BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE
STATE OF CALIFORNIA

In the Matter of the Public Hearing Regarding the Petition to Suspend Chapter 3.5 of the Food and Agricultural Code

OAH No. 2020020788

RECOMMENDED DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and telephone conference on June 9 and 10, 2020, in Sacramento, California.

Matthew J. Goldman and Linda Gandara, Deputy Attorneys General, represented the California Department of Food and Agriculture (Department).

Charles M. English, Jr., Attorney at Law, represented the Stop QIP Tax Coalition (Petitioners), a coalition of dairy producers.

Niall P. McCarthy, Attorney at Law, represented Save QIP, a coalition of dairy producers.

Megan Oliver Thompson, Attorney at Law, represented United Dairy Families of California (United Dairy Families), a coalition of dairy producers.

Evidence was received, the record was held open for the submission of written arguments, and the record closed and the matter was submitted for decision on June 26, 2020.

SUMMARY

Petitioners submitted a petition to suspend Chapter 3.5 of the Food and Agricultural Code[1] (Petition). They now seek a referendum vote on the Petition. Petitioners asserted that a referendum should be conducted pursuant to the procedures prescribed in Chapter 3.5. The primary issue in determining whether the Petition should proceed to a referendum is whether a referendum to suspend Chapter 3.5, including section 62757, must be conducted pursuant to the referendum procedures set forth in Chapter 3.5, as Petitioners argued, or under separate referendum procedures set forth in Chapter 3. This is significant, because a Chapter 3.5 referendum requires a simple majority vote to continue the operation of Chapter 3.5 (§ 62755), whereas a Chapter 3 referendum requires a supermajority vote (§ 62717).

The issue of whether the Petition is subject to the Chapter 3 or Chapter 3.5 referendum procedures is made more complicated by section 62757, which was added to Chapter 3.5 in 2017. Section 62757, subdivision (c), adopts the referendum procedures set forth in Chapter 3, which were enacted effective 1967, for the purpose of establishing a California milk pooling plan, including the Department's issuance of

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[1] All statutory references are to the Food and Agricultural Code, unless otherwise specified. References to "Chapter 3.5" means Chapter 3.5 of Division 21, Part 3 of the Food and Agricultural Code, which includes sections 62750 through 62757. References to "Chapter 3" means Chapter 3 of Division 21, Part 3 of the Food and Agricultural Code, which includes sections 62700 through 62731.

quota.[2] Sections 62716 and 62717 of Chapter 3, provide that the milk pooling plan and quota are subject to a referendum vote in which no less than 51 percent of eligible dairy farmers (producers) participate. As set forth in section 62717, the voting thresholds for a referendum to approve or terminate the milk pooling plan and quota are either (a) 65 percent of eligible producers who voted and who produce 51 percent or more of fluid milk in the state, or (b) 51 percent of eligible producers who voted and who produce 65 percent or more of the fluid milk in the state. Section 62757, subdivision (c), references the Chapter 3 referendum procedures as follows:

> The stand-alone quota program [QIP] shall be pursuant to a recommendation by the [producer] review board established pursuant to Section 62719 and approved by a statewide referendum of producers conducted pursuant to Sections 62716 and 62717.

Petitioners argued that the Chapter 3 referendum procedures referenced in section 62757 apply only to a referendum to establish a stand-alone quota program known as the Quota Implementation Plan (QIP), and not to a referendum to suspend or terminate it. Save QIP and United Dairy Families argued that the Chapter 3 referendum procedures apply equally to a referendum to establish or terminate the QIP. Their respective arguments are summarized in more detail below.

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[2] "Quota," as explained in the History of Milk Marketing and Quota section below, is essentially a certificate originally issued by the Department to dairy producers, since bought and sold among producers, which allows the quota holder to sell milk covered by quota for a higher price than milk not covered by quota.

A closely related issue is whether the Secretary of the Department (Secretary) is statutorily required to conduct a referendum on the Petition, and if not, whether the Secretary should do so. This question is answered here by resolving the primary issue of whether Chapter 3.5 referendum procedures, and the accompanying voting thresholds, apply to a suspension of Chapter 3.5, including section 62757, the QIP authorizing statute. For reasons discussed below, the law and evidence do not weigh in favor of Petitioners' argument that Chapter 3.5 referendum procedures apply to a suspension or termination of section 62757. The Petition is legally defective because it calls for the suspension of Chapter 3.5, including section 62757, based on Chapter 3.5 referendum procedures and voting thresholds. For this reason, and for all the reasons set forth herein, the Secretary is not required to conduct a referendum on the Petition, and should not do so.

