UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. M-08-0071

In re: In re: HEIN HETTINGA and ELLEN HETTINGA,
d/b/a SARAH FARMS,

Petitioners

DECISION AND ORDER

In this action the Petitioners, Hein and Ellen Hettinga, doing business as Sarah Farms, filed their Petition for Declaratory Relief [1]on March 7, 2008 pursuant to 7 U.S.C. § 608c(15)(A) seeking relief in the form of a determination that the Market Administrator misinterpreted and misapplied the Arizona-Las Vegas Marketing Order by imposing minimum price regulations upon them for the month of April of 2006; a determination that the imposition was not in accordance with law; a refund of the $324,211.60 which they paid under protest; pre and post-petition interest, attorney fees and costs; and for all other further relief to which they might be entitled.

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture ("AMS" and "USDA" respectively) responded to the Petition by filing an Answer on April 7, 2008. A Motion for Leave to Participate was filed on behalf of United Dairymen of Arizona, Shamrock Foods, Shamrock Farms and Parker

[1] This action is one of three filed by the Petitioners brought under 7 U.S.C. § 608c(15)(A) challenging various acts of the Secretary related to changes made to the status of producer-handlers in Arizona.

Farms on May 6, 2008. Leave for the additional parties to participate was granted by Order entered on August 27, 2008. An evidentiary hearing was held in the matter in Washington, D.C. on September 10, 2008 at which time testimony of James Daugherty, the Market Administrator for Federal Orders 124 and 131, and William Wise, the Assistant Market Administrator for Federal Orders 124 and 131 was taken and 10 exhibits were introduced and received into evidence. Initial briefs were received from all parties. Following the filing of the initial briefs, the Petitioners sought leave to file a Reply Brief to address matters contained in the Amici Brief. Their Motion For Leave to File a Reply Brief was granted, the Reply Brief has been received and the matter is now ripe for disposition.

Background

The Petitioners, Hein and Ellen Hettinga, since 1994 have owned and operated Sarah Farms, a large dairy business in Arizona. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers. To present, the Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas Milk Marketing area (now known as the Arizona Marketing Area, also known as the Order 131 area).

On February 24, 2006, USDA adopted a Final Rule which became effective April 1, 2006 that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest Milk Marketing areas to the pricing and pooling provisions of their respective

Marketing Orders if the producer-handler produced and sold more than 3,000,000 pounds of Class I milk per month. 71 *Fed. Reg.* 9430 (Feb. 24, 2006). As a producer-handler of milk since 1994 and continuing until April 1, 2006,[2] Sarah Farms had been exempt from the minimum pricing and pooling provisions of Federal Milk Marketing Orders adopted by the Secretary under the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA"). Acting under the newly adopted Final Rule, the Market Administrator assessed a pool payment of $324,211.60 on Sarah Farms for milk processed in April of 2006.

Subsequent to the adoption of the Final Rule, Congress enacted the Milk Regulatory Equity Act (codified at 7 U.S.C. § 608c(5)(M)-(N)) ("MREA") which statutorily affirmed the Secretary's determination to limit the scope of the producer-handler exemption. Additionally, the MREA required the Secretary to issue an order requiring dairy businesses within a milk marketing area that sell to states that are not subject to a federal milk marketing area to comply with the pricing and pooling requirements of the regional federal order. On May 1, 2006, the Secretary issued an order implementing the MREA.

In asserting that the Market Administrator wrongfully assessed a pool payment of $324,211.60 against the Petitioners for the month of April of 2006, the Hettingas argue that May of 2006 should have been the first month in which an assessment could properly be made and the assessment for April of 2006 was not in accordance with law as their status as a producer handler was not formally cancelled, invoking the language of 7 C.F.R. § 1131.10(c) which provides:

[2] Prior to the April 1, 2006 changes, there was no "producer-handler designation" and producer handlers self determined their status which was verified by audit of their operation. The record clearly indicates that the Petitioners operated as producer-handlers prior to April 1, 2006.

> …Cancellation of a producer handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were no met or the conditions for cancellation occurred….

Further they argue, as they continuously held the status of a producer-handler for 12 years, notice of loss of that status was required, and the Market Administrator failed to provide that notice.

While it is clear that the Petitioners had indeed qualified as a producer-handler prior to April 1, 2006, the definition of a producer-handler was changed by the Final Rule which became effective on April 1, 2006. Included in the changes in the new definition was a requirement that in order to obtain status as a producer-handler a two step process is required: (a) the operator has to apply to be a producer-handler, and (b) the Market Administrator has to designate a qualified dairy operation as a producer-handler[3]. The cancellation provision relied upon by the Petitioners was another change that also became effective on April 1, 2006. The Respondent argues that as the cancellation provision did not exist prior to April 1, 2006, the now existent cancellation provision logically applies only to producer-handlers that have been designated as such by the Market Administrator after April 1, 2006. Moreover, as there is no evidence that Petitioners ever applied for the producer-handler designation[4] (even if they had been otherwise eligible, *which they are not,* as their production and sales exceed the 3,000,000 pound Class I route distribution threshold), *a priori*, they could not be producer-handlers within the post April 1, 2006 definition.

