UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA Docket No. 11-0334
	)	
Burnette Foods, Inc.,	)	
a Michigan corporation,	)	
	)	
Respondent	)	**Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

On July 6, 2015, Burnette Foods, Inc. [Burnette], filed a Petition to Reconsider the Decision of the Judicial Officer [Petition to Reconsider] requesting that I reconsider *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819 (U.S.D.A. June 19, 2015), and requesting an extension of time within which to file a brief in support of its Petition to Reconsider.

On July 9, 2015, I conducted a conference call with James J. Rosloniec, counsel for Burnette, and Sharlene A. Deskins, counsel for the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], to discuss Burnette's request for an extension of time to file a brief in support of its Petition to Reconsider. Based upon the agreement of the parties, I extended the time for filing Burnette's brief in support of its Petition to Reconsider to August 21, 2015, and extended the time for filing the Administrator's response to Burnette's Petition to Reconsider and supporting brief to September 18, 2015.[1]

[1]Burnette Foods, Inc. (Order Granting Burnette's Request to File a Brief in Support of

On August 20, 2015, Burnette filed a Brief in Support of Petition to Reconsider the Decision of the Judicial Officer [Supporting Brief]. The Administrator requested, and I granted, two additional extensions of time to file a response to Burnette's Petition to Reconsider and Supporting Brief,[2] and on October 5, 2015, the Administrator timely filed Respondent's Opposition to Petition to Reconsider the Decision of the Judicial Officer. On October 9, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Burnette's Petition to Reconsider.

DISCUSSION

Summary of Denial of Burnette's Petition to Reconsider

The rules of practice applicable to this proceeding[3] provide that a party to a proceeding may file a petition to reconsider an order issued by the Judicial Officer, as follows:

Burnette's Pet. to Reconsider and Extending the Time for Filing the Administrator's Response to Burnette's Pet. to Reconsider and Burnette's Brief), AMAA Docket No. 11-0334, 2015 WL 4538821 (U.S.D.A. July 9, 2015).

[2]Burnette Foods, Inc. (Order Granting the Administrator's Request to Extend the Time for Filing the Administrator's Response to Burnette's Pet. to Reconsider and Burnette's Brief), AMAA Docket No. 11-0334, 2015 WL 5916954 (U.S.D.A. Sept. 16, 2015); Burnette Foods, Inc. (Order Granting the Administrator's Second Request to Extend the Time for Filing the Administrator's Response to Burnette's Pet. to Reconsider and Burnette's Brief), AMAA Docket No. 11-0334, 2015 WL 5916956 (U.S.D.A. Oct. 2, 2015).

[3]The rules of practice applicable to this proceeding are the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71).

> **§ 900.68 Petitions for reopening hearings; for rehearings or reargument of proceedings; or for reconsideration of orders.**
>
> (a) *Petition requisite—*
>
> . . . .
>
> (3) *Petitions to rehear or reargue proceedings, or to reconsider orders*. A petition to rehear or reargue the proceeding or to reconsider the final order shall be filed within 15 days after the date of service of such order. Every such petition shall state specifically the matters claimed to have been erroneously decided, and alleged errors must be briefly stated.

7 C.F.R. § 900.68(a)(3). The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. A petition to reconsider is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised in Burnette's Petition to Reconsider and Supporting Brief, I do not find any error of law or fact, any change in controlling law, or any unusual circumstances necessitating modification of *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819 (U.S.D.A. June 19, 2015). Therefore, I deny Burnette's Petition to Reconsider.

Burnette's Petition to Reconsider and Supporting Brief

Burnette raises five issues in its Petition to Reconsider and Supporting Brief. First, Burnette contends I erroneously found CherrCo, Inc., is not a "sales constituency" (Burnette's Pet. to Reconsider ¶ 2a at 2-3; Burnette's Supporting Brief ¶ 2a at 2-4).

The federal marketing order regulating the handling of "Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin" (7 C.F.R.

pt. 930) [Tart Cherry Order] defines the term "sales constituency," as follows:

> **§ 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.

