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DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

In the Matter of Milk in California;
Notice of Hearing on a Proposal to
Establish a Federal Milk Marketing
Order

7 CFR Part 1051
Docket No.: AO-15-0071;
AMS-DA-14-0095

**BRIEF AND PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW FILED ON
BEHALF OF CALIFORNIA PRODUCER-HANDLERS ASSOCIATION**

I. INTRODUCTION

California Producer-Handlers Association (“CPHA”) submits this post-hearing brief following public hearings held in Clovis and Fresno, California, September 22, 2015, through November 18, 2015, regarding the possible implementation of a Federal Milk Marketing Order (“FMMO”) governing California. The 40-day promulgation hearing addressed the entirety of a new FMMO in California, and one pivotal issue dealt with the preservation of the quota system as it was issued to California producers under the California State Order System (“CSOS”).

CPHA’s Proposal 3 supports the implementation of a California FMMO as proposed during the course of the hearing by California Dairies, Inc., Dairy Farmers of America, Inc., and Land O’ Lakes, Inc. (collectively, the “Cooperatives”), along with preserving CPHA’s exempt quota with the rest of the quota system. Specifically, Proposal 1, as proposed by the Cooperatives during the hearing, would preserve regular quota.¹ CPHA’s Proposal 3 proposes

¹ The Cooperatives’ Proposal 1, as published at 80 Fed. Reg. 47210 (Aug. 6, 2015) (to be codified at 7 C.F.R. pt. 1051), does not call for the preservation of exempt quota discussed

(continued . . .)

to preserve exempt quota along with regular quota in any California FMMO. All of the facts and legal arguments for preserving regular quota apply equally to preserving exempt quota. This brief will summarize the proposed findings of fact and then apply those facts to the proposed conclusions of law relevant to CPHA's Proposal 3.

II. PROPOSED FINDINGS OF FACT

A. **The Gonsalves Milk Pooling Act: Regular Quota, Exempt Quota, Base and Overbase**

California's quota system was initially enacted in 1967 under the Gonsalves Milk Pooling Act. (Hearing Tr. 6946:4-8.) Though it has been amended multiple times, it has always contained provisions for milk payments based upon regular quota, exempt quota, "base" and "overbase" ("Quota System").

Prior to the Gonsalves Milk Pooling Act, producers with coveted Class 1 contracts in California were able to sell their milk to processors for higher values. (Hearing Tr. 6819:13-6820:20, 1784:17-1786:1.) Producers without Class 1 contracts were often relegated to selling their milk for lower class uses with corresponding lower payments. (*Id.*) By contrast, producer-handlers created their own Class 1 markets by producing, processing and selling directly to customers their own Class 1 branded products. In determining to implement the Gonsalves Milk Pooling Act, the legislators and industry representatives recognized that a blended pool price would disadvantage the producers and producer-handlers who already had their own Class 1 contracts and who received higher milk margins. In order to protect the investment made by the

(. . . continued)

herein. Testimony by the Cooperatives' representative during the hearings makes clear, however, that the Cooperatives do not object to the preservation of exempt quota, as called for by Proposal 3. (*In re Milk in California*, [AO] Dkt. No. 15-0071, Transcript of Proceedings (hereinafter "Hearing Tr.") 8108:20-8109:24.)

Class 1 producers and producer-handlers, California created the Quota System to issue shares of rights to obtain and retain premium pricing for certain volumes of milk production.

Regular quota shares were issued to producers based on their production and sales to Class 1 handlers, and exempt quota shares were issued to producer-handlers based on their historical production of milk used for their own Class 1 sales. (Hearing Tr. 2403:3-24; 1779:10-20, 1781:23-1782:12.) As is relevant here, the Gonsalves Milk Pooling Act and issuance of quota represented a compromise between all producers', producer handlers', and handlers' interests. Both regular quota and exempt quota are asset values owned by the producers. (Hearing Tr. 6945:5-8, 6997:11-19.) In essence, exempt quota was the compensation given to producer-handlers for creating the Class 1 market. (Hearing Tr. 6983:2-21.) Regular quota was the compensation given to producers who had created Class 1 contracts for their milk, and exempt quota was issued to the producer-handlers who had created their Class 1 markets.² (*Id.*) Quota, both regular and exempt, became an asset that held value for producers and producer-handlers.