FACTUAL FINDINGS

Jurisdiction and Procedural History

1. On January 29, 2020, Petitioners submitted the Petition to suspend Chapter 3.5. On February 18, 2020, the Department certified that over 25 percent of dairy producers had signed the Petition, thus qualifying for a public hearing on whether a dairy producer referendum should be held.

2. On May 8, 2020, the Department published formal notice of a public hearing to consider whether a referendum should be conducted regarding the immediate suspension of Chapter 3.5. On May 15, 2020, the Department issued hearing procedures including the call of the hearing, which quotes the first paragraph of the Petition. The call of the hearing states:

> The call of the hearing is dictated by the STOP QIP Petition as follows, "Immediately suspend[ ] California Food and Agriculture Code §§ 62570 to 62757 ("Chapter 3.5"). Suspension of Chapter 3.5 would be subject to the language of §§ 62751 and 62756 that provide for continuation of § 62756 if Chapter 3.5 is suspended. Suspension of Chapter 3.5 would also terminate the Quota Implementation Plan, also known as the Quota Administration Program. Any pooling plan adopted subsequent to the suspension of Chapter 3.5 would not be subject to the $0.195 pounds per solid fixed differential between quota and non-quota prices."
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> The Department seeks stakeholder and public comment on whether a producer referendum should be conducted pursuant to Chapter 3.5, specifically Food and Agricultural Code sections 62753-62755.

3. The hearing was conducted on June 9 and 10, 2020. Evidence and argument were presented by Petitioners, Save QIP, and United Dairy Families. Extensive public comment was received through written statements and sworn testimony.

History of California Milk Marketing and Quota

4. California has regulated milk sales from dairy producers to dairy handlers (a term for processors or dealers of milk who commonly purchase raw milk from producers and sell pasteurized milk and milk products) since the 1930s. The Young Act

of 1935 established a legal framework by which handlers paid producers minimum set prices for fluid milk based on the handler's end product. Class 1 dairy product (fluid milk) commanded the highest price. Handlers paid progressively lower prices for raw milk which was processed into non-fluid products, including Class 2 (yogurt and cottage cheese), Class 3 (ice cream and frozen dairy desserts), Class 4a (butter and dry milk powders), and Class 4b (cheese). Under this structure, producers of similar quality raw milk received significantly different prices depending on whether the handler utilized the raw milk to make Class 1, 2, 3, or 4 dairy products. This resulted in increased competition among dairy producers to obtain contracts with Class 1 handlers, which in turn led to handler practices that eroded producer revenues. This, and other factors, contributed to market instability in the late 1950s and early 1960s.

5. In 1967, the California Legislature passed the Gonsalves Milk Pooling Act, which is set forth in Chapter 3, sections 62700 through 62731. The stated purpose of the legislation is to "enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream . . . ." (§ 62702.) The legislation required, among other things, the Department to appoint producers and producer representatives to formulate a milk pooling plan and submit it to eligible milk producers for a referendum vote. The producers voted by referendum to approve the milk pooling plan, and it was implemented in 1969.

6. Under the milk pooling plan, instead of paying producers directly, handlers were required to pay minimum prices per class of dairy product into a "pool" fund. Producers were then paid from the pool on the basis of a poolwide blend price that reflected the poolwide utilization of all classes of dairy product. Under this pooling arrangement, producers with extensive Class 1 contracts would suffer a loss in

revenue because the poolwide blend price was lower than the price for Class 1 contracts.

7. To offset the revenue losses for Class 1 producers, a quota was included in the Gonsalves Milk Pooling Act as an integral component of the milk pooling plan. Producers were assigned a production base, and a producer quota was allocated based on their historical Class 1 sales. Milk produced in excess of a producer's base and quota allocations was termed overbase milk. Producers who hold quota are paid a higher amount for raw milk covered by quota than for milk not covered by quota (which includes "base" and "overbase" production). The quota premium was and is funded entirely by producers through a deduction from the marketwide pool before the overbase price is calculated. The total quota premium paid to quota holders is approximately $12 million per month. All Grade A California dairy farmers are required to participate in the milk pool, regardless of whether they own quota.

