

Dated: December 3, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E9-29190 Filed 12-7-09; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB-2007-0067; T.D. TTB-83; Ref: Notice Nos. 36 and 77]

RIN 1513-AA92

Establishment of the Calistoga Viticultural Area (2003R-496P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the Calistoga viticultural area in Napa County, California. The viticultural area is entirely within the existing Napa Valley viticultural area. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: *Effective Date:* January 7, 2010.

FOR FURTHER INFORMATION CONTACT: Amy R. Greenberg, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220; telephone 202-453-2265.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. Section 105(e) of the FAA Act also requires that a person obtain a certificate of label approval (COLA) or a certificate of exemption, as appropriate, covering wine, distilled spirits, and malt beverages before bottling the product or removing the product from customs custody, in accordance with regulations

prescribed by the Secretary. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements.

Viticultural Areas Designation

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations (27 CFR part 9). The establishment of viticultural areas allows vintners to describe more specifically the origin of their wines to consumers and allows consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Use of Viticultural Area Names on Wine Labels

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as being viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). Under the provisions of 27 CFR 4.39(i), a wine may not be labeled with a brand name that contains a geographic name having viticultural significance unless the wine meets the appellation of origin requirements for the geographic area named. There is an exception for brand names used in existing certificates of label approval issued prior to July 7, 1986, which meet certain criteria set forth in that paragraph (see 27 CFR 4.39(i)(2)). Under 27 CFR 4.39(i)(3), a name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of the TTB regulations or by a foreign government, or when found to have viticultural significance by the appropriate TTB officer.

If the wine is not eligible for labeling with the viticultural area name or other viticulturally significant term and that

name or term appears in the brand name, then the label is not in compliance and the bottler must change the brand name (and have an approved COLA for that brand name). Similarly, if the viticultural area name or other viticulturally significant term appears in another reference on the label in a misleading manner, the bottler would have to relabel the product in order to market it.

Viticultural Area Petitions

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area boundary prominently marked.

I. Calistoga Petition

On behalf of interested parties in the Calistoga viticultural community, James P. “Bo” Barrett of Chateau Montelena, a Calistoga, California, winery and vineyard, petitioned TTB to establish “Calistoga” as an American viticultural area. Located in northwestern Napa County, California, the proposed area surrounds the town of Calistoga and is entirely within the existing Napa Valley viticultural area described in 27 CFR 9.23. Below, we summarize the evidence presented in the petition.

Name Evidence

The petitioner submitted the following as evidence that the proposed viticultural area described in the petition is locally and nationally known as Calistoga:

- Excerpts from Charles L. Sullivan’s book, “Napa Wine: A History from Mission Days to Present,” explaining that Sam Brannan founded the town of Calistoga in 1857 and established

vineyards there in 1862. Sullivan's book includes viticultural and winery census data circa 1880, which all report Calistoga separately from other Napa County grape-growing regions. Sullivan's map of Napa wineries in 1893 shows a significant clustering of wineries near Calistoga distinctly separate from the wineries found in surrounding areas.

- Excerpts from "The University of California/Sotheby Book of California Wine," which note Sam Brannan's first vineyard planting in Calistoga.

- Excerpts from an 1881 book, "History of Napa and Lake Counties," showing three Napa County viticultural districts—Calistoga, St. Helena, and Napa.

- Excerpts from Leon Adams' 1973 book, "The Wines of America," referring to Calistoga as a specific grape-growing area.

- Excerpts from Hugh Johnson's 1983 book, "Hugh Johnson's Modern Encyclopedia of Wine," listing Calistoga among his list of "unofficially recognized appellations or sub-areas." The petitioner explains that 10 of the 12 defined sub-areas listed in this book are now designated as American viticultural areas.

- Excerpts from André Dominé's book, "Wine," recognizing Calistoga as a distinct region within Napa Valley and noting that "the bay influences the weather less as the valley rises up toward Calistoga, which is classified as a Region III area."

- Excerpts from James Laube's 1989 book, "California's Great Cabernets," which explain that for the purposes of the book, "a 'commune' system within Napa Valley is utilized to differentiate where grapes are grown within the valley as well as to analyze regional styles of wines." In his list, Laube includes Calistoga equally among the other nine Napa Valley "communes." The petition notes that 9 of the 10 communes listed are now TTB-approved viticultural areas.

- An excerpt from James Halliday's book, "Wine Atlas of California," which, the petitioner states, "so definitively covers the Calistoga area that the chapter in his book could provide most of the evidential requirements for this entire petition."

- A brief summary of "Calistoga's Wine History" by Calistoga Winery proprietor Jim Summers, which, the petitioner states, "includes a more historical perspective in the long recognition of Calistoga as a viticultural area."

Boundary Evidence

The established viticultural areas surrounding the proposed Calistoga viticultural area define a portion of its boundaries. The existing St. Helena viticultural area (27 CFR 9.149) northwestern boundary defines the Calistoga southeastern boundary, while the existing Diamond Mountain District area (27 CFR 9.166) northeastern boundary defines the Calistoga southwestern boundary. The Napa-Sonoma county line, which forms the Napa Valley viticultural area boundary in the northwestern corner of Napa County, defines the Calistoga western and northern boundaries. The 880-foot elevation line, beyond which lies rugged, unplantable terrain, defines Calistoga's eastern limit and returns the boundary line to its starting point.

Distinguishing Features

The petition included, as evidence of the proposed Calistoga viticultural area's unique growing conditions, a report written by Jonathan Swinchatt, PhD, of EarthVision, Inc.

Geologic and Geographic Features

Dr. Swinchatt's report indicated that the proposed Calistoga viticultural area is distinguished from surrounding areas by its geographic and geologic features. Dr. Swinchatt explained:

The entirety of the proposed viticultural area is underlain by volcanic bedrock, part of the more widespread Sonoma Volcanics that occur in the Vaca Mountains, in the northern Mayacama Mountains, bordering the lower slopes of the southern Mayacamas Mountains, and in Sonoma County. All the rock materials in the proposed viticultural area—bedrock and sediments—are part of, or derived from, the Sonoma Volcanics. These rocks comprise lava flows, ash-fall tuffs, welded tuffs, pyroclastic flows, mudflows, and ignimbrites. Their composition is largely andesitic with some rhyolitic rocks admixed. AVAs [American Viticultural Areas] farther to the south—St. Helena, Rutherford, and Oakville, in particular—exhibit significantly greater geologic diversity across their width, being underlain primarily by marine sedimentary rocks on the west side of the valley but by volcanic rocks on the east. In addition, these AVAs contain alluvial fan environments on their edges, and fluvial (river) environments in their more central parts. The proposed Calistoga AVA is topographically more diverse but geologically more uniform than these other AVAs that include valley floor environments. The mineralogy and chemistry of the substrate throughout the proposed viticultural area reflects the common source of the granular materials in the Sonoma Volcanics.

In the mountains, vineyards are planted in colluvium-sedimentary particles that have been transformed from the parent bedrock through weathering processes and have accumulated either in place or moved only

a short distance. The upland soils are dominantly excessively drained, gravelly loams, very stony loams, and loams, on steep slopes. Most of the breakdown products of weathering have been transported by streams into the valley; much of the finer material has been transported from the area by the Napa River, leaving coarser sediments behind throughout much of the proposed viticultural area.

Alluvial fans have formed at the mouths of most of the drainages, particularly along the northeast side of the valley at Dutch Henry Canyon, Simmons Canyon, Jericho Canyon, and north of Tubbs Lane at the headwaters of the Napa River in Kimball Canyon. At all these locations, cobbly and gravelly loams extend well out onto the valley floor, mixed here and there with finer-grained sediments. On the southwest side, small fans occur at the mouths of Diamond Creek, Nash Creek, and Ritchie Creek. These locations are characterized by cobbly and gravelly loams. Coarse sediments characterize the valley floor throughout the extent of the proposed viticultural area, the finer-grained materials having been transported out of the region by the waters of the Napa River. Soils throughout the proposed viticultural area are loams, gravelly loams, cobbly loams, often with boulders, some with admixtures of silt and clay—clay-rich soils are of limited distribution. These sediments are well drained, with admixtures of clay providing water-holding capacity. Further south in the Napa Valley, gravelly loams and loams are characteristic only of the upper reaches of the alluvial fans that line the valley, while the valley center is often covered by much finer, clay-rich, material.

