

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Walter L. Wilson, d.b.a Buzz 76
Apiaries; Richard L. Adee, d.b.a
Adee Honey Farms; Steve E. Park
Apiaries, a California corporation;
A.H. Meyer & Sons, Inc., a South
Dakota corporation; Lyle Johnston,
d.b.a. Johnston Honey Farms;
Coy's Honey Farm, Inc., an Arkansas
corporation; Price Apiaries, a South
Dakota corporation; Jim Robertson,
d.b.a. Robertson Pollination Service;
and Tubbs Apiaries, Inc., a
Mississippi corporation,

Petitioners

HRPCIA Docket No. 01-0001

Decision

AND

The American Honey Producers Association,
Inc., an Oklahoma corporation,

Interested Party to Which
No Relief Can Be Granted

Decision Summary

[1] The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613), are government speech, in

accordance with *Johanns v. Livestock Marketing Assn.*, 125 S.Ct. 2055, 544 U.S. ____ (2005). Consequently, this Petition of individual honey producers must be denied.

Findings Of Fact

[2] The Secretary of Agriculture (herein frequently “the Secretary”) administers the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) (herein frequently “the Honey Act”), which was established by Congress in 1984.

[3] The Honey Act establishes the National Honey Board, which, under the Secretary’s supervision, administers the program mandated by Congress under the Honey Act. 7 U.S.C. § 4606, *et seq.*

[4] The National Honey Board includes 7 honey producers (at least 50% of the National Honey Board are producers), 2 honey handlers, 2 honey importers, and a national honey marketing cooperative representative (1 co-op member). 7 U.S.C. § 4606. Tr. 184.

[5] The National Honey Board’s goal is to maintain increased demand for honey. Tr. 305. 7 U.S.C. § 4601. Among the activities of the National Honey Board is generic advertising (advertising for the entire industry of honey designed to promote honey as a desirable product).

[6] The National Honey Board is funded with the assessments paid by honey producers and honey importers. Tr. 21-22, 356. 7 U.S.C. § 4606(e).

[7] Assessments initially were voluntary but thereafter became mandatory. Tr. 66, 107.

[8] The assessments are exacted by collecting from honey producers and honey

importers a penny on every pound of honey sold. 7 U.S.C. § 4606(e).

[9] Collection on honey produced in the United States is accomplished by “first handlers” (bottlers or others who place the honey in commerce), who deduct the assessments from the amount paid to the honey producers and forward the assessments to the National Honey Board. Tr. 22.

[10] The National Honey Board initiates budgets, marketing and program ideas. Tr. 331, 607.

[11] All National Honey Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval. Tr. 427-429, 432, RX 1 through RX 52. *See also*, Tr. 331-33.

[12] The National Honey Board is not a government entity, but it is tightly supervised by the Secretary; and, on behalf of the Secretary, by personnel of the United States Department of Agriculture, specifically, AMS; and even more specifically, by the Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS (Martha B. Ransom), and her staff. Tr. 427-29. *See also* Tr. 331-33.

[13] The National Honey Board pays for USDA’s oversight. Tr. 353.

[14] The National Honey Board staff are not government employees. Tr. 187, 346. The staff salaries are not set by USDA. Tr. 573-75.

[15] The property of the National Honey Board is not government owned.

[16] The Secretary appoints each member of the National Honey Board, in accordance with the specific directions contained in the Honey Act, from nominees proposed by the

National Honey Nominations Committee. 7 U.S.C. § 4606, *et seq.* Tr. 575-76.

[17] The Secretary appoints each member of the National Honey Nominations Committee, in accordance with the specific directions contained in the Honey Act, from nominees proposed by State beekeeper associations. 7 U.S.C. § 4606, *et seq.* Tr. 576.

[18] USDA's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board in the developmental process of promotion, research, and information activities. Tr. 427, 463-529, RX 1 through RX 52.

[19] A representative of USDA attends each and every meeting of the National Honey Board as an active participant. Tr. 427.

[20] Representatives of USDA who attend meetings of the National Honey Board provide comments or feedback to the Board at such meetings. Tr. 427.

