

APPEARANCES:

ON BEHALF OF THE USDA:

BRIAN T. HILL, Esq., Office of General

Counsel

ANTOINETTE M. CARTER, Technical Assistant to

the Chief, AMS

MELISSA SCHMAEDICK, Senior Marketing

Specialist, AMS

ANTHONY J. SOUZA, Federal Program Manager, AMS

DONALD L. HINMAN, Senior Agricultural

Economist, AMS

ON BEHALF OF THE PROPONENTS:

JASON E. RESNICK, Western Growers

HENRY GICLAS, Western Growers

P R O C E E D I N G S

(8:30 a.m.)

JUDGE HILLSON: Good morning

everybody. We are outside of Denver, in Aurora, Colorado. It is October 8, 2009. And this is the fourth site and the I think, seventh day of hearing we have had in the matter of leafy green vegetables handled in the United States, Docket No. AO-FE-09-0138 and AMS-FV-09-0029, FV-09-970-1.

My name is Mark Hillson. I'm the Chief administrative law judge in the U.S. Department of Agriculture. I'm presiding over the hearing. I don't have anything to do with the actual decision in this case. I am just here to make sure that the hearing proceeds in an orderly fashion, and I'm here to swear in the witnesses, and make sure testimony comes in properly.

Just a reminder about turning -- if you could turn your cellphones to vibrate or turn them off, please, I would appreciate

1 that. At these hearings, anyone who wants to
2 testify can testify, and anyone who wants to
3 ask questions can ask questions.

4 It looks like we are having a much
5 lighter day than I thought we were going to
6 have, compared to the other hearings -- the
7 other days we have had this hearing. So we
8 will probably get done pretty early.

9 But what I'm going to do is, I'm
10 going to give the -- oh, just for the record
11 also, since this is a continuation of a
12 hearing, I'm requesting that when the
13 transcript is made of this, that this doesn't
14 start from page one, but that it rather,
15 continues from where left off from the hearing
16 in Columbus, two days ago. And likewise, when
17 I receive exhibits, I'm going to be starting
18 with number 74. We have 73 exhibits so far in
19 this case.

20 And as is the custom, I am going
21 to ask anyone who is here in a
22 representational capacity to please identify

1 themselves for the record. And we start with
2 USDA Panel, Mr. Hill.

3 MR. HILL: My name is Brian Hill,
4 Offices of the General Counsel, USDA.

5 MS. CARTER: Antoinette Carter
6 with the Marketing or Administration Branch,
7 USDA Agricultural Marketing Service.

8 MS. SCHMAEDICK: Melissa
9 Schmaedick, USDA Agricultural Marketing
10 Service.

11 MR. SOUZA: Antony Souza, USDA
12 Agricultural Marketing Service, Fresh Products
13 Branch.

14 MR. HINMAN: Don Hinman, USDA
15 Agricultural Marketing Service, Food
16 Investment Programs, Economic Analysis.

17 JUDGE HILLSON: Okay. From the
18 Compliance side, please?

19 MR. RESNICK: Jason Resnick,
20 Western Growers and counsel for the proponent
21 group.

22 MR. GICLAS: Hank Giclas, Western

1 Growers.

2 JUDGE HILLSON: Okay. Is there
3 anyone else here in the representational
4 capacity who wants to identify themselves for
5 the record? If not, we will proceed. And Mr.
6 Resnick, you may call your witness.

7 MR. RESNICK: Thank you, Your
8 Honor. The Proponent Group calls Jay Carnes.

9 JUDGE HILLSON: I'm marking Mr.
10 Carnes' written testimony as Exhibit 74.

11 (The document referred to was
12 marked for identification as
13 Exhibit 74 and received in
14 evidence.)

15 Whereupon,

16 J. ALLEN CARNES

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

20 JUDGE HILLSON: Okay. Can you
21 please state your name and spell it for the
22 record, Sir.

1 WITNESS: My name is J. Allen
2 Carnes. That is spelled J obviously, the
3 first name is just J. No A-Y or anything.
4 Allen, A-L-L-E-N, Carnes, C-A-R-N-E-S.