Climatic Features

In addition to the unique geographic and geologic features of the proposed Calistoga viticultural area, Dr. Swinchatt's report indicated that its unique climatic features further distinguish the proposed Calistoga viticultural area from surrounding areas. Dr. Swinchatt explained:

Climatic information in our report for the Napa Valley Vintners' Association is based on data from DAYMET.org, a website that provides climatic information throughout the United States. DAYMET data is based on a computer algorithm that allows the extension of data from scattered weather stations into areas of complex topography. The algorithm was tested over 400,000 square kilometers in Washington State and found to be accurate within 1.2 degrees centigrade for temperature prediction and to be able to predict rainfall with an 83 percent accuracy.

Heat summation in degree days, defined as the total number of hours above 50 degrees Fahrenheit, is the accepted general measure of temperature and solar insolation in the wine industry. While heat summation is only a general indicator of regional temperature, it provides a more useful view than the limited temperature data from one or two available weather stations. Temperature—climate in general—can vary over distances of a few hundred feet or less, so that temperature measurements at one or two locations mean

little within a regional context. Under these conditions, DAYMET heat summation data provides as good a measure of regional conditions as is available.

Examination of DAYMET data indicates that most of the proposed viticultural area—mountain slopes and valley floor alike—lies within Region III, defined as the range of 3,000 to 3,500 degree days. Only a small area of the valley floor in the proposed viticultural district—east of the restriction in the valley formed by the ridge just west of the mouth of Dutch Henry Creek—lies within low region IV. The difference is well within the limits of accuracy of the data, indicating that the entire proposed viticultural area has a similar temperature profile. Farther south, valley floor vineyards are exposed to significantly different temperature conditions than those in the hills; in the Calistoga region, valley floor and hills appear to be part of a single climatic regime. This regime is characterized by hot days and cool nights, conditions ideal for a combination of ripening grapes but maintaining good acid balance.

One of the long-standing climatic assumptions in the Napa Valley is that Calistoga has the highest temperatures of any location within the valley. Temperature data and anecdotal evidence, however, dispute this assumption, both indicating that the hottest part of the valley is a small region just west closer of Bale Lane. Hottest average temperatures in August (over the 18 year period from 1980 to 1997) occur from Stags Leap District to south of Dutch Henry Canyon, along the base of the Vaca Mountains.

The Calistoga AVA is cooled by air currents drawn in from the Russian River through the northwestern corner of the mountain heights. These are drawn in to replace hot air rising from the valley, currents that used to support sailplanes headquartered at the Gliderport at Calistoga. In addition, cooling breezes flow down the slopes of both the Vaca and Mayacamas Mountains in the later afternoon. Daytime peak temperatures reach about 100 degrees at mid-day. The heated air rises by convection, drawing in cooler air from the Russian River, the breezes continuing after sunset, cooling the valley floor to about 65 degrees. Further cooling occurs, on fog free nights, driven by cool air moving downslope from the mountains providing additional cooling of 12 to 15 degrees.

Minimum nighttime temperatures often average about 50 degrees, giving a diurnal temperature range that sometimes is greater than 50 degrees. Vintners in the proposed viticultural areas hold that this large diurnal variation is one of the main influences on the character of wines from the region. The hot daytime temperatures provide color and big berry fruit, while the cool nights provide good acid balance for structure and develop power in the wines. The character of wines in the southeastern-most corner of the proposed viticultural district, south of the “Sterling Hill” between Maple and Dunawall Lanes is somewhat softer due to higher nighttime temperatures.

In its southern and central portions, the Napa Valley trends northwest-southeast, with

slopes facing mainly northeast and southwest, modified by the drainages that cut the slopes that add diversity to the aspect presented by vineyards to the sun. In its northern portions, however, the trend of the valley is closer to west-east, with the major slopes facing just east of north (in the Mayacamas Mountains) and just west of south (in the Vaca Mountains). A slope aspect map indicates also that the valley floor has very little flat ground, most of it reflects the slopes of alluvial fans, gentle on the north (such as at Dutch Henry Canyon) and steeper on the south. Slope aspect and exposure to the sun in the Calistoga region thus is quite distinct from that in any other AVA within the Napa Valley region.

Rainfall in the Calistoga region is typically higher than elsewhere in the area, with the highest rainfall recorded just outside the northern perimeter of the proposed viticultural area, on Mount St. Helena. Precipitation is highest in the mountains, up to 60 plus inches per year, and lowest in the valley, but year-to-year variation is large, as it is elsewhere in the Napa Valley region. DAYMET data for the years 1990 to 1997 indicate that precipitation ranged from just over 20 inches to over 55 inches on the valley floor, and from about 25 inches to over 65 inches in the surrounding mountains. Measures of average rainfall thus have little meaning.

II. Notice No. 36

On March 31, 2005, TTB published in the **Federal Register** (70 FR 16451) as Notice No. 36 a notice of proposed rulemaking regarding the establishment of a “Calistoga” viticultural area. In that notice, we requested comments from all interested persons by May 31, 2005. TTB received two brief comments regarding Notice No. 36 before the close of the comment period. Both comments fully supported the establishment of the Calistoga viticultural area.

After the close of the comment period, we received representations on behalf of two entities opposing the establishment of the Calistoga viticultural area as proposed because the brand names used by these entities contain the name “Calistoga” and, upon establishment of the Calistoga viticultural area, a brand name that included the “Calistoga” name could be used on a label only if the wine in the bottle met the appellation of origin requirements for that viticultural area, or the brand name were used on certificates of label approval issued prior to July 7, 1986, and met the conditions under the § 4.39(i)(2) “grandfather” provision. Both indicated that, under their existing business practices, their wines would not meet the appellation of origin requirements for use of the Calistoga viticultural area name on their wine labels and that, additionally, neither would meet the conditions of the “grandfather” provision. The two

entities in question are Calistoga Partners, L.P., d.b.a. Calistoga Cellars, and Chateau Calistoga LLC, which uses “Calistoga Estate” as its trade name, and they are referred to in this preamble as “Calistoga Cellars” and “Calistoga Estate,” respectively.

In a written submission to TTB, representatives of Calistoga Cellars expressed opposition to the establishment of the Calistoga viticultural area due to the impact the establishment of an area named “Calistoga” would have on the winery and its existing wine labels. In particular, Calistoga Cellars noted that it has been using the “Calistoga Cellars” name on wine labels since 1998. The letter also stated that Calistoga Cellars had invested millions of dollars and years of effort in building the trade name, trademark, and brand name “Calistoga Cellars,” and that losing the use of the name or being restricted in its use would materially impact the winery. According to the letter, Calistoga Cellars produced about 8,500 cases of wine a year and sold in about 10 states. As to the merits of a “Calistoga” viticultural area, Calistoga Cellars argued that the term “Calistoga” is most often associated with the town of Calistoga and that the town is known as a tourist destination rather than a specific viticultural area.

For these reasons, Calistoga Cellars requested that TTB: (1) Reopen the public comment period to allow it and others to provide additional comment on alternative solutions that would protect Calistoga brand names; (2) exempt Calistoga Cellars from any restrictive consequences resulting from the establishment of the Calistoga viticultural area, by providing a specific “grandfather” provision for that brand name; (3) delay approval of the viticultural area until an industry-wide solution is implemented to protect Calistoga Cellars; or (4) allow Calistoga Cellars to continue to use its existing labels with a TTB-approved notice on the back label.

Also in a written submission to TTB, representatives of Calistoga Estate opposed the establishment of the Calistoga viticultural area. According to the letter, in 2005 Chateau Calistoga LLC purchased a small estate in the Calistoga area which had no vineyards of its own. The Calistoga Estate wines were made under contract with another winery, Adler Fels in Santa Rosa, California, and produced with grapes from the Napa Region, but not necessarily from the Calistoga region. This commenter stated that Calistoga Estate had spent thousands of dollars and a considerable amount of time

building its brand name, selling the wine in six states and the District of Columbia and planned to add two additional states, and urged that TTB consider some relief for that brand name.

