IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRUCE CIAPESSONI, et al., on behalf of themselves and others similarly situated, Plaintiffs,	)	
v.	)	No. 15-938C (Judge Margaret M. Sweeney)
THE UNITED STATES, Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

KENNETH M. DINTZER
Deputy Director

BRIAN A. MIZOGUCHI
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 305-3319
Email: brian.mizoguchi@usdoj.gov

OF COUNSEL:

FRANK MARTIN
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

August 5, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Miscellaneous

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Defendant, the United States, respectfully submits this reply to plaintiffs' opposition to our motion to dismiss, or, in the alternative, motion for summary judgment.

INTRODUCTION

Since the 1949 adoption of an Agricultural Marketing Agreement Act (AMAA) marketing order, whenever the size of raisin growers' crops would exceed demand, growers have been able to support higher raisin prices by agreeing to reserve from immediate sale a portion of their raisin crop. As recently as April 2015, Sun-Maid Growers and the Raisin Bargaining Association -- comprising the majority of raisin production by California growers, and, thus, the putative class in this case -- filed an *amicus* brief in *Horne v. United States Department of Agriculture* that *opposed* an appeal that this reserve system was an unconstitutional taking. These California growers admitted that: (1) raisin growers "were able to obtain [a] higher market price" because they "complied with the marketing order and withheld their reserve-tonnage raisins from the market" and (2) that "[t]hat system benefits the entire raisin industry." In August 2015, plaintiffs here claimed that the same system that raisin growers in April had embraced as legal and beneficial, instead was a physical taking without just compensation.

Our opening brief demonstrates that the Court lacks jurisdiction to entertain plaintiffs' claims of a physical taking of raisins in years before the crop-year[1] 2009-2010, because the six-year limitations period elapsed before plaintiffs' August 2015 complaints. 28 U.S.C. § 2501.

In response, plaintiffs assert that *Horne's* description of a physical taking is only *dicta* here and that claims for earlier crop-years are not time-barred. Plaintiffs assert that their physical takings claims accrued well after their Raisin Administrative Committee (RAC) in October 2008 designated the percentage of the raisin crop reserved from immediate sale. The RAC's October announcement triggered a United States Department of Agriculture (USDA) regulation requiring that, within three days, the growers' raisins be physically segregated between free tonnage available for immediate sale and the allegedly unconstitutional reserve.

We agree with plaintiffs that *Horne* is *dicta* here, as that case is peculiar to a district court's review of takings as a defense to a fine assessed against an individual handler for refusing to comply with reserve regulations. In contrast, plaintiffs here are suing in the capacity of raisin growers who elected collectively to reserve their raisins, securing the reserve program's price support and marketing benefits for *all* of their raisins – free and reserved.

Notwithstanding that *Horne* is *dicta* here, plaintiffs' arguments for the later accrual of their physical takings claims are all unavailing. Plaintiffs contend that the statute of limitations did not begin to run until after either: (1) the reserve ends and an accounting indicates whether there is a residual cash balance in the reserve; (2) publication in the Federal Register of a final rule ratifying the RAC's earlier reserving action, or (3) a suspension of accrual due to the purportedly "inherently unknowable" occurrence of the taking they now claim. As we demonstrate here, plaintiffs' arguments are largely premised upon challenges to agency action

[1] A "crop-year" begins August 1, and ends July 31 of the following year. 7 C.F.R. § 989.21.

that are not within the Court's subject matter jurisdiction to entertain and/or are also time-barred or waived. Even assuming jurisdiction, plaintiffs' arguments that their physical takings claims accrued long after the requirement to physically segregate their raisins are, in any event, erroneous. Consequently, plaintiffs' claims are time-barred for all but the last reserve in crop-year 2009-2010.

I. Plaintiffs' Claims Are Time-Barred Because Their Complaints Were Filed More Than Six Years After Their Physical Taking Claims Accrued With The Requirement To Physically Segregate Their Raisins For The Reserve

Although plaintiffs' complaint, alleging a physical taking, cites to *Horne,* their opposition to our motion correctly acknowledges that *Horne* is only *dicta* as to claims here by growers who elected to reserve their raisins. Pl. Opp. 7 & n.6; 20-21 & n. 69; Pl.B. Opp. 17.[2]

Plaintiffs, however, continue to assert a physical takings theory. *See* Pl. Opp. 18. Growers' raisins were required to be physically segregated into a reserve, within three days after the RAC's October announcement of the reserve percentage for the crop-year. 7 C.F.R. §§ 989.54, 989.166(b)(1); Def. Mot. 5. As we also demonstrated -- and plaintiffs do not dispute our math -- if the RAC's October announcement triggering the required physical separation of raisins is the physical taking claim accrual, more than six years elapsed between the August 2015 filing of plaintiffs' complaints and the October 2008 reserve announcement for the 2008-2009 crop year. Consequently, plaintiffs' claims concerning the 2008-2009 crop-year, and all prior crop-years, are time-barred by the statute of limitations, 28 U.S.C. § 2501. See Def. Mot. 9.

