IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Bruce Ciapessoni, **Elisa Ciapessoni**, **Bob F. Hansen**, **Hansen Enterprises**, **R&H Agri-Enterprises**, **Eldora Rossi**, **Rossi & Ciapessoni Farms**, and **Rossi & Rossi**, on behalf of themselves and all others similarly situated, Plaintiffs, v. **United States of America**, Defendant.	Case 1:15-cv-00938-MMS Hon. Margaret M. Sweeney

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

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INTRODUCTION

For several decades, the U.S. Department of Agriculture ("USDA") physically took raisins produced by California raisin growers under the "California Raisin Handling Order," 7 C.F.R. §§ 989.1–.95 (2015) ("Marketing Order"). Of particular relevance here, USDA took Plaintiffs' raisins during the 1999–2000, 2000–2001, 2001–2002, 2002–2003, 2003–2004, 2005–2006, 2006–2007, 2007–2008, 2008–2009, and 2009–2010 crop years.[1] *See Horne v. Dep't of Agric.* (*Horne II*), 135 S. Ct. 2419, 2428 (2015) (holding that the Marketing Order's transfer of title of raisins effects a "clear physical taking").[2] For some of those crop years, the government paid Plaintiffs nothing for their raisins; in others, it paid Plaintiffs cents on the dollar. But in none of those years did the government provide "just"—full—compensation. In this class action, Plaintiffs and those similarly situated to them seek the just compensation the government owes them under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The government has moved to dismiss, and in the alternative, for summary judgment on some of Plaintiffs' claims.[3] It argues that the applicable six-year statute of limitations deprives this Court of jurisdiction over Plaintiffs' claims for raisins taken in the 2008–2009 and earlier crop years. According to the government, only Plaintiffs' claims for the 2009–2010 crop year fall within the statute of limitations. Gov't Mot. 10–14.

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[1] The government asserts that Plaintiffs limit their claims to the 2002–2003 and later crop years. Gov't Mot. 2. Plaintiffs' complaint, however, is not so limited. *See* Compl. ¶ 29 (alleging that "[i]n numerous crop years where USDA established a reserve pool, *including but not limited to* 2002–[20]03" and later crop years, the government "physically appropriated Plaintiffs' reserve-tonnage raisins" (emphasis added)).

[2] *Horne II* was that lengthy litigation's second visit to the Supreme Court. The first visit was *Horne v. Department of Agriculture* (*Horne I*), 133 S. Ct. 2053 (2013).

[3] Because the government concedes that Plaintiffs' claims for at least one crop year are within the applicable limitations period, the government's motion is properly characterized as a motion to dismiss *in part*, or in the alternative, for *partial* summary judgment.

The government argues that a takings claim for a crop year under the Marketing Order accrues when handlers separate the raisins that they must hold ("reserve tonnage" raisins) from those that they may sell on the open market ("free tonnage" raisins). The government asserts such separation occurs *entirely* when the Raisin Administrative Committee ("RAC"), an industry advisory group selected by the Secretary of Agriculture ("the Secretary") under the Marketing Order, makes its preliminary reserve recommendation in October of a given crop year. *Id.* at 5–8. The government concludes that only the 2009–2010 crop year falls within the six-year period preceding Plaintiffs' commencement of this action on August 26, 2015. *Id.* at 12–14.

The Court should deny the government's motion for several reasons.

First, the government has provided no evidence to support its assertion that handlers completed the physical separation of reserve- and free-tonnage raisins in October of the crop years at issue. In fact, growers delivered raisins to handlers weekly over the course of each crop year (August 1–July 31), and handlers separated such raisins as deliveries occurred. It simply cannot be, as the government's theory requires, that growers' takings claims in any given crop year accrued in October even as to raisins delivered, and separated into free and reserve tonnage, later in the crop year (i.e., November through July).

Second, the RAC's preliminary reserve recommendation in October was only that: preliminary. In every crop year at issue in this case, the Secretary ultimately designated a *lower* reserve percentage than the percentage initially recommended by the RAC in October.[4]

[4] Under the government's theory, if Plaintiffs' claims in any crop year accrued in October when the RAC made its preliminary recommendation, then Plaintiffs' takings claims would need to be based on that higher percentage rather than the lower percentage later designated by the Secretary. Applied to the 2009–2010 crop year, for instance—the one crop year that the government admits falls within the applicable limitations period—acceptance of the government's accrual theory would mean that Plaintiffs' takings claims are for 27 percent of their raisin deliveries to handlers (the amount of the RAC's preliminary recommendation), *see* Final

Third, handlers' separation of raisins pursuant to RAC instructions did not constitute the government's physical taking of the raisins. The government neither took title to nor completed the physical occupation of Plaintiffs' raisins until the Secretary issued a final rule designating the reserve.

Fourth, although the Secretary's designation of the reserve in a final rule constituted the physical *taking* in any given crop year, Plaintiffs' just compensation claims were not *ripe* until the RAC completed its administrative process for paying compensation to growers from its disposition of reserve-tonnage raisins taken in that crop year.

Finally, the government does not account for the suspension of claim accrual between December 22, 2006, and June 22, 2015, when this Court's law effectively foreclosed Plaintiffs' claims until *Horne II* abrogated it. The suspension of claim accrual brings earlier crop years as far back as 1999–2000 within the statute of limitations.

QUESTIONS PRESENTED

1. Did Plaintiffs' claims for just compensation for a given crop year accrue:

    i. when, as the government contends, the RAC announced its preliminary raisin reserve recommendation in October, even though growers had delivered less than half of their crop by then, and even though USDA ultimately designated a *lower* reserve percentage;

Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 20,897, 20,898 (Apr. 22, 2010), although the Secretary ultimately designated (and thus took) only 15 percent of such deliveries, *see* Final Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959 (June 24, 2010).

ii. when USDA subsequently issued its final rule designating a reserve that transferred title and completed the government's physical occupation of the raisins, even though the government had not yet denied compensation to Plaintiffs by then; or

iii. when, as Plaintiffs contend, the government completed its administrative process for paying compensation for raisins taken by the government?

2. Whatever the accrual date of Plaintiffs' claims in any crop year, was such accrual suspended for 3,104 days—the time between this Court's rejection of raisin growers' claims on December 22, 2006, in *Evans v. United States*, 74 Fed. Cl. 554 (2006), and the Supreme Court's effective overruling of *Evans* on June 22, 2015, in *Horne II*?

STATEMENT OF THE CASE

A. Statutory Background

The Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §§ 601 *et seq*., authorizes the Secretary of Agriculture to issue "orders" applicable to "handlers" of various agricultural commodities, including raisins. *See* 7 U.S.C. § 608c(1). Although the statute does not define "handling," the term is understood to encompass processing—as opposed to producing—agricultural commodities. The statute specifically disclaims any regulation of an agricultural "producer in his capacity as a producer." *Id.* § 608c(13)(B).

Orders issued by the Secretary under the AMAA may, *inter alia*, "establish[] or provid[e] for the establishment of reserve pools" of agricultural commodities, and provide for "the equitable distribution of the net return derived from the sale" of reserve pool commodities "among the persons beneficially interested therein." *Id.* § 608c(6)(E). The purpose of such

reserve pools is "to establish and maintain such orderly marketing conditions . . . as will . . . avoid unreasonable fluctuations in supplies and prices." *Id.* § 602(4).

The AMAA authorizes the Secretary to "select[] . . . an agency or agencies"—advisory committees such as the RAC—to aid in the administration of a marketing order. *Id.* § 608c(7)(C). The statute provides that the "powers and duties" of such committees "shall include *only*" the powers:

> (i) To administer such order in accordance with its terms and provisions;
> (ii) To make rules and regulations to effectuate the terms and provisions of such order;
> (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
> (iv) To recommend to the Secretary of Agriculture amendments to such order.

Id. (emphasis added).

The AMAA authorizes the Secretary to amend orders—subject to an exception not relevant here—through informal "rulemaking under section 553 of title 5" (i.e., the Administration Procedure Act ("APA")). *Id.* § 608c(17)(E). It provides that the Secretary "shall complete all informal rulemaking actions necessary to respond to" committee recommendations to amend the order "not more than 45 days (to the extent practicable) after submission" of such recommendations. *Id.* § 608c(1).

The AMAA authorizes the Secretary—not the advisory committee selected by the Secretary—to enforce his orders under the statute by imposing civil penalties in USDA administrative proceedings. *Id.* § 608c(14)(B). The statute also authorizes the Secretary to appoint "such officers and employees"—not advisory committees—"as are necessary to execute the functions vested in him" under the AMAA. *Id.* § 610(a).