[21] USDA's oversight of the National Honey Board includes retaining final approval authority over every assessment dollar spent by the Board. Tr. 427, 432.

[22] USDA's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for word process) of any materials that the National Honey Board prepares for use. Tr. 332-333, 374-386, 428-29, RX 1 through RX 52.

[23] USDA review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with USDA policy, AMS guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration's labeling requirements. Tr. 429. RX 60.

[24] The honey locator, on the third website that the National Honey Board operates, is one example of the National Honey Board's marketing to increase demand for honey, enabling producers to be found by those seeking local honey, or seeking different varieties of honey that are available depending on the floral source. Tr. 195.

[25] The antioxidant level in honey, which varies depending on the floral source, is one example of research undertaken by the National Honey Board. Tr. 196.

[26] The use of light spectroscopy to detect adulteration of honey with high fructose corn syrup or sucrose or other sugars, to help maintain purity of honey products, is another area of research in which the National Honey Board was involved, cooperating with Penn State University. Tr. 197.

[27] Honeybees' value as pollinators was the subject of a study funded by the National Honey Board (RX 70); about 1/3 of our diet is dependent on such pollination, and the toxic impact of pesticides on the bees is of great concern. Tr. 198-203.

[28] The Honey Act prescribes the contents of the Order to be issued by the Secretary. 7 U.S.C. § 4606, *et seq.*

[29] The Honey Act provides for termination or suspension of the Order, including referenda on request of the National Honey Board or at least 10% of those subject to assessment. 7 U.S.C. § 4612.

[30] The Honey Act provides for notice and comment rulemaking. 7 U.S.C. § 4606, *et seq.*

[31] The honey industry is divided roughly 50/50 into direct consumer sales versus the

industrial ingredient market. Tr. 50. Floral source determines the honey's flavor, quality and price. Tr. 51-52, 76-77. Based on market competitiveness, honey producers may sell directly to consumers, directly to packers or be part of a cooperative. Tr. 47-53, 77-79.

[32] The National Honey Board does not regulate the price, quality or sales amount of honey. The National Honey Board does not provide an anti-trust exemption for the honey industry. Tr. 84-85.

[33] National Honey Board advertisements and publications are not attributed to individual honey producers; they bear a trademark symbol that is the property of the National Honey Board; they do not bear a government symbol. Tr. 346-47.

[34] Petitioner Walter L. Wilson, a beekeeper, honey producer, and sole proprietor of Buzz 76 Apiaries, paid assessments to the National Honey Board. Mr. Wilson objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1998 through Crop Year 2002 were: 1998- \$9,374.84; 1999- \$12,585.54; 2000- \$4,853.97; 2001- \$9,607.78; and 2002- \$4,631.90. PX 8.

[35] Petitioner Richard L. Adee, a beekeeper, honey producer and sole proprietor of Adee Honey Farms, paid assessments to the National Honey Board. Mr. Adee objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1998 through Crop Year 2002 were: 1998- \$11,921.34; 1999- \$23,308.19; 2000- \$48,406.93; 2001- \$24,506.65; and 2002- \$18,136.48. PX 1. Tr. 28.

[36] Petitioner Steve E. Park Apiaries, Inc., a corporation, a beekeeper and honey producer, represented by shareholder Steve Elwood Park, paid assessments to the National

Honey Board. Steve E. Park Apiaries, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1996 through Crop Year 2002 were: 1996- \$2,948.49; 1997- \$9,944.36; 1998- \$5,450.89; 1999- \$550.17; 2000- \$8,032.25; 2001-\$12,019.38; and 2002- \$6,227.14. PX , Tr. 280.

[37] Petitioner A.H. Meyer & Sons, Inc., a corporation, a beekeeper and honey producer, represented by Jack Meyer Jr., a shareholder and Vice President, paid assessments to the National Honey Board. A.H. Meyer & Sons, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1998 through Crop Year 2002 were: 1998- \$11,859.44; 1999- \$9,163.30; 2000- \$13,647.40; 2001- \$7,747.87; and 2002- \$11,037.21. PX 10.