[2] "Pl. Opp." refers to the *Ciapessoni, et al*. opposition brief. "Pl.L." refers to the *Lion Farms* opposition, which adopts the *Ciapessoni* brief. "Pl.B. refers to the *Boyajian* opposition brief.

II. The Raisin Reserve Is Not An "Administrative Compensation Process" That Would Defer Physical Takings Claim Accrual From The Earlier Physical Segregation Of Growers' Raisins Into The Reserve

Plaintiffs' primary response is that their physical taking claim does not accrue with the October requirement that growers' raisins be physically segregated into a reserve. Instead, plaintiffs contend, physical takings claims did not accrue until long after the physical segregation and crop-year, when the reserve is finally disposed of, and residual cash if any, is distributed as the growers' remaining "equity" in the reserve. Pl. Opp. at 15-18. Plaintiffs' argument fails because: (a) the reserve, although relevant to compensation, is not an "administrative compensation process" that defers claim accrual; (b) the disposition of the reserve, including whether any residual cash remains, is the product of elections made by raisin growers, not the Government; and (c) plaintiffs' premise that a cash residual is the sole form of compensation provided by a reserve is erroneous, because growers' election to have a reserve reflects that *reserving itself provides compensation* -- the price support and marketing benefits for all raisins, free and reserved.

A. The Reserve Is Not An "Administrative Compensation Process" That Defers Physical Takings Claim Accrual

We agree with one implication of plaintiffs' "administration compensation process" argument -- that the value conferred by a reserve is relevant to the compensation issue. A raisin reserve is not, however, the equivalent of the inverse condemnation process in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) or anything like such an "administrative compensation process" that must be completed before a physical takings claim accrues. *Cf. United States v. Dow*, 357 U.S. 17, 25 (1958) (taking accrued with physical possession, not when Government enters condemnation proceedings to determine compensation). A raisin reserve, in contrast, is initiated by the raisin growers who elected in

over-supply years to create a reserve -- for the purpose of supporting the price and marketing of their raisins including their unreserved raisins available for sale at a reserve-supported price. Def. Mot. 3-5; Pl. Op. 4-5. For this reason alone, plaintiffs' argument fails.

B. The Disposition Of A Reserve, Including Whether Any Residual Cash Exists At The End Of The Reserve, Is The Product Of Elections Made By The Raisin Growers Who Comprise The Majority Of The RAC

Decisions by the RAC -- including the determination whether to have a reserve, and the percentage of a crop to be reserved -- are made by a majority vote of RAC members. See 7 C.F.R. §§ 989.38; 989.54-55; *accord*, Brief of Sun-Maid Growers Of California And The Raisin Bargaining Association As *Amicus Curiae* In Support Of Respondent, *Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (no. 14-275), 2015 WL 1569759 (Sun-Maid Growers & RBA *Horne* Brief), at 2-5.[3] Because 35 of the RAC's 47 members represent raisin growers, Def. Mot. 4, 7 C.F.R. 989.26, the RAC's decisions, made by a majority of a quorum of 25, 7 C.F.R. § 989.38, necessarily reflect elections made by raisin growers. Decisions as to the disposition of raisins after they are put in a reserve, whether they are released for sale as free tonnage, or continue to be used to support prices and marketing programs, are, thus, determined in the first instance by raisin growers. *See* 7 C.F.R. § 989.67. Because the disposition of a reserve's raisins is the product of elections by raisin growers, the reserve's residual cash, if any, is attributable to grower, not Government, action.

To illustrate, growers could elect through their RAC vote to release raisins for sale from the reserve as free tonnage. *See* 7 C.F.R. § 989.67. Such an election would provide for growers the net cash proceeds from selling their formerly reserved raisins. Alternatively, growers may seek to suspend or terminate the reserving authority itself. Section 608c(16) of the AMAA

[3] A copy of the raisin growers' April 8, 2015 *Horne* brief is appended to this reply, and is available at 2015 WL 1569759.

permits growers to obtain the termination of a marketing order, such as the raisin marketing order, if 50 percent of growers, representing 50 percent of industry production, vote in favor of termination. 7 U.S.C. § 608c(16)(B). *See* Sun-Maid Growers and RBA *Horne* brief at 7, 13 (acknowledging the ability to terminate reserving authority).

