

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

Tuesday,
April 26, 2011
Utah Country Administration Building
100 East Center Street
L900
Provo, Utah 84606

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

JILL S. CLIFTON
Administrative Law Judge

APPEARANCES:

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Also Present:

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

(9:05 a.m.)

1
2
3 JUDGE CLIFTON: We're now on
4 record. We are picking up on a hearing
5 already begun. Today is Tuesday, April 26,
6 2011. We're in Provo, Utah. The case before
7 me has the following caption: In Re Tart
8 Cherries Grown in Michigan, New York,
9 Pennsylvania, Oregon, Utah, Washington, and
10 Wisconsin.

11 The heading for the transcript is
12 United States Department of Agriculture Before
13 The Secretary of Agriculture.

14 The case has a number of numbers.
15 The Hearing Clerk's number is Docket No. 11-
16 0093, and so I use that as the first number in
17 the sequence. The other numbers that are
18 associated with this proceeding are capital A,
19 capital O, hyphen, 370, hyphen, capital A9.

20 Capital F, capital V, hyphen, 10,
21 hyphen, 930, hyphen, 5. And the last number,
22 capital a, capital M, capital S, hyphen,

1 capital F, capital V, hyphen,
2 10, hyphen, 0087.

3 My name is Jill Clifton. I'm a
4 United States Administrative Law Judge. I
5 work for the U.S. Department of Agriculture,
6 and it's my job, at this hearing, to take in
7 the evidence. There are two kinds of
8 evidence, testimony and exhibits. That
9 evidence will establish the basis on which the
10 Secretary of Agriculture makes decisions about
11 proposed rule changes concerning tart
12 cherries.

13 And when I had everyone introduce
14 himself, I then want Ms. Deskins to notify you
15 all about the prohibition against ex parte
16 contact with anyone who is part of this tart
17 cherries team within USDA, and will be working
18 on the decision.

19 What that means is although you
20 can talk to these people individually, and not
21 on the record, about procedural items, you may
22 not talk with them about the merits of the

1 proceeding. You may not lobby them for your
2 point of view, privately.

3 You may do so from the witness
4 stand of course.

5 All right. Let's now take
6 introductions, and I'm going to begin at the
7 table to my left, and Ms. Deskins, would you
8 begin.

9 MS. DESKINS: Yes. My name is
10 Sharlene Deskins. I'm an attorney with the
11 United States Department of Agriculture,
12 Office of the General Counsel. My office is
13 in Washington, D.C., and I represent the
14 Agricultural Marketing Service in this
15 proceeding.

16 JUDGE CLIFTON: Thank you.

17 MR. ENGELER: My name is Martin
18 Engeler. I'm with the USDA Agricultural
19 Marketing Service, and I work out of Fresno,
20 California.

21 MS. SALEHI: My name is Parisa
22 Salehi. I am also with Marketing Orders

1 Administration Branch at the United States
2 Department of Agriculture.

3 JUDGE CLIFTON: All right. And
4 before I go to the other table, let me have
5 people who are not seated at this table but
6 are a part of this team, identify themselves.
7 Please come to the podium.

8 MR. MCFETRIDGE: Mark McFetridge,
9 USDA Ag Marketing Service, Fruit and Vegetable
10 Programs, Economic Analysis and Program
11 Planning Branch. My office is in Washington,
12 D.C.

13 MR. JOHNSON: My name is Kenneth
14 Johnson. I'm the regional manager of the D.C.
15 Marketing Field Office, Fruit and Vegetable
16 Programs, Marketing Order Administration
17 Branch. AMS.

18 JUDGE CLIFTON: Thank you. Now
19 that's the group that you're not to have ex
20 parte contact with.

21 Ms. Deskins, would you explain
22 what that means.

1 MS. DESKINS: Yes. Once the
2 notice of hearing was filed in this case, it
3 prohibits anyone who's in USDA, who's involved
4 with the decision making process, from talking
5 about the merits of the case. Everyone from
6 AMS and--well, USDA, who's identified
7 themselves today, cannot discuss the merits of
8 the case with you.

9 However, we are available to talk
10 about procedural issues with you, such as if
11 you have a question about how to get an
12 exhibit put into evidence or when you can
13 testify. We can discuss those matters with
14 you, and also anything that's not noticed for
15 the hearing, if you have other questions. But
16 for this proceeding, we cannot discuss the
17 merits of what's been noticed in the Federal
18 Register on this case.

19 JUDGE CLIFTON: All right. Now
20 I'd like to go to the table to my right.

21 Mr. Hill, would you begin please.

22 MR. HILL: Yes. My name is Brian

1 Hill. I'm with the United States Department
2 of Agriculture's Office of the General
3 Counsel, Marketing Division. I am actually
4 representing the Cherry Industry
5 Administrative Board in this matter.

6 JUDGE CLIFTON: And is everyone
7 allowed to talk to you about the merits of the
8 case?

9 MR. HILL: Well, the Cherry
10 Industry Administrative Board, yes, and those
11 in the tart cherry industry. Correct. Yes,
12 they can speak with me.

13 JUDGE CLIFTON: All right. Mr.
14 Hedin.

15 MR. HEDIN: I'm Harry Hedin,
16 executive director of the Cherry Industry
17 Administrative Board which is the proponent
18 for the current amendment process.

19 JUDGE CLIFTON: All right. So Mr.
20 Hill, your official capacity here is to
21 represent the board; is that correct?

22 MR. HILL: Yes. I am representing

1 the board; correct.

2 JUDGE CLIFTON: But if someone has
3 a position that's different from the board's
4 position, they can still talk to you?

5 MR. HILL: Correct. They can
6 speak with me.

7 JUDGE CLIFTON: All right. And if
8 they want their concerns known, the best way
9 to do that is to testify so it's part of the
10 official evidence.

11 MR. HILL: That would also be
12 correct; yes.

13 JUDGE CLIFTON: All right. Very
14 good. All right.

15 We had 13 witnesses, I believe, in
16 the two days in Grand Rapids, Michigan. That
17 might not be exactly right, but roughly 13
18 people. So there's already a transcript
19 started, and we already have two days of it.

20 I would like today's pages to be
21 numbered in sequence to those that were begun
22 in Grand Rapids, Michigan.

1 All right. The way we've done the
2 numbering of the exhibits, we just do it
3 sequentially. So whatever the next exhibit's
4 going to be, I'm going to ask that it be
5 marked as Exhibit 18.

6 So if you've already got a number
7 on your exhibit, and you've already made
8 copies, we can accommodate that. But if
9 there's not a number, we'll just take them in
10 order. That's what we've done so far.

11 All right. What other preliminary
12 matters are there?

13 Ms. Deskins, is there anything?

14 MS. DESKINS: Nothing else from
15 us.

16 JUDGE CLIFTON: All right. Mr.
17 Hill.

18 MR. HILL: I don't believe we have
19 any preliminary matters at this moment.

20 JUDGE CLIFTON: All right. Then
21 Ms. Deskins, the--

22 MR. HEDIN: Can I ask one

1 question?

2 JUDGE CLIFTON: you may.

3 MR. HEDIN: Can we confirm with
4 the reporter that he's able to hear from the
5 desks.

6 JUDGE CLIFTON: Good. All right.
7 That's an excellent, very important item and
8 I'm glad you thought of it. Good.

9 We have already established the
10 economic statistics that the Government
11 prepared, that's established both in testimony
12 and in exhibit form.

13 We have all of the procedural
14 documents in evidence. They're part of
15 Exhibits 1 through 17.

16 Ms. Deskins, is there anything
17 further that the Government would like to
18 introduce at this time?

19 MS. DESKINS: Yes. We would like
20 to recall Mr. Marc McFetridge to the stand.

21 JUDGE CLIFTON: Mr. McFetridge,
22 you may come forward. And you may be seated.

1 You remain sworn.

2 Please state and spell your name.

3 MR. MCFETRIDGE: First name is
4 Marc, M-a-r-c. Last name, McFetridge. M-c-F-
5 e-t-r-i-d-g-e.

6 WHEREUPON,

7 MARC MCFETRIDGE

8 WAS RECALLED AS A WITNESS BY AND ON BEHALF OF
9 THE GOVERNMENT AND, HAVING PREVIOUSLY BEEN
10 DULY SWORN, WAS FURTHER EXAMINED AND FURTHER
11 TESTIFIED AS FOLLOWS:

12 BY MS. DESKINS:

13 Q Mr. McFetridge, just briefly, can
14 you tell us who you work for and what you do.

15 A Sure. I work for the Economic
16 Analysis of Program Planning Branch for Fruit
17 and Vegetable Programs, and I am a
18 agricultural economist.

19 Q And Mr. McFetridge, for this
20 hearing did you prepare any exhibits?

21 A I did.

22 Q Okay. Can you tell us the name of

1 the exhibit you prepared.

2 A Sure. The exhibit I prepared is
3 called U.S. Red Tart Cherry Crop Statistics
4 Graphs and Tables.

5 Q And it's already been entered into
6 evidence as Exhibit 6.

7 A Yes.

8 JUDGE CLIFTON: That's Exhibit 7.

9 MS. DESKINS: Seven. I'm sorry.
10 Exhibit 7.

11 BY MS. DESKINS:

12 Q Mr. McFetridge, at the previous
13 hearing, you were asked a question about some
14 of the data. Do you recall that question?

15 A Yes. There was a question about
16 the prices for Oregon and Washington for the
17 year 2009.

18 Q And can you tell us what page of
19 the exhibit that information is located on.

20 A Sure. That is on page ten.

21 Q Do you recall the question that
22 you were asked?

1 A Yes. There was a question raised
2 about the price for Oregon, which--for 2009,
3 which shows up as 84.5 cents, and then also
4 for Washington, which shows up as 46.8 cents.

5 Q And for the purposes of the table
6 on page ten, you rounded off; correct?

7 A Yes.

8 Q Now Mr. McFetridge, did you look
9 at the source data that came from the, from
10 NASS on this information?

11 A Yes.

12 Q And you confirmed that those
13 numbers were correct, with the rounding off?

14 A Yes.

15 Q Okay. What did the data from NASS
16 say was included in the tart cherries, that
17 the prices were derived from?

18 A Well, for specific regions, the
19 fresh and processed is included in an All
20 price. NASS withholds data without--so that
21 they don't disclose individual operations. So
22 like in Oregon, there's very few producers.

1 So without--if they published the data, they'd
2 be giving insight to competitors, what people
3 are actually charging, so--

4 Q Should anything on page ten be
5 changed?

6 A I went back through and added, at
7 the very bottom, and actually at the top--
8 before I had stated process tart cherry
9 prices, I went back through, double-checked
10 all the data last Friday, and made sure that
11 it was all included in the "All" category, so
12 this includes fresh and processed, and then
13 also made a note at the very bottom of the
14 table which says prices include fresh and
15 processed.

16 Q So then the change to page ten
17 would be--it covers processed and fresh tart
18 cherries?

19 A Exactly.

20 MS. DESKINS: All right. Judge
21 Clifton, based on what Mr. McFetridge has
22 testified to, we would like to change Exhibit

1 7, page ten. It would just be a change to the
2 title, not to any of the numbers. Is that
3 correct, Mr. McFetridge?

4 THE WITNESS: Yes.

5 JUDGE CLIFTON: I think that's
6 excellent. If I'd been a little sharper when
7 Mr. Hedin was asking about the change, I would
8 have realized there was a change, wasn't a
9 change to the numbers, was a change to the
10 title. So I think this is an excellent
11 approach, and I really think the best way to
12 have Mr. McFetridge mark the exhibit would be
13 as he's done on his own, where he marks it at
14 the top, and he also has the note at the
15 bottom.

16 MS. DESKINS: He's prepared a new
17 sheet that has it that way.

18 JUDGE CLIFTON: Excellent.

19 MS. DESKINS: And if we could take
20 out the page ten that's current in there and
21 substitute the new one. Or we could submit as
22 a separate exhibit.

1 JUDGE CLIFTON: In order for the
2 transcript to make sense, we have to have them
3 both.

4 MS. DESKINS: Okay.

5 JUDGE CLIFTON: So let's call
6 this--let's mark this new page Exhibit 7, page
7 10A.

8 MS. DESKINS: Okay.

9 MR. HEDIN: So we will not be
10 going to 18 but as 7A?

11 JUDGE CLIFTON: This will be 7,
12 page 10A. That will be its whole name.
13 Exhibit 7, page 10A.

14 (Whereupon, Exhibit No. 7, page
15 10A, was marked for
16 identification)

17 MS. DESKINS: Your Honor, at this
18 time, if anyone would like to voir dire the
19 witness about the exhibit, that would be
20 acceptable with me.

21 JUDGE CLIFTON: Are there any
22 questions for Mr. McFetridge?

1 Mr. Hill.

2 MR. HILL: Just a quick question.

3 MR. HILL: Fresh and processed.

4 So are you saying that for the other states,
5 Michigan, New York, Pennsylvania, Utah, those
6 numbers are fresh and processed as well?

7 THE WITNESS: Yes. I went back
8 through and made everything consistent. So
9 they're all fresh and processed prices.

10 MR. HILL: Okay. So their numbers
11 don't change with the addition of the word
12 "fresh"?

13 THE WITNESS: I believe some a
14 the prices did cause they were--it was a
15 little bit of a mix and match. The way it was
16 created before was to include processed, if it
17 was available, and then "All" for when it
18 wasn't available, and so I just went back
19 through and made it consistent, so "All"
20 prices reflect fresh and processed.

21 MR. HILL: Okay. So on the new 7,
22 Exhibit 7, page 10A, that's going to be

1 reflected in the rest of the numbers as well?

2 THE WITNESS: Yes.

3 MR. HILL: All right.

4 JUDGE CLIFTON: Are there other
5 questions for Mr. McFetridge?

6 Mr. Hedin.

7 MR. HEDIN: Mr. McFetridge, I'm a
8 bit confused, because if I recollect properly,
9 doesn't NASS break down the fresh portion, the
10 processed portion, and then give an "All"
11 summary total?

12 THE WITNESS: Yes; that's
13 correct.

14 MR. HEDIN: So is this the summary
15 total for each of the states?

16 THE WITNESS: Yes.

17 MR. HEDIN: Okay. So it's their,
18 quote, All, end quote?

19 THE WITNESS: Yes.

20 MR. HEDIN: Okay. Thank you.

21 MS. DESKINS: You need to say
22 "yes" for the record.

1 THE WITNESS: Yes.

2 JUDGE CLIFTON: Are there other
3 questions for Mr. McFetridge?

4 (No response)

5 JUDGE CLIFTON: For those of you
6 who weren't at the prior proceeding, the way
7 this came up is one of the witnesses said you
8 must have a mistake about those prices down
9 there in 2009, cause nobody's getting 85
10 cents. That's how this started.

11 MR. ROWLEY: We all agree.

12 (Laughter)

13 MR. HEDIN: Your Honor, if I may,
14 I too followed up a little bit on this, and I
15 don't know--I'm sort of in that testimony
16 phase here, for a moment.

17 JUDGE CLIFTON: Yes. Mr. Hedin,
18 you also remain sworn.

19 MR. HEDIN: Yes.

20 JUDGE CLIFTON: You may proceed.

21 MR. HEDIN: But in that regard, I
22 did speak with both with a processor and a

1 board member from Oregon, and the Oregon Ag
2 Statistics Service, about the 85 cent posting,
3 in particular, and the processor indicated
4 that he felt that the citations for the prices
5 for 2008 and 2010 were correct. But he too
6 had spoken with Oregon Ag Statistics about the
7 85 cent price, and asked that they revisit
8 that.

9 I also spoke with Oregon Ag
10 Statistics, asked them to do the same thing,
11 but because of the way their system works, any
12 change cannot be reflected until, at the
13 earliest, July of this year, to the record.

14 So we acknowledge that it says 85
15 cents but it may be subject to change after
16 they've reconsidered the information they told
17 me.

18 JUDGE CLIFTON: Thank you. That
19 was good--good digging.

20 All right. Are there other
21 questions for Mr. McFetridge?

22 (No response)

1 JUDGE CLIFTON: Mr. McFetridge, is
2 there anything you'd like to add?

3 THE WITNESS: Just a couple
4 things. I also modified the chart on page
5 nine. Previously, it had US--I believe U.S.
6 Processed Tart Cherry Prices. And so I took
7 out the word Processed, so that wouldn't be
8 confusing with the data on the following page.

9 And then also on page 13, where it
10 reflects tart cherry production and prices, I
11 removed the word Processed for prices, and so
12 it's consistent across every graph.

13 JUDGE CLIFTON: Now did the graph
14 change, say, on page nine?

15 THE WITNESS: No.

16 JUDGE CLIFTON: The lines are
17 still where they were. All right. And on
18 page 13, did the lines change at all?

19 THE WITNESS: No.

20 JUDGE CLIFTON: All right. All
21 right. Ms. Deskins, how would you like to
22 handle those pages?

1 MS. DESKINS: Mr. McFetridge, you
2 have copies of the changes that you've made?

3 THE WITNESS: Yes.

4 MS. DESKINS: Maybe what we should
5 do is just submit an Exhibit 7A, that has all
6 of his changes in it.

7 JUDGE CLIFTON: I actually think
8 it's more helpful, for someone looking at the
9 record, to have only the pages that are
10 changed.

11 MS. DESKINS: Okay. Okay. If he
12 could take out those pages and mark them, I
13 guess would be B and C.

14 JUDGE CLIFTON: No. I think it
15 would be Exhibit 7, page 9A and Exhibit 7,
16 page 13A.

17 MS. DESKINS: Okay.

18 JUDGE CLIFTON: "A" might stand
19 for amended.

20 MS. DESKINS: Okay.

21 JUDGE CLIFTON: But just some way
22 for a person to actually look at them side by

1 side.

2 MS. DESKINS: Okay.

3 (Whereupon, Exhibit 7, page 9A and
4 Exhibit 7, page 13A, were marked
5 for identification)

6 JUDGE CLIFTON: All right. Now I
7 don't know--let's go off the record for just
8 a moment.

9 (Discussion off the record)

10 MR. HEDIN: A point of
11 clarification. We were doing 7A, 9A, and 13A;
12 is that correct? Or Exhibit 9A--

13 JUDGE CLIFTON: We're doing
14 Exhibit 7, page 9A, Exhibit 7, page 13A. And
15 they will accompany the Exhibit 7, page 10A.

16 MR. HEDIN: Okay.

17 JUDGE CLIFTON: All right. Also
18 while we were off the record, the court
19 reporter asked about the spelling of NASS.

20 Mr. McFetridge, would you describe
21 not only the spelling of that but what it
22 means.

1 THE WITNESS: Sure. It is N-A-
2 S-S, all capital letters, and it stands for
3 the National Agriculture Statistic Service.

4 JUDGE CLIFTON: All right. Ms.
5 Deskins, do you have any other questions of
6 Mr. McFetridge?

7 MS. DESKINS: I have no further
8 questions for him.

9 JUDGE CLIFTON: All right. Do you
10 now move the new exhibits into evidence?

11 MS. DESKINS: Yes. I do.

12 JUDGE CLIFTON: Is there any
13 objection?

14 MR. HILL: No.

15 JUDGE CLIFTON: Exhibit 7, page
16 10A is admitted into evidence. Exhibit 7,
17 page 9A is admitted into evidence. Exhibit 7,
18 page 13A is admitted into evidence.

19 (Whereupon, Exhibit 7, page 10A,
20 page 9A, and page 13A, previously
21 marked for identification, were
22 received in evidence)

1 JUDGE CLIFTON: Thank you, Mr.
2 McFetridge.

3 (Witness excused)

4 JUDGE CLIFTON: Ms. Deskins, do
5 you have any additional evidence at this time?

6 MS. DESKINS: I have no further
7 witnesses.

8 JUDGE CLIFTON: All right. Mr.
9 Hill, you may call your next witness.

10 MR. HILL: I'd like to call Ray
11 Rowley to the stand, please.

12 JUDGE CLIFTON: This would be a
13 good time to pass those out. Let's go off the
14 record for just a moment.

15 (Discussion off the record)

16 JUDGE CLIFTON: We're back on
17 record at approximately 9:29.

18 Would you please state and spell
19 your full name.

20 MR. ROWLEY: Raymond Claude
21 Rowley. That's R-a-y-m-o-n-d. Claude, C-l-a-
22 u-d-e. Rowley. R-o-w-l-e-y.

1 JUDGE CLIFTON: Thank you. Would
2 you raise your right hand, please.

3 WHEREUPON,

4 RAY ROWLEY
5 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
6 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
7 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
8 TESTIFIED AS FOLLOWS:

9 JUDGE CLIFTON: Let's see. This
10 would either be Mr. Hill questioning or Mr.
11 Hedin. Who will begin? Mr. Hill?

12 MR. HILL: Yes. I'll start.
13 Well, I'm actually not going to question you
14 right now since I see you have a prepared
15 statement, so I'll let you read it, and I'll
16 let you field some questions afterward. So
17 you can begin.

18 THE WITNESS: Okay. My name is
19 Ray Rowley. I'm a cherry grower in the
20 Santaquin area, which is in the south end of
21 Utah County, State of Utah. I'm affiliated
22 with Cherry Hill Farms, Inc. It's a family-

1 owned business that grows tart cherries,
2 apples and peaches. My brothers and I own and
3 operate the farm. We are affiliated with the
4 Payson Fruit Grower Co-op, which handles our
5 cherries. We would be considered a large tart
6 cherry grower by your standards. I believe
7 your standards--okay.

8 Cherry Hill Farms, Inc. is in
9 support of the proposed amendment to the Tart
10 Cherry Market Order, which makes in-orchard
11 diversion credits equal to bottom line credits
12 in value.

13 And add another little thing in
14 here, is I've been around the country and
15 spoken to different growers throughout the
16 country. I've yet to talk to one grower that
17 has not been in support of this amendment.

18 Cherry Hill Farms has used in-
19 orchard diversions in past years to generate
20 diversion certificates for our handler. An
21 example of that is in the 2009 crop year. We
22 in-orchard diverted 1.9 million pounds of tart

1 cherries, about 15 percent of the crop.

2 We used in-orchard diversions in
3 the 2006 and 2007 crop years also.

4 We have made the decision, in each
5 of these years, to divert cherries based on
6 our handlers' compliance plan. At the
7 beginning of the 2009 harvest season, we
8 estimated that it would take--what it would
9 take to be in compliance with the restriction
10 of the regulation.

11 We in-orchard diverted what we had
12 planned. As the national crop increased above
13 that June estimate from the CIAB, the value of
14 our in-orchard diversions was reduced. As the
15 crop and restriction increased, the value of
16 our diverted fruit increased.

17 This seems just opposite of what
18 it should have been. The incentive was to not
19 in-orchard divert in this large crop year.
20 This is one of the biggest reasons for the
21 amendment, I believe, to give growers an
22 incentive to put some cherries on the ground

1 in large crop years, to bring supply and
2 demand back into balance.

