brown*, 317 U.S. 341, 354 (1943).

⁴² Vetne, *supra* note 4, § 2.57, at 176.

⁴³ Vetne *supra* note 4, § 2.57, at 176-77 & n.652 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See *Jones v. Ruth Packing Co.*, 430 U.S. 519 (1977). See also

marketing controls that have interfered with interstate commerce.⁴⁴

II. ALTERNATIVE METHODS OF REGULATING MARKETS

Marketing orders are governed by the AMAA and the Administrative Procedure Act (APA).⁴⁵ These statutes permit the Secretary, after complying with notice and hearing requirements, to issue formal rules establishing marketing orders.⁴⁶ An order becomes effective when the commodity's producers ratify it by the typically required two-thirds majority.⁴⁷ Grower approval of a marketing order establishes an administrative committee that periodically develops implementing regulations. Such regulations must be approved by the Secretary and published in the *Federal Register* before they are binding.⁴⁸ Marketing orders authorize the Secretary to impose a variety of controls in response to requests from the administrative committee.⁴⁹ In most cases, such controls do not apply directly to producers, but rather to handlers.⁵⁰

Marketing order provisions that have sparked the most controversy are those that restrict the flow of crops to market, allegedly curtailing

Vetne *supra* note 4, § 2.57, at 177 & nn.653, 656 for application of the *Hines* test in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (holding that California avocado maturity regulations, which excluded some Florida avocados that conformed to a federal-order maturity test, did not violate the Supremacy Clause and the Equal Protection Clause of the Constitution). *See also* *United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n of Pa.*, 335 F. Supp. 1008 (M.D. Pa. 1971) (rejecting preemption arguments and concluding that the federal and state regulations were compatible), *aff'd per curiam*, 404 U.S. 930 (1971).

⁴⁴ Vetne, *supra* note 4, § 2.57, at 176 & n.651.

⁴⁵ Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

⁴⁶ 7 U.S.C. § 608c(3) (1994).

⁴⁷ 7 U.S.C. § 608c(8)(A), (B); 608c(9)(B)(i), (ii). With the exception of the California-Arizona citrus orders, two-thirds of producers, or producers who account for two-thirds of the volume of a commodity, must vote to approve a marketing order. The California-Arizona citrus orders require that three-fourths of producers, or producers who account for two-thirds of the volume, must vote to approve an order.

⁴⁸ Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, 9 REG. 20 (1985). At the time their comments were published, Mr. Lenard was Special Assistant to the Director, Bureau of Economics, Federal Trade Commission, and Mr. Mazur was an economist with the Office of Management and Budget.

⁴⁹ *Id.*

⁵⁰ Shepard, *supra* note 9, at 90 n.24. A handler is an intermediary, sometimes a member of a producer cooperative, who receives a commodity from growers, processes and packs the commodity, and markets it.

supply and driving up prices. Marketing orders encompass four types of supply restrictions.⁵¹

A. Volume Control Provisions

Volume control or "prorate" provisions⁵² limit the quantity of a commodity a handler may ship to the primary markets⁵³ during a specified period of time, typically a week.⁵⁴ Excess produce must be held for later shipment or sold in the secondary markets. Exemplary of volume control provisions is a regulation that the USDA published October 12, 1984 stipulating that growers could ship to market during the period extending from October 14 to October 20 no more than 200,000 cartons of fresh California-Arizona lemons.⁵⁵

Marketing orders encompassing volume control provisions include those that applied, until their termination, to California-Arizona navel oranges, Valencia oranges and lemons.⁵⁶ Because the prorate provisions were effective throughout the growing season, portions of these citrus crops were never permitted to reach the primary markets.⁵⁷ It is this restriction of supply that is largely responsible for the nation-wide controversy surrounding the California-Arizona citrus marketing orders.

⁵¹ Lenard & Mazur, *supra* note 48.

⁵² Volume prorates are sometimes referred to as "flow-to-market allotments." See Vetne, *supra* note 4, § 2.12, at 95-97.

⁵³ "Primary markets" are those in which a handler sells his highest-grade produce and from which he anticipates the highest price. Primary markets generally encompass the domestic fresh produce markets. "Secondary markets" are those in which excess or inferior-grade commodities are sold. Secondary markets include those involving processed foods, exports (although some export markets accommodate only high-grade produce) and nonfood uses, such as cattle feed.

⁵⁴ Some of the marketing orders with volume control provisions include a minor form of volume control known as a "shipping holiday," which is a designated period during which shipments of a regulated commodity are not permitted. A shipping holiday is typically imposed to overcome the impact of unusual supply-demand conditions such as those that occur around seasonal holidays. See Garoyan, *supra* note 1, at 700 & n.10; Vetne, *supra* note 4, § 2.12, at 96; Lenard & Mazur, *supra* note 48, at 20-21.

⁵⁵ Lenard & Mazur, *supra* note 48.

⁵⁶ 7 C.F.R. pt. 907 (1994) (navel oranges grown in Arizona and designated part of California); *id.* pt. 908 (Valencia oranges grown in Arizona and designated part of California); *id.* pt. 910 (lemons grown in California and Arizona).

⁵⁷ Lenard & Mazur, *supra* note 48.

B. Market Allocation Provisions

Market allocation provisions direct output from the primary to the secondary markets.⁵⁸ For example, during the 1983-84 crop year, the USDA agreed with a Walnut Marketing Board recommendation that 76% of the crop was required to satisfy domestic needs. The effect of the order was to prevent the remaining 24% of the crop from being offered for sale in the domestic market. The withheld walnuts were instead made available for export.⁵⁹

Market allocation provisions apply to almonds, filberts and hazelnuts, walnuts, dates, raisins and spearmint oil.⁶⁰

C. Reserve Pool Requirements

Reserve pool requirements dictate that all producers of a designated commodity place a specified portion of their crop in storage. Later, all or a portion of the stored commodity may be released for unrestricted sale or for sale in the secondary markets.⁶¹ In some instances, producers may satisfy the reserve requirement by destroying a specified quantity of the commodity.⁶²

Commodities subject to reserve pool requirements include almonds, walnuts, raisins, prunes and spearmint oil.⁶³

D. Producer Allotment Provisions

The producer allotment provisions of the marketing order system assign each producer of a designated commodity a "base quantity." Annually, a "uniform percentage" is established upon the recommendation of the administrative committee. A producer's base quantity is multiplied by the uniform percentage to arrive at the "marketable quantity"

⁵⁸ Vetne, *supra* note 4, § 2.14, at 98-99.

