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Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon;

Order on Remand Clarifying Procedures Under Order Nos. 473 and 473-A

On April 30, 1990, the United States Court of Appeals for the Tenth Circuit issued its decision in *Phillips Petroleum Co., et al. v. FERC*, 902 F.2d 795, affirming in part and remanding in part for clarification Commission Order Nos. 473¹ and 473-A.² These orders established protest procedures whereby interstate pipelines or their customers could contest whether express contractual authority existed for the payment to producers of NCPA section 110 generic delivery (gathering) and compression allowances authorized by the Commission.³ This order implements the court's decision.

As a part of the protest procedures established in Order Nos. 473 and 473-A, the Commission adopted the presumption that the existence of an area rate clause in the parties' contract is sufficient to authorize the producer to collect a delivery allowance, but is insufficient to authorize the collection of a compression allowance. A hearing was provided for in those instances where a pipeline or third party disputed the producer's right to collect a delivery allowance or a producer claimed the right to collect a compression allowance. The order also provided that express contractual authorization was required for a producer to collect

interest on "that portion of the amount due but not yet collected * * * 18 CFR 271.1104(e)(2).

In *Phillips*, the court generally affirmed Order Nos. 473 and 473-A but remanded the orders for clarification on two points. First, the court directed the Commission to make clear that the presumption concerning the effect of an area rate clause had no applicability outside of the protest procedure. The court was concerned that absent a protest the Commission would rule on a particular claim for compression costs in accordance with the presumption, *viz.*, a producer with an area rate clause in its contract would be entitled to collect a delivery allowance but would not be permitted to collect a compression allowance. The court held that this result would render the rule substantive rather than procedural in nature and would be inconsistent with the governing principle that the intent of the contracting parties is controlling. *Phillips*, 902 F.2d at 801-802. Under the clarification of procedures mandated by the court, a producer with an area rate clause is entitled to collect a compression allowance in all cases where there is no protest to its claim.

The court also directed the Commission to clarify (1) that in the event a protest is filed and the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption is eliminated from the analysis, and (2) that in making specific determinations of intent in the protest proceeding, the Commission is obligated to take account of and follow any differences with general contract law that state contract law may require. Finally, the court instructed the Commission to clarify that its "requirement for express contract authority for interest in Orders 473 and 473-A applies only to 'retroactive' allowances as stated in 18 CFR 271.1104(e) and not to non-retroactive late paid or unpaid production-related cost allowances." 902 F.2d at 805.

Accordingly, the Commission clarifies that a producer with an area rate clause is entitled to collect a compression allowance in all cases where there is no protest to its claims. In the event of a protest, specific determinations of intent will be governed by the procedures set forth above. Further, the requirement for express contract authority for interest as stated in 18 CFR 271.1104(e) is clarified as set forth above.

The Commission orders: The provisions of Order Nos. 473 and 473-A are clarified in accordance with the terms of this order.

By the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 90-26884 Filed 11-14-90; 8:45 am]

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DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[T.D. AFT 304; Ref: Notice No. 703]

RIN 1512-AA07

Mt. Harlan, CA (89F-39P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Treasury decision, final rule.

SUMMARY: This final rule establishes a viticultural area located entirely within San Benito County, California to be known as "Mt. Harlan." This final rule is based on a notice of proposed rulemaking published in the *Federal Register* on June 5, 1990, at 55 FR 22925, Notice No. 703. ATF believes that the establishment of viticultural areas and the subsequent use of viticultural area names as appellations of origin in wine labeling and advertising will help consumers identify the wines they may purchase. The establishment of viticultural areas also allows wineries to specify further the origin of wines they offer for sale to the public.

EFFECTIVE DATES: December 17, 1990.

FOR FURTHER INFORMATION CONTACT: David W. Brokaw, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, Ariel Rios Federal Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20226, (202) 566-7626.

SUPPLEMENTARY INFORMATION:

Background

On October 2, 1979, ATF published Treasury Decision ATF-60 (44 FR 56692) which added a new part 9 to 27 CFR, providing for the listing of approved American viticultural areas, the names of which may be used as appellations of origin. Section 4.25a(e)(1), title 27, CFR defines an American viticultural area as a delimited grape-growing region which has been delineated in subpart C of part 9.

