

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: )  
 ) [AMAA]  
Burnette Foods, Inc., ) Docket No. **11-0334**  
a Michigan corporation, )  
 )  
Petitioner ) **Decision and Order**

Appearances:

James J. (“Jay”) Rosloniec, Esq., Grand Rapids, Michigan, for Burnette Foods, Inc., the Petitioner; and

Sharlene Deskins, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., for the Administrator of the Agricultural Marketing Service, an agency of the United States Department of Agriculture, the Respondent.

**Decision Summary**

1. The Petition of Burnette Foods, Inc., is DENIED in part and GRANTED in part, as follows. The Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, is in accordance with law EXCEPT in two respects:

A. To require handlers who are **not** exempt from restriction, to bear greater restriction requirements (volume control) by being required to absorb, in addition to their own share of restriction, the share of restriction that would have been the responsibility of other handlers were they not exempt, is arbitrary and capricious, and consequently not in

accordance with law. The **exempt**-from-restriction-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed. [Examples of handlers who are subject to the Tart Cherry Order but who are **exempt** from restriction requirements are handlers in Oregon and Pennsylvania, based on the size of production. Tr. 1612-13. Another example of handlers who are subject to the Tart Cherry Order but who were **exempt** from restriction requirements in 2010 were handlers in Northern Michigan because of crop failure (production fell below 50 per cent of average production). Tr. 1613-15.]

B. It is fiction to state that tart cherries processed into metal cans can be stored and carried over from crop year to crop year. [They **cannot**; the canned tart cherries need to reach the consumer promptly and cannot be maintained in the processor's inventory from crop year to crop year; the "best before" or "best by" date is roughly one year from harvest.] It would be arbitrary and capricious, and consequently not in accordance with law, to persist in that fiction. *See* paragraph 9. It is confiscatory to require the harvest-to-metal-can-tart-cherries-production that Mr. Sherman described in paragraph 9 to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. Consequently, **tart cherries that are delivered from being harvested directly to a canner that are promptly canned with no processing other than canning having occurred shall be exempt from restriction requirements (volume control)**. Like the requirements of paragraph 1.A., the **exempt-**

from-restriction-tart-cherries-processed-into-metal-cans-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with.

### Overview

2. In the United States tart cherry industry, the majority apparently find an advantage in **restricting** their commercial sales. Perry Hedin testified that no one wants (emphasis added) high restriction levels [restriction, under certain circumstances, is deemed by the majority to be necessary, for stability] (Tr. 1541-44):

Ms. Deskins: . . . to your knowledge, is there anybody who wants the restriction levels to be, let me ask you, above 50 percent?

Mr. Hedin: Absolutely not.

Ms. Deskins: Is there anyone who's advocating for high restriction levels?

Mr. Hedin: I don't think they're, they don't advocate for the high restriction levels. What discussion tends to be about is as I described earlier, if we have the restriction percentage too low and we end up with excess free tonnage, the concern is that in year two that's going to cause greater restriction in the subsequent year.

Mr. Hedin: So, a lot of them think we should deal with the issue in the year in which we're involved rather than to kick the can down the road. So, that sometimes will result in a higher restriction percentage than might be desired, but it's based on the Board's consideration of the consequences.

Ms. Deskins: Now, you've heard the testimony here today, I'm sorry, during the dates that you've been here that the frozen tart cherry industry has an interest in high restriction levels. In your experience, is that true?

Mr. Hedin: It's certainly not my opinion. I think that as I just said no one wants the high restriction level but they sometimes feel that it's appropriate given the circumstances (emphasis added) but I don't think it's categorized by frozen versus non-frozen, by CherrCo versus non-CherrCo. I think it's by their understanding and perception of what will happen in the industry during the crop year.

Ms. Deskins: Okay. And restriction, a restriction of the fruit that you can sell in the primary market, that only comes up in what type of years? In what type of years would you get a restriction, what event happens to cause a restriction?

Mr. Hedin: Under the formulation when the available supply exceeds the demand plus the market growth factor of ten percent, we have a restriction. If we are in a situation where the supplies are less than the demand, then there is no restriction. 2002, there was no restriction. In 2012, there will be no restriction.

Ms. Deskins: So, are the restrictions caused by the size of the tart cherry crop in a particular year?