⁵⁹ Lenard & Mazur, *supra* note 48, at 20.

⁶⁰ 7 C.F.R. pt. 981 (1994) (almonds grown in California); *id.* pt. 982 (filberts and hazelnuts grown in Oregon and Washington); *id.* pt. 984 (walnuts grown in California); *id.* pt. 987 (domestic dates produced or packed in Riverside County, California); *id.* pt. 989 (raisins produced from grapes grown in California); *id.* pt. 985 (spearmint oil produced in the Far West).

⁶¹ Lenard & Mazur, *supra* note 48, at 20. *See* Vetne, *supra* note 4, § 2.14, at 98-99.

⁶² Lenard & Mazur, *supra* note 48, at 20.

⁶³ 7 C.F.R. pt. 981 (almonds grown in California); *id.* pt. 984 (walnuts grown in California); *id.* pt. 989 (raisins produced from grapes grown in California); *id.* pt. 993 (dried prunes produced in California); *id.* pt. 985 (spearmint oil produced in the Far West).

that the individual producer can sell.⁶⁴

Typically, allotments are granted only to existing producers at the time a marketing order is established. Therefore, new growers cannot enter the field without first acquiring an allotment base from an existing producer.⁶⁵

Only cranberries, Florida celery and spearmint oil are affected by producer allotments.⁶⁶

III. THE ORANGE MARKETING ORDERS

When a marketing order corrects a genuine failure in the market, the best interests of producers and consumers are served. This is achieved, for example, when a marketing order restricts and redistributes the supply of a perishable commodity to minimize seasonal crop fluctuations that would otherwise result in waste or overcapacity.⁶⁷ In contrast, if a marketing order fails to correct a market deficiency, it "simply redistributes wealth within the marketplace, most likely at consumers' expense and probably inefficiently."⁶⁸

As with other marketing orders, the orange marketing orders were intended primarily to enhance the economic viability of producers. Yet most of the family farmers the orange marketing orders were designed to protect have proved to be absentee owners engaged in farming as a tax shelter.⁶⁹ Eighty percent of California citrus farmers are absentee landowners focused as much on minimizing their tax obligations as on farming.⁷⁰

Beyond their impact on growers, marketing orders are known to exert profound effects on the availability and cost of fresh fruits, nuts and certain processed food products. The result is not always in the best interests of either producers or consumers, as evidenced in the history of the navel orange marketing order.

⁶⁴ Lenard & Mazur, *supra* note 48, at 20. See Vetne, *supra* note 4, § 2.13, at 97-98.

⁶⁵ Lenard & Mazur, *supra* note 48, at 20. See Vetne, *supra* note 4, § 2.13, at 98.

⁶⁶ 7 C.F.R. pt. 929 (cranberries grown in 10 states); *id.* pt. 967 (celery grown in Florida); *id.* pt. 985 (spearmint oil produced in the Far West).

⁶⁷ Rauch, *supra* note 35, at 2483.

⁶⁸ Rauch, *supra* note 35, at 2483.

⁶⁹ BOVARD, *supra* note 11, at 185.

⁷⁰ Alton Pryor, *Citrus Limelight: Sunkist's Chief Talks Marketing Issues*, CAL. FARMER, Feb. 16, 1985, at 13-E (quoting Russell Hanlin, President of Sunkist Growers, Inc.).

A. *The Role of the Navel Orange Administrative Committee*

Handlers of navel oranges grown in Arizona and designated parts of California were subject to regulation under marketing order 907 from 1953 until it was terminated in 1994.⁷¹ The order divided the growing region into four districts⁷² and authorized the Secretary to impose weekly volume restrictions on the amount of navel oranges that could be shipped to the domestic fresh-fruit market when he determined that the imposition of controls would tend to effectuate the purposes of the AMAA. A committee of handlers, the Navel Orange Administrative Committee (NOAC),⁷³ established pursuant to the order, advanced recommendations to the Secretary concerning market conditions and the need for implementation of regulatory authority allowed by the AMAA and the order.

The order required that the NOAC forward to the Secretary a marketing policy statement and the committee's recommendations for the use of volume controls prior to the commencement of each marketing season.⁷⁴ The annual marketing policy statement included a proposed weekly shipping schedule to impose the volume control regulation and an equity factor that was used to determine the number of oranges that could be shipped on a weekly basis from each district. The NOAC met weekly to determine the number of oranges that should be shipped to the fresh-fruit market. The NOAC's recommendations were then submitted to the Secretary.

Until 1991, the Secretary simply approved the weekly recommendations of the committee and published them as a final rule under the

⁷¹ Although the marketing orders for navel and Valencia oranges are separate (*see supra* note 56), they encompass the same provisions. The controversy surrounding the orange marketing orders focused over the years on the navel orange marketing order principally because of the larger volume of navel oranges compared to Valencia oranges and the dominance of Sunkist Growers, Inc. in the navel orange markets. The marketing orders and related regulations governing navel and Valencia oranges and lemons grown in Arizona and designated parts of California were terminated by the Secretary in 1994. *See* 59 Fed. Reg. 44,020 (Aug. 26, 1994).

⁷² District 1, central California's San Joaquin Valley; district 2, southern California; district 3, Arizona-Desert Valley; district 4, northern California.

⁷³ A similar committee of handlers, the Valencia Orange Administrative Committee (VOAC) administered the Valencia orange marketing order. 7 C.F.R. pt. 908 (1994).

⁷⁴ The marketing season for navel oranges extends from November through May. Volume control regulations, if implemented, may be implemented for an entire season or part of a season. Since the order was initiated in 1953, volume control regulations have been imposed for at least part of each marketing season. During the 1984-85 and 1990-91 marketing seasons, volume controls were suspended because of crop losses due to severe freezes.

APA's "good cause" exception to notice and comment rulemaking. This regulatory scheme was changed for the 1992-93 season as a result of *Riverbend Farms, Inc. v. Madigan*,⁷⁶ in which the Ninth Circuit concluded that the procedures previously followed by the Secretary violated the APA. Subsequent to the decision in *Riverbend Farms*, the Secretary issued proposed rules incorporating shipping schedules based upon recommendations submitted to him by the NOAC. If the recommendations were accepted, the Secretary issued final regulations.

