

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:)
)
TART CHERRIES GROWN IN) Docket Number(s)
MICHIGAN, NEW YORK,) 11-0093
PENNSYLVANIA, OREGON,) AO-370-A9
UTAH, WASHINGTON, AND) FV-10-930-5
WISCONSIN) AMS-FV-10-0087

Thursday, April 21, 2011

U.S. Bankruptcy Court
One Division Avenue
Courtroom A
Grand Rapids, Michigan

The above-captioned hearing was
held pursuant to notice at 8:01 a.m.

BEFORE:

JILL S. CLIFTON, Administrative Law Judge
One Division Avenue,
Grand Rapids, Michigan
(707) 364-8996

PRESENT:

ON BEHALF OF THE USDA MARKETING
DIVISION:

MS. SHARLENE DESKINS

MR. MARTIN ENGELER

MS. PARISA SALEHI

MR. KENNETH G. JOHNSON

MS. JENNIE M. VARELA

MR. MARC MCFETRIDGE

ON BEHALF OF THE CHERRY INDUSTRY
ADMINISTRATIVE BOARD:

MR. BRIAN T. HILL

MR. PERRY M. HEDIN

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1 P-R-O-C-E-E-D-I-N-G-S

2 (8:01 a.m.)

3 JUDGE CLIFTON: We're back on
4 record on April 21, 2011. It's Thursday.
5 It's 8:01 in the morning. We're in Grand
6 Rapids, Michigan and the case before me is
7 Docket number 110093. This is a rule making
8 hearing regarding tart cherries. I'd again
9 like to take appearances of those who are
10 participating. You don't need to spell your
11 names but, if you'd give me your full name,
12 beginning at counsel table with Ms. Deskins.

13 MS. DESKINS: My name is Sharlene
14 Deskins. I'm with the Office of General
15 Counsel, United States Department of
16 Agriculture and I represent the Agricultural
17 Marketing Service.

18 MR. ENGELER: I'm Martin Engeler
19 and I'm with the USDA's Agricultural Marketing
20 Service.

21 MS. PARISA SALEHI: Parisa Salehi,
22 also with the USDA Agricultural Marketing

1 Service.

2 JUDGE CLIFTON: And, let's see,
3 let's go to counsel table where the board is
4 represented by Mr. Hill and then I'll go back
5 and have some more people identify who are not
6 at a table.

7 MR. HILL: Okay, Brian Hill, the
8 USDA Agency Marketing Division. I'm
9 representing the Cherry Industries'
10 Administrative Board.

11 MR. HEDIN: Perry Hedin, Executive
12 Director, Cherry Industries' Administrative
13 Board.

14 JUDGE CLIFTON: All right, and now
15 I'd like the row who are seated behind Ms.
16 Deskins please to come to the microphone and
17 identify yourself.

18 MR. JOHNSON: Kenneth Johnson,
19 USDA Ag Marketing Service.

20 MS. VARELA: Jennie Varela, USDA
21 Ag Marketing Service, Marketing Owner,
22 Administration Branch.

1 MR. MCFETRIDGE: Marc McFetridge,
2 USDA Ag Marketing Service, Fruit and Vegetable
3 Programs, Economic Analysis and Program
4 Planning Branch.

5 JUDGE CLIFTON: And, I presume we
6 want to resume Mr. Hedin's testimony?

7 MR. HILL: That would be correct,
8 Your Honor.

9 JUDGE CLIFTON: All right, and
10 then at any time you want to interrupt that to
11 take a new arrival, I'm happy with that.

12 MR. HILL: All right, thank you.

13 JUDGE CLIFTON: All right, then if
14 we're not going to use the board to begin the
15 rest of testimony, let's have Mr. Hedin return
16 to the witness stand. The minute it becomes
17 necessary to illustrate by using that exhibit,
18 you're welcome to do so.

19 MR. HILL: All right.

20 JUDGE CLIFTON: All right. You
21 remain sworn Mr. Hedin. Did you have anything
22 further that you wanted to add by the way of

1 your direct examination?

2 MR. HEDIN: I think not. I think
3 after we go through the cross examination we
4 can probably then, if there's anything to add.

5 JUDGE CLIFTON: All right, good.
6 Then who would like to begin with the first
7 questions for Mr. Hedin? Mr. Hill?

8 Whereupon,

9 PERRY HEDIN,
10 recalled as a witness herein, having been
11 previously duly sworn, resumed the stand and
12 testified as follows:

13 EXAMINATION

14 BY MR. HILL:

15 Q Good morning.

16 A Good morning.

17 Q Okay, I just want to make a quick
18 clarifying, a quick clarifying question for
19 you. Do you have the exhibit marked Exhibit
20 No. 15 in front of you?

21 A Yes, I do.

22 Q Okay. Could you please look at

1 Exhibit B of just a, which is the bottom line
2 -- on the OSF and restriction compliance.

3 A Yes.

4 Q And, while you have that just, if
5 you don't mind, I'd refer back to page 11.
6 When you deal with percentages on, on the
7 Exhibit B in the final column Alyssa has 68
8 percent and you used, I believe, let's see, we
9 used as the denominator, you mentioned 270
10 million carry on pounds, do you remember --

11 A If I referred to 270 I was, it was
12 incorrect. It should have been the 265 which
13 is the restricted times number.

14 Q Correct. And so, for the other
15 two categories as well or on the final --
16 preliminary, the same thing you should have
17 been using the 295 as opposed to 300.

18 A That's correct.

19 Q Okay, I just wanted --

20 A Thank you.

21 Q Looking at table one and table two
22 which are on pages three and four, a quick

1 question. You were talking much about
2 uncertainty in, amongst the growers and
3 handlers because the credits don't match up.
4 Sometimes they decrease in credit, decrease in
5 value. Isn't it also true though that even
6 without the decrease in value, the credits all
7 work the same as the post harvest credits?

8 A Most definitely. Post harvest
9 credits as Mr. Facer testified yesterday, come
10 from processed products and are already given
11 a pound for pound credit status. Whereas, in
12 orchard diversion credits will always be
13 discounted by the degree of restriction for
14 the year.

15 Q All right, so in table, table one
16 on page three, even if it doesn't go down to
17 this, even if the restriction percentage
18 doesn't increase to 15 percent, you're still
19 losing 25 percent on there, table three --

20 A That's correct.

21 Q -- table --

22 A Yes, that is correct.

1 Q As opposed to a post harvest
2 credit where you're incurring no discount?

3 A That is correct.

4 Q Now, every executive director, I'm
5 assuming that you have talked to people in the
6 industry fairly --

7 A Extensively.

8 Q -- extensively. What is your
9 sense of how people feel, what people feel is
10 going to happen under this proposed amendment?

11 A Well, I, I believe that it will be
12 much like has been described by a number of
13 the witnesses. Those handlers who have,
14 pardon me, an ability to earn these post
15 harvest diversion credits will continue to use
16 those avenues for themselves and for their
17 grower bases.

18 Those that don't have similar
19 options will probably take greater advantage
20 of this opportunity. It's just, again, as
21 they were saying, that it's a matter of the
22 business model that the particular handler has

1 and the economic realities involved with that.

2 Q So, when you've talked to smaller
3 growers, smaller handlers, do they have any
4 sense that they may be disparately, impact
5 negatively by this proposed agreement,
6 proposed amendment to the agreement?

7 A I, I don't think that they would
8 be negatively impacted. In fact, those
9 smaller processors who aren't as vertically
10 integrated as others, see this as a very
11 strong positive for them to be able to comply
12 with the restriction requirements.

13 Q Now, let's go back to Exhibit B
14 once again. You made a little, you've made
15 much of the fact that the same supply is still
16 going to be available.

17 A Uh-huh.

18 Q Now, we've talked about the thirty
19 million pounds that's in the OSF final, go
20 down a couple of lines in the OSF final
21 column, and you show it as moved to the OS, in
22 the final amended in the third column, that

1 thirty pounds as just essentially moved to
2 another place. Can you explain just a little
3 bit more for the record?

4 A Well, that's really intended to
5 depict how we will account for the tonnage.
6 I assume we're talking about the upper half of
7 Exhibit B?

8 Q Correct.

9 A Yeah, and, and right now to
10 account for it, it is part of the gross supply
11 and in calculating our restriction, restricted
12 percentages. So, this is intended to suggest
13 that it's still part of the industry's
14 production. That fruit was still out in the
15 orchards, it was still produced, it was
16 sprayed and treated by growers as though it
17 was going to be brought in for processing.
18 But, we aren't incorporating it into the
19 supply side of the equation. So, it's still
20 part of the total production but, it's not
21 part of the supply formula's structure.

22 Q Now, you've also made mention of

1 the farm gate value. Why, why have you
2 decided to use farm gate values as opposed to
3 grower pricing in discussing, making a
4 decision about the, what, how --

5 A Yeah. I think the, the simply
6 response from growers tends to be focusing on
7 the grower price. But, grower price as you've
8 heard yesterday is a variable and will
9 fluctuate quite wildly based on all of the
10 factors that, that play into establishing a
11 price.

12 But, if we look at farm gate value
13 which is the combination, both of the
14 production and the price being paid, it better
15 demonstrates what the total returns to growers
16 is and will be for the year. So, I think it's
17 a better measure to look at to determine the
18 effectiveness, one of the marketing order and
19 what growers are getting for their farm
20 production.

21 Q Now, in your experiences, several
22 people have testified that they don't expect

1 that diversions are going to go through the
2 roof just because we put in this, amend this
3 order.

4 A Uh-huh.

5 Q Do you share that or do you think
6 that it's, it's going to happen more often for
7 no reason?

8 A I think, in talking with growers
9 across the country and I was a farmer too in
10 a former life, they grow their products not to
11 destroy them but, to sell them. And, I don't
12 think that that basic premise is going to
13 change. The economics as Mr. Nugent testified
14 yesterday, really don't support the idea of
15 growing for diversion. You can't make a
16 living on a long term basis.

17 Furthermore, as we've discussed,
18 the diversion process is, is available to
19 growers but, it's done after they've had
20 discussions with the people who are taking
21 their fruit. And, if any of the handlers sit
22 down with their grower base and say, I have a

1 plan to deal with your production, i.e, I'm
2 going to move it in a domestic market, I'm
3 going to move it into an export market, I'm
4 going to move it into a new market, or I'm
5 going to hold it in for inventory in the event
6 that I need to supply a product for the future
7 years, that dialogue is the, the primary
8 discussion.

9 So, the growers going to listen to
10 their buyers and act accordingly. So, most of
11 the handlers are going to deal with their
12 grower base and then the decision to do
13 orchard diversion will happen. So, I don't
14 think it's going to be much different with the
15 exception, as I said, for those smaller
16 processors and growers who supply them where
17 this is a, an effective alternative to the
18 post harvest diversion credits when they don't
19 have that available to them.

20 Q So, do you share the position that
21 more than likely this is going to be used,
22 this diversion will be used most likely when

1 there are large crop, large crops?

2 A Yes.

3 Q I don't have any further questions
4 at the moment.

5 JUDGE CLIFTON: Thank you, Mr.
6 Hill. Who would next like to ask questions of
7 Mr. Hedin? Mr. Engeler?

8 EXAMINATION

9 BY MR. ENGELER:

10 Q Mr. Hedin, would it be an accurate
11 statement to say that the, the thrust or the
12 gist of these amendments are to change the way
13 grower diversion is treated under the order
14 and how they impact the volume control
15 formula? Would that be --

16 A Not directly. I, it's to change
17 how we account for them. The supply formula
18 is working basically as it does today. The
19 change is, is how a handler is charged with,
20 or not charged with the diverted touch. So,
21 I think the, the supply formula is operating
22 in the same fashion but, we're just having a

1 different base line for it. I may be saying
2 the same thing but --

3 Q Yes, essentially that's what I was
4 trying to get at.

5 A Yeah.

6 Q My follow up question is, is there
7 anything else in the marketing order that
8 these proposed amendments would have an impact
9 on such as reporting requirements or
10 assessment provisions or anything you could
11 think of as the, as the director of the CIAB?

12 A No, I think we would be capturing
13 the same information, requiring the same
14 reports of handlers, undergoing the precisely
15 the same processes that we do now for
16 diversion. So, administratively it would not
17 be any different.

18 Q Okay, thank you. Do you have a
19 copy of your written testimony --

20 A I do.

21 Q Could you turn to page four,
22 please? Now, the first full paragraph in that

1 page if you look down to the third sentence
2 there, begins with as, could you read that for
3 us, please?

4 A First full paragraph?

5 Q Yes --

6 A Oh, okay. As can be seen, the
7 volume of diversion certificates available to
8 offset other handler diversion requirements
9 decreased accordingly. How far do you want me
10 to go?

11 Q That's fine there. I was just
12 wondering as I read through this, is the word
13 diversion in that sentence, is that the word
14 you wanted to use or did you mean restriction?

15 A I meant to use diversion because
16 I'm referring to the certificates generated
17 through the grower diversion process. Right
18 now, when a handler is subject to restriction,
19 they, they report to me in the Fall what their
20 plans are for their diversion activities.

21 So, they, they indicate how many
22 handler diversion certificates they took in on

1 the upper line and they post that number on
2 the lower line. So, they're using those
3 certificates as part of their compliance
4 efforts for their restriction. So, I think I
5 meant to refer to diversion certificates in
6 that sentence. Oh, oh, oh, you're talking,
7 I'm sorry --

8 Q In the second --

9 A In the second one, yes. Other
10 handler, yes, restriction requirements.

11 Q Okay.

12 A I'm sorry.

13 Q That's what I thought, thank you.

14 Now, turning to page six, if you will. The
15 table at the top of that page.

16 A Yes.

17 Q And, the third column over, the
18 column, the heading of the column is REST
19 number, what does that represent?

20 A It's intended to say percent of
21 restriction pounds or restricted pounds.

22 Q Okay, and then if you look in the

1 years 2002 and 1999, there's a number in that
2 column, a 60 and then a 239. Could you
3 clarify for me why there would be restricted
4 pounds in those years when there was no
5 restriction percentages in effect?

6 A In generating that, they, we did
7 not have restriction in that year and that's
8 the total production across the United States.
9 So, I, I put it, generally it's restricted
10 pounds but, in that particular case and in
11 '99, we didn't have restriction but I, it
12 would have been a longer title.

13 Q So, what would those numbers
14 represent in those years?

15 A Those were just production from
16 the United States. It would be free
17 production. All fruit those two years were
18 unrestricted and therefore, free.

19 Q Okay, so the crop in 2002 was only
20 60 million pounds?

21 A That's correct.

22 Q Okay, and in 1999 it was 239

1 million?

2 A That's correct.

3 Q All right, thank you.

4 A That, that 1960 was the year that,
5 in Mr. Nugent's testimony, he said he ignored
6 as a general rule because it was such an
7 anomaly.

8 And, and if I may go down the path
9 a little bit, the fact that we had inventory
10 reserves to carry over was a huge benefit to
11 the industry that year. We had roughly a
12 hundred million pounds in storage. That was
13 added to the 60 that was produced so we had
14 sales of 161 million which was quite small and
15 we shorted -- of markets and we lost
16 opportunities but it demonstrated the value of
17 inventory reserves to the industry.

18 Q Okay. Now, could you turn to page
19 12, please? In the section under the section
20 titled free tonnage and carry out.

21 A Uh-huh.

22 Q Could you read that first sentence

1 for us, please?

2 A Yeah, the two formulations for the
3 order will ultimately provide the same free
4 tonnage to the industry and the same carry out
5 at the end of the year.

6 Q So, would it be an accurate
7 characterization to say that these, these
8 changes would not impact the, the free tonnage
9 available to handlers during the year?

10 A No, it would not. The way the
11 order is written and as Mr. Facer testified
12 yesterday, we are obligated to report, or
13 excuse me, provide 110 percent of the average
14 sales. That was a requirement of having put
15 the order in place. I understand, I was not
16 here at the time but, that the department
17 mandated that we have that provision and we
18 will continue to operate in that fashion. So,
19 no, it will not short the market.

20 Q My question was exactly that. It
21 would provide the same about of free tonnage,
22 correct?

1 A Yes.

2 Q According to that statement?

3 A Yeah.

4 Q Okay, thank you. Then if you turn
5 to the next page, page 13, and a table at the
6 top of that page.

7 A Uh-huh.

8 Q Keeping in mind that the statement
9 that it won't affect the free tonnage, I was
10 looking at this table and I was having a
11 little bit of difficulty I guess understanding
12 how this table fits in with that statement.
13 If you look at the, in the left-hand column
14 there, there's a line titled restricted free
15 portion, do you see that?

16 A Yes.

17 Q And, then if you look under the
18 first column or the middle column there, the
19 first column of numbers, the number 115.

20 A Uh-huh.

21 Q And, then you look over to the
22 right-hand column, there's a number that says

1 85.

2 A Uh-huh.

3 Q Now, my first question here is
4 what, what does this column represent? Does
5 it represent the free, free tonnage available
6 to handlers?

7 A It's the free portion of the
8 production from the restricted districts. So,
9 if we had a hundred million pounds produced in
10 a, the restricted districts with a 25 percent
11 restriction, did I say a hundred million. So,
12 75 million pounds would be free, 25 million
13 pounds would be restricted. So, it's the free
14 portion from those restricted districts.

15 Q Okay, what I'm trying to
16 understand here and I hope you, hope you can
17 explain this to us as why on the previous page
18 where it says the free tonnage will not be
19 changed, I mean, it would be the same under
20 both scenarios then why under this one
21 scenario it indicates in the table that it's
22 115 million pounds and the other it's 85

1 million pounds? And, I don't, just below that
2 there's a --

3 A Right.

4 Q -- there's a line that talks about
5 an adjustment to paying 110 percent. Perhaps,
6 that's where it comes in if you could explain
7 that to us?