III. Notice No. 77

On November 20, 2007, TTB published in the **Federal Register** (72 FR 65256) as Notice No. 77 a new proposal for the establishment of the Calistoga viticultural area for public comment. This new proposal included a limited “grandfather” protection for some brand names, as explained later in this preamble.

In Notice No. 77, TTB stated that the original petition included sufficient evidence of the viticultural distinctiveness of the Calistoga area and that there was a substantial basis for the establishment of the Calistoga viticultural area. At the same time, while distinctive from surrounding areas, the Calistoga area nevertheless retains common characteristics with the Napa Valley appellation. We also noted that, consistent with previous practice, we had considered alternative names as a means of resolving conflicts between existing labels and the “Calistoga” viticultural area name. For example, the “Oak Knoll District of Napa Valley” viticultural area (T.D. TTB–9, 69 FR 8562) and the “Diamond Mountain District” viticultural area (T.D. ATF–456, 66 FR 29698) were established after resolving such conflicts, resulting in viticultural area names that were modifications of those originally proposed by the petitioners. The petition to establish the “Oak Knoll District of Napa Valley” viticultural area originally proposed the name “Oak Knoll District”. The petition to establish the “Diamond Mountain District” viticultural area originally proposed the name “Diamond Mountain” for the viticultural area. In these and similar cases, TTB or its predecessor agency found that name evidence supported the use of the modified names, that the modified names were associated with the proposed viticultural area boundaries, and that their use reduced potential consumer confusion with long-standing existing labels. In the cases of Oak Knoll District of Napa Valley and Diamond Mountain District, the petitioners also agreed to the modifications of the viticultural area names.

Notice No. 77 explained that, in the case at hand, the petitioners and commenters to Notice No. 36 did not suggest any modification to the proposed name that would resolve conflicts between existing brand names

and the “Calistoga” viticultural area name. (We also note that the evidence submitted with the original petition did include historical information that the term “District” was associated with the Calistoga area. Nevertheless, while not determinative of the appropriateness of the name, the petitioner did not believe that a modifier in the name such as “district” was appropriate.) Moreover, TTB had not found any potential name modifications that would be acceptable alternative names for the proposed “Calistoga” viticultural area. TTB had carefully considered the evidence submitted in support of the Calistoga viticultural area petition and had concluded that the term “Calistoga” alone is a specific, not generic, descriptive name that is clearly associated with Napa Valley viticulture. Accordingly, TTB acknowledged in Notice No. 77 that the term “Calistoga” alone would have viticultural significance. Therefore, under § 4.39(i), even if the name of the viticultural area were “Calistoga District,” a wine containing the term “Calistoga” in the brand name would still have to meet the appellation of origin requirements for the viticultural area (unless the brand name were subject to the exception in § 4.39(i)(2)).

In Notice No. 77, we stated that the evidence submitted by the petitioners indicates that designation of the Calistoga viticultural area would be in conformity with applicable law and regulations, and that a delay in the approval of the “Calistoga” viticultural area, as suggested by Calistoga Partners, would not be an appropriate or responsive resolution. After noting that the Calistoga case and cases with similar factual bases involve a fundamental conflict between two otherwise valid and appropriate TTB administrative actions, that is, the approval of labels by TTB through the issuance of certificates of label approval (COLAs) and the subsequent approval of a petitioned-for AVA, we stated:

However, TTB also believes that Calistoga Partners has demonstrated a legitimate interest in not losing the ability to continue to use its long-held Calistoga Cellars brand name on its wines in the same way it has been using this name. We believe it is desirable to find a solution that will address the legitimate interests of both the Calistoga petitioners, who have an interest in gaining formal recognition of a viticulturally significant area and name, and vintners who have an interest in retaining the use of long-held brand names. We also believe, as a fundamental tenet of administrative practice, that it is preferable to avoid, whenever possible, a situation in which one otherwise proper administrative action (issuance of a certificate of label approval in this case) is

restricted by a subsequent, valid administrative action (establishment of a viticultural area). And perhaps more importantly, where a conflict arises between a proposed AVA name and an established brand name, we do not believe that, in the context of the labeling provisions of the FAA Act, it is an appropriate government role to make choices between competing commercial interests, if such choices can be avoided.

As a result, we proposed regulatory text that would address the concerns of Calistoga Partners, L.P., and its continued use of the brand name “Calistoga Cellars.” Specifically, the proposal would allow for the continued use of a brand name containing the word “Calistoga” on a label for wine not meeting the appellation of origin requirements of 27 CFR 4.25 for the established Calistoga viticultural area if (1) the appropriate TTB officer finds that the brand name has been in actual commercial use for a significant period of time under one or more existing certificates of label approval that were issued under 27 CFR part 4 before March 31, 2005; and (2) the wine is labeled with information that the appropriate TTB officer finds to be sufficient to dispel the impression that the use of “Calistoga” in the brand name conforms to the appellation of origin requirements of 27 CFR 4.25. The notice noted that the proposed grandfather provision would not apply to a brand name that was first used in a certificate of label approval issued on or after March 31, 2005, the date that Notice No. 36 was published in the **Federal Register** originally proposing the establishment of the Calistoga viticultural area. This “grandfather” protection as proposed would not extend to the use of the name “Calistoga Estate” because that name was first submitted to TTB in connection with a label approval in July 2005, that is, after publication in the **Federal Register** of Notice No. 36.

In Notice No. 77 we invited comments on the “grandfather” provision, on the period of time that a label should be in actual commercial use for that use to be deemed “significant,” on the type of dispelling information that would be sufficient to prevent consumers from being misled as to the origin of the grapes used to produce the wine, on the appropriate type size and location on the wine label of such dispelling information, and on other alternatives.

The comment period for Notice No. 77 was originally scheduled to end on December 20, 2007. TTB received multiple requests to extend the comment period. In consideration of the requests and in light of the impact that

the approval of the proposed viticultural area and grandfather provision would have on wine labels, we published Notice No. 79 on December 17, 2007 (72 FR 71289), extending the comment period through March 20, 2008.

IV. Overview of Comments Received in Response to Notice No. 77

TTB received over 1,350 comments in response to Notice No. 77. Of these, approximately 1,160 were variations of form letters and postcards, submitted by mail and e-mail. The remaining written comments were received from individuals, wine consumers, wine distributors, winegrape growers, wineries, interest groups, business and trade organizations, and local, State and Federal Government representatives. Nearly all of these comments focused on the proposed grandfather provision for some labels and the “dispelling” information statement (referred to by many as the “disclaimer”) that was proposed as a condition for use of the grandfather provision.

A number of the comments we received in response to Notice No. 77 also included commentary on Notice No. 78, which also was published in the *Federal Register* (72 FR 65261) on November 20, 2007. Notice No. 78 primarily involved proposed amendments to the TTB regulations regarding the establishment of viticultural areas in general, including a new grandfather concept for § 4.39(i). Comments that relate to proposals in Notice No. 78 are outside the scope of this rulemaking and will be addressed in a separate rulemaking action specific to Notice No. 78.

During the public comment period for Notice No. 77, TTB also met with attorneys representing Calistoga Cellars at their request. TTB included a summary of that meeting with the comments we received on Notice No. 77 that are posted on the Regulations.gov Web site (<http://www.regulations.gov>), and the points raised on behalf of Calistoga Cellars in that meeting are included where applicable in the following discussion.

The following discussion focuses on the commenters' positions on the establishment of the Calistoga American viticultural area (AVA) as a general proposition and on the grandfather provision in the proposed regulatory text (referred to herein as the “Notice No. 77 grandfather provision”). Some commenter totals are given as approximations, because some commenters might fall within more than one of these general categories. A more detailed discussion of the comments on

these two issues follows this category breakdown discussion.