B. Sunkist Growers' Dominant Position in the Marketplace

The navel orange industry consists of one dominant cooperative marketer,⁷⁶ which controls about 50% of the market, four unaffiliated handlers, with an aggregate total of 26% of the market, and all other handlers, which account for the remaining 24% of the market.⁷⁷ In a week when the demand for navel oranges was high, such as around Christmas, the volume control regulations prevented small handlers from shipping sufficient oranges to meet the needs of their wholesale and retail customers. However, Sunkist, due to its size and presence in all districts and its sophisticated marketing methods, could obtain sufficient volume to supply all its customers. Although denied by Sunkist, handlers allegedly cheated by shipping more than they were allotted under the volume control restrictions.⁷⁸ Thus, the imposition of volume controls placed small handlers at a distinct disadvantage.

Sunkist maintained five seats on the NOAC, and a majority vote of six was required to forward volume control recommendations to the Secretary. Sunkist therefore needed to obtain the vote of only one other NOAC member to obtain approval of a volume control recommendation.

A detailed assessment of the volume control system illustrates how Sunkist could meet the demands of its customers while other handlers encountered difficulty in doing so. Volume control regulations provided the Secretary with a mechanism to apportion the amount of a crop that could be shipped to the domestic fresh-fruit market. The regulations

⁷⁶ 958 F.2d 1479 (9th Cir. 1992).

⁷⁶ The dominant cooperative, Sunkist Growers, Inc., is grower owned and consists of approximately two-thirds of the 130 navel orange handlers identified by the USDA. Letter from Thomas P. Kerester, Chief Counsel for Advocacy, U.S. Small Business Admin., to Dan Haley, Administrator, Agric. Mktg. Serv., U.S. Dep't of Agric. 6 n.9 (Nov. 16, 1992) (copy on file with the *San Joaquin Agricultural Law Review*).

⁷⁷ Memorandum from the General Counsel to the Secretary at 2 (Apr. 17, 1986).

⁷⁸ See *Leavens v. Madigan*, No. 92-2832 (D.C.C. Dec. 29, 1992).

called for the total number of navel oranges produced to be established. Estimates were formed of the amount of the crop that should be shipped to the domestic fresh-fruit market to maximize returns to growers and produce orderly marketing. The ratio of these two amounts constituted the "equity factor."⁷⁹ The equity factor was then applied to the total tree crop in each of the four producing districts. The result represented the total amount of the crop that should be sold from each district in the domestic fresh-fruit market.⁸⁰ This amount was apportioned weekly over the season. The amount an individual handler could ship—i.e., the prorate—was the percentage of the total crop that a handler had available for shipment.⁸¹ This percentage was multiplied by the total amount that should be shipped from the district in a stipulated week. For example, if a handler controlled 25% of the crop in a district (the prorate base), and shipments from the district should be 10,000 cartons in a particular week, the handler's prorate would be 2,500 cartons.

Of the four districts to which the navel orange order applied, district 1, which encompassed central California, produced the greatest amount of oranges. Prorate allotments normally prevented handlers in district 1 from shipping all their oranges to the fresh-fruit market. Districts 2, 3 and 4, which were dominated by Sunkist growers, were granted sufficiently large prorate bases relative to production that they were not, as a practical matter, restricted by prorate allotments. The differences in allocations among districts enabled Sunkist to avoid prorate restrictions while smaller handlers could not.⁸²

1. Bloc Vote Provision Withstands Challenge

Both the navel and Valencia orange marketing orders contain a provision requiring the Secretary to conduct a referendum every six years to determine whether the orders should be continued.⁸³ The AMAA permits a cooperative to bloc vote in a referendum in behalf of its member handlers.⁸⁴

In the summer of 1991, the Secretary conducted the required referendum to determine whether the orange marketing orders should be continued. Despite provisions in its bylaws that members could "opt

⁷⁹ 7 C.F.R. § 907.110(a) (1994).

⁸⁰ *Id.*

⁸¹ *Id.* § 907.54.

⁸² Letter from Thomas P. Kerester to Dan Haley, *supra* note 76, at 8 n.13.

⁸³ 7 C.F.R. §§ 907.83, 908.83.

⁸⁴ 7 U.S.C. § 608c(12) (1994).

out”—i.e., vote for or against continuation of the order without restriction by the Sunkist board—Sunkist bloc voted in behalf of its entire membership, thus ensuring continuation of the orders.⁸⁵ Had the Sunkist board not bloc voted, continuation of the orders may have been defeated.⁸⁶

The Sunkist bloc vote was challenged on First Amendment and equal protection grounds. In *Cecelia Packing Corp. v. USDA*,⁸⁷ the Ninth Circuit concluded that the First Amendment rights of Sunkist members were not infringed, because the “opt out” provision permitted them to vote independently.⁸⁸ The court also concluded that, based upon congressional policy that fostered agricultural cooperatives, Sunkist members’ rights under the Equal Protection Clause of the Fifth Amendment were not violated because a rational basis existed for the bloc vote authority.⁸⁹

2. Referendum on Amendments Struck Down

In March 1983, the USDA announced that it was considering amendments to the marketing orders governing both navel and Valencia oranges. After holding hearings and issuing proposed rules, the Secretary announced that a referendum would be held on the orders as altered by the proposed rules as a group, otherwise known as an “all-or-nothing” voting process. However, at Sunkist’s urging, the Secretary modified his position and subsequently announced that the referendum would not focus on the proposed amendments as a group, but instead referenda would focus on each of the proposed amendments individually. The Secretary’s decision was challenged, and, in *Sequoia Orange Co. v. Yeutter*,⁹⁰ the Ninth Circuit held that the “all-or-nothing” voting process was part of the finding that the new proposals would tend to effectuate the purposes of the AMAA. As a result, the Secretary terminated the proceedings and left intact the orange marketing orders absent the 1985 amendments.⁹¹

⁸⁵ Letter from Thomas P. Kerester to Dan Haley, *supra* note 76, at 10.

⁸⁶ Continuation of the orders required support from two-thirds of the growers or those who represented two-thirds of the production. Opponents of continuing the orders accounted for 20% of the vote. Had Sunkist not been able to bloc vote, the potential existed for the opponents to obtain the one-third required to defeat continuation of the orders. Letter from Thomas P. Kerester to Dan Haley, *supra* note 76, at 10 n.19.

⁸⁷ 10 F.3d 616 (9th Cir. 1993).

⁸⁸ *Id.* at 621-23.

⁸⁹ *Id.* at 625.

⁹⁰ 973 F.2d 752 (9th Cir. 1992), *modified*, 935 F.2d 1419 (9th Cir. 1993).