7 C.F.R. § 930.16.

I found CherrCo, Inc., is not a "sales constituency" because CherrCo, Inc., is an organization which receives consignments of tart cherries from its member-cooperatives and does not direct where the consigned tart cherries are sold.[4] Burnette asserts I ignored many facts relating to the relationship between CherrCo, Inc., and its member-cooperatives and asserts CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives (Burnette's Supporting Brief ¶ 2a at 2).

The record supports Burnette's assertion that CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives, as I stated in the June 19, 2015, Decision and Order:

> CherrCo, Inc., was created to provide a uniform price structure for its member-cooperatives. CherrCo, Inc., provides a variety of services for its member-cooperatives, including establishment of a minimum price for tart cherries sold by its members, storage of tart cherries, inventory management, and release of tart cherries for shipment to buyers (Tr. at 550-52).

Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *5 (U.S.D.A. June 19,

[4]Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *5, 12 (U.S.D.A. June 19, 2015).

2015). However, despite my agreement with Burnette's assertion that CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives, Burnette raises nothing in its Petition to Reconsider or Supporting Brief that convinces me that my finding that CherrCo, Inc., does not direct where consigned tart cherries are sold, is error. The record establishes that CherrCo, Inc.'s member-cooperatives select their own sales agents (Tr. at 550, 558, 572). Once a member-cooperative's sales agent sells tart cherries to a buyer, the sales agent notifies CherrCo, Inc., of the identity of that buyer, the quantity of tart cherries sold to that buyer, the price, and other terms of sale (Tr. at 530-48). Therefore, I reject Burnette's contention that CherrCo, Inc., is a "sales constituency," as that term is defined in the Tart Cherry Order.

Second, Burnette contends I erroneously concluded the Cherry Industry Administrative Board complies with 7 C.F.R. § 930.20(g). Burnette contends the Cherry Industry Administrative Board has more than one member from, or affiliated with, a single sales constituency, CherrCo, Inc., in violation of 7 C.F.R. § 930.20(g). (Burnette's Pet. to Reconsider ¶ 2b at 3; Burnette's Supporting Brief ¶ 2b at 4).

The Tart Cherry Order limits the number of Cherry Industry Administrative Board members from one district who can be from, or affiliated with, a single sales constituency, as follows:

> **§ 930.20 Establishment and membership.**
>
> . . . .
>
> (g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not

> more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

7 C.F.R. § 930.20(g). Burnette established, and the Administrator does not dispute, that multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc. However, as discussed in *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819, at *4-5 (U.S.D.A. June 19, 2015), I reject Burnette's contention that CherrCo, Inc., is a sales constituency; therefore, I also reject Burnette's contention that the Cherry Industry Administrative Board, as constituted, violates 7 C.F.R. § 930.20(g).

Third, Burnette contends I erroneously concluded the Secretary of Agriculture is not required to include imported tart cherry products in the Tart Cherry Order optimum supply formula (Burnette's Pet. to Reconsider ¶ 2c at 4-5; Burnette's Supporting Brief ¶ 2c at 4-9).

The Tart Cherry Order provides the method by which the Cherry Industry Administrative Board establishes the optimum supply level each crop year, as follows:

> **§ 930.50 Marketing policy.**
>
> (a) *Optimum supply*. On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years reduced by average sales that represent dispositions of exempt cherries and restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is

> necessary to recommend otherwise with respect to sales of exempt and restricted percentage cherries, to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

7 C.F.R. § 930.50(a). Burnette argues, since the optimum supply formula in 7 C.F.R. § 930.50(a) is calculated based upon "sales" and the optimum supply formula does not differentiate between sales of foreign-produced tart cherry products and sales of domestically-produced tart cherry products, the optimum supply formula must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products (Burnette's Supporting Brief ¶ 2(c)(i)-(iii) at 4-8).