- *Form letters and postcards.* As mentioned above, we received over 1,160 comments that were variations of form letters and postcards, nearly all of which were submitted through a group called “Stand Up for the Little Guy,” an interest group supporting Calistoga Cellars. The form letter asks TTB to “sustain TTB Notice #77” as it “strikes a balance between the desire for a regional competitive advantage by designating the new Calistoga AVA and the due process right of a small winery.” It states that “Calistoga Cellars has spent over 10 years building a successful brand with customers throughout the country,” that the winery has “already agreed to more stringent labeling language,” and that it is “wrong for large, corporate wineries to use the AVA process to threaten the livelihood of a small winery such as Calistoga Cellars.” The form postcard language is similar to that of the letter.

- *Wineries and wine cellars.* We received approximately 60 nonform-letter comments from representatives of wineries and wine cellars (other than the petitioner and representatives of Calistoga Cellars and Calistoga Estate). All of these comments opposed the proposals set forth in Notice No. 77, without distinguishing between the establishment issue and the grandfather issue. The majority of these comments argued that allowing geographic brand names to appear on labels of wine that do not comply with the sourcing requirements for the use of that viticultural area on the label will mislead and confuse consumers, and will undermine the integrity of the viticultural area. Many of these comments also noted that a disclaimer on a back label of a wine will not dispel consumer misperception of the origin of the wine. Several of the commenters suggest that the affected wineries should have known better than to have selected geographic brand names, like Calistoga, and that the proposal serves to harm those in the industry who have played by the rules when selecting their brand names.

- *Business interests and trade groups.* We received approximately 25 comments from interest groups and wine trade organizations, including the Calistoga Chamber of Commerce, the Napa Chamber of Commerce, Napa Valley Vintners, the Wine Institute, Sonoma County Vintners, Oregon Winegrowers Association, Appellations St. Helena, Family Winemakers of California, Napa County Farm Bureau, Winegrowers of Napa Valley, Lodi District Grape Growers Association,

Wine America, California Farm Bureau Federation, Paso Robles AVA Committee, California Association of Winegrape Growers, Washington Wine Institute, Walla Walla Valley Wine Alliance, Stags Leap District Winegrowers Association, Santa Cruz Mountains Winegrowers Association, and the Washington Wine Group (self-described as a public agency “empowered to speak for the Washington wine industry”). Many of these groups explicitly or implicitly supported the establishment of the Calistoga AVA in their comments, although all of the comments from these groups also expressed opposition to Notice No. 77. Many argued that the Notice No. 77 grandfather provision would have the effect of confusing and misleading consumers and undermining the integrity of the AVA system and the global competitiveness of American wines. Napa Valley Vintners (NVV) suggests that existing labels using the term “Calistoga” in the brand name should be prohibited from continued use because, along with being misleading, they were “mistakenly issued.” In addition, the NVV states that the proposed grandfathering of “Calistoga” brand names is incompatible with U.S. international obligations pursuant to Article 23 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

- *Members of Congress.* We received a number of letters from members of the United States Congress. Several forwarded letters from constituents supporting Notice No. 77 (constituents included owners and investors in Calistoga Cellars). One Senator voiced support for Notice No. 77, expressing concern that “a large wine industry group could use the AVA process to threaten the livelihood and survival of one vineyard,” and asking that “full and fair consideration” be given to the concerns raised by Calistoga Cellars. Similar views were expressed in letters submitted by other Members of Congress. Another Senator also wrote on behalf of Calistoga Cellars, stating that, while he recognized the legitimate needs of consumers to better identify wines they purchase and vintners' desires to better describe their wines' origins, he encouraged TTB to “continue to fully take into account businesses like Calistoga Cellars, which have made significant commercial investments over a period of time.”

One Senator submitted four letters in opposition to Notice No. 77. In referencing both Notice Nos. 77 and 78, the Senator stated that “the changes being proposed do not improve the identification and labeling requirement

of wine products nor do they protect the consumer.” The Senator further stated the proposed rules are “contrary to U.S. international obligations and out of step with international wine industry standards for recognition of wine regions”, and that the grandfather provision in Notice No. 77 does not comply with the regulatory standards of the AVA system for grape content and geographic origin. TTB also received a letter signed by 61 members of the United States Congress expressing support for the existing AVA regulations and “grave concern” over Notice Nos. 77 and 78, “which would significantly and detrimentally alter the American Viticultural Area (AVA) system.” Two of the cosigners subsequently submitted a separate letter expressing the same viewpoint.

- *State and local governments.* We received comments from five State and local government representatives. A California State Senator submitted a resolution passed unanimously by the California State Legislature requesting TTB to withdraw Notice Nos. 77 and 78 and to move forward with the “uncompromised recognition” of the Calistoga AVA as originally petitioned for. The Mayor of the City of Paso Robles wrote in opposition to the Notice No. 77 grandfather provision, as did the City Manager for the City of Calistoga, the Napa County Agricultural Commissioner, and the Chair of the Napa County Board of Supervisors, who also expressed support for the establishment of the petitioned-for Calistoga AVA. The comment from the Napa County Board of Supervisors included a resolution passed by that body endorsing the Calistoga AVA petition and objecting to the Notice No. 77 proposals. These State and local government commenters raised concerns over potential negative economic consequences of the proposal, misleading and deceptive labels, diluting public confidence in domestic wine products, potential conflicts with the provisions of international agreements and with trademark laws, the integrity of the American wine industry domestically and internationally, and the devaluing of the Calistoga name.

- *Other businesses.* Approximately twenty comments were received from submitters identifying themselves in occupations relating to wine publishing and education, hotel operations, and wine importation, marketing, promotion, retail sales and distribution. Others identified themselves with Napa area businesses, such as the Napa Community Bank and Chardonnay Golf Club. One comment was received from

Compliance Service of America, whose services include the preparation and filing of AVA petitions. With the exception of the latter, all of these commenters oppose the provisions of Notice No. 77. Generally, these commenters cited concerns about misleading wine labels that confuse consumers and about disclaimers hidden on the back labels that would not be read by a consumer before purchase at retail, from a wine list in a restaurant, or when using the internet. Some argued that such labels will undermine the integrity of American wine and the credibility of the AVA system. The comment from Compliance Service of America supports all of the proposals set forth in Notice No. 77 and cites examples of how conflicts between viticultural area names and brand names may legitimately arise.

- *Calistoga Cellars.* Five comments were submitted by representatives of Calistoga Cellars. The general partners of Calistoga Cellars provided specific information about that winery’s operations, similar to information submitted in response to Notice No. 36 described above, including a list of existing certificates of label approval, specific sourcing information for grapes used in Calistoga Cellars wine, and an explanation of the “impediments to sourcing grapes in the proposed Calistoga AVA.” One comment reiterated the winery’s position that it would be unable to find grapes of appropriate quality and quantity for its winery operations. For example, they asserted that the winery has found no source of Sauvignon Blanc grapes, Zinfandel grapes, or Cabernet Sauvignon grapes in the Calistoga viticultural area equal to or superior to its current sources. Further, they stated that, if required to source grapes only from the Calistoga AVA, the winery would suffer a “devastating financial impact” and the quality of its wines would suffer. According to that letter, Calistoga Cellars sold approximately 10,000 cases of wine in 2006 and 2007, an increase from approximately 8,000 cases in 2005. Further, Calistoga Cellars had continued to build its national brand by increasing the number of States into which it was distributed to 35.

- *Calistoga Estate.* Eight comments were received from submitters describing themselves as owners, investors, partners, or attorneys of Calistoga Estate. One commenter specifically opposed the establishment of the Calistoga viticultural area. Others opposed excluding Calistoga Estate from the Notice No. 77 grandfather provision, pointing out that the grandfather

provision applies only to labels in commercial use as of March 31, 2005, whereas Calistoga Estate received its first label approval in July 2005. They argued that the proposed provisions would be arbitrary and capricious, serve no public policy purpose, and constitute an improper taking of their property (brand). Further, the commenters asserted that the winery has spent considerable time and money establishing the brand name (distributing in 10 States, adding 3 more in January 2008), and that for the winery to “have to change our name at this time would be devastating.” They asserted that the Notice No. 77 proposals, if adopted, would also harm the wholesalers, brokers, retailers, and food establishments handling Calistoga Estate wines. They suggested that TTB should have notified the winery about the potential AVA name conflict when the Calistoga Estate labels were submitted for approval.