⁹¹ See 57 Fed. Reg. 49,655 (Nov. 3, 1992).

C. Volume Control Regulations Resulted in the Misallocation and Waste of Resources

Under volume control regulations, the NOAC determined the portion of the navel orange crop that could be sold in the domestic fresh-fruit market. The balance of the crop was then sold in the secondary markets for processing, exported or marketed as cattle feed. By causing shortages and high prices in the domestic fresh-fruit market and gluts and low prices in the processing markets, this regulatory scheme resulted in the very costs it purportedly sought to avoid.

During the 1988-89 season, growers managed 117,165 fruit-bearing acres of navel oranges in California and Arizona⁹² These growers incurred average per acre production costs of \$2,292, excluding harvesting and marketing costs.⁹³ Total production costs therefore exceeded \$268.5 million. The cost of harvesting and marketing oranges sold for processing exceeded the price that growers could obtain from processors.⁹⁴ Since the demand for processing oranges is elastic,⁹⁵ navel oranges sold in the processing market fail to make a net positive economic contribution to society. Thus, for each one percent of the crop that the volume control regulations caused to be sold in the processing market, at least \$2.68 million in production costs were wasted. The true waste is greater yet, for this amount does not take into consideration the opportunity costs attributable to foregone consumption.

During the three decades following 1960, the volume control regulations only exacerbated problems of resource misallocation and economic waste. The portion of the crop that was processed grew from an average annual rate of 18% during the 1960's to an average annual rate of 25% during the 1980's.⁹⁶ Under normal weather conditions, about 11%

⁹² NOAC, 1992-93 MARKETING POLICY FOR NAVEL ORANGES GROWN IN ARIZONA AND DESIGNATED PART OF CALIFORNIA Table D (Sept. 22, 1992) [hereinafter NOAC 1992-93 Marketing Policy Statement].

⁹³ BOYD M. BUXTON, U.S. DEP'T OF AGRIC., COSTS OF PRODUCING ORANGES IN CALIFORNIA AND FLORIDA, 1988/89 6 (Agric. Econ. Rep. No. 650, June 1991).

⁹⁴ ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., FRUIT AND TREE NUTS SITUATION AND OUTLOOK REPORT 51 (Aug. 1991).

⁹⁵ PETER K. THOR & EDWARD V. JESSE, U.S. DEP'T OF AGRIC., ECONOMIC EFFECTS OF TERMINATING FEDERAL MARKETING ORDERS FOR CALIFORNIA-ARIZONA ORANGES 21 (Tech. Bull. No. 1664, 1981); NICHOLAS J. POWERS ET AL., U.S. DEP'T OF AGRIC., ASSESSMENT OF A MARKETING ORDER PRORATE SUSPENSION: A STUDY OF CALIFORNIA-ARIZONA NAVEL ORANGES 19 (Agric. Econ. Rep. No. 557, 1986).

⁹⁶ Roger Fox, Data Relating to Alternate Utilizations of the 1991-92 California-Arizona Navel Orange Crop, Table 1 (May 24, 1991) (unpublished report on file with the *San Joaquin Agricultural Law Review*). Data pertaining to the 1962-63, 1967-68,

of the crop would be unsuitable for sale in the fresh-fruit market.⁹⁷

D. Volume Control Regulations Failed to Produce Long-Term Benefits for Producers or Consumers

When demand is relatively inelastic, a given percentage reduction in output generates a larger percentage increase in price. Conversely, when demand is relatively elastic, a given percentage increase in production generates a smaller percentage decrease in price. Because demand for navel oranges in the fresh-fruit market is relatively inelastic compared to demand in the processing market, volume control regulations raised grower revenue over the short term. Therefore, over the short term, by diverting otherwise marketable navel oranges from the fresh-fruit market to the processing market, volume control regulations could have been expected to increase prices and grower revenue more in the fresh-fruit market than they decreased prices and revenue in the processing market. But empirical evidence suggests that producers did not derive increased returns over the long term from the imposition of volume control regulations.⁹⁸ By one estimate, such regulations may have resulted in excess production approaching 30%.⁹⁹

The adverse impact of volume control regulations on producers was clearly apparent during the 1990-91 season, when only 32,895 carloads of navel oranges were produced.¹⁰⁰ Although prices during the 1990-91

1968-69 and 1980-81 seasons have been excluded from the calculation because the percentage of product processed, donated for charitable purposes and disposed of as unfit for human consumption during these seasons was abnormally high due to freeze damage losses that were estimated in each season to exceed five percent of the harvested crop. The report by Dr. Fox, Professor of Agricultural Economics at the University of Arizona, Tucson, Arizona, consisted of four tables that were incorporated into NOAC, 1991-92 MARKETING POLICY FOR NAVAL ORANGES GROWN IN ARIZONA AND DESIGNATED PART OF CALIFORNIA (June 25, 1991).

⁹⁷ Ninety percent of the navel oranges produced in districts 1 and 3, and 85% produced in district 2, were suitable for sale in the fresh-fruit market. THOR & JESSE, *supra* note 95, at 29-30. During the 1980's (excluding the 1980-81 season in which freeze damage losses were estimated to have equaled or exceeded five percent of the harvested crop), production was distributed among the districts as follows: district 1, 84%; district 2, 12%; district 3, 3%; district 4, 1%. Therefore, even if none of the oranges in district 4 could have been sold in the fresh-fruit market, 89% of all oranges produced could have been sold in the fresh-fruit market. See NOAC 1992-93 Marketing Policy Statement, *supra* note 92, at Table E.

⁹⁸ Shepard, *supra* note 9, at 83; Roy J. Smith, *The Lemon Prorate in the Long Run*, 69 J. POL. ECON. 573 (1961).

⁹⁹ THOR & JESSE, *supra* note 95.

