

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	SMA Docket No. 04-0003
	)	
Amalgamated Sugar	)	
Company, L.L.C.,	)	
	)	
Petitioner	)	<b>Decision and Order</b>

**PROCEDURAL HISTORY**

On September 16, 2003, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company. On October 2, 2003, Amalgamated Sugar Company, L.L.C. [hereinafter Petitioner], requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the September 16, 2003, decision. On November 14, 2003, the Executive Vice President determined on reconsideration that transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938].

On December 4, 2003, Petitioner filed a Petition for Review pursuant to the Agricultural Adjustment Act of 1938, the Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations], and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice]. In January 2004, Wyoming Sugar Company, LLC, and Southern Minnesota Beet Sugar Cooperative intervened in support of Petitioner.

On December 23, 2003, the Executive Vice President filed: (1) an “Answer and Motion to Dismiss” in response to Petitioner’s Petition for Review; (2) a certified copy of documents relating to Petitioner’s October 2, 2003, request for reconsideration; and (3) a list of “affected persons.”<sup>1</sup> On January 14, 2004, American Crystal Sugar Company intervened in support of the Executive Vice President. On March 25, 2004, American Crystal Sugar Company filed “American Crystal Sugar Company’s Memorandum in Support of Its Motion to Dismiss the Appeal Petition or, in the Alternative, for Summary Judgment.” During the period January 20, 2004, through May 21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company made numerous filings related to the Executive Vice President’s motion to dismiss,

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<sup>1</sup>Rule 2(c) of the Rules of Practice defines an “affected person” as a sugar beet processor, other than the petitioner, affected by the Executive Vice President’s determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

American Crystal Sugar Company's motion to dismiss, and American Crystal Sugar Company's motion for summary judgment.

On June 23, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Denying Motions to Dismiss and Motion For Summary Judgment": (1) denying the Executive Vice President's motion to dismiss; (2) denying American Crystal Sugar Company's motion to dismiss; (3) denying American Crystal Sugar Company's motion for summary judgment; (4) ruling, pursuant to section 359i of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359ii), he had subject matter jurisdiction to hear and decide Petitioner's claim; (5) ruling Petitioner had a legally cognizable claim under the Agricultural Adjustment Act of 1938; and (6) ruling Petitioner is not barred under the doctrine of judicial estoppel from pursuing its claim.

On September 20-21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company, filed pre-hearing briefs. On September 21-23, 2004, and October 4-5, 2004, the ALJ conducted a hearing in Washington, DC. Kevin J. Brosch and John Lemke, DTB Associates, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Executive Vice President. Steven A. Adduci, Venable, LLP, Washington, DC, and David A. Biegging, Olsson, Frank and Weeda, P.C., Washington, DC, represented Southern Minnesota Beet Sugar Cooperative. Steven Z. Kaplan, David P. Bunde, and

Daniel C. Mott, Fredrikson & Byron, P.A., Minneapolis, Minnesota, represented American Crystal Sugar Company.

In November 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company filed post-hearing briefs. On February 7, 2005, the ALJ issued a “Decision” [hereinafter Initial Decision]: (1) reversing the Executive Vice President’s November 14, 2003, determination on reconsideration; and (2) ordering the CCC to distribute the amount of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)).

On February 28, 2005, Petitioner, Southern Minnesota Beet Sugar Cooperative, and the Executive Vice President appealed to the Judicial Officer. On March 7, 2005, American Crystal Sugar Company appealed to the Judicial Officer. On April 14, 2005, after Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company filed responses to the appeal petitions, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I reverse the ALJ’s February 7, 2005, Initial Decision, and affirm the Executive Vice President’s November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company’s beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's exhibits are designated by "AMAL-SM." American Crystal Sugar Company's exhibits are designated by "ACS." Exhibits from the certified copy of the record submitted by the Executive Vice President are designated as "AR." Exhibits from the addendum to the certified copy of the record submitted by the Executive Vice President are designated by "AR Addendum." The transcript is divided into five volumes, one volume for each day of the 5-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the September 21, 2004, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the September 22, 2004, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the September 23, 2004, segment of the hearing; references to "Tr. IV" are to the volume of the transcript that relates to the October 4, 2004, segment of the hearing; and references to "Tr. V" are to the volume of the transcript that relates to the October 5, 2004, segment of the hearing.

**APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

.....

**CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938**

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**SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR**

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**§ 1359dd. Allocation of marketing allotments**

**(a) Allocation to processors**

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

**(b) Hearing and notice**

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**(2) Beet sugar**

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**(E) Permanent termination of operations of a processor**

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall—

- (i) eliminate the allocation of the processor provided under this section; and
- (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

**(F) Sale of all assets of a processor to another processor**

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

7 U.S.C. § 1359dd(a), (b)(2)(E)-(F) (Supp. III 2003).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

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**CHAPTER XIV—COMMODITY CREDIT CORPORATION,  
DEPARTMENT OF AGRICULTURE**

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**PART 1435—SUGAR PROGRAM**

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**Subpart D—Flexible Marketing Allotments For Sugar**

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**§ 1435.319 Appeals and arbitration.**

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the

Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

7 C.F.R. § 1435.319(a)-(b) (2003).

## **DECISION**

### **Discussion**

The Agricultural Adjustment Act of 1938 establishes flexible marketing allotments for sugar. The Secretary of Agriculture is required to establish flexible marketing allotments for sugar for any crop year in which allotments are required by the Agricultural Adjustment Act of 1938. If allotments are required, the Secretary of Agriculture establishes the overall allotment quantity in accordance with a statutory formula. The overall allotment quantity is then allocated between sugar derived from sugar beets and sugar derived from sugar cane.<sup>2</sup>

The Secretary of Agriculture is required to make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the

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<sup>2</sup>7 U.S.C. § 1359cc (Supp. III 2003).



adjusted weighted average quantity of beet sugar produced by beet sugar processors for each of the 1998 through 2000 crop years.<sup>3</sup> The Secretary of Agriculture is required to adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years if the Secretary of Agriculture determines that the processor opened a sugar beet processing factory, closed a sugar beet processing factory, constructed a molasses desugarization facility, or suffered substantial quality losses on stored sugar beets during any crop year from 1998 through 2000.<sup>4</sup>

The CCC determined the percentage of the overall beet sugar allotment to which each beet sugar processor was entitled based on the processor's weighted average quantity of beet sugar produced during the 1998 through 2000 crop years, as adjusted in accordance with the Agricultural Adjustment Act of 1938. Effective October 1, 2002, the CCC assigned to each beet sugar processor, including Pacific Northwest Sugar Company, a percentage of the weighted average quantity of beet sugar produced during the 1998 through 2000 crop years commensurate with the statutory formula. Pacific Northwest Sugar Company's share of the beet sugar allotment was 2.692 percent (AMAL-SM 78). Each beet sugar processor's share of the beet sugar allotment remains fixed for the life of the flexible marketing allotment provisions of the Agricultural Adjustment Act of 1938, unless the Secretary of Agriculture takes some action pursuant to the Agricultural

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<sup>3</sup> U.S.C. § 1359dd(b)(2)(A) (Supp. III 2003).

<sup>4</sup> U.S.C. § 1359dd(b)(2)(D) (Supp. III 2003).

Adjustment Act of 1938. Thus, if the CCC had taken no action, Pacific Northwest Sugar Company would have retained the right to market beet sugar under its allocation through crop year 2007.

The Agricultural Adjustment Act of 1938 provides for the elimination, distribution, assignment, reassignment, and transfer of a beet sugar processor's beet sugar marketing allocation under various circumstances.<sup>5</sup> Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides, if the assets of a beet sugar processor are sold to another beet sugar processor, the Secretary of Agriculture is required to transfer the beet sugar marketing allocation of the seller to the buyer, unless the beet sugar marketing allocation has been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

On September 8, 2003, Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company (AR Addendum 236-49). On September 16, 2003, the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company pursuant to section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) (AR Addendum 250-51).

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<sup>5</sup>7 U.S.C. § 1359dd(b)(2)(E)-(I) (Supp. III 2003).

The only issues in this proceeding are: (1) whether Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003; (2) whether Pacific Northwest Sugar Company sold its assets to American Crystal Sugar Company on September 8, 2003; and (3) whether the CCC had, prior to September 16, 2003, distributed Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). I find Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003, when Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company. I also find, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company on September 16, 2003, Pacific Northwest Sugar Company's beet sugar marketing allocation had not been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I conclude the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company in accordance with the Agricultural Adjustment Act of 1938, and I affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

### **Findings of Fact**

1. The Columbia River Sugar Company was formed as a cooperative in 1991 to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the sugar beet processing factory located there had gone out of business and was inoperable. (ACS 1 at 3.)