5 JUDGE HILLSON: Okay. Do you have
6 a statement that you want to read, sir?

7 THE WITNESS: Yes, sir. I will
8 read into the record, here.

9 JUDGE HILLSON: Go ahead.

10 DIRECT TESTIMONY

11 THE WITNESS: I'm the president of
12 a vegetable shipping company in Texas, as well
13 as part owner in a family farming operation.
14 I also served as President of the Texas
15 Vegetable Association from 2005 to 2009.

16 I come here today not only
17 representing myself and my company but also
18 representing the Texas Vegetable Association,
19 which is listed as one of the proponent groups
20 to the National Leafy Greens Marketing
21 Agreement. My main objective here today is to
22 speak in favor for the adoption of the

1 proposed rule.

2 My family has been involved in
3 vegetable production business since 1950. We
4 grow and ship cabbage, broccoli, onions,
5 melons and lettuce. We have strived in the
6 past to provide the consumer with safe,
7 quality vegetables, and we will continue to do
8 so in the future.

9 Because of the events of the past
10 couple of years involving food-borne pathogens
11 involving fresh produce, I believe we as an
12 industry need to take the extra step to assure
13 the consumer that fresh produce is as safe as
14 good science and good agricultural practices
15 can make it.

16 I believe that the proposed
17 National Leafy Greens Marketing Agreement is
18 a step in the right direction. Not only is
19 this a step to show the good faith of our
20 industry, but it also can serve as a national
21 blueprint for growers and receivers alike.
22 This national agreement can start the process

1 of sensible consistent government oversight
2 that in my experience has been lacking to this
3 point.

4 My company has been involved with
5 the third-party audits since 2003. Since that
6 time to the present, this practice has been
7 scrutinized and looked at by many receivers.
8 To some receivers of my product, third-party
9 audits have been more than sufficient and
10 adequate to others.

11 Some of the receivers we work with
12 have asked for an entirely different audit
13 practice. This agreement would allow for some
14 streamlining of the third-party audit
15 guidelines, and thus making the process not
16 only more workable for the producers but more
17 concise and understandable for the consumer.

18 I would like to stress that it is
19 critical that scientifically based regional
20 variation be allowed. The Texas Vegetable
21 Association and other proponents are
22 advocating that the metrics for growing and

1 handling should reflect some regional
2 differences. Different water quality,
3 weather, soil types and pest intrusions exist
4 in different regions of the country. Any
5 national agreement voluntary or otherwise
6 needs to recognize these variations and the
7 effect they have on specific commodities.

8 I'm not saying that we should
9 compromise food safety in Texas or other
10 regions, but most scientists agree the metrics
11 in California were done with the best science
12 available at the time. We are learning more
13 all the time about the science of food safety,
14 and some of this sciences is being done for
15 specific regions. Clearly, one size food
16 safety program cannot be applied equally to
17 all regions of the country.

18 The rule, in my opinion would also
19 start to have a level playing field effect.
20 One of my chief concerns as far as food safety
21 goes for the Texas and national leafy greens
22 is only -- we are only as good as our weakest

1 link, be it that link of our neighbor or
2 someone across the country.

3 I truly believe that at the end of
4 the day, that food safety is not and should
5 not be used as a marketing ploy. Any
6 marketing ploy that I'm seeing now because of
7 my company's food safety policies would be
8 negated tenfold if one of my neighbors had an
9 avoidable food-borne illness outbreak traced
10 back to him, or even worse, traced back to our
11 area that cannot be pinpointed because lack of
12 good practices.

13 This agreement, although voluntary
14 to a point, I believe it would be a great
15 start to a process where growers and shippers
16 begin to adopt good agricultural practices in
17 their day-to-day activities. Most of us know
18 this has not occurred on a consistent basis in
19 the past, and at the same time, the national
20 framework will encourage retailers, processors
21 and food service operators alike to adopt this
22 process and quickly demand that their

1 suppliers are signatories to the agreement.

2 I want to thank you for allowing
3 me to share not only my thoughts as far as the
4 National LGMA goes, but also some of my
5 experiences with food safety. I believe
6 implementation of this agreement is a step in
7 the right -- is a right step for the fresh
8 produce industry, and for the consumers of our
9 product.

