

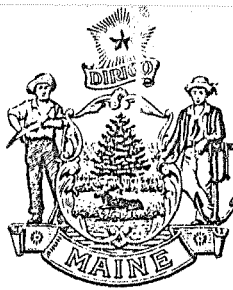
MAINE STATE LEGISLATURE

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79-104

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

April 27, 1979

Joseph Williams, Commissioner
Department of Agriculture
State Office Building
Augusta, Maine 04333

Re: Russet Marketing Order

Dear Commissioner Williams:

This is in response to your request dated April 12, 1979, for an opinion as to whether or not the Department of Agriculture may issue a marketing order confined to russet potatoes, and, if so, which producers can and should participate in the referendum regarding such marketing order. The Department may issue an order confined to one variety of potatoes, and the referendum may be limited to producers who grow that variety of potatoes.

The statutory authority for the Commissioner of the Department of Agriculture to issue a marketing order regulating the marketing of potatoes within the State of Maine reads as follows:

"The Commissioner shall administer and enforce sections 991 to 1006 and shall have and may exercise any or all of the administrative powers conferred upon the head of a department of the State. In order to effectuate the declared purposes of said sections, the Commissioner is authorized to issue, administer and enforce the marketing orders regulating the marketing of potatoes within the State.

"Whenever the Commissioner has reason to believe that the issuance of a marketing order will tend to effectuate the declared policy of sections 991 to 1006, he shall, in a manner consistent with the rule-making

provisions of the Maine Administrative Procedure Act, either upon his own motion or upon application of any producer or handler of potatoes, give due notice of and an opportunity for a public hearing upon a proposed marketing order. * * * " (Title 7 M.R.S.A. § 994, emphasis supplied)

The purposes of the Maine Potato Marketing Act are generally to correlate marketing, to provide for uniform grading and proper preparation of potatoes for market, to develop markets for potatoes grown within the State of Maine, to establish orderly marketing of potatoes, and to eliminate or reduce economic waste in marketing potatoes. See, Title 7 M.R.S.A. § 992.

The statute does not speak specifically to your question as to whether a potato marketing order issued pursuant to Title 7 M.R.S.A. § 994 may encompass only certain specified varieties of potatoes. The definition of "potato" provides that the term means, "all Irish potatoes grown within the State which retain the same physical form as possessed when harvested. . . ."^{1/} The enabling language of Title 7 M.R.S.A. § 994, quoted above, does not mention a marketing order for anything but "potatoes" as a general classification. Nevertheless, the term "variety" is defined and used in other sections of the statute, indicating that the legislature in enacting the statute as a whole contemplated the possibility of a more restricted marketing order. The term "varieties" is separately defined as including "all classifications or subdivisions of Irish potatoes according to those definitive characteristics now or hereafter recognized by the United States Department of Agriculture." See 7 M.R.S.A. § 993.15; compare, 7 M.R.S.A. § 993.9.^{2/}

The statute also provides that it will be the responsibility of the Potato Marketing Committee to recommend marketing policy and implementing regulations for "any or all varieties of table-stock or seed potatoes or both during any period." See 7 M.R.S.A. § 997.2.B (emphasis supplied); see also 7 M.R.S.A. § 997.3. These references would tend to indicate legislative contemplation of the possibility of a marketing order limited to a certain variety of potatoes.

^{1/} Chapter 600 of the Public Laws of 1971 amended the definition of "potatoes" cited herein to delete the words "varieties of" preceding Irish. However, it appears that this amendment was for the purpose of bringing the definition in § 994 into harmony with the definition of "potatoes" in the Potato Licensing Act, Title 7 M.R.S.A. § 1011, et seq., rather than for the purpose of eliminating any substantive significance of the use of the term "varieties" in the Potato Marketing Act.

^{2/} The USDA does not maintain a list of approved varieties. It has, however, recognized the characteristics of russett potatoes in its Potato Shipping Point Inspection Instructions. April 1978. ¶47.

A construction of § 994 which would allow a limited marketing order is further supported by reference to the federal statute concerning marketing orders and agreements upon which the Maine statute was based. See, generally, 7 U.S.C. § 608c, see also, Legislative Record, 1953, p. 1894, as to the basis of the State law in federal law.^{3/} The federal statute specifically provides that the Secretary of Agriculture may combine commodities to be covered by a marketing order and/or limit the order to certain varieties of commodities where he determines that the declared policy of the federal statute would be achieved thereby; Title 7 U.S.C. § 608c(2); see also, e.g., 7 C.F.R. § 950.13 defining "varieties" and 7 C.F.R. § 950.52(b)(1), (2), indicating different varietal requirements in former federal marketing order.