3 Growers think that the different
4 value of top-line and bottom line credits is
5 unfair. That's me speaking. That's everybody
6 I've talked to. The CIAB market order is
7 confusing to the growers and others, because
8 of in-orchard diversion credits are not
9 treated the same as all other diversion
10 credits.

11 These in-orchard diversion credits
12 are currently counted as part of the overall
13 gross pounds harvested, and are thus referred
14 to as top-line credits, or certificates.

15 All other credits--exports, new
16 market, new products, and those other credits,
17 are all counted as bottom line, and taken at
18 a one to one face value. The top-line credits
19 are usually discounted in value because more
20 cherries that are harvested, the greater the
21 restriction. As a fixed number of orchard
22 diversion certificates are spread over the

1 increasing number of total gross cherries,
2 they become less valuable.

3 Growers in the cherry industry
4 have seen this inequity play out time and time
5 again over the years of the marketing order.
6 In years where the restricted percentage is
7 low, it has less impact on the growers. But
8 in years where it is high, there is a greater
9 negative impact to the value of the grower
10 certificates.

11 At the CIAB meeting September
12 10th, 2009, the board recommended the
13 restriction percentages to deal with the large
14 2009 crop. A couple months later, in November
15 and December--in November, or December of
16 2009, and I made a spelling error there--
17 sorry--the USDA did not accept the CIAB
18 board's recommendation for that restriction
19 percentage.

20 It kind a threw the industry into
21 a turmoil.

22 On February 16, 2010, there was a

1 meeting between CIAB leaders and USDA
2 representatives that oversee the market order.
3 We were in the office there with Mr. Shipman,
4 Mr. Durando, and others.

5 They told us that we had to work
6 out several areas in the market order, mostly
7 get supply and demand back in line, keep
8 working on promotions, do all possible to
9 eliminate the variation between preliminary
10 restrictions made in the June meeting before
11 the crop and the final restrictions made in
12 the September meeting, after the crop was
13 harvested.

14 They also asked us to consider a
15 tree pull and see if it would work for our
16 industry. And then they asked us to come up
17 with any other ideas.

18 The idea of in-orchard diversion
19 credits equal to all other credits, to
20 encourage more diversion on the ground in high
21 production years, was discussed as a possible
22 solution again, and brought to the forefront

1 as a viable alternative to help reduce the
2 overall production.

3 In that meeting--and this is kind
4 of a side note from the narrative here--we
5 brought that up and said look--this is
6 something that we've been thinking about, this
7 is something we've discussed a little bit.
8 And they were very encouraged with this plan.
9 Okay.

10 The March meeting, March CIAB
11 meeting on March 23rd, 2010. The concept of
12 making in-orchard diversion credits equal the
13 bottom line certificates was discussed again.
14 We had a big presentation in that meeting.
15 The board passed the motion, 16 to one, to
16 adopt this concept. Now I've heard it was 17
17 to one. I don't know what it was. We had one
18 guy opposed. Whether it was 16 or 17 to one,
19 I'm not sure.

20 Perry can probably straighten that
21 one out.

22 Anyway, 16 to one to adopt this

1 concept of making in-orchard diversions equal
2 to bottom line credits. It was the intent of
3 the board to get this into place as soon as
4 possible, and try to get it into place for the
5 2010 years, if at all possible.

6 We were thinking of informal
7 rulemaking at that point.

8 In the June 2010 meeting, the USDA
9 told the CIAB that it may or may not require
10 an amendment, talked more about informal
11 rulemaking, and they thought it would be--you
12 know--they weren't sure.

13 On July 20th, we sent another
14 group back to talk to Mr. Shipman and Mr.
15 Durando. We sat in their office and talked
16 for a few minutes, and we reported on the
17 progress that we, as an industry, had made.

18 If you go back under point number
19 five there, those five points that we talked
20 about. We wanted to go back and tell them the
21 progress that we'd made as a board, how we
22 come--you know--what's going on here.

1 Anyway, we met there on July 20th.
2 Among other things--and we talked about all
3 those other things, but it's not pertinent
4 today--but among other things, the in-orchard
5 diversion and bottom line credits issue was
6 discussed.

7 Both Mr. Dave Shipman and Mike
8 Durando understood the importance of making
9 the change to the industry. They understood
10 this proposal. They understood what we were
11 trying to do.

12 In the interest of time, and the
13 need to have this change in place as soon as
14 possible, we asked Mr. Shipman if it would be
15 possible to proceed with this change through
16 informal rulemaking, rather than go through
17 the lengthy process of amending the market
18 order.

19 Other amendments to the order have
20 taken four and five years, and we didn't want
21 to wait that long. We wanted this thing in
22 place, if at all possible.

1 Mr. Shipman seemed open to the
2 idea and was ready to move forward on it from
3 all the indications that we could get from
4 him.

5 Mr. Mike Durando, after sitting
6 there for a minute, said that his people could
7 expedite the amendment process and have it
8 done in 18 months.

9 Mr. Shipman sat there for about 30
10 seconds thinking about that point, and he said
11 that it would go through the amendment process
12 at that point, if it was only going to be 18
13 months. Now I know that's caused a lot of
14 consternation, that table right over there.
15 Okay? But ladies and gentlemen, this industry
16 needs this amendment, and we started counting
17 at the meeting.

18 We're hoping in 18 months from
19 that day, we have this thing in process.
20 Okay? I hope you understand the necessity of
21 this.

22 Point eight. September 10, 2010.

1 CIAB board meeting. The board decided to
2 start the amendment process for the in-orchard
3 bottom line credits change. This was done
4 with the expectation of having this change in
5 place within the 18 months, and in time
6 hopefully for the 2012 crop year. September
7 2010 to July of 2012 is 21 months, and I'm
8 just giving you the timeline again, putting a
9 little bit more pressure on you, hopefully.

10 Nine. One purpose of the
11 amendment is to comply with the request made
12 from the USDA to the cherry industry to get
13 supply and demand closer in line with what is
14 happening in the industry. The larger a crop
15 and the restriction gets, the less incentive
16 there is for a grower to put excess cherries
17 on the ground, and gain in-orchard diversion
18 certificates.

19 We felt that if we could get the
20 proper incentive to the growers, and give them
21 real value for putting excess cherries on the
22 ground in high crop years, then the supply and

1 demand would be closer.

2 That's just exactly what Mr.
3 Shipman and Mr. Durando asked us to do.

4 Ten. Another purpose of the
5 proposed amendment is to make the order less
6 confusing. As the order is written currently,
7 the two different types of credits, top line
8 and bottom line credits, have different values
9 to growers and processors. The value of the
10 top line credits is a moving target and is
11 dependent on the total crop size, and also the
12 restriction percentage. The value of the
13 bottom line credits is usually different from
14 the top line credits. If we pass this
15 amendment, it increases the value of the top
16 line credits and makes them similar in value
17 to the bottom line credits.

18 Eleven. Another purpose of the
19 proposed amendment is to make it more
20 equitable to growers. The only market for
21 diversion credits is the processors. This
22 proposed amendment makes it so the grower can

1 get similar value from in-orchard diversion
2 certificates as bottom line credits--exports
3 and new markets. This amendment will help
4 growers get a better return on diversion
5 certificates.

6 Twelve. The concept of the
7 proposed amendment is that in-orchard
8 diversions will become pound-for-pound
9 diversion credits against handler
10 restrictions. In-order diversions will no
11 longer be considered part of the handle or top
12 line, and in-orchard diversions can be used,
13 pound for pound, for handler compliance, or
14 bottom line.

15 Their worth as a compliance too
16 will not vary due to fluctuations in crop
17 size.

18 Thirteen. Benefits to handlers of
19 the proposed amendment. Handlers know that
20 the in-orchard credits have a fixed, pound-
21 for-pound worth as a compliance tool. They
22 can use more accurately in-orchard diversions

1 as a part of their compliance plan. Handler
2 compliance plans should be more accurate with
3 this tool in place.

4 Fourteen. Benefits to growers of
5 the proposed amendment. Growers know that
6 their in-orchard diversion credits have a
7 fixed worth to handlers. Growers know that
8 their credits are of equivalent worth to post-
9 harvest credits.

10 Fifteen. Benefits to the industry
11 of the proposed amendment. Industry handlers
12 and growers can still elect to use the in-
13 orchard diversion process if it fits their
14 business models and compliance plans.

15 Inventory reserves will be reduced. There
16 should be fewer surplus cherries processed for
17 the sake of processing. Less expense will be
18 incurred for processing of cherries and
19 storing finished goods in reserves.

20 Conclusions. Growers are able to
21 undertake diversions with confidence that
22 their diversion credits will retain their

1 relative worth. Handlers will be free to take
2 diversion credits, knowing that the credits'
3 worth as a compliance tool will remain
4 constant. The optimum supply formula will
5 continue to function and the free market will
6 be properly supplied. The amendment process
7 should be supported by all and implemented as
8 soon as possible.

9 I also put in here a graph. I
10 should have stopped halfway in the middle of
11 it. But this is kind a like 9A and 13A in
12 Exhibit 7, as we just got done talking about;
13 right? This graph came out of the book that
14 the industry puts together through Cherry
15 Marketing Institute. It's the--what do they
16 call the statistics?

17 MR. HEDIN: Crop statistics.

18 THE WITNESS: Crop statistics.

19 I'm not sure if they pull from the
20 same pool of numbers. I think they do. But
21 if you look at this and look at that thing red
22 line, that thin red line is the average price

1 to growers. And the other two lines are the
2 total production and the total sales.

3 So if you look at the bars down
4 below and the thin red line, the important
5 part here is to see that when a crop's low,
6 prices are high; when a crop's high, prices
7 are low. This amendment should help to even
8 out that, and when we have a huge crop, a
9 large crop, a large restriction, it should
10 take some of those cherries, put them on the
11 ground, and increase the grower price. It
12 gives the growers a tool to be part of that
13 formula, rather than encourage them to not put
14 cherries on the ground in high crop years, as
15 it does currently.

16 I also included in this two pages
17 of a spreadsheet. I think you've been through
18 it in Michigan, time and time again. I don't
19 mind answering questions on that but I'm not
20 going to go through it with you. Okay? I
21 helped put it together with all you guys, and
22 if you've got questions on it, I don't mind

1 answering it. But there's no sense spending
2 another 20 minutes going through that again.

3 JUDGE CLIFTON: What are the two
4 pages of the spreadsheet?

5 THE WITNESS: They're just part--
6 they're on the back, the next two pages there.
7 Perry, didn't you give out all of them?

8 MR. HEDIN: That's what you
9 copied, is a partial sheet.

10 THE WITNESS: Okay. Okay. I am
11 sorry then.

12 JUDGE CLIFTON: That's all right.
13 The main people that need them, though, are to
14 my left.

15 THE WITNESS: The four copies I
16 had have them in them. So if we can find
17 those and get them to them.

18 MS. SALEHI: Your Honor, I also
19 don't have a colored graph, so when Mr.--

20 THE WITNESS: We're in Utah.

21 MS. SALEHI: Well, when you're
22 referring to the red graph--

1 JUDGE CLIFTON: The one colored
2 one needs to be with her for the record copy.

3 THE WITNESS: If you've got
4 colored ones, give them to them. There we go.
5 Sorry. I didn't make enough copies.

6 JUDGE CLIFTON: All right. Let's
7 go off record just a moment.

8 (Discussion off the record)

9 JUDGE CLIFTON: All right. We're
10 back on record.

11 Mr. Rowley, did you want to add
12 anything before people begin to question you?

13 THE WITNESS: Not at this time.

14 JUDGE CLIFTON: All right. Thank
15 you. Who would like to begin the questioning?

16 Mr. Hill?

17 MR. HILL: Yes.

18 BY MR. HILL:

19 Q You did mention that you believed
20 yourself to be a large tart cherry grower.

21 The SBA, Small Business Administration

22 definition says that a small grower is below

1 750,000 gross receipts per year. So would
2 that mean you're a large grower?

3 A Large.

4 Q Okay. And you also mentioned that
5 you have not spoken to a grower who was
6 against this change. Would that include those
7 that you believe to be small growers?

8 A Yes.

9 Q And how many growers would you say
10 that you--

11 A That I've talked to? Nine or ten
12 here in Utah, and probably 30 to 40 outside of
13 Utah, including Washington, Oregon, Michigan,
14 Pennsylvania, New York.

15 Q And basically unanimous is what
16 you're saying?

17 A Yes.

18 Q Let's look at your number two,
19 which starts Cherry Hill Farms on your
20 document. You mention how your in-orchard
21 diversion--basically, that the value of it was
22 reduced. Could you tell us how a one-to-one

1 credit would have helped you in determining
2 what you were going to do for that crop year.

3 A A one-to-one would have made it so
4 we wouldn't have had to put as many on the
5 ground, okay, to meet our compliance.

6 Okay. We--it would have made our
7 compliance plan easier, because we put our
8 compliance plan in as we started to pick.
9 Okay? And so we said okay, we need X amount
10 of cherries from each grower in our co-op on
11 the ground, or about that many. That's where
12 we want it to be. Okay?

13 And then as we started putting
14 cherries on the ground, and more cherries went
15 on the ground, we could see that the crop was
16 getting bigger, the restriction was getting
17 bigger.

18 The more we put on the ground,
19 they were becoming less and less valuable.

20 And so had we been using a
21 strictly financial incentive, we wouldn't have
22 put any on the ground. And yet with such a

1 huge crop in 2009, we probably should have put
2 more on the ground. And so the incentive
3 wasn't there to put more on the ground. Does
4 that make sense?

5 Q It makes sense to me.

6 A Okay.

7 Q So would you say that it not being
8 one to one, it essentially made it harder to
9 comply?

10 A Right.

11 Q And would you say it provided a
12 moving target of what your compliance number
13 would be?

14 A Of course. Yes; yes.

15 Q Now it has been asked, several
16 times before: Do you think that passing this
17 amendment would essentially incentivize people
18 to just, as a first option, put cherries on
19 the ground?

20 A I don't think growers grow
21 cherries to just put 'em on the ground. Okay?
22 I think the people will look at their

1 restriction percentage and use this as another
2 tool to help meet that restriction. But they
3 will use it in a way that they say, okay, it's
4 fair for everybody now, it's more equal, it's
5 an opportunity for us to use it as a tool,
6 rather than hate it and, and be belligerent
7 about it, and call the New York Times, or
8 Washington Post, or whatever, and have 'em
9 come out and look at all the cherries we're
10 dumping on the ground and blame USDA. You
11 know? I don't think that will happen.

12 I think we'll use it as a tool to
13 put those we need on the ground.

14 Q And ultimately, you believe that
15 it will increase grower prices?

16 A Yes.

17 BY MR. HEDIN:

18 Q Ray, in your discussion about
19 grower pricing, how, actually, do you think
20 that the reduced amount of inventory will
21 impact the grower pricing as a result of your
22 diversions?

1 A I think it will raise the price,
2 but you know, that we say we have so many in
3 reserves, okay, and we do, but I believe, in
4 the back of our buyers' minds, they look at
5 everything. They don't look at just what's on
6 the market. They look at what's in reserve
7 and then they try and beat the price down from
8 there. If they're not in reserve, they're not
9 there to begin with, it doesn't put that
10 downward pressure on price.

11 Q Ray, it appears that Utah has been
12 a pretty--in general, has been a pretty strong
13 area for use of diversion credits.

14 Why do you think that Utah does
15 more than, proportionally, than most of the
16 other states?

17 A Like a herd a sheep. Okay. If
18 one grow--if one packer in Michigan is packing
19 everybody's fruit, everybody else follows
20 along. Pretty soon, they have the opportunity
21 to take it to one handler, another handler,
22 and if he's going to take all the fruit, then

1 they do it, and pretty soon they're at the end
2 of the harvest and not very many's gone on the
3 ground.

4 Here, in Utah, most of the growers
5 are involved with a handler, and so it's not
6 the bickering or the--I don't know--infighting
7 between grower and handler, because sometimes
8 we wear the same hat. Mostly, we wear the
9 same hat cause we're involved with the
10 handler, and so we say, okay, what's best for
11 grower and handler, both? We put the plan
12 together as grower and handler cause we're the
13 same people.

14 And I believe we come up with our
15 compliance plan that way, and it's been part
16 of the plan. We put some on the ground.

17 Q And have those compliance plans
18 been disrupted with the changes--

19 A Yes.

20 Q -in the worth of those compliance
21 credits?

22 A Yes. They have, because it's,

1 like I said before, it's a "moving target."
2 You never know exactly where you're going to
3 end up, and the more you put on the ground,
4 the less it's worth, so--

5 Q So your ability to comport with
6 Payson Fruit Growers' requirements will be
7 improved by having this available?

8 A Sure, because they will be able
9 to, one for one, take those diversions, or
10 certificates, or whatever you want to call
11 'em, and put it towards their compliance plan,
12 rather than not know what they're really worth
13 until all the numbers come in.

14 Q Okay. Do you sit on the board of
15 Payson Fruit Growers?

16 A Yes.

17 Q So you're familiar with the
18 process by which you've--

19 A Yes.

20 Q --ascertained the compliance
21 tools?

22 A Yes.

1 Q Does Payson have the same-- Payson
2 Fruit Growers. that is, have the same
3 opportunity to deal with some of the post-
4 harvest credits as processors from other
5 districts?

6 A Yes. Payson Fruit Growers has
7 opportunity for new market, new product,
8 export, just as other processors throughout
9 the country are part of this order.

10 Q So it's elected to utilize the
11 grower diversion process?

12 A Payson Fruit Growers has actively
13 sought new products, actively sought new
14 markets, been part of exports through, through
15 marketing co-ops, and actively sought, in
16 years past, to put some on the ground, so we
17 use all those tools available, whichever best
18 we figure out that year to use, to meet the
19 compliance.

20 Q Is it fair to suggest that the use
21 of diversion credits in the orchard is a last
22 resort rather than the first resort?

1 A Yes.

2 Q And would you describe, briefly,
3 how you think you, personally, as a grower,
4 and Payson Fruit Growers, will respond to
5 different crop sizes, say a small crop under
6 250, one 250 to 300, and then a large crop.

7 A Under 250, we will--well, okay.
8 All three of those categories, we will still
9 actively seek new markets for our products,
10 and also new products, okay, and wherever
11 possible, exports. We will seek those and
12 that is--that is a goal--to keep pushing
13 those, those areas.

14 Under 250, I suspect the
15 regulation would be where new market, new
16 product, and export credits would, for our co-
17 op, handle our restriction, those--those
18 certificates that we get.

19 Between 250 and 300, I think we
20 would be in the middle there. Where those
21 other certificates might handle, we might
22 consider putting some on the ground for in-

1 orchard diversion for certificates. Would
2 have to see. Above a 300 million pound crop,
3 almost definitely, we would have to consider
4 putting some in-orchard diversions, some on
5 the ground for credits there. that's just my
6 "gut feel" for right now, depending on, you
7 know, how it all shakes out in sales, and
8 everything else.

9 Q Okay. Under your point No. 7, you
10 talked about the informal and formal
11 rulemaking process. What difference does that
12 make to you as a grower, whether it's formal
13 or informal?

14 A Time. Formal rulemaking, or the
15 amendment process, seemed to be like forever.
16 Okay. We've had other amendments in the
17 process, and it just goes on and on and on.
18 It never seems to get there until finally, it
19 does, and, you know, informal rulemaking would
20 make this change effective this year. We have
21 the potential, this year, with a small crop
22 last year, if history repeats itself, to have

1 well over 300 million pounds in the country.

2 If this change were in place for
3 the 2011 year, and we have over 300 million
4 pounds in the country, we would put enough
5 cherries on the ground, I believe, to be a lot
6 closer with supply and demand, where there's
7 almost no chance of it being in place this
8 year, and if we have over a 300 million pound
9 crop, it's going to be ugly.

10 Q For your information, Mr. Hackert,
11 in Grand Rapids, wants it in effect by July of
12 2011.

13 A So do I. So do I.

14 Q And then if I may, unfortunately,
15 Ray, I'd like to draw attention to your
16 attachments, the last two pages.

17 Will you explain a little bit your
18 involvement in crafting the industry's
19 response to Mr. Shipman's suggestion, and why
20 we decided to go this route versus some other.

21 A You know, Mr. Shipman and Mr.
22 Durando, as we spoke there in that meeting,

1 they--we talked five things, and this route
2 here puts the incentive back in to the
3 orchard, on the grower level, to take care of
4 excess cherries before there's even one single
5 cent put into processing, or storage.

6 On the handlers' end, and even--
7 you know, you grow the cherries, but a fair
8 amount of the cost the grower has is
9 harvesting and getting into the packing shed.

10 So this here seemed the most
11 economic way to help solve this problem. Put
12 'em on the ground, or don't harvest 'em in the
13 first place, reduce the harvest cost, stop the
14 processing cost, stop the storage cost, before
15 these things cause problems and put a downward
16 pressure on the market because they're sitting
17 out there in storage.

18 So that's why we chose to go down
19 this route. I mean, this idea had been
20 floating around three or four years in the
21 past, and it just kind a hung there.

22 But after that meeting with Mr.

1 Shipman and Mr. Durando, it became very clear
2 that we had to do something, and this saved
3 the grower and the handler the most money, and
4 increased revenues for doing it. So that's
5 why we went down that road.

6 Q And did you not chair the
7 committee of the CIAB that--

8 A Yes.

9 Q --put this together?

10 A They gave it to the Diversion
11 Committee. I was chair of the Diversion
12 Committee that fostered this through.

13 Q So it's your understanding that
14 the change to Section 10 for Handle, where
15 we've deleted the reference to grower
16 diversion certificates as being part of the
17 handler, is the most effective way to
18 accomplish this goal?

19 A Yes; yes. You know, we looked at
20 lots of things. I mean, lots of people have
21 lots of ideas on how to help solve this, and
22 as our committee met several times, and we

1 said, okay, this is the best one, this is
2 where we ought to go, let's start putting our
3 efforts down this road, and that's where we
4 put our efforts, and this is--this is what's
5 come of it, so far.

6 MR. HEDIN: Okay. I don't have
7 any further questions, Your Honor, at the
8 moment.

9 JUDGE CLIFTON: Mr. Hill?

10 MR. HILL: Not at the moment, Your
11 Honor.

12 JUDGE CLIFTON: All right. Who
13 next has questions for Mr. Rowley?

14 Ms. Salehi.

15 MS. SALEHI: Sure.

16 BY MS. SALEHI:

17 Q Mr. Rowley, this is Parisa Salehi
18 with USDA again. I just wanted to ask you to
19 please describe the cherry industry in this
20 part of the country for me a little bit, just
21 so I'm familiar, as far as how many handlers,
22 growers, there are, to your knowledge.