[38] Petitioner Lyle Johnston, also known as Lyle B. Johnston, a beekeeper, honey producer and sole proprietor of Johnston Honey Farm, also known as Johnston Honey Farms, paid assessments to the National Honey Board. Mr. Johnston objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1996 through Crop Year 2002 were: 1996- \$2,308.73; 1997- \$838.41; 1998- \$1,167.67; 1999- \$1,216.66; 2000- \$1,386.33; 2001- \$953.38; and 2002- \$2,049.84. Tr. 82-83, 72-75, PX 2.

[39] Petitioner Coy's Honey Farm, Inc., a corporation, a beekeeper and honey producer, represented by shareholder and President Bobby Coy, paid assessments to the National Honey Board. Coy's Honey Farm, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1997 through Crop Year 2002 were:

1997- \$5,640.97; 1998- \$8,345.45; 1999- \$9,298.05; 2000- \$11,199.73;

2001- \$9,875.79; and 2002- \$4,341.76. PX 9.

[40] Petitioner Price Apiaries, a corporation, a beekeeper and honey producer, also known as Price Honey Farms, and as Price Honey, represented by shareholder Harvey Price, paid assessments to the National Honey Board. Price Apiaries objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1996 through Crop Year 2002 were: 1996- \$4,945.08; 1997- \$4,370.46; 1998- \$5,834.10; 1999- \$4,027.03; 2000- \$7,439.99; 2001- \$3,590.13; and 2002- \$1,462.86. PX 3, Tr. 109, 113.

[41] Petitioner Jim Robertson, full name James Vincent Robertson, a beekeeper and honey producer and sole proprietor of Robertson Pollination Service, paid assessments to the National Honey Board. Mr. Robertson objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1997 through Crop Year 2002 were: 1997- \$2,638.81; 1998- \$1,959.88; 1999- \$657.89; 2000- \$2,442.45; 2001- \$987.98; and 2002- \$727.56. PX 12-13, Tr. 131-171.

[42] Petitioner Tubbs Apiaries, Inc., a corporation, represented by shareholder and President Hubert Tubbs, Jr., beekeeper and honey producer, paid assessments to the National Honey Board. Tubbs Apiaries, Inc. objects to paying the assessments and seeks a full refund of his assessments. Its payments from Crop Year 1998 through Crop Year 2002 were: 1998- \$1,957.41; 1999- \$1,747.61; 2000- \$1,268.13; 2001- \$1,263.87; 2002 (partial only, not all of 2002 had been reported when Declaration prepared)- \$408.96. PX 7.

Procedural History

[43] Petitioners instituted this proceeding pursuant to the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) (the Honey Act); the Honey Research, Promotion, and Consumer Information Order and its regulations (7 C.F.R. § 1240 *et seq.*) (the Honey Order); and the First Amendment to the United States Constitution.

[44] The Petition, filed on September 28, 2001, alleges, among other things, that assessments collected pursuant to the Honey Act violate Petitioners' freedom of speech and freedom of association rights under the First Amendment to the United States Constitution.

[45] Petitioners initially included The American Honey Producers Association, Inc.; Walter L. Wilson, d.b.a. Buzz 76 Apiaries; Richard L. Adee, d.b.a. Adee Honey Farms; Steve E. Park Apiaries, a California corporation; A.H. Meyer & Sons Inc., a South Dakota corporation; Lyle Johnston, d.b.a. Johnston Honey Farms; Coy's Honey Farm, Inc., an Arkansas Corporation, Price Apiaries, a South Dakota corporation; and Tubbs Apiaries, Inc., a Mississippi corporation.

[46] Respondent is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS"). AMS's Answer, filed on October 25, 2001, among other things, claims that the Honey Act; the Honey Order, and the rules and regulations promulgated thereunder (7 C.F.R. § 1240 *et seq.*), as interpreted by AMS and the National Honey Board, were and are fully in accordance with the law.

[47] The case was initially assigned to Administrative Law Judge Dorothea A. Baker but

was reassigned to me, Administrative Law Judge Jill S. Clifton, on July 15, 2002.

[48] Petitioners' Motion For Judgment on the Pleadings and/or Motion for Summary Judgment, was filed on September 12, 2002.