At the same time, there is considerable discretion in the Maine statute for the Commissioner to determine the efficiency of a marketing order. See 7 M.R.S.A. § 994; see also State v. Fin and Feather Club, 316 A.2d 351 (Me., 1974), as to the scope of administrative authority. Accordingly, should you find it in the best interests of the industry, consistent with the purposes provided in Title 7 M.R.S.A. § 992, to issue a marketing order limited to russets, it appears that you have the authority to do so.

Assuming that you should find it in the best interest of the potato industry to issue such a marketing order, the procedure is set out by statute. You must first issue a proposed order in the manner provided in Title 7 M.R.S.A. § 994. This section incorporates the provisions of the Maine Administrative Procedure Act concerning notice and opportunity for hearing. Accordingly, you must provide notice and opportunity for public hearing as indicated by Title 5 M.R.S.A. § 8052 and § 8053. The marketing order proposed by you must include (in addition to substantive provisions contemplated by § 994) the proposed membership for the Potato Marketing Committee, as defined by Title 7 M.R.S.A. § 995.^{4/}

3/ Aside from the reference to the federal statute, the Maine Legislative Record provides no further information regarding a marketing order limited to a certain variety of potatoes.

4/ Section 995 provides for a certain selection procedure for the Committee. However, the selection procedure apparently contemplates an existing committee responsible for nomination for a committee for the succeeding fiscal year. In the present situation where there is no existing committee capable of providing nominations in the manner specified in Title 7 M.R.S.A. § 995.4, it would appear appropriate for you to either state the proposed committee in the marketing order, or to the extent you believe it feasible and desirable, to solicit nominations in a manner analogous to that provided in § 995.

Based upon information which you receive after notice and opportunity for hearing, you may issue the proposed marketing order on such terms and conditions as you believe will effectuate the policies of the Maine Potato Marketing Act. The order, however, will not become effective until such time as it is approved by the producers consistent with the provisions of Title 7 M.R.S.A. § 994.1. This section provides that:

"No marketing order or amendment thereto issued pursuant to sections 991 to 1006 shall become effective unless and until the commissioner determines that the issuance of such order is approved and favored by at least 2/3 of the producers who participated in a referendum on the question of its approval and who, during the preceding fiscal year, have been engaged in the production of potatoes for market within the production area specified in such marketing order, and who, during such year, have produced at least 2/3 of the volume of potatoes produced for market within such production area specified herein by all producers who participated in the said referendum."

The term "producer" is defined by Title 7 M.R.S.A. § 993.11 to mean "any person engaged in the production of potatoes for market." You have indicated that a marketing order limited to russets would not affect producers of other potatoes. With this fact in mind, the preceding analysis would indicate that it is not necessary that all producers (regardless of variety) participate in the referendum. The Legislature explicitly contemplated that only those who were within a certain area to be covered by the marketing order would participate. See, e.g., § 994.1. By analogy, it seems appropriate that only those who produce the variety of potatoes to be governed should participate. As discussed above, the Legislature's intent in this matter was simply to provide a mechanism for the potato industry to regulate the marketing of potatoes where the industry so desired. Since the proposed order will only cover those persons growing russet potatoes, it appears consistent with the legislative intent that only russet producers participate in the referendum.^{5/}

^{5/} For a general indication of the legislative intent in this matter, see, e.g., Legislative Record 1953, p. 1781, testimony of Senator Fuller; p. 1898, testimony of Representative Lovely, indicating the significance of the referendum provisions for self-regulation.

In this regard, for the order to become effective, the referendum must indicate approval by a certain stated percentage of russet producers. To comply with the provisions of Title 7 M.R.S.A. § 994.1, it will be necessary for producers to vote by name and by indication of the acreage and volume of russet potatoes grown during the preceding fiscal year in order that compliance with required percentages be ascertainable. Although § 994.1 is rather ambiguous as to the numbers and combination of approvals required, it appears that an affirmative vote of 2/3 of the number of producers voting will be required. The approval must include producers representing 2/3 of the producers of russet potatoes for the preceding fiscal year. It must also represent 2/3 of the volume of russet potatoes produced during the preceding year by the number of producers voting. This latter requirement appears not to be for 2/3 of all volume of production, but 2/3 of volume produced by those persons participating in the referendum. (See, generally, P.L. 1963, c. 162).

I believe the preceding provides a general outline of the steps necessary for you to institute a marketing order for russet potatoes. If you should require further assistance in the drafting of such an order, please feel free to let me know.

Sincerely yours,



SARAH REDFIELD
Assistant Attorney General

SR/ec
cc: Edwin Plissey