8. The Department has allocated additional quota since the initial allocations, but none since 1991. Producers are permitted to sell quota to other producers, and have done so many times such that ownership of quota is no longer tied to Class 1 production.

9. Prior to 1994, the price differential between the price for milk covered by quota and overbase production varied greatly month-to-month. In 1991, the Department appointed a committee of producers to receive comments throughout the state. The committee found, among other things, that producers of milk not covered by quota became concerned when the price differential became too broad, and that producers of milk covered by quota became concerned when the price differential became too narrow. After extensive review, the committee recommended a fixed rather than variable differential between quota milk and overbase milk.

10. In 1994, consistent with the committee's recommendation, the Legislature enacted Chapter 3.5, which established a fixed differential between quota and overbase milk prices in the amount of $0.195 per pound of solids-not-fat (equivalent to $1.70 per hundredweight). (§ 62750.) The Legislature also established that the fixed differential would remain in effect until such time that the producers may vote to suspend the operation of the chapter pursuant to the simple majority voting threshold set forth at section 62755[3], in which event the pooling plan in effect on December 31, 1993, including the variable differential, would again take effect. (§ 62756.)

11. In 2015, the three largest dairy producer cooperatives in California petitioned the U.S. Department of Agriculture (USDA) to implement a Federal Milk Marketing Order (FMMO) in California, which would transfer regulation of raw milk sales in California from state to federal jurisdiction. The USDA conducted an extensive promulgation hearing, including testimony from 98 witnesses over the course of 40 days. Dairy producer cooperative witnesses testified that the primary reason producers were seeking the establishment of an FMMO was to receive prices that reflect the national commodity values for all milk uses, and that they were not receiving full value

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[3] Though inexact, the term "simple majority" is used for convenience. Section 62755 of Chapter 3.5 provides that Chapter 3.5 shall be suspended pursuant to a referendum vote if at least 51 percent of eligible producers vote, and fewer than 51% of voters who produce 51 percent or more of the fluid milk produced in the state approve the continued operation of Chapter 3.5. Because an affirmative vote to continue operation of Chapter 3.5 requires at least a 51 percent vote, a 49.1 percent vote against continuation will result in suspension of the chapter.

for their raw milk under the then existing California pooling plan. The producers requested that any FMMO that would replace the California pooling plan include provisions for maintaining the California quota program.

12. Following the hearing, the USDA issued a decision recommending provisions for a California FMMO. The USDA recommendations included that the California quota program be allowed to operate independently of the FMMO, and that California's quota program "will not be diminished or disturbed in any form by California's entry into the FMMO system." (82 Fed. Reg. 10654 (Feb. 14, 2017).) Before the rulemaking process could be finalized, federal law required that the California FMMO be approved by a referendum vote of the state's dairy producers. (7 USC § 608c, subd. (9)(b).)

13. In a letter dated May 12, 2017, the Secretary notified the USDA that in response to the USDA's decision recommending a California FMMO, the Department was "ready and willing to establish a stand-alone, producer funded quota program." The Secretary also stated that the Department intended to sponsor California legislation to ensure the Department has the authority to establish and administer a stand-alone quota program, convene the Provider Review Board (PRB) to provide recommendations regarding the substance of a stand-alone quota program, and hold a producer referendum on the PRB's recommendations. The Secretary further stated that the Department's goal was to accomplish all of this prior to the producer referendum on the California FMMO.

14. In May 2017, the Department sponsored California legislation authorizing it to establish and administer a stand-alone quota program. Approximately one month later the legislation was signed into law, and codified at Chapter 3.5, section 62757. On May 30, 2017, the PRB convened its first of four public meetings for the purpose of

developing a recommendation outlining the criteria for a stand-alone producer funded quota program. All four meetings were open to the public, and comments were accepted at each meeting. At the final meeting in September 2017, the PRB voted to recommend its final draft of the stand-alone quota program to the Secretary in the form of the QIP. The Secretary then put the QIP to a referendum vote by producers. Among the eligible producers, 66 percent voted, and 87 percent of the voting producers voted to approve the QIP, satisfying the requirement for approval by a supermajority vote. (§ 62757, subd. (c), referencing §§ 62716 and 62717.)

