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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AO Docket No. 15-0071
Milk in California) AMS-DA-14-0095
)

ORDER RATIFYING ALJ CLIFTON'S INSTRUCTIONS AND RULINGS AND
REVISING ALJ CLIFTON'S CERTIFICATION OF TRANSCRIPT

On February 5, 2015, the Agricultural Marketing Service, United States Department of Agriculture [AMS], received a proposal from three dairy cooperatives to conduct a hearing to promulgate a federal milk marketing order to regulate the handling of milk in California. AMS received additional proposals in April 2015. In response to these proposals, AMS published a notice of public hearing on a proposed rulemaking to add a federal milk marketing order to regulate the handling of milk in California (80 Fed. Reg. 47210 (Aug. 6, 2015)). During the period September 22, 2015, through November 18, 2015, AMS conducted a forty-day hearing over which Administrative Law Judge Jill S. Clifton [ALJ Clifton] presided. After the conclusion of the hearing, AMS reviewed the record and post-hearing briefs and published a proposed rule entitled "Milk in California; Recommended Decision and Opportunity to File Written Exceptions on Proposals to Establish a Federal Milk Marketing Order" (82 Fed. Reg. 10634 (Feb. 14, 2017)).

On November 29, 2017, the Solicitor General of the United States submitted a brief to the Supreme Court of the United States in *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (per curiam), *cert. granted*, No. 17-130 (U.S. Jan. 12, 2018), in which the Solicitor

General took the position that administrative law judges are inferior officers of the United States, subject to the Appointments Clause of Article II of the Constitution of the United States. The Solicitor General urged the Court to grant a writ of certiorari and resolve a split in circuit courts concerning the constitutional requirements for administrative law judge appointments. On January 12, 2018, the Court granted certiorari.

At the time of the proposed rulemaking hearing over which ALJ Clifton presided, USDA believed ALJ Clifton to be an employee of USDA and properly appointed as an administrative law judge in accordance with agency procedures. However, if the Supreme Court of the United States determines administrative law judges are inferior officers of the United States rather than employees, ALJ Clifton's original appointment as an administrative law judge would be brought into question.

To put to rest any Appointments Clause challenge to this proceeding, the Secretary of Agriculture instructed that I¹ review ALJ Clifton's actions in this proceeding, determine whether to ratify or revise in any respect ALJ Clifton's actions, and issue an order setting forth a determination regarding ratification of ALJ Clifton's actions.² Pursuant to the Secretary of Agriculture's instructions, I conducted an independent de novo review of ALJ Clifton's actions in this proceeding. Except as discussed below with respect to ALJ Clifton's March 3, 2016 Certification of Transcript, I hereby ratify all ALJ Clifton's actions, including instructions regarding corrections to exhibits, rulings on objections, rulings on the admission of evidence, rulings on the conduct of the hearing, and rulings on requests for corrections to

¹ In January 1996, former Secretary of Agriculture Daniel R. Glickman appointed me as an inferior officer of USDA, as required by the Appointments Clause of the Constitution of the United States. Secretary of Agriculture Sonny Perdue recognized and reaffirmed my appointment on June 6, 2017 (Attach. 1).

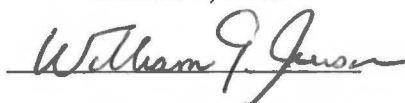
² Attach. 2.

the transcript of the hearing. I also ratify ALJ Clifton's Certification of Transcript, except that I revise the list of exhibits that ALJ Clifton identified as not having been admitted into evidence (Certification of Transcript at 3) by adding "Exhibit 108-Exhibit D" to that list.³

The Hearing Clerk, Office of Administrative Law Judges, USDA, shall serve each party to this proceeding with a copy of this Order Ratifying ALJ Clifton's Instructions and Rulings and Revising ALJ Clifton's Certification of Transcript.

Done at Washington, DC

March 9, 2018

A handwritten signature in black ink, appearing to read "William G. Jenson", written over a horizontal line.

William G. Jenson
Judicial Officer

³ ALJ Clifton explicitly rejected the admission into evidence of Exhibit 108-Exhibit D (Tr. 4858-61) but did not identify Exhibit 108-Exhibit D in the Certification of Transcript as an exhibit that was not admitted into evidence.



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

Appointment of William G. Jenson as Judicial Officer

I, Sonny Perdue, as the Secretary of Agriculture and pursuant to the Act of April 4, 1940, as amended (7 U.S.C. § 450c – 450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. app), on this day do hereby reappoint William G. Jenson the Judicial Officer for the United States Department of Agriculture, and recognize and reaffirm the 1996, appointment made by then Secretary of Agriculture Daniel R. Glickman of William G. Jenson as the Judicial Officer.

Signed this 6th day of June 2017, in Washington, D.C.

A handwritten signature in cursive script that reads "Sonny Perdue".

SONNY PERDUE
Secretary



DEPARTMENT OF AGRICULTURE


OFFICE OF THE SECRETARY

WASHINGTON, O.C. 20250

MEMORANDUM

DATE: February 14, 2018 **FEB 14 2018**

TO: William Jenson
Judicial Officer

FROM: Sonny Perdue
Secretary of Agriculture 

SUBJECT: Appointment to Serve as Judge in Formal Rulemaking Proceedings

Effective today, I am appointing you to serve as the judge presiding over the formal rulemaking proceedings for the Federal Milk Marketing Order for California. Specifically, you are to conduct an independent de novo review of the hearing record and either ratify or modify any decision or ruling made by Administrative Law Judge Jill Clifton. You are authorized to exercise the powers and duties of a judge under the rules of practice and procedures applicable to the proceedings. You will issue an order upon completion of the reconsideration ordered above and set forth a determination regarding ratification.

CERTIFICATE OF SERVICE

Milk in California, Petitioner

Docket: 15-0071

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the ORDER RATIFYING ALJ CLIFTON'S INSTRUCTIONS AND RULING AND REVISING ALJ CLIFTON'S CERTIFICATION OF TRANSCRIPT has been furnished and was served upon the following parties on March 9, 2018 by the following:

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Respectfully Submitted,



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