[49] Respondent's Opposition to Petitioners' Motion for Judgment on the Pleadings and/or Motion For Summary Judgment and in Support of Respondent's Cross-Motion to Dismiss Petitioner The American Honey Producers Association, Inc. for Lack of Standing, was filed on October 10, 2002. Respondents' Supplemental Authority was filed November 4, 2002.

[50] Petitioners' Reply To Respondent's Opposition to Petitioners' Motion For Judgment on the Pleadings and/or Motion for Summary Judgment; and Petitioners Opposition to Respondent's Cross-Motion to Dismiss The American Honey Producers Association, Inc. for Lack Of Standing, was filed on October 24, 2002. Petitioners' Supplemental Authority was filed October 31, 2002.

[51] My Order Denying the Petitioners' Motion for Judgment on the Pleadings was issued and filed on December 27, 2002.

[52] My Order Realigning the Parties and Amending the Caption was also issued and filed on December 27, 2002. Therein I declared that The American Honey Producers Association, Inc., had exhausted "its 'administrative remedies' by attempting to obtain relief here" but that since it is "not 'subject to an order,'" "it is not entitled to be a petitioner in this case. 7 U.S.C. 4609." I kept The American Honey Producers Association, Inc., as a party, identifying it as an "Interested Party To Which No Relief Can Be Granted."

[53] The three-day hearing was held before me in Fresno, California on February 3-5, 2003. Individually named Petitioners have been ably represented by Brian C. Leighton, Esq., of Clovis, California. The American Honey Producers Association, the Interested Party to Which No Relief Can be Granted, has been ably represented by James A. Moody, Esq., of Washington D.C. AMS has been ably represented by Frank Martin, Jr., Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The transcript is referred to as Tr.

[54] Petitioners called five witnesses: Richard Adee, a beekeeper and honey producer, owner of Adee Honey Farms, a sole proprietorship, Tr. 13-70; Lyle Johnston, a beekeeper and honey producer, owner of Johnston Honey Farm, also known as Johnston Honey Farms, a sole proprietorship, Tr. 72-99; Harvey Price, a “semi-retired” beekeeper and honey producer, a shareholder in Price Apiaries, a corporation, also known as Price Honey Farms, and as Price Honey (*see* Tr. 113-114), Tr. 100-130; James Vincent Robertson, a beekeeper and honey producer, owner of Robertson Pollination Service, a sole proprietorship, Tr. 131-171; and Steve Elwood Park, a beekeeper and honey producer, shareholder in Steve E. Park Apiaries, Inc., Tr. 269-297.

[55] AMS called three witnesses: Gene Brandi, a beekeeper and honey producer, owner-operator of Gene Brandi Apiaries, also National Honey Board Chair since June 2001 (Tr. 183), Tr. 178-248, 257-268; Julia Pirnack, National Honey Board, Industry Services Director, Tr. 299-420; and Martha B. Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs, AMS, Tr. 423-532, 536-681.

[56] Petitioners submitted 13 exhibits, Petitioners' Exhibits, referred to as PX. PX 1 through PX 13 were admitted into evidence. Tr. 298.

[57] AMS submitted 82 exhibits, Respondent's Exhibits, referred to as RX. RX 1 through RX 6, RX 7A, RX 7B, RX 8 through RX 68, and RX 70 through RX 82 were admitted into evidence.

[58] During the hearing, James Vincent Robertson, owner of Robertson Pollination Service, a sole proprietorship, testified (Tr. 131-171), and he has since been added to the case caption as a Petitioner. *See* Notice of Filing of Affidavit-Verification-Declaration filed March 24, 2003; I approve the amended case caption included therein. Tr. 687-91.

[59] Petitioners' Post-Hearing Brief was timely filed on May 29, 2003. Petitioners' Post-Hearing Reply Brief was timely filed on June 26, 2003. Petitioners' supplemental authority was filed on July 11, 2003, and on October 24, 2003; and on April 21, 2004.

[60] AMS's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof, was timely filed on June 11, 2003.

Individual Honey Producer Petitioners' Position

[61] Agriculture holds some of the last nomadic tribes.¹ Like the wheat, corn and pea harvesters, honey producers find themselves moving from state to state throughout the year to follow the fruit of their labors. As they move, their bees pollinate crops and produce honey from different floral sources, creating the varieties of honeys we know and consume.

