

**Comment 3**

**FORT ROSS VINEYARD & WINERY LLC**

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EXPRESS MAIL

May 4, 2005

**Chief, Regulations and Procedures Division  
Alcohol and Tobacco Tax and Trade Bureau  
Attn: Notice No. 34,  
P.O. Box 14412  
Washington DC 20044-4412**

Re: Proposed Fort Ross-Seaview Viticultural Area (2003R-191T)  
RIN 1513 AA64 (Notice No. 34)

Dear Sir:

We are Lester and Linda R. Schwartz, owners of Fort Ross Vineyard Winery LLC (hereafter collectively "Fort Ross Vineyard Winery"). We write in support of the proposed Fort Ross-Seaview AVA and support the name "Fort Ross-Seaview." We favor the "Fort Ross-Seaview" name by which the grape growing area is now commonly known. We contributed funds to the Fort Ross-Seaview AVA committee and we supported the filing of a petition.

However, we also write in specific response to your request for info Illation about any conflict with existing brands the proposed viticultural area name might create.

We own federal trademark registrations for the names FORT ROSS WINERY (Registration Number 2,636,029) and FORT ROSS VINEYARD (Registration Number 2,594,976), a common law trademark for the name FORT ROSS and the farm known as "FORT ROSS VINEYARD" for which Certificate of Registration No. 2657 was issued April 14, 1999 by the California Secretary of State pursuant to California Business Professions Code Section 14460.(Collectively "FORT ROSS TRADEMARKS").

We were surprised and disappointed to see in the Notice No. 34 that without any request in the petition and without any documentary or other discernable support, the proposed rule proposes to include "Fort Ross" (our trademark) and "Ft. Ross" (a permutation of our trademark) as alternative stand alone names of viticultural significance.

As we are sure the TTB will understand we are opposed to the clear and extreme negative

economic impact that approval of these alternative names will have on our business.  
Inasmuch

as the proposed rule declares that "Fort Ross" and "Ft. Ross" (hereafter collectively, "Fort Ross") have viticultural significance, and suggests that Fort Ross may be available to any one who uses grapes from the proposed AVA, it will have more than a negative economic impact on the substantial goodwill our business has generated over the 10 years of its existence—it could destroy it.

Fort Ross Vineyard & Winery requests that the final rule not attribute viticultural significance to the stand alone names of "Fort Ross" and/or "Ft. Ross," for these reasons and the additional reasons set forth below.

#### SUMMARY OF COMMENTS AND OBJECTIONS

A. There is no factual or legal basis that exists to support the use of "Fort Ross" standing alone as a name of viticultural significance.

B. Use of "Fort Ross" standing alone, rather than the proposed viticultural area name "Fort Ross–Seaview," will be misleading and confusing to consumers and the trade.

C. If the name "Fort Ross" is attributed viticultural significance a conflict will arise with the FORT ROSS TRADEMARKS, including our bottling trade names, operating trade name and registered vineyard name, and will cause us significant and irreparable economic loss.

D Ascribing viticultural significance to "Fort Ross" standing alone is inconsistent with TTB's and ATF's past practices.

These summarized issues are more fully addressed under the heading DETAILED COMMENTS below.

#### FACTUAL BACKGROUND

Fort Ross Vineyard & Winery LLC, a California limited liability company, is owned by the Lester and Linda R. Schwartz Trust of which we are the beneficial owners. As noted, we also own FORT ROSS TRADEMARKS, including our registered farm name.

Fort Ross Vineyard & Winery holds TTB Basic Permit CA-W-15162 and California Winegrower (Type 02) license 202 4678966.

Existing "Fort Ross" COLAs used by Fort Ross Vineyard & Winery and its licenses with respect to wines made with grapes derived exclusively for our Fort Ross Vineyard are listed in attached Schedule 1.

Since 2000, wines made exclusively from grapes harvested from our Fort Ross Vineyard have been bottled and sold by our Fort Ross Vineyard & Winery itself or its licensees under the "Fort Ross" label or labels specifically designating the "Fort Ross Vineyard" as the source of origin.

Wines bearing the "Fort Ross" label and/or the "Fort Ross Vineyard" designation have

been marketed and sold in California, other parts of the United States and the United Kingdom and have received national and international recognition. Consumers and vintners associate them with the Fort Ross Vineyard & Winery and/or the Fort Ross Vineyard itself. Some examples of the public recognition our Fort Ross wines have received are listed on attached Schedule 2.

There is no viticultural significance to "Fort Ross" standing alone. The historic town of Fort Ross is mostly a wooden fort named for the Russians who established and occupied it from 1812 to 1843 as an outpost on the Sonoma coast to harvest sea otter fur. Perched on a bluff just above the ocean, it serves today as a museum.