Section 4.25a(e)(2), title 27, CFR, outlines the procedure for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area. The petition should include:

¹ 32 Fed. Reg. 21,660 (June 9, 1987); III FERC Stats. and Regs. ¶ 30,747 (1987).

² 53 Fed. Reg. 15 (Jan. 4, 1988); III FERC Stats. and Regs. ¶ 30,768 (1988).

³ See Order No. 94-A, Final Rule and Order on Rehearing of Order No. 94, 48 Fed. Reg. 5152 (Feb. 3, 1983); FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,419 (1983), *reh'g denied*, Order No. 94-C 48 Fed. Reg. 24,039 (May 31, 1983); FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,454 (codified at 18 CFR 271.1100-271.1104) (1983).

(a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;

(b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;

(c) Evidence relating to the geographical characteristics (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;

(d) A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and

(e) A copy of the appropriate U.S.G.S. map(s) with the proposed boundaries prominently marked.

Petition

ATF received a petition proposing a viticultural area to be known as Mt. Harlan. Mt. Harlan has a prominent 3,274 foot peak, and is in the upper elevations of the Gabilan (also known as Gavilan) Mountain Range. The Gabilan Range is a short mountain range, the watershed of which serves as the boundary line between San Benito and Monterey counties.

The Mt. Harlan viticultural area lies inland, approximately twenty-five miles east of Monterey Bay and nine miles south of the city of Hollister. The eastern border of the Mt. Harlan viticultural area nearly abuts the approved viticultural areas of "Cienega Valley," "Lime Kiln Valley" and "San Benito," but is included in none. The combined effects that unique soil composition, elevation and microclimate have upon the production of grapes grown in the Mt. Harlan viticultural area distinguish it from the other viticultural areas in San Benito County which are at lower elevations.

The Mt. Harlan viticultural area consists of approximately 7,440 acres and measures six miles at its widest point east-west and three miles north-south. Total vineyard acreage at this time consists of 44 acres with plans to establish more than 100 additional acres. Both the planned and current vineyards are planted at an elevation of around 2,200 feet, distinguishing them from any other vineyards in San Benito County.

1. Evidence That the Name of the Area is Locally or Nationally Known

A. Historical Name Recognition and Usage

"Mt. Harlan" is named for Ulysses Grant Harlan, a rancher who settled in the northwestern region of San Benito County between 1860 and 1880. A map produced by the Department of the Interior in 1884 shows the location of two homesites for U.G. Harlan in this area: "Harlan's Cabin" in section 28, Township 14 South, Range 5 East; and "Harlan's Upper Cabin", in section 23 of the same township and range. The Harlan family was well established in the area by 1884. There are direct descendants of Ulysses Grant Harlan in the area to this day.

B. Current Name Recognition and Usage

Because of its prominence, Mt. Harlan is firmly fixed as a place name and landmark, and is currently recognized and referred to as a distinct region of San Benito County. The California Department of Forestry, the California Department of Fish and Game, and the United States Geological Survey Division of the Department of the Interior, all use Mt. Harlan to pinpoint areas of interest respective to their department's particular needs. The name is also used to identify the area surrounding the summit.

It was the size of Mt. Harlan in relation to the surrounding features in this area of the county which led the United States Geographical Survey ("U.S.G.S.") to name the 7.5 minute topographic map quadrangle of this region, "Mt. Harlan." U.S.G.S. states on its field report name sheet that the name Harlan, as attached to the mountain, has been in local usage for over sixty years. This fact is corroborated by the appearance of Mt. Harlan on a map of California produced in 1928.

The U.S.G.S. map also uses the Harlan name for physical features other than the mountain. Harlan Creek flows from the area south of Mt. Harlan to Grass Valley in the north. Harlan Mountain Road connects the area west of the summit with the area known as Lime Kiln, a low-lying area to the east. Local residents are familiar with both Harlan Mountain Road and Harlan Creek.

2. Historical or Current Evidence for the Boundaries of the Viticultural Area

The petitioner submitted two U.S.G.S. Quadrangle (7.5 Minute Series) maps titled "Mt. Harlan" and "Paicines."