10 So far, I'm encouraged by the
11 process, and USDA's willingness to work with
12 our industry and consumer groups modification
13 as needed for its adoption. I look forward to
14 being involved with this process as it goes
15 forward. Thank you.

16 JUDGE HILLSON: Okay. Mr. Carnes,
17 we have received your written statement,
18 Exhibit 74, and I'm going to ask the panel if
19 they have questions.

20 Ms. Schmaedick.

21 CROSS-EXAMINATION

22 BY MS. SCHMAEDICK:

1 Q Melissa Schmaedick. Good morning.
2 And thank you for your testimony. You stated
3 that you are a proponent of the proposal.

4 A Yes, ma'am.

5 Q So have you been involved in the
6 drafting of the proposed language?

7 A I wouldn't say I had been directly
8 involved in it. But I have been reading its
9 process and following its process all the way
10 through. Our Chief Executive Officer for our
11 association has been involved in some of that
12 language. Yes, ma'am.

13 Q Okay. And you are let's see, the
14 President of a vegetable shipping company. Is
15 that correct?

16 A Yes, ma'am.

17 Q How would this proposed agreement
18 impact your shipping companies business?

19 A At present time, not a whole lot.
20 We were doing a lot of these things that
21 California has already adopted. And as I
22 stated in my testimony, we have been following

1 some third-party guidelines and audits since
2 2003.

3 And so it wouldn't affect it much
4 at all. I mean, some of our business that we
5 have gone after and pinpointed so to speak
6 requires this already.

7 Q And on page 2 of your statement,
8 you said that you believe that this proposal
9 would allow for some streamlining of the
10 third-party audit guidelines, thus making the
11 process a little more workable for the
12 producers. Would it also make it more
13 workable for handlers and processors?

14 A Yes, ma'am. I think so. And as I
15 stated in the opening, not only am I president
16 of a shipping company, a packaging and
17 shipping company, my family also farms over
18 4,000 acres in Texas. And we are involved in
19 the third-party audit process on the farm
20 also.

21 And so yes, I think it would be
22 helpful. And what I meant by streamlining, we

1 are, like I said, third-party audit on the
2 farm also. And what I mean by streamlining is
3 a lot of our receivers whether they be retail
4 or processors have different guidelines. And
5 I think that the time has come for us to look
6 at a national agreement or a national process
7 for food safety.

8 Q And you mentioned that you have
9 been already following a number of these
10 practices, whether they are GAP, GHP or GNP
11 practices, since the early 2000s? Is that
12 correct?

13 A Yes, ma'am.

14 Q What are some of the types of
15 things that you have put into effect?

16 A Well, the first thing that we did
17 that we pinpointed is our biggest critical
18 area would be employee hygiene and employee
19 education. And we started that, not only in
20 the shed process, in the handling process
21 after harvest, but also in the growing process
22 and stuff on the farm. As I said, that would

1 be the first step.

2 But then we have also -- we've
3 realized as I said also in there, that you
4 know, I think there needs to be some process
5 for regional modification a little bit here
6 and there. What we do in Texas -- or what I
7 do in my region is almost solely deep water,
8 well water, and which is very good quality, so
9 I think water is one of our least concerns.

10 But our biggest concern is
11 wildlife. And we've been monitoring wildlife
12 in our fields. Obviously, to have a sellable,
13 marketable commodity, you have got to have a
14 good commodity. And we have been doing that
15 since 1950, probably. But we have been
16 documenting it and realizing the effect that
17 it has on the food safety concerns since all
18 of this has come about.

19 And that is one of the other areas
20 that we have monitored and tried to take good
21 record keeping. And tried to avoid certain
22 areas and certain fields and stuff like that.

1

2 Q As a shipping company, do you work
3 with other growers who supply you product?

4 A Yes, ma'am. We have -- we
5 probably do 60 percent of -- whatever we ship
6 is probably 60 percent comes off of our own
7 farms. So about 40 percent, we utilize
8 outside growers at this point.

9 Q And are those -- the growers that
10 supply that 40 percent, would you categorize
11 them as larger, smaller, mid-size businesses?