Mr. Hedin: The restrictions are caused by the total supply which is both the crop and the carried over free tonnage. So, we have to look to both elements in making that determination. Generally, driven more by the size of the crop than the size of the carry-in.

Ms. Deskins: Okay. So, in the years where the size of the crop is very close to what the demand is, is there any need for a restriction?

Mr. Hedin: If your question assumes that it's less than the sales volume, no, there's no need for a restriction.

Tr. 1541-44.

3. The majority in the tart cherry industry restrict their commercial sales by the authority of a federal marketing order that they, the majority, vote for; that has the force of a federal regulation, because it IS a federal regulation: 7 CFR Part 930.<sup>1</sup> The theory that the restriction (volume control) is based on, is that tart cherries are processed and can be stored

---

<sup>1</sup> See Title 7 of the Code of Federal Regulations, concerning Agriculture; specifically Part 930, concerning Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

and carried over from crop year to crop year. William Sherman proved that the theory does not hold true for the canned segment [canners include but are not limited to Burnette Foods, Pinnacle Foods and Knouse Foods (*see* Tr. 979, 1110)]; William Sherman testified on cross-examination (Tr. 1060-61):

Ms. Deskins: Well, isn't it unusual for you to promote a position on behalf of your competitors?

Mr. Sherman: As I look at this and what we're asking for, I, my opinion is the other, the canned segment in total should be exempted from this marketing order.

Tr. 1060-61.

4. The percentages of the tart cherry crop that have been restricted, from year to year, can be found in the Federal Register. These percentages are not small (look at the first two columns):

---

**2011 Tart Cherry Crop** [July 1, 2011 - June 30, 2012 Crop Year]

<u>Restricted, Prelim</u> known in June 2011	<u>Restricted, Final</u> known in Sept 2011	<u>Free, Prelim</u> known in June 2011	<u>Free, Final</u> known in Sept 2011
59% revised to 40%	then 12%	41% revised to 60%	then 88%

[*See* 77 Fed. Reg. 12748, esp. 12749-12750, 12752 (March 2, 2012);  
and 77 Fed. Reg. 36115, esp. 36119 (June 18, 2012).]

---



---

**2010 Tart Cherry Crop** [July 1, 2010 - June 30, 2011 Crop Year]

<b><u>Restricted, Prelim</u></b> <b><u>known in June 2010</u></b>	<b><u>Restricted, Final</u></b> <b><u>known in Sept 2010</u></b>	<b><u>Free, Prelim</u></b> <b><u>known in June 2010</u></b>	<b><u>Free, Final</u></b> <b><u>known in Sept 2010</u></b>
<b>40%</b>	then <b>42%</b>	<b>60%</b>	then <b>58%</b>

[See 76 Fed. Reg. 10471, esp. 10472 and 10476 (February 25, 2011).]

---



---

**2009 Tart Cherry Crop** [July 1, 2009 through June 30, 2010]

<b><u>Restricted, Prelim</u></b> <b><u>known in June 2009</u></b>	<b><u>Restricted, Final</u></b> <b><u>known in Sept 2009</u></b>	<b><u>Free, Prelim</u></b> <b><u>known in June 2009</u></b>	<b><u>Free, Final</u></b> <b><u>known in Sept 2009</u></b>
<b>49%</b>	then <b>68%</b>	<b>51%</b>	then <b>32%</b>

[See 75 Fed. Reg. 12702, esp. 12703-12704, and 12706-12707 (March 17, 2010).]

---



---

**2008 Tart Cherry Crop** [July 1, 2008 through June 30, 2009]

<b><u>Restricted, Prelim</u></b> <b><u>known in June 2008</u></b>	<b><u>Restricted, Final</u></b> <b><u>known in Sept 2008</u></b>	<b><u>Free, Prelim</u></b> <b><u>known in June 2008</u></b>	<b><u>Free, Final</u></b> <b><u>known in Sept 2008</u></b>
<b>10%</b>	then <b>27%</b>	<b>90%</b>	then <b>73%</b>

[See 73 Fed. Reg. 74073, esp. 74075 and 74078 (December 5, 2008).]