8 A Precisely.

9 Q Okay.

10 A What, right now, as I said
11 earlier, we have to supply 110 percent. We
12 can't side step that and don't intend to.
13 Right now when we go through the optimum
14 supply formula, we do the calculation and
15 you'll see the line item that says market
16 growth factor at 17. We do supply that, that
17 traditionally has been the ten percent of the
18 110 percent. With this change, in order to
19 sustain that 110 percent supply, we have to
20 make an additional adjustment to allow for the
21 difference up above of 115 less 85 or 30. So,
22 the adjustment will be used to insure that we

1 supply 110 percent of the market.

2 And, this is also relevant to my
3 footnote about the gross percentage versus the
4 net percentage. Whenever we speak with MOAB
5 and we've gone through the OSF, we talk, they
6 talk to us about the gross percentage. That's
7 what the AMS has focused on in the supply
8 formula. The industry looks at the net
9 numbers, net of the 17 million adjustment that
10 you see there for market growth. So, we would
11 make an additional adjustment to obtain 110
12 percent supply and as you see, that 30 is
13 added back in and the gross total is 187 which
14 in my example is 110 percent of supply.

15 Q So, what does the 30, the
16 adjustment of 30 million pounds, what does
17 that represent? Does that represent actual
18 cherries? Is that going to be available to
19 handlers?

20 A So, it would come from any, right
21 now the market growth factor is a release from
22 the current production and it is the only one

1 of the four release opportunities to the
2 industry that come out of current production.
3 Whenever we have other releases, they come out
4 of either a primary or secondary reserve
5 depending on the nature and the size of the,
6 the reserves. So, it would come out, and I
7 think this is, we could, it could either come
8 out of the current production but, I think
9 under the, the rules that we are using, it
10 would come out of the reserve positions that
11 are carried from one year to the next. So,
12 they're released from the inventory reserves.

13 Q Okay, that would represent a --
14 reserve cherries back to the handlers?

15 A Yes.

16 Q So that would be -

17 A Yes.

18 Q Okay, thank you. That's helpful.
19 Now, if you could turn to Exhibit D, please,
20 which is the, represents the --

21 A Uh-huh.

22 Q If you look about half way down

1 the, the table there. There's a column titled
2 ST, free. Do you see that, do you have that?

3 A Under the gross and restricted
4 free?

5 Q Correct, yes.

6 A Uh-huh.

7 Q Now, what does that represent?
8 What does ST stand for?

9 A Subtotal, sorry.

10 Q Subtotal, okay. And, then if you
11 look across those numbers there to the right
12 of that there's 120, 120 and 90.

13 A Uh-huh.

14 Q And, does that represent the same,
15 is that a representation of the same numbers
16 as on the previous table? Not the exact same
17 numbers but, the same, same concept I guess?

18 A When you say previous table, to
19 what are you referring?

20 Q I'm sorry, the table we were just
21 discussing, table, is it six in your
22 testimony? Table nine, it's table nine.

1 Because I notice there's a difference of 30
2 million pounds there and yet the numbers are
3 the, the numbers are slightly different but,
4 I guess it would be the numbers above that.
5 The 115 and the 85, I'm sorry. Does that
6 represent the same, the same thing in both
7 tables, the 115 and 85?

8 A Oh, okay. Yeah, you mean the line
9 that says free tonnage from restricted
10 districts?

11 Q Correct.

12 A Yes. Table nine is really talking
13 about the supply formula and how we get to the
14 number. So, we do have the portion from the
15 restricted districts that is free. We always
16 add to that the production from the
17 unrestricted districts which is also free
18 tonnage. So, the two together add up to a 120
19 and similarly under the amended OSF, we had
20 have 85 and five or 90.

21 Q Okay, so as far as the impact on
22 the supply available to handlers then would

1 your answer be the same for this row of
2 numbers in this table as it was in table nine?
3 In other words, the 85 million pounds on the
4 right, far right-hand column, that would be
5 ultimately, that would be the free supply
6 available to handlers and that would be
7 adjusted upwards to a reserve release perhaps
8 to get them back to the 115 million pounds?

9 A Yes, I, I think. You see there in
10 table nine, you've got the unrestricted of
11 five, the restricted free portion at 85 which
12 added together are the same 90 and then, down
13 below that 30 from the adjustment to obtain
14 110 percent of sales would indeed bring us
15 back up.

16 Q Okay. That's all I have, thank
17 you.

18 JUDGE CLIFTON: Mr. Hedin, you
19 were correct. He did study this last night
20 and --

21 MR. HEDIN: I can --

22 JUDGE CLIFTON: -- to bed.

1 MR. HEDIN: I bet they all did.

2 JUDGE CLIFTON: Ms. Salehi?

3 EXAMINATION

4 BY MS. SALEHI:

5 Q Thank you. I have a couple of
6 questions for you. The first being, would you
7 please --

8 A Could you speak into the mic,
9 please?

10 Q Oh, sure.

11 A Thank you.

12 Q Is that better?

13 A Yes.

14 Q Okay. My first question is we
15 have heard here today and yesterday the terms
16 restricted cherries and cherries in the
17 reserve. Would you please explain to me the
18 difference between the two?

19 A Okay. Under the order as I think
20 I said yesterday, we have seven states, nine
21 districts. Any district that produces over
22 the threshold is, is subject to restriction.

1 The states of Pennsylvania and Oregon have
2 never and will probably never reach that
3 threshold. So, their production is by
4 definition free. The production from the
5 other districts are, by default they will be
6 subject to restriction unless they fall below
7 a threshold production of 50 percent. So, as
8 happened in northwest Michigan this past
9 season, their production was less than their
10 five year norm, than half of their five year
11 norm. So, that production became free.

12 So, when we talk about restricted
13 production, we're talking about the production
14 in the district that is subject to the supply
15 formula calculations where we have free and
16 restricted portions calculated.

17 Inventory reserves is a, one of
18 the compliance tools that's available to
19 handlers who have generated restricted
20 production. So, if, and I will pick on cherry
21 growers since they're sitting in the audience
22 today, if cherry growers takes in restricted

1 production and decides that it will maintain
2 inventory reserves, so it will take some of
3 that restricted production, process it and
4 store it, then that is inventory reserves.
5 And, they have the opportunity to put it into
6 primary reserve which is currently maxed at 50
7 million for the industry and they can put in
8 to that primary reserve their proportion at
9 interest based on the current year's
10 production.

11 If they choose to put more in
12 reserves than they are allowed to put in to
13 the primary, it becomes secondary reserve as
14 Mr. Facer described yesterday, commonly known
15 as the cesspool. So, it's just a compliance
16 tool as compared to defining whether their
17 production is restricted for a year.

18 Q And the difference between the
19 primary and secondary being that the primary
20 reserve, the cherries have a potential of
21 going to the market, free market?

22 A It's the sequence of release

1 basically.

2 Q Okay.

3 A The primary reserve will be drawn
4 down first until it's emptied out after which
5 we'll start drawing down the secondary
6 reserve. So, there's greater risk associated
7 with being in the secondary reserve because we
8 might never get to a release position for
9 them.

10 Q Okay.

11 A For your information, however,
12 handlers can use product in their reserves to
13 generate these diversion credits. So, if
14 cherry growers has an export market
15 opportunity and moves product overseas, I will
16 give them a certificate reflecting how much
17 they've moved into the export arena and they
18 can then reduce their inventory obligation by
19 an equivalent amount.

20 Q Okay. My other clarifying
21 question was if you could please explain the
22 difference between the post harvest diversion

1 certificates versus the grower diversion
2 certificates?

3 A Okay. The, let me go to the, the
4 post harvest first. Handlers in dealing with
5 their restriction, the operating premise in
6 the default is they maintain inventory
7 reserves. So, if cherry growers has a million
8 pound obligation, unless they do any, if they
9 do nothing else, they have to have that amount
10 of tonnage in reserve. If they choose to do
11 so, they can use these alternative mechanisms
12 of export, new market, charitable
13 contributions, new products, et cetera, to
14 reduce that inventory reserve obligation. So,
15 any of those types of activities are
16 considered post harvest diversion credits.
17 So, they brought in the fruit, they've
18 processed it, they've incurred whatever costs
19 are associated and then they put it through
20 one of the secondary market outlets to
21 reserve, to reduce their reserve obligation.

22 The grower certificates by

1 contract are, the process as Mr. Facer
2 described, you know, they apply to us and say,
3 we want to earn, us being the CIAB, we want to
4 do a diversion. So, we go through the
5 process, we issue them a piece of paper that
6 we call a grower diversion certificate. It
7 then is brought to one of the handlers by the
8 grower and in this case, again, the cherry
9 growers would take that in hand. And, then
10 cherry growers in their reports to us says, I
11 received X million pounds of orchard diversion
12 certificates from our grower base. And, they,
13 as I said earlier, they incorporate that in
14 the upper portion of their report to us, it's
15 called a form four. It's part of their gross
16 production for the year. We apply the
17 restriction percentage against that because
18 it's part of their supply or handle and then
19 they use that certificate as a offset to their
20 restriction obligation.

21 But, because that grower diversion
22 certificate was part of the handle against

1 which restriction was applied, as I said or
2 was trying to demonstrate in tables one and
3 two, it has less compliance worth because it's
4 been discounted.

5 Q Okay, thank you. I was also
6 looking at your testimony on page 15, the
7 first two lines are, I guess it's the first
8 full sentence. Yesterday when, when you were
9 going through your testimony, you emphasized
10 that phrase, and is willing to pay, do you see
11 that? If the handler encourages, that
12 sentence?

13 A Uh-huh.

14 Q Would you please read that?

15 A Yeah. If the handler encourages
16 the grower to deliver his or her cherries, and
17 is willing to pay accordingly, it's likely the
18 grower will in fact deliver the cherries.

19 Q I just wanted to ask you, are
20 there situations where the grower delivers the
21 certificate and is not paid? Is that why you
22 were --

1 A Well, I don't, I don't really know
2 because I'm not privy to the discussions
3 between handlers and their grower bases but,
4 in some instances, if the handler in his plans
5 for complying with restriction feels that his
6 growers need to help out with the process,
7 then he may say to his growers, we need you to
8 do X percent across the board. And, may
9 require that as part of the relationship with
10 that handler.

11 Now, whether or not he pays for
12 them, I simply do not know. I can imagine
13 that in instances they don't pay for that.
14 And, I think the better persons to have asked
15 that would be, you know, those, those who are
16 testifying as handlers in the, in the process.

17 But, I think what will happen here
18 is that if a grower, and a grower by the way,
19 may elect independently of his discussions
20 with the handler, to do diversion. He has
21 that right if he so chooses or she so chooses.
22 So, if the grower opts to do a diversion, he

1 can go out and, and say to any handler in the
2 industry, I've got diversion certificates,
3 would you like to buy them from me. They are
4 a commodity that's transferrable and, and
5 there are sales transactions of those credits.
6 I don't get involved with that so I'm not
7 privy to the prices or, or how that goes.
8 But, it really is a function of the
9 handler/grower discussion as to what they're
10 going to require of their grower bases and
11 what's going to be paid for those
12 certificates, if anything.

13 Q Thank you.

14 A Uh-huh.

15 JUDGE CLIFTON: What other
16 questions are there for Mr. Hedin? Ms.
17 Deskins?

18 EXAMINATION

19 BY MS. DESKINS:

20 Q Mr. Hedin, I just wanted to help
21 clarify just, just so we have in the record.
22 Proposal one concerns the definition of

1 handle?

2 A Correct.

3 Q Okay, and the only changes being
4 made to this is an exclusion of including
5 grower diversion certificates in the
6 definition of handled?

7 A That's correct.

8 Q And, just for the record, can you
9 tell us what excluding that will do to the
10 definition?

11 A In essence it will mean that, that
12 handling, the tonnage that you handled, will
13 simply be the amount of fruit that you
14 brought, a handler has brought in for
15 processing.

16 Q And, then for the grow, grower
17 diversion certificates, all that does is
18 document that the fruit that was in the
19 orchard stayed in the orchard?

20 A Correct, and, and, and calculates
21 the estimated volume that was left.

22 Q All right. So, the fruit, so

1 those certificates represent fruit that never
2 left the orchard, never moved?

3 A That's correct.

4 Q And, that's been excluded from the
5 definition of handled now?

6 A That's also correct.

7 Q Thank you.

8 A Just as a footnote. When we go
9 through the process, we will do a first check,
10 oversee how the orchard diversion is done and
11 then the CIAB does a follow-up. And, if the
12 fruit is still in the orchard, then we issue
13 a certificate. If the fruit has been
14 harvested and is no longer in the orchard,
15 then we do not issue a certificate and the
16 presumption is that it has been delivered for
17 processing.

18 Q Thank you.

19 A Uh-huh.

20 JUDGE CLIFTON: Mr. Johnson?

21 EXAMINATION

22 BY MR. JOHNSON:

1 Q Hi, Perry. Do you envision an
2 opportunity or situation where it will be
3 beneficial to have the grower diversions
4 including, let's say this proposed amendment
5 if accepted, do you ever see an opportunity
6 where it would be beneficial to have grower
7 diversion credits reinserted or included back
8 in their production number in the OSF
9 calculation?

10 A I hate to say never envision a
11 reason for it to be back in but, you know,
12 we've operated now for, I think it's 14
13 seasons with this structure. And, it's, it's
14 kind of been a headache at both the grower and
15 the processor levels. So, I don't anticipate
16 the need for it. If you're hinting at whether
17 we should suspend the provision versus delete
18 the provision, I don't know.

19 JUDGE CLIFTON: I'm sorry, what
20 was your, what was the last part?

21 THE WITNESS: Well, if, if --

22 JUDGE CLIFTON: Did you say I

1 will?

2 MR. HILL: I think he said I don't
3 know.

4 THE WITNESS: I don't know.

5 JUDGE CLIFTON: I don't know, I
6 didn't understand.

7 THE WITNESS: Oh, I'm sorry. So,
8 it's, it's conceivable that, that the industry
9 might want to revert but I kind of doubt it.
10 As you heard, from Mr. Hackert and Mr. Facer,
11 then the old order didn't have it this way.
12 It wasn't imagined that we would have this
13 consequence and difficulty with the grower
14 diversion process. So, I think most of the
15 industry would say it's not really necessary
16 to have it back in.

17 MR. JOHNSON: Thank you.

18 THE WITNESS: Uh-huh.

19 JUDGE CLIFTON: Other questions
20 for Mr. Hedin?

21 THE WITNESS: Ken, could we do it
22 as an informal rule making next time if we

1 wanted to add it back?

2 JUDGE CLIFTON: Ms. Salehi?

3 EXAMINATION

4 BY MS. SALEHI:

5 Q Mr. Hedin, may I also ask you to,
6 again just so we have that on the record, to
7 explain the changes that are being made as a
8 result of this proposal for section 9 30 50
9 marketing policy paragraphs D and E and how
10 that would change the order as it is
11 currently?

12 A I don't have the, the notice of
13 hearing in front of me but, I believe it was
14 that we included subparagraph ten of E as a
15 factor for consideration under the optimum
16 supply formula. Which is, right now when we
17 meet in June and/or September, we consider
18 factors that are pertinent to the supply
19 and/or sales components of the industry.
20 Those are delineated currently as paragraphs
21 one through nine and we're heading that we
22 would consider have it as one of those

1 factors, the --

2 MR. HILL: Your Honor, could I
3 approach?

4 JUDGE CLIFTON: Please?

5 THE WITNESS: So, in answer to
6 that specific one, it would be something that
7 we would have as part of the discussion
8 process in formulating the industry's
9 recommendation to the secretary. And three
10 is, I think it's a conforming change in
11 Section 58 to, to ensure that we don't have
12 the grower certificates as part of handling.

13 BY MS. SALEHI:

14 Q Thank you. Could you please
15 address the changes on paragraph D of Section
16 9 30 50?

17 A D --

18 Q You might have already addressed
19 it just discussing the addition of Section E.
20 I just want to make sure.

21 A Well, I think that's really the
22 only relevant change.

1 Q Okay.

2 A But, you can correct me if I'm
3 wrong.

4 JUDGE CLIFTON: Mr. Hill?

5 MR. HILL: May I approach one more
6 time?

7 JUDGE CLIFTON: You may.

8 THE WITNESS: Certainly. Oh,
9 yeah, we've added language about the most
10 current information available including but
11 not limited to process production and grower
12 diversion of cherries during the, during the
13 crop year and make it accordingly, the
14 adjustments. I think that just reflects the
15 methodology of the amended process.

16 BY MS. SALEHI:

17 Q Okay, and why have we taken out
18 the word actual in that because before it
19 read, but, actual production, and you've taken
20 the word actual out?

21 A Well, I think actual is, is
22 duplicative of processed. Cherries that are

1 in the orchard are actual production but they
2 aren't processed. So, I think it just
3 emphasizes that we're talking about the fruit
4 received by processors for processing rather
5 than total cherries generated throughout the
6 industry.

7 Q Thank you, no further questions.

8 A Okay.

9 JUDGE CLIFTON: Are there any
10 other questions for Mr. Hedin? Mr. Hedin,
11 what do you want to add?

12 THE WITNESS: Well, I think like
13 those that have testified before, this
14 amendment is, in fact, a, a grower oriented
15 benefit. It brings the growers in to the, the
16 process much more effectively than they have
17 been in the past. I think the basic premise
18 of the order to improve grower returns, both
19 price and total farm gate values, will be
20 advanced by this. And, for our industries,
21 it's sustained its viability. We have to get
22 more back to the grower and I, I think that

1 this will do that.

2 And, in large part and I will
3 defer to the economist in the world but, with
4 the supply/demand components, the fact that
5 we're carrying over substantial inventories
6 does, in fact, depress prices. And, this,
7 because it will, its main effect will be the
8 reduction of total inventories carried from
9 one season to the next, we ought to see a
10 better price to the growers for a given sized
11 crop.

12 And that, you know, that's, that's
13 an important component of what we're doing
14 here and, and, you know what, cherry growers
15 and, and all the other processors in the
16 industry need to have viable production bases
17 in order to stay in the business. And, you
18 heard Mr. Nugent talk about the costs of
19 production. He tends to overload, I think,
20 some of the, the costs. Some of the growers
21 don't think you have to put all the land costs
22 and those kinds of things in it but, we're

1 still not meeting cost of production and we've
2 got to drive the industry in that direction or
3 we would be in existence for very long. So,
4 I think it fulfills the goal of the industry
5 and that the marketing order to advance good
6 growers' interests.