12 A I would categorize them as mid-
13 size businesses. Most of the growers that we
14 contract from are well diversified. They do
15 a lot of vegetables, but they also do some
16 grains and cash crops and types -- program-
17 type crops. Excuse me.

18 Q And do you require any type of
19 certification or documentation of field
20 practices from those?

21 A Yes. And we are in the process of
22 working with them. And I will say that I have

1 got -- I have numerous growers that are on
2 board and doing the practices where we are
3 doing them, the water testing and the training
4 of their employees.

5 And there are some that are still
6 lagging, some that are still lagging. They
7 are farther out, since it gets pushed into
8 different areas. And I'm working with them to
9 get them up to speed. So whether or not the
10 national LGMA comes about, which I fully
11 support and hope it does, all of my producers
12 will be at that point.

13 Q And about how long have you been
14 making those requirements of your growers and
15 suppliers?

16 A Probably the last -- this is the
17 third growing season, probably.

18 Q Are you aware of any changes that
19 those growers have had to make in order to
20 become compliant?

21 A I wouldn't say major changes. I
22 would say the biggest headache with individual

1 growers and smaller growers is the record
2 keeping process of this. Like I said before.
3 I mean, some of testing, some of the water
4 testing and the tissue testing and stuff, that
5 is something new for them.

6 But that is also something that we
7 are taking monetary responsibility for. But
8 for them, probably the biggest thing is the
9 record keeping. And like I said before, some
10 of the wildlife and stuff like that, they are
11 having to do that anyway.

12 To generate a marketable product,
13 they are having to do that anyway to keep
14 wildlife out of the field and stuff, whether
15 it be through high fences or some other
16 deterrent. They are doing that at the present
17 time.

18 Q You touched just briefly on the
19 cost of water testing and tissue testing.
20 First of all, what type of tissue testing do
21 you --

22 A Well, some of our receivers,

1 mostly processors that are taking my product
2 and processing and putting it in bag salads or
3 whatever, require tissue testing before we
4 start to harvest a field to make sure there is
5 no pathogens and inert E. coli on each 157.
6 But as I said before, that is something that
7 we are going out and doing.

8 We are not requiring all the
9 producers whether it be my family farm or an
10 outside producer. I mean, we are taking
11 responsibility for that, and having it done
12 for them.

13 Q So in that context, tissue means
14 cell?

15 A No. Tissue means product testing.
16 Excuse me for not explaining myself well. No,
17 that is basically where we are going out and
18 harvesting a head of cabbage or a head of
19 lettuce and having it sent off to a lab that
20 does the testing to make sure there is no
21 pathogens, no harmful pathogens within it.

22 Q And again, to clarify, that is an

1 expense that as the handler or the shipping
2 company, you take on that expense? That is
3 not passed on?

4 A Yes, ma'am. Right now. Yes.

5 Q Okay. Do you work with any
6 organic producers?

7 A No, ma'am. We are strictly
8 conventional.

9 MS. SCHMAEDICK: Okay. Those are
10 all my questions for the moment.

11 THE WITNESS: Thank you.

12 JUDGE HILLSON: Anyone else on the
13 panel with questions. Ms. Carter?

14 MS. CARTER: Good morning.
15 Antoinette Carter with the USDA.

16 THE WITNESS: Good morning.

17 BY MS. CARTER:

18 Q I just had a few followup
19 questions for you. You had indicated that
20 your farming operation consists of 400 acres.

21

22 A We have over 4,000 acres.

1 Q Oh, 4,000 acres.

2 A Yes, ma'am. And that is not in my
3 testimony. But yes, over 4,000 acres.

4 Q Okay. And on -- how many of those
5 do you grow leafy green vegetables on?

6 A And I just completed a survey, so
7 I -- I think we're -- 1,500 acres or so are
8 dedicated to leafy greens on an annual basis.
9 Obviously, that is a rotational basis. So one
10 piece of ground would be utilized this year;
11 it will be a different one utilized next year.
12 But it's about 1,500 acres on an annual basis.