[62] The testimony of Richard Adee, who grew up in a beekeeping family and bought his

¹ Agriculture's nomads travel with a focus on production.

first bee operation in 1957 (Tr. 18), is illustrative of the position of the individual honey producer Petitioners. Mr. Adee testified, in part, as follows:

Mr. Leighton: . . . what goes into your beekeeping operation?

Mr. Adee: . . . we raise bee colonies, and we - - it's what's called a migratory bee operation. We move bees a lot, but we have a queen breeding operation in Mississippi, Woodville, Mississippi where we start like our cow/calf operation. We start raising our colonies of bees there. They go north to the honey producing country of the Dakotas. And then they're there for the summer. In the fall, in October, they're moved from the Dakotas to California to get ready for the pollination season, which is in progress right today (3 February). After the pollination is over, we - - the almonds is the big pollination. Then we go from the almonds. Some of them will go up to Washington State to the apples. Some of them will go back to Mississippi to start the process over again for breeding new bees and new queens. And the rest will go back to the Midwest to make honey. So in the summertime, they all eventually wind up back in the Dakotas to produce honey. So they're really kind of a bunch of tourists.

Mr. Leighton: Okay. And I don't know what the proper lingo is, but how many hives do you have?

Mr. Adee: We have 55,000 colonies.

Mr. Leighton: Okay. And is a colony in one box?

Mr. Adee: One colony is the - - they're the queen, the bees, and the box is necessary to produce honey.

Mr. Leighton: And approximately how many bees are there in a colony?

Mr. Adee: Oh, in the summertime, you can have up to 70,000. Going into winter, about 30,000.

Mr. Leighton: Okay.

Mr. Adee: They reduce their colony numbers so that they - - when they're not making honey, they don't eat all of the honey that they have gathered, so by natural attrition, they - - the colony numbers are restricted for the winter months.

Mr. Leighton: Now are there certain kinds of crops that you look for as far as making honey?

Mr. Adee: Crops that we look for?

Mr. Leighton: Yes.

Mr. Adee: Well, we - - yeah, to a degree. We look for the most nectar producing plants, and out in the Midwest, that's alfalfa and sweet clover.

Mr. Leighton: Okay.

Mr. Adee: Here in California would probably be the orange . . .

Mr. Leighton: Okay.

Mr. Adee: . . . crop would be the main - - maybe some sage if they got a little rain.

Mr. Leighton: Okay. And for example, would you make honey out of almonds?

Mr. Adee: No, no. We hope they make enough honey out of the almonds just to replenish what they're eating, but almond honey is not a good tasting honey.

Mr. Leighton: What is the best tasting honey?

Mr. Adee: Well, of course I'm prejudiced to sweet clover.

Mr. Leighton: Okay. And you have a lot of that in the Dakotas.

Mr. Adee: We do . . .

Mr. Leighton: Okay.

Mr. Adee: . . . when we get the right moisture, yes.

Mr. Leighton: And how often do you collect the honey?

Mr. Adee: Well, we start in the latter part of July. And this is - - it's kind of continuing process going through - - hopefully through the end of October, but most of the time, we'll collect it one time from the colony. We - - the ones we start on first we'll put some empty boxes back on. We can go and collect twice on those, but the process - - you could just collect once and save yourself going back twice, but . . .

Mr. Leighton: This sounds like a dumb question, but approximately how much honey could a good honeybee collect for you every year?

Mr. Adee: A good colony of bees?

Mr. Leighton: Yeah.

Mr. Adee: Yeah, that's a good question. We try to set our budgets based on 100 pounds per colony, but during these real dry years, we've been - - like last year, we didn't quite make 40, so it was kind of a bad year. We have made up to 180 or 200 pounds, but our budgets are set on 100 pounds per colony.

Tr. 14-18.

[63] Individual honey producer Petitioners object to being compelled to pay the

assessments used to pay for generic advertising under the Honey Act. In their view, they are being compelled to subsidize private speech in violation of their First Amendment rights to freely speak and freely associate. Petitioners seek refunds on back assessment payments already made.