I disagree with Burnette's contention that the optimum supply formula must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products. As an initial matter, 7 C.F.R. § 930.50(a) does not explicitly include sales of foreign-produced tart cherry products. Moreover, the Secretary of Agriculture issued the Tart Cherry Order in 1996[5] and the record contains no indication that the Cherry Industry Administrative Board has ever used foreign-produced tart cherry products sales data to establish an optimum supply level for any crop year.[6] Based upon the absence of an explicit reference to sales of foreign-produced tart cherry products in 7 C.F.R. § 930.50(a) coupled with the Cherry Industry Administrative Board's consistent interpretation of the method by which to establish the

[5]61 Fed. Reg. 49,939 (Sept. 24, 1996).

[6]Burnette states the Cherry Industry Administrative Board "has steadfastly refused to consider imported tart cherry products." (Burnette's Supporting Brief ¶ 2c(ii) at 6).

optimum supply level, I reject Burnette's contention that 7 C.F.R. § 930.50(a) must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products.

Burnett also argues the failure to include imported tart cherry products in the optimum supply formula in 7 C.F.R. § 930.50(a) results in disorderly marketing conditions in violation of 7 U.S.C. § 602(1) (Burnette's Supporting Brief ¶ 2c(iv) at 8-9). While Burnette cites testimony of witnesses who expressed the opinion that the Cherry Industry Administrative Board should consider issues relating to imported tart cherry products,[7] Burnette fails to cite any basis for its contention that the failure to include imported tart cherry products in the optimum supply formula in 7 C.F.R. § 930.50(a) results in disorderly marketing conditions contrary to the policy of Congress, as declared in 7 U.S.C. § 602(1).

Fourth, Burnette contends I erroneously reversed Administrative Law Judge Jill S. Clifton's ruling exempting from Tart Cherry Order volume restrictions tart cherries delivered from harvest directly to canners and processed into metal cans. Burnette, relying on *Horne v. Department of Agric.*, 576 U.S. ____, 135 S. Ct. 2419 (2015), asserts application of Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States. (Burnette's Pet. to Reconsider ¶ 2d at 5-7; Burnette's Supporting Brief ¶ 2d at 9-18).

[7]See Burnette's Supporting Brief ¶ 2c(iii) at 7 n.4.

Horne involved a challenge to the reserve requirement in a marketing order issued under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674), entitled "Raisins Produced From Grapes Grown in California" (7 C.F.R. pt. 989) [Raisin Order]. Marvin D. Horne, Laura Horne, and their family argued the reserve requirement in the Raisin Order resulted in an unconstitutional taking of their property in violation of the Fifth Amendment. The Supreme Court of the United States held the Raisin Order reserve requirement— a requirement that growers set aside a certain percentage of their raisin crops for the account of the Government, free of charge— was an unconstitutional taking of property in violation of the Fifth Amendment. The Court described the Raisin Order reserve requirement and the property rights transferred from raisin growers to the Government when raisin growers are subject to the Raisin Order reserve requirement, as follows:

> The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. App. to Pet. for Cert. 179a; Tr. of Oral Arg. 31. The Committee's raisins must be physically segregated from free-tonnage raisins. 7 CFR § 989.66(b)(2). Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. § 989.66(a). The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.
>
> Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them, *Loretto*, 458 U.S., at 435, 102 S. Ct. 3164 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," *id*., at 431, 102 S. Ct. 3164 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their

> raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.*, at 432, 102 S. Ct. 3164.

Horne v. Department of Agric., 576 U.S. ____, 135 S. Ct. 2419, 2428 (2015).

In *Horne*, the imposition of the Raisin Order reserve requirement resulted in the raisin growers' loss of the entire bundle of property rights in the appropriated raisins—the rights to possess, use and dispose of the raisins—which loss the Supreme Court found to constitute a taking under the Fifth Amendment. Under the Tart Cherry Order, the Cherry Industry Administrative Board does not obtain the right to possess, use, or dispose of the tart cherries that are subject to volume restrictions. Instead, producers of canned tart cherry products retain possession, control, and ownership of their tart cherries that are subject to Tart Cherry Order volume restrictions. Therefore, I find *Horne* inapposite.