Producers who own quota shares receive from the CSOS a premium price for the amount of solids nonfat shares of regular quota they own. Producers who own exempt quota receive the Class 1 price paid directly by their related handler entity. (Hearing Tr. 7039:4-7046:19.) The handler side of the producer-handler operation continues to account to the pool for all of its milk, and then receives a deduction (or credit) from the pool for the value of the solids nonfat shares of

² There are two types of producer-handlers recognized under the CSOS: Option 70 and Option 66 producer-handlers. Option 70 producer-handlers are the ones holding the exempt quota shares described here. Option 66 producer-handlers are fully exempted from the pool for their entire production and do not participate in the quota system. (Hearing Tr. 6945:14-17.) Option 66 producer-handlers are more akin to the Federal Order exemptions for producer-handlers. (Hearing Tr. 6992:3-6993:10.) All of the CPHA members are Option 70, not Option 66, producer-handlers. (Hearing Tr. 6945:14-17.)

exempt quota multiplied by the Class 1 price. (Hearing Tr. 6819:13-6820:20.) The producer side of the business who owns the exempt quota still pays the full administrative fees to the pool for all of the raw milk it produces, whether exempt or not. (Hearing Tr. 7046:4-7047:3.)

As milk consumption increased, new quota was allocated to all California producers. Any producer can purchase regular quota, although the shares of regular quota have not increased for some time. By contrast, once the initial 49 exempt quota holders were created in 1968, no new producer-handlers could be formed to acquire exempt quota. (Hearing Tr. 6969:10-22.)

Ownership of regular quota and exempt quota is reflected in numbered "Certificates of Ownership" issued by the Dairy Marketing Branch of the California Department of Food and Agriculture, which implements the CSOS. The producer entity for each producer-handler is the legal entity that owns the exempt quota. (Hearing Tr. 6945:6-8.) However, since March 1995, the volume of exempt quota has been capped and has only decreased as the number of exempt quota holders has decreased, or as holders of exempt quota transferred their shares (and thus converted it to regular quota). (Hearing Tr. 6956:7-18, 6964:2-18, 6969:10-22; *see also* Ex. 153(C).)

Since the enactment of the Gonsalves Milk Pooling Act and the creation of the quota system, producer-handlers cannot sell their businesses (without losing their exempt quota treatment) and must keep the businesses within certain degrees of the initial bloodlines in order to maintain their exempt quota (*i.e.*, consanguinity). (Hearing Tr. 6839:15-6840:6.) Thus, unique exempt quota has always been an integral part of the California quota system; but it is limited in scope and duration. (*See* Exs. 150-151.)

B. The Four Remaining Exempt Quota Holders Today

Though there were originally 49 producer-handlers that held exempt quota, that number has dwindled more than 91% to the final four that remain today. (Hearing Tr. 6977:11-6978:3.) This reflects a reduction of 48.5% in exempt quota holders as a percent of production of the total Class 1 market over the past 30 years. (Hearing Tr. 6979:15-20; *see also* Ex. 153(D).) The final four that remain today—Foster Dairy Farms, Inc., Hollandia Dairy, Inc., Producers Dairy Foods, Inc. and Rockview Dairies, Inc.—are the only members of CPHA. (Hearing Tr. 6945:6-8.) Once the generational transfers have exhausted the consanguinity limitations, the exempt quota will be converted to regular quota and cease to exist. (Hearing Tr. 6983:11-21.)

C. Quota Is a Valuable Asset

Lon Hatamiya, MBA, JD, on behalf of the Cooperatives, testified that quota holds multiple layers of value that includes: (1) the original investment value in creating the Class 1 contract relationships or markets; (2) tradable share value for quota; (3) premium pricing received for the volume of solids nonfat shares held; and (4) for exempt quota holders, an additional premium value for having that volume of milk excluded from the pool altogether. From these valuation points, Mr. Hatamiya testified that the quota, both regular and exempt, holds an economic value. He testified that “economic value” is

commonly recognized as the value of an asset calculated according to its ability to produce . . . income in the future. Value is linked to price through . . . the mechanism of exchange. When one observes an exchange, two important value functions are revealed: Those of the buyer and seller. Just as the buyer reveals what he or she is willing to pay for a certain amount of a good, so too does the seller reveal what it costs him to give up that good. This definition describes California’s dairy quota most appropriately . . . as it is a marketable and transferable asset that can be bought, sold, and results in an assured source of cash flow for the owner of that quota.