7 JUDGE CLIFTON: It was an
8 excellent summary.

9 THE WITNESS: Well, thank you.

10 JUDGE CLIFTON: Mr. Hill, do you
11 wish at this time to move the admission of
12 Exhibits 13 --

13 MR. HILL: Yes, I would.

14 JUDGE CLIFTON: -- 14 and 15?

15 MR. HILL: I would, Your Honor,
16 13, 14 and 15.

17 JUDGE CLIFTON: Is there any
18 objection?

19 MS. DESKINS: No objection.

20 JUDGE CLIFTON: Exhibits 13, 14
21 and 15 are admitted into evidence. What is
22 the location of the exhibit that I took

1 official notice of yesterday?

2 (Whereupon, Exhibits 13, 14 and 15
3 were admitted into evidence.)

4 MS. SALEHI: Your Honor, I have it
5 in my possession.

6 JUDGE CLIFTON: Excellent. All
7 right, I'm content about all my little
8 exhibits.

9 MR. HEDIN: Good. Your Honor, I,
10 if I could change the subject a little bit.
11 We do have, 9:00 was the official time for
12 starting up and I think we're close to that
13 and I believe Mr. Mitchell will be down here.
14 I know Mr. Sherman was planning to be here at
15 9:00 and we've got another group from
16 Wisconsin coming at 11:00. And, that's all I
17 know of for the balance of the day.

18 JUDGE CLIFTON: All right, the
19 group would each testify?

20 MR. HEDIN: Yeah, but there's only
21 two from Wisconsin.

22 JUDGE CLIFTON: Okay.

1 MR. HEDIN: So, it should be too
2 long.

3 MS. DESKINS: Judge Clifton, we do
4 have one witness we would like to recall.

5 JUDGE CLIFTON: Ah, excellent,
6 that's good timing. Very good, then you may
7 step down, Mr. Hedin.

8 MR. HEDIN: Thank you.

9 JUDGE CLIFTON: And, are you ready
10 to go with that witness now, Ms. Deskins?

11 MS. DESKINS: Yes, we are.

12 JUDGE CLIFTON: You may recall the
13 witness.

14 MS. DESKINS: We'd like to call
15 Marc McFetridge to the stand.

16 JUDGE CLIFTON: Mr. McFetridge,
17 you remain sworn. Please, again, state your
18 full name.

19 THE WITNESS: Marc McFetridge.

20 JUDGE CLIFTON: Thank you. Ms.
21 Deskins, you may proceed.

22 Whereupon,

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MARC McFETRIDGE,

recalled as a witness herein, having been previously duly sworn, resumed the stand and testified as follows:

EXAMINATION

BY MS. DESKINS:

Q Mr. McFetridge, yesterday you were asked a question about some of the, the data in the material you prepared, do you recall that question?

A I do.

Q And, do you happen to have a copy of the exhibit that was admitted into evidence yesterday that was --

A Yeah, I have, I don't remember the exhibit number but, U.S. cherry crops statistics graph and tables.

JUDGE CLIFTON: Exhibit 7.

BY MS. DESKINS:

Q Exhibit 7, all right. You asked a question about the data concerning the price of tart cherries in Oregon and Washington, do

1 you recall that question?

2 A I do.

3 Q Okay. Could you tell us what page
4 of Exhibit 7 the question was raised about it?

5 A Sure. On page ten of Exhibit 7
6 for the year 2009, under Oregon and under
7 Washington, there was a question raised about
8 the price for Oregon tart cherries at 85 cents
9 per pound and Washington at 47 cents per
10 pound.

11 Q And, have you had a chance to
12 check on that, that information?

13 A I have.

14 Q Can you please tell us what you
15 found?

16 A Sure. Based on NASS's non-citrus
17 fruits and nuts 2010 preliminary summary that
18 was published in January of 2011, the price
19 for Oregon for 2009 was reported at 84.5 cents
20 per pound so, my table rounded up would be 85
21 cents and then also for Washington, the price
22 reported by NAS was 46 or 46.8 cents per pound

1 so rounded up would be 47 cents per pound.

2 Q Mr. McFetridge, could you tell us
3 for the record what NASS stands for?

4 A Sure. It's the National
5 Agricultural Statistics Service.

6 Q And, what executive partner is
7 that an agency of?

8 A USDA.

9 Q I have no further questions for
10 this witness.

11 JUDGE CLIFTON: Mr. Hedin, you
12 just need to do what they were doing.

13 MR. HEDIN: What's that?

14 JUDGE CLIFTON: For every grower.

15 MR. HEDIN: Oh, okay. If I may Mr.
16 McFetridge?

17 JUDGE CLIFTON: You may.

18 EXAMINATION

19 BY MR. HEDIN:

20 Q Is that for the processed products
21 or was it for the fresh sales?

22 A This is for all.

1 Q For all.

2 A Oregon, I'm looking at the sheet
3 right now, Oregon and Washington they have
4 three different columns where there's listed
5 fresh, processed and all. Oregon and
6 Washington, NASS does not report those
7 statistics for fresh or processed. They just
8 report for all.

9 Q So, anything posted in the columns
10 for Oregon and Washington are for all?

11 A Yes. I believe all the prices
12 here are for all so that they're all
13 consistent. So, just doing a quick check
14 back, if you look for the final column under
15 U.S., the prices for 2008 are 30 cents per
16 pound, 2009, 19 cents a pound and 2010, 21
17 cents per pound. Under the column from the
18 non-citrus fruits and nuts 2010 preliminary
19 summary, they only report back three years
20 for, so for 2008 under the price per pound for
21 all including fresh and processed, for 2008
22 this, the cents per pound is 37 cents. For

1 2009, it's 19 cents and for 2010, it's 21
2 cents.

3 Q Is the 2010 the preliminary?

4 A Yes.

5 Q Yes.

6 A Yes, I believe that the final will
7 be published in July for NASS.

8 Q Do you have, given it, was that
9 going to be submitted as an additional exhibit
10 or just an adjustment to the --

11 JUDGE CLIFTON: There's no
12 adjustment suggested. Did you mean --

13 BY MR. HEDIN:

14 Q Well, he's reading from something
15 that we have not seen. I'd like to see the
16 reports for which, are you, are you working
17 from a separate set of documents or is that --

18 A Well, everything based in the
19 information that I presented is copied
20 directly from the non-citrus fruits and nuts.

21 Q All right.

22 JUDGE CLIFTON: I understand what

1 you would like, I think, Mr. Hedin. When,
2 let's say, the growers report from the state
3 of Oregon about their fresh fruit separately
4 from the other, who collects that data and
5 what report is that published?

6 THE WITNESS: Well, I believe NASS
7 is the one that collects all the information
8 and they report it back in this non-citrus
9 fruits and nuts publication. I believe from
10 my experience working with NASS data, the
11 reason why they're not listing the fresh and
12 processed price individually is usually a
13 proprietary problem. Usually it could be that
14 there's only two or three producers and so, if
15 they know what the price is for everybody and
16 there's only one or two, they can figure out,
17 oh, this is what the other person's charging
18 so, they can kind of understand what's going
19 on completely in the market and know what
20 their competition is doing.

21 BY MR. HEDIN:

22 Q No further questions, Your Honor,

1 from me.

2 JUDGE CLIFTON: All right. Any
3 other questions for Mr. McFetridge? Okay, I
4 suppose we're all thinking the numbers are
5 higher for fresh fruit. Would that be a
6 likely fact?

7 THE WITNESS: Let me look here
8 for, just for an example under U.S., U.S.
9 reports under fresh and processed. So, for
10 2010, NASS reported that for fresh tart cherry
11 prices it was \$1.21 per pound and then for
12 processed it was 21 cents per pound. So, yes,
13 that would be, yeah. I would assume that
14 that's an accurate statement that fresh would
15 be higher than processed.

16 JUDGE CLIFTON: All right. Any
17 other questions for Mr. McFetridge?

18 MR. HEDIN: No further questions,
19 Your Honor.

20 JUDGE CLIFTON: All right. When
21 NASS publishes what we see on page ten, do
22 they entitle their document processed tart

1 cherry prices or do they refer to it some
2 other way like fresh and fresh fruit and
3 processed?

4 THE WITNESS: The way that the
5 table is presented it's listed under tart
6 cherry price and value of production. And,
7 then they list on one column the states and
8 then the year and then total U.S. And, then
9 it's broken out by price per pound and then
10 under price per pound they have fresh, a fresh
11 column, a processed column and an all column.
12 And, then there's also a separate column for
13 value of production which also has the fresh,
14 processed and total.

15 JUDGE CLIFTON: All right, and is
16 that on the NASS website?

17 THE WITNESS: Yes.

18 JUDGE CLIFTON: And, do you happen
19 to have the citation for that NASS website?

20 THE WITNESS: I don't have the
21 exact citation. I should be able to find
22 that.

1 JUDGE CLIFTON: Anybody can use
2 that as evidence in briefs. If you were
3 searching for it you would first go on the
4 USDA website, is that right, or does, is it
5 easier to get to the NASS website a different
6 way?

7 THE WITNESS: I would recommend
8 going to, like to a search engine like Google
9 and then just typing in NASS and then
10 searching that way. And, then that should
11 bring up the nass.gov website that you can
12 click on. And, for my own personal way I
13 usually go through to find the tart cherry
14 information, on the NASS website there is a
15 link that allows you to select item or crop,
16 I believe, and then once you click on that
17 there is, it refreshes the page and brings up
18 a secondary page where it allows you to select
19 if it's a, I believe, a field crop or a tree
20 bearing acre for bearing fruit and then, I
21 think, maybe vegetable.

22 And, then once you select on that,

1 then it'll bring up, it'll populate a
2 secondary search field that'll allow you to
3 select like tart cherries or sweet cherries,
4 depending on what you selected. And, then
5 once you click on that then the bottom of the
6 page will refresh and a list, give a list of
7 different statistics that NASS will
8 automatically populate when you click on,
9 there's little check boxes, and you click on
10 those and you click on the search bottom.
11 It's refresh, it'll bring back an instant
12 table that, for those statistics that you
13 asked for and then below it'll provide all the
14 information that, all the NASS publications
15 that they have for that specific commodity.

16 And so, for example, under tart
17 cherries once you did a search under
18 statistics, then this non-citrus fruit and
19 nuts publication would pop up. You'd click on
20 that link. Once that refreshed, it would
21 bring back the non-citrus fruit and nut
22 publication, the most recent one but, also

1 would give you an option to select an archive
2 which, I believe, goes back through the early
3 1900's, I believe. And so, depended on what
4 type of information you're looking for, if
5 you're looking for the most recent, the most
6 recent will pop up and it'll give you an
7 option to view the file either in pdf, html,
8 and I believe a text file. There'll be a link
9 highlighted that you can click on that to view
10 in any of those views.

11 JUDGE CLIFTON: Excellent, thank
12 you. Mr. Hedin?

13 MR. HEDIN: If I may offer? I
14 think you can get to it also by going
15 www.nass.usda.gov and search their
16 publications.

17 JUDGE CLIFTON: Okay, good. Thank
18 you both. Any other questions for Mr.
19 McFetridge? All right, you may step down.
20 Thanks so much. And, let's go off record for
21 about five minutes. Please stay in the room.

22 (Off the record.)

1 JUDGE CLIFTON: All right, we're
2 back on record at 9:28. Mr. Hill, how would
3 you like to proceed?

4 MR. HILL: Yes, I'd like to call
5 Bill Sherman.

6 JUDGE CLIFTON: Mr. Sherman, would
7 you come forward, please? If you will be
8 seated in the witness chair to my right, I'll
9 swear you in after you are seated. Please
10 state and spell your full name for me.

11 MR. SHERMAN: William Rollin
12 Sherman, W-i-l-l-i-a-m, R-o-l-l-i-n, Sherman,
13 S-h-e-r-m-a-n.

14 JUDGE CLIFTON: Thank you. Would
15 you raise your right hand, please? Do you
16 solemnly swear or affirm under penalty of
17 perjury that the evidence that you will
18 present will be the truth?

19 MR. SHERMAN: Yes.

20 JUDGE CLIFTON: Thank you. Mr.
21 Hill, you may proceed.
22 Whereupon,

1 WILLIAM ROLLIN SHERMAN,
2 called as a witness herein, having been first
3 duly sworn, was examined and testified as
4 follows:

5 EXAMINATION

6 BY MR. HILL:

7 Q Hello, Mr. Sherman.

8 A Good morning.

9 Q Now, we have, there is a document
10 that's been handed out, Your Honor, as Exhibit
11 16.

12 JUDGE CLIFTON: It has.

13 BY MR. HILL:

14 Q Okay. Well, thank you for coming
15 today. We appreciate you coming in, giving
16 some testimony. Could you tell us about why
17 you're here today?

18 A I, I'm here in support of the
19 proposed amendment to modify marketing order
20 930 in such a way as to promote the increased
21 consumption of tart cherries. My, I've been
22 in the cherry business since I was 14 years

1 old and, which is almost 56 years ago so, I've
2 been doing this stuff for a long time. Not
3 quite the level I'm doing it now but, if, I'm
4 the CEO of a company called Burnette Foods.
5 We operate four food processing factories in
6 Michigan and we're in the processing of
7 acquiring a fifth. We produce about 200
8 products for primarily private label products
9 or store brands as they're known for a variety
10 of grocery retailers. We're also growers and
11 there are nine Sherman family members in this
12 business who are active managers.

13 So, we have, we have, we're
14 serious business people and we have a lot of
15 issues with this marketing order because we're
16 able to promote our other products, we see our
17 other food products increasing in demand,
18 increasing in pricing for the growers and the
19 restrictions that we have under this order
20 make it very, very difficult for us to expand
21 the consumption of tart cherries. And, it
22 makes it very, very difficult for us to hire

1 more employees or to promote our product.

2 And so, I've got a couple examples
3 here of things that we, that I'd like to show
4 you that how I feel from, from not just the
5 standpoint of Burnette Foods but, from the
6 standpoint of the growers that deliver
7 cherries to Burnette Foods that create
8 problems for us and I see that this order as
9 it could be amended, could enhance grower
10 returns and allow companies such as ourselves
11 to expand the consumption of our products for
12 the benefit of many, many people.

13 Q Can you quickly spell Burnette
14 Foods for the record?

15 A Yeah, I can, B-u-r-n-e-t-t-e. Is
16 that fast enough?

17 Q N-e-t-t-e.

18 A Foods, f-o-o-d-s.

19 JUDGE CLIFTON: Where is your
20 headquarters located?

21 THE WITNESS: Actually, our, our,
22 eastern Michigan.

1 BY MR. HILL:

2 Q Okay, so you say you have some
3 examples?

4 A I do and what I'd like to, I think
5 maybe the best way to do this, I, you probably
6 can't read my scribbling but, you know, for
7 any of us that have had any kind of one on
8 one, this, you look at this, this right angle
9 that I've drawn here and I have three separate
10 examples, I'll call them.

11 And, at the top, what I've labeled
12 Exhibit A and you can't read it very well, my
13 scribbling, which I didn't realize I'd cut off
14 when I duplicated this but, what, what I'm
15 trying to, to, my explanation below Exhibit A
16 is supposed to say, the value of, of an in
17 orchard diversion credit under the current
18 program. And, my, so, and I'm trying, and
19 then if you look to, to the right of that,
20 you'll see my, the right angle and a line
21 there. And, my vertical line says percent
22 restriction and it goes from zero to a

1 hundred. And, the horizontal line is the
2 value of a diversion credit to a grower in, in
3 cents per pound of diverted cherries.

4 So, what happens, honestly, if
5 there's zero percent restriction, the
6 diversion in the orchard isn't worth anything.
7 Converse, and likewise, as the restriction
8 goes up and it goes, as it approaches a
9 hundred, honestly, if you have a hundred
10 percent diversion in the orchard, likewise, a
11 diversion credit to the grower is worth
12 nothing.

13 So, what happens there at some
14 point, and I've tried to make this graph and
15 I, I don't have data to support it but, it
16 just sort of makes, makes sense, that as, at
17 some, as, because these cherries that are left
18 in the orchard, these phantom cherries, are
19 counted as part of the crop.

20 At, it, it's a hard, and then we
21 can go back 17 years when you were talking
22 about the formulation disorder and why this

1 happened. I really don't know and I'm not
2 even going to say I think they were good
3 reasons, who knows, but I'll give you an
4 example of, of the grower that, something that
5 actually happened. That a grower who delivers
6 to Burnette Foods decided that he was going to
7 leave, I'm going to say, leave one orchard for
8 diversion credit and, and so the, the
9 estimator, I'll call him the estimator, the
10 guy who works, the field person for the CIAB,
11 came into the orchard, did some sampling and
12 said, and we told him, I think we told, we
13 told the grower we'll pay him I'm going to say
14 five or six cents a pound for these diversion
15 credits. And, and then the number that the
16 grower received from the, on the estimate of
17 the cherries in the orchard was 240,000
18 pounds. So, we were going, that man was going
19 to leave the cherries in the orchard and we
20 were going to pay him five cents for \$240,000,
21 12,000, five cents for 240,000 pounds,
22 \$12,000.

1 What happened is, he decided like
2 many growers, they hate leaving the cherries
3 in the orchard. They want to harvest
4 everything. They harvested the cherries,
5 there weren't 240,000 pounds there. There are
6 180,000 pounds of actual cherries in this
7 orchard that the man then harvested and he
8 sold for four cents a pound. He got \$7,200
9 for it.

10 This idea of leaving these
11 cherries in the orchard and then having them
12 be phantom parts of the crop just gets so
13 complicated and changes the percentages of, of
14 regulation for everybody. And, I think
15 there's a bias on the part of the, the
16 inspector, what do you call your field
17 people, Perry? Your --

18 MR. HEDIN: Compliance officer.

19 THE WITNESS: Compliance officers
20 to be helpful to the grower. And, by that I
21 mean, they want to say, well, maybe it, you
22 know, maybe the numbers, because it's a guess,

1 maybe the numbers is 180,000 or maybe it's 200
2 but, they lean on the heavy side which makes
3 the crop bigger which makes the regulation
4 bigger which makes the restriction bigger.