- *The petitioner.* The original petitioner for the Calistoga AVA, submitted two comments, both opposing the Notice No. 77 grandfather provision. He argued that the provision would “greatly weaken American consumers’ confidence in American wine labels,” that the proposed regulations would conflict with international agreements and may cause the European Union and Japan to prohibit importation of wine from the United States bearing a viticultural area designation, and that the proposals conflict with current TTB publications and regulations. He also argued that the proposals would benefit “illegitimate economic interests of one owner of a misdescriptive Calistoga brand name over the legitimate economic interests of the wine industry for the entire Calistoga region and the veracity of the Calistoga name.”

- *Concerned citizens and “unaffiliated” commenters.* The remaining commenters, approximately 50, either described themselves as “concerned citizens” or did not designate a particular affiliation. One of these comments supported the position of Calistoga Estate and asked that the date by which labels could be considered for the Notice No. 77 grandfather provision be changed to accommodate that winery’s labels. Seven of the approximately 50 comments supported the position of Calistoga Cellars, most citing concern over abuses of the policy process by “large corporations” and anticompetitive practices that harm “small, independent businesses,” while one argued that not sustaining Notice No. 77 would “constitute an ex post

facto taking of Calistoga Cellars' name without just compensation." The remaining comments opposed Notice No. 77, suggesting that it would allow misleading labels, would violate the intent of, and would be contradictory to, the stated objectives of the AVA process and would support deceptive brand names. Many commenters opposed a provision they describe as contrary to "truth in labeling," and considered disclaimers on back labels to be ineffectual in conveying information to consumers buying wine at a restaurant, at retail, or through the Internet.

V. Comments on the Establishment of the Calistoga Viticultural Area

Twenty-eight commenters stated support for the establishment of the Calistoga viticultural area. Many others indirectly expressed support for or opposition to the establishment of the AVA, conditioned on other issues, such as the Notice No. 77 grandfather provision. A few commenters who supported the establishment of the viticultural area said that it would enhance the distinct character of the Calistoga region and protect consumers who rely on the meaning and value of the Calistoga name. A representative of Jericho Canyon Vineyard wrote that the Calistoga appellation would enable consumers to "identify characteristics that make Calistoga wines unique." A Jax Vineyards representative stated that "[w]hen we purchased our vineyard in 1996, we specifically chose Calistoga for its unique weather conditions and specific soil content ideal for Cabernet Sauvignon," and that the proposed Calistoga viticultural area is distinct from the viticultural area next to it. That commenter argued that she should be able to promote the fact that her wines come from Calistoga. Napa Valley Vintners also provided numerous references in support of the petitioners' evidence showing that the Calistoga area is recognized as an area of viticultural significance and has been associated with the "Calistoga" name.

Three commenters offered several arguments against the establishment of the proposed viticultural area, including questioning the proposed name and boundaries. Two commenters suggested that Calistoga is not known for wine, but rather for tourism, hot springs, and mineral water. One asserted that there "has not been any clear connection with that name and wine produced in the Napa Valley, or for that matter in and near the city of Calistoga." Another opined that "suggesting an AVA is confusing in that Calistoga is not the major wine 'player' that is suggested by an AVA designation." Two commenters

expressed opposition to the proposed viticultural area boundaries because of the relationship between those boundaries and political (*e.g.*, county or city) boundaries in the area. One commenter specifically objected to the use of the county line as the proposed AVA boundary "as if the characteristics of the soil and climate respected political divisions". This commenter argued that those with Calistoga as their legal address should be allowed to use the name on their wines.

Two commenters, one an investor in the Calistoga Estate winery and the other an attorney writing on behalf of that winery, questioned the proposed viticultural area boundaries because the boundaries do not include all of the city of Calistoga. The latter commenter asserted that, because the proposed viticultural area boundaries and the city boundaries do not perfectly correspond, using the "Calistoga" name for the viticultural area would cause confusion between that Calistoga viticultural area and the city of Calistoga. He stated that, "because many consumers know the city of Calistoga, they almost certainly will believe that wine bearing a Calistoga AVA originated in the city of Calistoga." In addition, he pointed out that some parts of the city of Calistoga are within a different viticultural area, the Diamond Mountain District viticultural area and that, in some cases, "consumers would confront wines that bear Calistoga, California as the mandatory name and address information on the label, but confusingly bear the Diamond Mountain District AVA on the label." Additionally, some wineries that are not within the Calistoga city limits would be in the Calistoga viticultural area. This commenter also argued that the proposed AVA would include areas even outside of the city of Calistoga's "unincorporated Planning Area," which would "sweep in far more area than the city itself," and that consumers could be confused by areas in the AVA that are outside of the planning area. The commenter suggested for the reasons above that the name "Calistoga" for the viticultural area would be misleading unless further qualified, for example, by modifying the name to "Calistoga District."

Another commenter stated that TTB should expand the boundaries of the proposed viticultural area to accommodate the vineyards used by Calistoga Cellars.

TTB Response

After carefully considering the evidence submitted in support of the petition and the comments received in

response to Notice No. 77, TTB continues to believe that the evidence submitted supports the establishment of the "Calistoga" viticultural area, with the boundaries as the petition describes and as set forth in the proposed regulatory text. We find that there is sufficient evidence that the proposed viticultural area boundaries are associated with both a name and a set of geographical features (climate, soils, elevation, and physical features) that are common to the designated region and that distinguish it from other areas. None of the commenters opposing the proposed boundaries has submitted evidence to undermine this finding. Much of the Calistoga boundary reflects the boundaries of existing AVAs, and the record in those rulemakings supports those boundaries, including the political boundary of the county line to which one commenter objected. Moreover, none of these commenters has specifically proposed new, more appropriate boundaries, other than to say that the boundaries should or should not reflect political boundaries or that the boundaries should include other vineyards or wineries. None of these commenters has provided evidence to show that the viticultural area geographic features coincide with, or vary from, the relevant political boundaries such as a county line. We have in the past considered, and will continue to consider, any petition to amend the boundaries of an established viticultural area, so long as that petition contains sufficient name and geographical features evidence to support such an amendment. The points made by these commenters do not meet this evidentiary standard and, therefore, we find no basis at this time for modifying the boundary proposed for the Calistoga viticultural area.

We disagree with those commenters who suggested that there is, or should be, a relationship between the legal address of a business, in this case a winery, and the viticultural area designation of a wine. Under the TTB regulations at 27 CFR 4.32(b)(1) and 4.35(a) there is only one specification for name and address that is mandatory on a label for American wine: The words "bottled by" or "packed by" followed by the name of the packer or bottler of the wine and the place where the wine is bottled or packed. (Wine labels may also bear, as optional statements under certain conditions, address information corresponding to the place the wine was produced, blended, or cellared.) Therefore, it is not uncommon or inappropriate for a wine label that bears a viticultural area name

to also bear address information that does not correspond to that viticultural area. The same result might arise from wines that bear a county or state name as an appellation of origin due to the fact the product may be bottled outside of the county or State.