[64] Individual honey producer Petitioners distinguished their position from that described in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). [AMS does not rely on *Wileman Brothers*; see AMS's Brief filed June 11, 2003, at page 4, footnote 1.] On cross-examination, Ms. Martha Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs, AMS, testified regarding the nature of the National Honey Board's statutorily defined authority.

Mr. Leighton: Let me ask it a different way. Can the National Honey Board take any action to set honey prices?

Ms. Ransom: No.

Mr. Leighton: Can they take any action to set any honey prices that packers have to pay producers?

Ms. Ransom: No.

Mr. Leighton: Does the National Honey Board have any authority to set prices for which honey can be sold?

Ms. Ransom: No.

Mr. Leighton: Does the National Honey Board have any authority to control the supply of honey?

Ms. Ransom: No.

Mr. Leighton: In fact, Congress actually stated in the Act that there's no such authority, correct?

Ms. Ransom: That's correct.

Mr. Leighton: Okay. And is it your understanding that honey producers can produce as much honey as they want?

Ms. Ransom: Yes, sir.

Mr. Leighton: That they can sell as much honey as they want?

Ms. Ransom: Yes.

Mr. Leighton: That they can export as much honey as they want?

Ms. Ransom: Yes.

Mr. Leighton: That they can sell domestically as much honey as they want?

Ms. Ransom: Yes.

Mr. Leighton: They can sell it at any price?

Ms. Ransom: Yes.

Mr. Leighton: At any time?

Ms. Ransom: Yes.

Mr. Leighton: To any consumer or customer they want?

Ms. Ransom: Yes.

Tr. 582-84.

Mr. Leighton: Do they have any quotas?

Ms. Ransom: No.

Tr. 584.

Mr. Leighton: Does the National Honey Board enforce any quality restrictions?

Ms. Ransom: No, Mr. Leighton.

Tr. 585.

[65] The individual honey producer Petitioners emphasize the competitive environment in which they operate, again distinguishing their industry from that described in *Glickman v. Wileman Brothers, supra*. Richard Adee's testimony is illustrative:

Mr. Leighton: Okay. Does the National Honey Board regulate your operation?

Mr. Adee: No.

Mr. Leighton: Okay.

Mr. Adee: No, sir.

Mr. Leighton: Is the only thing they do is collect your assessment?

Mr. Adee: That's correct, sir.

Mr. Leighton: Okay. Is the honey production fully competitive?

Mr. Adee: Yes, sir.

Mr. Leighton: Okay. Is honey marketing fully competitive?

Mr. Adee: Yes, sir.

Mr. Leighton: Does the National Honey Board do anything setting, like, prices?

Mr. Adee: No, sir.

Mr. Leighton: Okay. Do they set the amount of money that honey producers are

paid by packers?

Mr. Adee: No, sir.

Mr. Leighton: Okay. Do they limit the amount that you can produce?

Mr. Adee: No, sir.

Mr. Leighton: Do you have any quotas?

Mr. Adee: No, sir.

Mr. Leighton: Are any - - is any honey mandatorily put in to reserves?

Mr. Adee: No, sir.

Mr. Leighton: How is it how you determine which packer you are going to use?

Mr. Adee: Basically, it's all based on price. Wherever we can get the best price, that's the market we'll sell to.

Mr. Leighton: Okay. And you have the choice to do that, correct?

Mr. Adee: Yes, sir.

Tr. 36-38. *See also* Petitioner Lyle Johnston's testimony at Tr. 84-85.

[66] Petitioners assert that the money used to finance the research and promotion aspects of the Honey Promotion program could be better spent, and they question the overall efficacy of the Honey Promotion program because the activities have not increased honey prices.

[67] Richard Adee's testimony illustrated the impact of even a penny per pound:

Mr. Leighton: Okay. And can you tell us what the significance of the amount of assessments that you pay?

Mr. Adee: How much does this add up . . .

Mr. Leighton: Well, no, not how much they add up to, but how much is - - is it a penny a pound?

Mr. Adee: Oh, it's a penny a pound . . .

Mr. Leighton: Okay.

Mr. Adee: . . . yes, sir. Yes, sir.

