

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE, et al.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, et al.,
Defendants.

1:09-cv-01790-OWW-SKO

MEMORANDUM DECISION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGEMENT (Docs. 14, 15)

I. INTRODUCTION.

Plaintiffs Marvin D. Horne, Laura R. Horne, and Raisin Valley Farms Marketing, LLC proceed with this action for declaratory and injunctive relief against the United States Department of Agriculture ("USDA"). (Doc. 2). Plaintiffs seek an order setting aside the USDA's denial of Plaintiffs' petition for rule-making.

The parties have filed cross-motions for summary judgment. (Docs. 14, 15). Plaintiffs filed opposition to USDA's motion for summary judgment on October 26, 2010. USDA filed a reply on November 15, 2010. (Doc. 17).

II. FACTUAL BACKGROUND.

USDA's Rules of Practice ("Rules of Practice") provide that a final order issued by the Secretary shall be filed with the hearing clerk, who shall serve it upon the parties. 7 C.F.R. § 900.66(b).

1 The Rules of Practice provide several methods for service:

2 Service shall be made either (1) by delivering a copy of
3 the document or paper to the individual to be served or
4 to a member of the partnership to be served or to the
5 president, secretary, or other executive officer or any
6 director of the corporation, organization, or association
7 to be served, or to the attorney or agent of record of
8 such individual, partnership, corporation, organization,
9 or association; or (2) by leaving a copy of the document
10 or paper at the principal office or place of business of
such individual, partnership, corporation, organization,
or association, or of his or its attorney or agent of
record; or (3) by registering and mailing a copy of the
document or paper, addressed to such individual,
partnership, corporation, organization, or association,
or to his or its attorney or agent of record, at his or
its last known principal office, place of business, or
residence.

11 7 C.F.R. § 900.69(b). The Rules do not provide for electronic
12 service.

13 Plaintiffs were the victims of a failed notice attempt
14 effected under section 900.69(b), and as a result, lost the ability
15 to challenge a decision adverse to them. *See Horne v. USDA*, 2008
16 U.S. Dist. LEXIS 95094 * 16 (E.D. Cal. Nov. 10, 2008) *aff'd*, 2010
17 U.S. App. LEXIS 19393 (9th Cir. Sept. 17, 2010). On or about
18 December 31, 2008, Plaintiffs filed a petition with USDA seeking,
19 *inter alia*, that USDA "engage in rule making to amend the Rules of
20 Practice located at 7 C.F.R. § 900.50 Et Seq [sic] to require
21 prompt notice, such as facsimile or e-mail, or even overnight
22 delivery" of decisions by the Administrative Law Judge or Judicial
23 Officer ("the Petition"). By letter dated September 18, 2009,
24 USDA's Agricultural Marketing Service denied the Petition.

25 **III. LEGAL STANDARD.**

26 Pursuant to 5 U.S.C. § 533(e), "[e]ach agency shall give an
27 interested person the right to petition for the issuance,
28 amendment, or repeal of a rule." As the Senate Judiciary Committee

1 noted in its report on the APA:

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3 the mere filing of a petition does not require an agency
4 to grant it, or to hold a hearing, or engage in any other
5 public rule making proceedings. The refusal of an agency
6 to grant the petition or to hold rule making proceedings,
7 therefore, would not per se be subject to judicial
8 reversal. However, the facts or considerations brought to
9 the attention of the agency by [a petition for rule-
10 making] might be such as to require the agency to act to
11 prevent the rule from continuing or becoming vulnerable
12 to judicial review.

13 *WWHT, Inc. v. Federal Communications Com.*, 656 F.2d 807, 813 (Ct.
14 App. D.C. 1981) (citing S. REP. NO. 752, 79th Cong., 1st Sess.
15 (1945), reprinted in LEGISLATIVE HISTORY, at 201-02 (1946)).

16 An Agency's denial of a petition for rule-making is subject to
17 judicial review, but such review is "extremely limited" and "highly
18 deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007)
19 (citing *National Customs Brokers & Forwarders Ass'n. v. United*
20 *States*, 883 F.2d 93, 96 (D.C. Cir. 1989)); see also *Preminger v.*
21 *Sec'y of Veterans Affairs*, 2011 U.S. App. LEXIS 1559 *16-17 (Ct.
22 App. Fed. Cir. 2011). Review is necessarily limited to the narrow
23 issues as defined by the denial of the petition for rule-making,
24 and does not extend to substantive review of the merits of the
25 policies implicated by the rule-making petition. See *id.*, see also
26 *Digiovanni v. FAA*, 249 Fed. Appx. 842, 843 (2nd Cir. 2007) (citing
27 *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834
28 F.2d 191, 196 (D.C. Cir. 1987)). For purposes of a challenge to
an agency's denial of a petition for rule-making, the
administrative record consists of the petition for rule-making,
comments pro and con where deemed appropriate, and the agency's
explanation of its decision to reject the petition. *WWHT*, 656 F.2d

1 at 817; *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 920 (D.C.
2 Cir. 2008) (same); see also *Action for Children's Television v.*
3 *FCC*, 564 F.2d 458, 472 n.24 (D.C. Cir. 1977) (in cases where the
4 agency has decided against promulgation of a rule, the scope of
5 review is very limited because the "record" will likely be a simple
6 statement of reasons for non-adoption).