---



---

**2007 Tart Cherry Crop** [July 1, 2007 through June 30, 2008]

<b><u>Restricted, Prelim</u></b> <b><u>known in June 2010</u></b>	<b><u>Restricted, Final</u></b> <b><u>known in Sept 2010</u></b>	<b><u>Free, Prelim</u></b> <b><u>known in June 2010</u></b>	<b><u>Free, Final</u></b> <b><u>known in Sept 2010</u></b>
<b>52%</b>	then <b>43%</b>	<b>48%</b>	then <b>57%</b>

[See 73 Fed. Reg. 11323, esp. 11325 and 11328 (March 3, 2008).]

---

---

**2006 Tart Cherry Crop** [July 1, 2006 through June 30, 2007]

<u>Restricted, Prelim known in June 2010</u>	<u>Restricted, Final known in Sept 2010</u>	<u>Free, Prelim known in June 2010</u>	<u>Free, Final known in Sept 2010</u>
40%	then 45%	60%	then 55%

[See 72 Fed. Reg. 13674, esp. 13675-13676 and 13679 (March 23, 2007).]

---

**2005 Tart Cherry Crop** [July 1, 2005 through June 30, 2006]

<u>Restricted, Prelim known in June 2005</u>	<u>Restricted, Final known in Sept 2005</u>	<u>Free, Prelim known in June 2005</u>	<u>Free, Final known in Sept 2005</u>
36%	then 42%	64%	then 58%

[See 70 Fed. Reg. 67375, esp. 67377 and 67380 (November 7, 2005).]

5. How did William Sherman prove that tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year? William Sherman testified (Tr. 1041-43):

Mr. Rosloniec: Describe for me how the canned segment of the industry differs from the remainder of the cherry industry in terms of holding reserves.

Mr. Sherman: Well, simply stated the canned product has a shelf life of a little over a year. And as you heard Mr. Hackert testify, five plus one, for example, has a, probably a four year shelf life for sure.

Mr. Rosloniec: So it's just, it's the shelf life is the issue, okay. And what causes it to have that shelf life?

Mr. Sherman: The product in the canned segment's produced in a metal container. The acid in the fruit reacts with the container and causes deterioration of the container. It can cause

literally spoilage, leakage, and believe me, everybody in the canned foods segment has seen it, by that I mean spoilage.

Mr. Rosloniec: Does this --

Judge Clifton: Let me inquire about that. Isn't there a lining inside metal cans?

Mr. Sherman: There is.

Judge Clifton: Okay. Tell me why that's not an effective barrier.

Mr. Sherman: Well, it is, but it only, it only, it's sort of like paint on your car, if you can imagine, I mean, you know, you drive it through the salt, and if you live in Michigan then pretty soon you see a few rust spots.

Mr. Sherman: Well, the acid in the fruit, I mean really it starts to, it starts to attack, and that's the word that people in the can-making business use, the acid in the fruit, it's not just cherries, but many, many products, and some are more difficult to pack than others, it starts to attack the, what's called the enamel almost immediately, and if it, but, and so if it would, and the enamel then would, I'll say, this is not how a can-making technician would describe it, but basically there's a hole in the enamel, and then the acid attacks the bare metal, and it literally can create a, like a pinpoint hole in the can.

Mr. Sherman: And in fact, we had some product recently that we, we being Burnette Foods, had shipped to Japan, and the only reason I'm telling this story, the containers failed, I'll put it that way. And so we were on the receiving end of, you know, complaint of, more the complaint of Bill.

(Tr. 1041-43).

Mr. Sherman identified PX 42, which was admitted into evidence over AMS's objection. Tr. 1045. PX 42 is two pages which identify Burnette Foods' Ball Corporation specs for the 300 x 407 sized can, which Burnette uses for only water packed tart cherries, showing "Shelf Life Warranty: Cherries, Red Tart 15 M" (15 months). William Sherman testified (Tr. 1044-47):

Mr. Rosloniec: Mr. Sherman, are you familiar with this document (PX 42)?

Mr. Sherman: Yes.

Mr. Rosloniec: Okay, and what is this document?

Mr. Sherman: It's a, Ball Corporation is a major supplier of containers to Burnette Foods, and it's a spec sheet and it also includes their statement of shelf life warranty.

Mr. Rosloniec: Okay. Is this an accurate representation of the --

Mr. Sherman: Yes.

\* \* \* \*

Judge Clifton: What does 15m mean?

Mr. Sherman: Months.

Judge Clifton: 15 months. Now does it make a difference whether the cherries are packed in water?

Mr. Sherman: This particular, let me see, oh, this is water-packed product.