(Hearing Tr. 2246:15-2247:5.)

Mr. Hatamiya testified that value in quota is attributable to premium pricing and transferability valuation. (Hearing Tr. 2396:22-2397:13.) For example, quota is recognized by accountants as investments and transferable intangibles, the elimination of which would result in write-offs. (Hearing Tr. 2247:24-2248:17.) Furthermore, in making lending decisions and reviewing debt-to-asset information, financial institutions place a value on quota ownership and consider it an asset that is unencumbered and marketable. (Hearing Tr. 2248:18-25.)

This value is a principal reason for preserving quota in any California FMMO, and the same justifications that support preservation of quota value advanced by the Cooperatives are applicable to exempt quota. (Hearing Tr. 2407:3-10.)

D. Exempt Quota Has Value in Addition to Quota Value

Though quota and exempt quota each hold value that is both measurable and immeasurable, the value of exempt quota is even greater. (Hearing Tr. 6962:23-6963:10; *see also* Exs. 42 and 54 and corresponding testimony.)

First, exempt quota has more value because it required more of an investment to acquire and maintain. Farms invested considerable sums in creating their Class 1 sales and markets.³ For example, in passing and implementing the Gonsalves Milk Pooling Act, those farms that had created their Class 1 markets, or relationships with Class 1 processors, created quality programs

³ CPHA members agreed that the quota value includes the cost incurred in acquiring the quota, the cost of investment in creating the initial Class 1 markets that were the basis of creating the exempt quota holders in 1969, and the premium value in payments. (Hearing Tr. 2403:25-2405:1; *see* Hearing Tr. 1802:5-1802:16 (“[E]xempt quota establishes an economic benefit beyond the value of standard quota. Standard quota entitles the owner to a higher price that is established at 19 and a half cents per pound of solids not fat per day. [E]xempt quota waives the obligation of the owner to account to the pool for the equivalent amount of Class 1 production. The additional benefit of exempt quota is then, the difference between the announced Class 1 price and the announced RQA adjusted quota price for the same month. From January 1970 to December 2014, the additional value to exempt quota owners averaged about 58 cents per hundredweight in Southern California (RQA of zero dollars per hundredweight).”))

that allowed them to put in place their historical numbers, which were then used to assign quota. (Hearing Tr. 2403:3-16.)

In addition, over the years, and through two subsequent amendments to the Gonsalves Milk Pooling Act, the original exempt quota holders were permitted to acquire more exempt quota through assignments and purchase. The exempt quota holders spent millions of dollars to acquire additional quota between 1978 and 1994. (Hearing Tr. 6956:7-18.) For example, in purchasing new exempt quota between 1978 and March 1995, the CPHA farms spent \$9,298,677.84. This does not account for the costs incurred in creating their respective Class 1 markets, or the costs of preserving their ownership structure necessary to maintain those exemptions. (Hearing Tr. 6967:19-6968:9.) Moreover, in light of the restrictions for exempt quota holders (*i.e.*, the fact that they could not transfer exempt quota without it being converted into regular quota), an additional investment was required in order to preserve the exemption. (Hearing Tr. 2403:17-24.)

Second, exempt quota generally provides for a higher guaranteed stream of income. Mr. Hatamiya described exempt quota as having additional value from not being subjected to the pool. (Hearing Tr. 2396:22-2397:23.) For example, Richard Shehadey of Producers Dairy testified that for its farm, Bar 20, exempt quota has been worth \$1.14 per hundredweight more than regular quota, on average for the past 20 years. (Hearing Tr. 6979:21-6981:25.) Dennis Lund, Foster Dairy's Director of Cost Accounting, testified similarly, stating that the ratio he calculated for the value of regular quota compared to exempt quota was approximately 1:2 (Hearing Tr. 8122:22-8125:21.)

Based upon the exceptional value of exempt quota, "[t]he only way by which to 'recognize the long-standing California quota system,' is to preserve the value of both regular

quota and exempt quota together, as they are both granted at the quota system's inception.”