The peak of Mt. Harlan is in the center of the viticultural area. The western boundary is the ridge top which serves as the dividing line between

Monterey and San Benito Counties and also the watershed division. The boundary also follows, in part, two drainage channels: Thompson Creek to the south and Pescadero Creek to the west. The 1,800 foot contour defines the remainder of the viticultural area.

The preponderance of geological, geographical, historical, and contemporary evidence supports the boundaries herein established.

3. Evidence Relating to the Geographic Features (Climate, Soil, Elevation, Physical Features, etc.)

A. Climate; Elevation; Aspect

The vineyards around Mt. Harlan are located at an elevation of around 2,200 feet where special microclimatic conditions exist. The Mt. Harlan viticultural area is distinguished from the lower elevations and valley floor by (1) cooler temperatures, (2) less incidence of fog, and (3) higher rainfall with less danger of frost as a result of differing air drainage on upland and lowland areas.

According to the *Soil Survey of San Benito County (hereafter, Soil Survey)*, the average annual temperature within the Mt. Harlan viticultural area is between 56 and 60 degrees F. This contrasts with the warmer average annual temperatures of Lime Kiln and Cienega Valleys to the northeast (60-62 degrees F.).

This dissimilarity in temperature translates into differing maturation periods for mountain grapes and valley grapes. In the mountains, the cooler temperatures retard the ripening of the grapes. Therefore, more time is required for the grapes to reach acceptable sugar levels. The warmer temperatures of the valley floor allow the varieties planted there to ripen earlier. Generally, harvest will occur two to four weeks later in Mt. Harlan than in Lime Kiln and Cienega Valleys. This difference in harvest dates further distinguishes the Mt. Harlan viticultural area from its immediate neighbors to the east.

Fog also plays a major role in distinguishing the Mt. Harlan viticultural area. Because of the higher elevations at Mt. Harlan, fog is not nearly so prevalent as it is in Cienega and Lime Kiln Valleys. As the air over the California Central Valley heats each morning, it rises, creating a suction effect that pulls the moist Pacific Ocean air inland. The Gabilan Range acts as a natural barrier to this eastward flowing cool air, keeping the cooling, moist breezes west of the valley areas. Yet the Pacific air from Monterey Bay flows into the interior through Chittenden Pass and

Pacheco Pass, bringing the effects of fog and moist air through San Benito County and into the Central Valley.

As the fog enters Cienega and Lime Kiln Valleys it may often reach the 1,400 foot elevation. At the same time that vineyards in Cienega and Lime Kiln Valleys are blanketed under fog, the vineyards on Mt. Harlan are exposed to full sun. When the fog occasionally does reach the mountain vineyards, it burns off early in the morning, sometimes a full two hours ahead of the valley. The result is more hours of sunlight on Mt. Harlan than in the valleys.

Rainfall also distinguishes the Mt. Harlan viticultural area from the neighboring viticultural areas. The disparity in rainfall between Cienega/Lime Kiln Valleys (average 16 inches annually) and Mt. Harlan (35 to 40 inches annually) is a major point of distinction.

B. Soils; Geology

In Lime Kiln Valley and in Cienega Valley the dominant soil series comprising the vineyards is the Hanford series. The Soil Survey characterizes this series as lowland soils which are "nearly level to sloping" and as "occurring on flood plains and fans." They occur primarily in the larger valleys. According to the Soil Survey, bedrock or hardpan is always reached at depths greater than five feet. The average depth of these soils is 70 inches. The available water holding capacity ranges from 7.5 to 8.5 inches per representative soil profile. Because they are lowland soils, they exhibit very slow runoff and only slight to moderate erosion potential. In contrast to the lowland soils which are present in Lime Kiln Valley and Cienega Valley, upland soils of the Sheridan series comprise nearly 70% of the soils in the Mt. Harlan viticultural area. These are mountainous soils which, as noted in the Soil Survey, occur west of Cienega Road and northwest of Lime Kiln Road. Bedrock or hardpan may be reached in as little as 1.5 feet from the surface. The average soil depth is 3.5 feet. The runoff is rapid, a natural result of the slope and elevation of the area (anywhere from 15%-75% slope). Therefore, the available water holding capacity ranges from two to seven inches per representative profile. Concomitantly, the erosion potential is severe to very severe.