B. The USDA Marketing Order

In 1949, the Secretary issued the Marketing Order under the AMAA. *See* 14 Fed. Reg. 5136, 5136 (Aug. 18, 1949) (codified as amended at 7 C.F.R. Part 989). The Marketing Order regulates "handlers"—*not* raisin growers—and defines "handlers" as the packers, processors, and others that receive raisins from "producers"[5] and prepare and place raisins into trade channels. *See* 7 C.F.R. § 989.15.

The heart of the Marketing Order requires the *Secretary* to designate final free and reserve percentages "[w]henever [he or she] finds, from the *recommendation* and supporting information supplied by the [RAC] . . . that to designate [such] percentages for . . . raisins acquired by handlers, during the crop year will tend to effectuate the declared policy of the Act." *Id.* § 989.55 (emphasis added). This allows the Secretary—and only the Secretary—to restrict the raisin supply reaching markets by designating a percentage of the yearly raisin crop delivered to handlers as a pool of "reserve-tonnage raisins." *See generally id.* §§ 989.65–.71.

The Secretary selects the RAC, *id.* §§ 989.29–.30, as the "agency" to administer the Marketing Order under 7 U.S.C. § 608c(7)(C)(i). The RAC is composed of raisin industry representatives. *See* 7 C.F.R. §§ 989.26–.27. It has the power to "administer," to "make rules and regulations" to "effectuate," to "*recommend* to the Secretary amendments" (i.e., recommend free and reserve tonnage designations), and to "receive, investigate, and report to the Secretary" violations of, the Marketing Order. *See id.* § 989.35(a)–(d) (emphasis added). The RAC's

[5] "Producers" include those "engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins" (i.e., growers). 7 C.F.R. § 989.11. The roles of "producer" and "handler" are not mutually exclusive. A producer can act as its own handler. *Horne II*, 135 S. Ct. at 2424.

specifically enumerated powers do not include the power to "designate" reserve tonnage percentages and thereby amend the Marketing Order to establish a reserve pool.[6]

Under the Marketing Order, the crop year begins on August 1 and runs through July 31. *Id.* § 989.21. Raisin growers deliver raisins every week to handlers throughout the crop year, with the bulk of raisin deliveries completed between October and December.[7]

The Secretary's process for designating each crop year's reserve pool begins with a preliminary recommendation by the RAC, which considers the so-called "trade demand" formula and compares expected production to expected demand. *Id.* § 989.54(b). Based on these projections, on or before October 5, the RAC computes and recommends *preliminary* free- and reserve-tonnage percentages for the Secretary to adopt as an amendment to the order. *Id.*

Once the RAC makes its preliminary recommendation, the Marketing Order requires handlers to physically separate reserve-tonnage raisins from free-tonnage raisins on a rolling basis as growers make deliveries. *Id.* § 989.166(b)(1). At that point, however, the RAC has not yet taken title to separated reserve-tonnage raisins, because the Secretary has not yet "designated" and thereby fixed the final reserve percentage. Instead, reserve raisins are merely segregated by handlers pending further word from the RAC. *See* Declaration of Richard Stark ¶ 7, App. 145 ("Stark Decl."). Handlers are obligated to pay growers only for delivered raisins that are not set aside as reserve raisins (i.e., free-tonnage raisins). *Id*. ¶ 6, App. 145.

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[6] The government notes that, in *Horne II*, the Supreme Court stated that the *RAC* "imposed" the "reserve requirement." *See* Gov't Mot. 12 (quoting *Horne II*, 135 S. Ct. at 2428). This inaccurate statement by the Court was dicta, as it was not essential to the decision. In contrast, in *Horne I*, the Court accurately stated that the "RAC . . . makes *recommendations* to the Secretary whether or not there should be a reserve," *Horne I*, 133 S. Ct. at 2057 (emphasis added), and that the Secretary "approves the recommendation if he determines that the recommendation would 'effectuate the declared policy of the act,'" *id*. (quoting 7 C.F.R. § 989.55).

[7] RAC, Marketing Policy and Industry Statistics 26–27 (2009) (Table 13 showing weekly raisin tonnage deliveries in the 2004–2005 to 2008–2009 crop years). App. 149–50.

On or before February 15, the RAC recommends final reserve percentages to the Secretary. The RAC's final recommendations can—and, in every year at issue in this case, did—vary from the RAC's preliminary recommendation. 7 C.F.R. § 989.54(d). The Marketing Order requires handlers, in turn, to adjust their ongoing separation and retention of raisins to conform to the RAC's final recommendation. *Id*. § 989.166(b)(1). To the extent that the RAC later adjusts its recommended reserve percentage to a lower number, the Marketing Order authorizes handlers to release a corresponding portion of raisins previously set aside. *See id.* § 989.66(c) (authorizing handlers to "release[]" previously separated raisins after "a change of percentages" by the RAC or the Secretary). Handlers then pay growers for the raisins so released as free tonnage after the RAC lowers its recommended reserve percentage. Stark Decl. ¶ 8, App. 145.

The RAC's final recommendation, however, is not binding on the Secretary, who—after providing public notice in the Federal Register and inviting public comment on the same as required by 5 U.S.C. § 553—thereafter "designate[s] final free and reserve percentages for any varietal type of standard raisins acquired by handlers." *Id.* § 989.55. The Secretary's designation of the final free and reserve percentages, which is published in the Federal Register, is promulgated as an amendment to and regulation under the Marketing Order.[8]

Raisins "which *are* [so] *designated* as reserve tonnage" by the Secretary are held by handlers "for the account of the RAC." *Id*. § 989.66 (emphasis added). To the extent the Secretary's final reserve percentage designation varies from the RAC's final recommendation, the Marketing Order requires handlers to adjust their separation of raisins to conform to the Secretary's final designation. *Id*. § 989.166(b)(1).

[8] *See* Final Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959, 35,962 (June 24, 2010) ("[T]he interim rule that amended 7 CFR part 989 and that was published at 75 FR 20897 on April 22, 2010, is adopted as a final rule"); 7 C.F.R. § 989.257 (free and reserve percentages designated by the Secretary).

The Secretary's *designation* of reserve-tonnage raisins "for the account of the RAC" thus transfers title to the RAC, which disposes of them in various ways. *Id.* § 989.67(b)(5). The RAC later pays growers their respective shares of the net proceeds of the RAC's disposition of reserve-tonnage raisins. *See id.* § 989.66(h). In some crop years, this administrative process for determining compensation owed growers has yielded significant, albeit partial, compensation. For example, in the 2002–2003 crop year, the RAC paid out $272.73 per reserve ton[9] when the free tonnage price was $745.00 per ton[10]—representing net proceeds of approximately thirty-seven cents on every dollar of reserve raisins taken by the government. Such partial compensation would necessarily entitle the government to assert an offset in any subsequent takings litigation brought by growers in this Court (including this litigation).

The 2008–2009 crop year illustrates the Marketing Order's operation in practice. On October 9, 2008, the RAC issued its preliminary recommended reserve percentages for the crop year: 78% free tonnage and 22% reserve tonnage.[11] The government contends that that event triggered the accrual date for all of Plaintiffs' claims for the crop year because handlers then had to begin separating raisins. Gov't Mot. 10, 13. Through October 31, however, just over 36% of the year's total crop had been delivered to handlers,[12] and some growers, including certain Plaintiffs, had not completed raisin deliveries to handlers. Stark Decl. ¶ 9, App. 145.

[9] RAC, Statement of Disposition and Growers Equity for 2002–2003. App. 93.

[10] Final Free and Reserve Percentages for 2002–2003 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959, 35,960 (June 24, 2010).

[11] Final Free and Reserve Percentages for 2008–2009 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 44,269, 44,270 (Aug. 28, 2009).

[12] Through the 13th week of the 2008–2009 crop year, handlers delivered 133,185 tons of raisins, out of a total of 364,268 tons delivered in that crop year. RAC, Marketing Policy and Industry Statistics 26–27 (2009). App. 149–50.

Two months later, on December 18, 2008, the RAC announced final recommended reserve percentages of 87% free tonnage and 13% reserve tonnage[13]—reducing the reserve by almost 50% from the RAC's preliminary recommendation. In light of this reduction, handlers thereafter released a corresponding percentage of previously separated raisins into free tonnage, and paid growers for the previously-separated raisins so released. Stark Decl. ¶ 8, App. 145.