(Hearing Tr. 6972:1-5.) Indeed, Mr. Shehadey served on the California Department of Food and Agriculture Quota Review Committee and was tasked with reviewing the quota system back in 2007. (Hearing Tr. 6944:15-24, 7096:19-7098:19.) In evaluating whether there was any feasible option to terminate the quota system, the committee had to determine the value of the quota system. The committee determined that the quota was worth over a billion dollars, and thus concluded that there was no viable way to buy out the quota. (*Id.*)

E. California Producer-Handlers Differ from “Producer-Handlers” in Existing FMMOs

Producer-handlers holding exempt quota under the CSOS are very different from producer-handlers in other Federal Order systems. (Hearing Tr. 7096:4-6.) This is the case for several reasons.

First, CPHA members comprise two separate legal entities: on one side, the farm or dairy operation that invested in and acquired all of the exempt quota, and on the other side, the processing and handling plant that purchases from the farms on an arm's-length basis just as if it were purchasing from any third-party farm. They are separate businesses, with separate profit and loss statements, separate balance sheets, and separate ownership structures. (Hearing Tr. 6997:11-19.) For example, Richard Shehadey, Chief Executive Officer of Producers Dairy Foods, Inc., testified on behalf of the CPHA. Producers Dairy dates back to 1932, and it has been owned by the Shehadey family since 1949. (Hearing Tr. 6940:12-25.) Their farm is called Bar 20 Dairy, and the plant is operated under Producers Dairy. These are separate legal entities and their ownership structure is different (although overlapping with some individuals). Bar 20 is the entity that purchased, owns and reaps all benefits from its exempt quota. Thus, in 2009, when Bar 20 lost millions of dollars with the economic downturn, members of Mr. Shehadey's

family had to cover the losses with their own individual personal financial resources. None of those resources were covered by the plant side of their business because it is a separate legal entity. (Hearing Tr. 6997:11-6999:5.) Likewise, the handler side of their business stands along and receives no financial benefit from Bar 20's ownership of exempt quota. (*Id.*)

Second, under the Federal Order system, there was no investment requirement to obtain the exemption like there is under the CSOS to obtain and maintain exempt quota. (Hearing Tr. 6984:1-23.) The financial investment to create a Class 1 market to obtain the original designation as an exempt quota holder, and the subsequent financial investment of \$9 million to purchase new exempt quota certificates, were tangible investments made by CSOS Option 70 producer-handlers in order to obtain their exempt quota. Exempt quota are book value assets that are held by the producer-side of their business. (Hearing Tr. 6984:1-23.)

Third, the exempt quota is limited in scope, volume and duration. The number of producer-handlers who hold exempt quota were set in 1968 with the enactment of the Gonsalves Milk Pooling Act. The volume of exempt quota shares was set by the 1994 Amendment to the Act. And exempt quota will sunset when the tables of consanguinity are exceeded, and are currently capped by March 1995 volumes. (Hearing Tr. 6984:1-23.) In the Federal Order producer-handler hearings, the concerns addressed producer-handler exemptions that did not have such similar limitations as the CSOS and could be expanded as much or as long as the producer-handlers continued to produce and sell their milk. (Hearing Tr. 6984:1-15.) The exempt quota holders have a limited amount of exemption, it cannot be expanded, and it will only sunset after a period of time.

Fourth, there has been no evidence that exempt quota disrupts the milk market. The exempt quota holders have been operating with their exemption rights since 1969, and there is no

actual evidence of disorderly market conditions. As Mr. Shehadey testified, “after 50 years of exempt quota being part of the California State order system, to my knowledge, there has never been a finding of disorderly market conditions, and no reports that any CPHA member has improperly priced product below cost because of the exempt quota.” (Hearing Tr. 6985:11-21.) “No Option 70 producer-handler has ever used their exempt quota to win any customer account.” (Hearing Tr. 6953:6-8.) All four of the CPHA members pay their producers Class 1 milk – the same that they pay their third party producers for the milk. So the CPHA members compete on a level playing field with all other Class 1 handlers for the sale of their Class 1 milk.

Exempt quota is a value that is held by the farm entity of each CPHA member. (Hearing Tr. 6951:6-21.) The plant side of the business that sells the Class 1 milk does not receive any price advantage. The plants all pay their own farms the Class 1 price, the exact same price that the plant would pay into the pool if it were not exempt. The plant accounts to the pool for the volume of milk, and then gets a deduction in the exact amount that it paid to its farm. That means there is absolutely no financial advantage for the plant for any exempt quota shares held by its farm. There is no price advantage to pass on to customers or to undercut Class 1 competitors.