5 So, the whole bias of the
6 marketing order is more restriction, more
7 regulation and, frankly, more difficulties for
8 a company like Burnette Foods. So, that's my
9 Exhibit A and I really, it shows that as the
10 crop, as the regulate, as the crop increases
11 as the regulation increases, the value of an
12 in orchard diversion credit for a grower
13 actually decreases under the existing
14 amendment, under the existing order.

15 Exhibit B, in my Exhibit B which
16 is the middle one here is, is what would
17 happen if, with this proposed amendment
18 change, what would happen to the value of, of
19 in orchard diversion credit for a grower. So,
20 under B you could see that in, in terms of,
21 again my vertical line is zero percent,
22 obviously in orchard diversion credit is worth

1 nothing. But, then as the percent of
2 regulation increases or restriction increases,
3 the value of the in orchard diversion credit
4 actually goes up. And, and it's worth more to
5 a processor because it doesn't count as part
6 of the top line. It's just, it's a, it's a
7 pure deduction. So, it, it has a lot of
8 benefit for growers and it certainly has a lot
9 of benefit for processors such as Burnette
10 Foods. So, that would be in my opinion a
11 positive change.

12 And, then when you compare it to,
13 to C which is the same as B, you can see the
14 lines are parallel, so if you are a processor
15 and you, and you have a new market, a supposed
16 new market that meets the, the guidelines
17 under the order or if you have export, that's
18 what happens to your, your, the value of, of
19 a diversion credit for a process, or a handler
20 as you call them. I call it process, you call
21 it handler. So, then the grower and the, the
22 handler would have equal value to their

1 diversion credit.

2 Now, there's some, there's some
3 handlers in this industry that, that really
4 are for the status quo and their, their
5 position is they don't want to see their
6 diversion credit devalued. So, obviously, if,
7 if the grower, the value of a grower diversion
8 credit is worth the same as a value of a
9 handler diversion credit, there's more
10 diversion credits out there that have value.

11 And so, I suspect that we'll see
12 among the people in this industry and, and
13 board members who don't understand the
14 fiduciary responsibility and will vote out of
15 their own pocketbook that they will object to
16 this order. That's the history of the last 16
17 or 17 years that we have here. And, as I said
18 to Perry and, and Ken, I mean, these people,
19 there are people in this board that would
20 actually vote companies like Burnette Foods
21 out of business. That's their sense of
22 responsibility.

1 So, I have, I have a few other
2 points I'd like to bring up if I can, or you
3 can ask me a question --

4 JUDGE CLIFTON: Mr. Sherman, when
5 we were off the record --

6 THE WITNESS: Yeah.

7 JUDGE CLIFTON: -- you read what
8 Exhibit A says under it and what exhibit --

9 THE WITNESS: Do you want me to
10 read it again?

11 JUDGE CLIFTON: Yes, please.

12 THE WITNESS: Okay. Exhibit A,
13 this is a value of an in orchard diversion
14 credit under the current program. This is my
15 scribbling, which I apologize for. Exhibit B,
16 is the value of an in orchard diversion credit
17 with the amendment change. And, Exhibit C, is
18 a value of a new market or export diversion
19 credits and these can only be earned by
20 handlers. They can't be earned by a grower.

21 JUDGE CLIFTON: Mr. Sherman has
22 invited questions about what he's done thus

1 far and I think that's a good idea before he
2 continues on. Who would like to begin
3 questioning? Mr. Hedin?

4 EXAMINATION

5 BY MR. HEDIN:

6 Q Bill, you mentioned in your
7 Exhibit A that the value decreases to the
8 grower. Why does it decrease to the grower?

9 A Well, it, the value decreases to
10 the grower because it decreases to the handler
11 who's, that's his only market to, to sell a
12 diversion credit. As, as the, as the
13 percentage of regulation increases the, this
14 all goes to the top line. This is considered
15 part of the crop and it just, it doesn't have
16 a lot of value. Probably, probably the most
17 value for an in orchard diversion credit is
18 when there's a regulation of around 20 percent
19 and it probably is, the truth is, it probably
20 starts declining after that.

21 Q How do you as a processor deal
22 with the June versus the, the September change

1 to the crop and grower certificate?

2 A Well, if I was a praying man I
3 would probably do something like that but, I'm
4 not. So, you know, I mean, we just use our,
5 the rule, we have to use our best guess and
6 apply what we think is going to happen. And,
7 obviously, there is a lot of variables in this
8 equation and it's moving all the time. And
9 so, it, it's, it's very, very difficult and it
10 becomes a problem, we're trying to run a
11 business and we're trying to promote our
12 products, we're trying to keep our factories
13 open and our staff working and it becomes the,
14 I, I doubt if there's another example of
15 anything in agriculture processing even close
16 to equivalent to the cherry marketing order --
17 as you know, federal marketing order 930. Is
18 that an indirect answer?

19 Q That's direct. If you purchase a
20 certificate in August --

21 A Yeah.

22 Q -- and the crop goes up, what

1 happens to that certificate?

2 A Well, it, it diminishes in value.

3 Q Because of the discount?

4 A Because of the discount. It's
5 really discounted by the amount of the
6 regulation. I think that's a good word to
7 use.

8 Q All right. And, then in your
9 Exhibits B and C, you've equated the two. Why
10 does Burnette Foods not take advantage of
11 Exhibit C --

12 A Well, we produce what might be
13 called mature products. Fruit fillings,
14 canned cherries and, and so, these products as
15 they hit the grocery store shelves, we, our
16 products are probably, there's probably a
17 fruit filling in almost every, cherry fruit
18 filling in almost every grocery store in the
19 United States. Finding a new market is very,
20 very difficult. If it, I mean, for all
21 practical purposes, it's impossible and, and
22 export of these cherries, there were years ago

1 and like I said to you in my lead in, I've
2 done this for a long time, in the mid-70's, we
3 in the cherry industry were exporting close
4 to, in canned cherries to Europe, close to 50
5 million pounds. My guess is, and these were
6 all from Michigan, my guess is in canned
7 cherries from this year, the 2010 crop, it
8 might be a million pounds.

9 And, if, and that's for a variety
10 of reasons. It's the EU and competing fruit
11 from Yugoslavia and other places but, the
12 structure of this industry has changed
13 enormously. For, for example, just fruit
14 filling plants in, in Michigan. Since the
15 inception of this order, there's been three
16 closures. I don't know how many people that's
17 put out of work. Birds Eye who has the only
18 real brands in the cherry industry, in the
19 fruit filling business, they own the --
20 variance, they're closing their Rochester, New
21 York plant. These, these are big deals and as
22 I said to Perry a few minutes ago, you know,

1 we talk about employment, we talk about the
2 social aspects and the greater good and yet,
3 we in the cherry industry just focus on our,
4 what is our percentage regulation. There,
5 there's more, there's more responsibility than
6 that.

7 Q If this is implemented and you're
8 operating under Exhibit B's scenario, how
9 would that advantage your opportunities to
10 more product?

11 A Well, it, what it would do for us
12 is the, the product that we would process we
13 would be able to sell and we'd be able to
14 promote our product better in bigger crop
15 years. The, the history of the cherry
16 industry is one of volatility in terms of crop
17 size, ups and downs, which is why the order is
18 here, and I think the truth is that from the
19 grower perspective, the volatility of the
20 market is what has made for them, what it, a
21 viable industry. We, we've, with the order
22 and the constant reserves which means carry

1 over inventory, the appearance is we'll always
2 have too much. We can't promote our product
3 in the big crop years because we're required
4 to restrict this.

5 Under this amendment provision,
6 we'd have a lot more flexibility to sell what
7 we've produced and that's what we would do.

8 Q And, your grower base that would
9 support this process?

10 A Well, I would hope so.

11 Q Yes.

12 A I would hope so. I mean, this is
13 clearly an amendment that, that would be, I
14 can't imagine a grower not being for this.

15 Q I'm a bit concerned, Bill, about
16 your, the example you cited with the 240,000
17 versus the 180,000. That wouldn't change with
18 this amendment. That's, that's the internal
19 structure --

20 A I understand. I'm giving you an
21 example of what happens.

22 Q Yes.

1 A If you want to talk to the person
2 that did that, he wouldn't be willing to
3 discuss it with you --

4 Q That's all right.

5 A He wasn't very happy by the time
6 he got done with the whole process and he had
7 to pay for the harvesting of his crop, pay for
8 the delivery, pay the CIAB fee and get a, you
9 know, his gross was \$5,000 less.

10 Q In that example, if he were
11 getting, if you were getting 100 percent value
12 for those, would you pay any more for those
13 certificates?

14 A Probably, yeah. I mean, it just,
15 it would just streamline our operation. I
16 mean, we, we've bought diversion credits from
17 other handlers who, who had too many.

18 Q Uh-huh.

19 A For example.

20 Q In the past, Bill, you've
21 described to me the, sort of the model that
22 the fruit filling segment follows as compared

1 to some of the others in the industry. Could
2 you describe that a little bit on the record
3 and then --

4 A Sure. I mean, I, for instance --

5 Q Well, that you guys pack to an
6 unknown --

7 A Well, okay.

8 Q -- volume of production and, and
9 this would help you fulfill that.

10 A Right. Well, we try to. As I
11 said, there's a lot of volatility in the, in
12 the growing of tart cherries. And, I'll give
13 you a perfect example of that. We've,
14 Burnette Foods has, we've in my family have
15 been cherry producers for 52 years and last
16 year for the first time we had zero cherries
17 in our orchard. Zero. Not one cherry. And,
18 we could probably go back to, I don't know,
19 maybe 700 or 800,000 pounds, maybe more than
20 that in a given year. So, but, so it, we lost
21 an important, Burnette Foods lost an important
22 source of supply meaning our captive, our

1 captive cherries and, and, so we had to, we
2 had to broaden our reach and, and try to
3 procure fruit from other sources that we, it'd
4 probably be fair to say that we hadn't done
5 business with before. Now, like I was telling
6 you about the fact even being able to do that.
7 But, I think we do try to, I'll call it manage
8 our, our production closely to what we
9 anticipate our sales will be and there's some
10 very practical reasons for that.

11 Our product goes in a metal
12 container. The container has a shelf life.
13 Consumers and our, our retail customers are
14 very, very conscious of what they describe as
15 out of date product. It, really a canned food
16 product, I'm going to say this without, most
17 canned food products would probably still be
18 in very good condition after, I'm, I'm not
19 exaggerating, seven or eight years. But, but,
20 the retailer wants the product that was
21 produced this year. So, when we have to have
22 an inventory reserve made up of product from

1 last year, we have to somehow find a way to
2 shuffle that product into the market place
3 and, and, frankly, we probably shouldn't be
4 doing that. And, and our customers, if they
5 knew more about it, probably wouldn't like us
6 to do it.

7 Q So --

8 A So, that's a real problem for us.

9 Q And, a diversion credits would
10 give you the mechanism to deal with your
11 restriction obligations and avoid --

12 A In a different way than, than
13 holding inventory reserve. Exactly right.
14 The other thing that happens with canned
15 cherry products, especially tart cherries, is
16 they, in a can they do tend to darken over
17 time. So, there is, there is less eye appeal
18 for the product as it ages in a can.

19 Q And, Bill, can you speculate what
20 you think will happen to the grower prices
21 with this change?

22 A I, I would expect the grower

1 prices would increase. That, that would be,
2 I think it would create an actual, we would in
3 fact be able to control supply. And, there
4 would be a significant incentive for growers
5 when, when the crop was legitimately too
6 large, whatever that means, that I can see
7 economic abandonment in the orchard that would
8 be very, that would work.

9 Q One of the fears that has been
10 expressed to me, Bill, is that this is just
11 going to give license to growers to grow
12 simply to divert.

13 A Oh.

14 Q Any chance that's going to happen?

15 A I, I can't imagine. Whoever said
16 that, I'd be more than willing to confront him
17 on that issue that --

18 Q Yes, okay. I have no further
19 questions, Your Honor. Thank you.

20 JUDGE CLIFTON: Mr. Hill?

21 EXAMINATION

22 BY MR. HILL:

1 Q In fact, doesn't your example that
2 you gave earlier show the contrary with the
3 grower who went out and tried to sell their
4 harvest, their cherries and then took a loss
5 on the cherries even though you were going to
6 pay more?

7 A Right. That's exact, I mean,
8 they, and I, I think there's general agreement
9 and I think the growers, I mean, they,
10 absolutely. And, I really understand it being
11 a cherry grower myself. It, I mean, yeah, and
12 I'd say growers, people in agriculture in
13 general, the idea of abandoning their crop
14 that they, it only comes once a year for them,
15 this isn't, this isn't for a grower, it's not
16 like they're a fruit processor like Burnette
17 Foods is and, okay, so we missed Tuesday
18 morning but we can make it up Thursday
19 afternoon. You know, when you're in the
20 manufacturing side you can literally do that.
21 When you're growing an annual crop, it's
22 obviously impossible.

1 So, they're proud of their crop
2 and, and you know the other thing I was saying
3 and -- felt this way and to a certain extent
4 I feel this way myself, that the, the cherry
5 industry is as much a way of life, at least as
6 much a way of life, as it is a business. And
7 so, applying grower dollars and cents to all
8 these decision-making, you know, it doesn't
9 always happen that way.

10 Q You did mention a few times when
11 talked about diverting product --

12 A Uh-huh.

13 Q -- and the accounting, you
14 mentioned phantom cherries.

15 A Phantom cherry.

16 Q Can you expound upon --

17 A Well, I, well, my, my, I,
18 hopefully, easy explanation is it, if you, if
19 an apple grower abandons 20 acres of apples,
20 it, it doesn't get counted as a part of the
21 crop. Nobody comes in there and says, hey,
22 this is part of the national crop. But, if a

1 cherry grower under the circumstances, the
2 example I, I gave you of the grower that
3 supposedly diverted 240,000 pounds, that's
4 counted as part of the crop. So, with every
5 pound that the overall crop increases, the
6 regulation increases by that number of pounds.
7 It's literally a quota system that once you,
8 everything over whatever that threshold number
9 is, that's the quota and everything over that
10 number is excess. So, by definition, if you
11 can imagine, the, the percentage of regulation
12 goes up with every pound.

13 JUDGE CLIFTON: This is a colorful
14 hearing. I now know about cesspools --

15 THE WITNESS: Oh, yeah.

16 JUDGE CLIFTON: -- and cherries.

17 What other questions are there for Mr.
18 Sherman?

19 Mr. Engeler?

20 EXAMINATION

21 BY MR. ENGELER:

22 Q Yes, Mr. Sherman, you spoke a lot

1 about how you believe that these amendments
2 would benefit your handler operation and you
3 talked a little bit about the growers side and
4 how you believe that it would help grower
5 returns. Would you extent on that a little
6 bit for us? More from a grower perspective
7 and how it would be beneficial?

8 A Well, I mean, the beneficial as I,
9 as you can see from my diagrams there, that as
10 the, under the present circumstances, as the,
11 as the crop increases and the regulation
12 simultaneously increases, the value of these
13 diversion credits for in orchard diversion,
14 continues to decline because they're in a
15 sense, to use Perry's word, they're discounted
16 by the percentage of regulation.

17 So, when you get to a certain
18 point, and it, to a certain point they're
19 literally valueless. And so, that's, that's
20 what I'm trying to point here. And, and I
21 think also from the handler, or from the
22 grower perspective, the idea that processors

1 can promote the products and that their
2 inventory is something they can sell, is also
3 in the growers interest.

4 Every grower, I would say every
5 grower, every grower of Burnette Foods deals
6 with, I'm sure, almost every, while some have
7 gone out of business, the people that are
8 remaining in business are all producing more
9 cherries and, and somehow, we as a handler, we
10 have a, it's part of our business, we want to
11 be able to market this product and the grower
12 wants us to market their product.

13 Q Do you believe in the larger crop
14 years that there will be more grower diversion
15 activity under the proposal?

16 A Well, there probably would be,
17 yeah.

18 Q And that --

19 A There probably would be.

20 Q And, what impact would that have
21 on the, on the inventories and the supplies?

22 A Well, I mean, it's hard to

1 speculate but, I think it would be, I think we
2 would be more manageable. We might not be
3 brilliant to the USDA, billing out to the
4 public troth, to ask them to buy our excess.
5 And, have our products more in line with the
6 perception of demand.

7 Q Thank you, that's all I have.

8 JUDGE CLIFTON: Ms. Salehi?

9 EXAMINATION

10 BY MS. SALEHI:

11 Q I just wanted to ask you, assuming
12 this amendment passes and the value of grower
13 diversion products and handler diversion
14 credits become more of an equal footing, and
15 going back to your example about the grower
16 who really didn't want to leave his crop in
17 the field, so I'm assuming that if these
18 values become more equal, we're assuming that
19 this will create an incentive for the grower
20 to actually divert? But, since you were
21 saying that it's really not a dollar, dollar
22 issue, not dollar and cent issue, it's more of

1 an emotional or a way of life, do you think
2 that in actuality it will create an incentive
3 for the grower?

4 A I, I do. I, I think it will bring
5 that more into balance and, and I think it's
6 also equitable. Why should a handler have
7 the, why should a handler have a piece of
8 paper that is worth a lot more than the grower
9 has at the field level. I mean, where's the
10 equity in that. There's none. And yet, I
11 venture to say, when we get to the vote on
12 this thing, it's going to be very, very close
13 for the reasons I said earlier.

14 Q No further questions, thank you.

15 JUDGE CLIFTON: Mr. McFetridge?

16 EXAMINATION

17 BY MR. MCFETRIDGE:

18 Q Marc McFetridge, USDA. Mr.
19 Sherman, a quick record keeping question for
20 you. Been asking everybody so, based on the
21 small business administration definition of a
22 small business having annual receipts of less

1 than \$7 million and a small agriculture
2 producer as having annual receipts of less
3 than \$750,000, how would you classify your
4 tart cherry business? Are you a large
5 agriculture business or a large agriculture
6 producer?