Grower elections, determining the disposition of a raisin reserve, and whether it contains residual cash at the end, provide no basis to define or defer when a physical taking claim accrues.

C. Plaintiffs' Administrative-Compensation-Process Theory Is Based Upon An Erroneous Premise: That Just Compensation Depends Solely On Whether Any Residual Cash Remains When The Reserve Ends

Plaintiffs' argument reduces to the notion that just compensation depends solely upon whether there is any residual cash dispersed when the reserve ends. This argument is contrary to common sense, and is contradicted by raisin growers' conduct. If raisin growers believed that residual cash after the reserve ends is the only form of compensation for reserving raisins, they would never have elected to have a reserve, but would instead always dump their raisin supply into the market.

That raisin growers concluded that the benefits conferred by a reserve compensate justly for the burden of reserving, at least temporarily, a percentage of their crop, is incontrovertible. First, as demonstrated above, the reserve, and its disposition, are the product of growers' elections. Second, it is an inferable and admitted fact that reserving itself provided price and marketing benefits to raisin producers before the end of the reserve, in addition to any residual cash.

Corroborating the later point, in their April 2015 *amicus* brief opposing the Hornes' challenge to enforcement of the reserve regulations as an unconstitutional taking, Sun-Maid Growers and the Raisin Bargaining Association, representing 60 percent of California raisin

production, admitted that raisin reserves confer a benefit on growers by supporting the market price of raisins that are being sold outside of the reserve:

> Petitioners were able to obtain this higher market price precisely because their competitors such as Sun-Maid and the RBA complied with the marketing order and withheld their reserve-tonnage raisins from the market.

Sun-Maid Growers & RBA *Horne* Brief at 13.[4] As they also admitted, a reserve benefits all growers by supporting raisin prices:

> The purpose of the raisin marketing order is, in essence, to help maintain orderly marketing conditions by regulating the handling of raisin supplies. *That system benefits the entire raisin industry, including petitioners*, by avoiding price volatility that was endemic prior to promulgation of the raisin marketing order. Such price stability "is especially important" for producers of "perishable commodities" such as raisins.

Id. at 2-3 (emphasis added). As the growers' brief noted, the Supreme Court has also observed that the amount of raisins grown has exceeded the amount that could be economically marketed, leading to a sharp decline in raisin prices. *Id.* at 9, citing *Parker v. Brown,* 317 U.S. 341, 363-64 (1943).

In sum, the price support effect and marketing benefits conferred with the initiation of a reserve elected by growers, and not just consideration in the form of residual cash at the end of a reserve,[5] provides the compensation elected by raisin growers through their RAC. The reserve, although relevant to the compensation issue, is not the equivalent of plaintiffs' *Williamson* inverse condemnation administrative compensation process. Accordingly, the limitations period

[4] A copy of the raisin growers' *Horne* brief is appended hereto.

[5] In some reserve years, the reserve is expended supporting raisin prices and marketing and no residual cash remains at the end of the reserve. *See, e.g.,* Pl. Opp. Appx. 38 (Dkt. no. 45-1) (crop-year 2008-2009). Sometimes the reserve has a gross residual of cash but it is then applied to pay the growers' California advertising assessment. *Id.* at 22 (crop-year 2007-2008).

for an alleged physical taking is not suspended until after a reserve ends with, or without, residual cash.

III. Plaintiffs' Physical Taking Claim Accrual Was Not Deferred Until Publication In The Federal Register Of A Final Rule Ratifying The Reserve Established By The RAC's Earlier Announcement Of The Reserve Percentage

A. Plaintiffs' Theory That A Taking By Title Transfer Occurred, But Only After Federal Register Publication Of A Final Rule Approving The RAC's Reserve Percentage, Is Without Basis In Fact Or Law

Alternatively, plaintiffs contend that a physical-taking-by-title-transfer occurred, but not before Federal Register publication of a final rule ratifying the reserve that had already been announced and required to be set-aside. Pl. Opp. 18-21. Plaintiffs failed to support any aspect of their theory. Neither the AMAA nor the Raisin Marketing Order dictate that title to raisins transfers to the Government. Plaintiffs suggest that 7 C.F.R. § 989.66 implies that no title could transfer before the USDA published in the Federal Register a final rule approving of the reserve. Pl. Opp. 3. But this regulation merely states that raisins designated as reserve tonnage shall be held for the account of the RAC. Those raisins were required to be physically segregated for the reserve when the RAC set the reserve percentage in October. 7 C.F.R. § 989.166(b)(1)-(2). Publication of the final reserve percentage in the Federal Register in fact does nothing to physically transfer raisins.