Mr. Leighton: And is a penny a pound a significant amount of money?

Mr. Adee: A penny a pound for years and years was two percent of our gross, and sometimes it was 100 percent of our profit. We didn't make two percent during those years when the crops are down in the 40 and 50 . . . pound per colony range. . . .

Mr. Leighton: The penny a pound could've been your profit?

Mr. Adee: It could've been.

Mr. Leighton: Okay. And were there years that would've been?

Mr. Adee: There were years that it was - - when the costs - - when we were operating in the red, it was a cost. Yes, definitely.

Tr. 22-23.

[68] Individual honey producer Petitioners indicate that the Honey Promotion program has not been effective in raising the price of honey partially because it cannot promote U.S. honey over imported honey. They assert that imported honey has been a problem, particularly when other countries dump their product on the U.S. market, an occurrence that

honey producers fought and won at the International Trade Commission² against China and Argentina. Tr. 44-45, 81-82, 276-280.

Discussion

[69] On June 25, 2001, the U. S. Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently “*United Foods*”), struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the “Mushroom Act”), 7 U.S.C. § 6101, *et seq.*

[70] The reliance of the individual honey producer Petitioners on *United Foods* was, at the time, justified. In response to *United Foods*, actions were filed involving a number of agricultural products subject to assessments used to pay for generic advertising. The actions that eventually reached the U. S. Supreme Court that were encouraging to the individual honey producer Petitioners, included beef (Eighth Circuit), pork (Sixth Circuit), milk (Third Circuit), and alligators (Fifth Circuit).

[71] The position of the individual honey producer Petitioners was also reinforced by *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003), which held that the assessment of independent and competing firms to pay for generic advertising is a violation of the First Amendment. *Id.*, at 898-899.

² Honey producers funded, from pledges among themselves, attorneys and economic experts to bring the anti-dumping case, raising close to \$800,000. Tr. 45, 289. The Honey Board did provide the ITC with information, including lists of names, and web site locations with statistical information maintained by the Honey Board. Tr. 307.

[72] Particularly persuasive in bolstering the position of the individual honey producer Petitioners, was the alligator case, *Pelts & Skins v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (the alligator case). See Petitioners' filing April 21, 2004.

[73] On May 23, 2005, the U. S. Supreme Court issued its third decision in eight years which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Assn.*, *supra*, (herein frequently "*Livestock Marketing Assn.*") (the beef case). *Livestock Marketing Assn.* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech.

[74] *Livestock Marketing Assn.* came out of the Eighth Circuit. The U. S. Supreme Court remanded on May 31, 2005, to various other Courts of Appeals for further consideration in light of *Livestock Marketing Assn.*, the cases involving pork (Sixth Circuit), 544 U.S. ____ (2005); milk (Third Circuit), 544 U.S. ____ (2005); and alligators (Fifth Circuit), 544 U.S. ____ (2005).

[75] Not until the U. S. Supreme Court ruled in May 2005 regarding government speech in *Livestock Marketing Assn.*, did it become clear that the individual honey producer Petitioners' arguments would fail. In light of *Livestock Marketing Assn.*, the individual honey producers' Petition must be denied.

[76] The U. S. Supreme Court's explanation of why the "Beef Promotion" program is government speech is found mainly at pages 8-10, *Livestock Marketing Assn.* Congress directed the implementation of a "coordinated program" of promotion, "including paid

advertising, to advance the image and desirability of beef and beef products.” *Id.* at 9.

[77] Here, likewise, the “Honey Promotion” program is directed by Congress. The Honey Act, 7 U.S.C. §§ 4601-4613, authorizes “the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information . . . 7 U.S.C. § 4601(b)(1). The “Honey Promotion” program is designed to “strengthen the position of the honey industry in the marketplace;” “maintain, develop, and expand domestic and foreign markets and uses for honey and honey products;” “maintain and improve the competitiveness and efficiency of the honey industry;” and “sponsor research to develop better means of dealing with pest and disease problems”. 7 U.S.C. § 4601(b)(1). These excerpts are merely a portion of the purposes declared in the Honey Act. *See* 7 U.S.C. § 4601 for the complete “Findings and purposes” of the Honey Act.