7 A Well, we're in the large
8 agricultural business.

9 Q Okay --

10 A I mean, we're not, by that
11 definition, we're not a small business.

12 Q And, do you also, are you also a
13 grower or --

14 A Right.

15 Q Would you have less than \$750,000
16 annual receipts a year?

17 A I, I think I told you we had zero
18 -- in 2010.

19 Q All right.

20 A So, I'm able to do the math but --

21 Q All right, thank you. So, based
22 on the small business definition, could you

1 see any negative impacts on small growers with
2 these proposed amendments?

3 A No, I think it would be an all
4 positive. I, I can't imagine a negative
5 aspect for small growers in this. The
6 negative impact would probably be in the
7 larger grower who's vertically integrated who
8 might have found a way to use the existing,
9 the existing or new market or export credits
10 and so, they're the ones that would probably,
11 they will be the ones that will object to any
12 change.

13 Q Thank you. I wanted to go back to
14 the --

15 MR. HEDIN: Your Honor, before we
16 move on, can I ask a point of clarification?

17 JUDGE CLIFTON: You may?

18 MR. HEDIN: Mr. McFetridge, with
19 your asking if the, the processing entity is
20 large or small on the seven million, is that
21 in total for all products they produce or
22 specifically for cherries?

1 THE WITNESS: Just for cherries.

2 JUDGE CLIFTON: Oh.

3 THE WITNESS: We're, we're
4 probably still, I don't know. We're probably
5 borderline. I, I, I'd have to look. We might
6 not be a large business --

7 MR. HEDIN: Okay.

8 THE WITNESS: -- for cherries.

9 Thank you.

10 BY MR. MCFETRIDGE:

11 Q So, back to your example where you
12 said you were willing to offer, was it six
13 cents a pound for the grower to divert in the
14 orchard?

15 A You know what, I don't remember.
16 This happened several years ago. I don't
17 remember exactly what the number was and, and
18 I don't remember exactly how many pounds the
19 field man for the CIAB gave him, was willing
20 to give him the diversion credit for. But, I
21 know it was about 25 percent less than what he
22 actually harvested.

1 Q Okay. Well, I have this other
2 question about, so, so we know just for
3 example --

4 A Yeah.

5 Q -- the six percent that you were
6 willing to offer as an in orchard diversion
7 versus the four, four cents that they got when
8 they actually harvested.

9 A Yeah.

10 Q How much does harvesting usually
11 cost? Is it roughly --

12 A I, you know, I, I don't have a,
13 you're going to have to ask somebody else that
14 question.

15 Q All right.

16 A I don't, I don't really know.
17 It's probably two or three cents a pound,
18 something like that.

19 Q Okay.

20 A There are some people in this room
21 that could answer that question.

22 Q All right, thank you. I wanted

1 to, I really enjoyed the charts that you
2 brought in. It really helps to kind of show
3 how these diversion credits with the proposed
4 amendments were, really increase in value. I
5 just want to see, can you envision a case
6 where, I know for your Exhibit B where you
7 have the graph showing a constant rate of
8 returns, can you envision where maybe it would
9 peak at a certain point or stay constant?

10 A Oh, of course. Yeah, I, you know,
11 I'm, I'm sure it would but, I mean, common
12 sense would dictate that as it, that under
13 high levels of regulation that the, the value
14 of diversion credits would increase. And, I
15 don't know whether it's a, exactly what the
16 ratio would be but, yeah, of course, it would
17 peak at some point.

18 Q Could you ever envision of case
19 where it could possibly decline as the
20 restriction increases?

21 A Well, you know, I guess when you
22 get close to a hundred percent what's the

1 point.

2 Q Yes.

3 A So, I mean, we might as well just
4 pack it in and say enough of this.

5 Q Uh-huh.

6 A So, yeah.

7 Q Okay, all right. That's it, thank
8 you very much.

9 A You're welcome.

10 JUDGE CLIFTON: I think I'll ask
11 Mr. Sherman to go on with what else he had for
12 us before we ask more questions.

13 THE WITNESS: No, I just have a
14 couple other points about the, about the order
15 itself that, that I think that since there are
16 people here from the USDA who probably don't
17 know such a thing about this.

18 One of the things that's happened
19 since the inception of this order is we've
20 had, what, what an economist might call a
21 structural change. And, we especially have
22 this, this issue with what's called the

1 marketing, sales group, what, what's the term,
2 Perry? The sales --

3 MR. HEDIN: A sales constituency.

4 THE WITNESS: Sales constituency.

5 So, and, and there have been some issues
6 there. But, but, and in today's world there's
7 a sales constituency in the, in the cherry
8 business called CHERRCO. It's spelled C-h-e-
9 r-r-c-o, with capital letters of course. And,
10 there are 19, 19 seats on the board and to my
11 latest count, the CHERRCO people control 14 of
12 these seats. And, ironically, well, Burnette
13 Foods is not a part of this but, I think it's
14 fairly common knowledge that whenever the CIAB
15 has a meeting, and of course the CIAB pays the
16 transportation for the 19 members plus 19
17 alternates to come to the meetings, and as I
18 think you know, we have cherries grown in
19 Washington, Oregon, Utah, New York, Wisconsin
20 and Michigan, and amazing coincidence, CHERRCO
21 usually has their meetings either the day
22 before or the day after these, the CIAB

1 meetings.

2 I mean, I find that and the fact
3 that CHERRCO is not a sales constituency, and
4 while they don't, you can't say they vote
5 unanimously on these issues, it's a real
6 problem for the minority. And, I consider
7 Burnette Foods a minority company because we
8 don't produce frozen cherries, we produce
9 canned product, and so we have this board
10 dominated by the frozen cherry industries who
11 basically all sell their product through one
12 entity, that's one thing.

13 And, then it comes to voting to
14 fill the CIAB seats. In northern Michigan, I
15 think there are eight votes, they're eight
16 processor, one family controls three votes out
17 of eight. And, then on the, and then when we
18 get to voting on these amendments, the larger
19 the grower, the more impact that grower has
20 on, on voting for or against changes in the
21 order.

22 We have a supply problem in this

1 industry. The larger the grower, the more
2 they're creating the problem and yet they have
3 more, more voting power when we come to vote
4 on amendments and other issues before the
5 board. Well, I told, and then, diversion, I
6 told you about that, I told you how I feel
7 about non-existent cherries, phantom cherries,
8 and the way these new market and new product
9 diversion credits have been given away for
10 years and yet, we haven't been able to
11 increase the demand, increase the consumption
12 of cherries.

13 So, it, a couple other points.

14 And, I had written this to an attachment to a
15 letter to Senator Stabenow, who's a senator
16 for Michigan, but a couple things about the
17 inventory reserve that I mentioned to you
18 about the shelf life of canned cherries.
19 Furthermore, the can manufacturers, the people
20 we buy containers from, only guarantee their
21 cans for one year. And yet, we're required to
22 have this product a year. If we produce it on

1 July 1st, we're required to have it in
2 inventory on June 30th. Now, there's some
3 proposed, I'll call them Rule I, I'm probably
4 using the wrong word, rule, rule
5 interpretation changes here that, that might
6 have an impact to segment these markets.
7 Because we really, we in the canned cherry
8 industry, really do not have a problem with
9 excess. Our problem is having cherries to
10 promote our product.

11 The other interesting thing is the
12 USDA buys many, many food products under a
13 variety of programs. School lunch program and
14 what used to be called the needy folk, needy
15 family program and I think there's a different
16 word for it today but, they only buy current
17 year product. So, any product we have out of
18 inventory reserve that's a year old, USDA
19 would not buy it. And yet, under the terms of
20 this order, we're forced to voice this off on
21 our unsuspecting retail customers.

22 So, I, I think furthermore, as you

1 probably know, Pennsylvania and Oregon, who
2 also produce cherries, are never regulated.
3 Where we, Burnette Foods, one of our major
4 competitors is a Pennsylvania company.
5 Furthermore, and something I meant to mention
6 and I wish I had a sample of it here, we're,
7 we're faced with competition from China
8 producing fruit filling and importing product
9 to compete with our product here that we're
10 producing in the states.

11 So, you know, that's about all.
12 As you can tell I'm, I'm a former board member
13 and it probably isn't surprising to you when
14 I was nominated this past year to be re-
15 elected after a, an absence, I was not re-
16 elected. So, anyway, that's about all I have
17 to say and if you have anymore questions for
18 me, I'd be, I'd be glad to answer them.

19 MR. HEDIN: Bill, for the record,
20 can you, CHERRCO is, what company, what's its
21 scope and why are you not a member of it?

22 THE WITNESS: Its scope is, I hate

1 to use that word, Perry, but I think --

2 MR. HEDIN: Well what --

3 THE WITNESS: -- I think what they
4 do or what they try to do, it's a cartel and
5 it's a legal cartel, I think. That's probably
6 never been tested but, they are a group of
7 supposedly grower owned cooperatives and they
8 come together to establish pricing, to fix the
9 pricing of their product and to, I think
10 that's their point. I think they, they being
11 CHERRCO act, to the best of, well, I know this
12 fact because we, we being Burnette Foods,
13 we've bought cherries from, from CHERRCO.
14 They invoice the customer. They collect the
15 receivables.

16 MR. HEDIN: But, do they not just
17 cover the frozen and hot pack categories
18 within the industry?

19 THE WITNESS: I think it's just --

20 MR. HEDIN: They are, they are in
21 the, the, your fruit filling segment, the
22 juicing of the product, is that correct?

1 THE WITNESS: To the best of my
2 knowledge.

3 They're not in the fruit filling business, no.

4 MR. HEDIN: Okay. So, you
5 couldn't be a member of it even if you wanted
6 to?

7 THE WITNESS: Oh, God. We could
8 probably put in a frozen line and, you know,
9 and --

10 MR. HEDIN: Yes.

11 THE WITNESS: -- go to their
12 meetings if they'd have us probably, I don't
13 know. Might be black balled.

14 MR. HEDIN: Okay. Well, I just
15 wanted to grab you to reflect what the company
16 is and --

17 THE WITNESS: Yeah, what, what
18 CHERRCO is?

19 MR. HEDIN: Yes.

20 THE WITNESS: I, I, you know, I'm
21 sure you have other witnesses and you can ask
22 them to explain what CHERRCO is much better

1 than I. They know the intimate details.

2 MR. HEDIN: All right. Okay, that
3 was all.

4 JUDGE CLIFTON: Ms. Deskins?

5 EXAMINATION

6 BY MS. DESKINS:

7 Q Good morning, Mr. Sherman.

8 A Good morning.

9 Q I just wanted you to maybe explain
10 a little further. You talked about, I think
11 some of the current system now, the growing
12 diversion certificates are discounted?

13 A Well, that, do you want an
14 explanation of what --

15 Q Yes.

16 A That was really Perry's word and I
17 think it's really a good word. And, the point
18 being, that as the, okay, let's, I'll just
19 give you an example. Say that we, Burnette
20 Foods, buy a thousand pounds of cherries and
21 the, and we buy a, and we process a thousand
22 pounds of cherries. And, we buy a thousand

1 pounds of grower in orchard diversion
2 certificates. So, our reserve requirement is
3 not based upon the thousand pounds of cherries
4 that we processed, it's based upon the
5 thousand pounds of cherries that we process
6 plus the thousand pounds of diversion credits.

7 So, now we have what is called a
8 handle of, I mean, of two thousand pounds.
9 So, if, if the regulatory or if the restricted
10 amount is, is 20 percent, we have to have, we
11 have to have 400 pounds of reserve. If the
12 regulation is 50 percent, we have to have
13 1,000 pounds of reserve. So, as you can see,
14 that, that diversion credit declines in value
15 as, I hope I've explained this, the diversion
16 credit declines in value as the percentage of
17 regulation increases. Just, is that, does
18 that example explain?

19 Q That explains. So, that's what
20 your, that's what it, what has been
21 illustrated --

22 A Yeah.

1 Q I'm sorry, Exhibit A illustrates?

2 A Yeah, yeah, it is.

3 Q Okay. It is the discounting of
4 the diversion certificate?

5 A Right.

6 Q Okay. All right, thank you.

7 JUDGE CLIFTON: Mr. Sherman, when
8 you said Oregon and Pennsylvania are not
9 regulated did you mean they're never
10 restricted?

11 THE WITNESS: That's what I meant.
12 They're never restrict, they, they, those two
13 states are allowed to harvest a hundred
14 percent of their crop and no reserve
15 requirements are associated with those two
16 states. There might have been a little bit of
17 politics there. It's amazing how close the
18 Pennsylvania cherry growing area is to
19 Washington. And, it was amazing how Oregon
20 had a senator named Mark APCA who was very
21 influential when this order came into, the
22 darndest things happen.

1 MS. DESKINS: I don't have any
2 further questions.

3 JUDGE CLIFTON: Are there any more
4 questions for Mr. Sherman? Mr. Sherman, was
5 there anything further you'd like to add?

6 THE WITNESS: I've said enough.

7 JUDGE CLIFTON: Thank you, you may
8 step down.

9 THE WITNESS: Thanks.

10 JUDGE CLIFTON: Mr. Hill, you may
11 call your next witness.

12 MR. HILL: I'm calling Brian
13 Mitchell.

14 JUDGE CLIFTON: Thank you, and Mr.
15 Mitchell, please be seated. I'll swear you in
16 after you're seated. And, do you have a
17 statement to distribute?

18 MR. MITCHELL: Yes.

19 JUDGE CLIFTON: All right. Go
20 ahead and distribute that Mr. Hill. That
21 document will be Exhibit 17.

22 MR. HILL: And, Your Honor, we'd

1 like to admit Exhibit 16 into evidence.

2 JUDGE CLIFTON: Is there any
3 objection?

4 MS. DESKINS: No objection.

5 JUDGE CLIFTON: Exhibit 16 is
6 hereby admitted into evidence. So, please
7 mark Mr. Mitchell's statement as Exhibit 17.
8 And, do you have a copy with you, Mr.
9 Mitchell?

10 (Whereupon, Exhibit 16 was
11 admitted into evidence and Exhibit
12 17 was marked for
13 identification.)

14 MR. MITCHELL: I do.

15 JUDGE CLIFTON: Good. First,
16 state and spell your full name for me.

17 MR. MITCHELL: Brian Mitchell, B-
18 r-i-a-n,
19 M-i-t-c-h-e-l-l.

20 JUDGE CLIFTON: Thank you. Would
21 you raise your right hand, please?
22 Whereupon,

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BRIAN MITCHELL,

called as a witness herein, having been first
duly sworn, was examined and testified as
follows:

MR. MITCHELL: I do.

JUDGE CLIFTON: Thank you. Mr.
Hill, you may proceed.

EXAMINATION

BY MR. HILL:

Q Hello, Mr. Mitchell.

A Good morning.

Q I love your first name. You've
prepared a statement. Would you mind
expanding on the statement or reading your
statement if you want to?

A Absolutely. As my statement
indicates, I represent Cherry Growers, Inc.
which is a handler in district one. It is
structured as a cooperative for processing
tart cherries and has member grower owners
throughout the state of Michigan. We
currently are supporting the federal marketing

1 order and the cherry industry is for the
2 proposal of the amendment to change the
3 regulations to what we call the, the in
4 orchard credits for the bottom line diversion.

5 Over the last several years, we've
6 requested our ownership, grower member groups
7 to divert roughly 19 million pounds of in
8 orchard diversion activity and I think we, we
9 understand the mind set of the growers, as
10 well as, the handlers on, on what those
11 impacts are.

12 As you probably heard, the purpose
13 to change to allow to an in orchard credit for
14 bottom line was probably unlikely intended
15 consequences as that diversion amount grew to
16 disincentivize in some manner that actual
17 activities due to the, the lower value of the
18 credit itself. It, and I put an example in
19 here explaining that if we receive one million
20 pounds of cherries and in orchard restriction
21 is 40 percent, the restricted volume is
22 600,000. As that restriction moves up, it

1 impacts the overall restriction percentage
2 which is, obviously does not in our eyes
3 create an equal playing field among handlers
4 and then eventually trickles down to the
5 grower level and the producers of the tart
6 cherry products.

7 I think most importantly, it would
8 encourage more diversion in crop destruction
9 on these years that have high restriction
10 volumes and those are the years when, when you
11 need to make it probably more importantly
12 happen, you won't have the avenues of, of
13 offshore sales, new market credits and new,
14 new expansion of domestic credit. So, as
15 this, as this restriction grows, your, your,
16 as others have probably pointed out, it
17 disincentizes to a level in the critical year
18 when you should be, should be utilizing the
19 mechanics of the market order and destroying,
20 or leaving or abandoning these cherries in
21 the, in the orchards.

22 Obviously, the, the other part of

1 the marketing order is when the grower is
2 forced with this idea that we want to harvest
3 at the grower level the best product quality
4 first, so as not to ruin relationships with
5 end users on overall cherry quality. And, I
6 think what happens in my opinion, is that in
7 some years, because of the current structure,
8 not only do we probably pack more cherries
9 than we ought to, I think the quality aspect
10 is not always there as well. Which I think
11 does hamper the ability for the market to grow
12 its, its overall presence in the domestic
13 market when it's not producing a high level
14 product.

15 JUDGE CLIFTON: Did you want to
16 add anything more before people begin to ask
17 you questions?

18 THE WITNESS: Well, I would just
19 add to the, the fact that I, I don't see a
20 smaller grower having any type of, of adverse
21 effect versus a larger grower when it comes to
22 moving towards a, a bottom line credit

1 situation. I would agree with some of the
2 statements I've heard earlier today that it
3 does have a leveling, so to speak, amongst the
4 different categories of, of end user cherry
5 products more so than the, the current set up
6 gives the industry.

7 JUDGE CLIFTON: Now, questions for
8 Mr. Mitchell. Who would like to begin? Mr.
9 Hedin?

10 EXAMINATION

11 BY MR. HEDIN:

12 Q Thank you, Brian. Thanks for
13 coming. How long did you, you and your family
14 been involved in producing cherries?