Judge Clifton: How do you know?

Mr. Sherman: Well, I know, in the upper right corner, right below file name where it says 300 by 407.

Judge Clifton: Yes.

Mr. Sherman: We only use, we only use that container for water packed cherries.

Judge Clifton: All right.

Mr. Sherman: It's the retail sized can, it's 14 ½ ounces.

Judge Clifton: Okay. Thank you.

Mr. Rosloniec: Mr. Sherman, how does this warranty impact Burnette's ability to hold reserves?

Mr. Sherman: Well, we're required to hold, as I said, we produce four products, four tart cherry products, they're all in metal containers, when we have reserve requirements and we have had in the history of this order many years out of the last, I guess it's 16 years now, I would say in ten of those years at least we've had reserve requirements, so we're required to hold inventory reserves in a, or we hold our inventory reserves in a form that has a limited shelf life, and it's, I mean, it's recognized. Mr. Hackert recognizes it as well.

(Tr. 1044-47).

### **Parties and Counsel**

6. The Petitioner, Burnette Foods, Inc., a Michigan corporation (“Burnette”), is represented by James J. (“Jay”) Rosloniec, Esq., Grand Rapids, Michigan. Burnette’s President and CEO is William Sherman. Burnette’s COO is John Pelizzari.

7. The Respondent, the Administrator of the Agricultural Marketing Service, an agency of the United States Department of Agriculture (“AMS”), is represented by Sharlene Deskins, Esq., with the Office of the General Counsel, United States Department of Agriculture (“USDA”), Washington, District of Columbia. AMS’s Agency Representative is Lois Tuttle. AMS’s Marketing Specialist assigned to the Tart Cherry Marketing Order is Jennie Varela.

### **Procedural History**

8. The Petition, filed on August 3, 2011, challenges the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), requesting relief under Section 15(A) of the AMAA (Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-674), especially 7 U.S.C. § 608(c)(15)(A). The 6-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan. Briefs were filed August 15, 2012 (Burnette); September 14, 2012 (AMS); and October 19, 2012 (Burnette).

### **Tart Cherries Canned, Different from Frozen**

9. William Sherman testified on direct examination (Tr. 990-92):

Mr. Sherman: . . . the cherries are harvested by the grower, and in our case I'll just talk about what happens at Burnette Foods, they're delivered, in most cases to our factories by the grower, and over the period of the next, usually 24 hours, those cherries will be processed into, in our case, either one of the four products that I mentioned, which are the two fruit filling products, one in the food service size can, one in the retail size can, or the retail water pack cherries or

the food service size water pack cherries. So those are the four products for tart cherry products that we produce.

Mr. Sherman: And we often, often label these products as we're producing this product for our various customers, and in some cases the, not enough, but in some cases the product is actually shipped to a retailer within 24 hours of the time it's harvested from the, by the grower.

Mr. Rosloniec: Where in this processing cycle does Burnette Foods product end up?

Mr. Sherman: It ends up at the retail grocery store. Is that an answer, is that what you're --

Mr. Rosloniec: Yeah, as a finished product?

Mr. Sherman: As a finished product, ready for the consumer to take home and make a cherry product, if that's what they want to do with it.

Mr. Rosloniec: If you --

Judge Clifton: I'd like to go back to what the grower does before delivering a harvest to your factory.

Mr. Sherman: Is the question --

Judge Clifton: Does the grower wash them?

Mr. Sherman: No.

Judge Clifton: No? The grower just --

Mr. Sherman: He harvests them, he harvests the cherries in a container that, and then it comes to our facility in that container.

Judge Clifton: Okay. Thank you.

Mr. Rosloniec: Mr. Sherman, if you know, where would the product that's produced by a member of CherrCo end in that cycle?

Mr. Sherman: Frozen cherries are ingredients. Burnette Foods is not in the ingredient business, and so, so a frozen cherry would be sold to possibly somebody like Burnette Foods, or Knouse Foods, or Pinnacle, I guess Foods, I guess that's what they call themselves, or a company like Sara Lee or various other industrial baking companies. And frozen cherries are also used to make dry cherries, as you heard in the testimony. And in fact, even tart cherry

juice concentrate, even in the case of tart cherry juice concentrate as its produced in the United States, the cherries are frozen first and then they're, they go through a defrost process and then made into tart cherry juice concentrate.