Associated with the Sheridan soils are the Cienega and Auberry series which together make up the remaining 30% of the soils in the Mt. Harlan viticultural area. Both associated series are upland soils with similar slope to the Sheridan series (15%-75%). All three soil series

exhibit similar erosion potential and available water holding capacity.

In addition to the uniformity of its soil characteristics, Mt. Harlan contains an important and distinguishing geological feature—the presence of limestone. In discussing the Cienega soils series, the Soil Survey, notes that there "are a few small areas of limestone * * * in the mountains to the west of Cienega Road." In addition, the soil Survey notes that within the Sheridan series are "areas of soils underlain by limestone." A special report issued by the California Division of Mines corroborates the findings of the soil survey. "Limestone deposits of different sizes are found in the Mt. Harlan vicinity of Cienega Valley between Pescadero Canyon and McPhails Peak." These citations place outcroppings of limestone within the Mt. Harlan viticultural area and not within Cienega Valley or Lime Kiln Valley in which the soils overlie a bedrock of limestone and dolomite.

Notice of Proposed Rulemaking

On June 5, 1990, Notice No. 703 was published in the **Federal Register** with a 45-day comment period. In that notice, ATF requested comments regarding the proposal to establish Mt. Harlan as an American viticultural area. ATF was particularly interested in comments concerning the eastern border of the proposed area which follows the 1,800-foot contour line. This border nearly abuts the Lime Kiln and Cienega Valley viticultural areas which have their border on the 1,400-foot contour line. In Notice No. 703, ATF stated its understanding that there are no vineyards or grape growing in the 400-foot gap between the three areas. ATF requested comments on whether the eastern boundary of the Mt. Harlan viticultural area should meet the western boundary of the Lime Kiln and Cienega Valley viticultural areas.

During the 45-day comment period, no comments were received. ATF believes the eastern boundary of the Mt. Harlan viticultural area should follow the 1,800 foot contour line.

Miscellaneous

ATF does not wish to give the impression by approving "Mt. Harlan" as a viticultural area that it is approving or endorsing the quality of the wine derived from this area. ATF is approving this area as being distinct and not better than other areas. By approving this viticultural area, wine producers are allowed to claim a distinction on labels and advertisements as to the origin of the grapes.

Any commercial advantage gained can only come from consumer acceptance of wines from "Mt Harlan."

Regulatory Flexibility Act

It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required because the final rule is not expected (1) to have secondary, or incidental effects on a substantial number of small entities; or (2) to impose, or otherwise cause a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Executive Order 12291

It has been determined that this document is not a major regulation as defined in E.O. 12291 and a regulatory impact analysis is not required because it will not have an annual effect on the economy of \$100 million or more; it will not result in a major increase in costs or prices for consumers, individual, Federal, State, or local government agencies or geographical regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Public Law 96-511, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there is no requirement to collect information.

Drafting Information

The principal author of this document is David W. Brokaw, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Consumer protection, Viticultural areas, Wine.

Authority And Issuance

27 CFR part 9, American Viticultural Areas, is amended as follows:

PART 9—[AMENDED]

Paragraph 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Par. 2. The table of contents in 27 CFR part 9, subpart C, is amended to add the title of § 9.131 to read as follows:

Subpart C—Approved American Viticultural Areas

Sec.

§ 9.131 Mt. Harlan.

Par. 3. Subpart C is amended by adding § 9.131 to read as follows:

Subpart C—Approved American Viticultural Areas

§ 9.131 Mt. Harlan.

(a) *Name.* The name of the viticultural area described in this section is "Mt. Harlan."

Approved Maps. The appropriate maps for determining the boundaries of the "Mt. Harlan" viticultural area are two U.S.G.S. Quadrangle (7.5 Minute Series) maps. They are titled:

(1) Mt. Harlan, California (Photorevised (1984)).

(2) Paicines, California (Photorevised (1984)).

(c) *Boundaries.* (1) The point of beginning is the unnamed 3,063' peak on the county line between San Benito and Monterey Counties in Township 14 S., Range 5 E., Section 34 of the "Mt. Harlan," California Quadrangle map.