15. The QIP includes two provisions (§§ 1101 and 1103) requiring that significant amendments or termination of the QIP require a producer referendum to be held in the same manner as required for its initial approval. As referenced above, a supermajority vote was required for approval of the QIP.

16. In June 2018, the eligible producers voted to approve the referendum conducted by the USDA on the recommended California FMMO. The California FMMO and the QIP became effective on November 1, 2018.

17. In December 2018 and March 2019, the PRB convened two public meetings to develop procedures regarding petitions for proposed changes or termination of the QIP. The PRB received public comment at both meetings, and submitted recommended procedures to the Secretary. The Secretary approved the procedures on April 3, 2019. Similar to sections 1101 and 1103 of the QIP, the procedures require that any referendum to substantively amend or terminate the QIP must be subject to a supermajority vote of eligible producers "in the same manner as provided for in its initial approval per Food and Agriculture Code 62717."

Testimony and Documentary Evidence

18. The parties and members of the public provided extensive testimony and documentation regarding the costs and benefits of quota. Dairy producers who do not own quota clearly experience substantial financial burdens as a result of the deductions to fund quota. Conversely, dairy producers who own quota very often depend upon the enhanced revenue as part of a well-developed business plan. The parties also presented testimony of experts who advanced competing conclusions regarding the costs and benefits of quota, and whether it continues to serve its original purpose. This evidence, though important and compelling, did not factor into this decision which is based primarily on statutory requirements for a referendum, as stated in the Analysis and Legal Conclusions section below.

Arguments

STOP QIP TAX COALITION

19. Petitioners argued that the primary issue is whether the hearing officer in this matter should apply the plain language of Chapter 3.5, sections 62751 through 62755, and recommend that the Secretary conduct a referendum on the Petition under Chapter 3.5. Petitioners advanced three primary arguments that the hearing officer should recommend a Chapter 3.5 referendum. First, the Secretary must or at least should order a referendum on the Petition. Second, the referendum should be conducted using the simple majority vote threshold pursuant to Chapter 3.5, and not the supermajority vote threshold under Chapter 3. Third, the QIP is economically disruptive and burdensome to the California dairy industry. These arguments are summarized below, and are fully set forth in Petitioners' pre-hearing statement and post-hearing brief which are part of the administrative record.

20. Petitioners argued that the plain language and structure of Chapter 3.5 require the Secretary to conduct a referendum following a petition hearing. Specifically, section 62753 states that the Secretary "shall establish a period of 60 days in which to conduct the referendum." The Legislature's use of the word "shall" results in a mandatory duty for the Secretary. Therefore, Petitioners contend, given that the hearing on the Petition was conducted in this matter on June 9 and 10, 2020, the Secretary is under a mandatory duty to conduct a referendum.

21. Alternatively, Petitioners argued, even if the Secretary is not required to conduct a referendum on the Petition, she should exercise her discretion to do so. First, dairy producers deserve the right to vote on whether to continue a program that re-allocates approximately $12 million per month among California Grade A dairy producers. Second, the fixed differential as implemented through the QIP no longer serves dairy policy purposes. Specifically, the fixed differential no longer works as intended because the Class I market shrank significantly, such that the value generated by the Class I market cannot support quota payments. Finally, the QIP no longer serves the purpose of providing a stable and adequate fluid milk supply, and serves only to redistribute revenues among dairy producers in a way that creates inequities favoring those who hold quota over those who do not.

22. Petitioners next argued that the plain language of Chapter 3.5 requires that the simple majority vote threshold set forth in Chapter 3.5 applies to any referendum vote to suspend the entire chapter, including the QIP authorization at section 62757. This is clear from the referendum ballot language, as set forth in section 62754, which states "shall Chapter 3.5 (commencing with Section 62750) . . . be continued in effect? Yes No." Section 62755 provides that following a referendum vote Chapter 3.5 shall remain in effect if not less than 51 percent of the eligible dairy

producers vote in the referendum, and 51 percent or more of the voters who also produce 51 percent or more of the fluid milk approve the continued operation of Chapter 3.5. If the producer vote is not favorable, the Secretary is required to declare Chapter 3.5 inoperative. This would include section 62757, which authorizes the Department to implement the QIP.