Historic references to the old fort at Fort Ross usually illustrate the role played by these Russian settlers. There is no evidence that grapes were actually grown at Fort Ross itself during the Russian occupation or at any time since then, or that the name Fort Ross has any independent viticultural significance. The little town of Fort Ross is located on a bluff virtually at sea level in a cold and foggy climate where the climatic conditions, proximity to the ocean and low elevation make it too cold for grapes to ripen.

Seaview was a small, 19th-century town and stagecoach stop on the ridge nearest the ocean, about 1,200 feet above Fort Ross. It consisted of a hotel, bar, dance hall, livery stable and two sawmills; but it no longer exists as a viable town. Records show that in 1938 Joseph Stefani owned a bonded winery (BW No. 1165) on Seaview Road. Sir Peter Michael is currently developing his Seaview Vineyard located off Seaview Road within the proposed viticultural area.

Besides our Fort Ross Vineyard there are a number of vineyards in the proposed Fort Ross-Seaview AVA. These include Hirsch, Martinelli, Marcassin, Hellenthal, W.H. Smith, Pahlmeyer, Flowers, Wild Hog, Failla Wines, Precious Mountain and Peter Michael (the owner of the Seaview Vineyard). None of these vineyards or wineries has used the name Fort Ross in the labeling or packaging of their wines. In fact, we (and our licensees) are the only ones who have ever used the "Fort Ross" label and name.

When the owners of the vineyards and wineries in the area agreed to petition for the "Fort Ross-Seaview" viticultural area, the petitioners chose the name by which the proposed AVA had become locally known. The group acknowledged that this name not only reflected the AVA's geographical boundaries and location, but also specifically recognized that it avoided confusion that could arise from misattribution of other grapes grown in the Fort Ross-Seaview AVA to those grown in our Fort Ross Vineyard. Historic Fort Ross itself is outside the proposed AVA.

#### DETAILED COMMENTS

*A. No factual or legal basis exists to support the use of "Fort Ross" standing alone as a name of viticultural significance.*

The proposed rule concludes, without citing any evidence, that:

In addition, with the establishment of the Fort Ross-Seaview viticultural area, the name "Fort Ross" or its abbreviated form "Ft. Ross" standing alone will be considered a term of viticultural significance because consumers and vintners could reasonably attribute the quality, reputation, or other characteristic of wine made from grapes grown in the proposed Fort Ross-Seaview viticultural area to the name Fort Ross itself (emphasis added). 70 FR 11174 at 11176.

No factual or legal basis exists to support this conclusion. All that the TTB cites in support is that the name Fort Ross is not used for any other place in the United States ("We note...that searches of the Geographic Names Information System... [of the U.S.G.S.] and the Internet reveal that the names `Fort Ross' and `Ft. Ross' apply only to the region of Sonoma County, California, where the proposed Fort Ross-Seaview viticultural area is located." 70 FR at 11176.).

The fact that there is no other place in the United States called Fort Ross has no relationship to whether consumers and vintners could reasonably attribute the characteristics of wine made from grapes grown in the proposed Fort Ross-Seaview area to the name Fort Ross itself. It may be noted that there is another Fort Ross located in Canada.

Neither "Fort" nor "Ross" by themselves carries the suggestion of grape growing or winemaking. No grapes have ever been grown in the town of Fort Ross or at the old fort which are both virtually at sea level where the cold and foggy climate does not permit the grapes to properly grow or ripen. The petitioners chose "Fort Ross-Seaview" because that is what locals call the area which produces fine grapes and wine. Neither "Seaview" nor "Fort Ross" standing alone has been used to describe an area that produces fine grapes and wine. The assertion in the proposed Rule that "consumers could reasonably attribute the quality, reputation, or other characteristic of wine made from grapes grown in the proposed" has no basis in fact. We submit that the TTB does not have the authority under 27 CFR 4.39(i) (3) to simply determine, with out reasonable evidence, that a name has viticultural significance. The Administrative Procedures Act, 5 USC 500 et. seq. requires such a determination to be based on more than conjecture.

We respectfully submit that proposed rule as currently written will destroy our valuable property and intellectual property rights without any factual or legal basis and without justification.

*B. The use of "Fort Ross" standing alone will be misleading and confusing to consumer and the trade.*

Avoidance of information likely to mislead the consumer is one of the underlying principles which informs the enabling statute on which the AVA rules are based. Section 205(e) (1) of the Federal Alcohol Administration Act (27 USC 201 et. seq.) requires labels that "prohibit deception of the consumer" and misleading statements (even if true). 27 CFR 4.39(a) (1). Section 205(e) (2) requires labels that will "provide the consumer with adequate information as to the identity and quality of the products..." The use of "Fort Ross" standing alone would frustrate both statutory mandates.