[3] Prior to April 1, 2006, a producer-handler determined the scope of his or her operation and the Market Administrator audited the information to verify its accuracy. (T 23). The pre April 1, 2006 definition did not have any designation provision by the Market Administrator and contained no cancellation provision. (T 64). *See,* 7 C.F.R. § 1131.10, as effective September 1, 1999 through March 31, 2006. 64 *Fed. Reg.* 48010 (September 1, 1999).

[4] T 72

Although the parties differ as to whether the amendments to a milk marketing order merely amend the old order, or create a new order, as amended, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of producer-handler in such a way as to make the Petitioners no longer eligible for the regulatory exemption afforded producer-handlers. Similarly, imprecation concerning imprecision in the use of terminology by the Market Administrator and his staff in describing the "designation" or "status" of a producer-handler fails to provide any support for the Petitioners' position as in absence of a published definition of the terms, recourse falls upon the language of the regulatory language contained in the milk marketing order. Last, the misoneistic boot strap argument that a producer-handler who not only exceeds the volume threshold of 3,000,000 pounds of route distribution, but also has never either applied for or been designated as a producer-handler after April 1, 2006 somehow still requires cancellation under the new cancellation provisions effective April 1, 2006 is somewhat hard to follow.

Based upon the entire record, the testimony of the witnesses given at the evidentiary hearing, the exhibits, and having considered the arguments of counsel as expressed in the briefs, the following Findings of fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Petitioners, Hein and Ellen Hettinga, since 1994 have owned and operated Sarah Farms, a large dairy business in Arizona.

2. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers.

3. To present, the Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas Milk Marketing area (now known as the Arizona Marketing Area, also known as the Order 131 area).

4. On February 24, 2006, USDA adopted a Final Rule which became effective April 1, 2006 that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest Milk Marketing areas to the pricing and pooling provisions of their respective Marketing Orders if the producer-handler produced and sold more than 3,000,000 pounds of Class I milk per month. 71 *Fed. Reg.* 9430 (Feb. 24, 2006).

5. From 1994 and continuing until April 1, 2006, Sarah Farms, as a producer-handler of milk, had been exempt from the minimum pricing and pooling provisions of Federal Milk Marketing Orders adopted by the Secretary under the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA").

6. Following adoption of the Final Rule, the Market Administrator assessed a pool payment of $324,211.60 on Sarah Farms for milk processed in April of 2006.

7. The Hettingas paid the pool assessment of $324,211.60 under protest.

8. Subsequent to the adoption of the Final Rule, Congress enacted the Milk Regulatory Equity Act (codified at 7 U.S.C. § 608c(5)(M)-(N)) ("MREA") which statutorily affirmed the Secretary's determination to limit the scope of the producer-

handler exemption. Additionally, the MREA required the Secretary to issue an order requiring dairy businesses within a milk marketing area that sell to states that are not subject to a federal milk marketing area to comply with the pricing and pooling requirements of the regional federal order. On May 1, 2006, the Secretary issued an order implementing the MREA.

9. Commencing April 1, 2006, the Petitioners ceased to be eligible for producer-handler exemption under the Arizona Milk Marketing Order because they failed to apply for a producer-handler designation and because their production and sales exceeded the Order's threshold of 3,000,000 pounds of Class I route distribution.

Conclusions of Law

1. The Secretary has jurisdiction over this action.

2. The Market Administrator's assessment of $324,211.60 against the Petitioners for the month of April of 2006 was appropriate and in accordance with law based upon the revisions to the Milk Marketing Order.

3. As of April 1, 2006, the definition of a producer-handler was changed by the Final Rule. Included in the changes to the new definition was a requirement that in order to obtain status as a producer-handler a two step process is required: (a) the operator has to apply to be a producer-handler, and (b) the Market Administrator has to designate a qualified dairy operation as a producer-handler.

4. Cancellation of the designation as a producer-handler was not required for an entity which had not applied for and been designated as a producer-handler after April 1, 2006.

5. The Petitioners' production and sales of Class I milk exceeded 3,000,000 pounds and precluded them being eligible to be afforded the producer-handler designation even had they applied.

Order

The relief sought by the Petitioners is **DENIED** and the Petition is **DISMISSED,** with prejudice.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.
November 17, 2008

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PETER M. DAVENPORT
Administrative Law Judge

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