

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) 2007 AMA Docket No. F&V 989-0069
)
Marvin and Laura Horne, husband and)
wife, d/b/a Raisin Valley Farms; Don)
Durbahn; Raisin Valley Farms Marketing)
Association, an entity which does not now)
exist, but has in the past; Raisin Valley)
Farms Marketing, LLC., a California)
limited liability company; Raisin Valley)
Farms, LLC., a California limited liability)
company; Lassen Vineyards, LLC., a)
California limited liability company; and)
Lassen Vineyards, a California general)
partnership,)
) **Ruling Granting Administrator's**
Petitioners) **Motion to Dismiss**

PROCEDURAL HISTORY

On March 5, 2007, Marvin Horne and Laura Horne, d/b/a Raisin Valley Farms; Don Durbahn; Raisin Valley Farms Marketing Association; Raisin Valley Farms Marketing, LLC; Raisin Valley Farms, LLC; Lassen Vineyards, LLC; and Lassen Vineyards [hereinafter Petitioners] filed a Petition.¹ Petitioners filed the Petition under

¹Petitioners entitle their Petition "Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to Terminate Specific Raisin Marketing Order (continued...)"

the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674 (Supp. V 2005)) [hereinafter the AMAA]; the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioners seek a declaration that they are raisin producers not subject to the Raisin Order, or, if they are subject to the Raisin Order, a declaration that the Raisin Order violates the AMAA which does not regulate producers in their capacity as producers.

On March 23, 2007, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed “Respondent’s Motion to Dismiss” in which the Administrator contends: (1) Petitioners lack standing to file a petition pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005) because only handlers can file a petition pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005) and Petitioners are not handlers under the Raisin Order; (2) Petitioners’ statuses under the Raisin Order have been previously litigated and the doctrine of res judicata precludes Petitioners from relitigating their claim that they are producers; and (3) Petitioners did not file their

¹(...continued)

Provisions/Regulations, and/or Petition to Exempt Petitioners from Various Provisions of the Raisin Marketing Order and Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law” [hereinafter Petition].

Petition in good faith. On April 20, 2007, Petitioners filed “Petitioners’ Opposition to Respondent’s Motion to Dismiss.”

On May 15, 2007, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order denying Respondent’s Motion to Dismiss. The ALJ rejected the Administrator’s contentions that Petitioners lack standing, that doctrine of res judicata precludes Petitioners from relitigating their claims that they are producers, and that Petitioners did not file their Petition in good faith. On June 4, 2007, the Administrator filed “Respondent’s Appeal of the ALJ’s Decision Denying His Motion to Dismiss” [hereinafter Appeal Petition] and a memorandum in support of the Appeal Petition. On June 15, 2007, the Administrator filed a request to file a revised memorandum in support of the Appeal Petition and to strike from the record the June 4, 2007, memorandum in support of the Appeal Petition. Simultaneously, the Administrator filed a revised memorandum in support of the Appeal Petition.² On July 5, 2007, Petitioners filed a response to the Administrator’s Appeal Petition. On July 9, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Administrator’s June 15, 2007, Requests

On June 15, 2007, the Administrator requested that I substitute his June 15, 2007, memorandum in support of the Appeal Petition for his June 4, 2007, memorandum in

²The Administrator does not appeal the ALJ’s rejection of the Administrator’s contention that Petitioners did not file their Petition in good faith.

support of the Appeal Petition and strike from the record his June 4, 2007, memorandum in support of the Appeal Petition. Petitioners have not filed any objection to the Administrator's June 15, 2007, requests, and I find no basis for denying the Administrator's June 15, 2007, requests. Therefore, I grant the Administrator's June 15, 2007, requests to substitute his June 15, 2007, memorandum in support of the Appeal Petition for his June 4, 2007, memorandum in support of the Appeal Petition and to strike from the record his June 4, 2007, memorandum in support of the Appeal Petition.

**Petitioners Lack Standing to File a Petition
Pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005)**

The AMAA allows any handler subject to an order to file a petition with the Secretary of Agriculture requesting modification of the order or exemption from the order, as follows:

§ 608c. Orders

.....

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A) (Supp. V 2005). The term *handler* is defined in the Rules of Practice to include any person to whom a marketing order is sought to be made applicable, as follows:

§ 900.51 Definitions.

....

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

7 C.F.R. § 900.51(i). Petitioners, citing 7 C.F.R. § 900.50(i) and *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999), assert they have standing to file the Petition under 7 U.S.C. § 608c(15)(A) (Supp. V 2005) because they are persons to whom the Raisin Order is sought to be made applicable.