On March 9, 2009, the Secretary accepted the RAC's recommended final percentages and published them for public comment as an interim final rule.[14] On August 28, 2009, the Secretary adopted the percentages without change in a final rule designating reserve-pool raisins.[15] The final rule amended the Marketing Order accordingly.[16] The RAC disposed of the reserve-pool raisins, and on January 31, 2013, the RAC informed growers that their equity interest in the reserve pool had been exhausted and that "no reserve payment will be made."[17]

As the chart below demonstrates, this process for designating reserve-tonnage raisins and paying compensation to growers for these raisins operated in each of the nine crop years at issue in this case that the government contends are outside the limitations period. In all of those crop years, the RAC's final recommended reserve percentage varied from its preliminary October recommendation. In three of those nine crop years, the administrative process for determining

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[13] Final Free and Reserve Percentages for 2008–2009 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 44,269, 44,270 (Aug. 28, 2009).

[14] Final Free and Reserve Percentages for 2008–2009 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 9951 (Mar. 9, 2009) (interim final rule requesting comments).

[15] Final Free and Reserve Percentages for 2008–2009 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 44,269 (Aug. 28, 2009).

[16] *Id*. at 44,273; *see also* 74 Fed. Reg. at 9956 (interim final rule amending 7 C.F.R. § 989.257) ("The final percentages for the respective varietal type(s) of raisins acquired by handlers during the crop year beginning August 1, which shall be free tonnage and reserve tonnage, respectively, are designated as follows.").

[17] RAC, Letter of Gary Schulz to All 2008–09 Natural (sun-dried) Seedless Growers, Jan. 31, 2013. App. 22.

compensation yielded payments (and thus partial compensation) to raisin growers.[18] Even in crop years where the RAC made no compensation payments, growers did not finally know whether such payments would be made until the RAC officially closed its administrative process—sometimes years after the crop year in question.

Crop Year	RAC Preliminary Percentage	RAC Final Percentage	USDA Interim Rule	USDA Final Rule	Net Payment For Reserve Raisins
2008–09	22% Oct. 9, 2008[19]	13% Dec. 18, 2008[20]	13% Mar. 9, 2009[21]	13% Aug. 28, 2009[22]	$0.00 Jan. 31, 2013[23]
2007–08	28% Oct. 11, 2007[24]	15% Oct. 11, 2007[25]	15% Feb. 19, 2008[26]	15% July 7, 2008[27]	$0.00 After Jan. 11, 2011[28]

[18] For the 2009–2010 crop year—which the government admits is within the limitations period—the RAC in 2015 paid growers compensation of $112.23 per reserve ton. RAC, Statement of Disposition and Growers Equity for 2009–2010 (Jan. 26, 2015). App. 10. This payment yielded net compensation of approximately 8.5 cents for every dollar of reserve tonnage taken by the government, as the free tonnage price was $1,323.00 per ton. Stark Decl. ¶ 10, App. 145.

[19] Final Free and Reserve Percentages for 2008–09 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 9951, 9953 (Mar. 9, 2009).

[20] *Id.*

[21] *Id.* at 9952.

[22] Final Free and Reserve Percentages for 2008–09 Crop Natural (Sun-Dried) Seedless Raisins, 74 Fed. Reg. 44,269, 44,269 (Aug. 28, 2009).

[23] RAC, Letter of Gary Schulz to All 2008–09 Natural (sun-dried) Seedless Growers, Jan. 31, 2013. App. 22.

[24] Final Free and Reserve Percentages for 2007–08 Crop Natural (sun-dried) Seedless Raisins, 73 Fed. Reg. 9005, 9006 (Feb. 19, 2008).

[25] *Id.*

[26] *Id.*

[27] Final Free and Reserve Percentages for 2007–08 Crop Natural (Sun-Dried) Seedless Raisins, 73 Fed. Reg. 38,307, 38,307 (July 7, 2008).

[28] RAC, Statement of Disposition and Growers Equity for 2007–2008, App. 38–39; RAC, Minutes of Meeting (Jan. 6, 2011). App. 35.

Crop Year	RAC Preliminary Percentage	RAC Final Percentage	USDA Interim Rule	USDA Final Rule	Net Payment For Reserve Raisins
2006–07	28% Sept. 6, 2006[29]	10% Nov. 21, 2006[30]	10% Apr. 9, 2007[31]	10% Oct. 19, 2007[32]	$0.00 Feb. 19, 2009[33]
2005–06	26% Oct. 4, 2005[34]	17.5% Jan. 26, 2006[35]	17.5% May 23, 2006[36]	17.5% Jan. 18, 2007[37]	$0.00 Feb. 19, 2009[38]
2003–04	35% Oct. 2, 2003[39]	30% Feb. 12, 2004[40]	30% Apr. 22, 2004[41]	30% Aug. 16, 2004[42]	$0.00 June 23, 2008[43]

[29] Final Free and Reserve Percentages for 2006–07 Crop Natural (sun-dried) Seedless Raisins, 72 Fed. Reg. 17,362, 17,363 (Apr. 9, 2007).

[30] *Id.* at 17,363.

[31] *Id.*

[32] Final Free and Reserve Percentages for 2006–07 Crop Natural (sun-dried) Seedless Raisins, 72 Fed. Reg. 59,153, 59,153 (Oct. 19, 2007).

[33] RAC, Statement of Disposition and Growers Equity for 2006–2007 (Feb. 19, 2009). App. 51–52.

[34] Final Free and Reserve Percentages for 2005–06 Crop Natural (Sun-Dried) Seedless Raisins, 71 Fed. Reg. 29,567, 29,568 (May 23, 2006).

[35] *Id.*

[36] *Id.* at 29,567.

[37] Final Free and Reserve Percentages for 2005–06 Crop Natural (Sun-Dried) Seedless Raisins, 72 Fed. Reg. 2173, 2173 (Jan. 18, 2007).

[38] RAC, Statement of Disposition and Growers Equity for 2005–2006 (Feb. 19, 2009). App. 63–64.

[39] Final Free and Reserve Percentages for 2003–04 Crop Natural (Sun-Dried) Seedless Raisins, 69 Fed. Reg. 21,695, 21,696 (Apr. 22, 2004).

[40] *Id.*

[41] *Id.* at 21,695.

[42] Final Free and Reserve Percentages for 2003–04 Crop Natural (Sun-Dried) Seedless Raisins, 69 Fed. Reg. 50,289, 50,289 (Aug. 16, 2004).

[43] RAC, Statement of Disposition and Growers Equity for 2003–2004 (June 23, 2008). App. 75–76.

Crop Year	RAC Preliminary Percentage	RAC Final Percentage	USDA Interim Rule	USDA Final Rule	Net Payment For Reserve Raisins
2002–03	69% Oct. 8, 2002[44]	47% Feb. 13, 2003[45]	47% Apr. 2, 2003[46]	47% July 15, 2003[47]	$272.73/ton Apr. 12, 2007[48] 37% net[49]
2001–02	44% Sept. 20, 2001[50]	37% Feb. 14, 2002[51]	37% Apr. 3, 2002[52]	37% July 19, 2002[53]	$260.92/ton Dec. 12, 2003[54] 30% net[55]

[44] Final Free and Reserve Percentages for 2002–03 Crop Natural (Sun-Dried) Seedless and Zante Currant Raisins, 68 Fed. Reg. 15,926, 15,928 (Apr. 2, 2003).

[45] *Id.*

[46] *Id.* at 15,926.

[47] Final Free and Reserve Percentages for 2002–03 Crop Natural (Sun-dried) Seedless and Zante Currant Raisins, 68 Fed. Reg. 41,686, 41,686 (July 15, 2003).

[48] RAC, Statement of Disposition and Growers Equity for 2002–2003. App. 93; RAC, Minutes of Meeting (Apr. 12, 2007). App. 92.

[49] The free-tonnage price for 2002–2003 was $745.00 per ton. *See* Final Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959, 35,960 (June 24, 2010).

[50] Final Free and Reserve Percentages for 2001–2002 Crop Natural (Sun-Dried) Seedless Raisins, 67 Fed. Reg. 15,707, 15,708 (Apr. 3, 2002).

[51] *Id.*

[52] *Id.*

[53] Final Free and Reserve Percentages for 2001–2002 Crop Natural (Sun-Dried) Seedless Raisins, 67 Fed. Reg. 47,439, 47,439 (July 19, 2002).