The conclusion in the proposed Rule that "Fort Ross" and "Ft. Ross" standing alone are terms of viticultural significance "because consumers and vintners could reasonably attribute the quality, reputation or other characteristic of wine made from grapes grown in the proposed Fort Ross-Seaview viticultural area to the name Fort Ross itself," 70 FR at 11176, is factually and legally incorrect for the following reasons:

- The use of "Fort Ross" standing alone will *in fact* mislead and confuse consumers and the trade into thinking that any such labeled wines are made with grapes from our well known Fort Ross Vineyard or are related to wines which are sold under FORT ROSS TRADEMARKS when such is not the fact.
- Wines made with grapes harvested from the Fort Ross Vineyard and wines marked as "Fort Ross Vineyard" designated wines are known in California, nationally in the United States and abroad. "Fort Ross" wines have received widespread acclaim in nationally and internationally recognized publications. The name "Fort Ross" is used extensively on the internet and in commerce in connection with "Fort Ross" wines made by Fort Ross Vineyard & Winery or wines derived from grapes made exclusively with grapes from our Fort Ross Vineyard.
- The name "Fort Ross" is currently associated only with our Fort Ross Vineyard and not the other vineyards in the proposed viticultural area or any other vineyard. Any use of the name "Fort Ross" by any other vineyards or persons or wineries in the area or else where will mislead consumers and the trade to believe that the grapes used in such wines are from our Fort Ross Vineyard when such is not the case.

Use of the full and proper name, Fort Ross-Seaview, avoids another opportunity for serious consumer confusion that could result from the use of "Fort Ross" standing alone.

The wine labeling regulations (27 CFR Part 4) do not limit the maximum size of any given labeling element (except the statement of alcoholic content, see 27 CFR 4.38(a) (3)). And, while the regulations purport to require a brand name on every label, if none appears, the bottler's name will be deemed the brand name. 27 CFR 4.33(a). If the rule is approved as proposed, then arguably a bottler who made 85% of its wine from Fort Ross-Seaview grapes, could have a label which clearly suggested that its wine was from Fort Ross Vineyard even though that label would infringe the trademarks

The TTB would eliminate the opportunity for consumer confusion simply by requiring the use of the full AVA name, "Fort Ross-Seaview," instead of "Fort Ross" standing alone.

*C. If the name "Fort Ross" is attributed viticultural significance, a conflict will arise with FORT ROSS TRADEMARKS, including our bottling trade names, operating trade name*

*and registered vineyard name and will cause irreparable economic loss.*

Any use of the name of "Fort Ross" standing alone by persons other than Fort Ross Vineyard & Winery or its licensees will infringe on our existing registered Federal trade marks and vested common law rights to the name "Fort Ross" for grapes grown in our Fort Ross Vineyard and for wines made exclusively with grapes harvested from our Fort Ross Vineyard.

If other persons besides Fort Ross Vineyard and its licensees are permitted to use the name "Fort Ross" such use will cause irreparable harm to the existing viticultural enterprise owned and operated by Fort Ross Vineyard & Winery and the Lester and Linda R. Schwartz Trust, the owners of the vineyard and the beneficial owners of the LLC because:

- The brand name "Fort Ross" has been extensively and exclusively used and promoted by the Fort Ross Vineyard & Winery and its licensees.
- Fort Ross Vineyard & Winery has used the name for several years and has expended millions of dollars and years of effort to install the vineyard, develop a winery presence, promote the name "Fort Ross" for its wines, establish markets and sell its wines in commerce.
- Wines made exclusively with grapes from our Fort Ross Vineyard have achieved recognition and significance as Fort Ross Vineyard designated wines, and both Fort Ross Vineyard & Winery and its licensees have investments of several million dollars in bottled inventory bearing FORT ROSS TRADEMARKS or references to vineyard designation. This investment could be lost if TTB ascribes viticultural significance to "Fort Ross" standing alone.

We are committed to policing and protecting FORT ROSS TRADEMARKS to the fullest extent of the law. We have created great value in our name and we cannot and will not let others infringe on our valuable intellectual property.

*D. Ascribing Viticultural Significance to "Fort Ross" standing alone is inconsistent with TTB's and ATF's Past Practices.*

Besides lacking any reference to factual documentation or other supporting information, the TTB's conclusion in the proposed rule is substantially at odds with the facts in this particular matter and with its own conclusions regarding numerous other AVA applications.