Burnette also argues *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is consistent with its position that application of Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional taking of property in violation of the Fifth Amendment. In *Lucas*, the Supreme Court held a regulation that deprives a property owner of all economically beneficial use of his or her land is a per se taking. Burnette asserts, "[i]n the instant case a *per se* taking has occurred because Burnette has been, and is being, deprived of all benefit of the tart cherry products which it is required to place into reserves." (Burnette's Supporting Brief ¶ 2d(vii)-(viii) at 15-16).

Contrary to Burnette's contention, Burnette does not lose all economically beneficial use of tart cherry products it is required to place into reserves. As discussed in the June 19, 2015,

Decision and Order, Burnette retains options to use and dispose of tart cherries even when volume restrictions are in effect:

> If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and Mexico. The form of the cherries (frozen, canned, dried, or concentrated juice) a handler places in inventory reserve is at the option of the handler.

Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *4 (U.S.D.A. June 19, 2015) (footnotes omitted). Therefore, I find *Lucas* inapposite.

Burnette further contends the Supreme Court's takings analyses in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *Andrus v. Allard*, 444 U.S. 51 (1979), support Burnette's contention that the application of Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional taking of property in violation of the Fifth Amendment (Burnette's Supporting Brief ¶ 2d(vii) at 15-16).

The Court in *Penn Central* applied a balancing test to determine whether regulation of property amounts to a taking of that property:

> In engaging in these essentially *ad hoc*, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, *supra*, 369 U.S., at 594, 82 S.Ct., at 990. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g., United States v.*

> *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). The Court in *Allard* held a regulation that reduces the value of property and bars trade in lawfully acquired property does not necessarily effect a taking in violation of the Fifth Amendment.[8]

The primary benefit of Tart Cherry Order volume restrictions is that handlers receive higher prices for their tart cherries that are not required to be held in reserve than they would have received had no volume restrictions been in effect. Burnette enjoyed the higher prices for its tart cherries that it was able to market in normal commercial outlets. The benefit of the higher price offsets the negative economic impact of Tart Cherry Order volume restrictions. As discussed in *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819, at *4 (U.S.D.A. June 19, 2015), the interference caused by Tart Cherry Order volume restrictions limits, but does not destroy, Burnette's ability to use and dispose of its tart cherries and does not rise to the level of a physical invasion. When this interference is balanced against the economic benefits of higher prices for tart cherries that are not required to be held in reserve and the benefits of this public program promoting the common good, including a stable supply of tart cherries, the application of Tart Cherry Order volume restrictions to Burnette does not result in a taking under the *Penn Central* and *Allard* analyses,[9] as Burnette contends.

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[8] *Andrus v. Allard*, 444 U.S. 51, 66-68 (1979).

[9] *See Horne v. Department of Agric.*, 576 U.S. ____, 135 S. Ct. 2419, 2429 (2015) (stating a regulatory restriction on use that does not entirely deprive an owner of property rights may not

be a taking under *Penn Central*).

Fifth, Burnette contends the decision to limit the geographical applicability of the Tart Cherry Order to Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, has no rational basis, was purely a political consideration, and violates the equal protection and due process safeguards of the Fifth Amendment to the Constitution of the United States (Burnette's Supporting Brief ¶ 2e at 18-20).

Burnette's contention that the limited geographical applicability of the Tart Cherry Order violates the "equal protection and due process safeguards" of the Fifth Amendment is raised for the first time in Burnette's Supporting Brief. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[10] Therefore, I find Burnette's argument regarding the constitutionality of the limited geographical applicability of the Tart Cherry Order comes too late to be considered.

For the foregoing reasons, the following Order is issued.

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[10]Zoocats, Inc. (Order Denying Respondents' Pet. to Reconsider and Administrator's Pet. to Reconsider), 68 Agric. Dec. 1072, 1074 (U.S.D.A. 2009); Schmidt (Order Denying Pet. to Reconsider), 66 Agric. Dec. 596, 599 (U.S.D.A. 2007).

ORDER

Burnette's Petition to Reconsider, filed July 6, 2015, is denied.

This Order shall become effective upon service on Burnette.

Done at Washington, DC

December 21, 2015

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William G. Jenson
Judicial Officer