1 A Okay. Utah really has one major
2 tart cherry area, and it's just south here, 10
3 to 20 miles--10, 25--you know, it's along the
4 foothills here. There used to be a growing
5 area north of here. It's mostly houses now,
6 so most tart cherries are grown just south of
7 here, anywhere from 10 to 25 miles away; okay?
8 It's pretty concentrated. It's on the
9 foothills.

10 There are two big handlers, Payson
11 Fruit Growers and McMullin Orchards.

12 JUDGE CLIFTON: Would you spell
13 them both.

14 THE WITNESS: They're going to
15 come up here in a minute. They can spell
16 their own name. Payson Fruit Growers. P-a-y-
17 s-o-n. Fruit Growers. And the other one is--
18 what do they pack under, Jack? Is it Mc--
19 McMullin Orchard. M-c, and then another
20 capital M-u-l-l-i-n, Orchards. Okay.

21 Payson Fruit Growers is larger
22 than McMullin Orchards. There are a couple of

1 smaller handlers that handle their own
2 individual fruit. Fowers. And I'm not sure
3 what name they pack under, but it is the
4 Fowers family.

5 JUDGE CLIFTON: Spelled...?

6 THE WITNESS: F-o-w-e-r-s.

7 And then I think Mr. Woodyatt, up
8 north, has a single pitter, and he puts for a
9 roadside market. I don't think I've missed
10 'em. I think that's--that's the processors.
11 Okay?

12 MR. HILL: What was his name?

13 "Woodie"?

14 THE WITNESS: Woodyatt.

15 MR. HILL: Do you know how to
16 spell that?

17 THE WITNESS: Good luck. W-o-o-o-
18 d-y-a-t-t, I believe.

19 MR. HILL: Okay.

20 MR. HEDIN: For the record, Your
21 Honor, first name is Glenn.

22 THE WITNESS: Yes.

1 JUDGE CLIFTON: Spelled?

2 MR. HEDIN: G-l-e double n.

3 JUDGE CLIFTON: Thank you.

4 THE WITNESS: I would have missed
5 that one, Perry.

6 Most of the cherries in Utah
7 eventually end up at Payson Fruit Growers to
8 dry. Payson Fruit Growers dries the tart
9 cherries and then sells them from there.

10 So grower-wise, there's--on our
11 records, for the red tart cherry marketing for
12 here in the state, and I'm the president of
13 that one, the chairman or whatever you want--I
14 think there's 22 grower names that we send
15 information to. Okay?

16 BY MS. SALEHI:

17 Q Are most of the growers small
18 growers, or do you consider them--

19 A Okay. Of that, your--your
20 definition is 750,000, higher or lower; right?

21 Q Yes.

22 A I would say there's five or six

1 large growers, and the rest would be
2 considered small growers.

3 Q Okay.

4 A Now there's other people here that
5 run the packing sheds, that will be up here
6 later, that can answer that more accurately.

7 Q Okay. Now you spoke about the
8 costs of processing and storing, and if I
9 remember you correctly, you mentioned that
10 you're a large grower and a handler. If you
11 were to guess, what's the percentage of that
12 cost in your total cost of business?

13 A Okay. I can't speak for the
14 handler. There'll be another handler here
15 soon, that can speak for that. Our harvesting
16 cost is between one-fourth and one-third of
17 everything we put into the cherries.

18 Q Okay.

19 A Okay. So anything we put on the
20 ground, and only have to either shake on the
21 ground with one machine, rather than all the
22 other machines involved in harvest, or pick

1 ten trees and five thousand trees, and leave
2 the rest to fall, we save all that cost.

3 Q Okay. And then I wanted to take
4 you to your testimony on--

5 MR. HEDIN: Your Honor, can I ask
6 for a clarification. Did you say one-third to
7 one-quarter of--

8 THE WITNESS: One-fourth to one-
9 third, depending on the year, of all the
10 inputs into that orchard are harvesting.

11 MR. HEDIN: Okay. Of input cost.
12 Okay.

13 BY MS. SALEHI:

14 Q In the conclusion of your written
15 statement, on point 16, you have talked about
16 how the OSF formula continue to function. I
17 just wanted you to expand on that testimony
18 and explain to me how you think this formula
19 is working right now, under the current
20 existing marketing order, and how it will
21 change, if this amendment passes.

22 A Okay.

1 MR. HEDIN: I was just going to
2 say we have the foam boards, and I know
3 everybody doesn't have copies of the last two
4 pages. Shall we bring those forth?

5 THE WITNESS: Let's do it. Do
6 you really want to go through it again.

7 MS. SALEHI: Well, I just wanted to
8 get your perspective, if that's okay.

9 THE WITNESS: Just my
10 perspective?

11 MS. SALEHI: Yes.

12 THE WITNESS: Okay. My
13 perspective is it will continue to function.
14 As we put this together and went through all
15 the different scenarios, you know, we wanted
16 to make sure that formula stayed sound, that
17 we weren't doing anything out of line, and
18 Martin and I went the rounds on this a few
19 times too. I even offered to go to California
20 so they could hear what I was saying. He
21 didn't like that one, though.

22 But we wanted to make sure, that

1 in the end, the same amount of carry in and
2 carry out--it was the same. We didn't put any
3 burden from what we did this year on to the
4 next year.

5 We wanted to make sure that the
6 only thing that changed was if--if I, as a
7 grower, put more cherries on the ground, it
8 reduced inventory, and raised the possibility
9 for price. But we didn't want to carry in
10 from one year to the next and carry over,
11 anything like that.

12 So carry in, carry out, stay the
13 same. The only thing that reduces is
14 inventory reserves. I don't know if that's
15 what you want me to explain, or what.

16 I mean, we can go through those
17 boards, if we want, if it's going to help
18 everybody. I'm willing to go through 'em, but
19 I know you guys saw 'em in Michigan. Okay?

20 MS. SALEHI: I think I'm okay with
21 that.

22 THE WITNESS: Okay.

1 MS. SALEHI: Thank you.

2 Martin.

3 MR. ENGELER: You done?

4 MS. SALEHI: Yes.

5 JUDGE CLIFTON: Mr. Engeler.

6 MR. ENGELER: Yes.

7 BY MR. ENGELER:

8 Q First of all, just to follow up to
9 the same line of questioning she, Ms. Salehi
10 was asking. But you mentioned--the last thing
11 you said, I believe, was that the inventory
12 would be--or the carry in and carry out would
13 stay the same, but did you say the inventory
14 would be reduced? I think--

15 A Any excess inventory; yes.

16 Q Okay. And could you just briefly
17 explain how that occurs.

18 A Give me the boards. Let's just--

19 (Laughter)

20 MR. ENGELER: Just want to make
21 it clear for the record.

22 THE WITNESS: Let's just put it

1 so everybody can see it here; okay? Cause I
2 don't know that everybody here has seen these
3 boards. Okay. What I was referring to is the
4 bottom lines here. All right.

5 MR. HILL: Ray, make sure that the
6 judge sees your--

7 JUDGE CLIFTON: Actually, no. I
8 think you're good, and I'll move if I need to.
9 But you'll have to say out loud what you can
10 see because the people in the back won't be
11 able to see that.

12 THE WITNESS: Okay. This is just
13 an assumption of a 300 million pound crop, 170
14 million pound sales, 30 million, the original,
15 what we would put on the ground, and a 50
16 million carry in to start with.

17 You can put any number you want in
18 there. We put whole bunches of different
19 numbers in there. It all came out, you know,
20 working the bottom lines, you know, the carry
21 in, carry out, all worked out. Okay?

22 So we take the 30 million pounds

1 that would have gone on the ground, and
2 instead of putting them as top line, we move
3 'em down here on this line, which is your--I
4 can't read that, Perry. Okay? Okay.

5 So we take them off of what is
6 considered Handle, and they're no longer
7 Handle, and put 'em down here. Now you guys
8 have heard how the divisors change, what we--
9 the important part here is that we increase
10 the restriction--and that's the hard part for
11 the USDA to comprehend and to get sometime,
12 cause when we move from top line down to the
13 bottom, it increases the restriction but we
14 never increase the number of pounds
15 restricted. Okay? So the number of pounds
16 restriction stays the same. The restricted
17 percentage does increase from 61 to 68 in this
18 example.

19 So that was important for us, not
20 to have any more pounds restricted. Carry
21 that through with the whole optimum supply
22 formula, and you see right where it comes off-

1 -right here. It shows the 30 million as an
2 in-orchard compliance, and then it shows,
3 right here, with the impact on the reserves.

4 And so you've got your inventory
5 reserves of the current year go from 113 to
6 exactly what you put on the ground, down to
7 83, okay. It would have been 83; it's 83
8 there. Your carry in and carry out all stay
9 the same. You just have less in reserves,
10 less for the market to beat down the price
11 with you on, less that you actually paid for
12 to get picked, less cherries that were
13 processed, less cherries accumulating in a
14 storage bill each month.

15 So that's how we put it together.
16 Does that answer it, Martin?

17 MR. ENGELER: Yes; that's
18 helpful.

19 BY MR. ENGELER:

20 Q Would it be safe--or accurate to
21 say that the reserve--or the cherries in
22 reserve would be reduced because handlers were

1 utilizing those grower diversion certificates
2 as part of their compliance tool?

3 A Yes.

4 Q To satisfy that restricted
5 requirement?

6 A Yes.

7 MR. ENGELER: Okay. Thanks.
8 That's good. Thank you.

9 JUDGE CLIFTON: Mr. Engeler, did
10 you have other questions?

11 MR. ENGELER: Yes, I had a couple
12 other questions.

13 THE WITNESS: I just looked at
14 her. She's just biting at the bit here.

15 MR. HILL: Just as a note--

16 JUDGE CLIFTON: Go ahead. Mr.
17 Hill?

18 MR. HILL: Just as a note, I want
19 to make note of what he was looking at on the
20 stand here. He was looking at Perry Hedin's
21 document.

22 MS. SALEHI: Exhibit 15.

1 MR. HILL: Yes, and I don't have
2 what number--what exhibit number is that
3 again?

4 MS. SALEHI: Fifteen.

5 MR. HILL: Exhibit 15. He was
6 looking at Exhibit B of Exhibit 15 for the
7 bottom line, in-orchard diversion credits, and
8 then he was also looking at Tables 7, 9 and
9 10, between pages 11 and 13 of that same
10 exhibit.

11 JUDGE CLIFTON: That is very
12 helpful. Thank you.

13 Now Ms. Salehi, did you want to
14 add?

15 MS. SALEHI: That's exactly what
16 I wanted to say.

17 JUDGE CLIFTON: Good job. Mr.
18 Engeler.

19 MR. ENGELER: Okay. Just a
20 couple more questions here.

21 BY MR. ENGELER:

22 Q You had mentioned in your

1 testimony, that Utah probably participates in
2 grower diversion more than other parts of the
3 country, and I was wondering--in the past,
4 during the current situation, under the
5 current order--but I was wondering if this
6 proposal were to go into effect, if you think
7 that, overall, the industry would participate
8 in this program more. In the grower diversion
9 aspect.

10 A You know, that question's been
11 asked of growers throughout this country and
12 their initial response is yes, as I've talked
13 to them. You know, it's what they say they
14 will do, but whether they do or not, as far as
15 Utah, we will still put our compliance plan
16 together, we will still do everything we can
17 for new markets, new products, exports, and
18 then we will use this as, you know, what's
19 left, to finish out the compliance plan.

20 And so whether they do it or not,
21 we will still use it on the years we need it.

22 Q Would there be an expectation that

1 there would be more--

2 A Yes.

3 Q --participation, industry-wide?

4 A Yes. As our Diversion Committee
5 met and discussed this, and on that committee
6 there's several growers, and they talked to
7 growers in each one of their areas--the
8 consensus overall is yes, growers will get
9 involved with this thing on the years that it
10 is a high crop year and a high restriction
11 year, so--but those are the years we need a
12 little bit less on the market. Not on the
13 market. A little bit less in the overall
14 pools.

15 Q Okay. Changing the line a thought
16 here a little bit. You mentioned in your
17 testimony that you're a member of a
18 cooperative; is that correct?

19 A Yes.

20 Q And do you--can you foresee any
21 difference in the impact on, on this kind of
22 a proposal, on growers that may not be a

1 member of a co-op?

2 A Growers that may not be a member
3 of a co-op. I see this as even a greater tool
4 for them. Okay? They still have the same
5 restriction that all of us have. This gives
6 them an opportunity to take that, if they
7 haven't got into new markets and new products,
8 and things like that. This gives them "an
9 out," where they can meet that compliance
10 regulation easier and better.

11 So I see this as being a great
12 advantage for those that aren't members of co-
13 ops, and those that are smaller growers.

14 Q Okay. And then one final thing
15 here. Do you--you guys have obviously spent
16 a lot of time going through this, and having
17 a lot of industry meetings, and considering
18 the different alternatives available to you.

19 And I was wondering, in those
20 discussions and in all your meetings, if there
21 has been any concerns, or any things that have
22 come up, that would indicate that this might

1 cause problems for people, or may not benefit,
2 may not be a benefit?

3 A To somebody out in the industry?

4 Q Yes. Just--

5 A This will be a great benefit for
6 larger growers, small growers, and many of the
7 handlers. There is a little bit of an
8 opposition to this by some handlers, and it's
9 a very small number of handlers, that are
10 exporting. Okay. Because they figure that if
11 the growers get full value for diversion
12 credits, just like their exports, or new
13 markets and new products, it will dilute the
14 value of what they're currently doing.

15 I see where they're coming from,
16 but I really believe this is the fairest that
17 we can do. I don't think it's been as far as
18 it could be; okay. I think this is fairer, I
19 guess.

20 Q Okay.

21 A More fair. I don't know.

22 Q I've got some handler-related

1 questions. Would it be better for me to save
2 those for somebody later? Are you involved in
3 a handling operation, or--

4 A I am a board member of a handling
5 operation. You're going to have the manager
6 of the handling operation up here in a few
7 minutes.

8 MR. ENGELER: Okay. I'll save my
9 questions on that side later.

10 THE WITNESS: All right.

11 MR. ENGELER: Thanks. That's all
12 I have.

13 JUDGE CLIFTON: Mr. Johnson.

14 BY MR. JOHNSON:

15 Q Hey, Ray.

16 A You be nice, Ken.

17 Q I have one question, Ray. Under
18 item 11 in your testimony, you say this
19 proposed amendment makes it so the grower can
20 get similar value from in-orchard diversion
21 certificates as bottom line credits.

22 Would this similar value help you

1 receive a return above your costs of
2 production?

3 A You know, that's a--that's a hard
4 one to answer, because if we only got three or
5 four thousand pounds per acre out there, it
6 doesn't matter what the price is--we're not
7 going to get a return above the cost of
8 production. Does that make sense? So it's
9 all depending on how much fruit's out there
10 for sale.

11 What it will do is it will
12 increase what the growers get, and help, go
13 towards that, and in many instances, yes, help
14 would be above the cost of production.

15 But if it freezes and there's no
16 cherries out there, it doesn't make a
17 difference. You see what I'm--oh, it does
18 help increase.

19 MR. JOHNSON: Right. Okay. Thanks.

20 JUDGE CLIFTON: Mr. Hedin.

21 BY MR. HEDIN:

22 Q Ray, you talked about the supply

1 formula operating in its continued fashion,
2 and I know the Department is concerned about
3 that. Are you confident that we will still
4 see 110 percent supply as mandated under the
5 order?

6 A You know, let's just carry that a
7 little bit--I think there will--you know,
8 whatever that order mandates, we're going to
9 put on the market; okay? And yes, there will
10 be that there. I don't think that we're ever
11 going to drop enough cherries on the ground to
12 ever get below the 110 percent.

13 We don't grow 'em to drop 'em on
14 the ground. We just don't. And those growers
15 are smart enough to see, when there's 300 and
16 some odd million pounds out there, and the
17 sales are whatever they are, that some have
18 got to go on the ground, and they will drop a
19 few on the ground. They're not going to drop
20 their whole crop, heavens no. They might take
21 5 or 10 percent off, okay, if they can get
22 full value for 'em. That's what I see.

1 I don't see us ever getting to
2 that 110, anywhere near that. Okay.

3 Q And the reform--or the amendment
4 won't change the way the supply formula
5 provides that 110 percent?

6 A No; no. It's taken care of in
7 that, in that supply formula.

8 MR. HEDIN: Good. Thanks.

9 THE WITNESS: And if you want
10 something to rack your brain, just try and
11 figure the supply formula out for a little
12 while.

13 JUDGE CLIFTON: Ms. Deskins.

14 BY MS. DESKINS:

15 Q Mr. Rowley, I just wanted to ask
16 you about the average grower price chart that
17 you prepared.

18 A Yes.

19 Q You said you got the information
20 from the Cherry Marketing Institute.

21 A Right.

22 Q Can you just say, for the record,

1 what that institute is.

2 A Okay. The Cherry Marketing
3 Institute is an organization of industry
4 growers that get together, and all put money
5 into a pot, and then we use that money for
6 grower issues and marketing, and one of the--
7 one of the services they do is they have a
8 statistics handbook that comes out each year,
9 where they gather information on different
10 things, and one of those is grower prices,
11 supply, demand, how much is sold, things like
12 that.

13 And this chart came out of the
14 information that they have gathered, and they
15 do use NASS numbers quite a bit in there, but
16 I don't know the source of all of their
17 numbers.

18 Q Okay. And did you prepare this
19 yourself?

20 A No. I took it off of the handbook
21 that was just recently published.

22 Q Okay. And that's the handbook

1 from the Cherry Marketing Institute?

2 A Yes; yes.

3 MS. DESKINS: Okay. I have no
4 further questions.

5 THE WITNESS: I pulled it off
6 yesterday. That's how new it is.

7 MS. DESKINS: Okay. All right.
8 Thank you.

9 JUDGE CLIFTON: Now those of you
10 who are not part of the Agricultural Marketing
11 Service team, and not part of the Cherry Board
12 team, you're still welcome to ask any
13 questions you have of any witness, including
14 Mr. Rowley. So if you have questions, either
15 to draw out some aspect of his testimony that
16 needs clarification, or because you have a
17 particular topic that hasn't been touched on
18 yet, and you know he knows about it, you're
19 welcome to do that.

20 So who will ask the next questions
21 of Mr. Rowley?

22 MR. HEDIN: Your Honor, I forgot

1 one question.

2 BY MR. HEDIN:

3 Q Ray, do you think that when this
4 order was promulgated in its original form,
5 that people understood what was going to
6 happen with grower certificates and how they
7 were going to be devalued, as they are?

8 A You know, I was going to write
9 that in. I didn't get to it. I was not one
10 of the original founders of this order. My
11 father was. And I've talked to him two or
12 three times about this subject, as we've gone
13 through this whole amendment process and
14 preparing for it.

15 And what I've gathered from him,
16 and others like Tom Facer and Roy Hackert, and
17 some of those that were the original founders
18 of this order, were that they never imagined
19 restriction percentages where they are.

20 But they also didn't imagine new
21 markets and new products to go against those
22 restrictions. Because there's a lot of people

1 out there trying to get new markets and new
2 products. As the old five plus one pack and
3 pie filling, the way the United States
4 consumers and consumers throughout the world
5 consume different cherries, you know, they
6 never imagined that we would be in this sort
7 of a--a place.

8 Now--and so I don't think they
9 really thought through--and I'm not faulting
10 them because they--through an awful lot.

11 Okay? I never--I don't think that they ever
12 thought through what would happen with top
13 line and bottom line certificates, the way we
14 handle them today.

15 Now, you know, as we try and find
16 new markets, and new products, and exports,
17 those restriction percentages aren't as
18 devastating as they might have been 15 years
19 ago, or whenever this market order was
20 started, and there was mainly a pie fill
21 business. And so, you know, the industry has
22 changed an awful lot since then.

1 Q Does this amendment bring us back
2 closer to--or back to the original conception
3 of how diversion credits would be employed?

4 A According to my father, yes.
5 Okay? And like I said, he was there at the
6 inception of this order. I said: Why didn't
7 you put this in at the first? And he says:
8 Well, we never thought about it, but if we
9 would a thought about that, we would have.
10 So, you know, that's his comment.

11 MR. HEDIN: Thank you.

12 JUDGE CLIFTON: Who else has
13 questions for Mr. Rowley?

14 (No response)

15 JUDGE CLIFTON: Mr. Rowley, is
16 there anything else you'd like to add?

17 THE WITNESS: No.

18 JUDGE CLIFTON: Now do you want to
19 keep your exhibit, or do you want to share it,
20 your--the one you testified from?

21 THE WITNESS: If somebody needs
22 one of these, it's all colored up, they can

1 have it; okay?

2 JUDGE CLIFTON: Did you end up,
3 Mr. Hill, with what you need?

4 MR. HILL: I have what I need, and
5 I would like to admit No. 18 into evidence.

6 JUDGE CLIFTON: Is there any
7 objection?

8 MS. DESKINS: No objections.

9 JUDGE CLIFTON: Exhibit 18 is
10 admitted into evidence.

11 (Whereupon, Exhibit No. 18,
12 previously marked for
13 identification, was received in
14 evidence)

15 MR. HILL: You can leave it there
16 for the next witness.

17 JUDGE CLIFTON: Good thinking.
18 That's great. Thank you so much, Mr. Rowley.

19 (Witness excused)

20 JUDGE CLIFTON: It's almost 10:30.
21 Why don't we take a break. Would you like--

22 MR. HEDIN: Your Honor, we have

1 some people from Washington who want to get
2 off as soon as possible, and we have the
3 manager of Payson Fruit Growers, who has a
4 commitment at 11:00. So if we could--I think
5 we could probably do both before 11:00.

6 JUDGE CLIFTON: We can do those
7 before we take a break.

8 Is there anybody that needs a
9 comfort break, right this minute?

10 (No response)

11 JUDGE CLIFTON: No. We can go
12 forward. You may call your next witness, Mr.
13 Hill.

14 MR. HILL: I call Mark Hawkins.

15 MR. HAWKINS: B. Bart.

16 MR. HILL: Oh.

17 MR. HAWKINS: Your Honor, do I
18 stop here, or do I come here?

19 JUDGE CLIFTON: Please have a
20 seat. Thank you.

21 MR. HAWKINS: Thank you.

22 JUDGE CLIFTON: Please state and

1 spell your full name.