Plaintiffs quote portions of *Horne dicta* to contend that title to raisins passed to the Government, Pl. Opp. 19. Plaintiffs, however, omitted the portions of *Horne* that indicate that title to raisins does *not* pass to the Government, describing in *dictum* a transaction in which it is "as if" possession and title passed to the Government. *Horne*, 135 S. Ct. at 2428.

Plaintiffs argue that a physical taking can be triggered by an agency's order. Pl. Opp. at 22-23 & n. 72, citing, among other cases, *Goodrich v United States*, 434 F.3d 1329, 1333, 1335

(Fed. Cir. 2006). As plaintiffs note, the Federal Circuit held claim accrual may be triggered by an agency's order in "unqualified language." *Id.,* 434 F.3d at 1335. Here, USDA regulations in "unqualified language" directed physical segregation based on the RAC's initial announcement of the reserve percentage, ordering that handlers:

> *shall be allowed 3 calendar days . . . after the preliminary or interim percentages have been computed and announced by the Committee,* and after the publication in the Federal Register of the . . . final reserve percentages established for the crop year, or after any reserve tonnage raisins are acquired subsequent to the percentages being announced *or* established, *to segregate and properly stack . . . reserve tonnage raisins*.

7 C.F.R. § 989.166(b)(1) (emphasis added).

B. Plaintiffs' Taking Claim Accrual Was Not Deferred By Their Election To Deliver Some Of Their Raisins To The Reserve After The RAC's October Reserve Announcement Required Physical Segregation Of Their Raisins

Plaintiffs suggest that their physical taking claim did not accrue with the physical segregation required in October, but rather was deferred by their own election to deliver their raisins later in the crop-year. Pl. Opp. 9, 21 & n.70. It is true that some growers have elected to deliver raisins to handlers at various times within the crop year after the RAC's October announcement of a reserve. Pl. Opp. 2. Growers' election to defer delivering raisins, however, did not avoid the accrual of plaintiffs' physical taking claims. Physical separation of the reserve percentage was, in unqualified language, required within three days of the RAC's October announcement and continued as to growers' raisins "acquired subsequent to the percentages being announced." 7 C.F.R. § 989.166(b)(1).

Plaintiffs' contention that claim accrual should be deferred because the RAC later adjusted its preliminary reserve percentage to a final percentage, Pl. Opp. 18, also is erroneous. As plaintiffs' brief confirms, every year in which a reserve was announced, the RAC later elected to reduce the reserve percentage. *See* Pl. Opp. 11-14. Accordingly, the RAC's October

designation of the preliminary reserve percentage placed growers on notice of the maximum size of the reserve for the crop-year and, thus, the scope of the alleged taking.

Plaintiffs misplace their reliance on *Silverberg v. United States*, 155 Ct. Cl. 436, 438-39 (1961), Pl. Opp. 23, a dated and unusual wartime case. In *Silverberg*, slaughterers were required to set aside a portion of their beef production and to deliver it at a discount for an indefinite period beginning in 1943. *Id.* Because the plaintiffs "had no way of ascertaining just how long the set-aside order would remain in effect or how much beef would be taken from them," the statute of limitations was treated as deferred until the order was terminated. *Id.*, at 439-40. Unlike in *Silverberg*, raisin growers knew the October preliminary reserve consistently was the maximum amount of the reserve for the crop-year, and that each crop-year ended July 31. 7 C.F.R. § 989.21.

C. Plaintiffs' Argument That, For Lack Of Government Authorization, Their Physical Taking Claim Did Not Accrue Before Federal Register Publication Of A Final Rule, Fails Because It Depends Upon An Administrative Procedure Act Challenge

Plaintiffs contend that no physical taking could occur before the USDA's Federal Register publication of a final rule, because the agency's earlier publication of an interim rule approving of the RAC's earlier establishment of the reserve percentage violated the Administrative Procedure Act (APA). Pl. Opp. 23-24. The APA, however, "is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." *Califano v. Sanders*, 430 U.S. 99, 105 (1977). This Court lacks jurisdiction over claims based on the APA. *E.g. Berry v. U.S.*, 27 Fed. Cl. 96, 103 (1992); *Synernet Corp. v. U.S.*, 41 Fed. Cl. 375, 382 (1998). Plaintiffs' argument should be rejected because it depends on a belated, backdoor APA challenge to the legality of USDA rulemaking that the Court lacks subject matter jurisdiction to entertain.