¹⁰⁰ NOAC 1992-93 Marketing Policy Statement, *supra* note 92, at Table E.

season were about 50% higher than prices during the 1989-90 season,¹⁰¹ revenue was only one-half that of the 1989-90 season. The United States Department of Justice observed that “[a]n industry that remains in good health after a loss of this magnitude is unlikely to be harmed by any minor price variations that might occur if prorated were not reinstated in the current season.”¹⁰²

1. Fresh Fruit Prices Declined in the Absence of Volume Control Regulations

In an analysis based on the 1984-85 season, the USDA projected that suspending volume control regulations would lead to an increase in shipments of fresh navel oranges and a corresponding decrease in shipments of navel oranges for processing. The USDA concluded that suspension would not change the prices of processed navel oranges, but would result in lower prices for navel oranges in the fresh-fruit market.¹⁰³

In 1985, Florida experienced a severe freeze that seriously damaged the state’s orange crop. To avoid an orange shortage, the USDA suspended supply controls on navel oranges for six months. The result was a significant drop in orange prices accompanied by a sharp rise in consumption.¹⁰⁴ The USDA’s Economic Research Service concluded that “under deregulation . . . ‘grower income was about the same as it would have been under regulation.’”¹⁰⁵

Similar results occurred in 1992 when the Secretary suspended the volume prorated provisions of the navel orange marketing order. “California growers shipped 80 million oranges a week *more* than they would have under quotas—and prices were 25 to 35 percent lower.”¹⁰⁶

A 1990 USDA study illustrated that the consumption of fresh navel oranges increased while that of processed navel oranges decreased because of the suspension of volume control regulations during portions of each of the growing seasons from 1982-83 through 1988-89. These changes resulted in lower prices in the fresh-fruit market and higher prices in the processed-fruit market. The study estimated social gains

¹⁰¹ NOAC 1992-93 Marketing Policy Statement, *supra* note 92, at Table 5.

¹⁰² U.S. Dep’t of Justice, Navel Oranges Grown in Arizona and Designated Part of California: Proposed Weekly Levels of Volume Regulation for the 1991-92 Season, No. FV-91-408PR, at 18 (Oct. 30, 1991).

¹⁰³ POWERS ET AL., *supra* note 95.

¹⁰⁴ BOVARD, *supra* note 11, at 187.

¹⁰⁵ BOVARD, *supra* note 11, at 187.

¹⁰⁶ Mark Thompson, *Food Fight*, CAL. LAW., Aug. 1993, at 64.

attributable to the suspensions ranging from \$4.4 million for the 1982-83 season, a large crop year in which there were small shipments during the suspension, to \$43.5 million for the 1984-85 season, a small crop year in which there were large shipments during the suspension.¹⁰⁷

2. Quantity Sold in Fresh-Fruit Markets Declined

Growers prevented from selling their fresh navel oranges under the volume prorate restrictions were compelled to market their crops to processors in the secondary markets. However, navel oranges are not ideally suited for processing. Their juice is bitter, necessitating that it be mixed with other juices to produce an acceptable end product. Navel orange growers found that they could not compete successfully in the juice market, particularly in view of negative grower returns from sales to processing outlets.¹⁰⁸ The volume prorate system was based on the presumption that "growers are better off losing money on much of their sales so that the prices they receive for fresh oranges may be artificially inflated."¹⁰⁹

Supporters of the volume prorate provisions sometimes claimed that the fruit sold in secondary markets was below the quality acceptable in the fresh markets.¹¹⁰ They contended that virtually all fruit that met the minimum fresh-fruit quality standards was eventually allowed into the fresh-fruit markets. Only substandard fruit, so the argument went, was processed into juice or fed to cattle.¹¹¹

This argument implies that the quality of California-Arizona oranges has declined since imposition of the mandatory prorate system. In the 1920's and 1930's, before volume control regulations existed, more than 90% of oranges produced in California and Arizona were shipped to the fresh-fruit markets.¹¹² As Table 1¹¹³ illustrates, the figure has fallen below 70% in recent years. Sales of California-Arizona navel oranges more than doubled during the two decades from 1963 to 1983, as the last column in Table 1 confirms. In order to keep this increased

¹⁰⁷ Nicholas J. Powers, *Effects of Marketing Order Prorate Suspension on California-Arizona Navel Oranges*, 7 AGRIBUSINESS 203 (1990).

¹⁰⁸ *Sequoia Orange Co. v. United States Dep't of Agric.*, No. CV-F-88-98, slip op. at 163 (E.D. Cal. 1988).

¹⁰⁹ BOVARD, *supra* note 11, at 187.

¹¹⁰ Lenard & Mazur, *supra* note 48, at 24.

¹¹¹ Lenard & Mazur, *supra* note 48, at 24.

¹¹² Lenard & Mazur, *supra* note 48, at 24.

¹¹³ Lenard & Mazur, *supra* note 48, at 24.

output from depressing fresh navel orange prices, the NOAC was compelled to shift an increasing portion of the commodity into secondary markets. This trend is apparent from the table's first column, which reflects a significant, steady decline in the percentage of the total crop sold in the domestic fresh-fruit markets.

TABLE 1
DISPOSITION OF
CALIFORNIA-ARIZONA NAVEL ORANGES
(annual averages)

| | Domestic Fresh | Export Fresh | Processed | Total |
|------------------|-------------------|-----------------|-----------|--------|
| 1963-68 | | | | |
| Carloads | 23,622 | 1,045 | 5,517 | 30,833 |
| Percent of total | 76.6 | 3.4 | 17.9 | 100 |
| 1968-73 | | | | |
| Carloads | 28,728 | 1,607 | 10,045 | 47,719 |
| Percent of total | 68.9 | 3.9 | 24.1 | 100 |
| 1973-78 | | | | |
| Carloads | 34,272 | 3,559 | 12,484 | 51,560 |
| Percent of total | 66.5 | 6.9 | 24.2 | 100 |
| 1978-83 | | | | |
| Carloads | 39,425 | 5,128 | 19,804 | 66,041 |
| Percent of total | 59.7 | 7.8 | 30.4 | 100 |

Note: Each figure represents an average over five seasons; that is, 1963-68 refers to the five seasons 1963-64 through 1967-68 inclusive. The first three columns do not sum to the fourth column, which also includes other minor uses such as charitable donations. Oranges that are grown but not harvested are not included in any of the four columns of this table.

Source: USDA.

Producers critical of volume control regulations contended that the regulations were "meant to increase the income of the *average* grower not only at the expense of the consumer, but also at the expense of the grower [who] could prosper by producing better quality fruit or by marketing it more effectively."¹¹⁴ The portion of their crop that producers and handlers could sell in the more profitable fresh-fruit markets was dictated not by competition, but instead by the prorate system.

¹¹⁴ Lenard & Mazur, *supra* note 48, at 24-25.

Implicit in the system was a disincentive for growers to improve the quality or marketing of their products. Growers and handlers willing to invest the resources in product quality and marketing improvements were unable to recapture their investment through increased sales volume.