2 MR. HAWKINS: My name is Barton,
3 B-a-r-t-o-n. W. Hawkins, H-a-w-k-i-n-s.

4 JUDGE CLIFTON: All right. And
5 how are you called by friends?

6 MR. HAWKINS: Most commonly would
7 be "Bart."

8 JUDGE CLIFTON: That makes me
9 wonder what else but--

10 (Laughter)

11 MR. HAWKINS: We'll limit it to
12 "Bart" for this purpose.

13 JUDGE CLIFTON: Would you raise
14 your right hand.

15 WHEREUPON,

16 BARTON W. HAWKINS
17 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
18 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
19 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
20 TESTIFIED AS FOLLOWS:

21 JUDGE CLIFTON: Mr. Hedin.

22 BY MR. HEDIN:

1 Q Bart, can you describe for us, a
2 little bit, your positions in the industry and
3 your membership on the various boards?

4 A Yes. I am a cherry grower; also a
5 cherry processor. I currently serve as the
6 grower representative on the CIAB for the
7 State of Washington. Been involved in this
8 industry for just barely under 30 years, and
9 was actually on the original committee that
10 formed this order.

11 Q And would you consider yourself as
12 a small or a large grower by the definition of
13 the USDA?

14 A By that definition, we would be--I
15 would be a larger grower.

16 Q Okay. And can you name for us the
17 handling entity.

18 A Yes. It would be Northwest Tart
19 Cherry, Incorporated.

20 Q Do we need that spelled, Your
21 Honor.

22 JUDGE CLIFTON: Please.

1 THE WITNESS: N-o-r-t-h-w-e-s-t
2 C-h-e-r-r-y, I-n-c.

3 JUDGE CLIFTON: And was the word
4 "tart" in there?

5 THE WITNESS: Did I leave that
6 out? Northwest T-a-r-t. I beg your pardon.

7 JUDGE CLIFTON: okay. And
8 Northwest, it's all one word and the "w" is
9 small?

10 THE WITNESS: Yes.

11 JUDGE CLIFTON: Okay.

12 BY MR. HEDIN:

13 Q In the past, have you engaged in
14 in-orchard diversion activities as a grower?

15 A Yes. I have.

16 Q Can you explain the situations in
17 which you did so, and why you did so.

18 A Yes. It was because the situation
19 was a very large crop. There was concern with
20 how we were going to comply with the amount
21 that we needed to restrict ourselves to, and
22 at that point we decided one of the tools we

1 were going to use was to divert them right
2 there in the orchard.

3 Q And if I can ask you to put on
4 your handler's hat for a moment. When
5 Northwest Tart Cherry used those diversion
6 credits, was it happy with that structure?

7 A Could I--would you allow me just
8 to back up a little teeny bit to help answer
9 that question.

10 Q Certainly. This is going to
11 expose my ignorance, I guess, or my lack of
12 understanding. When we originally formulated
13 this order, it was absolutely our intent that
14 in-orchard diversion would have the same
15 value, pound for pound, of the other forms of
16 diversion.

17 And so when all of a sudden, we
18 came to the realization that we didn't get
19 full credit for the pounds that were put on
20 the ground, it was met with, at first, almost
21 unbelief, couldn't imagine that that could
22 ever be possible. Shock. Very disgruntled.

1 Very upset, not pleased, not a good thing.

2 It's not fair.

3 Q In doing that, do you continue to
4 use those diversion credits, orchard diversion
5 credits today?

6 A We have ceased because of a
7 complete lack of unfairness.

8 Q Okay. So you've opted for other--
9 the post-harvest diversion credits that we've
10 talked about?

11 A Yes.

12 Q Okay.

13 A May I add to that, that if it
14 were, in what our estimation would be fair, in
15 other words, pound for pound, or bottom line,
16 I think we would implement that tool. But the
17 way it currently exists, or has existed
18 recently, it makes it so ridiculous unfair,
19 that all the value for doing it, in our
20 estimation, has gone.

21 Q Okay. Do you anticipate that you
22 would see different responses, depending on

1 crop size, and if so, what would those be?

2 A Yes. It's been well-stated
3 before. Small crop, probably that tool will
4 not be used on very large crops, because I do
5 view that as a last-resort tool. But on very
6 large crops, I would think it would be
7 implemented, and it would be implemented if we
8 can get this amendment through and make it
9 fair.

10 Q Okay. I know, Bart, that you're
11 one of three handlers, and various growers in
12 Washington. Can you describe a bit, the
13 nature of the tart cherry industry in
14 Washington, and do you think you can speak for
15 some of your colleagues there?

16 A Sure. Very limited tart cherry
17 industry in the State of Washington. As Perry
18 mentioned, there are three handlers.
19 Interesting perhaps to note is we used to all
20 work together as, as one company, and then as
21 we grew and it became a little cumbersome, we
22 parted company, friendly, but just decided it

1 was better for each of us to pursue our own
2 course. It became a little cumbersome, as big
3 as we were.

4 And so we're very close. We're in
5 the same proximity. We're within 30 miles of
6 each other.

7 I know everyone in the industry
8 well. They, me. We're a very close-knit
9 group, and yes, I could speak for the State of
10 Washington.

11 Q Okay. Can you just recount what
12 some of the others have said about this
13 amendment process.

14 A I think it would be safe to say
15 that we are all of the opinion that the way it
16 currently exists is not correct, is not fair,
17 and is not what we thought was the original
18 intention. We would all like to see this
19 amendment put in place, to bring it back to
20 the way we thought it really originally was.

21 Q And do you concur with Mr. Rowley
22 that grower prices will be advanced by

1 implementing this change?

2 A Net effect will be the betterment
3 of grower prices. Yes.

4 MR. HEDIN: Good. No further
5 questions, Your Honor.

6 JUDGE CLIFTON: Mr. Hill.

7 MR. HILL: Just one question.

8 BY MR. HILL:

9 Q Just one question. You did
10 mention that you're a grower and a processor;
11 correct?

12 A Yes.

13 Q And you did say that you're a
14 large grower but--correct?

15 A Yes.

16 Q As a processor, though, are you--
17 would you say you're large and small? This
18 is--there's a different definition. Now we're
19 talking about 7 million, more or less.

20 A \$7 million of--

21 Q Gross receipts.

22 A Of gross receipts. That's going

1 to vary, year by year, but--but most time, we
2 would not meet that. We would be small, then.

3 MR. HILL: Okay. That's all I had
4 to ask you. Thank you.

5 JUDGE CLIFTON: Ms. Salehi.

6 BY MS. SALEHI:

7 Q Mr. Hawkins, thank you very much
8 for coming today. I'm Parisa Salehi with USDA
9 and I Just wanted to ask you, if you see a
10 potential adverse impact on anyone, if this
11 amendment is to pass?

12 A The only adverse effect that I
13 could potentially see--and again I believe
14 this is adverse only to a very limited number--
15 -would be the same event that Mr. Rowley
16 described. Those who depends heavily on
17 export credits, they have a pretty good deal
18 right now, and I think out of selfishness
19 would be inclined to not see this pass.

20 The industry at large, across the
21 board, there would be no ill effects that I--
22 that I can foresee.

1 MS. SALEHI: Thank you.

2 MR. ROWLEY: Can I ask for
3 clarification on that one issue.

4 JUDGE CLIFTON: You may. Would
5 you come to the podium, Mr. Rowley.

6 MR. ROWLEY: You said exports, but
7 that's handler exporting, not grower
8 exporting; correct?

9 THE WITNESS: That's correct.
10 That's what I meant when I said that.

11 MR. ROWLEY: That's what I
12 thought.

13 JUDGE CLIFTON: Mr. Engeler.

14 MR. ENGELER: I have just a
15 couple quick questions here. I know you're
16 anxious to head back to Washington, so I
17 won't--

18 THE WITNESS: Thank you.

19 MR. ENGELER: --ask you a lot.

20 BY MR. ENGELER:

21 Q But from a handler perspective, I
22 had a couple questions, and it's been

1 testified earlier today, that the restricted
2 percentage on the final volume control
3 percentages would increase, if this proposal
4 were implemented, and there were a lot of
5 grower diversions.

6 And I was wondering if your
7 perspective as a handler, whether that would
8 impact your ability to have enough supply of
9 cherries to meet your needs?

10 A Thank you. Good question. I think
11 it's been mentioned, while the actual
12 percentage number would increase, the overall
13 net effect, that has no negative impact. In
14 fact, should this amendment be put into place,
15 it does nothing but good. It makes it easier
16 to comply. There will always be plenty of
17 cherries. Puts the industry at large on a
18 more level playing field, and I see nothing
19 but good about it.

20 Q Okay. Thank you. Just one other
21 from a handler perspective. If this proposal
22 goes into effect, it was testified in

1 Michigan, that it would not likely impact the
2 preliminary percentages, because at that point
3 you wouldn't know what the grower diversion
4 activity would be.

5 But if there were a lot of grower
6 diversion activity it would impact the final
7 percentages. And if that were to occur, the
8 final percentages could differ quite a bit
9 from what the preliminary percentages were.

10 And I was wondering if that might
11 cause any kind of planning problems for you as
12 a handler?

13 A I don't know that that would--the
14 change is likely to occur, as you mentioned.
15 I don't foresee there being any--I don't see
16 any negative issues that would impact us, as
17 far as how we deal with our compliance plan,
18 etcetera. I really believe that to make it so
19 that these, the cherries that go on the ground
20 have equal value--I really see that as an
21 across-the-board positive change, and I'll
22 state it again.

1 I really believe that was the
2 original intent. The fact that it's not now
3 was a real surprise, and just something that
4 happened because of our lack of ability to
5 foresee the future. Unintended negative
6 consequence.

7 MR. ENGELER: Thank you. That's
8 all I have.

9 THE WITNESS: Thank you.

10 JUDGE CLIFTON: Mr. Johnson.

11 BY MR. JOHNSON:

12 Q Hi, Bart. Just a quick
13 clarification. You said that this, if this
14 proposed amendment goes through, that it might
15 be injurious to those who are currently
16 exporting and have developed new markets, and
17 are exporting product.

18 Is that because they would no
19 longer be able to get discounted cherries?

20 A Let me state that I take advantage
21 of export credits, new market credits, new
22 product credits. The only potential, and

1 negative impact, that I foresee, could be to
2 a very limited, very. very small number who,
3 almost exclusively, export their products.

4 Hence, in my estimation, they have
5 an unfair advantage over the rest of the
6 industry that unilaterally take, you know,
7 takes advantage of all of 'em.

8 And the only reason that I think
9 that would perhaps be negative to them is
10 because it takes them from what I would view
11 a current unfair advantage, and brings it back
12 level with everyone else. That's the only
13 potential negative that I can see.

14 And if they were honest in their
15 assessment of what's good for the whole
16 industry, they would be in favor of this as
17 well.

18 Does it potentially slightly
19 injure an unforeseen advantage that they have
20 now? Possibly.

21 MR. JOHNSON: Okay. Thanks, Bart.

22 JUDGE CLIFTON: Mr. Johnson, don't

1 leave. To his question, though, are they
2 currently advantaged because of so many
3 cherries coming to them at a discounted price,
4 or--and they will lose that--or is there some
5 other reason for the advantage they currently
6 enjoy?

7 THE WITNESS: You know, I'm not
8 in that position, so it's a little bit hard
9 for me to fairly evaluate, you know, what
10 their situation is. I don't know that I could
11 honestly--I don't know that I could honestly
12 tell you that. Perhaps that potential exists,
13 because since there's not fair, what I would
14 call fair value for putting them on the
15 ground, well, okay, you'll take them, and so,
16 yes, perhaps they do have a source of
17 discounted cherries.

18 But I'm really not in that
19 position, so I don't know that I could
20 actually, appropriately address that.

21 MR. JOHNSON: Thanks, Judge.
22 Thanks, Bart.

1 JUDGE CLIFTON: Mr. Hedin.

2 BY MR. HEDIN:

3 Q Mr. Hawkins, are you--do you use
4 all of your credits internally, for your
5 organization, generally? Your post-harvest
6 credits. I'm sorry.

7 A Generally.

8 Q And are you--

9 A I don't know that that's always
10 been exactly the case. But generally, yes.

11 Q And are you aware that these
12 certificates are transferrable amongst
13 handlers?

14 A Yes.

15 Q Okay. Is there a market for those
16 credits?

17 A The credits do transfer, do change
18 hands. Their value of course varies year to
19 year, depending on circumstances. But yes,
20 they transfer.

21 Q When you were describing the
22 inequity that an exporter might have, is that

1 because they have more than they need and are
2 able to sell them, or transfer them to other
3 handlers, and would be less able to do so
4 under this? Or there might be a weaker
5 market?

6 A I suppose that potential exists;
7 yes.

8 Q So that it's the impact on the
9 marketability of their credits--or I shouldn't
10 say that. Is it that there is an impact on
11 the marketability of their credits, that could
12 cause them some consternation?

13 A I don't know, honestly, that I'm
14 in a real good position to fairly assess that.
15 I would have to know more about the specifics
16 of their business. And I don't.

17 Q Okay.

18 A In all honesty, I hadn't really
19 thought that there would be a disadvantage to
20 anyone, prior to having that brought up to me.
21 So I don't know.

22 MR. HEDIN: Okay. That's all,

1 Your Honor. Thank you.

2 JUDGE CLIFTON: Who else has
3 questions for Mr. Hawkins?

4 (No response)

5 JUDGE CLIFTON: Is there anything
6 you'd like to add?

7 THE WITNESS: Just thank you for
8 the opportunity to come and present our views,
9 and our thoughts on the matter. Thank you.

10 JUDGE CLIFTON: Thank you. You
11 may step down.

12 (Witness excused)

13 JUDGE CLIFTON: You may call your
14 next witness.

15 MR. HILL: Thanks, Bart. Yes.
16 I'd like to call Chad Rowley to the stand,
17 please.

18 JUDGE CLIFTON: Let's go off
19 record while the statements are distributed.

20 (Discussion off the record)

21 JUDGE CLIFTON: All right. We're
22 back on record at 10:48.

1 Please state and spell your full
2 name.

3 MR. ROWLEY: Chad Rowley. C-h-a-d
4 R-o-w-l-e-y.

5 JUDGE CLIFTON: Thank you. Would
6 you raise your right hand, please.

7 WHEREUPON,

8 CHAD ROWLEY
9 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
10 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
11 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
12 TESTIFIED AS FOLLOWS:

13 JUDGE CLIFTON: Mr. Hill.

14 BY MR. HILL:

15 Q Good morning, Mr. Rowley.

16 A Good morning.

17 Q I should call you Chad Rowley
18 because there's a few of you here.

19 MR. HILL: Your Honor, I would
20 like to mark this as Exhibit No. 19, if I
21 could.

22 JUDGE CLIFTON: It is so marked.

1 (Whereupon, Exhibit No. 19 was
2 marked for identification)

3 BY MR. HILL:

4 Q Mr. Rowley, I see that you have a
5 document that you have distributed. If you'd
6 like to read it into the record.

7 A Okay. Thank you. My name is Chad
8 Rowley. I am the general manager of Payson
9 Fruit Growers in Payson, Utah. Our company
10 handles between 20 and 30 million pounds of
11 tart cherries annually. The reduced value of
12 in-orchard diversion credits has been a
13 frustration or many years.

14 I believe the procedures that we
15 currently operate under were really an
16 oversight, or an unintended consequence of the
17 present marketing order.

18 Handlers and growers have come to
19 understand the inequalities of the current
20 system and have worked together, with USDA,
21 tart cherry handlers and processors, to make
22 this change, proposed change.

1 As a handler of tart cherries--
2 there's an error there, sorry--I support the
3 proposed amendment for the following reasons.

4 Number 1. Growers will more
5 profitably share the responsibility to manage
6 crop size in large crop size years. Utah
7 Growers have diverted more in-orchard, on a
8 percentage basis, than any other growing
9 region in the country.

10 This proposed amendment will be
11 more equitable to them for their efforts to
12 comply with the marketing order.

13 Number 2. Handlers will have a
14 stronger incentive to encourage in-orchard
15 diversion when needed. Smaller handlers who
16 may not be involved with exports and new
17 products will have a viable alternative to be
18 more able to comply with their restrictions.

19 Number 3. Payson Fruit Growers
20 will better able to--will be better able to
21 meet its restriction obligations using the
22 pound-for-pound Grower Credits, rather than

1 credits that have been discounted by the
2 restriction percentages.

3 For Payson Fruit Growers, in-
4 orchard diversion is our last choice. We
5 focus on market expansion, exports and new
6 products, which are our first choice to deal
7 with the requirements of the marketing order.

8 Number 4. Growers will be treated
9 equally with handlers as surplus fruit is
10 removed from the supply chain, using post-
11 harvest diversion certificates, or in-orchard
12 grower diversion certificates.

13 Number 5. A fair market value
14 will be paid to growers for their in-orchard
15 diversion activities.

16 6. As the crop surplus gets
17 larger, there will be more financial incentive
18 for growers to participate with in-orchard
19 diversion activities. Properly balanced
20 inventories will stabilize price and help the
21 entire tart cherry industry become more stable
22 and sustainable.

1 7. The current system decreases
2 incentives for growers to participate with in-
3 orchard diversion activities as the crop gets
4 larger. This is a serious problem with the
5 current order.

6 And 8. I know that grower
7 returns for diversion credits will increase
8 with this amendment.

9 Mainly, these were my notes to go
10 on, but I thought I'd print 'em for you, so
11 you've got 'em, so--

12 Q I was going to ask, Chad, after
13 hearing a lot of the questions and the
14 discussions today, and this was prepared, I
15 presume yesterday, you want to add anything?

16 A Mostly, we don't grow cherries to
17 put 'em on the ground. It's a tool in a large
18 crop season, when it looks like there's going
19 to be a lot--a high restriction, that we all
20 need to participate with that.

21 Handlers have their ways and
22 methods, through new products, new markets,

1 new credits, exports--those are all viable
2 options, and growers, in many cases, try to
3 help with that. But we--the ratio, the
4 formula the top end goes through takes a pound
5 and makes it worth a third of a pound, or a
6 fourth of a pound, or maybe half of a pound.
7 And so it's just not fair, and never has been
8 since this order was started 11, 12 years ago.

9 Growers, in some areas, that's
10 their only way to participate. They put it on
11 the ground and get a third value. And as
12 another witness says, another witness said, it
13 takes away the fairness, and so they refuse to
14 do it.

15 And so then we end up with a huge
16 supply of cherries that I think people would
17 have participated in controlling, and we end
18 up doing things that--well, we go to the
19 Government and ask for help.

20 We go to other sources and ask for
21 help, when I think we would have taken care of
22 some of the problem ourselves, if we--if it

1 would--if the incentive were fair, across the
2 board.

3 So I've always felt this was the
4 right way to go, and I'm glad we're to the
5 point of an amendment process where it can
6 hopefully be approved, and make it fair,
7 across the board, for growers and handlers.

8 JUDGE CLIFTON: Mr. Hedin.

9 BY MR. HEDIN:

10 Q Chad, you heard Ray discuss, a
11 little bit, the savings that would be seen by
12 growers with this. From a handler's
13 perspective, what kind of savings could be
14 generated?

15 A Well, half the cost, or half,
16 nearly half the value of cherries is in
17 processing, pitting, processing them, and then
18 you add storage to it, which adds up, years
19 after year. And so I would say that at least
20 half of your value is in the processing, and
21 then it depends on how many years it stores
22 after that.

1 It could even exceed half of the
2 value, gets tied up in processing.

3 Q So if you had savings generated
4 from not carrying inventory, who benefits from
5 that, and how would they benefit?

6 A Well, Payson Fruit Growers is a
7 grower-owned co-op, so in our case the growers
8 benefit. We're grower-owned, and so the
9 growers--I assume that handlers and growers
10 would both benefit, across the country. But
11 in our certain situation, all growers would
12 benefit.

13 Q So it's direct returns back to the
14 growers?

15 A Yes. Direct savings; yes.

16 MR. HEDIN: No further questions
17 at the moment.

18 JUDGE CLIFTON: Who else has
19 questions for Mr. Chad Rowley?

20 Mr. Engeler?

21 MR. ENGELER: Yes. I have a
22 couple.

1 BY MR. ENGELER:

2 Q First of all, a few minutes ago,
3 you mentioned that you believe that if this,
4 these amendments had been in effect, that you
5 may have reduced the industry's occurrence of
6 asking for Government help, and for the
7 record, could you clarify what you meant by
8 that. I believe you probably meant asking for
9 USDA purchases, and so forth, but--

10 A That's what I--that's what I
11 referred to. In our plan--our plan has always
12 been to work with the growers, as many
13 certificates of new product, new development
14 as we can. And then we ask some of our
15 growers to put a certain percentage on the
16 ground. And as a state, we've done that, I
17 think fairly responsible.

18 I think other states have not done
19 that, maybe because it appears to be unfair.
20 So then we get large surpluses in storage,
21 which puts pressure in other areas, to find
22 how are we going to sell this. We've put them

1 up, we've put storage into them, growers
2 didn't put any on the ground, so now what are
3 we going to do with them? A logical option is
4 go to the Government and ask for help, for a
5 USDA purchase.

6 Q Thank you. And I have a couple
7 other questions. I'm going to ask you the
8 same questions I asked the previous witness
9 regarding the impact that this might have on
10 your handling operation from the standpoint of
11 it the restricted percentage is higher, or to
12 the extent that the restricted percentage
13 would be higher, if this proposal is
14 implemented and growers divert product, would
15 that--do you see that as a negative, or do you
16 believe that might impact your ability to have
17 enough supply to meet your handlers' needs?

18 A I do not see it as a negative,
19 because the total doesn't change. The total
20 pounds does not change in the formula. None
21 of us like to see restrictions. We don't like
22 to see it go higher or lower. But we like to

1 see it go lower. We don't like to see it go
2 higher. But we--but the total pounds doesn't
3 change, and I feel like we will meet our
4 supply--we'll meet our supply in the
5 marketplace.

6 We will do that, one way or
7 another, with either in-orchard diversion
8 activities, or through new market, new credit
9 diversion activities.

10 Q Okay. Thank you. And then the
11 other question was if this proposal's
12 implemented, and in a large crop year, there
13 is a large amount of grower diversion
14 activity, and to the extent that the final
15 percentages would change significantly from
16 the preliminary volume control percentages,
17 would that negative impact your ability as a
18 handler, to plan for the year?

19 A I think the change is difficult to
20 adjust to. That the large change is hard. We
21 sit down in that meeting, in June, and try to
22 come up with the best number we can come up.

1 Then we go out and estimate our
2 different sources of diversion activity, and
3 part of it is in-orchard, and we are working
4 hard as an industry, as was mentioned earlier,
5 to try to reduce the change, try to become
6 more accurate in our estimating, because at
7 point, we'll ask growers, as part of our plan,
8 to put some on the ground, which, again, is
9 our last option. And so we hope we can get
10 better at predicting the crop. That's a real
11 key to everything we do, not just this
12 amendment, but everything we do. That crop
13 prediction is very important.