Mr. Sherman: So other than the canned segment, at one time or another, everything else in its product creation cycle is a frozen cherry.

Tr. 990-92.

### **Sales Constituency**

10. **Sales Constituency**: Is the Capper-Volstead cooperative CherrCo, Inc. a sales constituency? Did Burnette Foods, Inc. meet its burden of proof to support its claim that CherrCo, Inc. is a sales constituency? If, not, does a single industry group dominate the actions of the Cherry Industry Administrative Board and exert improper control over the tart cherry industry? Sales constituency is defined in the Tart Cherry Order:

#### **§ 930.16 Sales constituency.**

Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

9 C.F.R. § 930.16.

11. Being positioned economically and legally to profit in the tart cherry business is complicated. Many owners in the tart cherry industry have found it useful to form more than one entity - - including a grower cooperative entity formed specifically to become a member of the Capper-Volstead cooperative CherrCo. The Capper-Volstead cooperative CherrCo has been effective in benefitting not only its members, but on occasion its members' affiliates such as packers. Burnette maintains that the federal regulations governing the marketing of tart

cherries as-administered are not in accordance with law, in part because of CherrCo's influence and methods of operating.

12. Petitioner Burnette Foods, Inc. ("Burnette") is vertically integrated; that is, Burnette the grower is the same entity as Burnette the canner (packer). Burnette does not choose to be a member of the Capper-Volstead cooperative CherrCo, Inc. ("CherrCo"), but if Burnette did, a different entity (or entities) would be required. Burnette has its own sources of tart cherries (including growers such as James Von Holt and Dorance Munro Amos). Burnette has its own customers (especially in the retail grocery trade, including store brands such as Kroger, Target, Walmart, Spartan, and Meijer; and in the food service industry, including Sysco, U.S. Foodservice, and Gordon Food Service). Burnette does not need CherrCo's power or influence to operate in the marketplace. Burnette does object to CherrCo's power and influence regarding the administration of the Tart Cherry Order, from which Burnette asks that all canners be entirely exempt.

13. If CherrCo were not a Capper-Volstead cooperative, I might take Burnette's insistence that CherrCo is a sales constituency more to heart. But CherrCo is a Capper-Volstead cooperative, which necessitates that CherrCo do a lot of management on behalf of its members. I find that CherrCo is **not** a sales constituency. See paragraphs 30 and 31.

#### **Composition of the Board that Administers the Tart Cherry Order**

14. **Cherry Industry Administrative Board**: Is the Cherry Industry Administrative Board (CIAB) properly formed and operated in accordance with the Tart Cherry Order? I find that it is. Burnette's arguments on this issue (composition of the CIAB) do not persuade me,

although I certainly understand Burnette's frustration. *See* Tr. 744-47 regarding composition of the CIAB.

### **Findings of Fact**

15. Burnette Foods, Inc., the Petitioner ("Burnette"), is a Michigan corporation, with a principal place of business in Elk Rapids, Michigan.

16. Burnette grows (produces) tart cherries (among other fruits), buys tart cherries from other growers, and processes tart cherries (among other fruits).

17. Burnette is subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930).

18. When the tart cherries domestic crop plus carried over free tonnage combined is plentiful, the Tart Cherry Order as-administered requires processors to hold tart cherries off the market. The theory is that (a) the price for tart cherries will not plummet because of over-supply if part of the supply is kept off the market; and (b) tart cherries held off the market will be available during scarcity (they keep well when frozen) so that purchasers can rely on tart cherries being available year-to-year. The theory is that this keeps the price from plummeting and keeps tart cherries available year-to-year and that both promote orderly marketing, which is the objective of the AMAA (Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.*).

19. There is **no limit** on the percentage of restriction (keeping tart cherries off the market) that can be imposed. Tr. 1602-03.

20. Burnette processes tart cherries into four finished products, each in a metal can:

- (a) fruit filling (such as for cherry pie) in a number 10 can (food service size can) which holds about 7 pounds of net weight;
  - (b) fruit filling (such as for cherry pie) in a number 2 can (retail size can) which holds about 21 ounces;
  - (c) water pack (tart cherries and water) in a number 10 can (food service size can) that holds about 107 ounces; and
  - (d) water pack (tart cherries and water) in a can (retail size can) that holds about 14-1/2 ounces.
- Tr. 978-79, 990-91.