2. Columbia River Sugar Company formed Pacific Northwest Sugar Company in partnership with Holly Sugar Company to construct the sugar beet processing factory, which took place in 1996 through the summer of 1998 (ACS 1 at 3; AMAL-SM 58 at 8).

3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar Company whose personnel had experience gained from operating other sugar beet processing factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the sugar beets it processed of only 25 percent and two-thirds of the sugar beets delivered to the factory were not processed, but instead rotted. (Tr. II at 51-52, 67; AMAL-SM 58 at 8.)

4. In 1999, Holly Sugar Company left the partnership conveying its interest in Pacific Northwest Sugar Company to Columbia River Sugar Company. That year, Pacific Northwest Sugar Company, operating the sugar beet processing factory without assistance from Holly Sugar Company, hired a number of experienced employees to

operate the factory. Plant equipment was improved through the investment of several million dollars. The sugar recovery rate for the 1999-2000 processing season increased from 25 percent to 65 percent. However, to be profitable, a sugar beet processing factory requires a recovery rate in excess of 80 percent with 90 percent being the optimum target. (Tr. II at 52- 67; Tr. V at 6-10, 23-24.)

5. In the 2000-2001 processing season Pacific Northwest Sugar Company made additional improvements to its operations at the factory and increased its sugar recovery rate to 82 percent (Tr. II at 66-67; Tr. V at 10-11, 25).

6. Pacific Northwest Sugar Company encountered numerous problems in connection with the operation of the Moses Lake, Washington, sugar beet processing factory, including financing issues, the California energy crisis of 2000-2001, and a drought (AMAL-SM 58; Tr. II at 46-48, 61-66, 72-79, 85-109).

7. Sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed. No sugar beet crop was planted by Columbia River Sugar Company growers in 2002 or 2003. (Tr. I at 188; Tr. V at 11.)

8. On May 13, 2002, the Farm Security and Rural Investment Act of 2002 was approved. On October 1, 2002, the CCC announced the initial beet sugar marketing allocation for crop year 2002. The CCC provided Pacific Northwest Sugar Company a beet sugar marketing allocation of 2.692 percent of the future beet sugar allotment under the Agricultural Adjustment Act of 1938, on the basis of its beet sugar production during each of the 1998, 1999, and 2000 crop years. (AMAL-SM 78.)

9. Although the CCC provided Pacific Northwest Sugar Company with an initial beet sugar marketing allocation for crop year 2002, the CCC was legally empowered to redistribute any allocation that was not being used. On October 1, 2002, when the CCC announced initial allocations under the provisions of the Farm Security and Rural Investment Act of 2002, it simultaneously redistributed 87 percent (97,639 of 112,639 short tons) of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors. During the remainder of that same crop year, the CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest Sugar Company's initial beet sugar marketing allocation, as well as any additional allocation that Pacific Northwest Sugar Company might have received because of increases in the total beet sugar allotment – to other beet sugar processors. (Tr. IV at 149-54; AMAL-SM 78 at 1.)

10. Pacific Northwest Sugar Company sought to have its beet sugar marketing allocation increased for crop year 2003. On June 16, 2003, the Executive Vice President presided at a hearing on Pacific Northwest Sugar Company's application to increase its beet sugar marketing allocation. Subsequently, the Executive Vice President denied Pacific Northwest Sugar Company's request to increase its beet sugar marketing allocation. (ACS 23; AR Addendum at 7-88.)

11. American Crystal Sugar Company negotiated to purchase Pacific Northwest Sugar Company's assets. American Crystal Sugar Company's proposal to purchase Pacific Northwest Sugar Company's assets was described in a July 3, 2003, fax by Joseph

Talley of American Crystal Sugar Company to Barbara Fesco, a CCC sugar program official (AR Addendum at 89-91), as follows:

First, our understanding is that Pacific Northwest Sugar Company Sugar Company (PNSC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the adoption of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only for the current fiscal year).

American Crystal Sugar Company (ACSC) is currently contemplating a transaction which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

This transaction structure is clearly our preferred option. Although we did discuss other potential structures, which are outlined below, the alternative structures appear to be less favorable in terms of their complexity, cost and the risks that they would create for ACSC.