[54] RAC, Statement of Disposition and Growers Equity for 2001–2002. App. 107.

[55] The free tonnage price in 2001–2002 was $880.00 per ton. *See* Final Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959, 35,960 (June 24, 2010).

Crop Year	RAC Preliminary Percentage	RAC Final Percentage	USDA Interim Rule	USDA Final Rule	Net Payment For Reserve Raisins
2000–01	65% Oct. 4, 2000[56]	47% Jan. 12, 2001[57]	47% Aug. 1, 2001[58]	47% Oct. 25, 2001[59]	$294.23/ton Apr. 23, 2003[60] 34% net[61]
1999–2000	44% Oct. 1, 1999[62]	15% Feb. 11, 2000[63]	15% Apr. 10, 2000[64]	15% July 3, 2000[65]	$0.00 Nov. 13, 2001[66]

LEGAL STANDARD

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. A claim does not accrue until "all the events have occurred which fix the

[56] Final Free and Reserve Percentages for 2000–2001 Crop Natural (Sun-Dried) Seedless Raisins, 66 Fed. Reg. 39,623, 39,624 (Aug. 1, 2001).

[57] *Id.* at 39,625.

[58] *Id.* at 39,623.

[59] Final Free and Reserve Percentages for 2000–2001 Crop Natural (Sun-Dried) Seedless Raisins, 66 Fed. Reg. 53,945, 53,945 (Oct. 25, 2001).

[60] RAC, Statement of Disposition and Growers Equity for 2000–2001, App. 122; RAC, Minutes of Meeting (Apr. 23, 2003). App. 124.

[61] The free tonnage price in 2000–2001 was $877.50 per ton. *See* Final Free and Reserve Percentages for the 2009–2010 Crop Natural (Sun-Dried) Seedless Raisins, 75 Fed. Reg. 35,959, 35,960 (June 24, 2010).

[62] Final Free and Reserve Percentages for 1999–2000 Crop Natural (Sun-Dried) Seedless Raisins, 65 Fed. Reg. 18,871, 18,872 (Apr. 10, 2000).

[63] *Id.*

[64] *Id.* at 18,875.

[65] Final Free and Reserve Percentages for 1999–2000 Crop Natural (Sun-Dried) Seedless Raisins, 65 Fed. Reg. 40,975, 40,975 (July 3, 2000).

[66] RAC, Financial Report: 1999–2000 Natural (sun-dried) Seedless Reserve Pool, App. 143; RAC, Minutes of Meeting (Nov. 13, 2001). App. 138.

liability of the Government and entitle the claimant to institute an action." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355 (Fed. Cir. 2006).

When considering the government's motion to dismiss, the Court accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the plaintiff. *Hamlet v. United States*, 873 F.2d 1414, 1415–16 (Fed. Cir. 1989). The Court dismisses only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claims that would entitle her to relief. *Hyde v. United States*, 85 Fed. Cl. 354, 357 (2008) (applying standard to statute-of-limitations analysis in takings case).

A party moving for summary judgment must demonstrate either "an absence of evidence to support the nonmoving party's case," or that undisputed material facts mean it is entitled to judgment as a matter of law. *Grand Acadian, Inc. v. United States*, 87 Fed. Cl. 193, 196–97 (2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). In the latter instance, the moving party "must file with the court documentary evidence, such as declarations, that support its assertions that material facts are beyond genuine dispute." *Id.* at 197.

ARGUMENT

I. Plaintiffs' Takings Claims Did Not Accrue in Any Crop Year Until the RAC Completed Its Administrative Compensation Process

Because "the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id*. at 194–95 (1985) (alteration in original) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)).

Accordingly, under what is known as the "second prong" of *Williamson County*, once the government has taken property, a "Fifth Amendment [takings] claim is premature until it is clear that the Government has . . . denied just compensation." *Horne I*, 133 S. Ct. at 2062;[67] *see also Horne II*, 135 S. Ct. at 2429 ("[O]nce there is a taking, as in the case of a physical appropriation, *any* payment from the Government in connection with that action goes . . . to the question of just compensation." (emphasis added)).

Under *Williamson County*'s second prong, "[p]roperty owners are . . . expected to exhaust any administrative remedies available to them before seeking the intervention of the Court." *Bayou des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1037 (Fed. Cir. 1997); *see also MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 350 (1986) ("[A] court cannot determine whether [the government] has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." (citing *Williamson Cty.*, 473 U.S. at 195)). Thus, where Congress has provided a "reasonable [and] certain" administrative process to provide compensation, a suit in this Court for just compensation is unripe until the completion of such administrative process yields "[in]adequate" compensation. *Williamson Cty.*, 473 U.S. at 194; *see, e.g.*, *People of Bikini ex rel. Kili/Bikini/Ejit Local Gov't Council v. United States*, 77 Fed. Cl. 744, 768 (2007) (concluding that a physical takings claim was premature where the administrative compensation procedure available to plaintiffs had not "run its course"), *aff'd*, 554 F.3d 996 (Fed. Cir. 2009); *Juda v. United States*, 13 Cl. Ct. 667, 689 (1987), *aff'd sub nom. People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988) (dismissing physical takings suit as unripe because administrative procedure established by Congress "provide[d] a 'reasonable' and 'certain' means for obtaining

[67] In restating *Williamson County*'s second prong, the Court in *Horne I* did not distinguish between physical and regulatory takings.

compensation. Whether the [procedure] provides 'adequate' compensation cannot be determined at this time.").[68]

The Marketing Order provides a "reasonable" and "certain" administrative process to provide compensation to growers for reserve-tonnage raisins. Specifically, it provides that "net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the [RAC] to the respective producers." 7 C.F.R. § 989.66(h). That administrative process can take one or more years to complete, and in four of the crop years at issue in this suit, it resulted in payment of partial compensation to producers. Thus, under *Williamson County*'s second prong, Plaintiffs' takings claims were not ripe in any given crop year until the RAC completed its administrative process for paying compensation for reserve-tonnage raisins, even though the taking *occurred* when the Secretary designated the reserve.

Until Plaintiffs' takings claims were ripe, this Court lacked jurisdiction, and the statute of limitations did not run. *See Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004) (the Court of Federal Claims "does not have jurisdiction over claims that are not ripe"); *Bayou Des Familles*, 130 F.3d at 1038 ("[T]he statute of limitations clock" starts when a "takings claim become[s] ripe for adjudication."); *Norco Constr., Inc. v. King Cty.*, 801 F.2d 1143, 1146 (9th Cir. 1986) (Kennedy, J.) (noting, in the takings context, that "[t]he conclusion that a claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations").

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[68] In *Enewetak*, the Federal Circuit "adopt[ed]" the "extensive analysis" of the Court of Federal Claims in *Juda*. *See* 864 F.2d at 137. In endorsing the application of *Williamson County*'s second prong to physical takings, the Federal Circuit followed the approach taken by every federal court of appeals to examine the issue. *See, e.g.*, *Severance v. Patterson*, 566 F.3d 490, 497 (5th Cir. 2009) (collecting First, Fifth, Sixth, Seventh, and Ninth Circuit cases applying *Williamson County*'s second prong to physical takings claims); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (*Williamson County*'s second prong applies to physical takings claims); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995) (same).

Thus, for each of the nine crop years that the government asserts to be outside the limitations period, Plaintiffs' claims for just compensation accrued on the date that the RAC completed compensation payments to growers for reserve-pool raisins, or announced that no such compensation would be paid. Those dates are set forth above in the Statement of the Case. Even absent any suspension of claim accrual, *see infra* Part III, Plaintiffs' claims for two crop years disputed by the government (2007–2008 and 2008–2009) are within the applicable six-year limitations period because the RAC did not complete its administrative process for paying compensation until January 11, 2011, and January 31, 2013, respectively—which, for both crop years, is less than six years prior to Plaintiffs' commencement of this litigation on August 26, 2015.

II. Alternatively, Plaintiffs' Takings Claims in Any Crop Year Accrued When the Secretary's Final Rule Designated the Reserve

Alternatively, to the extent that this Court concludes that the RAC's administrative process for paying growers compensation for reserve-pool raisins did not delay the ripening, and hence accrual, of Plaintiffs' takings claims under *Williamson County*'s second prong, those claims accrued in any given crop year when the Secretary's final rule published in the Federal Register designated the reserve and thereby completed a physical taking.