[78] “‘Compelled support of government’ - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. ‘The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.’ *Southworth*, 529 U.S., at 229.” *Livestock Marketing Assn.*, at p. 8.

[79] In both the Beef Promotion program and the Honey Promotion program, the message of the promotional campaigns is effectively controlled by the Federal Government itself. The degree of governmental control over the message funded by the (targeted assessments) distinguishes these cases from *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). See *Livestock Marketing Assn.* at p. 10.

[80] “When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Livestock Marketing Assn.* at p. 10.

[81] “Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions’ content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording. [footnote omitted] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.” [footnote omitted] *Livestock Marketing Assn.* at p. 12. I conclude that the within case, the individual honey producer Petitioners’ case, cannot be distinguished from *Livestock Marketing Assn.*

Conclusions

[82] As Justice Thomas remarked in his concurring opinion in *Livestock Marketing Assn.*, “the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, *see* The Federalist No. 12, p. 75 (J. Cooke ed. 1961).” Justice Thomas prefaced that observation with “Like the Court, I see no analytical distinction between ‘pure’ government speech funded from general tax revenues and from speech funded from targeted exactions . . .” *Livestock Marketing Assn.*

[83] The Honey Research, Promotion, and Consumer Information Act specifically authorizes the compelled subsidy of generic advertising of honey and honey products. 7 U.S.C. §§ 4601-4613.

[84] Congress made the following finding in the Honey Act: “The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes. 7 U.S.C. § 4601(a)(4).

[85] The Honey Act was passed for a “substantial” - - indeed, a “compelling” - - government interest. 7 U.S.C. §§ 4601(a) (4), (5), (6), (7), (8), (9), and (10).

[86] A “nationally coordinated program of promotion, research, consumer education, and industry information” was created by Congress to “strengthen the position of the honey industry in the marketplace.” 7 U.S.C. § 4601(b)(1)(A).

[87] “(A)dequate assessment(s)” on honey are recognized by Congress as necessary to such program. 7 U.S.C. § 4601(b)(1).

[88] The National Honey Board is appointed by the Secretary of Agriculture, in accordance with the specific directions contained in the Honey Act. 7 U.S.C. § 4606, *et seq.* Tr. 575-76.

[89] The National Honey Board's projects and budgets (whether advertising, promotion, research, industry information, or consumer education) are reviewed and approved by the Secretary of Agriculture or on her or his behalf by USDA personnel. Tr. 429. RX 60.

[90] The National Honey Board, as part of its effort to increase demand for honey, educates chefs, consumers, retailers and others of the ways honey enhances food and nutrition. Tr. 305-320, RX 1 through RX 11.

[91] The National Honey Board, as part of its effort to increase demand for honey, develops health-related messages to promote and advertise honey's health benefits, including anti-microbial properties and antioxidant capability. Tr. 196-97, 258, 305-06.

[92] The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613), are government speech, in accordance *Livestock Marketing Assn.*

[93] What the individual honey producer Petitioners are compelled to do, is pay for government speech with which they do not agree. The individual honey producer Petitioners are not actually compelled to speak when they do not wish to speak, because the advertising is not attributed to them; they are not identified as the speaker; they are not compelled to "utter" the message with which they do not agree.

[94] The individual honey producer Petitioners have no constitutional right to avoid paying for government speech with which they do not agree. *Livestock Marketing Assn.* at p. 8.

[95] The individual honey producer Petitioners have no right to choose the message or the messenger of government speech.

[96] “The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Livestock Marketing Assn.* at p. 11.

[97] The Honey Act provides for termination or suspension of the plan. 7 U.S.C. § 4612.

[98] The Honey Act and the Honey Order, both as promulgated and as administered, are fully in accordance with law, including the First Amendment to the United States Constitution.

[99] In light of *Livestock Marketing Assn.*, this Petition of individual honey producers must be and hereby is denied.

Finality

[100] This Decision becomes final without further proceedings 35 days after service unless an appeal petition is filed with the Hearing Clerk within 30 days after service, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65).

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

Done at Washington, D.C.
this 7th day of September 2005

Jill S. Clifton
Administrative Law Judge

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