(2) From the point of beginning on the Mt. Harlan Quadrangle map proceed in a generally northwesterly direction along the county line through Sections 34 and 33, briefly into Section 28 and back through Section 33, and then through Sections 32, 29, and 30 all in Township 14 S., Range 5 E., to the point at which the county line intersects the line between Sections 30 and 19 of said Township and Range.

(3) Thence proceed in a straight line northeast approximately 750 feet to the commencement of the westernmost stream leading into Pescadero Creek. The stream commences in the southwest corner of Section 19 in Township 14 S., Range 5 E.

(4) Thence following the stream in a northeasterly direction to its intersection with the 1,800-foot contour line near the center of Section 19 in Township 14 S., Range 5 E.

(5) Thence following the 1,800' contour line in a southeasterly and then northeasterly direction through Sections 19, 20, 17, 16, 15, 14, then through the area north of Section 14, then southerly through Section 13 on the Mt. Harlan Quadrangle map and continuing on the "Paicines," California Quadrangle map to the point at which the 1800-foot contour line intersects the line between

Sections 13 and 24 of Township 14 S., Range 5 E.

(6) Thence along the 1,800' contour line through Section 24, back up through Section 13, and then in a southerly direction through Sections 18, 19, and 30 (all on the Paicines Quadrangle map), then westerly through Section 25 on the Paicines Quadrangle map and continuing on the Mt. Harlan Quadrangle map, and then through Section 26 to the point of intersection of said 1,800' contour and Thompson Creek near the center of Section 26 in Township 14 S., Range 5 E., on the Mt. Harlan Quadrangle map.

(7) Thence southwesterly along Thompson Creek to its commencement in the northwest corner of Section 34, Township 14 S., Range 5 E.

(8) Thence in a straight line to the beginning point.

Signed: October 10, 1990.

Daniel R. Black,
Acting Director.

Approved: October 19, 1990.

Dennis M. O'Connell,
Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 90-26890 Filed 11-14-90; 8:45 am]

BILLING CODE 4810-31-M

27 CFR Part 9

[T.D. ATF-305 Re; Notice No. 705]

RIN 1512-AA07

Establishment of San Ysidro District, Viticultural Area (89F018P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

ACTION: Treasury decision; Final rule.

SUMMARY: This final rule establishes a viticultural area in Santa Clara County, California, to be known as "San Ysidro District." This final rule is based on a notice of proposed rulemaking published in the *Federal Register* on July 5, 1990, at 55 FR 27652, Notice No. 705. ATF believes the establishment of viticultural areas and the subsequent use of viticultural area names in wine labeling and advertising will allow wineries to designate the specific grape-growing area in which the grapes used in their wines were grown and will enable consumers to better identify wines they purchase.

EFFECTIVE DATE: December 17, 1990.

FOR FURTHER INFORMATION CONTACT: Marjorie Dundas, Wine and Beer Branch, Ariel Rios Federal Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20226 (202) 566-7626.

SUPPLEMENTARY INFORMATION:

Background

On October 2, 1979, ATF published Treasury Decision ATF-60 (44 FR 56692) which added to title 27 a new part 9 for the listing of approved American viticultural areas. Section 4.25a(e)(1) of 27 CFR defines an American viticultural area as a delimited grape-growing region distinguishable by geographic features, the boundaries of which have been delineated in subpart C of part 9. Section 4.25a(e)(2) outlines the procedure for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area. The petition shall include:

(a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;

(b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;

(c) Evidence relating to the geographical features (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;

(d) A description of the specific boundaries of the proposed viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and,

(e) A copy of the appropriate U.S.G.S. map(s) with the proposed boundaries prominently marked.

Petition

ATF initially received a petition from Mr. Barry Jackson of Harmony Wine Co. proposing, on behalf of the owners of the Mistral Vineyard and the San Ysidro Vineyard, the establishment of a viticultural area in Santa Clara County, California, to be known as "San Ysidro." The petitioner subsequently amended the petition to request that the name be changed to "San Ysidro District." The viticultural area is located in southern Santa Clara County, California, about four miles east of the town of Gilroy. There are approximately 520 acres planted to winegrape varieties at the two commercial vineyards within the 2,340 acre area. The petitioner provided the following information as evidence that the area meets the regulatory criteria.

Evidence of Name

The petitioner provided documentation from various sources to support the name "San Ysidro." The