A "physical taking" occurs when the government takes title to property or physically occupies it. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). As an initial matter, the government neither took title to nor completed its physical occupation of Plaintiffs' raisins in any crop year until the Secretary designated the reserve in a final rule. And to the extent that the government argues that the Secretary's interim final rule in any crop year effected the physical taking, the argument fails because the Secretary's interim final rules violated the APA.

In any event, any transfer of title or completed physical occupation prior to the Secretary's reserve designation in a valid final rule would have been unlawful under the AMAA, and therefore not a compensable "taking" for Takings Clause purposes, *until* the Federal Register published the Secretary's designation in a final rule. And to the extent that the AMAA authorizes the RAC to take title to or complete physical appropriation of raisins before the Secretary's designation, the AMAA is unconstitutional. Accordingly, under the doctrine of constitutional avoidance, this Court should choose the interpretation of the AMAA that avoids implicating those constitutional questions: that the statute did not authorize the RAC to take Plaintiffs' raisins before the Secretary's designation.

A. Title did not transfer until the Secretary designated the reserve in a final rule

The Supreme Court in *Horne II* explained that the Marketing Order results in a physical taking of raisins because "[a]ctual raisins are transferred from the growers to the Government, [*t*]*itle to the raisins passes to the* [*RAC*] . . . [and though physically separated] raisins are sometimes left on the premises of handlers, . . . they are held 'for the account' of the Government." 135 S. Ct. at 2428 (emphasis added); *see also Scrase v. United States*, 118 Fed. Cl. 357, 362 (2014) (Sweeney, J.) ("The transfer of title" to the government "terminate[d] plaintiff[s'] property interest in the [property]" and thereby accomplished a physical taking). But the Court did not specify precisely when the title transfer occurs.

In any crop year, title transferred when the Secretary issued a final rule designating the reserve-tonnage portion of the crop. Until *that* happened, Plaintiffs' retained title to their reserve raisins. Before then, the RAC had only made its preliminary and final reserve recommendations, no title had passed, and none of the raisins separated by handlers were yet held for the account of the government. 7 C.F.R. § 989.66 (providing that only those raisins "*which are designated* [by

the Secretary] as reserve tonnage . . . shall be held . . . for the account of the [RAC]" (emphasis added)).

The government argues that the separation of raisins following the RAC's preliminary reserve recommendation in October represents the taking in any crop year. Gov't Mot. 5–8. But the RAC's initial recommendation is only that—a recommendation, and a preliminary recommendation at that. The RAC may modify these percentages until February 15, when it must "recommend to the Secretary[] final free and reserve percentages." 7 C.F.R. § 989.54(c), (d). And the regulations leave it to the Secretary to "*designate* final free and reserve percentages" based on the RAC's recommendation "or from other available information." *Id.* § 989.55 (emphasis added). Accordingly, the RAC's preliminary announcement and final recommendations are advisory in nature, nonbinding, and cannot transfer title. *Cf. Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (finding, in the context of the former navel-orange marketing order, that the "Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation").[69]

The government cites the Court's statement in *Horne II* that "the Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge . . . is of such unique character that it is a taking without regard to other factors that a court might ordinarily examine." Gov't Mot. 12 (quoting *Horne II*, 135 S. Ct. at 2428). This statement does not establish that a taking occurred in this case in any crop year prior to the Secretary's designation of the reserve for at least two reasons.

[69] The government quotes *Horne II*'s statement that "the reserve requirement *imposed by the Raisin Committee* is a clear physical taking," Gov't Mot. 12 (quoting *Horne II*, 135 S. Ct. at 2428), but as explained earlier, the Court's suggestion that the RAC (as opposed to the Secretary) imposed the reserve is dicta and is inconsistent with *Horne I*. *See supra* n.6.

First, the "formal demand" in the *Horne* litigation *was* "unique"; the Hornes defied the Marketing Order and were the subject of an enforcement proceeding. *See Horne I*, 133 S. Ct. at 2059. Plaintiffs and other growers in California that deliver their raisins to handlers have never been subjected to such a formal demand because the "AMAA does not directly regulate" growers. *Id.* at 2057. Barring noncompliance, growers that self-handle their own raisins are not the subjects of such a formal demand.

More importantly, the government reads the Court's statement literally, without providing the necessary context. *Horne II* involved enforcement litigation, rather than a suit (as here) for just compensation. In context, the Court's statement must mean that *for purposes of asserting a takings defense* in a government enforcement action, the government's demand to surrender property can amount to a taking. It cannot mean that such a demand is a "taking" that gives rise to accrual of a claim for just compensation for property never surrendered to or actually taken by the government in the first instance.

B. The government did not complete its physical occupation of Plaintiffs' raisins until the Secretary designated the reserve in a final rule

The government also contends that handlers' separation of raisins constituted a physical occupation that triggered the accrual of Plaintiffs' takings claims for raisins so separated.[70] Gov't Mot. 12. A physical taking by occupation is "a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of . . . property." *John R. Sand & Gravel Co.*, 457 F.3d at 1357 (alteration in original) (emphasis added) (quoting *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002)), *aff'd*, 552 U.S. 130

[70] As previously explained, the government's assertion that handlers' physical separation of raisins in any crop year was completed entirely in October—shortly after the RAC's issuance of its preliminary reserve recommendation—is unsupported by any evidence, and indeed is factually erroneous.

(2008).[71] But even for a physical takings claim based on physical occupation, the claim does not accrue until "*all* the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id*. at 1355 (emphasis added).

When a physical taking is accomplished by legislation or agency order, it is the passage of the legislation or issuance of the agency order that "fix[es] the liability of the government" and therefore constitutes the claim accrual date (absent any applicable administrative procedure for seeking compensation). *See Goodrich v United States*, 434 F.3d 1329, 1333, 1335 (Fed. Cir. 2006) (plaintiff's physical takings claim accrued with "final agency statements of official position that are published only after years of analysis and consultation with affected parties" rather than the actual physical appropriation of the plaintiff's water[72]); *see also Fallini v. United States*, 56 F.3d 1378, 1383–84 (Fed. Cir. 1995) (a physical taking that is accomplished by legislation "occurs on the date of enactment of the legislation"); *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 377 (2001) (Sweeney, J.) (same).

The facts of this case illustrate the practical wisdom of this legal principle. In October of any crop year, when handlers began to separate raisins pursuant to the RAC's preliminary recommendation, the government's liability was far from set. As previously discussed, in every crop year at issue in this case, the reserve-tonnage percentage *decreased* between the RAC's preliminary recommendation and the Secretary's designation of the percentage in a final rule. Until the latter happened, the government's liability was not "fixed."

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[71] The government points out that Plaintiffs allege that the RAC "physically appropriated" Plaintiffs' raisins "that were separated as a reserve set-aside for the account of the RAC." Gov't Mot. 11 (citing Compl. ¶ 29). But that says nothing about *when* the physical appropriation of Plaintiffs' raisins occurred for claim accrual purposes.

[72] In *Goodrich*, the physical appropriation of the plaintiff's property occurred *after* the issuance of the relevant agency rule rather than earlier as in this case, but that distinction is not material to the Federal Circuit's reasoning, which turned on the "clearly final" nature of the agency decision "taken after years of analysis and consultation with affected parties." 434 F.3d at 1335.

This Court's predecessor court effectively applied this principle in a factually similar context. In *Silverberg v. United States*, USDA ordered beef producers to transfer specified percentages of their production to the government at below-market prices. 155 Ct. Cl. 436, 438 (1961). The *Silverberg* court noted that the plaintiffs had no idea how long USDA's "set-aside" order would remain in effect or how much would be taken from them. *Id.* at 439. Accordingly, for claim-accrual purposes, the court found that "plaintiffs were entitled to defer action until they knew how much of their property would be taken pursuant to the set-aside order," that is, until the order terminated and became final. *Id.* at 440. It would have been "unreasonably burdensome" to require plaintiffs to bring, and the government to defend, a "multiplicity" of suits based on each shipment of beef. *Id*.

Here too, no final account was possible, in percentage terms, until the Secretary designated the reserve tonnage percentage. The Marketing Order permits the Secretary to deviate from the RAC's final recommendation, and the interim final rules expressly permit later variance. *E.g.*, 74 Fed. Reg. at 9956 ("[A]ll comments timely received will be considered prior to finalization of this rule."). Indeed, the Secretary could have decided that a crop year should have *no* reserve pool. As in *Silverberg*, Plaintiffs were entitled to defer action until they knew how much of their property would be taken, when the Secretary issued a final rule for the crop year.