14 If the change goes up, it means
15 we're going to have more cherries and
16 restriction. It does. But with this
17 amendment, that in-orchard diversion will have
18 the same value as those export certificates,
19 and that's important. That the value, that
20 they remain the same, is so important. That
21 way, if a grower did put something on the
22 ground, and there was change, those

1 certificates have a equal value.

2 Not all of a sudden did the
3 percentage go up, and the value maybe went
4 from 50 percent down to 35 or 30 percent--they
5 stayed one on one, and that's one a the keys
6 to this amendment, is they stay equal, even if
7 there is change. And there will be change.
8 We'll never hit it "right on," but we want to
9 be close.

10 But the fact that there is change,
11 and there always probably will be, even argues
12 for this amendment to be passed. That the
13 growers will be treated fairly.

14 Q So do you believe you might be
15 able to anticipate that there might be a
16 larger amount of grower diversion, and plan
17 accordingly, in those types of years?

18 A Again, we don't like large amounts
19 of grower diversion, but we like planned
20 amounts, something that we plan as part of our
21 plan, and we'll anticipate right after that
22 meeting in June, as we estimate our crop, and

1 plan what percentage needs to be part of a
2 grower in-orchard diversion plan for our
3 company.

4 Q So it'll be safe to say you feel
5 like you could plan for a general level of
6 grower diversion?

7 A It adds better--it makes planning
8 easier for us; yes.

9 Q Okay.

10 A I believe it makes planning--you
11 know, it's going to be one to one value, and
12 you understand that. No matter what the
13 change, a pound is a pound, instead a pound is
14 a third of a pound, or something.

15 Q Yes, I understand that part of it,
16 but I guess what I was getting at is that the
17 change between the preliminary percentage,
18 volume control percentages, and the final
19 percentages--that might be, if this proposal
20 goes through, that that change might be
21 significant. That's the aspect I was getting
22 at.

1 A I don't--I guess maybe I don't
2 understand your question. But I don't see a
3 big problem. We live with that change. We
4 anticipate--we hope it's minimal, but when the
5 final percentages are there, we all adjust our
6 plan and figure out how we're going to make it
7 work. Cause in-orchard's already done. At
8 that point, all we have ahead of us are
9 exports, new markets, and other things that we
10 have to deal with at that point, so I don't
11 see it as being a large negative to this
12 amendment.

13 MR. ENGELER: Okay. Thanks.

14 JUDGE CLIFTON: What other
15 questions are there for Mr. Chad Rowley?

16 Mr. Hill.

17 BY MR. HILL:

18 Q Ultimately, regardless of whether
19 there's a change in the amendment, the
20 restriction percentage can go up, depending on
21 whether there's more cherries out in the field
22 anyway; correct?

1 A That's correct.

2 Q So you're not really worried about
3 that. You're worried about how much your
4 diversion credit is worth at the end of the
5 day?

6 A That's correct. And that's, to me,
7 is what this amendment's about, is what--how
8 much that is worth.

9 MR. HILL: All right. That's all
10 I have.

11 JUDGE CLIFTON: Ms. Deskins.

12 BY MS. DESKINS:

13 Q Good morning, Mr. Rowley.

14 A Good morning.

15 Q In the beginning of your
16 testimony, you referred to the formula, and
17 could you just state for the record what
18 formula you're referring to.

19 A It'd be optimum supply formula
20 that was explained earlier.

21 MS. DESKINS: Thank you.

22 JUDGE CLIFTON: What other

1 questions are there for Mr. Rowley?

2 Mr. McFetridge.

3 BY MR. MCFETRIDGE:

4 Q Good morning, Mr. Rowley.

5 A Good morning.

6 Q I just wanted to ask a point of
7 clarification. Do you remember the Small
8 Business Administration definition for a
9 larger handler, that was specified earlier, of
10 \$7 million of annual receipts?

11 A Yes.

12 Q Would you say Payson Fruit Growers
13 is a large or small handler, based on that
14 definition?

15 A It'd be a large handler.

16 Q All right.

17 JUDGE CLIFTON: Would that be true
18 if you limited it to just the tart cherry?

19 THE WITNESS: That's what we do,
20 is tart cherry.

21 JUDGE CLIFTON: Okay. And you
22 don't have other fruits?

1 THE WITNESS: No. We'd be a large
2 handler.

3 MR. MCFETRIDGE: All right. Thank
4 you very much.

5 JUDGE CLIFTON: What other
6 questions are there of Mr. Chad Rowley?

7 (No response)

8 JUDGE CLIFTON: What would you
9 like to add?

10 THE WITNESS: Thank you. Thanks
11 for being here, giving us a change to share
12 our thoughts, and hopefully share the concern
13 we have that this can be fixed, and become
14 more equitable for everyone.

15 JUDGE CLIFTON: Thank you.

16 MR. HILL: I would like Exhibit 19
17 marked into evidence, to be admitted.

18 JUDGE CLIFTON: Is there any
19 objection to Exhibit 19 being admitted?

20 MS. DESKINS: No objection.

21 JUDGE CLIFTON: Exhibit 19 is
22 hereby admitted into evidence.

1 (Whereupon, Exhibit 19, previously
2 marked for identification, was
3 received in evidence)

4 JUDGE CLIFTON: All right. Is
5 this a good time for, say, a five or a ten
6 minute break?

7 MR. HILL: Yes.

8 JUDGE CLIFTON: All right. Which
9 do we want?

10 MS. DESKINS: Ten.

11 MR. HILL: Ten, please.

12 JUDGE CLIFTON: Ten. All right.
13 Please be back and ready to go at 11:15.

14 (Whereupon, a recess was taken
15 from 11:05 a.m. to 11:22 a.m.)

16 JUDGE CLIFTON: All right. We're
17 back on the record at 11:22.

18 Mr. Hill, you may call your next
19 witness.

20 MR. HILL: I'll be calling Thad
21 Rowley.

22 JUDGE CLIFTON: Good morning.

1 Please state and spell your full name.

2 MR. ROWLEY: My name is Thad
3 Rowley. T-h-a-d R-o-w-l-e-y.

4 JUDGE CLIFTON: Thank you. Please
5 raise your right hand.

6 WHEREUPON,

7 THAD ROWLEY

8 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
9 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
10 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
11 TESTIFIED AS FOLLOWS:

12 JUDGE CLIFTON: Thank you. Mr.
13 Hill.

14 BY MR. HILL:

15 Q Okay. Mr. Rowley, could you
16 please just tell us a little bit about
17 yourself, what you do, the business, and so
18 forth.

19 A Okay. I'm a tart cherry grower.
20 Your definition of a large or small grower.
21 We have been on the side of the larger grower.
22 We've been on the side of the small grower.

1 So maybe we could say we are a medium-size
2 grower.

3 I am vice president of Operations
4 of Rowley South Ridge Farms. It's a family-
5 owned business with me and my brothers, and my
6 dad is still involved with us, as well, a
7 little bit. We farm about 500 acres of tart
8 cherries.

9 JUDGE CLIFTON: Would you spell
10 all of the parts of the name, Rowley South
11 Ridge Farms.

12 THE WITNESS: You bet. Rowley.
13 R-o-w-l-e-y, apostrophe S, South, S-o-u-t-h,
14 Ridge, R-i-d-g-e-, Farms, F-a-r-m-s.

15 And so that's what we do. We also
16 grow a small amount of apples, a small amount
17 of tart cherries. We're also heavily involved
18 with agritourism, with the farm market, and
19 that's kind of the aspects of our business.

20 BY MR. HILL:

21 Q Okay. So we're here talking about
22 diversions, obviously.

1 A Yes.

2 Q So have you had any dealings with
3 the diversion process, in-orchard?

4 A Yes. We have in-orchard diverted
5 cherries, yes, in the past.

6 A And have you run into this
7 problem? What has been your experience with
8 the regulation as it is when you've had to in-
9 orchard divert?

10 A I'm going to--I'm going to say
11 that we were also, as Mr. Hawkins stated, we
12 were a little bit ignorant, I guess, of the
13 value of in-orchard diversion for a long time,
14 and were disappointed that it did not have the
15 equal value that the bottom-line credits, like
16 the exports, and others, have.

17 And so--but yes, as we have
18 diverted, you know, and as a member of Payson
19 Fruit Growers--I also sit on the board of
20 Payson Fruit Growers. As a member of Payson
21 Fruit Growers, at the beginning of the season,
22 we make a plan, as our manager, Chad, stated,

1 on how many--and the percentage of cherries we
2 are going to divert, and we have followed that
3 plan in the past, which would be the reason
4 why we have dropped cherries on the ground and
5 not, you know, put them on the market. We've
6 tried to follow the plan, so--

7 Q So how do you see this working for
8 you, if this amendment gets passed?

9 A If this amendment gets passed, as
10 a grower, I think it gives us an opportunity
11 to stand on equal footing of other handlers in
12 the industry, and to be able to get the value
13 of the diverted cherries that we've dropped on
14 the ground.

15 Q Now have you talked to other
16 growers about this issue?

17 A I have, and I do sit on the Cherry
18 Industry Administrative Board as a handler
19 member for Payson Fruit Growers, and the
20 growers that I have talked to, in Michigan,
21 and here, in Utah, have almost unanimously
22 been in favor of it. I would say instead of

1 "almost," I would say exclusively have been
2 unanimately in favor of it.

3 Q Now you heard--were you here when
4 Mr. Hawkins was asked a question about does he
5 foresee any group being damaged by this--

6 A Yes, I was here.

7 Q And you heard his response;
8 correct?

9 A Yes. I did.

10 Q Would you agree with his
11 sentiment?

12 A I would agree with his sentiment,
13 and when--if I could add just a little bit.
14 I think the people that exclusively export
15 credits are able to sell those credits, as Mr.
16 Hedin stated, to other handlers, to cover
17 their diversion certificates, and I think that
18 is why they would be against the grower, you
19 know, being able to drop cherries on the
20 ground.

21 Q Now Mr. Ray Rowley was asked about
22 this. Do you also believe that the

1 regulations, as currently formatted, provides
2 a bit of a "moving target" on how many
3 cherries you need to put into circulation or
4 put on the ground?

5 A Absolutely "moving target." As
6 the--as you go through the harvest, as it gets
7 larger, smaller, the plan you made at the
8 first can either become a great idea or one
9 that you thought, well, maybe that wasn't such
10 a good idea. So yes, it is a moving target.

11 MR. HILL: Let's see here. I have
12 no further questions for this moment. I'll
13 think of some more.

14 JUDGE CLIFTON: All right. Who
15 next has questions for Mr. Thad Rowley?

16 MR. RAY ROWLEY: You can't let him
17 off that easy.

18 (Laughter)

19 JUDGE CLIFTON: Mr. Ray Rowley,
20 please come ask him something.

21 MR. RAY ROWLEY: Thad, I apologize
22 for not being in here for the onset.

1 BY MR. RAY ROWLEY:

2 Q But how do you decide, determine
3 whether or not you're going to do in-orchard
4 diversions?

5 A You know, like I stated earlier,
6 Payson Fruit Growers, as we meet together
7 after the June CIAB meeting, and the estimates
8 are put together, we come up with a plan on
9 how we are going to handle our projected
10 percentage of diversion, and that's kind a how
11 we determine it. So we try to follow that
12 plan.

13 Q Does Payson--to Mr. Engeler's
14 earlier questions of others--does Payson
15 change its requirement at the grower level as
16 the percentages change? Do they ask more of
17 you, or less of you, as those numbers go up?

18 A I'm trying to remember, and maybe
19 you can help me out, Ray, but I can't--I can't
20 remember, I--you know, we have said yes, maybe
21 we need to divert a little more, if you can,
22 or a little bit less, if you can. But I think

1 we do try to "hit that moving target" as the
2 season goes through.

3 Q Okay.

4 A Does that seem about correct to
5 you? I think that's what we try to do.

6 Q Okay. And it's generally then
7 that Payson is able to deal with those changes
8 in percentages in activities after the
9 harvest?

10 A Yes; yes. Payson Fruit Growers,
11 and being on the board, I am familiar with a
12 small amount of those, Chad, the manager is a
13 lot more familiar with what goes on there--but
14 yes, as a board member of Payson Fruit
15 Growers, that is something we actively
16 encourage, is export and, well, mostly new
17 market, a little bit of export and other
18 credits.

19 MR. RAY ROWLEY: Okay. Just a
20 moment, please.

21 No further questions, Your Honor.
22 Thank you.

1 JUDGE CLIFTON: Who else has
2 questions for Mr. Thad Rowley?

3 MR. HILL: I do want to ask one
4 more question.

5 BY MR. HILL:

6 Q And when we talk about this
7 "moving target," I want to make this clear.
8 As it currently sits, the diversion amount--I
9 mean--not diversion--I've a mindblock all of
10 a sudden. The restriction percentage can
11 change, regardless, whether you--as it
12 currently is, the restriction percentage can
13 change if there are cherries out there, and
14 this will not change that; correct?

15 A No; it won't change that part of
16 the marketing order.

17 Q So we're talking about, when we're
18 talking about a "moving target," we're talking
19 about compliance due to the restricted amount?

20 A Exactly.

21 Q The diverted--

22 A Yes.

1 Q The diverted amount; correct?

2 A Yes.

3 MR. HILL: Thank you.

4 JUDGE CLIFTON: Mr. Engeler.

5 BY MR. ENGELER:

6 Q I have just one quick question for
7 you.

8 A I was hoping to get let off the
9 hook; but that's okay.

10 Q This would be an easy question.
11 But do you consider that grower diversion is
12 a cost-effective way of dealing with an excess
13 supply?

14 A You know, I do. I do feel it is a
15 cost-effective way.

16 MR. ENGELER: Okay. Thanks.

17 BY MR. HILL:

18 Q I do want to ask, is there any--do
19 you have any reason to believe that small
20 businesses would be harmed by this amendment
21 to the order?

22 A No. I can't see how they'd be

1 harmed at all. I think it'd be an advantage.

2 Q And can you explain why you
3 believe so.

4 A I think in the past--and this has
5 already been stated--I think the handlers have
6 a lot of control over where the cherries go,
7 and the diversion process, and the credits,
8 and I think this puts growers, including small
9 growers, in the driver's seat, and, you know,
10 being able to have credits and to be able to,
11 you know, sell market value, the same value as
12 bottom-line credits would have.

13 Q So ultimately, you believe like
14 Ray Rowley, Bart Hawkins, and Chad Rowley,
15 that this is going to improve grower returns
16 from where they're currently--

17 A Yes. I do.

18 JUDGE CLIFTON: What other
19 questions are there for Mr. Thad Rowley?

20 (No response)

21 JUDGE CLIFTON: Is there anything
22 you'd like to add?

1 THE WITNESS: No. Just thank you
2 again, the same as the others, for listening
3 to us and hearing our testimonies.

4 JUDGE CLIFTON: Thank you.

5 THE WITNESS: Yes.

6 (Witness excused)

7 MR. HILL: Okay. We'll call Paul
8 Meredith, Your Honor.

9 JUDGE CLIFTON: Thank you.

10 Welcome. Please state and spell
11 your full name for me.

12 THE WITNESS: Paul Meredith. P-a-
13 u-l M-e-r-e-d-i-t-h.

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

16 WHEREUPON,

17 PAUL MEREDITH
18 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
19 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
20 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
21 TESTIFIED AS FOLLOWS:

22 JUDGE CLIFTON: Thank you. Mr.

1 Hill.

2 BY MR. HEDIN:

3 Q Yes. Mr. Meredith, how are you
4 doing this morning? I think it's still
5 morning.

6 A I'm nervous.

7 Q So I won't ask you too many
8 questions, then. But I will ask you if you
9 could please tell us a little bit about your
10 business, any boards, or any dealings that you
11 have with any of the committees.

12 A Sure. I'm running my brother's
13 farm right now, and I'm a school teacher. So
14 if you wanted a lesson in history, I could do
15 that right now, and I would enjoy that much
16 more than--than this.

17 Q Can you tell us the name of the
18 farm. Or should I ask you the name of the
19 school?

20 A It's Payson High School. The name
21 of the farm is Meredith Orchards. M-e-r-e-d-
22 i-t-h , Orchard, O-r-c-h-a-r-d-s.

1 And I am--my brother's in
2 Indonesia right now, and he'll be there for
3 another year, and so I am operating the farm.

4 Q Mr. Meredith, I don't think those
5 at the USDA realize how many teachers are
6 involved in the cherry industry. It seems to
7 be a requirement of being here. But can you
8 explain--you do supply to Payson Fruit
9 Growers; is that correct?

10 A Yes.

11 Q And have you engaged in any of the
12 orchard diversion activities that have been
13 described here before?

14 A Yes.

15 Q And what has been your reaction to
16 that process?

17 A Well, apparently, when we divert,
18 we get credit for part of what we divert.

19 Q And are you in favor of the
20 alteration of the amendment that we're talking
21 about?

22 A I'll say I am.

1 Q Good.

2 A I might also state, for the
3 question that you had, we are a tiny farm. We
4 have 34 acres. And we don't grow cherries to
5 put 'em on the ground.

6 Q And the diversion process in which
7 you do participate, is that after you've had
8 discussions with Mr. Chad Rowley at Payson,
9 before deciding to do that?

10 A Yes. I'm a member of the board of
11 directors at Payson Fruit Growers, and my
12 brother normally is, but he is not there, so
13 I am his replacement.

14 Q Okay. And is it your
15 understanding that the grower in-orchard
16 diversion process at Payson is the last, not
17 the first choice, that you guys make?

18 A I'm sure it would be. I'm sure
19 they'd rather pick cherries and sell 'em than
20 drop 'em on the ground.

21 MR. HEDIN: No further questions,
22 Your Honor.

1 BY MR. HILL:

2 Q You said you were running this for
3 your brother at the moment; correct?

4 A Yes.

5 Q Have you had occasion to talk with
6 your brother about this process?

7 A Oh, yes.

8 Q Could you--

9 A I've worked on the farm for years.
10 We've ran it together; yes.

11 Q So in your discussions with him--
12 what's his name, by the way?

13 A Melvin.

14 Q Melvin Meredith.

15 A Yes.

16 Q Could you tell us a little bit
17 about that discussion and how you would say he
18 feels about this.

19 A He's a 100 percent in favor of
20 this amendment. I might add, it only seems
21 fair, in a line of fairness, that if you drop
22 about 10,000 pounds of cherries on the ground,

1 you get credit for 10,000 pounds. I mean,
2 that's--in my mind, there's no other way to do
3 it, cause there's no fairness in giving credit
4 for something that--you know, giving partial
5 credit for what you do, because it's somewhere
6 along the line, we have to justify to the
7 people that are driving past our orchards, how
8 come we're dumping cherries on the ground,
9 cause a lot of people don't understand that,
10 and it certainly should be fair, that we get
11 full credit for what we put on the ground.

12 MR. HILL: Very good. I have no
13 more questions, Your Honor.

14 JUDGE CLIFTON: Thank you, Mr.
15 Hill.

16 Who else has questions for Mr.
17 Meredith?

18 Ms. Salehi.

19 BY MS. SALEHI:

20 Q Thank you for coming. I just
21 wanted to ask you, as a small grower, in years
22 that you have diverted cherries, what

1 percentage of your entire operation would you
2 say you have diverted? An estimate.

3 A I'm not sure of the exact
4 percentage. Two years ago, when we had the
5 really big crop, we dropped a lot on the
6 ground. I can't tell you a percentage of--of
7 that.

8 Q Okay.

9 A But it was quite a few.

10 Q And if this amendment passes, do
11 you see that percentage changing, or an
12 incentive for that percentage to change? Do
13 you see that?

14 A I'm not sure the percentage of
15 that would change, because we work with Payson
16 Fruit Growers, and they kind of ask us to, you
17 know, divert a certain amount. So even as a
18 small grower, we have to divert what they ask
19 us to, although we're never going to flood the
20 market with what we do. It might just be a
21 very small amount that we put into Payson
22 Fruit Growers, but we still have an obligation

1 to divert our little tiny amount, cause I
2 think that's the way it should be.

3 MS. SALEHI: Thank you.

4 JUDGE CLIFTON: Mr. Engeler.

5 BY MR. ENGELER:

6 Q Just one quick question here. If
7 this amendment, this proposed amendment is
8 approved, and do you believe that it would, in
9 years when you would divert, that your
10 returns, your grower return would be better
11 than it would otherwise, when the grower
12 diversion certificates are not on an equal
13 level as the handler-grower diversions?

14 A Well, it probably, only logically,
15 it would improve our, our bottom line; yes.

16 Q Okay. Thanks.

17 A Because we would get paid for more
18 than what we have been. Yes.

19 MR. ENGELER: Okay.

20 JUDGE CLIFTON: Ms. Deskins.

21 BY MS. DESKINS:

22 Q Mr. Meredith, you testified that

1 as the regulations are now on the diversion
2 credit, it's unfair? Do you recall that?

3 A Well, yes. If we drop 10,000
4 pounds of cherries on the ground, and we get
5 credit for five thousand, that seems unfair to
6 me.

7 Q And is the current regulation--do
8 you find this discounting of what you get, in
9 terms of value for the cherries, confusing?

10 A Yes; it certainly seems confusing.

11 Q In your opinion, would it be--is
12 the proposed amendment in regard to grower
13 diversions fair to everyone?

14 A The way it is now?

15 Q No; the proposed amendment, this
16 proposed change that we're discussing today.

17 A Yes, I do, because it would affect
18 the small grower like we are, the same as it
19 would be the grower like the Rowley's are.
20 Yes. I think it would be absolutely fair.

21 MS. DESKINS: I have no further
22 questions.

1 JUDGE CLIFTON: Who else has
2 questions for Mr. Meredith?

3 (No response)

4 JUDGE CLIFTON: Now this is your
5 turn to ask us some history questions.

6 (Laughter)

7 THE WITNESS: Okay.

8 JUDGE CLIFTON: Is there anything
9 you'd like to add?

10 THE WITNESS: No. Just that I
11 appreciate being here, and I probably am the
12 least-informed person that you've had here
13 today, not that I haven't picked a lot of
14 cherries, but just because I've only been on
15 the board of directors for Payson Fruit
16 Growers for six months now, and so I'm just
17 learning what they're all about, and I didn't
18 even know this process existed until recently.
19 I think it's kind of an interesting process
20 that we do here.

21 JUDGE CLIFTON: It's very
22 important that we hear from people of all

1 different sizes. So your testimony is
2 exceptionally valuable because of the size.

3 THE WITNESS: We're probably the
4 smallest tart cherry grower in the country.
5 I would bet. But it still--it still--it's my
6 brother's main source of income. It's not
7 mine, cause I'd only get paid for doing it.
8 I'm a retired school teacher, so I make my
9 money from retirement and--but I do this so he
10 can be in Indonesia.