3. Producers' Asset Base Eroded

The citrus marketing orders impoverished consumers without enriching farmers.¹¹⁵ The 1985 Florida freeze experience suggested that California orange growers would benefit by being able to sell their entire crop in the fresh-fruit markets, even at reduced prices. At lower prices, consumers would be motivated to purchase more fresh oranges.

In 1974, the NOAC and the Lemon Administrative Committee (LAC) conducted research that "compared the return on investment in the three regulated citrus industries with that in thirty other comparable industries and found that, when regulated, citrus had the lowest return of all, and that returns were negative for navel orange and lemon producers."¹¹⁶ By keeping citrus off the fresh-fruit markets, marketing orders eroded the asset base to which growers look to fund future operations. The inflation-adjusted average per acre price for California navel and Valencia orange groves declined by 17% and 24%, respectively, between 1958 and 1984. During the same period, the real value of farm acreage in the United States and California more than doubled.¹¹⁷

4. Producers' Risk Increased by Inability to Forward Contract

Marketing orders were adopted by Congress with the express intention of establishing and maintaining "orderly marketing conditions." Yet, "[b]y hindering futures trading and forward contracts, the production restrictions block the natural market mechanisms for reducing price instability."¹¹⁸

¹¹⁵ BOVARD, *supra* note 11, at 187.

¹¹⁶ BOVARD, *supra* note 11, at 187.

¹¹⁷ Shepard, *supra* note 9, at 97 n.34 (citing AGRICULTURAL RES. SERV., U.S. DEP'T OF AGRIC., FARM REAL ESTATE MARKETS 8 (May 1958); ECONOMIC RES. SERV., U.S. DEP'T OF AGRIC., FARM REAL ESTATE MARKET DEVELOPMENTS 17 (Aug. 1984)).

¹¹⁸ DOUG BANDOW, THE POLITICS OF PLUNDER 205 (1990). A forward contract is an agreement between a grower and a buyer in which a price is set substantially in advance of harvest. Forward contracts enable growers to transfer the risk of low prices at harvest time to buyers.

Volume control regulations possess the inherent capacity to destabilize the navel orange markets. With unregulated commodities, buyers can be assured of adequate supplies of the product and producers can be assured of outlets for their production by engaging in forward contracts, which establish the sale price of the product well in advance of harvest. Such contracts enable producers to transfer the risk of low prices at harvest time to buyers. However, volume control regulations prevent handlers in many instances from entering into forward contracts, because handlers cannot determine in advance the quantity of product they will be allowed to ship.

5. Relief Unavailable in the Export Market

Exports represent a large segment of the overall orange market, but their sales do not directly affect the sale of oranges in the domestic market because of excess capacity in the industry. Sunkist is the predominant exporter of oranges, supported by export assistance programs funded by the federal government.¹¹⁹ Sunkist's export market dominance aside, production of navel oranges has exceeded demand for some time. Consequently, increased exports would not lead to higher domestic prices, although greater exports would improve returns to handlers and growers.

The California-Arizona citrus orders compounded export market difficulties. Oddly enough, Hawaii and Alaska were considered part of the export market, but Canada was treated as part of the domestic market. This anomaly was eliminated by the Secretary from the marketing orders governing the shipment of citrus from Florida, on the basis that consumer demand for citrus fruit in Canada differed markedly from that in the United States. Thus navel oranges from Florida became unregulated, while those from California and Arizona remained regulated until the California-Arizona orders were terminated in 1994.¹²⁰

6. Consumers Subsidized Excess Production

In 1982, 83,000 tons of navel oranges were sold for cattle feed in the secondary markets.¹²¹ It is estimated that 72,000 tons of those oranges

¹¹⁹ Export assistance is supplied principally through the Targeted Export Assistance Program, which was created in 1985. See JAMES BOVARD, *FAIR TRADE FRAUD* 256 (1991).

¹²⁰ Letter from Thomas P. Kerester to Dan Haley, *supra* note 76, at 13 n.24.

¹²¹ BOVARD, *supra* note 11, at 188.

were produced with federally subsidized water.¹²²

However, until the USDA terminated the orange marketing orders in 1994, consumers of oranges paid for excess production through more than subsidized water alone. The volume control regulations resulted in the waste or squandering of as much as one-half the fresh orange crop each year.¹²³ The artificially restricted supply of oranges boosted the retail price of fresh fruit to levels that forced consumers to subsidize agricultural interests with each fresh fruit purchase.

By restricting the supply of oranges entering the fresh-fruit markets, volume control regulations harmed "poor consumers the most, since they [could] least afford inflated food prices."¹²⁴

In 1981, the USDA concluded that consumers paid for the production of much more food than they actually purchase.¹²⁵ The USDA estimated that, in the absence of volume controls, California-Arizona citrus farmers would require 20% to 30% less acreage to produce the oranges that were then entering markets.¹²⁶

In 1985, the United States Department of Justice concluded that "the value of resources wasted in unnecessary processing as a result of the Navel and Valencia prorates was \$72 million annually in 1983 prices."¹²⁷

IV. THE LEMON MARKETING ORDER

Critics point to the lemon marketing order, which restricted the amount of fresh fruit that could be shipped to market each week, as indicative of a regulatory process gone awry. "Few economists have anything good to say about the lemon order"¹²⁸

Prior to its termination by the USDA in 1994, the lemon marketing order,¹²⁹ which was administered by the LAC, governed all lemons grown in California and Arizona.¹³⁰ The lemon marketing order was instituted in 1941 ostensibly to help save the small family grower.¹³¹ However, between 1954 and the early 1980's, the number of growers

¹²² BOVARD, *supra* note 11, at 188.

¹²³ BOVARD, *supra* note 11, at 185.

¹²⁴ BANDOW, *supra* note 118, at 204-05.

¹²⁵ THOR & JESSE, *supra* note 95.

¹²⁶ BOVARD, *supra* note 11, at 187 (citing THOR & JESSE, *supra* note 95).

¹²⁷ Lenard & Mazur, *supra* note 48, at 25.

¹²⁸ Rauch, *supra* note 35, at 2483.

¹²⁹ 7 C.F.R. pt. 910 (1994).

¹³⁰ *Id.* § 910.20 (providing for eight producer, four handler and one public seats on the LAC).

¹³¹ BOVARD, *supra* note 11, at 181.

declined from 8,012 to 2,079.¹³²

Additionally, the lemon marketing order was supposed to stabilize lemon prices, but during the order's existence prices of fresh lemons fluctuated far more than the prices of most fruits.¹³³ The marketing order produced especially distorted results, in part because growers in the three geographical areas that were subject to its control—northern California, southern California and Arizona—harvested their crops at different times of the year.