15 A My family has been probably
16 producing cherries since about 1970.

17 Q And, you've been involved in it
18 all that time? Did you start at 14 --

19 A I probably did start actively
20 being involved on the on farm aspects of
21 cherry growing since my adolescents, yes.

22 Q And then congratulations on your

1 new position as president and general manager
2 of cherry growers.

3 A Thank you.

4 Q A nice compliment. One of the
5 things, Brian, that's been talked about has
6 been, is the attitude of growers and what
7 they're producing. What they want it to be
8 used as as a food product, not as a source for
9 an orchard diversion credit. Do you think
10 that this proposal will prompt people to grow
11 just to divert?

12 A No, I do not. I, I would speak
13 maybe like similar testimony you may have
14 heard over the last couple days, that as a
15 grower, nobody is, is putting in the effort
16 and expense of producing an agriculture
17 product to then watch it rot on the ground
18 throughout the month of September. I do think
19 that, unfortunately, when you get into
20 heavier, higher percent restricted crop years,
21 those credits become devalued and therefore,
22 growers have a mind set which, which is

1 emotional, that I can't get anything for these
2 credits, I might as well put it into the
3 supply chain.

4 So, again, I, I saw Mr. Sherman's
5 chart and I agree that there is a, a kind of
6 a sweet spot, if you will, on the value of
7 these diversion credits as far as a percent
8 restriction and I would think that this
9 amendment change would allow that sweet spot
10 or value to, to grow at the higher percentage.
11 Which is really when you need to be addressing
12 your over supply issue. If, if it's the most
13 critical, you know, once in every five years
14 when you do have this significant over supply,
15 that's when you ought to make sure that the
16 emotional part can be put more at rest from
17 the grower end and make sure that the, the
18 possible spread in the economics isn't so
19 drastic that they have nothing to lose but to
20 harvest that, that unneeded crop.

21 Q Thank you. Brian, in your
22 testimony you mentioned that you did, the

1 cherry growers, it's now about 19 million
2 pounds of diversion over the last ten crops.
3 Can you explain a little bit how, if you know,
4 how cherry growers determined to do orchard
5 diversions and how they conveyed that to the
6 members and, and dialogue it between them.

7 A Well, a lot of the, the pack plan
8 compliance for the processor or handler comes
9 based on that June estimate of national and
10 state and, for us, district regional crop
11 volumes because we are heavily being supplied
12 by the northwest region of cherry grower
13 membership ownership in the cooperative.
14 Throughout, after that guesstimate occurs,
15 then, then we have the responsibility to build
16 a pack plan that is going to be compliant with
17 the regulated volumes. And, I think at that
18 time, we start having our opening grower
19 member meetings, pre, we'll go July 10th, and
20 start divulging and starting the dialogue on
21 exactly how many percent pounds we're going to
22 expect our growers to have to abandon in the

1 orchard.

2 Now, the problem comes, is that in
3 any given year, the regulation may say, 20
4 percent, 40 percent, 30 percent. But, by
5 adding the, the volume abandoned to the
6 overall, what you really have to do as a
7 grower, when you're on the grower side of this
8 conversation, is realize when the handler says
9 you have to destroy 15 percent, that really
10 means 18. And, when they, when, and so I
11 think there's been, in our case, some
12 confusion over the years of some of our
13 growers, trying to keep them educated that
14 when we request at 20 percent diversion
15 activity and they brought the compliance
16 officer out and they believe they've achieved
17 20 percent, only to find out sometimes when
18 it's too late through their, through their
19 mechanics of their calculations, that they
20 didn't actually bring back the amount they
21 diverted into the top line. And, therefore,
22 they've come out that, that extra 20 percent

1 on to what they've destroyed, short. And, and
2 of course, that's caused some hard feelings,
3 obviously, because they were trying to be
4 compliant with the, with the organization that
5 they participate with and, and have ownership
6 with and did not want to burden them with,
7 with non-compliance. And, and we have to sort
8 those, those issues out.

9 Now, I think we've done a good job
10 over the years trying to educate the growers
11 on exactly when these percentages that they
12 hear come out, that it really means more.
13 And, of course, every time that percentage is
14 raised, the spread is raised as well. And so,
15 I would say that there's been more than just,
16 I would assume more than just cherry growers,
17 has, has had its share of maybe earlier in the
18 order but, occasional situations with growers
19 who, the complexity of the order and the
20 complexity of how you calculate what you
21 actually have to abandon, becomes a problem.

22 But, as far as getting back to

1 your root question of, of we, we have to build
2 plan that, that's compliant as, as we can, as
3 we can based on those June numbers and we wait
4 until September to see how good we've
5 estimated that, that plan.

6 Q Is it fair to categorize the
7 decision to go to orchard diversions as the
8 last resort in the compliance tool?

9 A Yes, I think that, that'd be fair.
10 I think we've, we've, or we would much rather
11 try to utilize the tools of the market order
12 on creating and participating in new markets
13 on exports and on other avenues before we, we
14 destroy product. But, there's times when the,
15 when the supply and demand curve just don't
16 add up to that not being a realistic part of
17 the compliance plan.

18 Q And, you feel that this will
19 advance the returns to growers in the long
20 run, this change?

21 A Well, I think that if there's an
22 over supply situation, it's, it's hard to talk

1 about your reasonable return to the producer.
2 That's just the systemic main issue. However,
3 I do feel that creating an order and rules
4 within that order that allow the value of
5 those credits to, to maybe be more fairly
6 distributed amongst the industry and to have,
7 and not have this declining value as the
8 percent of restriction goes up to the point
9 where there, there's just little real economic
10 dollars at the grower level to divert at that
11 amount. We, you know, we have to take that
12 emotional and make the economics tighter so
13 that when we have these high volume issues
14 that are going to be very difficult to sell
15 our way out of, to increase seasons down the
16 road, that, that it really occurs.

17 Q And, you mentioned large crops.
18 With small or moderate size crops, how do you
19 think cherry growers will respond in terms of
20 orchard diversions other than say quality
21 issues, does it seem like orchard diversion?

22 A When you speak to a small or

1 moderately sized crop, I would think that any
2 time that you can achieve a compliance plan
3 for the restricted amount of cherries through
4 new market credits, offshore sales, that the
5 grow aspect and the elasticity in, in growing
6 the domestic market, I think you would utilize
7 those tools first. And, I guess, it comes
8 down to your definition of small or moderate
9 size crop. But, the changes of in orchard
10 diversion, hopefully those other mechanisms
11 could pick up the percent that you're dealing
12 with in any given crop year.

13 Q Great. No further questions, Your
14 Honor.

15 JUDGE CLIFTON: Thank you, Mr.
16 Hedin. Who else has questions for Mr.
17 Mitchell? Mr. McFetridge?

18 EXAMINATION

19 BY MR. MCFETRIDGE:

20 Q Marc McFetridge, USDA. Hello, Mr.
21 Mitchell.

22 A Hello.

1 Q I've been asking everybody what
2 the quick definition on the small business
3 administration, would your company, Cherry
4 Growers, Inc., do they have annual receipts of
5 more or less than \$7 million?

6 A They would have more, they would--

7 Q And, that's for tart cherries
8 specifically?

9 A I would think so, yes.

10 Q And, you also say that you're also
11 a grower?

12 A I am a grower, yes.

13 Q Would you say that you have more
14 or less than \$750,000 in receipts for this
15 tart cherries in the year?

16 A I would say that last year was a,
17 we consider a 20 percent crop so, considerably
18 under \$750,000 in annual receipts.

19 Q Thank you, that's all I have.

20 JUDGE CLIFTON: Thank you. Ms.

21 Salehi?

22 EXAMINATION

1 BY MS. SALEHI:

2 Q I just had a general question.
3 Can you explain to me what some of the primary
4 and secondary markets are for a typical cherry
5 grower? I think you have mentioned them in
6 your testimony, not specific ones, you've just
7 referred to primary and secondary markets.

8 A Okay. Well, I, I, my, my view on
9 the primary market is the U.S. domestic
10 market. And, then I would consider that would
11 be the calculation on, on domestic usage and
12 then there's the growth factor on that market.
13 And, that's what I consider the primary market
14 and the market that cherry growers is, is
15 trying to serve first as its customer base.

16 We do try to keep a reasonable
17 amount of export going every year so that we
18 are always conscious in the, in the minds of
19 those offshore buyers. However, there are
20 some eastern European countries that have
21 entered the market place, probably since this
22 order was put in place which has diminished on

1 a year to year basis, our opportunities to, to
2 sell in that direction. I guess that, I would
3 look at that domestic as the primary and I
4 would also look at new market credits as the,
5 the future of the primary and, but as you have
6 been made aware of, it, it takes a while to,
7 to enter into a new market with a new product.
8 And, the amount of time and investment it
9 takes from the industry to get it to a
10 meaningful volume.

11 Q Thank you.

12 JUDGE CLIFTON: Who else has
13 questions for Mr. Mitchell? Is there anything
14 else you'd like to add, Mr. Mitchell?

15 THE WITNESS: I think my written
16 statement pretty much concurs the feelings of
17 the cherry grower cooperative and the, the
18 grower members that are in the ownership group
19 of the cooperative.

20 JUDGE CLIFTON: Thank you so much.
21 You may step down.

22 MR. HILL: I'd like to admit

1 Exhibit 17 as evidence, please?

2 JUDGE CLIFTON: Is there any
3 objection to Exhibit 17 being admitted?

4 MS. DESKINS: No objection.

5 JUDGE CLIFTON: Exhibit 17 is
6 admitted into evidence.

7 (Whereupon, Exhibit 17 was
8 admitted into evidence.)

9 MR. HILL: I'd like to call Glenn
10 LaCross.

11 JUDGE CLIFTON: Welcome. You may
12 be seated.

13 MR. LACROSS: Thank you.

14 JUDGE CLIFTON: Will you please
15 state and spell your name?

16 MR. LACROSS: Yes, my name is
17 Glenn LaCross. That's G-l-e-n-n, L-a, capital
18 C-r-o-s-s.

19 JUDGE CLIFTON: Thank you. Please
20 raise your right hand.

21 MR. LACROSS: I do.

22 JUDGE CLIFTON: Thank you. Mr.

1 Hill?

2 Whereupon,

3 GLENN LaCROSS,

4 called as a witness herein, having been first

5 duly sworn, was examined and testified as

6 follows:

7 EXAMINATION

8 BY MR. HILL:

9 Q Good morning, Mr. LaCross.

10 A Good morning.

11 Q Well, we all know why we're here

12 today so --

13 A You bet.

14 Q -- you don't have to state that,

15 so, could you please expound on what, how you

16 feel about this proposed amendment?

17 A Yeah, I think it's somewhat of a

18 coincidence that I am a grower/processor and

19 all three representatives that has been up

20 here this morning, has mandated their growers

21 to participate in the last diversion. And,

22 maybe we feel a little guilty about doing that

1 and that's why we feel so strong that this
2 amendment should be made. We mandated our
3 growers to abandon some of their crop when the
4 rest of the industry, and I'm, I'm just
5 shooting from the hip but, I'm thinking that
6 that might have represented ten percent of the
7 national crop. But, we mandated our growers
8 to abandon part of their crop when it wasn't
9 enough to be effective to do anything for the
10 surplus, of the management of surplus of, of
11 tart cherries.

12 And, and that's pretty hard when
13 you're working with a grower that's got that
14 annual crop and he really, it is a way of life
15 and he really does want to harvest that.
16 That's his first goal, is to harvest it.

17 The second one is to get paid for
18 them. But, it's really hard for him to walk
19 away from a crop and when the processor says
20 that economically, we really have to do it
21 this way, it's really hard. But, there, there
22 just has not been enough participation in

1 abandonment in an over supplying year to
2 affect our industry economically.

3 Q And, you say you're a grower and a
4 processor?

5 A Yes.

6 Q You heard the SPA definitions,
7 what would you say, you're a large or a small
8 business --

9 A Small in both areas.

10 Q Then can you give us the name of
11 your processing facility?

12 A Yes. It's Leelanau Fruit Company.

13 Q And, I'm sure you'll be able to
14 spell Leelanau for the --

15 A Okay.

16 Q -- most of them.

17 A That is L-e-e-l-a-n-a-u. And, the
18 definition of Leelanau is native American for
19 land of delight. I thought I'd just throw
20 that in.

21 Q And, that is a county of the
22 northwestern Michigan?

1 A Yes, it is. It is, it is the
2 largest volume of tart cherries in the United
3 States of that, of that one county is.

4 Q Glenn, how long have you been a
5 grower of cherries?

6 A I have been a grower of cherries
7 for 46 years.

8 Q Started at 14, like Bill then?

9 A You betcha.

10 Q And, how long have you been an
11 independent processor?

12 A For about 20 years, uh-huh.

13 Q And, you described how you
14 required the, an orchard diversions of, from
15 some of your grower base --

16 A Yeah, base --

17 Q -- how did you come to that
18 decision? In passing it back down to the
19 grower level?

20 A Well, the tart cherry harvest
21 moves very quickly and we're dealing with
22 estimates and not factual volumes. And, it is

1 a moving target. And, at some point, our gut
2 feeling tells us that, that we've got, we've
3 got too many cherries to manage and it's going
4 to be too much of a burden on us as a
5 processor to, to buy the ingredients and
6 provide the labor and put this product into
7 storage for, for a long term, maybe three,
8 four years, maybe long enough that the, the
9 cost will eat up the value of the product.

10 Q Prior to passing that down to the
11 grower level, do you consider the other post
12 harvest activities you could utilize?

13 A Which ones are you --

14 Q Exports, new market, et cetera?

15 A Yes, right. You know, we are a
16 frozen packer of cherries and so, we are
17 somewhat limited as to our abilities to
18 entertain export markets. And, being a small
19 processor, somewhat limited to new markets.

20 Q So, this change would give you a
21 substantial advantage in terms of dealing with
22 the restriction?

1 A Yeah, it would, it would. It
2 would make it much more palatable, I think, to
3 our growers to tell them that we have a
4 restriction that we have to deal with. A
5 percentage to leave out in the orchard.

6 Q And, as I asked Mr. Mitchell, do
7 you think in, in large crop years would you
8 see some of that in how that compared to the
9 smaller crop years --

10 A Smaller crop years are manageable.
11 Large crop years take, take a lot of
12 management and we have had restrictions, we
13 have asked for our growers to participate in
14 restrictions of 20 to 25 percent and it would
15 be easier to, to maybe name a percentage
16 higher than that, that's actually going to
17 effect their return.

18 We have a, as a, as a marketing
19 order, we haven't been able to effectively
20 return a growers cost of production on several
21 years. And, that's really the intent. Not
22 to, to make win falls but, to keep our growers

1 in business even in an over supplied year, I
2 think is really the intent.

3 Q When there's, I was on the stand
4 this morning. I was asked a question about
5 whether or not you pay growers, that
6 processors pay growers for their diversion
7 activity and their certificates. In the
8 situation you described, did you pay the
9 growers for those certificates that they
10 generated or did you acquire those as part of
11 the delivery pack?

12 A We did not pay them a percent
13 value. We have figured that into their
14 overall return. And, right today in the 19,
15 or for the 2009 crop year, our growers have
16 been paid 100 percent and I don't think other
17 growers have. And, I think that, in that
18 respect, is how we have, have returned
19 something to our grower for that, that set
20 aside amount.

21 Q So, they got compensated through
22 being able to, to pay them all for the

1 delivered products?

2 A That's right, yeah.

3 Q And, you mentioned that you're a
4 frozen processor. Are you a member of
5 CHERRCO?

6 A I am a member of CHERRCO, only --
7 fruit cooperative is, yes.

8 Q All right. And, that is a capital
9 -- cooperative, isn't it?

10 A That's correct.

11 Q Okay.

12 A Yeah.

13 Q And, can you describe a little bit
14 for us, its scope? Who are in there and what
15 the products are that are in that?

16 A Yeah. I think every product is
17 represented in, in the CHERRCO cooperative.
18 I think we've been in business nine years now,
19 something like that. And, all processors have
20 a open door to become a member to CHERRCO.
21 There is some products, dry juice and pie
22 fill, is exempt. It deals with the frozen end

1 of, of the cherry business.

2 Mr. Sherman addressed the CHERRCO
3 issue and he, he has the right to become a
4 member of CHERRCO and with his pie fill
5 business, I don't think he would be affected
6 in any way.

7 Q You mentioned that there's sort of
8 the farming as a way of life versus farming as
9 a, as a business. Glenn, do most of the
10 growers that are members of your cooperative,
11 would they consider growing cherries just to
12 drop them on the ground? Is that conceivable
13 to you?

14 A No, not at all. It's, it's, it's
15 way too hard of work. Northern Michigan,
16 where we're from, has a lot of pressure from
17 the, of the other grape industries and, and
18 development type, type properties in a resort
19 area. There's too many options to our land to
20 be growing cherries to put them on the ground.
21 Just a necessary evil.

22 Q And, my last question is, do you

1 think this proposal would advance grower
2 returns?

3 A I certainly do, I certainly do.
4 You know, the higher restriction, the more the
5 grower is penalized in this situation. And,
6 because of that and the way we certainly
7 understand it today, us, us restricting our
8 growers when all it did was create a larger
9 penalty for him, is just, is just not right.

10 Q No further questions, Your Honor.

11 JUDGE CLIFTON: Thank you, Mr.
12 Hedin. Who else has questions for Mr.
13 LaCross? Mr. Johnson?

14 EXAMINATION

15 BY MR. JOHNSON:

16 Q Hi, Glenn.

17 A Hi, Ken.

18 Q Quick question. We heard that if
19 this proposed amendment is approved, that
20 grower diversion certificates would be equal
21 or on par with handler or post harvest
22 diversion certificates. Now, I'm going to ask

1 for some subjective response here. If a
2 handler diversion certificate is worth maybe
3 25, 30 cents per pound, does that mean that
4 grower diversion, if this proposal is
5 approved, the grower diversion certificate
6 would be of equal value or would it still have
7 to be negotiated?

8 A It would have to be negotiated
9 because a handler would have to own the
10 certificate. But, I think it would have equal
11 value.