7 The "arbitrary and capricious" standard set forth in section
8 706(2)(A) of the Administrative Procedure Act provides the
9 applicable standard of review for challenges to denial of rule-
10 making petitions, e.g. *Weight Watchers Int'l v. FTC*, 47 F.3d 990,
11 992 (9th Cir. 1994), but the standard is applied in an especially
12 deferential manner as a decision to deny a rule-making petition "is
13 essentially a legislative one," *WWHT*, 656 F.2d at 817; accord *EMR*
14 *Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) ("[a]s applied
15 to refusals to initiate rulemakings, this standard is 'at the high
16 end of the range' of deference" to the agency) (citations omitted);
17 *Brown v. Secretary of Health and Human Serv.*, 46 F.3d 102, 110 (1st
18 Cir. 1995) (agency's "refusal to institute rule-making 'is to be
19 overturned only in the rarest and most compelling of
20 circumstances.'"") (citations omitted). A reviewing court should do
21 no more than assure itself that the agency acted "in a manner
22 calculated to negate the dangers of arbitrariness and
23 irrationality" in denying a petition for rule-making. *WWHT*, 656
24 F.2d at 817.¹

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28 ¹ Plaintiffs do not allege that the USDA did not comply with relevant procedural
rules applicable to petitions for rule-making.

1 **IV. DISCUSSION.**

2 **A. Plaintiff's Motion for Summary Judgement**

3 The Petition is predicated on Plaintiffs' contention that the
4 Rules of Practice "have no provision for promptly and expeditiously
5 notifying Petitioners with various rulings," and that failure to
6 provide prompt notice is a denial of due process. (Complaint, Ex.
7 1, Petition for Rule-Making at ¶¶ 25, 27). The only evidence
8 presented in the Petition in support of Plaintiffs' request
9 consisted of a single instance in which Plaintiffs did not receive
10 timely notice because a decision that was sent to Plaintiffs'
11 counsel did not arrive until after the time to file for judicial
12 review had expired. (Complaint, Ex. 1, Petition for Rule-Making).

13 USDA denied Plaintiff's petition, finding that "procedures
14 under the applicable Rules of Practice are adequate to effectuate
15 service of department decisions and other legal documents."
16 (Complaint, Ex. 2). This finding was neither arbitrary nor
17 capricious in light of the scant evidence Plaintiffs presented to
18 show that the Rules of Practice are inadequate. Plaintiffs did not
19 present sufficient evidence of service failures to establish the
20 need for rule-making as the problem is exceptional and has not been
21 shown to be one that reoccurs.

22 In challenging an agency's denial of a petition for rule-
23 making, a party must establish that the agency's denial was
24 arbitrary and capricious in light of the facts and considerations
25 presented in the petition. See, e.g., *WWHT*, 656 F.2d at 817 (scope
26 of review limited to petition and decision). The Secretary of
27 Agriculture's record, which included a judicial decision confirming
28 the constitutional adequacy of the Rules of Practice in place,

1 establishes that it was reasonable to find that the current
2 procedures are adequate and to deny the Petition.

3 At oral argument, Plaintiffs' counsel argued it was
4 inappropriate for the USDA to rely on this court's decision in
5 denying the Petition. Plaintiffs' argument lacks merit, as the
6 Petition was based, in part, on Plaintiffs' contention that the
7 current Rules of Practice lead to due process violations.² The
8 record demonstrates that USDA received Plaintiff's petition,
9 considered it, and issued a reasoned written decision based on the
10 record before it. Plaintiffs' Petition did not contain sufficient
11 evidence to require USDA to change its notice procedures.
12 Plaintiffs motion for summary judgment is DENIED.

13 **B. USDA's Motion for Summary Judgment**

14 The factual record in this action is limited to the Petition
15 and the decision denying the Petition. Because, given state of the
16 record before the USDA, the court cannot say that denial of the
17 Petition was arbitrary and capricious, and because Plaintiffs
18 cannot adduce additional evidence in this court that was not raised
19 in the Petition, USDA's motion for summary judgment must be
20 GRANTED.

21 **ORDER**

22 For the reasons stated, IT IS ORDERED:

23 1) Plaintiffs' motion for summary judgment is DENIED;

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25 ² Had Plaintiffs produced sufficient evidence to establish that the Rules of
26 Practice create too great a risk of repeated failed notice attempts, reliance on
27 the court's decision may have been problematic. Based on the limited
28 administrative record, however, the court cannot say that USDA's finding was
arbitrary and capricious. Were a single anecdotal instance of injustice
sufficient to permit court intervention in administrative rule-making, the broad
discretion agencies enjoy in crafting appropriate policies and procedures would
be eviscerated.

1 2) USDA's motion for summary judgment is GRANTED; and
2 3) USDA shall lodge a form of order consistent with this
3 memorandum decision within five (5) days of electronic service
4 of this decision.

5 IT IS SO ORDERED.

6 **Dated: February 7, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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