C. The Secretary's interim final rule cannot trigger claim accrual in any crop year because it is invalid under the APA

The government may respond on reply that the Secretary's *interim* final rule—issued earlier than the Secretary's final rule—is the relevant accrual date in any crop year under Plaintiffs' (alternative) claim-accrual theory. Although the interim final rule may suffice as a *proposed* rule for the reserve-tonnage percentages, it cannot serve as a valid final rule under the

APA because it was not issued after public notice and opportunity to comment on it and the "good-cause" exception to notice-and-comment rulemaking does not apply in this case.

The interim final rules issued by the Secretary under the Marketing Order do not satisfy basic principles of the APA because they were not preceded by notice-and-comment periods and purported to be effective upon issuance. Before it can issue a rule, the APA requires an agency to (1) publish a "[g]eneral notice of proposed rule making" in the Federal Register, (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and (3) "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b), (c). Further, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." *Id.* § 553(d). The interim final rules satisfy none of these requirements. *See, e.g.*, 74 Fed. Reg. 9951 (Mar. 9, 2009) (2008–2009 interim final rule).

The APA excuses compliance with its notice-and-comment and thirty-day-waiting-period requirements upon a showing of "good cause," unless another statute mandates them. 5 U.S.C. § 553(b), (d). Good cause arises when an agency finds that such procedures are "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). To invoke this exception, an agency must "incorporate[] the finding and a brief statement of reasons therefor in the rules issued." *Id.* This exception is to be "narrowly construed and only reluctantly countenanced. . . . 'It is an important safety valve to be used where delay would do real harm.'" *New Jersey v. EPA*, 626 F.2d 1038, 1045–46 (D.C. Cir. 1980) (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)). It is "*not* [an] escape clause[] that may be arbitrarily utilized at the agency's whim." *AFGE v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (internal quotation marks omitted). "It should not be used . . . to circumvent the notice and comment requirements whenever an

agency finds it inconvenient to follow them." *New Jersey*, 626 F.2d at 1046 (quoting *U.S. Steel Corp.*, 595 F.2d at 214).

Here, there was no good cause for the Secretary to excuse the notice-and-comment and thirty-day-waiting-period requirements. In issuing the interim final rules, the Secretary asserted that (1) the reserve-tonnage percentage applies to all raisins in the crop year, (2) handlers are all aware of the reserve-tonnage percentage that the Secretary plans to impose, and (3) the interim final rule seeks comments on the rule. *See, e.g.*, 74 Fed. Reg. at 9955–56 (2008–2009 interim final rule).

The first assertion suggests that the Secretary needed to act quickly to provide the handlers with guidance, but a purported need for speed does not constitute good cause. *See, e.g.*, *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 24 (D.D.C. 2010) (asserted need for prompt guidance does not independently suffice to dispense with the APA's notice-and-comment requirement); *see also Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621 (D.C. Cir. 1980) (finding that good cause to suspend notice and comment must be supported by more than the bare need to have regulations"); *Riverbend Farms*, 958 F.2d at 1486 (finding good cause exception did not excuse failure to permit notice-and-comment before instituting weekly volume restrictions under navel-orange marketing order). Moreover, the 2008–2009 interim final rule did not attempt to explain (much less justify) why the Secretary waited until March 2009 to issue the interim final rule—more than three months after the RAC made its final reserve-tonnage recommendation. The AMAA requires the Secretary—"to the extent practicable"—to initiate such rulemaking within forty-five days of the RAC's recommendation. *See* 7 U.S.C. § 608c(1).

The other two assertions ignore the purpose of the APA, which is to provide the public with an opportunity to participate in regulatory action. Accordingly, it matters not that the

handlers all know about the rule or that the Secretary provides a post-issuance comment period. The interim final rules provided the public no opportunity to comment on the final reserve-tonnage percentages before the Secretary purported to impose them.

Because the interim final rules were invalid, they did not lawfully designate reserve pools. Therefore, they could not trigger the accrual of Plaintiffs' takings claims. *See Lea v. United State*s, 120 Fed. Cl. 440, 445 (2015) (Sweeney, J.) (unlawful taking of property by government is not actionable in the Court of Claims); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1369 (Fed. Cir. 2005) (same).

D. The RAC could not lawfully take Plaintiffs' raisins prior to the Secretary's designation of the reserve in a final rule

To the extent that this Court concludes that the RAC physically took Plaintiffs' raisins in any given crop year prior to the Secretary's designation of the reserve in a valid final rule, such physical appropriation was unlawful and hence could not trigger claim accrual for takings claims. As noted above, government taking of property that is unlawful is not a taking for Fifth Amendment purposes. *See Lea*, 120 Fed. Cl. at 445; *Lion Raisins*, 416 F.3d at 1369.

As discussed below, any physical taking of raisins by the RAC prior to the Secretary's designation of the reserve violated the AMAA, which delegated such authority only to the Secretary. Under the doctrine of constitutional avoidance, the court should resolve any uncertainty regarding the meaning of the AMAA in favor of Plaintiffs because if the AMAA permits delegation of the Secretary's taking authority to the RAC, the AMAA is unconstitutional.

1. The AMAA does not authorize the Secretary to delegate his power to take raisins to the RAC

The AMAA does not permit the RAC to physically appropriate raisins on its own authority. To the contrary, the statute's structure confirms that the Secretary's exclusive authority to take raisins in any given crop year is distinct from the RAC's authority to administer the

program. The AMAA requires "the *Secretary* . . . [to] issue, and from time to time amend, orders applicable to [parties] engaged in the handling" of certain agricultural commodities, including raisins. 7 U.S.C. § 608c(1). Among other things, such orders may establish or provide for the establishment of reserve pools of the regulated commodity. *Id.* § 608c(6)(E).

The statute separately contemplates the existence of committees like the RAC to aid in the administration of the orders, *see id.* § 608c(7)(C), and authorizes such committees to "*recommend* to the Secretary . . . amendments to [the relevant marketing order]," *id.* 608c(7)(C)(iv) (emphasis added). The statute requires the Secretary to respond to such "recommendations" through rulemaking. *Id.* § 608c(1). Committees themselves cannot amend marketing orders to establish reserve pools or to enforce such orders. *See* 7 U.S.C. § 608c(14)(B) (authorizing the Secretary to bring administrative enforcement action for marketing order violations). Allowing the Secretary to delegate his authority to the RAC would eviscerate the statute's distinction between committees and the Secretary.

Case law confirms that the AMAA does not allow administrative committees to exercise independent regulatory authority. *E.g.*, *Riverbend Farms*, 958 F.2d at 1488 (upholding navel-orange volume restrictions because the committee only made a recommendation and the Secretary "*retain*[*ed*] *ultimate authority to issue the regulation*" (emphasis added)); *Berning v. Gooding*, 820 F.2d 1550, 1552 (9th Cir. 1987) ("The [Hop Administrative Committee] recommendations have *no legal effect in themselves*." (emphasis added)); *Whittenburg v. United States*, 100 F.2d 520, 522–23 (5th Cir. 1938) (rejecting a nondelegation challenge to the AMAA because "the committees [under a Texas citrus marketing order] who recommend regulations are *not given any legislative power* . . . [and] can *never force action*" (emphasis added)); *cf. United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989) (rejecting a nondelegation challenge to a

beef industry marketing act because the industry committees created thereunder served only advisory and ministerial functions), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). Consistent with these cases, it was USDA—*not* the RAC—that brought the administrative enforcement action in the *Horne* litigation. *See Horne I*, 133 S. Ct. at 2059. Only USDA could enforce the Marketing Order because only the Secretary could lawfully take growers' raisins.

To the extent that the Marketing Order authorizes the RAC to physically appropriate raisins on its own authority, the regulation grants more power to the RAC than it lawfully may possess and therefore is invalid. *See* 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except . . . as authorized by law."). Accordingly, the RAC could not lawfully authorize physical appropriation of raisins on its own authority and the earliest a lawful (and hence compensable) taking could have occurred in any crop year is when the Secretary designated the reserve in a valid final rule.

The government may argue on reply that USDA's interpretation of the AMAA reflected in the Marketing Order is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but the "canon of constitutional avoidance trumps *Chevron* deference." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574–77 (1988)). As discussed below, that canon applies here.