12 Q That's all.

13 JUDGE CLIFTON: What other
14 questions are there for Mr. LaCross? Mr.
15 Engeler?

16 EXAMINATION

17 BY MR. ENGELER:

18 Q I just have one quick question for
19 clarification. You had stated that these
20 proposed amendments would make a diversion
21 more palatable to growers. And, by that did
22 you mean it would be more palatable because of

1 what you just stated to Mr. Johnson, the, the
2 value of the certificate would, grower
3 diversion certificate would be increased? Is
4 that what would make it more palatable to
5 growers?

6 A Yes, yes, because it would make
7 more economic sense for him to do it, yes.

8 Q Okay, thank you.

9 JUDGE CLIFTON: Are there other
10 questions for Mr. LaCross? Is there anything
11 Mr. LaCross that you'd like to add to what
12 you've already said?

13 THE WITNESS: Just a little bit.
14 Bill elaborated somewhat on the marketing
15 order. My son who farms with us is part of a
16 cherry industry leadership program right now
17 and he just come back from a meeting. He, he
18 presently chairs the young farmers and
19 ranchers committee for the United States for
20 Farm Bureau. And, he was explaining what they
21 had gone through.

22 They had about six hours of talk

1 on the marketing order and dissecting it and
2 trying to find areas where it could be
3 improved. And, he said, you know, I, I said,
4 you know, the industry over the last 50 years
5 had a marketing order. They lost that order.
6 They tried to operate without the order and it
7 didn't work. That's why we have a marketing
8 order. You know, we have had the chance in
9 this industry to try it both ways. And, I, I
10 was around to experience that. And, it wasn't
11 very much fun growing cherries without a
12 marketing order. That's about it.

13 JUDGE CLIFTON: Good perspective.

14 THE WITNESS: Thank you.

15 JUDGE CLIFTON: Thank you so much.

16 What, do you want him to bring something?

17 MR. HEDIN: Bring his phone with
18 you.

19 JUDGE CLIFTON: Thank you, Mr.
20 LaCross.

21 MR. LACROSS: No, thank you.

22 MR. HILL: I think we're going to

1 call Jim Seaquist to testify now.

2 JUDGE CLIFTON: All right. Let's
3 take a ten minute break and then we'll resume.

4 MR. HEDIN: We have one other
5 fellow who can't get past security because he
6 didn't bring his i.d. Can we have someone
7 from the formal rule making team do down and
8 escort him up? Is that possible?

9 JUDGE CLIFTON: I don't know what
10 their rules are here. Why don't you go Mr.
11 Hedin and you're welcome to chose a volunteer
12 to accompany you. All right, let's go off the
13 record. I'd like you back here and ready to
14 go at 11:05, please.

15 (Off the record.)

16 JUDGE CLIFTON: We're back on
17 record at 11:07. Mr. Hill, is Jim Seaquist
18 your next witness?

19 MR. HILL: That'll be correct.

20 JUDGE CLIFTON: All right. If
21 you'd come forward, sir, and have a seat.
22 Would you state and spell your name for us?

1 MR. SEAQUIST: Jim Seaquist. The
2 last name is S-e-a-q-u-i-s-t.

3 JUDGE CLIFTON: Thank you. Would
4 you raise your right hand?

5 Whereupon,

6 JAMES SEAQUIST,
7 called as a witness herein, having been first
8 duly sworn, was examined and testified as
9 follows:

10 JUDGE CLIFTON: Thank you. Mr.
11 Hill?

12 DIRECT EXAMINATION

13 BY MR. HILL:

14 Q Good morning, Mr. Seaquist.

15 A Good morning.

16 Q Could you tell us a little bit
17 about yourself and your operation?

18 A Well, we farm in the state of
19 Wisconsin. We came across this morning and,
20 and we are a fourth generation cherry farmer.
21 We've pretty much been on that chunk of ground
22 since 1862, fifth generation there. And, we

1 grow a fair amount of fruit in the state
2 there.

3 Q And, could you tell us a little
4 bit about your understanding of why we're here
5 today?

6 A Well, the amendment is pretty much
7 a single amendment for considering bottom line
8 credit for in orchard diversions.

9 Q And, your opinion on that
10 provision?

11 A Well, it, I think the idea, the
12 way they set out to do it in the beginning of
13 the writing in the order made sense but, in
14 reality, what happens is, the way it works
15 where you put those diversions on the top line
16 of your handler form, the higher the
17 restriction, the less the value of those
18 credits to growers.

19 Q And, you're talking about that's
20 the way it is prior to what's proposed --

21 A That's correct. The proposal is
22 to give full credit so that growers would

1 probably receive more for their diversions.

2 And, it may take a little bit of speculation
3 that now is almost incentivized the way the
4 system works today.

5 Q So, how did that, how do you
6 believe that works for you --

7 A An example would be, we are also a
8 handler in our state so, if, if our own
9 farmer, one of our grower's farms wants to do
10 a diversion or we were asking them to make a
11 diversion, the higher the restriction
12 percentage that year, the effect of less value
13 those credits have because you put them on
14 your top line and if it's a 75 percent
15 regulation, there's, whatever the regulation
16 is, basically is the value that has no value.

17 The 75 percent, you have, the
18 example would be if I'm a 10 million pound
19 packer and I buy a million pounds worth of
20 diversion credits and put those on the top
21 line and it's a 75 percent regulation. I've
22 got another 75, another 750,000 pounds to deal

1 with. And, and I think that's, that's the
2 issue and I know, especially in 2009, there
3 was handlers that looked at that the way the
4 mechanics of it worked and they'd go, we can
5 not do this. Even though it made economic
6 sense, there's the incentive to not do it.
7 And, that has an effect.

8 Q Jim, when you refer to "top line",
9 can you expand a little bit of what you mean
10 by that?

11 A The way it works today is, is when
12 we, when we purchase diversion credits as a
13 handler, they are entered in as production or
14 processed pounds, basically. So, even though
15 they're left in the orchard and they're not
16 really part of the market place that year,
17 they're counted as if they were and --

18 Q So, top line is referencing the
19 forms that you do for --

20 A That's correct, that's correct.

21 Q Accounting for this as part of
22 your handling.

1 A And, and, and the biggest issue is
2 the higher the restriction means the larger
3 the crop or, or more of the excess. So, that
4 the more of a problem we have, the less the
5 value is of the credit. So, the, the
6 incentive as we, as we have a, the problem
7 grows, the incentive is less which is inverse
8 to what we ought to do. And, I don't think
9 that was, when they drafted this in '96 and
10 '97, I don't think the intention was
11 understood of how this would actually be
12 carried out and be effective. And, if they
13 did know, I think they would have wrote it
14 differently.

15 Q And for the record, Jim, could you
16 name, give us the name of your handling
17 entity?

18 A It's Seaquist Orchards Processing,
19 Incorporated.

20 Q And, that's a Wisconsin company?

21 A That's correct.

22 Q Jim, has Seaquist Orchards used

1 orchard diversions in the past?

2 A Yes.

3 Q And, I assume that you will
4 continue to do so?

5 A Yes.

6 Q Is it a first choice, a second
7 choice? How do you render the decision to do
8 that?

9 A I think first of all, speaking as
10 a grower, you never grow anything to put it on
11 the ground. Second of all as the handler, you
12 don't own the facility to put product on the
13 ground. So, and, and I think all, almost all
14 situations, this is almost a last choice.

15 But, in our situation being a
16 smaller handler, the other options are to
17 store in the pool which may or may not be
18 already full, to export it of which we produce
19 a product that's not readily exported because
20 it has sugar in it and there's extreme
21 problems to try to do that. The other option
22 you have is to enter into new markets.

1 We don't have a huge sales staff.
2 We are not advantaged at all in that arena.
3 So, we believe that the bottom line credit
4 allows us to, to meet our regulation in a
5 little bit less painful way than what, the way
6 it's handled now. It becomes an option, not
7 one that we like but, it makes it a better
8 option than it is today and it can be used as
9 kind of the last resort but, can be part of
10 the package. Where now, there's a, there's a
11 disincentive to utilize it.

12 Q And, do you engage in discussions
13 with your growers of, of what you expect of
14 them and why in terms of orchard diversion?

15 A We always attempt to come up with
16 a plan based upon the crop, based upon the
17 certificates we believe we can gain in all the
18 other areas. And, then we, in orchard or at
19 plant diversions are always the last resort
20 but, always need to be part of the program.
21 And, I think there's been, there's been grower
22 issues in the past because it's, it hasn't

1 always been part of the program. And, the
2 reason it's not for some people is because of
3 this issue. This will help solve the problem.

4 An example would be, I believe
5 strongly that, certain years within our
6 industry, we've had pricing to growers that
7 has been a certain price for regulated
8 cherries and a certain price for non-regulated
9 cherries. And, as handlers, a lot of times we
10 don't, number one, you're afraid to make a
11 solid commitment on price and number two, you
12 never know exactly how the crop is going to
13 come out. But, but, what happens is a lot of
14 times, is, is handlers would like to get the
15 fruit, growers would love to deliver it and
16 sometimes it just flat out doesn't make sense.
17 And, what happens is under this program, a
18 handler may bring, just to say bring that
19 fruit in, with no commitment to a grower what
20 it's going to pay and then they may not get
21 very much for it at all.

22 I believe under this program that

1 there will be a well established diversion
2 credit price at pack time which will set a
3 floor in the market which we don't have today.
4 That growers will understand much better what
5 they may receive and, and also, handlers will
6 have to be realistic about what they can
7 export, what they can put in the new markets,
8 and take a little bit of the speculation out
9 of it. Because at the end of the day, the
10 speculation comes back and costs the grower
11 because the grower gets what's basically left
12 at the end of the day. So, I think this would
13 take a little bit of that out. I don't think
14 it would be over utilized just for the simple
15 fact that both growers and handlers want to
16 maximize and use, growers want to deliver what
17 they grew, handlers want to maximize the
18 production that they can run.

19 But, I think it, all it really
20 does is take the disincentive away from what
21 we have now.

22 Q From that, it sounds like you're

1 arguing strongly that it would improve grower
2 returns in pricing?

3 A And, and I don't know that that's
4 just a guarantee that we're going to see a ten
5 percent increase in, in grower prices. I
6 think that it'll definitely make an in orchard
7 diversion credit worth more to a handler.
8 What that will be worth, every year is
9 different, every crop is different and that's
10 going to be a very much a market driven
11 situation. I think that's a good situation to
12 have. There's no question that the grower
13 will benefit from this amendment.

14 Q Jim, in some of the earlier
15 testimony and discussions, they talked about
16 the impact of cherry inventories on grower
17 pricing.

18 A Uh-huh.

19 Q Do you think that this will change
20 the volume of inventories carried from year to
21 year and can you speculate on what that will
22 do for pricing?

1 A I, I think there's been in the
2 past, our history has been there's a, there's
3 quite a wide range between what handlers do
4 and, and, you know, it's a free country.
5 That's a good thing. But, there are some
6 handlers that are pretty conservative. They,
7 they pack what they believe they can sell.
8 They pack into those other markets what they
9 believe they can sell. There are, there's
10 others that pack every cherry they can get
11 their hands on. And, a lot of times that ends
12 up in inventory that's not sold and, you know,
13 it can be negative on the market and it's
14 there the next year and it reduces grower
15 prices for the, so I think, like I said, I
16 think it will take the speculation out because
17 they'll be, handlers will be able to offer
18 more up front for those diversion credits
19 which will take away a little bit of that over
20 packing without a sale.

21 Q And, does the fact that some of
22 that inventory is free and some of that is, or

1 primary versus secondary reserves or free,
2 does that have any bearing on the impact of
3 inventory and pricing?

4 A You know, the secondary reserve, I
5 think there's always a perception that that is
6 really the excessive part of the inventory.
7 You know, I, we've talked about as an
8 industry, that we wanted 50 million pounds of
9 product. I think that's being debated now
10 whether that's enough or, or too much. But,
11 but when we get a large volume of secondary
12 reserve cherries like we've had this last year
13 from the large 2009 crop, I think it's very
14 evident that in 2009 if we would have had
15 this, this procedure that gave us bottom line
16 credit availability, we probably wouldn't have
17 as many secondary reserve cherries.

18 Q Jim, can you also, you're a member
19 of CHERRCO as well, are you not?

20 A Yes.

21 Q And, do you have an officer's
22 position within CHERRCO?

1 A Yes.

2 Q Can you tell us what that is?

3 A Yeah, I'm chairman of the board.

4 Q Would you describe for us a little
5 bit what your group does, who are members and
6 its scope, just for the record?

7 A I think that that organization
8 controls close to 80 percent of the U.S.
9 production and Ontario, as well. And, it is
10 spread across Washington, Utah, Wisconsin,
11 Michigan and New York which is virtually all
12 growing regions other than a couple small
13 ones. And, basically, its, its total goal is
14 to, is to level and stabilize pricing. You
15 know, the federal marketing order gives us the
16 platform to have the tools to do that work and
17 CHERRCO is a federated coop that allows us to
18 work together to take the next step of, of,
19 then we've got, you know, we've got some way
20 to control supplies. This, this cooperative
21 allows us to have some effect on pricing.
22 It's not total effect. There's still a fairly

1 large number of handlers outside of that
2 group. Our group does not set pricing on
3 dried fruit, concentrate, things like that,
4 straight juices but, it does have a large
5 effect in the frozen market. And, that group
6 gets together and has decided to pool its
7 products together and to work together and set
8 prices. And, since 1997 when it set prices in
9 July, it's not back down from then. So,
10 obviously, it's had an effect of, of price,
11 pricing power and has definitely returned more
12 dollars to the industry.

13 Q And, you're aware that it's not,
14 it's legally not a sales constituency under
15 the terms of the market place?

16 A That's correct.

17 Q That's all I got, thank you.

18 JUDGE CLIFTON: All right, other
19 questions for Mr. Seaquist? Mr. McFetridge?

20 EXAMINATION

21 BY MR. MCFETRIDGE:

22 Q Marc McFetridge, USDA. Good

1 morning, Mr. Seaquist. I just have a quick
2 question on, based on the small business
3 administration definition of a small business
4 having annual receipts of less than \$7
5 million, would you say that your handling
6 operation is a large or small?

7 A Small.

8 Q Small. And, you're also a grower,
9 is that correct?

10 A That's correct.

11 Q The small business administration
12 defines a small agriculture producer as having
13 annual receipts of less than \$750,000. Would
14 you say that you're a small or large grower?

15 A We can be on either side of that.

16 Q Okay. And, another quick
17 question. Based on the definitions of a small
18 business or a small agriculture producer, do
19 you see or feel that these proposed amendments
20 would have any adverse effects on small or
21 large producers or handlers?

22 A I believe that the bottom line

1 credit amendment will definitely, probably be
2 a positive thing to both small growers and
3 small handlers. Because the small handler, I
4 think I mentioned earlier, does not always
5 have, number one, the marketing skills to do
6 the new product work or the product form to do
7 the export with so, a lot of times we're left
8 with only the reserve as a way to comply.
9 And, if that is full, it can be really
10 challenging. Now, all of us, you know, I
11 really support the new market program. I
12 think there still needs to be work probably
13 done and, and watched on how that works. I
14 think it's a great thing that all small,
15 medium and large grower works work with that
16 and try to expand their market. That's the
17 best way to deal with over supply is to sell
18 it and I think everyone in our industry
19 believes that. What the storing for a, for a
20 shorter crop is a gray tool for us. It's
21 been, the tart cherry industry is a very
22 volatile up and down crop and if ever there's

1 a situation where a marketing order with a
2 supply program makes sense, it, our crop is a
3 poster child for that. So, but at the end of
4 the day, there's times when we got too many
5 cherries and if you don't have a lot of
6 options being able to get a credit that's not
7 discounted for small growers and small handler
8 groups, it would be a really positive thing
9 and it would be very helpful to be able to
10 comply with the marketing order.

11 Q Thank you very much.

12 JUDGE CLIFTON: Mr. Hedin?

13 EXAMINATION

14 BY MR. HEDIN:

15 Q Two things. Jim, would you
16 consider yourself in that smaller handler
17 category that you just described?

18 A I think we're probably a medium
19 size handler.

20 Q Okay.

21 A Medium to small, yeah.

22 Q And, then can you share with us

1 your history with the CIAB and the memberships
2 that you had with us?

3 A Well, my dad is just about 79 and,
4 and he's still beats us all to work everyday.
5 But, he, he was on the CIAB when it started in
6 1997. He was on the old CAB board back in the
7 70's and since probably half, halfway through,
8 I've taken over for him in, in representing
9 our, our state from time to time within the
10 rules of the time frame that we can sit. But,
11 been involved with executive committee and for
12 a least a period of time with the CIAB.

13 Q The motion for this was virtually
14 unanimous with one abstention. Would you, how
15 would you categorize the discussion at the
16 CIAB meetings about this and the support,
17 general support of it?

18 A I think the growers almost without
19 exception support, support the issue. I think
20 handlers, you know, if you're, if you're a
21 handler that's extremely involved in exporting
22 new products and you like to get product from

1 growers at a low price, you might be a little
2 bit nervous about this, this amendment. But,
3 if we're worried about grower returns being
4 the best they can be and selling our products
5 at prices that return what a grower can live
6 on, you're pretty excited about this
7 amendment.

8 Q I won't ask you any more questions
9 after that.

10 JUDGE CLIFTON: Ms. Deskins?

11 EXAMINATION

12 BY MS. DESKINS:

13 Q Mr. Seaquist, I just had a couple
14 of questions. You're familiar with the
15 proposed amendment at this hearing. One
16 involves changing the definition of handler?
17 Just state for the record, you just have to
18 say yes.

19 A That it, that it changes --

20 Q Well, the proposal is to eliminate
21 the handing of grower diversion certificates
22 from the definition of handle?

1 A Uh-huh, yes, that is --

2 Q Okay. As a handler, do you see
3 that having a, what's your impact do you see
4 that having on your business?

5 A What it, what it means is when we
6 take those credits, we reduce, we take them
7 and we do not add them to the handle in the
8 first place. So, we basically say that they
9 aren't there. It, it allows us to have full
10 credit for them. Where as if we include them
11 in our handle, like I mentioned earlier, it,
12 it is an issue if it's a 50 percent regulation
13 you get in effect, 50 percent of the value of
14 those credits. And, the higher the regulation
15 goes, the worse it gets.