23. Petitioners also argued that while a supermajority referendum vote was required to approve the QIP, only a simple majority vote is required to suspend Chapter 3.5, including the QIP-authorizing statute. Section 62757, subdivision (c), states that the QIP "shall be pursuant to a recommendation by the review board . . . and approved by a statewide referendum of producers conducted pursuant to [Chapter 3.0 procedures for a supermajority referendum vote]." Nowhere, does the statute explicitly state that the Chapter 3 referendum procedures apply to a referendum to terminate section 62757. Petitioners argued that the plain meaning of this statute is that the supermajority vote requirement relates only to the approval of QIP, and that suspension of QIP pursuant to a referendum to suspend Chapter 3.5 is governed by the Chapter 3.5 suspension procedures which require a simple majority vote.

24. Given the plain language of section 62757, petitioners argued that it is not necessary to look any further to discern the meaning of the statute. Petitioners quoted the United States Supreme Court: "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." (*Bostock v. Clayton County, Ga.*, 2020 WL3146686, at *14 (US Sup. Ct., June 15, 2020).) Petitioners also quoted the California Supreme Court: "[w]hen interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the

actual words of the law." (*Equilon Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal. 4th 53, 59.)

25. Finally, Petitioners argued that the QIP is economically disruptive, and imposes burdens on non-quota holders. First, non-quota holders bear an increasing financial burden to support quota disbursements. Second, non-quota holders are increasingly going out of business because of the financial burdens imposed by the QIP. Third, the market for Class 1 dairy product is shrinking, such that the milk pool is continually losing the value needed to support quota payments. These factors, though important and significant, are not necessary to a determination of this matter and are therefore not summarized more fully.

SAVE QIP

26. Save QIP argued that: the Petition is procedurally and legally invalid and must be set aside; a Chapter 3.0 supermajority vote is, and always has been, required to terminate quota; termination of the quota would have devastating consequences; and, the Secretary should exercise her discretion to deny Petitioners' request for a Chapter 3.5 referendum. These arguments are briefly summarized below, and are fully set forth in Save QIP's prehearing statement and post-hearing brief which are part of the administrative record.

27. Save QIP argued that a Chapter 3.5 petition can only be used to suspend the fixed differential, which is set forth at section 62750. The 1994 Chapter 3.5 legislation provides a process to suspend the fixed differential and revert to the variable differential. This is explicit in section 62756, subdivision (a), which states "[i]f the continued operation of this chapter is not approved, the secretary shall continue the operation of the pooling plan in effect on December 31, 1993." This, Save QIP

argued, is the only remedy afforded by a Chapter 3.5 referendum. Given this limitation it logically follows that the voting threshold would be lower than that for a Chapter 3 referendum to entirely terminate the milk pooling plan and quota.

28. Save QIP also argued that section 62757, subdivision (c), makes it clear that a Chapter 3.5 petition can have no effect on section 62757 or the QIP. Specifically, section 62757, subdivision (c), states that "[t]he stand-alone quota program [QIP] shall be pursuant to a recommendation by the review board established pursuant to Section 62719 and approved by a state-wide [Chapter 3] referendum of producers conducted pursuant to Sections 62716 and 62717." Save QIP argued that the phrase "shall be pursuant to" means that "the stand-alone quota program shall have and maintain in its existence – i.e., can only be brought into and taken out of existence – pursuant to the two-step process provided in Section 62757(c)." That two steps referenced in section 62757, subdivision (c), are (1) the recommendation by the PRB pursuant to section 62719, and (2) the referendum vote conducted pursuant to Chapter 3, including the supermajority threshold set forth in sections 62716 and 62717.

29. This reading, Save QIP contended, is consistent with the statutory and social history of the quota program. When the Legislature authorized the milk pooling and quota program in the 1960s, it was subject to approval by a referendum pursuant to the Chapter 3 supermajority threshold. The same supermajority vote was required for any amendment to or termination of the milk pooling plan or quota. Given this history, it makes sense that the Legislature would require the same supermajority vote to authorize, amend, or terminate the new stand-alone quota program implemented through the QIP. Moreover, a change in the procedures to allow termination of quota would require a clear legislative mandate. Such a mandate is not present in Chapter 3.5, which established a fixed differential, or in the QIP authorization at section 62757.