Our view of the potential transaction outlined here is that it fits within the area of Sec. 359d(b)(2)(F) of the sugar section of the Farm Bill. The allocation has not been eliminated under Sec. 359d(b)(2)(E), and therefore since ACSC would be acquiring substantially all of the assets of a processor the transfer we are contemplating should be within the guidelines established by the Farm Bill. Our primary question for you is – do you agree that a transaction like this would be approved by the USDA?

We are also considering a couple of other alternative structures for this transaction. One would transfer the assets (primarily the marketing allocation) directly from PNSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). From your perspective, would this additional aspect have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

Another would include the above aspects, plus ACSC acquiring control of the processing facility (that is now owned by Central Leasing LLC). From your perspective, would this additional factor have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

We also discussed the current appeal to the USDA by PNSC to increase their marketing allocation. Our view relative to that appeal has not changed from the position presented to you earlier by Jim Horvath, and we do not anticipate that the result of that appeal would have any impact on this potential transaction.

Since the USDA typically establishes marketing allocations for the upcoming year before October 1, time is of the essence in this process.

12. On July 30, 2003, American Crystal Sugar Company's president, James J. Horvath, and Scott Lybbert for Washington Sugar Company, sent the CCC a fax that formally notified the CCC of American Crystal Sugar Company's intent to acquire ownership of the assets, including the rights to the production history and the beet sugar marketing allocation, associated with the Moses Lake, Washington, sugar beet processing factory (AR Addendum at 92-93), as follows:



Mr. Dan Colacicco  
United States Department of Agriculture  
Farm Service Agency  
1400 Independence Ave., SW  
Room 3752-S, Stop 0516  
Washington, DC 20250-0516

Re: Marketing Allocation Transfer

Dear Mr. Colacicco:

We are writing to make you aware of a series of pending transactions by which American Crystal Sugar Company (“ACSC”) will acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory (the “Factory”). The purpose of this letter is to request the USDA’s preliminary approval of these transactions as they relate to the transfer of the marketing allocation currently held by the Pacific Northwest Sugar Company, LLC, (“PNSC”) to ACSC.

As you know, PNSC currently holds a marketing allocation representing approximately 2.7% of the beet sugar allotment (the “Allocation”). The Allocation was based on PNSC’s historical operation of the Factory. PNSC has reached an agreement with the Washington Sugar Company, LLC (“WSC”) by which WSC has acquired substantially all of the assets of PNSC, including PNSC’s rights to the Allocation. Our understanding is that documentation of this agreement has previously been provided to the USDA, Central Leasing, LLC, (“Central Leasing”) an unrelated third party, is the current owner of the Factory.

Through a series of transactions with WSC and Central Leasing, ACSC (or its wholly owned subsidiary) will gain control of both the Factory’s ability to produce sugar and the rights to claim the production history and the related Allocation. The Agreement with WSC will provide that the assets it acquired from PNSC, including the Allocation, will be transferred to ACSC. ACSC will simultaneously gain control of the sugar production capabilities of the Factory through a series of contracts with Central Leasing. ACSC will also be obtaining non-competition agreements from WSC, Central Leasing and the principal owners of these entities. ACSC is confident that this combination of agreements will provide ACSC with

control of the sugar production capabilities of the Factory and will prevent a “new entrant” from operating the Factory, for the foreseeable future.

Given the fact that the Factory is not currently operating (and there are no growers currently raising sugarbeets in the vicinity of the Factory), it is ACSC’s intention that the Factory will not operate in the future as a sugar beet processing facility. In fact, much of the sugar production equipment at the Factory may be used at other ACSC facilities or sold to third parties for use elsewhere. We currently plan to have restrictions in the various agreements that would limit sales of certain key pieces of sugar production equipment to third parties operating outside of North or South America.

The parties are hereby requesting the USDA’s preliminary approval of the transfer of the Allocation from PNSC to ACSC based upon the transactions outlined above. The provisions of Section 359d(b)(2)(F) of the 2002 Farm Bill address the transfer of marketing allocations in connection with the sale of assets of one processor to another. Subparagraph (F) provides as follows:

(F) Sale of all assets of a processor to another processor.—If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

In this case, the series of transactions described above will result in ACSC acquiring the assets currently owned by WSC/PNSC, including the production history and all rights to the Allocation. As of the date of this letter, the USDA has not distributed the Allocation to other sugarbeet processors under subparagraph (E). Given these facts, the provisions of subparagraph (F) provide that the Secretary is to transfer the entire Allocation from PNSC to ACSC. Furthermore, the transfer of the Allocation will not be subject to any pro ration or future operating requirements.