Plaintiffs' APA challenge to USDA's interim rulemaking is also barred by the statute of limitations, 28 U.S.C. §§ 2401, 2501, because it was first raised in plaintiffs' May 2, 2016 opposition briefs. Pl. Opp. 23-24. More than six years have elapsed between plaintiffs' May 2, 2016 APA claim (or their August 2015 complaints) and the March 9, 2009 interim rule approving the RAC's final reserve percentage for the 2008-2009 crop year (the most recent year that is subject to our motion to dismiss the *Ciapessoni* and *Lion Farms* complaints).

In any event, plaintiffs should be held to have waived reliance on any purported lack of authority, having elected to exchange raisins for the reserve's benefits under this system governed by the USDA's regulations and its rulemaking, waiting until long after they reaped the benefits of the exchange to raise a challenge to the agency's authority. *Cf. AT&T v. United States*, 307 F.3d 1374 (Fed. Cir. 2002)(after taking benefits of contract, plaintiff waived claim that contract's compensation term was unauthorized).

D. Plaintiffs' Reliance On The Federal Register Publication Of A Final Rule As The Only Authorized Point Of Taking Accrual Is Erroneous Because (1) Plaintiffs Misconstrued USDA's Regulation; (2) 7 C.F.R. §§ 989.54(b) and 989.166 Authorize And Require The Establishment Of The Reserve Based On The RAC's Reserve Announcement; And (3) The USDA's Interim Rule Would Trigger Claim Accrual

Plaintiffs assert that a taking cannot occur until the Secretary designated a reserve in a final rule published in the Federal Register. Pl. Opp. 18. In doing so, plaintiffs quote 7 C.F.R. § 989.66, which they contend asserts: "that only those raisins '*which are designated* [by the Secretary] as reserve tonnage . . . shall be held . . . for the account of the [RAC]' (emphasis added))." *Id.* at 19-20. Plaintiffs misconstrue § 989.66(a), which does not suggest the word "only" and merely states in full that "[t]he standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of

this part." 7 C.F.R. § 989.66(a). This passage mentions the "committee" and says nothing of the USDA or "the Secretary." Nothing in this passage suggests that the Secretary alone may designate the reserve percentage.

In any event, Congress provided in the AMAA that committees comprised of agricultural producers, such as the RAC, could be delegated authority "to make rules and regulations to effectuate" marketing orders. *See* Def. Mot. 3-4; 7 U.S.C. § 608c(7)(C)(i)-(iv); 7 C.F.R. § 989.26-39. The Secretary promulgated regulations implementing the AMAA, and expressly authorized and directed the reserving of raisins "after the preliminary or interim percentages have been computed and announced by the Committee" "*or* established" following a Federal Register publication. 7 C.F.R. § 989.166(b)(1) (emphasis added). 7 C.F.R. § 989.166, does not require, or permit, handlers to wait until the USDA publishes in the Federal Register an interim or final rule, to physically separate raisins between free tonnage and the percentage to be set aside in the reserve announced by the RAC.

Even assuming that Federal Register publication matters, the interim rule would trigger the statute of limitations. Where, as here, the action complained of in a final rule is the same action undertaken earlier in an interim rule, the statute of limitations will begin to run based on the earlier interim rule. *Paucar v. Attorney General of U.S.*, 545 Fed. Appx. 121, 124 (3d Cir. 2013). In *Paucar*, the court of appeals noted that the Attorney General's final rule in an immigration case was "in all relevant respects identical to the interim rule," and, therefore, the statute of limitations began to run when the interim rule was published nine months earlier. *Id.*

In these cases, the final rule relied on by plaintiffs expressly states that it "continues in effect" the action that established the final reserve percentage indicated in the interim rule (which, in turn, ratified the RAC's earlier designation of the final reserve percentage). To

illustrate, Lion Farms contends that "USDA imposed a reserve," citing the Federal Register publication of the final rule for the 2008-2009 crop year. Lion Farms Compl. ¶17 (citing 74 Fed. Reg. 44269 (Aug. 28, 2009)). That final rule provides, in pertinent part, that:

> This rule *continues in effect* the action that established final volume regulation percentages for 2008-09 crop NS raisins covered under the order. The volume regulation percentages are 87 percent free and 13 percent reserve and *were established through an interim rule published on March 9, 2009* (74 FR 9951).