11 JUDGE CLIFTON: Very good. Are
12 there any other questions for Mr. Meredith?

13 MS. SALEHI: Judge.

14 JUDGE CLIFTON: Ms. Salehi.

15 MS. SALEHI: Out of curiosity only,
16 what do you say to people who say why do you
17 drop the cherries on the ground? What's your
18 response?

19 THE WITNESS: Well, my wife is the
20 one that says that the most.

21 (Laughter)

22 THE WITNESS: She's a city girl,

1 and she doesn't understand how, when there's
2 poverty in the world and people starving to
3 death, how we can dump cherries on the ground,
4 and, you know, I guess it's like the milk
5 marketing order. You know, you have to
6 eliminate milk, and people are going hungry,
7 and it just--I just tell her that that's--you
8 can't even get 'em to the people that need the
9 cherries. There's no way you could afford to
10 take 'em there, and I--that's really a sad
11 thing in this world, where we have to do that,
12 and we dump\ enough cherries on the ground to
13 feed a heck of a lot of people.

14 And the whole process seems really
15 kind a strange, that here, in this country, we
16 have enough, that we tell people not to grow
17 stuff, and poor people in Indonesia, where my
18 brother is, they don't have anything to eat,
19 yet we can dump 'em on the ground.

20 MS. SALEHI: Okay. Thank you.

21 THE WITNESS: You're welcome.

22 JUDGE CLIFTON: Are there other

1 questions for Mr. Meredith?

2 MR. RAY ROWLEY: Just a comment.

3 He was a great teacher. I was one of his
4 students many years ago.

5 THE WITNESS: It was a tough crew,
6 too--those bullies.

7 (Laughter)

8 JUDGE CLIFTON: That's great. Mr.
9 Rowley, he remembers you too.

10 (Laughter)

11 THE WITNESS: I can tell you this.
12 I have all the Rowley--I substitute teach now
13 and I have all the Rowley kids in classes, at
14 times, and they are very fine students. When
15 they say their name's Rowley, I know they're
16 good kids, and I never have any trouble with
17 'em.

18 JUDGE CLIFTON: Wonderful. They
19 probably learned to work at a young age.

20 THE WITNESS: Yes. They did that.

21 JUDGE CLIFTON: Mr. Meredith,
22 thank you for your testimony.

1 THE WITNESS: You're welcome.

2 (Witness excused)

3 JUDGE CLIFTON: Mr. Hill, how
4 would you like to proceed?

5 MR. HILL: We'd like to recall Ray
6 Rowley.

7 WHEREUPON,

8 RAYMOND ROWLEY
9 WAS RECALLED AS A WITNESS BY AND ON BEHALF OF
10 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
11 HAVING PREVIOUSLY BEEN DULY SWORN, WAS FURTHER
12 EXAMINED AND FURTHER TESTIFIED AS FOLLOWS:

13 JUDGE CLIFTON: Mr. Rowley, you
14 remain sworn. Again, please state your name.

15 THE WITNESS: Ray Rowley.

16 JUDGE CLIFTON: Thank you.

17 BY MR. HEDIN:

18 Q Ray, there was earlier
19 discussions, and inquiries, about the impact
20 of this proposal on some of the handlers,
21 especially those are earning export credits.

22 Do you want to share some thoughts

1 on that?

2 A As stated earlier, I'm chairman of
3 the Diversion Committee on the CIAB, and one
4 member--well, there's many members on that
5 committee, but one of the members is a
6 Southern Michigan processor, and I don't know
7 if it's appropriate to give his name, I have
8 no idea, he just--you know--but he works for
9 Honey Bear Canning, Mike Schrom is his name,
10 and in each of those discussions, he brought
11 up his concerns with the direction we were
12 going. They do a lot of export, and so as
13 they export cherries, they garner diversion
14 credits, and I don't know how many, I don't
15 know what circumstances. I do know they have
16 extra and they sell them.

17 And so as these discussions
18 progressed, and as we made the proposals to
19 make in-orchard diversions equal in value to
20 exports, new market, new product, those
21 credits, he became very concerned that the
22 value of export credits would be diluted as

1 in-orchard diversion credits gained value.

2 And the reason I believe he was--
3 and you'd have to get him to clarify it all
4 the way--but with a certain restriction
5 percentage, there's only so much value out
6 there, and if you take value from one place
7 and give it to another value, it's kind of a
8 reshuffling of the value. And so he thought
9 that his export credits that they earn, and
10 then sell, would be diluted in value a little
11 bit to in-orchard credits.

12 And that's the reasons that he
13 gave us in those diversion meetings.

14 Q When you say "diluted in value,"
15 what do you mean, specifically?

16 A Well, in-orchard diversion
17 credits--and this has been explained before,
18 I know--but it's kind of an inverse
19 relationship. The higher the restriction, or
20 the higher the crop totals go, the less value
21 they have for "getting cherries outta jail,"
22 so to speak. Okay? They have less value to

1 satisfy your restriction--your restriction
2 from the market order.

3 Q When you say "they," you mean--

4 A The in-orchard.

5 Q The in-orchard.

6 A As it's currently structured. And
7 so in high-crop years, they have so little
8 value, and it's getting less--the higher it
9 goes, there's that inverse relationship. If
10 we bring them up equal to exports, as Mr.
11 Schrom was talking about, then people can go
12 get those from growers and aren't going to be
13 as willing to pay his high price for export
14 credits. Does that make sense?

15 Q So the market value of those
16 export credits diminishes--

17 A It diminishes in relationship to--
18 as in-orchard credits increase, it diminishes,
19 yes. In his mind. Now there's been other
20 testimony that they don't--you know, Bart
21 Hawkins says, well, that wasn't even fair in
22 the beginning, and all that. But in his mind,

1 they would diminish in value and they wouldn't
2 be able to sell them for as much. They use it
3 as a money-maker, from what I understand.

4 As we talked in that diversion
5 committee, that was the only person that ever
6 said anything negative about this amendment.
7 He was the one that dissented in that meeting,
8 and I'd have to go back and look at my
9 testimony. It was in the March 2010 meeting,
10 I believe, where we had that dissension. All
11 other processors and growers around that CIAB
12 board voted for it.

13 And I understood where Mike was
14 coming from. You know, I can understand where
15 he's coming from. You know, we've talked many
16 times about this. So, you know, I respect his
17 position but I really believe it's more fair
18 to pass this amendment and go down the road
19 we're going down, so--

20 MR. HEDIN: No further questions,
21 Your Honor.

22 MR. HILL: One clarification. You

1 used his name, Mike. What was the last name?

2 THE WITNESS: Schrom.

3 MR. HILL: Do you happen to know
4 how to spell his name, for the record?

5 THE WITNESS: Perry will.

6 MR. HEDIN: It's S-c-h-r-o-m.

7 And he is a member of the board
8 representing handlers out of the Southwest
9 Michigan district.

10 THE WITNESS: And I want to make
11 it clear. I don't want to disparage anything
12 against him. I respect Mike. I count him as
13 a friend. I understand where he's coming from.
14 He's got a different point of view. Okay. So
15 don't think that this testimony is against
16 Mike. It's not. All right. I understand
17 where he's coming from and that's fine. It's
18 okay to have a different point of view.

19 JUDGE CLIFTON: Any other
20 questions for Mr. Ray Rowley on this topic?

21 Ms. Deskins.

22 BY MS. DESKINS:

1 Q Mr. Rowley, I just want to clarify
2 this. When you say that this handler thought
3 that the change would devalue export credits,
4 there's nothing in the proposed amendment
5 that's going to devalue them in terms of the
6 order language; correct?

7 A Correct.

8 Q Okay.

9 A From what I understand; yes.

10 Q It's just that it's an economic
11 perspective that he was concerned about?

12 A Yes; yes.

13 Q Okay. Because this proposal, as I
14 understand, it's going to give the diversion
15 credits the same value as--

16 A Correct.

17 Q --export credits--

18 A Correct.

19 Q --and handler diversion
20 certificates?

21 A Yes.

22 MS. DESKINS: All right. Thank

1 you. Claude.

2 THE WITNESS: You want me to
3 answer that one.

4 MS. DESKINS: No.

5 THE WITNESS: Okay.

6 MS. DESKINS: Judge Clifton,
7 Claude is Mr. Rowley's father.

8 JUDGE CLIFTON: Oh. Okay.

9 MS. DESKINS: They look a lot
10 alike.

11 JUDGE CLIFTON: All right. All
12 right.

13 THE WITNESS: He's 25 years older
14 than I am. You keep telling me that. I
15 wonder what I really look like; you know?

16 (Laughter)

17 MR. HEDIN: His father was also a
18 teacher and a principal.

19 JUDGE CLIFTON: Very good.

20 THE WITNESS: Dad's father is a
21 teacher.

22 JUDGE CLIFTON: Well, wear that

1 middle name proudly. I know you do.

2 THE WITNESS: I do. I respect
3 him. He's done a lot for this industry.

4 JUDGE CLIFTON: Mr. Ray Rowley, do
5 you have anything you'd like to add on the
6 topic that you were recalled to talk about?

7 THE WITNESS: I think we've
8 covered it.

9 JUDGE CLIFTON: All right. Thank
10 you. You may step down.

11 (Witness excused)

12 JUDGE CLIFTON: Mr. Hill.

13 MR. HILL: We do not have any more
14 witnesses that can appear at this time, prior
15 to lunch. We have someone who's scheduled to
16 arrive around 1:00 o'clock.

17 JUDGE CLIFTON: All right.

18 MR. HILL: I told him not to get
19 here before then.

20 JUDGE CLIFTON: Is that the only
21 person that we know is coming?

22 MR. HILL: As of right now, yes.

1 It's the only one of which I'm aware.

2 JUDGE CLIFTON: All right. The
3 timing is excellent. It's five minutes to
4 noon. If we take an hour for lunch and come
5 back at 1:00, and then take that witness, that
6 may end the proceeding.

7 MR. HILL: I believe it will.

8 JUDGE CLIFTON: Unless the
9 Government wants to recall anyone. So all
10 right. Good. Then I hear no objection. Let
11 us break for lunch. I'll see you all back
12 here at 1:00 o'clock.

13 (Whereupon, at 11:55 a.m., a
14 luncheon recess was taken and the hearing
15 reconvened at 1:00 p.m.)

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A F T E R N O O N S E S S I O N

(1:11 p.m.)

1
2
3 JUDGE CLIFTON: All right. We're
4 back on record at 1:11. While off the record,
5 we discussed the timetable after we leave here
6 today.

7 The first thing that will happen
8 with the hearing clerk will be that the court
9 reporter will deliver the original transcript,
10 and that will be a date that will trigger the
11 opportunity for anyone to suggest corrections,
12 proposed corrections to the transcript.

13 Those corrections should be filed
14 with the hearing clerk no later than two weeks
15 after the transcript is filed with the hearing
16 clerk.

17 Now to protect your two week
18 filing period, if you have a short filing, you
19 can fax it to the hearing clerk. If you have
20 a long filing, you really have to use a
21 delivery service such as FedEx, USP, or the
22 like, that can guarantee you next business day

1 delivery, and that avoids the document being
2 diverted for irradiation, which is intended to
3 kill anthrax. We always take care of the last
4 crisis. We're still doing that. So you don't
5 want to use ordinary mail.

6 The document that I would give
7 you, that has the hearing clerk's fax number,
8 as well as delivery address, is the same one
9 that I handed out in Michigan, but if anyone
10 wants a copy, this is just a copy of the case
11 assignment that assigned me to this case. But
12 at the bottom of it, it does have the hearing
13 clerk's contact information.

14 Anything that you put up on the
15 Web site, or in some way file electronically,
16 needs also to have a hard copy deposited with
17 the hearing clerk. If we fail to have the
18 hearing clerk have a complete record, then, if
19 there's any appeal of what the Secretary of
20 Agriculture does, the record's not clear. So
21 even though we have these modern ways of
22 showing what the case is turning on, the

1 hearing clerk needs a copy of each thing.

2 After I certify the transcript,
3 which is a document that I file saying what
4 the transcript consists of, and what
5 corrections, and what exhibits are admitted
6 into evidence, and if there were any that were
7 excluded, once I file that, then two weeks
8 after you receive that from the hearing clerk,
9 your briefs should be filed with the hearing
10 clerk.

11 Now because that may arrive from
12 the hearing clerk to Mr. Hedin at a different
13 time from when it arrives with Mr. Hill and
14 Ms. Deskins, I just invite you all to
15 coordinate, just talk to each other, e-mail
16 one another, and determine what deadline
17 you're going to set, so that you all have the
18 same deadline. So it's to be a deadline two
19 weeks after your receipt from the hearing
20 clerk of the certification of the transcript.
21 I will forward it to you by e-mail, so that
22 you'll have it, to begin to work, but you

1 already pretty much know what it is.

2 You can also share, among
3 yourselves, proposed transcript corrections,
4 so that you don't do unnecessary work, if you
5 want.

6 All right. And Mr. Engeler, you
7 have available for the parties' use some
8 instructions on filing briefs?

9 MR. ENGELER: Correct.

10 JUDGE CLIFTON: And if anyone
11 would like one of those, I invite you to
12 approach Mr. Engeler now and get that.

13 (Instructions shared amongst
14 attendees)

15 JUDGE CLIFTON: All right. Mr.
16 Hill, would you like to call your next
17 witness.

18 MR. HILL: We're going to call Mr.
19 McMullin.

20 JUDGE CLIFTON: All right. Mr.
21 McMullin, if you'll come forward. Please be
22 seated in the witness chair. And let's go off

1 record while we distribute and mark this
2 writing that Mr. McMullin has brought.

3 (Discussion off the record)

4 JUDGE CLIFTON: All right. We're
5 back on record. We've marked the document on
6 McMullin Orchards Inc. letterhead as Exhibit
7 20, and it is four pages.

8 (Whereupon, Exhibit 20 was marked
9 for identification)

10 JUDGE CLIFTON: Mr. McMullin,
11 would you please state and spell your complete
12 name.

13 THE WITNESS: My name is Robert
14 McMullin. R-o-b-e-r-t capital M-c, capital
15 M-u-l-l-i-n.

16 JUDGE CLIFTON: Would you raise
17 your right hand, please.

18 WHEREUPON,

19 ROBERT MCMULLIN
20 WAS CALLED AS A WITNESS BY AND ON BEHALF OF
21 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
22 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND

1 TESTIFIED AS FOLLOWS:

2 JUDGE CLIFTON: Thank you. Mr.
3 Hill.

4 BY MR. HILL:

5 Q Good afternoon, Mr. McMullin.

6 A Good afternoon.

7 Q It's good to see you here. As has
8 been noted, we have a document that's been
9 marked for evidence, Exhibit No. 20. It
10 appears to be your personal statement. Could
11 you please read that for us.

12 A Yes.

13 My name is Robert McMullin. I am
14 a 61-year-old third generation tart cherry
15 grower living at 11052 S. 200 W. Salem, Utah.
16 I have been involved in the growing of tart
17 cherries since I was 12 years old, trying to
18 fun a Friday limb shaker to harvest cherries.
19 I farm with my two brothers, a sister, my son,
20 and several nephews in the south end of Utah
21 County. W e have about 500 acres of tart
22 cherries that we grow.

1 I currently serve on the CIAB
2 board as a grower member from District 7.

3 I, as a Utah grower, support the
4 Federal Tart Cherry Marketing Order and the
5 Cherry Industry Administrative Board.

6 I'm here to speak in favor of the
7 proposed amendment to allow bottom line
8 diversion credits.

9 In years past, and especially in
10 2009, we have chosen to divert major portions
11 of our crop by putting them on the ground. In
12 2009, for example, our total crop was
13 8,494,438 pounds, and of that total crop,
14 3,468,055 pounds were diverted on the ground.
15 This represents almost 41 percent of our crop
16 that went on the ground.

17 We felt that rather than putting
18 it on the market and depressing prices, it was
19 better to do our part by just not harvesting
20 them.

21 During periods of high
22 restriction, this practice has not allowed us

1 to fully utilize our diverted fruit. We have
2 been penalized a high percentage because the
3 credits were added to the production of our
4 processor and not allowed as a bottom line
5 number.

6 As a result, in 2009, when we had
7 a 68 restriction, our credits that we did in
8 orchard diversion were only worth 32 percent
9 of what was diverted. This really came home
10 to us after the crop was harvested because of
11 the huge crop all over the country.

12 We had only planned on a
13 restriction after the market growth factor of
14 something in the high 40's for restriction.

15 This, in essence, penalized us for
16 allowing our fruit to go on the ground. This
17 fruit was not put on the market. It was not
18 processed or put into storage. It was just
19 abandoned. Why should the fruit that we
20 abandoned not be allowed the same credit as
21 fruit that was exported or put up for new
22 product development?

1 I am including an addendum, for
2 the record, that outlines some of the talking
3 points I have mentioned above. I will not
4 take the time to read those at this time, but
5 I do agree with all of the points mentioned.

6 I believe by passing this
7 amendment, that I, as a grower, will receive
8 a higher return for my cherries that are in-
9 orchard diverted, as well as a higher return
10 on those cherries that are put on to the
11 regular market.

12 This is another tool that again
13 will increase my returns. I am also including
14 written testimony from other members of my
15 family since they were not able to appear in
16 person today.

17 I will add to this testimony, I
18 have a brother by the name of David McMullin,
19 who I've been farming with all of my life, and
20 in his written statement here, he states: We
21 support the amendment to the marketing order
22 to allow full credit of orchard diversions and

1 not to be added to our production of our
2 processor.

3 I also have a written statement
4 from another brother. His name is William
5 McMullin, and he states also: As a grower, I
6 support the federal Tart Cherry Marketing
7 Order and also support the amendment for in-
8 orchard diversions.

9 I have a sister that we farm with
10 Her name is Ann Dockstader.

11 Q Can you spell that, please.

12 A D-o-c-k-s-t-a-d-e-r. And in her
13 letter, she states: Not to harvest your crop
14 is a tough decision for any farm, but looking
15 at all the costs associated with harvesting,
16 diverting in orchard comes with a much lower
17 price tag. One of the most difficult aspects
18 has been that the fruit diverted in the
19 orchards is added to the top of your overall
20 production, increasing the restricted pounds
21 by your unharvested fruit.

22 Because of this aspect of the

1 marketing order, I ask you to support the
2 amendment for in-orchard diversions.

3 And that's signed Ann Dockstader.

4 JUDGE CLIFTON: How is Ann
5 spelled?

6 THE WITNESS: A-n-n. And with
7 that, I'd like to thank you for this
8 opportunity to testify, and that concludes my
9 testimony.

10 JUDGE CLIFTON: Thank you, Mr.
11 McMullin. Would you like to begin the
12 questioning, Mr. Hill?

13 MR. HILL: Yes.

14 BY MR. HILL:

15 Q Just quickly, what was the first
16 brother's name? I heard--

17 A David.

18 Q David.

19 A David McMullin.

20 Q Now obviously since you brought
21 these in, and they're your brothers and your
22 sister, you've spoken to them about these

1 proposed changes?

2 A Absolutely, I have. I've spoken
3 to all three of them. We've had several
4 occasions to do that. So I have talked to
5 them.

6 Q And in your specific instance, has
7 this--how has this affected you? Could you
8 just give us a run-down on how the current
9 regulation has affected you.

10 A What it has--basically, where
11 we're not allowed to a full diversion credit
12 for our in-orchard diversion, it reduces the
13 value of those credits. So as I stated in my
14 testimony, for instance, in 2009--let's take
15 an example, let's say diversion credits were
16 worth 10 cents a pound. Okay.

17 Well, in 2009, my diversion
18 credits, by the time I left that fruit in the
19 field, were only worth four cents a pound. So
20 economically, it doesn't make sense to do the
21 diversion, to be honest with you.

22 Q And this would be in comparison to

1 maybe a post-harvest credit, which would be
2 worth still ten cents?

3 A Would still be worth the ten
4 cents; yes.

5 Q Now in talking to your brothers
6 and your sister, can you give us a little bit
7 more on what, on the conversation that you had
8 with them.

9 A Well, as we talk about it, my--to
10 give you an example, in 2009, as we talk about
11 this diversion, and what was going on, I'm the
12 one that advocated putting the crop on the
13 ground. I said hey, we need to, we need to
14 put this--we need to do our share. We need
15 to--we've got a huge national crop. We need
16 to, we need to put some of our crop on the
17 ground.

18 As things progressed, and the crop
19 was getting larger, then the wisdom of that
20 was--was good. My brothers and sister felt
21 good about that.

22 Okay. Well, when the dust

1 settled, and they found out, gee, we've got
2 this 68 percent restriction, then they figured
3 out okay, well, hey, my--our diversion credits
4 are only worth 32 percent of what they should
5 have been.

6 They were upset at me because I
7 did--because I suggested that they put this on
8 the ground. They said, hey, we would have
9 better off, rather than putting all of that on
10 the ground, we should have backed away and not
11 put as much fruit on the ground, and we should
12 a put it in juice, we should have processed
13 more. So we had an occasion to talk about
14 that several times.

15 And then when I told them about
16 this particular amendment, they were excited
17 about it and said, hey, that really makes
18 sense to us, to be able to control our
19 production, and we're not in the business to
20 store fruit, we're in the business to sell
21 fruit. And so that's--gives you a little bit
22 of background. I hope that's what you were

1 after.

2 Q Sure. Now looking at the next
3 page, which you have titled Talking Points--

4 A Right.

5 Q --did this basically go to the
6 point towards the bottom, as the crop size
7 increases, the worth of in-orchard diversion
8 credits decrease--

9 A Absolutely.

10 Q --and therefore the bullet point--
11 this is a disincentive--

12 A Sure--for growers to divert.

13 Q --for growers to divert.

14 A Absolutely. That is correct.

15 BY MR. HEDIN:

16 Q Is it safe to say, Robert, that if
17 it doesn't change, you and your brothers and
18 sister won't do the orchard diversion like you
19 did last time?

20 A Absolutely. We've learned our
21 lesson.

22 Q When you guys decided to do the

1 in-orchard diversion, was it a first choice,
2 a second choice? Would you have done other
3 diversions, had you been able to?

4 A We would have--it probably--since
5 we've had experience with it before, and we
6 knew that this was not a bottom line diversion
7 at the time, so it would have--it really was
8 a second or third choice. But barring the
9 availability of other credits, and having the
10 prospect of having to store that product in a
11 reserved form, this is what we chose to do.
12 We just chose to divert it on the ground.

13 Q What's the approximate cost of
14 storing products per month, then for a year?

15 A Well, we figure with storage and
16 interest, it's about a penny a pound.

17 Q Per month, or per year, or--

18 A Per month.

19 Q Per month.

20 A Yes. Depending on--and part of
21 that, Perry, depends on the cost of interest.
22 Now currently, with interest as low as it is,

1 it might be three-quarters of a cent a pound.