The parties are currently in the process of finalizing the terms of the various documents and agreements necessary to implement the transactions described above. It is anticipated that these transactions will close on or about August 15, 2003. The parties would appreciate your preliminary approval of the Allocation transfer in advance of the closing. We anticipate

that final USDA action to transfer the Allocation will not occur until after the closing.

Should you have any questions regarding the proposed transactions or if you require any additional details concerning the contractual arrangements, please feel free to contact either Joe Talley at American Crystal Sugar Company or Scott Lybbert at Washington Sugar Company, LLC. We would also be happy to meet with representatives of the USDA to discuss this matter in greater detail.

Thank you for your consideration, and we look forward to your response.

Very truly yours,

AMERICAN CRYSTAL SUGAR COMPANY

WASHINGTON SUGAR COMPANY, LLC

13. On August 28, 2003, the CCC replied to American Crystal Sugar Company's and Scott Lybbert's letter of July 30, 2003, advising that the CCC would transfer Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company if provided with documentation showing that all the assets of Pacific Northwest Sugar Company have been purchased by American Crystal Sugar Company (AR Addendum at 234-35), as follows:

Mr. Scott Lybbert  
Pacific Northwest Sugar Company  
3501 West 42nd Avenue  
Kennewick, WA 99337

Dear Mr. Lybbert:

Thank you for your letter of July 30, 2003, advising us of the pending transactions between the American Crystal Sugar Company (American Crystal) and the Pacific Northwest Sugar Company (Pacific Northwest). We understand that American Crystal is purchasing all of the

assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest.

Section 359d(b)(2)(F) of the Agriculture [sic] Adjustment Act of 1938, as amended, requires the Department of Agriculture (USDA) to transfer a processor's sugar marketing allocation when all of the assets of a processor are sold to another processor. Therefore, the Commodity Credit Corporation (CCC) will transfer Pacific Northwest's allocation to American Crystal, upon receipt of the documents listed below. We will accomplish the transfer of allocation by transferring all of Pacific Northwest's production history during the base period to American Crystal, in the same manner that we transferred the production history of the Holly Sugar's factories to American Crystal when American Crystal purchased the Holly factories.

We will require the following documentation before we will transfer the allocation:

- Settlement documents showing that all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
- Certification from Pacific Northwest that its [sic] has not marketed any sugar under its 2002-crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002-crop allocation to American Crystal.
- American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal

action by a third party challenging the original transfer from Pacific Northwest to American Crystal.

- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

Notwithstanding the foregoing, the USDA agrees that it will vigorously defend any third party challenge to the transfer of the allocation and will seek to provide the opportunity for American Crystal to participate in the defense of the USDA decision to transfer the allocation.

An identical letter is being sent to Mr. Horvath.

14. On September 8, 2003, American Crystal Sugar Company advised the CCC that, through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired, that day, ownership or control of all of the assets (including the rights to the production history and the beet sugar marketing allocation) associated with the production of sugar at the Moses Lake, Washington, sugarbeet processing factory. American Crystal Sugar Company's September 8, 2003, letter went on to positively address the requirements for the transfer the CCC specified in its August 28, 2003, letter. A bill of sale was attached. (AMAL-SM 70 at 1; AR Addendum at 243-49.)

15. On September 16, 2003, the CCC wrote to Scott Lybbert informing him that, effective immediately, the CCC was transferring Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company (AR Addendum at 250), as follows:

Mr. Scott Lybbert  
 Vice-President Finance and Marketing  
 Pacific Northwest Sugar Company  
 3501 West 42nd Avenue  
 Kennewick, Washington 99337

Dear Mr. Lybbert:

This letter is to inform you that the Department of Agriculture (USDA) will transfer, effective immediately, the marketing allocation of the Pacific Northwest Sugar Company (Pacific Northwest) to American Crystal Sugar Company (American Crystal). On the basis the documents you sent to us by facsimile on September 9, 2003, and the withdrawal of Petition for Review, SMA Docket No. 03-0003, USDA has determined that all assets of Pacific Northwest have been sold to American Crystal and that all documentation USDA required in an August 28, 2003 letter to you for proceeding with the transfer of allocation, has been received.

The transfer of allocation will be accomplished by transferring all of Pacific Northwest's production history during the base period to American Crystal (enclosure).

Thank you for your diligence in meeting all our requirements.