21. For any individual **grower**, the tart cherry harvest takes place over a period of about 20 days. Each individual grower has probably a 20-day window to harvest his product. Tr. 987-88. For Burnette as a **processor**, the tart cherry harvest lasts longer because Burnette starts in southern Michigan around the 4th of July and by the time Burnette is done in northern Michigan, it's probably the 10th of August (roughly a 37-day window). Tr. 988.

22. Frozen tart cherries keep well (at least 3 years and up to 4 or 5 years).<sup>2</sup> The same cannot be said of tart cherries processed into metal cans. Requiring Burnette or any other processor to hold tart cherries in cans off the market until close to the "best by" date (one year after canning) would be the equivalent of confiscation. It would be equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory.

23. Burnette's competitors suggested a solution for Burnette so that Burnette need not hold tart cherries in cans off the market; they suggest that Burnette buy from its competitors

---

<sup>2</sup> The costs of freezer space and of power to keep the tart cherries frozen are factors.

sufficient frozen tart cherries to hold off the market to meet its obligation under the Tart Cherry Order as-administered.

24. Burnette's competitors' suggested solution is not at all practical, especially when the percentage of tart cherries to be held off the market is large. *See* the percentages in paragraph 4.

25. Perry Hedin suggested a solution for Burnette, too: switch out the cans. Perry Hedin's suggested solution is not at all practical: next year's tart cherries in cans would not be available for an entire year, when the "best by" date has already been reached.

26. Counsel for AMS emphasized on cross-examination that Burnette could use the alternatives to inventory; for example, Ms. Deskins inquired, "But you can sell product that's exported?" Mr. Sherman explained that selling product that's exported is not Burnette's business; and that alternative does not include Canada, Mexico, Panama, or anywhere in North America. Tr. 1094-96. Ms. Deskins inquired, "Can you also meet your restriction requirements by developing new products?" Mr. Sherman explained that there's nothing new about the tart cherries in metal cans; the water packed products are probably 80 years old, maybe 90 or even older than that; the fruit filling the way Burnette does it is 40 or 50 years old. Tr. 1096-97.

27. Burnette argues that tart cherries growers' (producers') prices and crop values have not increased with the current Tart Cherry Order, contrary to an objective of the Tart Cherry Order. Burnette argues that the testimony of its economic expert Dr. Paul Edward Godek proves that the return to growers has not improved; even though the return to handlers of frozen product

has improved. *But see* Mr. Hedin's testimony regarding the total farm gate value for the industry (Tr. 1549-59) and RX 7 and RX 8. The impact of the Tart Cherry Order on the return to tart cherry growers is not clear. Were I to conclude that the return to tart cherry growers has not increased under the Tart Cherry Order, I would also conclude that failure to meet an objective is not equivalent to "contrary to law".

28. Frozen tart cherries prices have probably increased with the current Tart Cherry Order, approximately 12 cents per pound. Whether the tart cherries processors' costs increased is not clear.

29. Burnette on occasion does buy frozen tart cherries (Tr. 1113). Under this Decision, frozen tart cherries thereafter put into metal cans would **not** be exempt from restriction requirements (volume control).

30. CherrCo, Inc. ("CherrCo") is a Capper-Volstead cooperative; that is, its members are producer cooperatives. CherrCo provides sales opportunities to its members (producer cooperatives) and also to its members' affiliates (processors). The impact of assisting not only its members but also its members' affiliates (processors) to the exclusion of others could be important to determine if this were some other case. Here, I find that neither the Tart Cherry Order nor the Tart Cherry Order as-administered is implicated for any such impact.

31. CherrCo controls many aspects of the sales of its members' (producer cooperatives') tart cherries but NOT all aspects. For example:

- (a) CherrCo sets a minimum price; CherrCo may NOT determine the price.

(b) Each sales agent must have a contract with CherrCo to be permitted to sell; CherrCo may NOT designate which of the sales agents in its “stable” will be chosen to do the selling.

(c) CherrCo may designate eligible buyers; it is not clear whether CherrCo designates which of the eligible buyers will be chosen to do the buying.

As CherrCo manages on behalf of its members, CherrCo exerts control, and the control exerted does not make CherrCo a sales constituency; CherrCo is more correctly characterized as a Capper-Volstead cooperative.