16 And, and that's bad in and of
17 itself but, as the crop grows and the
18 regulation gets higher and those certificates
19 become worth less, is when you need them the
20 most. And, growers get less and, and it's,
21 that's where it can really be a frustrating
22 issue. And, I think I mentioned earlier, I

1 know for a fact in 2009, that there was large
2 growers and handler groups that sat down and
3 looked at the math and said, we can not put
4 this fruit on the ground. It does not make
5 economic sense to put it on the ground even
6 though we know it should go on the ground.

7 Q So, if the definition of handle is
8 changed, that would take care of that problem?

9 A Yeah, yeah, that's correct. It,
10 It's more of where those, if, if those
11 cherries are counted and where they're
12 counted.

13 Q Okay.

14 A If they're not counted in the top
15 part of our CIAB forms which is in the handle
16 like you say, that solves the issue. If, if
17 they are included in that, then as the
18 regulation goes higher, the, the less value to
19 growers those certificates have. And, in
20 effect, then to the handler as well. They
21 become less valuable.

22 Q Okay, and it's your understanding

1 that the same with those grower diversion
2 certificates was for them to have a value?

3 A That's correct.

4 Q Particularly, if there's a big
5 crop?

6 A That's correct.

7 Q Okay, and this will change that
8 problem?

9 A Yes.

10 Q Thank you.

11 JUDGE CLIFTON: Who else has
12 questions for Mr. Seaquist? Yes, please come
13 to the podium because there is a microphone
14 there.

15 MR. LACROSS: Yes, just for the
16 record, I'd like to ask Mr. Seaquist, Mr.
17 Sherman chose to elaborate somewhat on
18 CHERRCO's involvement in the industry. Would,
19 would, would Mr. Sherman and his growers be
20 welcomed to be a part of CHERRCO?

21 MR. SEAQUIST: Mr. Sherman has
22 always been welcome to be a part of CHERRCO as

1 all handlers in the U.S. and Canada.

2 MR. LACROSS: Okay. Would, would
3 Mr. Sherman's category be regulated by
4 CHERRCO?

5 MR. SEAQUIST: No.

6 MR. LACROSS: Okay. So, so he
7 could have a seat at, at that board without
8 having any effect of regulation on himself as
9 a member?

10 MR. SEAQUIST: Yeah, there is,
11 there is two other companies similar to his
12 that are members of CHERRCO that are, the
13 lion's share of their business is pie filling
14 which is an exempt category for our company.
15 But, they are at the table and they do
16 participate in the products that are in the
17 frozen markets.

18 MR. LACROSS: Right. Okay, thank
19 you.

20 JUDGE CLIFTON: Thank you, Mr.
21 LaCross. Are there other questions for Mr.
22 Seaquist? Mr. Seaquist, do you think of

1 anything else you'd like to add?

2 THE WITNESS: Just thanks for the
3 opportunity to address the group.

4 JUDGE CLIFTON: Thank you.

5 THE WITNESS: Thank you.

6 JUDGE CLIFTON: You may step down.

7 Mr. Hill?

8 MR. HILL: I think we're on our
9 last witness and it would be Terry Sorenson.

10 JUDGE CLIFTON: Please be seated.
11 I'll swear you in after you're seated. Please
12 state and spell your name for me?

13 MR. SORENSON: Terrance Sorenson,
14 T-e-r-r-a-n-c-e, S-o-r-e-n-s-o-n.

15 JUDGE CLIFTON: Thank you. Would
16 you raise your right hand, please?

17 JUDGE CLIFTON: Thank you.

18 Whereupon,

19 TERRY SORENSON,
20 called as a witness herein, having been first
21 duly sworn, was examined and testified as
22 follows:

1 EXAMINATION

2 BY MR. HILL:

3 Q Good morning, Mr. Sorenson.

4 A Good morning.

5 Q Could you just tell us a little
6 bit about, a little bit about yourself and
7 your involvement in --

8 A Sure. I have a small commercial
9 orchard, south of Sturgeon Bay in Wisconsin.
10 I'm a first generation fruit grower and
11 probably the newest to our industry. But, I
12 make up for experience with ambition. And,
13 presently I serve as the president of the
14 Wisconsin Cherry Growers, Incorporated which
15 is our state's growers association.

16 Q And, you're aware of the,
17 obviously, of the proposed amendments. Can
18 you give us your -- how you think it's going
19 to work and how the system is currently
20 working or not working?

21 A How the system currently, I view
22 is not working is that we're not encouraging

1 in orchard diversion and when we do have in
2 orchard diversion, we have no idea what value
3 that adds to the grower because there's really
4 no system out there for pricing a certificate.
5 So, what's happening today is that most of the
6 diversion is being handled at a plant by our
7 handlers and when it comes to the end of the
8 year, the sales year, we finally find out what
9 those restricted cherries are worth. So, in
10 effect, we're, we're delivering a product to
11 a plant that could be paying us much less than
12 even the harvest cost alone in the end. So,
13 that's why I believe that the current system
14 isn't working.

15 Q So, you said that you are a small
16 grower. Would that be under the USDA
17 definition that you or --

18 A Yes.

19 Q So, how has this personally
20 affected your business as it currently stands?

21 A As it presently stands, I've
22 never, myself, done an orchard diversion.

1 And, I'm in that boat of not knowing what my
2 restricted fruit is worth right now. And, I
3 would say that it makes a heck of a lot of
4 sense if the fruit is falling into the
5 category of, of needing to be diverted, then
6 it's obviously excess. And, what doesn't make
7 a lot of sense to me is to incur all the
8 expenses of producing this fruit, the excess
9 fruit, delivering the fruit and not generating
10 any potential profit.

11 Q So, have you had any conversations
12 with any similarly situated businesses as
13 yourself?

14 A I have, I have.

15 Q Okay, and that had actually
16 diverted in orchard?

17 A Yes.

18 Q And, what have those conversations
19 gone? What have you looked at?

20 A To be matter of fact, a lot of
21 growers in our area are not aware that there's
22 a difference between bottom line and top line

1 credit. And so, when they are diverting in
2 the orchard, they don't that on the back side
3 the handler is really only receiving a portion
4 of the production as, as a diversion and not
5 the whole, let's say if it was 100,000 pounds,
6 it's not really worth that to the handler.
7 And so, actually they're wondering why it's
8 not already set up that way.

9 Q So, I guess looking, with that
10 information, I would, I would suppose that
11 they are pretty pleased about the possibility
12 of that changing now?

13 A I've had no experience with anyone
14 on the grower side that is opposed to this.

15 Q Terry, to whom do you deliver your
16 cherries?

17 A Seaquist Orchard Processing.

18 Q How long have you been, you said
19 you're first generation, how long have you
20 been producing?

21 A I entered into the industry in
22 2008 when we had the only year of no

1 production in Wisconsin. That was my first
2 season with my own orchard, check book, doing
3 my own production --

4 Q And, you envision then if, if in
5 the future there, you need to do some
6 diversion, that this change will be to your
7 advantage?

8 A I believe it will be. It will
9 have a greater economic impact than the way
10 the system is presently being set up.

11 Q Great. No further questions, Your
12 Honor.

13 JUDGE CLIFTON: Thank you. Who
14 else has questions for Mr. Sorenson? Ms.
15 Deskins?

16 EXAMINATION

17 BY MS. DESKINS:

18 Q Mr. Sorenson, you said that you
19 were president of the Wisconsin Cherry Grower
20 Organization?

21 A Right.

22 Q How long have you been president

1 of that organization?

2 A I believe this is my second year.

3 Q And, do you know approximately how
4 many members you have in that organization?

5 A We presently have about 40
6 producers in the state of Wisconsin that
7 qualify as members.

8 Q Okay, and just to the best of your
9 knowledge, have you been around any discussion
10 what the definition is of what a small
11 business?

12 A Yes.

13 Q Okay. Just to the best of your
14 knowledge, do you know how many members of
15 your organization would be considered small
16 growers under that definition?

17 A By number of growers, the
18 majority.

19 Q Okay, okay. And then, you said,
20 so far you haven't been subject to diversion,
21 correct?

22 A In orchard, correct.

1 Q Okay. From your understanding of
2 how these amendments would work, do you think
3 it would be your, do you think it would be the
4 benefit with the benefit to you for the
5 handler who you deliver your fruit to to get
6 full credit for all the fruit you deliver?

7 A Absolutely.

8 Q Okay, I have no further questions
9 for this witness.

10 JUDGE CLIFTON: Mr. Hedin?

11 MR. HEDIN: Your Honor, the point
12 of clarification. The grower is not a
13 regulated individual or entity. We regulate
14 the processors. So, in Ms. Deskins inquiry,
15 it seems to me that, that the Wisconsin
16 production has been subject to the restriction
17 but, he may not have participated in the
18 process. His processors would have been
19 restricted but, the individual grower is not.

20 JUDGE CLIFTON: All right. Did
21 you want to ask him any question?

22 MR. HEDIN: No, I just wanted to

1 seek clarification of who was the regulated
2 entity.

3 JUDGE CLIFTON: When you seek
4 something, it sounds like you're going to ask
5 a question.

6 MR. HEDIN: Well, I could state,
7 there is a difference in terminology.

8 JUDGE CLIFTON: All right, thank
9 you. Are there other questions for Mr.
10 Sorenson? Mr. Engeler?

11 EXAMINATION

12 BY MR. ENGELER:

13 Q Yes, Mr. Sorenson, I was wondering
14 if you believed that your, your views are, are
15 the members of the Wisconsin Cherry Growers
16 associations views, or most of your members
17 have similar views as you on this subject or
18 have you had discussions within that
19 organization?

20 A I have not had discussions with
21 everyone but, but I have had discussions
22 recently and what I found out is that most of

1 the growers aren't even aware that we have a,
2 a separate situation for in orchard diversion
3 and diversion handled out of plant.

4 Q Okay. Now, you mentioned that
5 oftentimes when or there could be occasions
6 where a grower delivering his fruit to a
7 processor, that the return that they receive
8 would be less than the cost of the harvest, is
9 that fair --

10 A Right.

11 Q -- do that right?

12 A Right.

13 Q Okay.

14 A Potentially, it couldn't exist.
15 The, we could be calling in fruit that costed
16 us eight cents a pound to harvest and receive
17 five cents for it.

18 Q Okay, so that, that would provide
19 an incentive for somebody to divert in the
20 situation, due to a bad situation like that,
21 correct?

22 A That's correct.

1 Q Okay, thank you.

2 JUDGE CLIFTON: Does anyone else
3 have questions for Mr. Sorenson? And, Mr.
4 Sorenson, did you have anything else you'd
5 like to add?

6 THE WITNESS: I do not.

7 JUDGE CLIFTON: All right, thank
8 you so much.

9 THE WITNESS: Thanks.

10 JUDGE CLIFTON: You may step down.
11 Mr. Hill?

12 MR. HILL: It appears that we have
13 no more witnesses for the day -- Hold on one
14 second. Can I have one second?

15 JUDGE CLIFTON: Certainly. Let's
16 go off record for just a moment.

17 (Off the record.)

18 JUDGE CLIFTON: All right, we're
19 back on record at 11:42. Mr. Hill?

20 MR. HILL: I'm going to call Perry
21 Hedin back to testify.

22 JUDGE CLIFTON: Thank you. Mr.

1 Hedin, you may come to the witness stand and
2 you remain sworn.

3 THE WITNESS: Thank you.

4 PERRY HEDIN,
5 recalled as a witness herein, having been
6 previously duly sworn, resumed the stand and
7 testified as follows:

8 JUDGE CLIFTON: And you may
9 proceed.

10 THE WITNESS: Thank you. I just
11 have one point I wanted to address from Mr.
12 Sherman's testimony and that's, I don't
13 remember the number specifically but, it was
14 that we'd done an in orchard diversion
15 estimation for our grower at, I think it was
16 240,000 pounds and he ended up actually
17 harvesting 172. What happens in our
18 processing, we in fact work with NASS and
19 others to develop a process for estimating
20 crop sizes in the orchard. So, we have a
21 standard set of procedures where we sample an
22 orchard and from that sample, we then

1 calculate out the volume of cherries that we
2 think is in that orchard.

3 So, in the example that he
4 described, what happened, I don't know the
5 specifics but, our staff member would go out,
6 would follow the procedures and from that we
7 would then calculate a value of those
8 diversions. If it in fact goes through, we
9 rely upon that estimation process to generate
10 our volume certificates. It, and, and what
11 could happen because it's a random selection
12 process, we may select an area of the orchard
13 which is of far greater producing, producing
14 value than other parts of the orchard. But,
15 since we rely on that estimation, that's what
16 we would give a certificate.

17 So, it can happen that exactly
18 what Bill described is the situation where
19 we've over estimated the amount. Similarly,
20 we could select an area that under represents
21 an orchard. We hope that, that those random
22 selection processes off set each other and we

1 get accurate numbers. But, we can have those
2 kind of circumstances happen.

3 Also, our system allows a grower,
4 if he doesn't like a, if he's doing a whole
5 block diversion for example, and he doesn't
6 like our selection for that block, he has the
7 right to abandon that diversion and he can do
8 what's called a partial block diversion in the
9 orchard and, and if, for example there are ten
10 rows, he says, well, I want to do a partial
11 block of rows one through seven after finding
12 out what happened the first go around, he can
13 do so. And, the growers are smart enough to
14 work the system until it's most advantageous
15 to them in terms of the estimation process.
16 But, I did want to make it clear that it's
17 part of our process, it's been developed with
18 the state's statistician at NASS and it's not,
19 it's not an arbitrary effort on the part of
20 our field staff to openly benefit a grower in
21 this process. And, that was all.

22 JUDGE CLIFTON: Thank you. Does

1 anyone have any questions of Mr. Hedin? There
2 are none. You may step down.

3 THE WITNESS: Great.

4 JUDGE CLIFTON: Thank you. Mr.
5 Hill?

6 MR. HILL: Well, now we're sure we
7 have no more witnesses --

8 JUDGE CLIFTON: All right. Do you
9 have any other evidence for this Grand Rapids
10 segment of our hearing?

11 MR. HILL: No, Your Honor, we do
12 not.

13 JUDGE CLIFTON: All right, and
14 does the government have anything further for
15 us to do while we're still here in Grand
16 Rapids?

17 MS. DESKINS: Not at this time,
18 Your Honor.

19 JUDGE CLIFTON: All right. I do
20 want to go back to the court reporter
21 situation for just a moment. The reason you
22 need to get your request to Neal Gross quickly

1 if you want to order a copy of anything is so
2 that it can be produced at the same time the
3 original plus two already ordered by the
4 government are being produced. Otherwise it
5 costs more for him to handle it. So long as
6 you get the request to him promptly, which I
7 think means today or tomorrow for what we've
8 done so far. The contract price is for the
9 additional copies, a nickel a page on the hard
10 copy of the transcript. And, that's because
11 it's to be at cost and that's about the
12 cheapest you could ever get something produced
13 for you, a copy of a hard copy.

14 So, even though this order form
15 says all price quotations are handled by our
16 main office, reporters have no authority to
17 quote prices, I want everyone here who might
18 be ordering something, to know that you
19 already have negotiated for you a nickel a
20 page for the transcript copy and \$300 for a
21 CD. The idea being that there'd be a separate
22 CD for each day. Now, the separate CD for

1 each day is the way Neal Gross reads the
2 contract and I do not read the contract that
3 way. The contract says that each document,
4 each day will be a separate document on the
5 CD.

6 So, just bear in mind if you're
7 ordering something you are ordering at a time
8 that a, that a relatively new contract is
9 still being refined.

10 MR. HEDIN: Might I ask a question
11 on that?

12 JUDGE CLIFTON: Certainly.

13 MR. HEDIN: Is it prudent to do
14 that for, separately for the Michigan portion
15 versus the Utah or should we not wait until
16 the end of the four days of hearings to, to
17 generate that? Is it going to be available
18 any sooner?

19 JUDGE CLIFTON: What I have done
20 in the past, because Neal Gross has indicated
21 he wanted the order to be placed with the
22 court reporter at the hearing, is I have told

1 people that if the hearing has more than one
2 week to be sure and get your order in at the
3 end of each week. Now, when you call to find
4 out what the arrangements are, ask the
5 question that you just asked me.

6 We're going to be back in session
7 again so soon that it would seem to me that
8 you could place the order once it's all in.
9 But, don't take that for granted because if,
10 for example, if the court reporter who's here
11 with us now, he won't be the court reporter in
12 Provo and if his material is already back
13 being worked on somewhere, it could be that
14 you miss out on this excellent price if you
15 wait. It will still be a Neal Gross contract
16 but a different person will be attending us in
17 Provo.

18 MR. HEDIN: And, then I don't have
19 any understanding or knowledge of the
20 arrangement between your office or, and, and
21 growers for the USDA. Is it our cross records
22 we can make to that contracted price or do we

1 just state that to them?

2 JUDGE CLIFTON: Just say it's
3 under the USDA hearing clerk contract. That's
4 how it will be identified. And, in this case,
5 AMS, ask the hearing clerk to arrange for the
6 court reporting. But, it is the USDA hearing
7 clerk contract.

8 And, Neal Gross does an excellent
9 job and works for many different federal
10 agencies, as well as, all manner of private
11 business. And, whoever answers the phone
12 there may not know the details of the USDA
13 hearing clerk contract so, it's important that
14 you know them.

15 All right, good. Well, I think
16 we're done. I compliment the management team
17 on putting together just absolutely everything
18 we needed. This has been delightful and I
19 look forward to Provo. This concludes our
20 record at 11:52.

21 (Whereupon, at 11:52 the hearing
22 was concluded.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Red Tart Cherries Grown in MI, NY,
PA, OR, UT, WA and Wi

Before: US Department of Agriculture

Date: 04-21-11

Place: Grand Rapids, MI

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