16. American Crystal Sugar Company paid \$6.8 million to acquire Pacific Northwest Sugar Company's beet sugar marketing allocation. The following payments were made from an escrow account (ACS 67 at 30-36; Tr. I at 137-39):

Central Leasing	\$2,125,000
Scott Lybbert	\$ 300,000
Pacific Northwest Sugar Company	\$3,025,000

The \$300,000 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for \$1.65 million total going to him (Tr. I at 138-39).

17. After acquiring the beet sugar marketing allocation, American Crystal Sugar Company realized it could not fully use all of it. American Crystal Sugar Company contacted other beet sugar processors and leased them portions of American Crystal Sugar Company's allocation for undisclosed sums. The other beet sugar processors who leased portions of American Crystal Sugar Company's beet sugar marketing allocation were Michigan Sugar Company and Minn-Dak Farmers Cooperative and because of confidentiality agreements American Crystal Sugar Company has with each of them, American Crystal Sugar Company was not required to reveal the amounts it has received under the lease arrangements. (ACS 85-91, 93; Tr. I at 155-56, 159-66; Tr. V at 121-24.)

18. At all times material to this proceeding, American Crystal Sugar Company was a beet sugar processor. During the period 1998 through September 16, 2003, Pacific Northwest Sugar Company was a beet sugar processor.

19. At no time material to this proceeding did the CCC distribute Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

### **Conclusion of Law**

The CCC's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

**The Executive Vice President's Appeal Petition and  
American Crystal Sugar Company's Appeal Petition**

The Executive Vice President and American Crystal Sugar Company each request that I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration or remand the matter to the Executive Vice President to make a determination based on the evidence presented to the ALJ.

This proceeding involves the CCC's September 16, 2003, decision to allow the sale of a beet sugar marketing allocation from Pacific Northwest Sugar Company to American Crystal Sugar Company under section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)). The Agricultural Adjustment Act of 1938 provides, if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with the sale of the assets of the beet sugar processor. The record clearly reflects that on September 8, 2003, Pacific Northwest Sugar Company still had its beet sugar marketing allocation, which it sold that day to American Crystal Sugar Company. Section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)) provides that the Secretary of Agriculture shall eliminate and distribute the allocation of a processor which has permanently terminated operations other than in conjunction with the sale or other disposition of the processor or the assets of the processor. Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003))



provides that a processor's allocation can be sold if the allocation has not previously been eliminated and distributed. On September 16, 2003, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company, no previous distribution of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors had been made, as is fully reflected in the ALJ's February 7, 2005, Initial Decision.

The ALJ finds this reading of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) too simplistic (Initial Decision at 30-31). I disagree. The plain language of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) provides, if a processor still has an allocation, the processor may sell that allocation along with the processor's assets to another processor, and, under those circumstances, the Secretary of Agriculture is required to transfer the allocation of the selling processor to the buying processor.

I find no purpose would be served by remanding this proceeding to the Executive Vice President to make a determination based on the evidence presented to the ALJ. The facts presented to the ALJ and found by the ALJ support the Executive Vice President's November 14, 2003, determination on reconsideration. Therefore, I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration.

**Petitioner's and Southern Minnesota Beet  
Sugar Cooperative's Appeal Petition**

Petitioner and Southern Minnesota Beet Sugar Cooperative raise one issue in the “Notice of Appeal to the Judicial Officer by Amalgamated Sugar Company, L.L.C. and Southern Minnesota Beet Sugar Cooperative.” Petitioner and Southern Minnesota Beet Sugar Cooperative contend the ALJ erroneously limited his order to “future crop years.”

The ALJ ordered the distribution, in future crop-years, of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors, as follows:

[T]he Reconsidered Determination by the Executive Vice President of the CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of the Act.

Initial Decision at 37.

I reverse the ALJ's February 7, 2005, Initial Decision ordering the CCC to distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I reject Petitioner's and Southern Minnesota Beet Sugar Cooperative's request that I immediately distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet

sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

For the foregoing reasons, the following Order should be issued.

### **ORDER**

1. The ALJ's February 7, 2005, Initial Decision is reversed.
2. The Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, is affirmed.

### **RIGHT TO JUDICIAL REVIEW**

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.<sup>6</sup> The date of entry of the Order in this Decision and Order is March 3, 2006.

Done at Washington, DC

March 3, 2006

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William G. Jenson  
Judicial Officer

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<sup>6</sup>See 28 U.S.C. § 2344.