### **Conclusions**

32. The form of the tart cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. 7 C.F.R. § 930.55(b). Although Burnette is not required to withhold cans of tart cherry fruit filling and cans of water pack tart cherries from the market, because Burnette could instead withhold from the market **an equivalent** (7 C.F.R. § 930.55); nevertheless, the requirement that a canner withhold from the market the same percentage as handlers who freeze (for example), is contrary to law because it is confiscatory: the tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year. The frozen tart cherries **can** be stored and carried over from crop year to crop year.

33. It would be arbitrary and capricious to persist in the fiction of stating that tart cherries processed into metal cans can be stored and carried over from crop year to crop year.

34. The canned tart cherries need to reach the consumer promptly and cannot be maintained in the processor's inventory from crop year to crop year. The "best before" or "best by" date is roughly one year from harvest.

35. Just as it is confiscatory to require the tart cherries processed into metal cans to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. This Decision does not exempt all tart cherries processed into metal cans, but only those that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9.

36. Perry Hedin testified that the Tart Cherry Order is a national marketing order, and it's a national market, and that the concern in the industry is supply versus demand and we have producers from all over the country and the competition at the handler level is for that fruit. Mr. Hedin testified that Burnette should not be relieved of any responsibility ["I think it presents the classic free rider issue from marketing orders."] Mr. Hedin continued: "The fact that I might put it in a can or I might put it in a frozen product or I might dry it, is a business choice that the individual handler has made. There still is the supply. It's still part of the production and I think to exempt them is an improper way to go because you can adjust as easily." Tr. 1606-08. Here, I disagree with Mr. Hedin. I conclude that Burnette - - and other canners - - cannot "adjust as easily" to the restriction (volume control) requirements of the Order; that the tart cherries they receive directly from the harvest and promptly process into metal cans, with no processing other than canning, must be exempt from restriction. I will

agree with Mr. Hedin that the canners need not be relieved from the remaining responsibilities of the Tart Cherry Order. One of the 3 canners, Knouse, is already exempt from the restriction (volume control) requirements of the Order. All processors in Pennsylvania and Oregon are exempt from the restriction (volume control) requirements of the Order. Tr. 736. They could become restricted if their production increases. Processors in only 5 states, Michigan, New York, Utah, Washington, and Wisconsin, are subject to the restriction (volume control) requirements of the Order. The Tart Cherry Order may be a national marketing order, but 43 States have no handlers (processors) subject to it at all. Mr. Hedin testified that the percentage of the tart cherry industry represented by the canned segment was “roughly 12% of last year’s production. And back in 1997, it was close to, I would project about 17%. As you can see, it fluctuates year over year.” Tr. 739. Mr. Sherman testified that “Burnette Foods selling, Burnette Foods selling more pie filling is not going to injure a frozen packer, whatsoever. I mean, it's about like us selling oranges. That's not going to hurt the frozen packer either.” Tr. 1096. I agree with Mr. Sherman.

37. As of May 2012 (when the hearing was held), tart cherries imported into the United States had not been considered in determining “Optimum supply”. 7 C.F.R. § 930.50. “The estimated total production of cherries” and “The estimated size of the crop to be handled” (see 7 C.F.R. § 930.50(e)) have been understood to refer to **domestic production** (not world-wide) and to the **domestic crop** (not world-wide). It was generally recognized (when the hearing was held) that tart cherries imports into the United States had been increasing, and the Cherry Industry Administrative Board (CIAB) had been discussing the impact of imported tart cherries

on the supply. Measuring the imports is much less precise than measuring the domestic supply. It is not clear whether Customs' (U.S. Customs and Border Protection) figures would be useful. Burnette's Rebuttal Brief states at page 12: "Ignoring imported product results in a distorted view of sales of tart cherry products in the United States. By ignoring sales of imported products the demand component of the OSF (Optimum Supply Formula) is artificially decreased resulting in greater restrictions upon tart cherry production domestically. Thus, while the CIAB is increasing restrictions upon production of tart cherry products by domestic companies, foreign tart cherry products are being imported and sold in the United States. At the same time that severe restrictions are applied to domestic cherry products, there are no restrictions on the supply of imported cherry products which may be sold in the United States." Burnette Rebuttal Brief at p. 12.