30. In support of its argument, QIP cited the California Supreme Court: "[i]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006) 39 Cal. 4th 507, 526, as modified (Oct. 11, 2006) (quoting *Los Angeles Cty. v. Frisbie* (1942) 19 Cal.2d 634, 643-44.) Save QIP argued that neither section 62757 nor any other statutes include an express declaration that the Legislature intended to alter the established legal requirements that a petition to suspend the milk pooling plan including quota be subject to a supermajority vote.

31. Save QIP also pointed out that the Department adopted this interpretation of section 62757, subdivision (c), as indicated by the QIP language. Specifically, section 1101 of the QIP states that "[s]ubstantive, or significant amendments to this Plan requires a producer referendum to be held in the same manner as the referendum approving this plan." Similarly, section 1103 of the QIP states that "[i]f the Secretary finds that the Plan [QIP] no longer tends to effectuate the purpose intended, termination shall be submitted for referendum in the same manner as provided for its initial approval." Save QIP argued that the Department's contemporaneous construction of section 62757, subdivision (c), provides compelling evidence that QIP can be amended or terminated only pursuant to a Chapter 3 supermajority referendum. In support of this argument, Save QIP again cited the California Supreme Court, which held that the courts look to a variety of extrinsic aids in interpreting a statute, including "contemporaneous administrative construction" of the statute. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.)

32. Save QIP also noted that on April 3, 2019, the Department published a document entitled Procedures for Submitting a Petition for Substantive Amendments or Termination of Quota Implementation Plan. These published procedures state that a qualifying petition to amend or terminate the QIP "shall be submitted for referendum in the same manner as provided for in its initial approval, per Food and Agriculture Code 62717." Save QIP further argued that "when an administrative agency is charged with enforcing a particular statute, it's interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 220 (quoting *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3rd 658, 668-69).)

33. Save QIP presented substantial evidence and argument that quota is an important financial tool for dairy producers, and that it continues to serve the intended purpose of enabling "the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream . . . ." (§ 62702.) Save QIP presented additional evidence that the immediate termination of quota would cause substantial economic harm to dairy producers. As important and significant as these considerations are, these factors are not necessary to a determination of this matter and are therefore not discussed more fully.

34. Save QIP also presented a declaration by Jim Houston, which was subject to objections by Petitioners. For reasons discussed in the analysis and legal conclusions, below, the Houston declaration was not necessary to a decision in this matter and was not considered.

UNITED DAIRY FAMILIES

35. United Dairy Families argued that the only issue in this matter is whether the Secretary should hold a referendum on the Petition, and that based on the facts and applicable law the Secretary should not do so. United Dairy Families' arguments are summarized below, and fully set forth in their pre-hearing statement and post-hearing brief, which are part of the administrative record.

36. United Dairy Families first argued that Petitioner's interpretation of Chapter 3.5 is inconsistent with the plain language and historical purpose of the chapter, which was to establish a fixed differential for quota, and permit dairy farmers to terminate fixed quota with a simple majority vote. When the Legislature added section 62757 to Chapter 3.5 in 2017, it did not change section 62756, subdivision (a), which requires that the pooling plan in effect in 1993 resume its effect if Chapter 3.5 is suspended by a referendum vote. Thus, United Dairy Families argued, Petitioner's assertion that any suspension of Chapter 3.5 necessarily requires termination of the QIP cannot be reconciled with section 62756, subdivision (a), which provides for the continuation of a pooling plan including quota.

37. United Dairy Families next argued that Petitioner's interpretation that section 3.5 referendum procedures apply to the Petition would effectively nullify related statutory and regulatory provisions, in contravention of established legal doctrine against nullification. (*Lungren v. Deukmejian* (1988) 45 Cal.3rd 727, 735) ("[a]n interpretation that renders related provisions nugatory must be avoided. . . "); Drafters of legislation "do not, one might say, hide elephants in mouse-holes." (*California Redevelopment Association v. Matosantos* (2001), 53 Cal.4th 231, 260, quoting *Whitman v. America Trucking Associations* (2001) 531 U.S. 457, 468 (the Legislature

does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").)