In *Midway Farms*, the court found, although Midway Farms denied in its petition that it was a handler subject to the Raisin Order, the Raisin Administrative Committee had sent Midway Farms a letter “requiring it to complete and to submit certain forms because it was a processor and, as such, a ‘handler’ subject to the Raisin Marketing Order.” *Midway Farms*, 188 F.3d at 1138. The court concluded that the Raisin Administrative Committee sought to apply the Raisin Order to Midway Farms and that this action was sufficient to make Midway Farms a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A).

The Administrator admits the United States Department of Agriculture is conducting an investigation to determine if Petitioners violated the AMAA and the Raisin Order during the period December 1, 2003, through July 31, 2006, but asserts the United States Department of Agriculture’s investigation of Petitioners does not cause Petitioners to be persons to whom the Raisin Order is sought to be made applicable (Respondent’s

Motion to Dismiss at 6, Burnett Decl. ¶¶ 4-5, Worthley Decl. ¶¶ 4-5). The ALJ, however, concluded that, by conducting this investigation, the United States Department of Agriculture seeks to apply the Raisin Order to Petitioners; therefore, the investigation is sufficient to make Petitioners handlers with standing to file the Petition under 7 U.S.C. § 608c(15)(A) (Supp. V 2005), as follows:

While in *Midway* the forms were sent to Midway by the Committee, there, as here, the Department sought additional information by subpoena. Despite the Department's assurances in this action that neither the Raisin Advisory Committee nor the Department have told the Petitioners that they are subject to the marketing order (Respondent's Motion to Dismiss, Exhibits 1 and 2), those declarations also make it abundantly clear that the purpose of the investigation being pursued is to determine whether the AMAA and the Raisin Marketing Order have been violated. *Id.* As it is difficult to conceive how a person to whom the marketing order is not applicable would have violated the Act or the order, [t]he Department's actions are consistent with an overt intention to make the Petitioners persons to whom the marketing order is being sought to be made applicable. As such, the Petitioners will be found to have the standing to file the administrative petition and have the ultimate merits determined.

ALJ's Order at 3-4.

I disagree with the ALJ's conclusion. The Secretary of Agriculture's exercise of investigatory authority under 7 U.S.C. § 610(h) does not make the subjects of the investigation persons to whom a marketing order is being sought to be made applicable or confer standing on all such persons to file petitions under 7 U.S.C. § 608c(15)(A)

(Supp. V 2005).³ Instead, the investigation relevant to the instant proceeding is merely designed to determine if Petitioners should be subject to the Raisin Order.

**Res Judicata Does Not Preclude Petitioners From
Litigating Their Statuses Under the Raisin Order
During the Period December 1, 2003, Through July 31, 2006**

The Administrator argues that Petitioners should be barred under the doctrine of res judicata from relitigating whether they are handlers, which issue was decided by Administrative Law Judge Victor W. Palmer in *In re Marvin D. Horne*, ___ Agric. Dec. ___ (Dec. 8, 2006).⁴ However, as the ALJ states in his May 15, 2007, Order and, as Petitioners argue in Petitioners' Opposition to Respondent's Motion to Dismiss and Petitioners' Response to Respondent's Appeal of the ALJ's Decision Denying Respondent's Motion to Dismiss, *In re Marvin D. Horne*, ___ Agric. Dec. ___ (Dec. 8, 2006), does not address Petitioners' statuses under the Raisin Order during the period at issue in the instant proceeding, December 1, 2003, through July 31, 2006. Therefore, I agree with the ALJ that the doctrine of res judicata does not bar Petitioners from litigating

³*Cf. In re Foster Enterprises*, 62 Agric. Dec. 8, 16-17 (2003) (holding the Secretary of Agriculture's investigation of the petitioners' records pursuant to the Secretary of Agriculture's authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717) does not make the petitioners persons subject to the Egg Order or confer standing on the petitioners to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)).

⁴*In re Marvin D. Horne*, ___ Agric. Dec. ___ (Dec. 8, 2006), is currently on appeal to the Judicial Officer.

their statuses under the Raisin Order during the period December 1, 2003, through July 31, 2006.

For the forgoing reasons, the following Order is issued.

ORDER

1. The ALJ's May 15, 2007, Order denying the Administrator's motion to dismiss is vacated.
2. The Administrator's March 23, 2007, motion to dismiss is granted.
3. Petitioners' March 5, 2007, Petition is dismissed.

Done at Washington, DC

February 4, 2008

William G. Jenson
Judicial Officer