With regard to the viticultural area name, the evidence clearly establishes that "Calistoga" is a name that is locally and regionally known and that the term "Calistoga" by itself has been associated historically with viticulture, specifically Napa Valley viticulture. As noted above, in the preamble to Notice No. 77, we discussed in detail possible modifications to the name of the viticultural area, including the addition of the word "District" (making the viticultural area name "Calistoga District"). The evidence submitted with the viticultural area petition as outlined earlier in this final rule under "Name Evidence" supported a finding that the term "Calistoga" alone is a specific reference to an area associated with viticulture and therefore would be a term of viticultural significance regardless of other words that might be included in the viticultural area name such as "District". As to whether the name was underinclusive by not including other areas also known by the term Calistoga, such as all of the city of Calistoga, TTB's establishment of an AVA does not mean that there can be no area outside of the established AVA boundaries also known by that term. This is consistent with the past practice of TTB and its predecessor in establishing AVAs (e.g., Snake River Valley, T.D. TTB-59, 72 FR.10602 (Mar. 9, 2007) and Niagara Escarpment, T.D. TTB-33, 70 FR 53300 (Sept. 8, 2005)). In response to the comment that the AVA includes areas not included in the "unincorporated Planning Area," TTB does not believe that a map designed to reflect planning authority defines the extent of this area's name. Furthermore, the commenter was satisfied with calling the area "Calistoga District," which suggests that the term "Calistoga" in connection with the proposed area was acceptable.

VI. Comments on the Notice No. 77 Grandfather Provision

Whether Another Grandfather Provision Is Appropriate

As noted earlier, TTB received approximately 1,160 variations of a form letter and postcard supporting the Notice No. 77 grandfather provision. The vast majority of these comments, along with another 15 written comments supporting the position of Calistoga Cellars, focused primarily on the

expected effect of the grandfather provision (that is, the protection of a "small winery" or "a small investor" or "individual business owners" in the face of actions by "large, corporate wineries" or "the large wine industry group, the Napa Valley Vintners") and the hardship that the winery would otherwise face.

As noted above, several Members of Congress commented in support of Notice No. 77. The comment of one Senator provided a concise summary of many of the comments in favor of Notice No. 77, saying that it "struck the appropriate balance" and that, without the grandfather provision, the establishment of the Calistoga AVA "would have a devastating impact on Calistoga Cellars, forcing this small company to lose its investment and the brand name the company spent over 10 years building." One Senator expressed concern about opposition to the grandfather provision by Napa Valley Vintners, stating that he was "troubled that a large wine industry group could use the AVA process to threaten the livelihood and survival of one small vineyard" and that "the AVA process should not be used as a tool to eliminate competition in the marketplace."

A comment submitted by one of the general partners of Calistoga Cellars further argued that the existing grandfather provision of 27 CFR 4.39(i), which applies to brand names in commercial use prior to July 7, 1986, is "fundamentally unfair" because it "requires all owners of brand names containing a geographical term of viticultural significance used under certificates of label approval approved after July 7, 1986 * * * to change their business plan, marketing strategy and grape sources immediately upon the creation of a new AVA incorporating such geographic term, no matter how long such * * * COLA has been in use." The commenter went on to state that a "brand owner may have chosen a name without any knowledge of its (potential) geographic significance" and that "brand owners should have some assurance that their geographic brand name, perhaps used for years, will not be canceled by a newly created AVA." Finally, he argued that, if the Calistoga region were such a noted viticultural area for over 100 years, those concerned about protecting the use of its name would have filed a petition for establishment of the Calistoga viticultural area sooner. He stated that he believes the "failure to file until 2005 should be taken into consideration when determining how pre-petition geographic brand names should be treated."

Along the same lines, Compliance Service of America suggested that vintners commenting in opposition to the Notice No. 77 proposals may not realize that their own brand names hold the same potential for being limited by the creation of a viticultural area. The commenter gave as an example the Eola Hills viticultural area proposal, asserting that the winery that developed the viticultural significance of the region found that a petition had been submitted for the establishment of the viticultural area which would have caused the Eola Hills winery to lose the right to use its brand name on wines made with grapes sourced from outside the proposed viticultural area boundaries. The resolution was a modification of the proposed viticultural area name and of the term designated as viticulturally significant, which were agreed to by the petitioners and label holder. This commenter went on to note, with regard to the Calistoga viticultural area, that the "history of the Calistoga name does not support the argument that it had so much viticultural significance that the equities favor the AVA name over the brand name."

Out of the 184 nonform-letter comments, 110 specifically addressed the Notice No. 77 grandfather provision, 99 of which expressed opposition to it. Many of these commenters asserted that, because the TTB regulations have included a grandfather provision since 1986, at 27 CFR 4.39(i)(2), which prohibits the use of brand names on labels unless those labels were approved on certificates of label approval issued prior to July 7, 1986, Calistoga Cellars should have known better than to use a brand name containing a geographic name, should have been aware that they could lose the use of their brand name, and "did not do their due diligence in choosing the name." One commenter, a winery owner, recalled attending numerous seminars and reading information regarding geographic brand names and, after "doing his homework" decided against using a geographic brand name for his winery. Another commenter stated that "responsible vintners know the risk in choosing to name a winery after a township or geographic region (of potential conflict with future AVA designations) and the benefits (immediate brand recognition)."

Napa Valley Vintners (NVV) argued that TTB's approval of the labels bearing a "Calistoga" brand name was done so contrary to TTB guidance regarding geographic brand names appearing in the Beverage Alcohol Manual for Wine (BAM). NVV pointed out that the BAM

states that “[i]f the brand name includes the name of a geographic area that actually exists and is described in at least two reference materials as a grape growing area, the wine cannot be labeled with such a brand name.” The NVV included in its comment a number of references to the Calistoga area appearing in wine-related publications and, based upon those references, asserted that the COLAs issued for labels bearing the “Calistoga” brand names were mistakenly issued as Calistoga was a clearly established term of viticultural significance appearing in multiple reference sources at the time of the approval. Further, the NVV pointed to the TTB regulations in 27 CFR part 13 setting forth procedures by which specific COLAs may be revoked as the appropriate means for addressing labels that TTB may have erroneously approved.

TTB Response

As noted above, in the preamble of Notice No. 77 TTB set forth the reasons why we proposed the step of including a limited grandfather provision in the proposed regulatory text. We explained that we recognized in the Calistoga case a rare instance in which a conflict between approved COLAs and the approval of a petitioned-for AVA hinged upon a specific term of viticultural significance in such a way that an appropriate compromise between the affected parties regarding the term could not be reached. We believe that the comments that attempt to define the equities in this case by portraying the different parties as “large” or “small”, or that describe the Notice No. 77 proposal as “protecting” one entity over another, raise points that are not germane to the fundamental issue that Notice No. 77 addressed.

The present rulemaking raised the question of what to do about viticultural area petitions that are received long after the issuance in 1986 of § 4.39(i) on the use of geographical brand names of viticultural significance where the petition proposes a name that results in a conflict with a brand name first used on an approved COLA not covered by the grandfather provision in § 4.39(i). Such a circumstance may occur for legitimate reasons because exact terms of viticultural significance are not always universally agreed upon, and relevant facts and issues regarding terms and areas of viticultural significance are not always brought forward until a petition is published for rulemaking. Notice No. 78 addressed this issue in general terms. In the present rulemaking, TTB has to resolve it in the context of the Calistoga name.

We do not agree that, in light of statements appearing in the BAM, the COLAs for labels bearing the “Calistoga” brand names were mistakenly issued. The BAM was published as guidance to assist the industry in understanding the pertinent regulatory provisions, in this case, those appearing at § 4.39(i)(3) pertinent to the use of geographic brand names on wine labels. As we have noted, that regulation provides that a name has viticultural significance when it is the name of a State or county (or the foreign equivalent), when approved as a viticultural area in accordance with the regulations in 27 CFR part 9, or by a foreign government, or when found to have viticultural significance by the appropriate TTB officer under § 4.39(i)(3). The regulations specifically provide discretion to the Bureau with regard to making such determinations. Regardless of whether TTB or its predecessor agency should have done so, the fact remains that, when labels containing the “Calistoga Cellars” brand name or the “Calistoga Estate” brand name were approved, no specific determination had been made by TTB that the name “Calistoga” was viticulturally significant.

In the past, TTB and its predecessor agency looked at the proposed names of the AVAs to determine whether they would mislead the consumer taking into account existing brand names (see Stags Leap, Spring Mountain, Diamond Mountain, Oak Knoll, *etc.*). Where the proposed AVA name did not lead to a likelihood of confusion, for example because the proposed name included an additional word such as “District” or “Hills” that distinguished it from another identical name (such as a brand name), the name was approved. Alternatively, where the proposed name would likely lead to confusion, the assessment turned to alternative names proposed by the petitioner or commenters. In the present rulemaking, neither situation is present. The proposed name Calistoga would conflict with the existing brand names and a satisfactory alternative name has not been proposed by the petitioner or commenters nor found by TTB.