A. *Volume Control Regulations Resulted in the Misallocation and Waste of Resources*

Critics contended that Sunkist controlled the membership of the LAC.¹³⁴ “Federal marketing orders allow[ed] Sunkist to sacrifice Arizona growers (who [were] not Sunkist members) to its Southern California members.”¹³⁵ Critics also contended that the cooperative's domination of the LAC prevented northern California growers from holding their fruit for sale during the high-demand summer months.¹³⁶ Because of the LAC's manipulation of supply, lemon prices were sometimes twice as high in the summer as in the winter.¹³⁷ The benefits that accrued to southern California growers worked to the detriment of their industry counterparts in the other geographic areas covered by the order. During the 1981-82 crop year, the lemon marketing order “forced southern California growers to abandon 3% of their crop . . . , [while] Arizona growers left 16% of their crop rotting on trees and northern California growers lost 28% of their crop.”¹³⁸

Despite the intent of Congress to establish and maintain orderly marketing conditions, the lemon marketing order, as one observer noted,

disrupts all the lemon markets. Normally, growers sell their highest-quality fruit on the fresh market and then send the culls to the juice factory. But with prorate, farmers are forced to dump many high-quality lemons,

¹³² James Bovard, *Can Sunkist Wrap Up the Lemon Industry?*, WALL ST. J., Jan. 24, 1985, at 30.

¹³³ *Id.*

¹³⁴ *Id.* (quoting an SBA study which concluded that “‘the [LAC's] annual marketing-policy statement originates at Sunkist.’”). See BOVARD, *supra* note 11, at 191 & n.33 (citing U.S. Small Business Admin., Proposed Amendments of Marketing Order 910, No. AO-144-A14-R01, at 217 (Oct. 15, 1984)).

¹³⁵ BOVARD, *supra* note 11, at 181.

¹³⁶ Bovard, *supra* note 132.

¹³⁷ Bovard, *supra* note 132.

¹³⁸ Bovard, *supra* note 132.

glutting the juice market and making it impossible for farmers to earn a profit on lemons sold for lemonade. The net result of lemon marketing is that consumers buy fewer fresh lemons and more processed lemon juice, even though fresh lemons have more flavor and more vitamins. And since farmers lose money on their sales to the juice factories, this works out badly for both farmers and consumers.¹³⁹

The lemon volume control regulations resulted in "reduced consumption of fresh lemons, misallocation of resources due to chronic overproduction, reduced firm growth, and reduced price competition . . ." ¹⁴⁰

In 1991, there were 64,780 acres of producing lemon groves. Production costs, excluding harvesting and marketing costs, averaged \$2,748 per acre. Total production costs were therefore in excess of \$178 million.¹⁴¹ The cost of harvesting and marketing alone tended to exceed the price growers were able to obtain from processors.¹⁴² The demand for lemons for processing is highly elastic, in part because any upward movement in the price of domestic lemons encourages additional imports and the resulting greater supply tends to drive prices back down.¹⁴³ Thus each one percent of the crop that is sold in the processing market because of the volume control regulations resulted in a net economic waste of \$1.78 million in production costs.

However, between the 1985-86 and the 1991-92 crop years, the portion of the lemon crop diverted to processing fell from more than one-half to approximately one-third, reducing overproduction waste by at least \$30 million per year.¹⁴⁴ If, in the absence of volume control regulations, 95% of the domestic lemon crop could be marketed as fresh fruit and the remaining unmarketable 5% diverted to the processing markets (which could be supplemented, as needed, with imports), economic waste could be reduced by as much as \$50 million annually.¹⁴⁵

¹³⁹ BOVARD, *supra* note 11, at 183.

¹⁴⁰ BOVARD, *supra* note 11, at 187.

¹⁴¹ LAC, 1991-92 MARKETING POLICY FOR LEMONS GROWN IN ARIZONA AND CALIFORNIA A-2, E-2 (May 7, 1991) [hereinafter LAC 1991-92 Marketing Policy Statement].

¹⁴² *Id.* at 11; ECONOMIC RESEARCH SERV. U.S. DEP'T OF AGRIC., FRUIT AND TREE NUTS SITUATION AND OUTLOOK REPORT 30 (Nov. 1989).

¹⁴³ LAC 1991-92 Marketing Policy Statement, *supra* note 140, at 11.

¹⁴⁴ U.S. Dep't of Justice, Lemons Grown in California and Arizona: Proposed Weekly Levels of Volume Regulation for the 1991-92 Season, No. FV-91-289PR, at 10 & n.16 (Aug. 7, 1991).

¹⁴⁵ *Id.* at 11 & n.19.

B. Volume Control Regulations Failed to Produce Long-Term Benefits for Producers or Consumers

The lemon volume control regulations were able to improve growers' returns only over the short term, because the artificially high returns that the regulations produced provided incentives for expansion of lemon groves. The added production that resulted from this expansion required increasingly greater quantities of fresh lemons to be diverted to the processing markets in order to maintain the artificially high fresh-fruit prices.¹⁴⁶ As diversions of lemons to the processing markets increased, average returns per acre declined. As a consequence, output of fresh lemons declined, prices rose and additional land was devoted to unnecessary lemon groves.

The evidence supports the conclusion that the long-term returns derived by producers under volume control regulations were no greater than would have been the case in the absence of the regulations.¹⁴⁷ This is the case because lemons were only one of a number of specialty crops that could have been grown in the areas where lemons were produced. Expansion was a matter of choice by growers from among various crop alternatives. Where growers could plant additional acreage without incurring higher costs, expansion was likely to occur until the additional supply resulted in lower prices for the commodity.¹⁴⁸

The adverse economic effects that the volume control regulations imparted on growers is apparent from the following observations, which apply equally to oranges and lemons:

Independent farmers almost always lose money because the USDA restricts the percentage of the total crop, not the total number of a fruit sold. Thus, many growers try to "earn" the right to sell one more orange by increasing total production. Their incomes may rise some in the short

¹⁴⁶ *Id.* at 12 n.20:

Prorate quantity restraints raise grower revenue in the short run by restricting sales of fresh lemons if the demand for fresh lemons is relatively inelastic, as compared to demand in the processing market. When demand is relatively inelastic, a given percentage reduction in output generates a larger percentage increase in price. Conversely, when demand is relatively elastic, a given percentage expansion in output generates a smaller percentage decrease in price. Thus, by diverting otherwise merchantable fresh lemons from the fresh to the processing market, prorate may increase prices and grower revenue more in the fresh market than it decreases prices and revenue in the processing market. Overall, average returns to growers may thereby increase relative to returns attainable in a market not subject to volume-restriction regulation.