74 Fed. Reg. 44269 (emphasis added). Moreover, the 13 percent reserve referenced in the Federal Register publication that "[was] established through an interim rule published on March 9, 2009 (74 FR 9951)" is actually the 13 percent reserve that had been recommended by the RAC in December 2008 (reducing the preliminary 22 percent reserve established in October 2008). See 74 Fed. Reg. 44270 (Aug. 28, 2009). Indeed, as can be seen from plaintiffs' brief, the interim and final rules are similarly identical in each of the crop years presented by the plaintiffs, from crop year 1999-2000 through 2008-2009. Pl. Opp. 11-14. USDA Federal Register publication of a final rule continued in effect the interim rule, which, in turn, merely ratified the RAC's earlier reserve determination.[6]

The USDA's March 9, 2009 interim rule was issued more than six years before the August 2015 filing of plaintiffs' complaints (December 2015 in the *Boyajian* case). Accordingly, to the extent that a Federal Register publication designating the reserve percentage triggers the statute of limitations, plaintiffs' claims still are time-barred. *See Paucar*, 545 Fed. Appx. at 124.

[6] The RAC decreased the reserve size from the preliminary to the final recommendation every year from 1999 to 2009. See Pl. Opp. 11-14. Notably, the final percentage recommendation then remained unchanged through both the interim and final rules in each of the above years. *Id.* As a result, every year from 1999 to 2009 the plaintiffs knew the maximum percentage they would have to set aside by October of every crop year, and were provided the final percentage no later than February of every crop year. *Id.*

In sum, plaintiffs' physical takings claim accrual was not deferred until publication in the Federal Register of a final rule ratifying the earlier authorization and requirement to physically segregate raisins into a reserve.

E. Plaintiffs' Challenges To Claim Accrual Based On Other Constitutional Principles Are: (1) Not Within The Court's Subject Matter Jurisdiction To Entertain; (2) Time-Barred, (3) Incompatible With A Claim That The Actual Physical Transfer To A Reserve Was A Taking, and (4) Erroneous

Plaintiffs urge the Court not to conclude that a physical taking accrued with the physical segregation of raisins required by the RAC, citing the principle of constitutional avoidance. Pl. Opp. 28-34. Plaintiffs contend that no claim could accrue based on a RAC announcement because the Secretary cannot constitutionally delegate a "government" function to a committee, as to do so would violate constitutional principles other than the Takings clause: the nondelegation doctrine, Due Process, and Appointments Clause. The Court should avoid plaintiffs' constitutional-avoidance argument.

Plaintiffs' avoidance argument amounts to a backdoor challenge to the legality of the USDA's reserve regulations, a challenge the Court lacks subject matter jurisdiction to entertain. The Court lacks Tucker Act jurisdiction to entertain claims based upon the Constitution's provisions that do not create a substantive right to money from the United States. *United States v. Testan*, 424 U.S. 392, 398 (1976). *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (Court lacks jurisdiction to entertain alleged violations of Due Process clause or separation of powers); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (no jurisdiction over claims based upon Fifth Amendment Due Process clause). Plaintiffs' challenges under the nondelegation doctrine, Due Process, and Appointments Clause must fail because they are not premised upon any money-mandating provision of the Constitution. *See id.* The Court, therefore, lacks jurisdiction to entertain these constitutional challenges.

Plaintiffs' constitutional challenges should be rejected for the additional reason that they are at least as untimely as plaintiffs' underlying claims. The USDA's authorization of the RAC to compute and announce reserves, 7 C.F.R. 989.54(b), and the requirement of physical separation following the RAC's announcement, 7 C.F.R. 989.166(b)(1), have been in place since before the conduct about which plaintiffs belatedly complain.

Even assuming nondelegation, Due Process, and Appointments Clause challenges would be within the Court's jurisdiction, and timely, these challenges should be dismissed because they cannot support plaintiffs' takings claim. Plaintiffs do not (and cannot plausibly) dispute that physical separation in fact was required based on the RAC's action – the October reserve announcement's triggering the operation of 7 C.F.R. § 989.166(b)(1). Thus, even if plaintiffs' non-takings constitutional challenges to the RAC's authority were correct, which they are not, plaintiffs' arguments would fail because they cannot prevail upon a taking claim that maintains that the reserve requirement resulting from RAC action was unlawful. *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006) (claimant must concede the validity of the government action for a takings claim).

Plaintiffs' challenges fail in any event because, as we demonstrated, the RAC's reserve was authorized under the AMAA and by the Secretary's regulations. See III.D., *supra*. Plaintiffs allege that the AMAA and USDA regulations violate the Due Process clause because they confer upon the RAC independent regulatory authority. That argument fails because the RAC is subject to oversight by the USDA. *See* 7 C.F.R. § 989.55, .95; Pl. Opp. 32.[7]

[7] Plaintiffs rely on *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11, in support of their constitutional avoidance argument. Pl. Opp. 30-32. *Carter* is inapposite because the RAC does not set wages or prices, and plaintiffs here have not premised their claim upon a *Carter*-like notion that a subset of growers were improperly empowered to abuse other growers. *See id.* at 311; *see also* 7 C.F.R. §§ 989.4, .29-.30 (permitting grower nomination of RAC members).