Notwithstanding the considerations noted above, we have concluded for the reasons set forth below that the adoption of a specific, limited grandfather provision would not be appropriate in this case.

We believe that, consistent with the purpose behind the labeling provisions of the FAA Act and existing regulations, in particular § 4.39(i) which would preclude the use of a brand name that does not conform to the requirements

for use of the AVA name, a change that would permanently affect the application of § 4.39(i) would not be warranted in this case. Moreover, a specific grandfather provision for one winery is an approach that TTB and its predecessor have not used in the past. We believe in this matter that a label with the proposed disclaimer may not provide a consumer with adequate information as to the identity of the product but rather may result in the consumer being misled as to the true origin of the grapes used to produce the wine. Section 4.39(i) has been in effect for over 20 years, and its application and effect have been well understood over that period of time. That is, when it cannot be otherwise avoided the government may make a choice between competing commercial interests by requiring existing labels’ compliance with regulations establishing a new AVA.

Furthermore, the use of a grandfather provision would result in the application of multiple standards for the use of one name on wine labels, leading to potential consumer confusion and thus potentially frustrating the consumer protection purpose of the FAA Act labeling provisions. In the present case, we conclude that it is preferable as a matter of consumer protection for “Calistoga” to have only one meaning and association for viticultural area purposes. Accordingly, in this final rule we are not adopting a grandfather provision in the new § 9.209 text, and, as a consequence of this decision we are not adopting the proposed conforming amendment to § 4.39(i).

Whether the Proposed Action Would Result in a Taking of Property

One commenter suggested, in the context of Calistoga Estate, that the proposal would take away the label and that therefore the brand, as property, would be taken away by the government.

TTB Response

We do not agree that applying the regulations set forth at § 4.39(i) constitutes a “taking” of property. TTB and its predecessor agency have long held that the certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder. Indeed a statement to that effect was made in T.D. ATF-406 published in the **Federal Register** (64 FR 2122) on January 13, 1999, which set forth the procedures by which specific COLAs may be revoked. Moreover, the form required for use in applying for label approval, TTB F 5100.31, Application

for and Certification/Exemption of Label/Bottle Approval, states, "This certificate does not constitute trademark protection." In addition, we note that affected wineries may continue to use the labels in question if they configure their wines so that at least 85 percent of the wine is produced from grapes grown within the Calistoga viticultural area.

We note that a "taking" may occur under the Fifth Amendment, *inter alia*, when the government restricts some of the owners' uses of private property even though the owner is left with a substantial economic use. Consistent with the Supreme Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), three considerations may be applied in this situation to conclude that the government's action is not a taking. First, the nature of the government action to protect consumers from misleading labels and to prevent new conflicting brand names from coming into use after the establishment of a viticultural area is sound public policy. The brand names "Calistoga Cellars" and "Calistoga Estate" may continue to be used but simply must be used in a manner that conforms to the requirements of § 4.39(i) to ensure that consumers are not misled. That is, these brand names must be used in a truthful manner. See *Bronco Wine Co. v. Jolly*, 129 Cal.App.4th 988, 29 Cal.Rptr.3d 462, (Cal. Ct. App. 2005), *review denied*, 2005 Cal LEXIS 9470 (Aug. 24, 2005) and *cert. denied*, 546 U.S. 1150 (2006). Second, the negative economic impact on the affected brand names is mitigated by the fact that the government action leaves significant value in the brand name when it is used with grapes from Calistoga, or when the brand name is sold to a winery for use on wine eligible for the Calistoga viticultural name, and the brand name also may gain enhanced value from the new viticultural area designation. See *Andrus v. Allard*, 444 U.S. 51 (1979). Finally, the investment-back expectations are not derogated because all affected brand names came into use after publication of the current rule in § 4.39(i) and the approval of COLAs by TTB or its predecessor did not imply that the brand name could be used in every situation.

Whether Affected Wineries Should Be Allowed a Time Period To Phase Out Noncompliant Labels

NVV asserted that it would be reasonable to allow Calistoga Cellars to phase out, over a 3-year period, its use of the Calistoga Cellars brand name on wine not complying with the appellation of origin requirements for the Calistoga viticultural area. NVV

pointed out that a similar sunset principle was provided for varietal names and for the implementation of the original appellation of origin rules in T.D. ATF-53, 43 FR 37672 (Aug. 23, 1978). An attorney commenting on behalf of Calistoga Estate also argued that, should TTB decide to establish an AVA for the Calistoga area that does not permit Calistoga Estate to continue using the Calistoga Estate brand name on wine produced from grapes purchased elsewhere in the Napa Valley, TTB should provide Calistoga Estate a minimum 3-year phase-out period to allow the establishment of a new brand. The commenter argued that a minimum 3-year transition period would allow Calistoga Estate to "fully inform wholesalers, brokers, control state buyers, retailers and consumers about its new name, allowing it to transition the goodwill now associated with the Calistoga Estate wine to another brand name." In addition, the commenter cited other factors in support of a 3-year transition period, including the need to use up existing label stocks, the need to design new labels and receive TTB approval of those labels, and the need to test consumer acceptance of any new brand name. The commenter cited other TTB rulemaking actions that allowed for a 3-year transition period.

TTB Response

We agree with the comments received, and accordingly we believe that a 3-year use-up period would be sufficient and appropriate to transition the affected brand labels without unnecessary disruptions or economic costs. Therefore, we are providing for a 3-year transition period for the affected brand labels. As pointed out in the comments, there is agency precedent for such a transition period. In addition to the commenter's reference to the 5-year transition period for the original appellation of origin rules, among others, TTB provided a 1-year transition period for brand labels affected by the change in the name of the Santa Rita Hills AVA to the Sta. Rita Hills AVA, T.D. TTB-37, 70 FR 72710 (Dec. 7, 2005). We are providing this 3-year transition period to allow the use-up of existing label stocks, to provide time for the design of new labels, to submit labels and receive label approvals from TTB, and to allow each affected brand label holder the opportunity to consider other changes required of its business model in light of this rulemaking, including whether to begin sourcing 85 percent or more of its grapes from the new Calistoga viticultural area in order

to continue to use its brand name or to transition to a new brand name.

TTB Finding

After careful consideration of the evidence submitted in support of the petition and the comments received, for the reasons set forth above, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. The petitioners submitted sufficient evidence of the viticultural distinctiveness of the Calistoga area, and the comments did not include contradictory evidence. TTB also finds that "Calistoga" is the most appropriate name for the area. The evidence clearly shows that "Calistoga" is the name by which the area is locally and regionally known and that the term "Calistoga" by itself has been associated historically with viticulture, specifically Napa Valley viticulture.

TTB finds that the evidence submitted by the petitioners establishes that designation of the Calistoga viticultural area is in conformity with applicable law and regulations. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the "Calistoga" viticultural area in Napa County, California, effective 30 days from the publication date of this document with a 3-year transition period for the use of existing approved COLAs for labels containing "Calistoga" in the brand name on wine that does not qualify for the "Calistoga" designation.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this final rule.

Maps

The maps for determining the boundary of the viticultural area are listed below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, "Calistoga," is recognized under 27 CFR 4.39(i)(3) as a name of viticultural significance. The text of the new regulation clarifies this point. Consequently, wine bottlers using "Calistoga" in a brand name, including a trademark, or in another label reference as to the origin of the wine, must ensure that the product is eligible to use the viticultural area's name as an appellation of origin or meets the

requirements for application of the existing § 4.39(i) “grandfather” provision.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This rule would impact only a small number of existing entities. In addition, this regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor’s efforts and consumer acceptance of wines from that area. While we received comments suggesting that two small wineries might be adversely impacted by the adoption of the Calistoga AVA without some sort of relief, the final rule provides such relief in the form of a three-year period to allow the use-up of existing labels, to transition to new labels, or to consider other options for changing business practices to comply with the regulatory provisions. A search of the COLA database disclosed that several other brand names incorporating the name “Calistoga” appear on approved labels and the holders of those brand names did not comment on the proposal. It may be that these brand names are used on wines that are eligible for Calistoga AVA requirements or otherwise comply with § 4.39(i). In any case, to the extent those names are limited by the establishment of the Calistoga AVA, they are eligible for the continued use allowed under the transition period. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866 (58 FR 51735). Therefore, it requires no regulatory assessment.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend 27 CFR, chapter 1, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.209 to read as follows:

§ 9.209 Calistoga.