38. United Dairy Families then argued that section 62756, subdivision (a), which limits the effect of a Chapter 3.5 referendum vote to termination of the fixed differential, would be nullified if the vote could result in termination of the QIP. Section 62757, subdivision (c), would also be nullified insofar as it specifies that the quota program "shall be pursuant to" a supermajority referendum conducted pursuant to sections 62716 and 62717. Additionally, Petitioner's interpretation would nullify section 1103 of the QIP, which states that termination of QIP "shall be submitted for [supermajority] referendum in the same manner as provided for its initial approval."

39. United Dairy Families also contended that the Legislature's intent in enacting section 62757 was to ensure that the Secretary has explicit authority to implement a stand-alone quota program. This is clear in the analysis provided by the Senate Rules Committee, which states that the QIP authorizing statute (section 62757) "[a]uthorizes the California Department of Food and Agriculture to establish a stand-alone milk quota program." Neither the legislative history nor section 62757 indicate that the Legislature intended anything more than this limited purpose. Nor is there any indication that the Legislature intended that the stand-alone quota program would be subject to a simple majority referendum, simply because section 62757 was placed in Chapter 3.5. Rather, section 62757, subdivision (c), clearly states that the Chapter 3 referendum procedures at sections 62716 and 62717 apply.

40. United Dairy Families also argued that the Secretary has discretion and authority to deny Petitioners' request for a referendum vote on its "unlawful" petition under Chapter 3.5. Section 62752 states that the Secretary "shall hold a public hearing to review a petition requesting the suspension of this chapter . . . ." The hearing in this

matter on June 9 and 10, 2020, satisfied this requirement. Sections 62753 and 62754 set forth the timing and ballot requirements for any referendum, but nowhere in the referendum procedures is there any requirement that the Secretary conduct a referendum.

ANALYSIS AND LEGAL CONCLUSIONS

41. As set forth in the initial summary of this recommended decision, the primary issue in determining whether the Petition shall proceed to a referendum is whether Chapter 3.5, including section 62757, can be suspended by a referendum conducted pursuant to section 3.5. The language of section 62757, subdivision (c), is central to this question. For convenience, it is again provided here, as follows:

> The stand-alone quota program [QIP] shall be pursuant to a recommendation by the [producer] review board established pursuant to Section 62719 and approved by a statewide referendum of producers conducted pursuant to Sections 62716 and 62717.

42. Petitioners, Save QIP, and United Dairy Families, argued for very different interpretations of section 62757, subdivision (c). Petitioners argued that subdivision (c), refers only to the process by which the QIP was reviewed, approved, and enacted, and that it does not prescribe the process by which the QIP can be amended or suspended. Save QIP and United Dairy Families argued that the statute prescribes the process by which the QIP was enacted, and which must be followed in any effort to amend or terminate it. Specifically, Save QIP and United Dairy Families argued, that section 62757, subdivision (c), requires a two-step process by which (1) the PRB recommends

an action (either approval or termination) pursuant to section 62719, and (2) a referendum is conducted pursuant to sections 62716 and 62717, which require a supermajority vote.

43. The plain language of section 62757, subdivision (c), indicates that the PRB and referendum procedures prescribed by sections 62719, 62716, and 62717 apply equally to approval and termination of the QIP. The phrase "shall be pursuant to" is key to a clear understanding of section 62757, subdivision (c). For this, it is essential to understand the meaning of the verb "be." The definition of the substantive verb "be" includes means "to exist," "to happen or occur," and "to remain or continue." (Webster's New World Dict. (2d College ed. 1976) p. 121.) Based on this definition, section 62757, subdivision (c), is best understood to prescribe the two-step process by which the QIP was brought into existence, and by which it will be permitted to remain or continue. Thus, any effort to suspend, amend, or terminate the QIP must adhere to the two-step process outlined by sections 62719, 62716, and 62717, as incorporated by section 62757, subdivision (c).

44. Petitioners' arguments that section 62757, subdivision (c), applies only to the establishment of the QIP, not its termination, are inconsistent with the statute's plain language. In effect, Petitioners argue for a narrow reading of the phrase "shall be pursuant to" that is inconsistent with the definition of the verb "be." Petitioners incorrectly interpret section 62757, subdivision (c). For this reason, Petitioners' quotations from the United States Supreme Court and the California Supreme Court regarding deference to the plain meaning of the statute do not weigh in favor of Petitioners' interpretation of section 62757. (*Bostock v. Clayton County, Ga.*, 2020 WL3146686, at *14 (US Sup. Ct., June 15, 2020); *Equiline Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53, 59.)