Even if there was any ambiguity about the RAC's authority to trigger the physical separation of raisins (and there is not), the USDA is entitled to *Chevron* deference to its interpretation of its AMAA authority to use committees of agricultural producers to implement agricultural marketing agreements. When a statute is ambiguous as to congressional intent, the Supreme Court has directed that a court should defer to the requisite administrative agency for the proper interpretation, unless the agency interpretation is plainly erroneous. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The USDA's interpretation of its AMAA authority to rely upon an agricultural committee such as the RAC to help implement the reserve, as reflected in its promulgated regulations governing the RAC and directing establishment of a reserve based on the RAC's recommendation, was a reasonable interpretation of the agency's authority under the AMAA, not "plainly erroneous."[8]

Plaintiffs argue that the constitutional avoidance doctrine would trump *Chevron* deference here. Pl. Opp. 28. *Chevron* deference may only be abandoned, however, if there is a high likelihood of the challenged provision's unconstitutionality. *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004). Plaintiffs' argument fails because Congress' AMAA authorization of agency reliance on agricultural committees to assist with the implementation of marketing orders does not present a high likelihood of nondelegation, Due Process, and

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Nor would the AMAA violate the Appointments Clause because, even assuming RAC members are officers of the United States, they would likely be construed to be inferior officers who can be appointed by heads of departments. U.S. Const. art. II, § 2, cl. 2; *see Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (inferior officers are limited in duties, jurisdiction, and tenure).

[8] Courts have also held that, "respect for agencies' proper role in the *Chevron* framework" requires that "challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (quoting *NRDC v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994)). Plaintiffs have not identified any administrative challenge undertaken by them with respect to the March 2009 interim rule, or any interim rule potentially at issue and we are not aware of any such action by plaintiffs.

Appointments clause violations. Indeed, California raisin growers -- the putative class in these cases – in 2015 defended the reserve system against the *Horne* challenge that its enforcement would be an unconstitutional taking. Sun-Maid Growers and RBA *Horne* Brief, 2015 WL 1569759 at *9-10.

IV. The Accrual Of Plaintiffs' Taking Claims Was Not Suspended Because Plaintiffs' Taking Claims Were Not "Inherently Unknowable" Or "Barred" By This Court's 2006 Decision In *Evans* Until The 2015 *Horne II* Decision

Finally, plaintiffs contend that their takings claims accruing on or after February 21, 2001, are not time-barred because claim accrual should be suspended on the theory that it was "inherently unknowable" that their raisins had been taken within the meaning of the Fifth Amendment. Plaintiffs argue that a physical taking claim was "barred" due to this Court's conclusion that a reserve was not a taking in *Evans v. United States*, 74 Fed. Cl. 554, 563-64 (2006). Plaintiffs argue that this bar lasted until the Supreme Court purportedly "held otherwise" in *Horne II*. Pl. Opp. 34-36. Plaintiffs' argument fails because: (1) plaintiffs' claims were not "inherently unknowable;" (2) this Court's *Evans* decision did not bar plaintiffs' claims, and (3) *Horne II*, as plaintiffs' briefs elsewhere admitted, is only *dicta* here; as such, it is not a holding applicable to raisin growers who elected to participate in a reserve in exchange for its price support and marketing benefits.

Accrual suspension is an exception that is "strictly and narrowly applied" to the United States. *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003); *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985). To qualify for this exception, the plaintiff "must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Martinez*, 333 F.3d at 1319 (quoting *Welcker*, 752 F.2d at 1580).

Accrual suspension is generally limited to cases "where the factual basis, rather than the legal basis, of a . . . claim is concealed or inherently unknowable." *Banks v. United States*, 102 Fed. Cl. 115, 144 (2011) (*reversed and remanded on other grounds* by *Banks v. United States*, 741 F.3d 1268 (Fed. Cir. 2014));[9] *see Young v. United States*, 529 F.3d 1380, 1385 (Fed. Cir. 2008) (finding the trial court had properly declined to suspend accrual because "it is a plaintiff's knowledge of the facts of the claim that determines the accrual date"); *Venture Coal Sales Co. v. United States*, 57 Fed. Cl. 52, 54-55 (2003) (accrual of plaintiffs' claims for a tax refund was not suspended until the tax was found unconstitutional). Plaintiffs do not contend they were unaware of the fact of their alleged injury. Pl. Opp. 36.