2. The constitutional avoidance canon compels an interpretation of the AMAA that precludes the Secretary from delegating taking authority to the RAC

Under the canon of constitutional avoidance, federal courts are "obligated to construe statutes to avoid constitutional difficulties." *SKF USA, Inc. v. U.S. Customs & Border Patrol*, 556 F.3d 1337, 1349 (Fed. Cir. 2009). In so doing, "[e]very reasonable construction must be resorted

to, in order to save a statute from unconstitutionality." *Id*. Indeed, a court should choose a reasonable interpretation of a statute—even if it is not the best interpretation of the statute—to avoid an interpretation that necessarily requires the court to determine the constitutionality of the statute. *Id*.

As discussed below, an interpretation of the AMAA that allows the RAC to take raisins before any reserve designation by the Secretary raises at least three serious constitutional questions. Specifically, it would compel this Court to decide whether the AMAA violates (i) the nondelegation doctrine, (ii) the Due Process Clause, and (iii) the Appointments Clause. To avoid these serious constitutional issues, this Court should interpret the AMAA as precluding the RAC from taking raisins before the Secretary's designation in a valid final rule.

3. To the extent that the AMAA authorizes the Secretary to delegate taking authority to the RAC, the AMAA is unconstitutional

The power to take private property for public use is a core government function. *See, e.g.*, *United States v. Jones*, 109 U.S. 513, 518 (1883) ("The power to take private property for public uses . . . belongs to every independent government. It is an incident of sovereignty . . . ."). To the extent the AMAA permits the RAC—an industry group—effectively to exercise this power, the AMAA violates the nondelegation doctrine,[73] the Due Process Clause, and the Appointments Clause. As a result, the RAC could not lawfully take Plaintiffs' raisins.

[73] Plaintiffs are aware of decisions recognizing the validity of delegations of the takings power to common carriers, such as railroads or pipeline manufacturers. *E.g.*, *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 821 (4th Cir. 2004) ("Congress may, as it did in the NGA, grant condemnation power to 'private corporations . . . execut[ing] works in which the public is interested.'" (alteration in original) (quoting *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878))). That precedent does not apply here. First, the RAC is not a common carrier. Second, in those cases, the common carrier had to file condemnation actions in federal court before they could take the property they sought. *See, e.g.*, *id.* at 819–20. Here, the government assumes that the RAC's preliminary announcement took Plaintiffs' raisins without any action by a governmental actor.

a. Delegation of the Secretary's taking authority to the RAC would violate the nondelegation doctrine

To begin, as a matter of constitutional structure, Congress may not delegate legislative power to private actors. Article I, Section 1 of the United States Constitution provides that "[a]ll legislative power herein granted shall be vested in a Congress of the United States." Although Congress has some leeway to delegate its power to members of the executive or judicial branches, *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 378–79 (1989), the Supreme Court has long recognized that a delegation to a private party is different in kind. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court invalidated an act that, among other things, allowed a majority of coal-industry members to fix maximum hours and minimum wages for all participants in the industry. 298 U.S. at 310–11. The Court explained that this was "legislative delegation in its most obnoxious form; for it [was] not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311.

Congress later enacted a replacement for the statute at issue in *Carter*, which specified the organization of industry members into boards under the Bituminous Coal Code. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 387 (1940). The boards could *propose* prices to the National Bituminous Coal Commission but could not themselves *set*[74] prices. *Id.* at 399. That distinction made the difference when the Court resolved the nondelegation challenge to the act: because "[t]he members of the code function[ed] subordinately to the Commission," Congress had not improperly delegated its legislative authority to the industry. *Id.* Read together, *Carter*

[74] The *Carter* statute created similar boards and, in addition, empowered them to set prices. *Carter*, 298 U.S. at 281–82. Because the price-fixing provisions were inseparable from the wage and hour restrictions discussed above, the Court declined to resolve whether they were unconstitutional. *Id.* at 316.

and *Adkins* give rise to a straightforward rule: "Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004); *see also Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 & n.5, 673 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015).

Here, in terms of its creation and structure, the RAC is substantially similar to the boards at issue in *Adkins*. *Compare* 7 C.F.R. §§ 989.29–.39 (establishing the RAC and setting out membership criteria), *with* Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72, 76–77 (1937) (establishing the boards and setting out membership criteria).[75] But unlike the statute creating the boards, the government's position assumes that the AMAA makes the RAC a lawmaker, not a mere advisor or subordinate. Under its view, the AMAA allows the RAC's preliminary announcement to have the force of law and take private property. This grant of sovereign power to an industry group would violate the nondelegation doctrine. *Cf. Frame*, 885 F.2d at 1128–29 (rejecting nondelegation challenge to a statute similar to the AMAA because the industry committees created under it served only advisory and ministerial functions); *Whittenburg*, 100 F.2d at 522–23 (rejecting a nondelegation challenge to the AMAA because "the committees who recommend regulations are *not given any legislative power* . . . [and] can *never force action*" (emphasis added)).

[75] Plaintiffs are aware of the Federal Circuit's holding in *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005), that the RAC is a nonappropriated fund instrumentality ("NAFI") that acts as an agent of the United States when it *lawfully* takes private property for public use. 416 F.3d at 1363–64. *Lion Raisins* did not address the constitutionality or legality of takings by the RAC. Plaintiffs respectfully submit that regardless of whether the RAC is a NAFI, the RAC is a private industry group for purposes of separation-of-powers analysis. In addition to *Carter* and its progeny, there are numerous other reasons for that conclusion. For instance, the statute provides that members of the committee do *not* act in an official capacity if they receive no remuneration, at least for certain purposes. 7 U.S.C. § 608c(7)(C).

b. Delegation of the Secretary's taking authority to the RAC would violate the Due Process Clause

For the same reasons, concluding that the AMAA allows the RAC's announcement to effectuate a taking means that the AMAA violates the Due Process Clause of the Fifth Amendment. Due process demands a disinterested decisionmaker. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). In *Carter*, the Court recognized that a delegation to industry members violates this principle:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. . . . The delegation is . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.

298 U.S. at 311 (collecting cases). To the extent that the AMAA grants the RAC—which comprises a small subset of raisin industry participants—independent authority to take the property of all raisin growers, the AMAA violates the same principle. *See Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* (*Amtrak II*), No. 12-5204, slip. op. at 19–28 (D.C. Cir. Apr. 29, 2016) (delegation of power to Amtrak to regulate its competitors violated Due Process).

c. Delegation of the Secretary's taking authority to the RAC would violate the Appointments Clause

Finally, the AMAA violates the Appointments Clause of Article II to the extent it allows the RAC to effect a final taking for two reasons. Those who "exercis[e] significant authority pursuant to the laws of the United States"—such as the power to determine whether to take property for public use—must be officers of the United States and appointed in conformity with the Constitution's requirements. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976). Officers of the United States may be principal officers, whom the president nominates subject to

confirmation by the Senate, or inferior officers, whose appointment Congress may vest in the president, the courts, or the heads of departments. U.S. Const. art. II, § 2, cl. 2.

First, an officer who makes decisions independent of supervision and control by a principal officer must be a principal officer. *Amtrak II*, slip. op. at 33. To extent that the AMAA vests *independent* taking authority in the RAC, whose members are not appointed by the president and confirmed by the Senate, the AMAA violates the Appointments Clause. *See id*. (statute that empowered an official appointed by a principal officer—not the president with the advice and consent of the Senate—to determine final agency action without a principal officer's supervision or control violated the Appointments Clause).

Second, regardless of whether RAC members are deemed "principal" or "inferior" officers, the Constitution requires that all officers of the United States take an oath or affirmation to support the Constitution and receive a commission. U.S. Const. art. VI, cl. 3 ("[A]ll executive . . . Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . . ."); U.S. Const. art. II, § 3, cl. 6 (providing that the president "shall Commission all the Officers of the United States"). "There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring).

Here, although the Marketing Order contains several qualifications for members of the RAC, *see*, *e.g.*, 7 C.F.R. § 989.27, taking an oath to support the Constitution and receiving a commission from the president are not among them. And although the Secretary "select[s]" the members of the RAC, 7 C.F.R. § 989.30, there is no indication that he appoints them as officers

of the United States. As such, RAC members could not lawfully exercise the power to determine whether to take private property for public use.

* * *

In any given crop year, the "taking" occurred with the Secretary designated the reserve in a valid final rule. To the extent that this Court concludes that the ripeness requirement of *Williamson County*'s second prong does not apply to raisins taken by the government under the Marketing Order, Plaintiffs' takings claims in any crop year accrued when the Secretary designated the reserve in valid final rule. Absent any suspension of claim accrual discussed below, Plaintiffs' claims for raisins taken during the 2008–2009 and 2009–2010 crop years are within the applicable six-year limitations period, for as demonstrated in the Statement of the Case, the Secretary designated the reserve in each of those crop years *after* August 26, 2009—six years before this suit was filed on August 26, 2015.