¹⁴⁷ Smith, *supra* note 98.

¹⁴⁸ Smith, *supra* note 98, at 578.

term, but as production climbs in succeeding years, ever tighter controls become necessary to hold up incomes.¹⁴⁹

With the exception of the 1985-86 crop year, the lemon volume control regulations have been implemented in every year since their 1941 inception, irrespective of the size or nature of the crops. During the 1985-86 season, when prorate was suspended, fresh lemon prices were twice as high as prices during the 1984-85 and 1986-87 seasons,¹⁵⁰ and the value of production and the quantity sold were at record levels.¹⁵¹ Thus, there is no evidence that the suspension of prorate adversely affected the marketing of lemons during the 1985-86 season.

In the mid-1980's desperate Arizona lemon farmers petitioned the USDA to allow them to shrink-wrap winter lemons.¹⁵² Shrink wrapping would have permitted Arizona growers to delay the marketing of their fruit until June and July when consumer demand and prices tend to be higher. Arguably, the process would have eliminated the need for the volume controls imposed by the lemon marketing order.¹⁵³ But Sun-kist, which controlled 80% of summer lemon production, and the LAC prevailed upon government officials to prohibit the proposed application of a seemingly worthwhile technology.¹⁵⁴

1. Dynamics of the Export and Import Markets

Nor were battered lemon producers in Arizona and northern California, whose crops have disproportionately limited growing seasons, able to rely upon export markets for relief. The order's restrictions on domestic marketing forced growers to dump their crops at a loss on the export market.¹⁵⁵ As a result, Japanese consumers, unaffected by the lemon marketing order, often received high-quality American lemons at prices lower than those paid by their American counterparts.¹⁵⁶

By comparison, exports to Canada were controlled by the LAC.¹⁵⁷ By restricting such exports, the LAC maintained fresh-lemon prices at

¹⁴⁹ BANDOW, *supra* note 118, at 205.

¹⁵⁰ ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., FRUIT AND TREE NUTS SITUATION AND OUTLOOK REPORT 12 (Mar. 1991).

¹⁵¹ ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., *supra* note 141, at 28; Hoy F. Carman & Daniel H. Pick, *Marketing California-Arizona Lemons Without Marketing Order Shipment Controls*, 4 AGRIBUSINESS 248 (1988).

¹⁵² Bovard, *supra* note 132.

¹⁵³ Bovard, *supra* note 132.

¹⁵⁴ Bovard, *supra* note 132.

¹⁵⁵ BOVARD, *supra* note 11, at 182.

¹⁵⁶ BOVARD, *supra* note 11, at 182.

¹⁵⁷ BOVARD, *supra* note 11, at 182; *see supra* note 120 and accompanying text.

artificially high levels in the Canadian market. This condition encouraged United States' foreign competitors to increase imports of lemons to Canada.¹⁵⁸ Over time, such foreign imports eroded the market share claimed by United States producers.¹⁵⁹

Significantly, the lemon marketing order's restriction on the right of United States growers to sell lemons to domestic consumers did not extend to foreign producers.¹⁶⁰ Artificially inflated domestic fresh-lemon prices led to increased production of lemons in Chile, Spain and other countries. Imports of foreign lemons to the United States soared as the LAC restricted the sale of lemons produced domestically.¹⁶¹ It is ironic that United States companies were forced to import fresh fruit while their own rotted unharvested in the field. In 1983, for example, Riverbend Farms, Inc. imported lemons from Chile because it was unable to meet demand with the portion of its domestic crop it was permitted by the LAC to market.¹⁶²

CONCLUSION

The California-Arizona citrus marketing orders' volume control provisions, or prorates, failed to further the policy objectives of the AMAA and imposed net costs on society. Producers were harmed because they were unable to compete effectively for domestic primary market share. While restricted from bringing product to market, growers were in some instances forced to compete with foreign imports that were not equally shackled. The playing field was significantly imbalanced.

Growers were compelled to sell product in the secondary markets, which commanded substantially lower prices. As a result growers realized lower profits than they would have absent prorates, if they realized a profit at all. Repeated crop seasons of reduced profitability, or in some instances net losses, ultimately took their toll in erosion of the asset base of agricultural enterprises.

By restricting the supply of commodities, the citrus marketing orders stripped from farmers the mechanisms in which they traditionally engaged to address the risks associated with price fluctuations. Without the ability to forward contract or to engage in futures trading, producers turned to an array of agricultural subsidies in seeking refuge from

¹⁵⁸ BOVARD, *supra* note 11, at 182.

¹⁵⁹ BOVARD, *supra* note 11, at 182.

¹⁶⁰ BOVARD, *supra* note 11, at 182.

¹⁶¹ BOVARD, *supra* note 11, at 182.

¹⁶² Doug Bandow, *White House Hasn't Soured on Marketing Orders*, WALL ST. J., Jan. 10, 1984, at 32.

the uneven, often inequitable, effects generated by the volume control restrictions. The subsidy programs only served to complicate the already difficult circumstances with which producers were confronted.

Nor were consumers free from the restrictions imposed by the volume control regulations. If prorate compelled lower profit margins for producers, it just as surely dictated higher prices for consumers—higher prices that were not often immediately apparent. To be sure, fewer fresh oranges and lemons drove up the price of these commodities for domestic consumers. But the cost was not limited to the price consumers paid in the grocery store. Consumers also paid for the promotion of commodities exported for sale in foreign markets—commodities not available to domestic consumers, as a result. Consumers also paid for subsidized water to grow the very oranges and lemons that were never brought to the domestic markets—oranges and lemons exported or left to rot in the fields.

The California-Arizona citrus marketing orders increased prices of fresh navel and Valencia oranges and lemons above the levels that would have prevailed in the absence of the regulations, thus fostering wasteful production. The orders' volume regulation provisions also failed to increase long-term grower returns compared to those that producers would have realized in the absence of prorate. The record casts doubt on the notion that the volume control regulations provided any price stabilization benefits. On the contrary, there is considerable evidence that volume regulation was harmful. During the seasons prorate was suspended, the economic welfare of both producers and consumers was enhanced.

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