2 Q Sure.

3 A But we basically figure a penny a
4 pound.

5 Q But it becomes an ongoing cost--

6 A Oh, yes, absolutely; no matter
7 what.

8 Q There was a discussion before you
9 were here, but it was asking about what you
10 do--what growers do with their fruit, and why--
11 -how they explain that. You're aware, Robert,
12 are you not, that you could do charitable
13 contributions with your products?

14 A Yes; we're aware of that.

15 Q Can you explain, a little bit, why
16 you don't do more of that, and what's the cost
17 associated with that process.

18 A Well, the first thing they ask us
19 to do, when we do a charitable contribution,
20 is, Will you store it for us? and we want to--
21 we want to get rid of it, if we're going to do
22 that. So there's an added cost that we have

1 to store--cause we have to store it for them.
2 We have tried, we have given fruit away, and
3 one of the problems with charitable
4 contributions, too, is the form that it's in.

5 Where the fruit that we store is
6 commonly in a five plus one form, in a four
7 pound bucket, and when we try to--if we try to
8 give it away to somebody, they say, well, hey,
9 we can't use that because it's in a five plus
10 one form. And so it's not really something
11 that can be given away in the form that we, as
12 growers, have it, and it's just--we just can't
13 do it.

14 Q So contributing fresh tart
15 cherries isn't a practical--

16 A Well, no--well, especially fresh
17 is not practical. It doesn't--it's a
18 perishable commodity. It is--you just can't
19 handle it. If it's over 24 hours old, it's
20 gone.

21 Q So you would incur both the
22 packing costs and the carrying costs, if you

1 were making a charitable contribution?

2 A Right. You would. Far better to
3 in-orchard divert it than to try to do
4 something like that.

5 Q Also there was some discussion
6 about this--the inclusion of in-orchard
7 diversions as part of your handle, and a
8 slight, apparently misunderstanding, about how
9 that would be incorporated.

10 You were around when they were
11 formulating this marketing order, were you
12 not?

13 A Yes.

14 Q Participated in that?

15 A Yes.

16 Q Did you ever think that in-orchard
17 diversions would be treated as they currently
18 are?

19 A No; no. I did not. I didn't--I
20 just didn't anticipate that--that idea; no.

21 MR. HEDIN: Okay. Those are my
22 only questions at the moment. Thank you.

1 JUDGE CLIFTON: I'm sure there are
2 other questions. Would you explain what the
3 five plus one form is. A number of people
4 have testified about it, but I really don't
5 know what it is.

6 THE WITNESS: Five plus one is
7 when we pick cherries, they're pitted--well,
8 they're graded, pitted, sorted. Then they put
9 them in a four pound--or a four gallon pail.
10 It's a, it's a--just a four gallon plastic
11 pail.

12 And in that pail we put 25 pounds
13 of fresh cherries, the pitted cherries. Then
14 we put five pounds of cherries on top. So the
15 ratio is five plus--five pounds of cherries
16 plus one pound of sugar. So that's why we
17 call it five plus one.

18 JUDGE CLIFTON: Okay. So what's
19 in the pail?

20 THE WITNESS: Okay. We've got 25
21 pounds of cherries and we have five pounds of
22 sugar.

1 JUDGE CLIFTON: Okay. So the
2 sugar goes on top--

3 THE WITNESS: On top.

4 JUDGE CLIFTON: --of the pitted
5 cherries?

6 THE WITNESS: Of the pitted
7 cherries.

8 JUDGE CLIFTON: And doe sit just
9 gradually make its way down through all the
10 cherries?

11 THE WITNESS: Yes, gradually makes
12 its way down through. It's--part of it is a--
13 the sugar cap on top keeps the fruit from
14 oxidizing. It keeps the oxygen away from it,
15 and so in the freezing process, it just makes
16 it so that fruit on top isn't brown. So
17 that's part of the reason to do, put the sugar
18 cap on it, rather than mix it in with the
19 cherries.

20 JUDGE CLIFTON: So does this
21 happen at a packing shed?

22 THE WITNESS: Yes, happens at the

1 packing--at the processors. That's where it
2 happens.

3 JUDGE CLIFTON: And then what is
4 its next stage?

5 THE WITNESS: The next stage is
6 it's--after it comes off the line, it's
7 frozen. Then it's marketed, and either it
8 will go to a--into pie fill or something to do
9 with some kind of a dessert, some form like
10 that--and there are other uses for it too--but
11 most of it goes to pie fill.

12 Then the other processes, it goes
13 to a dried processor who takes it, and he--
14 they'll take it and then they dry it.

15 JUDGE CLIFTON: So the penny a
16 pound per month of cost of storing and paying
17 the interest is in a frozen state?

18 THE WITNESS: That's in the frozen
19 state. Yes, ma'am.

20 JUDGE CLIFTON: And most of that
21 product is in the five plus one form?

22 THE WITNESS: That's correct.

1 JUDGE CLIFTON: Thank you.

2 THE WITNESS: There are--I might
3 add, there are, you know, there are other ways
4 to do it. There are some processors that do--
5 and there's none in Utah--but there are some
6 that do an IQF, individually quick frozen, and
7 so they'll freeze them that way, without
8 sugar, and so that's another form that the
9 cherries--that you can get it in.

10 JUDGE CLIFTON: You say there are
11 none in Utah.

12 THE WITNESS: No.

13 JUDGE CLIFTON: Where do you know
14 of such processors?

15 THE WITNESS: In Michigan, there
16 are individual quick frozen. I don't
17 remember--I don't know if they do it in
18 Washington or not. It seems like I'd heard
19 that there was a, an IQFer.

20 MR. HEDIN: Yes; they do.

21 THE WITNESS: Yes. So in
22 Washington, there are some. We've done it in

1 the past in Utah, but we haven't done it for
2 the last ten years, haven't done the
3 individual quick frozen.

4 JUDGE CLIFTON: Thank you.

5 Who has other questions for Mr.
6 Robert McMullin?

7 Ms. Salehi.

8 BY MR. SALEHI:

9 Q Hi, Mr. McMullin.

10 A Hi.

11 Q I just wanted to ask you a
12 question. On page two of your testimony, at
13 the very bottom, there's a statement that says
14 "Handlers should have more capital available
15 with which to pay grower. See discussion
16 below."

17 Would you please walk me through
18 that discussion on the next page.

19 JUDGE CLIFTON: Where are you,
20 please.

21 MS. SALEHI: Page two of the--I'm
22 sorry--not the actual--

1 MR. HEDIN: It says page two at the
2 bottom.

3 JUDGE CLIFTON: All right.

4 MS. SALEHI: Right.

5 THE WITNESS: Okay. So let's look
6 at this, then. On grower costs, my cost as a
7 grower will be reduced, and just as we go
8 through that, and please interrupt me if you
9 have a question.

10 Okay. So what it does, if a
11 grower uses in-orchard diversions--I'm the
12 grower--okay, I'm going to save about six
13 cents a pound to harvest it. So that it costs
14 me to take my shaker out, my mechanical, the
15 harvester, harvest it, and in here it's also--
16 there's also broken out transportation. So it
17 costs me, you know, just, say, a half a cent
18 a pound to haul it, to haul it in to the
19 processor.

20 And then, in addition to that,
21 since, if I do the in-orchard diversions, then
22 I don't have to pay, I don't have to pay my

1 Cherry Marketing Institute costs, and I don't
2 have to pay my Cherry Industry Administrative
3 Board promotion.

4 So on that, that's--those are--
5 that comes out to about a penny a pound.

6 So overall, it saves me about 7.5
7 cents a pound not to--not just--just to leave
8 it in the field, just not to harvest it.

9 And so as we kind a go through
10 the--in our minds, you know, as we're thinking
11 about what we're going to do with this crop,
12 we think, well, hey, there's 7.5 cents a pound
13 right there, and if I can get 10 cents
14 diversion--or excuse me--if I can get a credit
15 for 10 cents a pound with that, I mean, that's
16 17.5 cents, and I don't have to do anything.

17 And so that makes it to me--I
18 think, gee, you know, I've--that's money in my
19 pocket, in hand. So that's the reason that we
20 look at that in-orchard diversion. So that
21 saves me as a grower then. The handlers,
22 they'll save--you know, there's variable costs

1 for cherries left in the orchard. Now I, you
2 know, from a handler point of view, the--I
3 would guess, I would assume that that means
4 that, okay, me, as a handler, I don't have to
5 mess with those cherries. They're over and
6 they're done with.

7 I don't--I won't have any costs
8 associated with those. Then the storage. I
9 won't have any storage for those cherries.
10 And I would say part of that variable is, as
11 Perry mentioned, is the carrying costs, that
12 a handler would have to bear, if he put that
13 fruit up.

14 And then that ties into the bottom
15 point there. He'll have less capital tied up
16 in the inventory.

17 BY MS. SALEHI:

18 Q Just as a point of clarification,
19 this is all if this amendment passes; correct?

20 A That's correct.

21 MS. SALEHI: Thank you.

22 JUDGE CLIFTON: Mr. McMullin, are

1 you the author of the Talking Points?

2 THE WITNESS: No. I'm not.

3 JUDGE CLIFTON: Where did they
4 come from?

5 THE WITNESS: They came from
6 Perry.

7 JUDGE CLIFTON: From Mr. Hedin.

8 THE WITNESS: Mr. Hedin. Yes,
9 ma'am.

10 JUDGE CLIFTON: Okay. And were
11 they presented in a group meeting of some
12 kind, or distributed--

13 THE WITNESS: No. These were--
14 they were sent out as part of a newsletter.

15 JUDGE CLIFTON: All right. And
16 are there any portions of them--you said you
17 didn't want to take the time today to go into
18 them. But this is precisely a good time to go
19 into them.

20 Are there any other portions that
21 you'd like to highlight for us because they're
22 especially important?

1 THE WITNESS: Not that I can
2 really pick out right now, Judge. Other than
3 I--on page two, this one, where it says
4 "Handlers are discouraged from encouraging or
5 utilizing in-orchard diversion credits by the
6 way the order is structured," that, to me, is
7 a very important section. And if you'd like,
8 I'll--would you like me to read through that,
9 or do you want to just point it out? Or what
10 do you think?

11 JUDGE CLIFTON: I'd like you to
12 walk me through it.

13 THE WITNESS: Okay.

14 JUDGE CLIFTON: You read it and
15 tell me what I need to understand from it.

16 THE WITNESS: Okay. A lot of the
17 handlers, since at least they're discouraged
18 from encouraging or utilizing in-orchard
19 diversion credits by the way the order is
20 structured, because if they take that fruit
21 in, then their bottom line is increased. So
22 the top line credits--okay, there's the top

1 and the bottom credits. Okay.

2 As I understand it, if I'm a
3 handler, and I say, hey, okay, I'm going to
4 handle--Mr. McMullin, I'm going to handle your
5 fruit. Okay.

6 And I come to them, and I say
7 okay. Hey, I've put a million pounds of
8 cherries on the ground. I brought you a total
9 of--I brought you 5 million that I brought
10 into the plant, and then I put a million on
11 the ground. Okay.

12 Well, he says, hey, I really don't
13 want that million that's on the ground,
14 because that really means that on my top line
15 I've got to have 6 million pounds of--or I
16 have to have 6 million pounds up there on top.
17 So that means that me, as a handler, I have to
18 go out, and I have to get that many more
19 credits to cover that million pounds.

20 If I have a 50 percent
21 restriction, okay, I've got to cover another
22 half a million pounds of credits because of

1 your--because you're bringing in me those
2 diversion credits. So I really don't want
3 those. And so that's that. That's that
4 particular point. I hope I haven't confused
5 you, totally.

6 And then it follows through and
7 explains that in-orchard diversion credits are
8 discounted by the amount of the restriction
9 percentage.

10 So if I bring in a 1000 pounds,
11 time 25 percent of the restriction, is 25,000
12 pounds--2500 pounds, total, of restriction,
13 that 7500 pounds of credit are available for
14 the other restriction.

15 Okay. If the crop increases and
16 the restriction increases, the worth of in-
17 orchard diversion credits decreases.

18 So if I bring in a 1000 pounds,
19 time the 50 percent restriction, there's 5000
20 pounds of restricted fruit.

21 MR. HEDIN: If I may--

22 THE WITNESS: Yes; excuse me.

1 That should be 10,000.

2 MR. HEDIN: 10,000.

3 THE WITNESS: Yes. Excuse me.

4 That's right. It should be 10,000. I'm
5 sorry. That didn't figure out either in my
6 mind. But that should be 10,000 pounds, time
7 the 25 percent restriction, is 2500 pounds
8 that I've got restricted.

9 So that 7500 pounds of credit are
10 available for other restrictions.

11 So if a crop increases, and I have
12 a bigger restriction, you can work it right
13 down through, then I've got to have 5000
14 pounds of credit, are available for other
15 restrictions.

16 Okay. At the higher restriction
17 levels, handlers can reach a point of
18 diminishing return for in-orchard credits as
19 a compliance option. So that's exactly what
20 my processor tells me. He says, hey, I don't
21 want any more in-orchard diversion. I don't
22 want you to do that because that's going to

1 increase my top line, and I have to--in order-
2 -if I accept those, I have to have more
3 cherries to cover my restriction.

4 So the changing of the compliance
5 worth of in-orchard diversion credits, it
6 presents a risk to the processor. And 2009
7 really showed that, because the restriction
8 went from--Perry, remind me, an early 51, 52
9 percent.

10 MR. HEDIN: And all the way up to
11 sixty-eight.

12 THE WITNESS: And went to sixty-
13 eight because of the huge crop that happened,
14 and our inability to predict how many pounds
15 we were going to have. So that really makes
16 the processor wary, and especially coming up
17 into the future years. It's actually making
18 those in-orchard diversions less valuable and
19 less desirable, because that processor is
20 really going to discourage that.

21 So I think that's a very important
22 part of this, is not only from a grower

1 perspective but from that handler perspective.
2 I hope I haven't completely confused you.

3 JUDGE CLIFTON: No; it's important
4 that you have testified about this, because I
5 had not yet gotten the impression of how
6 tricky the result could be to the handler.

7 THE WITNESS: Yes.

8 JUDGE CLIFTON: I had gotten the
9 impression of how tricky it could be to the
10 grower. But now I see that it can also be
11 tricky for the handler because of the
12 uncertainty of what the percentage of
13 restriction will be.

14 THE WITNESS: Okay.

15 JUDGE CLIFTON: All right. I'd
16 like to have Ms. Salehi approach you with the
17 record copy of this exhibit, so that you could
18 make the change--

19 THE WITNESS: Yes.

20 JUDGE CLIFTON: --to make those
21 two 1000 pounds figures be 10,000 pound
22 figures.

1 THE WITNESS: Yes. Okay.

2 JUDGE CLIFTON: And so if you'll
3 very legibly correct that and put your
4 initials.

5 THE WITNESS: Cross that out and
6 do it. Okay. I will do it. Thank you.

7 JUDGE CLIFTON: And I encourage
8 the rest of you to do likewise on your own
9 copies.

10 THE WITNESS: Okay. Thank you.

11 MR. HEDIN: Could we read into the
12 record what changes he made on that.

13 JUDGE CLIFTON: Yes. Ms. Salehi,
14 would you do that.

15 MS. SALEHI: Sure. On page two of
16 the Talking Points, mine, line seven, starting
17 with E.g., the number has changed from 1,000
18 to 10,000 pounds. And then from there, one,
19 two, three, four lines down, another, it
20 starts with Example, or e.g., the same number,
21 1,000, has changed to 10,000 pounds.

22 JUDGE CLIFTON: Mr. McMullin, I'd

1 like you to tell me a little more about the
2 business relationship you have with your
3 brothers and your sister.

4 You said that you had farmed for
5 years with your brother, David.

6 THE WITNESS: Yes.

7 JUDGE CLIFTON: Who is in McMullin
8 Orchards Inc.?

9 THE WITNESS: Those are the three
10 principals. My brother, David McMullin, my
11 brother, William McMullin, and my sister, Ann
12 Dockstader. And myself. We're the four
13 owners of McMullin Orchards Inc.

14 JUDGE CLIFTON: Okay. Are you
15 equal owners?

16 THE WITNESS: No; we're not.

17 JUDGE CLIFTON: All right. Who
18 are the primary owners?

19 THE WITNESS: The primary owners
20 would be David, William, and myself, Robert.

21 JUDGE CLIFTON: Okay. And you see
22 each other during the active times of cherry

1 production, every week?

2 THE WITNESS: Well, we have a
3 weekly meeting, 52 weeks out of the year.
4 Well, we take off Christmas and Thanksgiving.
5 But we have a weekly meeting. We have a
6 weekly farm meeting. Then we have interaction
7 all the time, back and forth. We work
8 together.

9 JUDGE CLIFTON: All right. And
10 you're located in Payson, Utah?

11 THE WITNESS: Yes, ma'am.

12 JUDGE CLIFTON: How far is that
13 from where we are, here, in Provo?

14 THE WITNESS: That's about twenty,
15 a little over 20 miles south of here, is where
16 we're at.

17 JUDGE CLIFTON: All right.
18 What other questions are there for
19 Mr. Robert McMullin?

20 MR. HEDIN: I don't know if they
21 finished over there yet.

22 JUDGE CLIFTON: Mr. Engeler.

1 MR. ENGELER: I have one.

2 BY MR. ENGELER:

3 Q Getting back to the Talking
4 Points, on page three, under the Grower Costs,
5 you have listed there a cost of one-half cent
6 per pound for CIAB promotion.

7 It's my understanding that those
8 costs are actually paid out of handler
9 assessments under the marketing order. So I'm
10 wondering if you listed this as a grower cost
11 because those costs are passed on to handlers.
12 Is that--

13 A That's--well, they're passed on to
14 me as a grower. They're passed on to me.
15 That's correct.

16 Q Okay. I just wanted to clarify
17 that.

18 A Yes. When we get out grower
19 printout, it has those costs listed, right
20 there.

21 Q Okay. Thank you for the
22 clarification there. And then I was

1 wondering, right at the beginning of your
2 testimony, you talked about running a Friday
3 limb shaker. For those of us that don't know
4 much about the cherry industry, could you
5 explain to us what that is.

6 A Well, I--we don't have those any
7 more. That's kind of an antique. That was
8 in--actually, that was about in 1962. That's
9 a--it's a machine--the particular one that we
10 have, it was a machine that hooked on to the
11 front of a tractor, and there was a boom that
12 came out, and on the end of that boom was a
13 device that you would go in and you could
14 attach it to a limb in a tree, and as you're
15 sitting there holding on to it, you'd hit the
16 button or hit the lever, and it would
17 actually--it would shake, and it would shake
18 the cherries off the tree into a catching
19 frame which was manually packed from three to
20 three, and then those catching frames were set
21 up and they would go--it'd roll off those
22 frames into boxes, into individual boxes that

1 were set up in a row by the tree.

2 I had no problem. My job was to
3 go in and actually run the shaking machine.
4 The trouble I had was the hired help that I
5 had, where my--I had some cousins, and some
6 other help that would help me, and they hated
7 to move the catching frames. That was the
8 hardest part of the job.

9 So we lasted about a half a day,
10 and then they says, hey, we're done with this-
11 -for 3 cents a pound, we can go do something
12 else. So that's the way it worked.

13 MR. ENGELER: Thank you.

14 JUDGE CLIFTON: Ms. Salehi.

15 BY MS. SALEHI:

16 Q You may have already mentioned
17 this. If so, I apologize for missing it. But
18 I know that you have mentioned you have 500
19 acres of tart cherries.

20 A Yes, ma'am.

21 Q I don't know if you were here when
22 we were discussing the SBA definition of small

1 growers, or--which I think was--

2 A I wasn't.

3 Q --750,000 in gross receipts.

4 According to that definition, do you consider
5 your operation as a small grower or a large
6 grower?

7 A We would be--well, it depends on
8 the year. It really does. But I would say on
9 average, with the 750,000, we would probably
10 be considered a large grower.

11 Q A large grower?

12 A Yes.

13 MS. SALEHI: Okay. Thank you.

14 JUDGE CLIFTON: What other
15 questions are there?

16 Ms. Deskins.

17 BY MS. DESKINS:

18 Q Mr. McMullin, I just want to
19 clarify a couple of things. And the Talking
20 Points, you said they came from Perry Hedin?

21 A Yes.

22 Q Were they published in a

1 newsletter?

2 A Yes.

3 Q Okay. And what was the name of
4 the newsletter?

5 A I don't--I'm sorry. I don't have
6 that information.

7 Q Was it a newsletter for the CIAB?

8 A Yes, and it came out to us as
9 growers.

10 Q And do you happen--if you recall
11 what month the newsletter would have been?

12 A I think that would have been--
13 when, Perry? January?

14 MR. HEDIN: Oh, no.

15 THE WITNESS: December.

16 MR. HEDIN: No; this was after the
17 March meeting.

18 THE WITNESS: Oh, after the March
19 meeting. So in--okay. Yes. It would have
20 been after the March meeting.

21 BY MS. DESKINS:

22 Q Okay. After the March meeting of

1 what year?

2 A Of 2011.

3 Q Okay. And also on page two of the
4 Talking Points, there's a term there, C-M-I.
5 Does that stand for Cherry Marketing
6 Institute?

7 A Yes, ma'am.

8 Q And you had a chance to look over
9 the Talking Points; correct?

10 A Pardon me?

11 Q You had a chance to look over the
12 Talking Points?

13 A Yes.

14 Q And there had been one correction
15 made to the pounds?

16 A Yes. The pounds--that was
17 incorrect. Yes, ma'am.

18 Q And other than that, the
19 information is correct to the best of your
20 knowledge?

21 A Yes, ma'am.

22 MS. DESKINS: I have no further

1 questions.

2 JUDGE CLIFTON: Who else has
3 questions? Mr. Hedin.

4 MR. HEDIN: If I may.

5 BY MR. HEDIN:

6 Q Robert, a little earlier, you
7 spoke about the savings and variable costs
8 from a processor standpoint. Can you
9 delineate a little bit for us what the cost of
10 a bucket is, the cost of the sugar that you
11 put on it, and roughly the cost of pitting,
12 that you would save by not harvesting the
13 fruit.

14 A From what I understand, the
15 bucket, the processing, and everything,
16 altogether, it's somewhere, 26, 27 cents a
17 pound, depending on the cost of sugar, and
18 from what they tell us, the cost of sugar's up
19 again this year.

20 Q Right.

21 A So in that, I would say--and it
22 depends on the processor. Some processors may

1 be more than that. But as I understand,
2 somewhere in the 25 to 30 cents range.

3 Q Okay. So that's money that would
4 not be expended--

5 A Expended; right.

6 Q --conceivably would be paid back,
7 then, to you and your brothers and your
8 sister?

9 A That's correct.

10 MR. HEDIN: That's all, Your
11 Honor. Thank you.

12 JUDGE CLIFTON: Mr. McMullin, you
13 haven't specifically talked about meeting the
14 cost of production. Do you have any comments
15 about it?