45. To the extent there is any ambiguity regarding the meaning of Chapter 3.5, and specifically section 62757, subdivision (c), the arguments advanced by Save QIP and United Dairy Families regarding statutory interpretation are persuasive. The persuasive arguments include, but are not limited to Save QIP's point that "when an administrative agency is charged with enforcing a particular statute, it's interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 220 (quoting *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal 3rd 658, 668-69).) Here, the Department is charged with applying section 62757, the QIP authorizing statute. The Department's interpretation of the statute is indicated in the QIP section 1103, and its Procedures for Submitting a Petition for Substantive Amendments or Termination of Quota Implementation Plan (Procedures), dated April 3, 2019. In both documents, the Department states that petitions to terminate the QIP shall be submitted for referendum "in the same manner as provided for its initial approval." The April 3, 2019 Procedures specify that the referendum shall be submitted pursuant to the procedures prescribed in section 62717, which requires a supermajority vote for approval.

46. Additionally, the evidence does not support a finding that section 62757 or any other statutes include an express declaration that the Legislature intended to alter the established legal requirements that a petition to suspend the milk pooling plan including quota be subject to a supermajority vote. On this point, Save QIP aptly quoted the California Supreme Court: "[i]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 526, as modified (Oct. 11, 2006) (quoting *Los Angeles Cty. v. Frisbie* (1942) 19 Cal.2d 634, 643-44.)

47. Based on the plain language of the statute and established principles of statutory interpretation, Petitioners did not follow the process prescribed by section 62757. They seek to suspend Chapter 3.5, including section 62757, through a referendum on their Petition conducted pursuant to the referendum procedures prescribed by Chapter 3.5. The law does not provide for the termination of section 62757 by means of a Chapter 3.5 referendum. For this reason, the Petition is legally defective and should not be advanced to a referendum.

48. Save QIP offered a declaration by Jim Houston as evidence. Petitioners objected on numerous grounds. The Houston Declaration is admissible with respect to his own observations and impressions, and was admitted for these purposes. The Houston declaration was, however, not necessary to this decision and was not considered.

49. The parties and members of the public provided compelling testimony and documentation regarding the costs and benefits of quota. The parties also presented testimony of experts who advanced competing conclusions. This evidence, however important and compelling, is not necessary to this decision and was not considered for purposes of this decision.

50. It is not necessary to make any findings here whether the QIP continues to "effectuate the purposes intended" (QIP § 1103) because the Petition submitted is not legally valid.

51. Petitioners' arguments have been considered, including those not summarized or discussed here. Petitioners' arguments inconsistent with this decision have been considered and rejected.

52. For all of the reasons stated herein, the Petition should not be advanced to a referendum.

ORDER

Petitioners' request for a referendum pursuant to Chapter 3.5 is DENIED.

DATE: July 24, 2020

DocuSigned by:
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TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings

BEFORE THE DIRECTOR
DEPARTMENT OF FOOD AND AGRICULTURE
STATE OF CALIFORNIA

In the Matter of: PETITION TO SUSPEND CHAPTER 3.5 OF THE FOOD AND AGRICULTURAL CODE,	Case No. OAH No. 2020020788 **ORDER OF DECISION**

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Food and Agriculture as its Decision in the above-entitled matter.

This Decision shall become effective on August 14, 2020.

IT IS SO ORDERED this 14th day of August.

By: Karen Ross

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State of California
Department of General Services
Governor Gavin Newsom

Notice Regarding Hearing Exhibit Availability

The proposed decision in this case is being sent without the hearing exhibits. Due to the current public health emergency, the exhibits will be delayed.

If the agency decision-maker has an urgent need to receive the hearing exhibits, please contact the OAH office.

Sacramento: 916-263-0550
Oakland: 510-622-2722
Los Angeles: 213-576-7200
San Diego: 619-525-4475

Thank you for your understanding.

OFFICE OF ADMINISTRATIVE HEARINGS