Instead, plaintiffs argue that their claim was "barred" by this Court's adverse decision in *Evans* and therefore the legal basis of their claim was "inherently unknowable." Pl. Opp. 34, 36. However, the Federal Circuit has consistently held that plaintiffs must file their claims within the statute of limitations "*notwithstanding the presence of adverse precedent* or the futility of filing." *Banks*, 102 Fed. Cl. at 145 (collecting cases) (emphasis added); *see also Frazer v. United States*, 288 F.3d 1347, 1354-55 (Fed.Cir.2002) (finding that whether similar claims had been unsuccessful in the past was "irrelevant" to the timeliness of the plaintiffs' claim).

Plaintiffs misplace their reliance on two non-binding and inapposite cases from other circuits, *Neely v. United States*, 546 F.2d 1059 (3rd. Cir. 1976); *United States v. One 1961 Red Chevrolet Impala Sedan (Red Chevrolet)*, 457 F.2d 1353 (5th Cir. 1972). Pl. Opp. at 36-37. The claims asserted by the plaintiffs in *Neely* and *Red Chevrolet* were barred at the time of their injury by binding precedent that later was expressly overruled by the Supreme Court and the

[9] Although *Banks* was reversed and remanded by the Federal Circuit in 2014, the reversal was based on the lower court's analysis of the claims' factual basis. The Federal Circuit found that the nature of the erosion delayed when the plaintiffs would have known, or reasonably known, the factual basis of their claim. 741 F.3d at 1271.

express overruling was given retroactive effect. *Neely* 546 F.2d. at 1061, citing *United States v. United States Coin and Currency*, 401 U.S. 715, 723-24 (1971) (giving new *"Marchetti"* rule retroactive application).

In contrast, plaintiffs here assert that their claim was barred by Court of Federal Claims decisions in *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 247 (1994), and *Evans v. United States*, 74 Fed. Cl. 554, 563 (2006). *Cal-Almond* (which is not even about a raisin reserve), and *Evans*, are not binding Supreme Court decisions. They are not even binding on other judges of the Court. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (decision of a Federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case); *Vessels v. Secretary of Department of Health & Human Services*, 65 Fed. Cl. 563, 569 (2005). Although *Evans* was affirmed, the Federal Circuit did so in an unpublished, nonprecedential order pursuant to Appellate Rule 36 (*i.e.*, without an explanatory opinion).[10] And, as plaintiffs elsewhere admit, *Horne II*'s description of the raisin reserve, in the context of a claim by a handler, as distinguished from a raisin grower who elected to participate in a reserve, is only *dicta*, not binding here (nor persuasive as to growers who elected to participate in the reserve).

[10] Only one court does more than mention *Evans* in passing. In its 2009 decision in *Horne*, the District Court for the Eastern District of California found the reasoning in *Evans to be persuasive. Horne v. U.S. Department of Agriculture*, 2009 WL 4895362 at 26 (E.D. Cal. December 11, 2009). However, persuasion does not create mandatory authority. Although *Evan*s may have decreased the likelihood of plaintiffs succeeding in their takings claim, a lessor likelihood of success is not the same as having "no reasonable probability of successfully prosecuting" a claim. *Red Chevrolet*, 457 F.2d at 1358. As such, an expansion of the accrual suspension rule in this matter would move well beyond the "strict and narrow" application insisted on by previous courts. *Martinez*, 333 F.3d at 1319.

In sum, plaintiffs' argument that their claims' accrual should be suspended because they had "inherently unknowable" "barred" claims until this Court's decisions purportedly were "overturned" retroactively by *dicta*, is entirely baseless.[11]

CONCLUSION

For these reasons, we respectfully submit that the Court should grant our motion and dismiss with prejudice the *Ciapessoni* and *Lion Farms* complaints as to all reserves in crop-years prior to the 2009-2010 crop-year, and dismiss the later-filed *Boyajian* complaint in its entirety.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Kenneth M. Dintzer
KENNETH M. DINTZER
Deputy Director

/s/ Brian A. Mizoguchi
BRIAN A. MIZOGUCHI
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 305-3319
Email: brian.mizoguchi@usdoj.gov

OF COUNSEL:

FRANK MARTIN
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

August 5, 2016

[11] Plaintiffs have not shown that *Evans* precluded alternative means of challenging the raisin reserve. The court in *Evans* noted that despite adverse rulings regarding their physical takings claim, the plaintiffs still had other "conceptually possible" avenues to pursue, including a regulatory takings theory, or an administrative remedy. 74 Fed. Cl. at 564. Under 7 C.F.R. § 989.91, raisin producers have the power to vote to terminate the reserve authority. As indicated in their amicus brief submitted in *Horne II*, Sun-Maid Growers of California, representing 650 growers, invoked this very process on November 17, 2014.