16 THE WITNESS: As far as meeting
17 the cost of production, on our farm, we--as we
18 look this over, as we've, you know, as we went
19 through this--on page three of the Talking
20 Points--as we go through this per pound basis
21 here that would be saved, and by the time I
22 get, say I'm hoping for a little bit more than

1 10 cents on a diversion credit. But, you
2 know, we're looking at 18 to 20 cents a pound,
3 that it costs us to produce that and--a pound
4 of cherries, and that is a variable cost
5 because we're blessed, because I'm third
6 generation, and most of our ground is paid
7 for, and if you have to borrow money and pay
8 the annual mortgage payment, that's in
9 addition to that.

10 So it's a--and again, that depends
11 on the year and where we're at. But that's a
12 ball park figure.

13 JUDGE CLIFTON: Thank you.

14 THE WITNESS: Thank you, ma'am.

15 JUDGE CLIFTON: What other
16 questions does anyone have of Mr. McMullin?

17 Mr. Johnson.

18 BY MR. JOHNSON:

19 Q Following up, Judge, on your
20 question. Robert, I just wanted--so it's safe
21 to say that given the figures you just cited,
22 and in the testimony, in the exhibit, that the

1 savings that you would incur, or receive, that
2 the amendment, if accepted, would help you--or
3 would return the cost of production?

4 A Yes. It would. That would--you
5 know, that's a fair trade-off. Yes.

6 MR. JOHNSON: Okay. Thank you.

7 JUDGE CLIFTON: What other
8 questions does anyone have for Mr. McMullin?

9 BY MR. HILL:

10 Q Yes. You've already mentioned the
11 high restriction percentage in 2009. Much of
12 that is due to the high crop, the large crop
13 that you had that year; correct?

14 A That's true, and well, then, also
15 the carryover that's come in.

16 Q And the carryover. Now you
17 haven't been here for much of this hearing.
18 So there has been a lot of talk about the
19 potential size of the crop this year. Do you
20 have any statement on what you expect the
21 national crop to be this year?

22 A As we have looked, and the folks

1 that I've talked to, and the folks in Michigan
2 had a relatively light crop last year, the bud
3 set that's in Michigan, I understand is
4 exceptional, and could be a very large crop
5 this year. And then also we had a light crop
6 last year, our buds are doubles and triples,
7 and it's very likely that we'll have a big
8 crop this year. It looks very good.

9 Q So would you say like in a year,
10 like if that were to come to fruition, would
11 you say that a year, like what you expect this
12 year would be a perfect time to have this
13 amendment, as it is currently--well, as it's
14 proposed, to be--

15 A Absolutely. This would be an
16 ideal year to have it.

17 Q So whether or not that happens, it
18 would be your position to get this done as
19 quickly as possible, in case this happens
20 maybe next year as well?

21 A Yes. We would like to see it
22 done, well, ASAP, right away. We really

1 would.

2 Q Just a couple quick questions. OR
3 maybe just one.

4 A Maybe just--I didn't want to
5 interrupt you but--

6 Q Oh, go ahead.

7 A Excuse me. One of the things
8 that, too, though, is going to influence us as
9 growers this year, is that hey, after this
10 learning curve that we've had, unless--well,
11 it's going to happen--my processor's going to
12 tell me--hey, you bring all that fruit that
13 you can this year because we're going to put
14 it in the corner, and it's going to cost you,
15 or whatever. But we don't want those, or
16 you're going to have to abandon it in the
17 field.

18 And so we're--it's going to be a
19 tough year for us this year, I think, without
20 having this amendment.

21 Q And just quickly. Under the
22 proposed amendment, is it safe to assume that-

1 -safe to believe that you expect fuller
2 returns to increase?

3 A Yes. I do.

4 Q One last question. Would you then
5 say that the certainty of the--that the
6 certainty with the one-for-one credit year, is
7 that good for the industry, having--

8 A Yes. I think it is. I really do.
9 I think it's good for the industry.

10 JUDGE CLIFTON: Are there other
11 questions for Mr. McMullin?

12 (No response)

13 JUDGE CLIFTON: Mr. McMullin, is
14 there anything else you'd like to add?

15 THE WITNESS: No, ma'am.

16 JUDGE CLIFTON: Thank you very
17 much for your testimony. You may step down.

18 (Witness excused)

19 MR. HILL: I would like to admit
20 what's marked as No. 20 into evidence, please.

21 JUDGE CLIFTON: Is there any
22 objection?

1 MS. DESKINS: No objection.

2 JUDGE CLIFTON: Exhibit 20 is
3 hereby admitted into evidence.

4 (Whereupon Exhibit No. 20,
5 previously marked for
6 identification, was received in
7 evidence)

8 MR. HILL: We do want to recall
9 Mr. Ray Rowley again, please.

10 MR. HEDIN: We just can't get rid
11 of you, Ray.

12 JUDGE CLIFTON: Mr. Rowley, you
13 remain sworn. Please again state your full
14 name.

15 THE WITNESS: Ray Rowley. How's
16 that? Or do you want all of it. Raymond
17 Claude Rowley.

18 JUDGE CLIFTON: Well, I know that
19 it's Raymond Claude Rowley. But since you're
20 the only Ray, that will be good enough.

21 THE WITNESS: That's fine. Okay.

22 WHEREUPON,

1 RAYMOND C. ROWLEY

2 WAS RECALLED AS A WITNESS BY AND ON BEHALF OF
3 THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
4 HAVING PREVIOUSLY BEEN DULY SWORN, WAS FURTHER
5 EXAMINED AND FURTHER TESTIFIED AS FOLLOWS:

6 BY MR. HILL:

7 Q How are you going again?

8 A Again.

9 Q Okay. You heard what I just asked
10 Mr. McMullin. So I kind a want the same
11 information from you. You've already mentioned
12 that you expect a large crop this year, or I
13 guess in the industry, it is expected to be a
14 large crop.

15 There's been questions about how
16 quickly this can be enacted, this proposed
17 amendment. Could you give us a little bit of
18 dialogue about how important this is, to get
19 in the timetable you'd like to see, and why.

20 A Let's talk about Utah's crop real
21 quick. I think Robert "hit it right on the
22 head." I've been in this business just under

1 30 years, and I have never seen the number of
2 buds on tart cherry trees in this area; okay.
3 And the inside of each of those numbers,
4 instead of one, there's either two or three
5 blossoms. So we're setting ourselves up for
6 a huge crop in Utah, barring any frost; okay.
7 The trees are healthy. They had a short crop
8 on them last year. They were able to build
9 reserves, and I expect the trees to come out
10 very healthy this year.

11 Michigan had a short crop last
12 year also. I've talked to several growers in
13 Northern Michigan, a couple in Central
14 Michigan, and they're all expecting large
15 crops, barring any freeze.

16 As I've talked to them, they've
17 all said the same thing--the spring is still
18 cool. They haven't progressed to where
19 damaging frosts are likely at this point.

20 Usually, if we can get through
21 Mother's Day in May, our risk of frost is
22 basically gone. Now every once in a while,

1 there's some that comes along. But usually,
2 if we can get through Mother's Day, we're
3 okay.

4 And so, you know, we're almost to
5 the end of April. It looks like there's going
6 to be a huge crop across the country. That's
7 what we project today. I would suspect that
8 crop would be in the neighborhood, barring any
9 frost, 350 million pounds--that's my guess--
10 but that is just a wild-eyed guess. But I'll
11 bet it's way above three hundred.

12 If that happens, there really
13 ought to be some cherries put on the ground.
14 But with the 350 million pound crop, the
15 restriction will be well over 50 percent. the
16 value of in-orchard diversions this year,
17 under the current system, will be minimal, and
18 so the incentive for growers like me, or
19 Robert, or any of the others that you've heard
20 today, will not be there to put them on the
21 ground.

22 So they'll be picked, that expense

1 will go into them, they'll be processed, that
2 expense will go into them, and every month
3 thereafter, according to, you know, and I
4 don't know these numbers, Robert does, that
5 somewhere around a penny a pound will be
6 charged them.

7 And I don't think that's best for
8 industry; okay. As far as how soon we can get
9 this in to place, speaking for myself and our
10 farm, and I believe I can speak for the tart
11 cherry growers of Utah, if there would be any
12 way to get this thing in place for the 2011
13 crop year--that's this year--whether it be
14 informal rulemaking, whether it be expedited,
15 whether it be going to Mr. Shipman and getting
16 on our knees and begging. I don't know. It
17 would be a great help for us this year, and it
18 would be--well, it would help every one of us
19 growers. Okay? It really would.

20 The incentive would be there to
21 put a few more on the ground. It would return
22 more money to us growers. So that's where I

1 see it. Am I outta line, Robert?

2 MR. MCMULLIN: No; not at all.
3 You're "right on."

4 BY MR. HILL:

5 Q Now I'm not sure if I have the
6 right person, but I think it was you who said
7 that with the large crop this year, under the
8 current system, it'd be a bit of a disaster.
9 Is that the disaster--

10 A That's just what I explained.
11 That's the disaster scenario.

12 Q And part of that disaster is lower
13 grower returns, I would--

14 A Lower grower returns, plus that
15 never-ending storage bill.

16 BY MR. HEDIN:

17 Q One thing. If that's all
18 processed, and then is all carried as
19 inventory, what do you think will happen in
20 the longer term, as well as the short term, on
21 pricing?

22 A Well, the carry-over will continue

1 to go on. It will be carried as inventory.
2 It will be in either a primary reserve pool,
3 or a secondary reserve pool, but I really
4 don't believe that those buyers, in their
5 mind, separate those. I believe they look at
6 the total crop and the total reserves, and
7 say, okay, here's what's really out there, and
8 so there's a downward pressure on price
9 because of the total carry-over.

10 Q So you would see the kind of--or
11 you would expect the kind of prices we saw in
12 2009--

13 A Yes.

14 Q --to be repeated?

15 A It would be very similar,
16 probably.

17 MR. HEDIN: Thank you.

18 BY MR. HILL:

19 Q And ultimately, does that carry-
20 over--could that effectively depress prices in
21 subsequent years, beyond this year?

22 A Yes, yes, because, you know, it's

1 not like an apple or a peach, that they go
2 away after you either sell 'em or you throw
3 'em away. In storage, cherries last and last,
4 and keep giving you that monthly storage bill;
5 okay. And so--

6 Q The "gift that keeps on giving."
7 Correct?

8 A It is. And so if it's put in
9 storage, it'll still be there until somebody
10 uses it, so, yes it will carry over, and carry
11 over, and carry over.

12 BY MR. HEDIN:

13 Q Now you're requesting of the USDA
14 that they look at any and all alternatives
15 that they might have to speed the process?

16 A I'll make that formal request.
17 How's that? As a cherry grower in Utah, and
18 as the chairman of the Red Tart Cherry Market
19 Board here, in Utah, and as head of the
20 Diversion Committee on the CIAB board, and
21 anything else you want to attach to it--okay--
22 -I formally request you do anything and

1 everything you can do to get this amendment,
2 or this process in place for us by the 2011
3 crop year, which is in three months. And I
4 don't know what it would take, on your part.
5 I don't know all the processes. But I do
6 plead with you to do what you can.

7 And if that means we have to go
8 talk to Mr. Shipman again, then I'm more than
9 willing to go do it. And I know everybody in
10 the industry would, too, if that's what it's
11 going to take. But I--you know, I look at
12 this room, and, you know, we're on this side,
13 you're on this side, and I think of USDA, and
14 I think, okay, the United States Department of
15 Agriculture, and agriculture's my life. I
16 think we're in this together. I think we're a
17 team; okay?

18 I don't see it as "us" and "you
19 guys," and I know we can't talk to you about
20 some things, and other things, and all that
21 stuff, in the middle of this. But I see it as
22 one team trying to get this through.

1 I appreciate the cooperation we've
2 had in the past, and whatever it takes, if we
3 can cooperate and make it work, I think we
4 would all be better off.

5 MR. HEDIN: Thank you.

6 MS. DESKINS: I have some
7 questions for you, Mr. Rowley.

8 THE WITNESS: All right. Go
9 ahead.

10 BY MS. DESKINS:

11 Q Okay. The last time there was a--
12 okay. You have a prediction of how big the
13 crop could be this year. The last time--do
14 you happen to recall when there was--the last
15 time there was a crop as big as what you think
16 it might be this year?

17 A 2009, the crop was--what was it?
18 It was big. I can't--I could get my paper.
19 It's on my paper.

20 MR. HEDIN: Look at Exhibit 7.

21 It'd be right on there.

22 THE WITNESS: It's on mine too but

1 it's back there a little bit.

2 JUDGE CLIFTON: Let's see. Yours
3 is eighteen, Mr. Rowley.

4 THE WITNESS: Yes. But it--
5 there's Tom's.

6 (Pause)

7 MR. HEDIN: You're on Exhibit 7.

8 THE WITNESS: Okay. We have 350
9 million pounds, or just a hair under it, in
10 2009. We had just over 350 million pounds in
11 2001. We had 400 million pounds, or just
12 barely under it, in 1995.

13 And from everything that I've
14 seen, the potential is there for another 350
15 million pound crop this year, because of the
16 way the trees are set up. You know, my life's
17 in those orchards, and I just haven't ever
18 seen the bud set that we have this year. I
19 have not seen it before. We have pruned twice
20 as much as we usually prune, hoping to take
21 off some a that crop so we can size the crop
22 that we expect to be on those trees.

1 BY MS. DESKINS:

2 Q Okay. And when a crop is as big as
3 what you predict it could be this year, what
4 kind of restrictions does the industry
5 typically see?

6 A Well, the last, in 2009, it was a
7 68 percent restriction for the 350 million
8 pound crop. That was almost--you know, what's
9 that? Two-thirds of our crop was restricted.
10 You know, you heard it from Bart Hawkins, from
11 Washington. Unless this changes, he's not
12 going to drop a cherry on the ground. You
13 heard him say that. You know. I expect some
14 of the Utah growers are going to do the same
15 thing.

16 You know, until we can change
17 this, there's no value for us to put any on
18 the ground. There's not an incentive.

19 If we can change the incentive,
20 right up front, then we come an awful long
21 ways to putting supply and demand back into
22 balance.

1 Q And to the extent this regulation
2 isn't changed, it doesn't help to put the
3 supply and demand back in balance?

4 A The price will. Price will. But
5 the price will drop so far, that it--I don't
6 know. You know, I look at what we got for our
7 2009 crop, and it hurt. It really hurt.

8 Q Okay. But say for the record,
9 when you talk about what you got, you got a
10 very low--

11 A A lower price.

12 Q A lower price.

13 A Yes; yes.

14 Q Enough, that would affect your
15 ability to stay in business?

16 A Well, to an extent, yes, okay,
17 because, you know, you--our operation--we've
18 got to be planting trees every two or three
19 years. We know how much we've got to plant to
20 keep our farm rotation going. I'm sure
21 Robert's the same way; you know? Cherry trees
22 last between 25 and 30 years. So you've got

1 to keep rotating them around.

2 Well, you run into a 2009 year,
3 and the price is way down, you have to order
4 trees three years out, two and a half to three
5 years out, and you say, okay, well, I haven't
6 got enough money this year to even pay for the
7 trees I ordered three years ago. That means
8 I'm not ordering out here, and so it throws
9 your whole rotation thing off.

10 I mean, it's not just as simple as
11 saying you're going to stay in business.
12 Well, yes, you got trees, you're going to stay
13 in business, but it hinders the whole plan,
14 and where you plant, and how fast you replace
15 the old broken-down trees.

16 And then you're seven or eight
17 years to the first crop, once you plant. So
18 from the time of planning to put an orchard
19 in, or replace an orchard, you're ten years
20 before you get a dime off of it.

21 And so it hinders that whole plan,
22 and it throws it all into a--anyway. It just

1 messes it up.

2 Q Okay. And just for the record,
3 the purpose of the restriction is to try to
4 keep tart cherries off the market?

5 A Right.

6 Q Okay.

7 A The purpose of the restriction is
8 it tries to keep them off the market, in a
9 pool, where they're available when we need to
10 put 'em back on the market. Does that make
11 sense?

12 Q Yes.

13 A What are you laughing at?

14 Q No; it makes sense, Mr. Rowley.
15 That makes sense. And to the extent this
16 regulation can be changed as soon as possible,
17 it is going to help deal with these huge
18 restrictions--

19 A Right.

20 Q --that the tart cherry industry is
21 looking for; is that correct?

22 A Right. Right. You heard in my

1 first testimony--you asked, you know, how come
2 some people didn't put more on the ground, and
3 I says "like sheep," and everybody laughed at
4 me there. But it's--more truth to that than
5 you know. I got a few sheep at home and they
6 follow each other, and as soon as there's one
7 processor that says, well, I don't think I'm
8 going to put any on the ground, the processor
9 five miles down the road, he can't do anything
10 different or he's going to lose his growers.

11 And the other processor next to
12 him says, well, if he's doing it, I gotta do
13 it. And pretty soon, nobody puts any on the
14 ground cause there's no incentive to put it on
15 the ground.

16 I heard one grower, back in
17 Michigan, and I don't know if it came out in
18 the testimony back there or not. He says we
19 would have been better off, in 2009, to pick
20 our cherries, concentrate 'em, then dump the
21 concentrate out in a landfill, cause we would
22 a got full value for that destruction of

1 product, rather than put 'em on the ground in
2 the orchard because we're only getting a third
3 of the value out of it. Now something is
4 broke. Something is broke.

5 We're trying to fix that. And
6 back to my plea to you folks. If we can get
7 this in place for this year, because it looks
8 so--like such a huge crop, we're all going to
9 be better off, and I believe, as a CIAB in the
10 cherry industry, we're committed to doing what
11 we can. But I don't know what that is yet,
12 and I don't know how we can go about it, to
13 get it.

14 I mean, if it's asking somebody
15 different, if it's going back and having
16 another meeting and inviting somebody else.

17 I don't know what it is. But
18 whatever we can do. If we can get it for this
19 year's crop, it would be a great benefit for
20 this industry.

21 MS. DESKINS: Thank you.

22 MR. HEDIN: Might I follow up,

1 Your Honor?

2 JUDGE CLIFTON: You may, Mr.

3 Hedin.

4 BY MR. HEDIN:

5 Q In following up Ms. Deskins'
6 question, Ray, you're a fairly sophisticated
7 and large grower, here, in the state. What
8 would you speculate would be the impact to the
9 smaller, or the medium-size grower, if they
10 got the kind of pricing structure that you
11 were talking about?

12 A Well, our co-op has eight growers,
13 and we handle cherries for five others that
14 are not members. The eight growers in the co-
15 op all have the exact same pricing structure
16 from that guy that called him the tiniest
17 grower in the industry--Mr. Meredith--to us,
18 which is the largest, here, in our co-op. So
19 I don't think it's different.

20 All I know is that the little guy
21 will benefit from this every much as the big
22 guy. Okay?

1 Q But would his cost of operations
2 be higher than yours--

3 A Oh, for sure; for sure.

4 Q --and thus, the consequence would
5 be more severe to them, would it not?

6 A Yes; it would. Yes. His cost of
7 operation would be much more per acre than
8 ours.

9 JUDGE CLIFTON: Are there any
10 other questions for Mr. Ray Rowley?

11 THE WITNESS: If you'll end this
12 hearing, I won't have to come back up anymore.

13 JUDGE CLIFTON: Mr. Rowley, I
14 think it's a very good thing that you came
15 back up.

16 THE WITNESS: Okay.

17 JUDGE CLIFTON: Thank you.

18 Is there anything else you'd like
19 to add?

20 THE WITNESS: Thank you for
21 coming. Thank you for being part of the team,
22 and I hope we can work as a team.

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(Witness excused)

JUDGE CLIFTON: Thank you.

Mr. Hill, do you have any other evidence?

MR. HILL: It would appear I do not, Your Honor.

JUDGE CLIFTON: Ms. Deskins, do you have any more evidence?

MS. DESKINS: I don't, but could we go off the record for a moment.

JUDGE CLIFTON: We certainly can. Let's go off the record. It's now 2:23.

(Discussion off the record)

JUDGE CLIFTON: All right. We're back on record. We have just confirmed the admission into evidence, and I'm just going to do it again, just to make sure we did not fail to admit anything. The exhibits that are admitted into evidence are 1 through 20, and Exhibit 7, page 10A, Exhibit 7, page 9A, Exhibit 7, page 13A.

All of those are admitted into

1 evidence.

2 (Whereupon, Exhibits No. 1 through
3 No. 20, previously marked for
4 identification, were received in
5 evidence)

6 JUDGE CLIFTON: All right.

7 Is there anything further before
8 we conclude this hearing?

9 Mr. Hill?

10 MR. HILL: I would believe--I
11 believe that's all from our side, Your Honor,
12 in our proposal one. That's correct.

13 JUDGE CLIFTON: Thank you.

14 Ms. Deskins?

15 MS. DESKINS: Judge Clifton, the
16 only thing we'd like to add to the record, in
17 case someone reads the transcript, is if they
18 want to submit anything electronically let me
19 just read the address where they can submit it
20 to. It's Parisa Salehi@ams.usda.gov, and I'm
21 going to spell Parisa. It's spelled P-a-r-i-
22 s-a, dot, Salehi, S-a-l-e-h-i, at

1 American.usda.gov.

2 And that's the address, if you
3 want to submit anything electronically. But
4 you should also file things with the Office of
5 the Hearing Clerk, and their address is 1400
6 Independence Avenue, S.W., Room 1031 South
7 Building, and it's Mail Stop 9203, Washington,
8 D.C. 20250-9203.

9 JUDGE CLIFTON: Excellent. Thank
10 you.

11 MR. HEDIN: Can I just ask a point
12 of clarification.

13 JUDGE CLIFTON: You may.

14 MR. HEDIN: Is it that it must be
15 filed with her, or it should be, as a
16 courtesy?

17 MS. DESKINS: There's new
18 electronic submission rules, and to the extent
19 practicable, you should try to e-mail it to
20 her. But it definitely has to be filed with
21 the Hearing Clerk's Office, in order to be
22 part of the record.

1 JUDGE CLIFTON: And Ms. Salehi, as
2 I understand it, there will be posted on an
3 Agricultural Marketing Service Web site, the
4 transcript and the exhibits; is that correct?

5 MS. SALEHI: That's correct.

6 JUDGE CLIFTON: All right. And we
7 have to get the transcript, of course, from
8 Neal Gross, before that can be done.

9 All right. Is there anything
10 further?

11 (No response)

12 JUDGE CLIFTON: There is not.
13 This concludes our hearing at 2:27.

14 (Whereupon, at 2:27 p.m., the
15 hearing was concluded.)

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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: USDA

Date: 04-26-11

Place: Provo, UT

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