Dean Foods was the only witness that testified it lost a customer to a CPHA member, and that testimony was based entirely on speculation as to what it concluded must have been the only reason it could have lost the bid to CPHA member.

Producers Dairy, the entity Dean Foods presumed to have won a bid based on a price advantage, testified specifically about the bid that Dean Foods lost. Producers Dairy confirmed that it won the bid on a variety of factors, and none of them were based on any competitive price advantage realized from the exempt quota holder benefit. (See Hearing Tr. 6995-6998.)

Producers Dairy, along with the rest of the CPHA members, has lost more bids to Dean Foods than Dean Foods has lost to the entire group of CPHA members. (Hearing Tr. 6996:21-6997:10.) If CPHA members held a competitive advantage because of their exempt quota shares, they would have been able to take a larger market share than what they have taken from Dean Foods. The simple truth is that the only bid CPHA members have won against Dean Foods was an account that Dean Foods lost on a national basis, and not one that was lost due to exempt quota ownership.

The evidence has been uncontroverted. The farm holds all of the financial benefit for the exemption treatment. The side of the business that processes the raw milk into fluid Class 1 milk incurs the exact same cost for the raw milk as if it were purchasing the milk from a third party and the handler side of the business receives no financial benefit from its farm owning exempt quota. There is no disorderly market conditions from the existence of quota, regular or exempt.

F. Preserving Exempt Quota Had Almost Zero Economic Impact

There is virtually zero economic impact to preserving exempt quota holders as part of preserving the quota system. (Hearing Tr. 6985:22-6986:14.) The USDA's economic impact analysis confirmed that as well. (Hearing Tr. 147:14-149:24.) If the quota system were preserved, but exempt quota holders lost their exempt treatment, presumably the exempt quota would be converted to regular quota. If that were the case, that volume of milk would be subject to the pool at Class 1 prices, but the pool would also have additional costs for transportation allowances that are not currently paid. Dr. Erik Erba testified that according to his calculations, the pool would experience less than one-half cent per hundredweight per month. (Hearing Tr. 8108:23-8109:20.) In contrast, the impact to the CPHA exempt quota owners would be significant. If exempt quota were not preserved, the exempt quota holders would lose a

significant value they obtained through investment and organizational structure preservation in return for a near zero financial benefit to the pool. (Hearing Tr. 6987:10-25.)

G. CPHA Proposal Is Supported by Cooperatives

CPHA's Proposal 3 seeks only to ensure the preservation of the value of exempt quota in any California FMMO. (Hearing Tr. 6988-6989.) The language proposed by CPHA during the hearing accomplishes this within the context of Proposal 1, without any unintended consequences. (Hearing Tr. 7390-7412; Ex. 168.) For the reasons discussed herein, doing so is necessary to preserve the quota system and value of quota to ensure fairness to all California producers. Indeed, the Cooperatives' expert testified as follows:

We recognize that exempt quota is rooted in the same California statutes as regular quota and was granted by the state or was purchased from other producers, just as regular quota was. When we understand the concerns expressed by Class I handlers regarding the uniformity of minimum Class prices, however, we see that exempt quota has some unique features in that it is confined to just four vertically integrated farms, and is subject to other limitations such as consanguinity provisions and lack of legislative authority, lack of legislative authorization to expand exemption. We have analyzed, to the fullest extent possible, the impact on the producer blend price to allow them the continuation of exempt quota, taking into account geographic locations, the amounts of exempt quota involved, the conversion of exempt quota to regular quota, the eligibility for transportation credits, and the application of regional quota adjusters, [and] we estimate the net impact on the pool of recognizing exempt quota is less than one-half cent per hundredweight, per month. **In light of these various considerations, the three Cooperatives, California Dairies, Inc., Dairy Farmers of America, Inc., and Land O'Lakes, Inc., do not oppose the California Producer Handler Proposal, also called Proposal Number 3.**

(Hearing Tr. 8108:23-8109:20 (emphasis added).)

The Cooperatives recognize that in preserving the quota system, it makes sense, financially, legally and in the interests of fairness to all producers, to preserve both regular and exempt quota. The Cooperatives' expert agreed that the economic justifications for preserving

regular quota apply equally to exempt quota. Exempt quota should be preserved with regular quota in order to honor the full integrity of the quota system.