(a) *Name.* The name of the viticultural area described in this section is “Calistoga”. For purposes of part 4 of this chapter, “Calistoga” is a term of viticultural significance.

(b) *Approved maps.* The appropriate maps used to determine the boundary of the Calistoga viticultural area are four United States Geological Survey 1:24,000 scale topographic quadrangle maps. They are titled:

- (1) Mark West Springs, Calif. (1993);
- (2) Calistoga, CA (1997);
- (3) St. Helena, Calif. (1960, revised 1993); and
- (4) Detert Reservoir, CA (1997).

(c) *Boundary.* The Calistoga viticultural area is located in northwestern Napa County, California. The boundary beginning point is on the Mark West Springs map at the point where the Napa-Sonoma county line intersects Petrified Forest Road in section 3, T8N/R7W. From this point, the boundary:

(1) Continues northeasterly along Petrified Forest Road approximately 1.9 miles to the road’s intersection with the 400-foot contour line near the north bank of Cyrus Creek approximately 1,000 feet southwest of the intersection of Petrified Forest Road and State Route 128 on the Calistoga map;

(2) Proceeds generally east-southeast (after crossing Cyrus Creek) along the 400-foot contour line to its intersection with Ritchey Creek in section 16, T8N/R6W;

(3) Follows Ritchey Creek northeast approximately 0.3 mile to its intersection with State Route 29 at the 347-foot benchmark;

(4) Proceeds east-southeast along State Route 29 approximately 0.3 mile to its intersection with a light-duty road labeled Bale Lane;

(5) Follows Bale Lane northeast approximately 0.7 mile to its intersection with the Silverado Trail;

(6) Proceeds northwest along the Silverado Trail approximately 1,500 feet to its intersection with an unmarked driveway on the north side of the Silverado Trail near the 275-foot benchmark;

(7) Continues northeasterly along the driveway for 300 feet to its intersection with another driveway, and then continues north-northeast in a straight line to the 400-foot contour line;

(8) Follows the 400-foot contour line easterly approximately 0.7 miles to its

intersection with an unimproved dirt road (an extension of a road known locally as the North Fork of Crystal Springs Road), which lies in the Carne Humana Land Grant approximately 1,400 feet southwest of the northwest corner of section 11, T8N/R6W on the St. Helena map;

(9) Continues northerly along the unimproved dirt road approximately 2,700 feet to its intersection with the 880-foot contour line in section 2, T8N/R6W;

(10) Follows the meandering 880-foot contour line northwesterly, crossing onto the Calistoga map in section 2, T8N/R6W, and continues along the 880-foot contour line through section 3, T8N/R6W, sections 34 and 35, T9N/R6W, (with a brief return to the St. Helena map in section 35), to the 880-foot contour line’s intersection with Biter Creek in the northeast quadrant of section 34, T9N/R6W;

(11) Continues westerly along the meandering 880-foot contour line around Dutch Henry Canyon in section 28, T9N/R6W, and Simmons Canyon in section 29, T9N/R6W, to the contour line’s first intersection with the R7W/R6W range line in section 30, T9N/R6W;

(12) Continues northerly along the meandering 880-foot contour line across the two forks of Horns Creek and through Hoisting Works Canyon in section 19, T9N/R6W, crossing between the Calistoga and Detert Reservoir maps, to the contour line’s intersection with Garnett Creek in section 13, T9N/R7W, on the Detert Reservoir map;

(13) Continues westerly along the meandering 880-foot contour line, crossing between the Calistoga and Detert Reservoir maps in sections 13 and 14, T9N/R7W, and in the region labeled “Mallacomes or Moristul y Plan de Agua Caliente,” to the contour line’s intersection with the Napa-Sonoma county line approximately 1.1 miles northeast of State Route 128 in the “Mallacomes or Moristul y Plan de Agua Caliente” region, T9N/R7W, of the Mark Springs West map; and

(14) Proceeds southerly along the Napa-Sonoma county line to the beginning point.

(d) *Transition Period.* A label containing the word “Calistoga” in the brand name approved prior to December 8, 2009 may not be used on wine bottled on or after December 10, 2012 if the wine does not conform to the standards for use of the label set forth in § 4.39(i) of this chapter.

Signed: December 1, 2009.

John J. Manfreda,
Administrator.

Approved: December 1, 2009.

Timothy E. Skud,
Deputy Assistant Secretary (Tax, Trade, and
Tariff Policy).

[FR Doc. E9-29217 Filed 12-3-09; 4:15 pm]

BILLING CODE 4810-31-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2009-0764]

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Dunedin, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation
from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Dunedin Causeway bridge across the Gulf Intracoastal Waterway, mile 141.9, at Dunedin, FL. The deviation is necessary to facilitate rehabilitation of the bascule leaves of the bridge. This deviation allows the bridge to conduct single leaf operations while repairs are conducted with a three hour notice for double leaf operations.

DATES: This deviation is effective from 7 a.m. on September 8, 2009 through 6 p.m. on February 28, 2010.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG-2009-0764 and are available online by going to <http://www.regulations.gov>, inserting USCG-2009-0764 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Gene Stratton, Bridge Branch, Seventh Coast Guard district; telephone 305-415-6740, e-mail allen.e.stratton@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION: Coastal Marine Construction, INC, on behalf of Pinellas County, FL, has requested a deviation to the regulations of the Dunedin Causeway bridge, mile 141.9, across the Gulf Intracoastal Waterway as required by 33 CFR 117.5: Except as otherwise authorized or required by this part, drawbridges must open promptly and fully for the passage of vessels when a request or signal to open is given in accordance with this subpart. To facilitate the repair of the bascule leaves, one leaf will be required to remain in the closed position upon signal from a vessel, except with a three hour notification for an opening requiring both leaves. This deviation effectively reduces the horizontal clearance of 91 feet by half for vessels requiring an opening. The Mean High Water clearance in the closed position remains 24 feet. Vessels not requiring an opening may pass at any time. This action will affect a limited number of vessels as the ability to use the full 91 foot horizontal clearance is available with a three hour notification. This action is necessary to allow Coastal Marine Construction, INC to conduct necessary repairs the bascule leaves safely and efficiently.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: November 6, 2009.

Scott A. Buschman,
Captain, U.S. Coast Guard Commander,
Seventh Coast Guard District, Acting.
[FR Doc. E9-29126 Filed 12-7-09; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2009-0989]

RIN 1625-AA00

Safety Zone; Chimes and Lights Fireworks Display, Port Orchard, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Port Orchard, WA during the Chimes and Lights fireworks display. This action is necessary to provide for the safety of recreational and commercial boaters in the area during

the fireworks show on December 5, 2009. Entry into, transit through, mooring, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

DATES: This rule is effective from 5 p.m. to 8 p.m., December 5, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2009-0989 and are available online by going to <http://www.regulations.gov>, inserting USCG-2009-0989 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail ENS Ashley M. Wanzer, Sector Seattle Waterways Management Division, Coast Guard; telephone (206) 217-6175, e-mail SectorSeattleWWM@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is contrary to the public interest to delay the effective date of this rule. Delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objective since immediate action is necessary to ensure the safety of vessels and spectators gathering in the vicinity of the fireworks launching barge and display sites. Hazards include premature detonations, dangerous detonations, dangerous projectiles and falling or burning debris. Additionally, the zone should have negligible impact on vessel transits due to the fact that vessels will be limited