First, in other situations where the TTB has proposed a shorter version of the petitioned for AVA name it has always cited or sought evidence to support the fact that the shorter name is used interchangeably with the longer name. (e.g., "The name evidence provided

by the petitioner shows that the names `Horse Heaven Hills' and `Horse Heaven' are often used interchangeably and that the name `Horse Heaven' applies to places within the proposed area's boundary." 70 FR3322 at 3225). In addition, the TTB has stated that where a AVA name is proposed to include a shortened version, that the TTB have "documentation or other information supporting the conclusion" that use of the shortened name on a wine label could cause consumers and vintners to attribute to the wine in question the quality, reputation, or other characteristic of wine made from grapes grown in the proposed viticultural area with the longer name, before deciding to include the shorter name as well. 70 FR 17940 at 17944.

In this case, the TTB has not sought and does not have any information that "Fort Ross" standing alone could be confused with Fort Ross-Seaview. The Fort Ross-Seaview petitioners cited no evidence of interchangeable use between the petitioned for name Fort Ross-Seaview and the name Fort Ross. This is because Fort Ross alone is not used as an alternate to Fort Ross-Seaview to describe the proposed AVA. To the contrary when used alone, Fort Ross is either used to describe the fort or town itself *which are both outside the proposed AVA* or our Fort Ross Vineyard or Fort Ross wines.

Second, as it does in the Fort Ross-Seaview proposed nile, the TTB has consistently expressed interest in receiving comments on the impact of the proposed name on existing trademarks and on ways to avoid such conflicts when they exist. As TTB stated in its recent final rule establishing the "Red Hills Lake County" AVA:

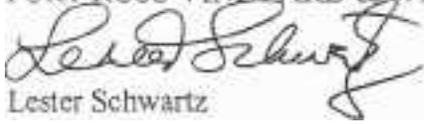
"TTB recognizes the interplay between trademarks and geographical designations and inthe past has rejected proposed viticultural area names when their use would be misleading to the consumer." 69 FR 41750 at 41752.

The TTB's attempt to avoid conflicts between existing trademarks and an AVA name makes sense. The failure to do so would unfairly prejudice the trademark holder and amount to a taking and the destruction of the trademark holder's intellectual property and other property. Where reasonable alternatives are available that meet the purpose of protecting the public consistent with respecting existing property rights, there is no legal basis or justification to destroy existing trademark rights established and recognized by the Lanham Act (15 USC 1051 et. seq.) and the common law. This is the case here. The "Fort Ross-Seaview "name adequately protects the public and the growers and vintners in the area without singling out our Fort Ross vineyard and winery for punitive treatment.

## CONCLUSION

In order to maintain consistency in the labeling of wine from the proposed Fort Ross-Seaview Viticultural Area, comply with the TTB's own rules and regulations regarding prohibited practices, avoid misleading and confusing consumers and vintners and avoid potential conflicts, the viticultural area name "Fort Ross-Seaview" as originally submitted and requested by the Petitioners, and agreed upon by the applicants and other vineyard and winery owners within the boundaries of the proposed area, should be adopted without the attribution of viticultural significance to additional names which will serve only to confuse and mislead consumers and the trade.

Please acknowledge receipt and notify us of any intended action or change in the proposed rule so that we may respond further if necessary.

Respectfully Submitted,  
FORT ROSS VINEYARD & WINERY, LLC  
  
Lester Schwartz

cc: N.A. Sutton  
Regulations & Procedures Division  
Alcohol & Tobacco Tax & Trade Bureau  
925 Lakeville St., No. 158  
Petaluma, California 94952

SCHEDULE 1

[LIST OF FORT ROSS VINEYARD & WINERY AND/OR LICENSEES COLAS]

TTB ID	Permit No.	Brand Name
0136000000003	CA-W-2408	FORT ROSS WINERY
0311300000074	BW-CA-6036	FORT ROSS
0311300000075	BW-CA-6036	FORT ROSS
0311300000076	BW-CA-6036	FORT ROSS
0311300000077	BW-CA-6036	FORT ROSS
0311300000079	BW-CA-6036	FORT ROSS
0405400300006	BW-CA-06211	FORT ROSS
0416700000075	BW-CA-6036	FORT ROSS WINERY
0416700000076	BW-CA- 6036	FORT ROSS WINERY
0416700000152	BW-CA-6211	FORT ROSS
0436500300053	BW-CA-6211	FORT ROSS
0436500300054	BW-CA-6211	FORT ROSS
0436500300055	BW-CA-6211	FORT ROSS
0436500300056	BW-CA-6211	FORT ROSS
0436500300057	BW-CA-6211	FORT ROSS
0507700300039	BWN-CA-15134	FORT ROSS

**SCHEDULE 2 CAN BE VIEWED**

**IN THE TTB READING ROOM**

(Schedule 2 is a list of public recognition that Fort Ross  
wines have received)