III. Regardless of When Plaintiffs' Claims Accrued in Any Crop Year, This Court Has Jurisdiction over Plaintiffs' Takings Claims Accruing on or After February 21, 2001, Under the Accrual-Suspension Rule

Regardless of when the Court finds that Plaintiffs claims accrued, the Court has jurisdiction to address takings that occurred more than six years before Plaintiffs filed this case. That is because claim accrual was suspended between December 22, 2006, when this Court held that raisins taken by the government pursuant to the Marketing Order were not "taken" for Fifth Amendment purposes, and June 22, 2015, when the Supreme Court held otherwise in *Horne II*.

This Court's 2006 holding occurred in *Evans v. United States*, 74 Fed. Cl. 554, 563 (2006), which the Federal Circuit affirmed by summary order, 250 F. App'x 321, 322 (Fed. Cir. 2007), and which the Supreme Court in turn declined to review, 552 U.S. 1187 (2008). Until *Horne II* overruled it and changed the law, *Evans* effectively barred Plaintiffs' takings claims based on operation of the Marketing Order, and such claims were "inherently unknowable."

Indeed, until *Horne II*, the long-running *Horne* litigation only confirmed *Evans*, as the Ninth Circuit twice rejected the Horne's takings claims on the merits.[76]

Evans was not the first time this Court rejected a takings challenge to a marketing order's reserve requirement. Just two years earlier, this Court rejected on the merits a similar physical takings challenge by California almond growers to the USDA marketing order establishing an almond reserve. *See Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 247 (1994). As in *Evans*, the Federal Circuit in turn affirmed on the merits, albeit through an unpublished decision rather than a summary order. *See* 73 F.3d 381 (Fed. Cir. 1995) (unpublished table decision).[77] And as in *Evans*, the Supreme Court denied review. *See* 519 U.S. 963 (1996).

A. The accrual-suspension rule applies in this case because Plaintiffs' claims were inherently unknowable from December 22, 2006, until June 22, 2015

The accrual-suspension rule suspends a statute of limitations when "an accrual date has been ascertained, but plaintiff does not know of his claim." *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 61 (2009) (quoting *Japanese War Notes Claimants Ass'n, Inc. v. United States*, 373 F.2d 356, 358–59 (Ct. Cl. 1967)). "Under the accrual suspension rule, 'the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed.'" *Id.* (quoting *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003)). Although "a misunderstanding of the meaning of the law or one's legal rights does not trigger this rule," the rule applies when "the change in circumstance arises out of a decision that overrules or alters prior precedent, *with the claim deemed to have been*

[76] The Ninth Circuit originally rejected the Hornes' takings claim in 2011 but subsequently withdrew that merits decision on jurisdictional grounds. *See* Petition for Writ of Certiorari, *Horne v. Dep't of Agric.*, No. 12-123 (U.S. July 26, 2012), at 26a (Ninth Circuit opinion rejecting takings claim prior to issuance of amended opinion). On remand from *Horne I*, the Ninth Circuit again rejected the takings claim on the merits. *See Horne v. Dep't of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014).

[77] The Federal Circuit's unpublished decision in *Cal-Almond* is available at 1995 WL 761454.

tolled until the modifying decision was made." *Id.* at 62 (emphasis added). Because this concept "derives directly from the meaning of the term 'accrues,' as used in section 2501," *id.* at 61, it "is viewed as matter of statutory interpretation, rather than a form of equitable tolling." *Id*.

The accrual-suspension rule applies in this case because Plaintiffs understood their legal rights—the government took some of their raisins—but they also knew that *Evans*, which simply repeated this Court's earlier rejection of a similar takings claim in *Cal-Almond*, barred their claims. The law, however, changed when the Supreme Court held that the Marketing Order resulted in a physical taking, effectively overruling *Evans* (and *Cal-Almond*). 135 S. Ct. at 2431.[78]

Plaintiffs know of no Federal Circuit decision addressing the question, but other circuits have applied the accrual-suspension rule in situations like this one, when the Supreme Court overturns preexisting circuit law. In *Neely v. United States*, after the Supreme Court held a wagering tax statute unconstitutional, the Third Circuit concluded that a Tucker Act claim to recover a fine paid upon conviction for violating the statute could go forward. 546 F.2d 1059, 1068 (3d Cir. 1976). The court concluded that the statute of limitations should be suspended, reasoning that "[t]o require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, would be to impose an unconscionable prerequisite to asserting a timely claim." *Id.* Under similar facts and citing the same Supreme Court cases as *Neely*, the Fifth Circuit reached a similar conclusion, noting that the claimant "had no reasonable probability of successfully prosecuting his claim against the government prior to the [Supreme

[78] The Federal Circuit designated its summary order in *Evans* as nonprecedential, which means the court believed it did not "add[] significantly to the body of law." Fed. Cir. R. App. P. 32.1(b). In other words, this Court's *Evans* holding was sufficiently noncontroversial that it could be affirmed in a nonprecedential order. Under those circumstances, Plaintiffs cannot be faulted for failing to tilt at *Evans*.

Court's] enunciation of the new . . . rule." *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972); *cf. Peak v. United States*, 353 U.S. 43, 45 (1957) ("Petitioner's cause of action . . . 'accrued' at the time when, under [the relevant statute], she might have successfully maintained her suit."). Similarly, Plaintiffs had no reasonable probability of successfully prosecuting their claims in this Court after *Evans*. Accordingly, claim accrual for Plaintiffs' takings claims was suspended in the period between *Evans* and *Horne II*.

B. This Court has jurisdiction over Plaintiffs' takings claims accruing on or after February 21, 2001

The parties dispute when Plaintiffs' takings claims accrued. *See supra* Parts I–II. Regardless of how it resolves the dispute of *when* Plaintiffs' takings claims accrued in any crop year, the accrual-suspension rule gives the Court jurisdiction over such claims accruing on or after February 25, 2001.

Plaintiffs commenced this case on August 26, 2015. (R. 1, Compl. 1.) Without any suspension of accrual, the Court would have jurisdiction over only those takings that accrued on or after August 26, 2009. As discussed above, *Evans* suspended accrual of any takings claims based on the Marketing Order's reserve pool requirement from December 22, 2006, to June 22, 2015. The Court thus has jurisdiction over takings claims accruing on or after February 25, 2001:

June 22, 2015–Aug. 26, 2015	65 days
Dec. 22, 2006–June 22, 2015	claim accrual suspended by *Evans*
Feb. 25, 2001–Dec. 22, 2006	5 years, 300 days (the balance of the six-year period under 28 U.S.C. § 2501)

Therefore, if the Court agrees with Plaintiffs that their takings claims did not accrue until the RAC finished its administrative process to pay compensation, application of the accrual-suspension rule means that Plaintiffs' takings claims for the 1999–2000 and all subsequent crop

years are within the limitations period, as the RAC closed the administrative process for paying compensation for the 1999–2000 crop year on November 13, 2001.[79]

If the Court accepts Plaintiffs' alternative argument that their claims accrued upon the Secretary's designation of the reserve in final rules, application of the accrual-suspension rule means that Plaintiffs' takings claims for the 2000–2001 and all subsequent crop years are within the limitations period, as the Secretary designated the 2000–2001 reserve in a final rule issued on October 25, 2001.[80]

Finally, if the Court accepts the government's argument that the Plaintiffs' claims in any crop year accrued when the RAC made its preliminary reserve recommendation, application of the accrual-suspension rule means that Plaintiffs' takings claims for the 2001–2002 and all subsequent crop years are within the applicable limitations period, as the RAC made its preliminary reserve recommendation in the 2001–2002 crop year on September 20, 2001.[81]

CONCLUSION

For the foregoing reasons, the Court should deny the government's motion.

[79] RAC, Financial Report: 1999–2000 Natural (sun-dried) Seedless Reserve Pool, App. 143; RAC, Minutes of Meeting (Nov. 13, 2013). App. 138.

[80] Final Free and Reserve Percentages for 2000–2001 Crop Natural (Sun-Dried) Seedless Raisins, 66 Fed. Reg. 53,945, 53,945 (Oct. 25, 2001).

[81] Final Percentages for 2001–02 Crop California Raisins, 67 Fed. Reg. at 47,440.

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