38. The Optimum Supply Formula is unwieldy, and its failure to take into account tart cherries imported into the United States seems to be a deficiency. A deliberative process allows the CIAB to make recommendations to AMS regarding economic adjustments to the Optimum Supply Formula. The inputs are not at all precise, including the inputs even of expected domestic supply. Nevertheless, except as stated in this Decision, I do **not** find use of the Optimum Supply Formula to be contrary to law. So long as the majority in the tart cherry industry continue to vote in favor of being regulated under the Tart Cherry Order, 7 CFR Part 930, absent an amendment, the tart cherry industry will continue to have the Optimum Supply Formula to look forward to. Tr. 775-76.

39. With the implementation of the Order below, the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, will be in accordance with law.

#### **Order**

40. Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], tart cherries that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9, shall be exempt from restriction requirements (volume control).

41. Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], **exempt-from-restriction-tart-cherry-production** [whether based on the size of production such as Perry Hedin described concerning Oregon and Pennsylvania and crop failure in Northern Michigan in 2010 (Tr. 1612-15); or whether the **exempt-from-restriction-tart-cherries-processed-into-metal-cans-production**] must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not-exempt-from-restriction** are required to comply with. That additional mathematical step must be employed.

42. Burnette Foods, Inc. remains otherwise subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930); the remainder of Burnette's Petition is denied.

#### **Finality**

43. This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 9 C.F.R. §§

900.64 and 900.65. Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.  
this 18<sup>th</sup> day of March 2014

s/ Jill S. Clifton

Jill S. Clifton  
Administrative Law Judge

Hearing Clerk's Office  
U.S. Department of Agriculture  
South Building Room 1031  
1400 Independence Avenue, SW  
Washington DC 20250-9203  
202-720-4443  
Fax: 202-720-9776

**APPENDIX A**

In re:	)	
	)	[AMAA]
Burnette Foods, Inc.,	)	Docket No. <b>11-0334</b>
a Michigan corporation,	)	
	)	
Petitioner	)	<b>Witnesses</b>

The 6-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan.

The transcript pages are shown below for testimony of witnesses:

Day 1, May 15 (Tues) 2012:

Mr. James Thomas Horton (Tr. 60-81) May 15, 2012 called by Burnette Foods

Ms. Cheryl Kroupa (Tr. 86-111) May 15, 2012 called by Burnette Foods

Mr. James Edward Nugent (Tr. 112-171) May 15, 2012 called by Burnette Foods

Mr. Glenn F. LaCross (Tr. 180-213) May 15, 2012 called by Burnette Foods

Mr. Roy Hackert (Tr. 214-280) May 15, 2012 called by Burnette Foods

Mr. Jonathan Tad (Jon) Veliquette (Tr. 281-312) May 15, 2012 called by Burnette Foods

Day 2, May 16 (Wed) 2012:

Dr. Paul Edward Godek (PhD) (Tr. 360-517) May 16, 2012 called by Burnette Foods

Mr. James Robert (Jim) Jensen (Tr. 519-607) May 16, 2012 called by Burnette Foods  
[with counsel Christopher Breay]

Day 3, May 17 (Thur) 2012:

Mr. Perry Hedin (Tr. 650-810) May 17, 2012 called by Burnette Foods

Mr. Dorance Munro Amos (Tr. 812-839) May 17, 2012 called by Burnette Foods

Mr. Timothy Orr Brian (Tr. 840-876) May 17, 2012 called by Burnette Foods

Mr. James Von Holt (Tr. 876-929) May 17, 2012 called by Burnette Foods

Day 4, May 18 (Fri) 2012:

Mr. William Sherman (Tr. 971-1153) May 18, 2012 called by Burnette Foods

Mr. Thomas Facer (Tr. 1157-1225) May 18, 2012 called by AMS

Day 5, May 21 (Mon) 2012:

Mr. Steven Donald (Steve) Nugent (Tr. 1270-1374) May 21, 2012 called by Burnette Foods

Ms. Jennie (Jen) Varela (Tr. 1376-1401) May 21, 2012, called by AMS

Mr. Donald (Don) Gregory (Tr. 1401-1430) May 21, 2012, called by AMS

Day 6, May 22 (Tues) 2012:

Mr. James Robert (Jim) Jensen RECALLED (Tr. 1466-1525) May 22, 2012, called by AMS  
[with counsel Christopher Breay]

Mr. Perry Hedin RECALLED (Tr. 1525-1631) May 22, 2012, called by AMS