PROPOSED CONCLUSIONS OF LAW

CPHA respectfully requests that the Secretary reach the following conclusions of law pursuant to 5 U.S.C. § 557(c). “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d).

A. Any California FMMO Should Preserve Quota and Exempt Quota

The 1996 Federal Agriculture Improvement and Reform Act, Pub. L. No. 104-127, 110 Stat. 888 (“1996 Farm Bill”) provided the USDA with the authority to designate an FMMO for the State of California. Section 143(a) of the 1996 Farm Bill, codified at 7 U.S.C. § 7253, stated, in pertinent part: “Upon the petition and approval of California dairy producers . . . the Secretary shall designate the State of California as a separate Federal milk marketing order. *The order covering California shall have the right to reblend and distribute order receipts to recognize quota value.*” (Emphasis added.) However, Section 143(b) of the 1996 Farm Bill contained a deadline for the USDA to consider the designation of an FMMO for California. The Agriculture Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (“2014 Farm Bill”) repealed that deadline by expressly providing that “Section 142(a) of the Federal Agriculture Improvement Act of 1996 is amended by adding at the end the following new sentence: ‘Subsection (b) does not apply to the authority of the Secretary under this subsection.’” Accordingly, the Secretary is authorized to issue an FMMO covering California that “shall have the right to reblend and distribute order receipts to recognize quota value.”

Indeed, the Conference Report that accompanies the 2014 Farm Bill includes a “Joint Explanatory Statement of the Committee of Conference” that reflects the intent of the drafters. It states in pertinent part: “The Managers intend for the Secretary to conduct a hearing prior to the

issuance of an order designating the State of California as a Federal milk marketing order. The provision provides the Secretary of Agriculture with the discretion, if a California Federal milk marketing order is requested, *to recognize the longstanding California quota system . . . established under state marketing regulations*, in whatever manner is appropriate on the basis of a rulemaking hearing record.” (Emphasis added.)

Here, the evidence reveals that exempt quota is part of the “quota system” and, thus, the reasons for preserving any aspect of quota ownership would apply equally to preserving exempt quota. Because of the additional investment and the additional value of exempt quota, even more reasons exist to preserve exempt quota to achieve recognition of quota value. Finally, USDA’s economic analysis does not suggest otherwise.

Moreover, the only way to recognize quota value for exempt quota holders is to preserve exempt quota. A federal agency “literally has no power to act . . . unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). An agency “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Therefore, “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

In light of the express language of the 1996 Farm Bill, the amendments in the 2014 Farm Bill that maintained the “quota value” language, and the Conference Report direction to “recognize the longstanding quota system,” a California FMMO cannot be promulgated without recognizing both regular and exempt quota as part of the “longstanding quota system.” (See Exs. 150-151.)

B. Failing to Preserve Exempt Quota Constitutes an Unconstitutional Taking Under the Fifth Amendment

The Takings Clause of the Fifth Amendment of the United States Constitution states that “private property (shall not) be taken for public use, without just compensation.” The purpose of the Takings Clause is to prevent “Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978). The protections of the Takings Clause apply to real property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); personal property, *see Andrus v. Allard*, 444 U.S. 51, 65 (1979); and intangible property, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984).

As is discussed above, exempt quota is personal property, owned by the producers of each CPHA member. If the Secretary were to issue a final California FMMO that did not recognize the value of exempt quota, it would effect a taking to the CPHA members who hold exempt quota. “That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.” *Ruckelshaus*, 467 U.S. at 1003.

Here, California law expressly protects the value of quota as a property right. (Hearing Tr. 1782:4-21.) For example, California Agricultural Code § 62716(e) precludes diminishment of quota: “(a)ll pool quotas initially determined pursuant to Section 62707 shall be recognized and shall not be in any way diminished.” The Code further prevents downward adjustment of quota: “There shall be no downward adjustment of pool quota below the quota initially established pursuant to this chapter.” Cal. Agric. Code § 62707. Wiping out the considerable value of exempt quota would therefore constitute an impermissible taking in violation of the

United States Constitution. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015) (finding regulations promulgated under Agricultural Marketing Act constituted impermissible taking).

CONCLUSION

In order to give effect to the direction provided by the Farm Bill and corresponding conference, in promulgating a California FMMO the Secretary should preserve the quota system, both regular and exempt quota together. All of the justifications that pertain to preserving regular quota apply equally to the preservation of exempt quota.

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Respectfully submitted,



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