13 Q And based on the Small Business
14 Administration's definition of small
15 businesses, would you classify yourself --
16 being a grower, if your annual revenue is over
17 \$750,000, you would be considered --

18 A Yes, ma'am.

19 Q Would you be considered large or
20 small? And do you feel comfortable
21 classifying yourself as --

22 A You know, I have no problem

1 classifying myself. There are times of year
2 when you look at some of their guidelines, we
3 are definitely over the small business by the
4 number of people we employ, but that is
5 seasonal in nature.

6 So we are kind of in the middle,
7 to tell you the truth. Sometimes it is small,
8 and we go over that number like I said, with
9 employees in our weekly payroll, and stuff
10 like that.

11 Q Okay. And with regard to revenue?

12 A Yes, ma'am. Our revenue is over
13 that point, so it's on the larger side.

14 Q And that is specifically with
15 regards to the leafy green vegetables that you
16 grow?

17 A Yes.

18 Q Would you still be over?

19 A Uh-huh.

20 Q Okay. And you indicated that you
21 do source supply from other growers. Are
22 those local growers in the Texas area?

1 A Yes, ma'am. We only have one
2 grower out of state that we source from, and
3 that is here in Colorado that we source from
4 a couple of our processors during the summer
5 months when we don't have any product in
6 Texas.

7 Q Okay. Can you describe for us the
8 growing and harvesting season in Texas?

9 A Yes. We started the planting
10 process back in July. And we'll start harvest
11 with cabbage, is the first crop we will start
12 with here in a couple of weeks. And that
13 process will go until the end of May. And at
14 that time, during points -- different points
15 during the season, we'll have lettuce and a
16 couple of other things.

17 Q And so you harvest during what
18 months?

19 A We harvest from October until May,
20 commodities that fall within the LGMA.

21 Q Okay. And you mentioned wildlife
22 as one of the areas of concern that you deal

1 with. Are there any specific, any other areas
2 of concern for growers?

3 A No, ma'am. And I hate speaking
4 for all of them. But I think in my
5 experience, the biggest concern is the record
6 keeping process. You know, most of the
7 expense is borne by our company. Some of the
8 more expensive pieces of food safety.

9 That is not to say that they are
10 not doing it. But their biggest -- the
11 biggest hurdle is record keeping. And I think
12 that a chief component of this all is the
13 education of these smaller growers. Once they
14 realize why they need to be doing this and
15 keeping up their record keeping, none of them
16 have a problem with it.

17 Q Okay. And one, just one final
18 question. Are there any unique, I guess
19 growing practices or climatic conditions that
20 are very unique to Texas as opposed to other
21 growing areas?

22 A You know, I wouldn't say unique.

1 But we definitely deal with wildlife, like I
2 said. That is a critical point. You know we,
3 we probably have -- because our weather
4 fluctuates a lot more, the regions of the
5 country, we have more pest and chemical usage
6 in areas, in some parts of the country.

7 But anything that is unique? No,
8 I can't think of any. Well, like I said, we
9 don't have any -- water is not a chief concern
10 for us. We don't use as much surface water at
11 all. And so that is not something that we
12 have had to worry about up to this point.

13 MS. CARTER: Okay. That is all I
14 had. Thank you.

15 JUDGE HILLSON: Other questions
16 from the panel? Mr. Souza?

17 BY MR. SOUZA:

18 Q Thank you. Anthony Souza. USDA.
19 Good morning. You mentioned in your testimony
20 a level playing field effect. How do you feel
21 that a national leafy green agreement would
22 aid in having a level playing field?

1 A Well, I personally believe that
2 the LGMA were voluntary at this point, either
3 through marketplace or economics or through
4 governmental oversight will be better than
5 something larger. And I firmly believe that
6 it is the smallest grower, or it is a big
7 grower that is your next-door neighbor that is
8 not doing things the way they should could
9 adversely affect our whole industry.

10 As I say that, I thoroughly
11 recognize you know, there has to be some --
12 concessions is not the right word. But there
13 has to be some special circumstances for the
14 smaller grower. Because I want them to play
15 in this.

16 I mean, if it is somebody growing
17 ten acres of cabbage that is going straight
18 into a local retailer, them being caught -- I
19 have as big of a risk as them being caught as
20 I do almost of myself, because of what it
21 would do to our industry. Region wide, I
22 think we looked at the spinach outbreak and

1 realize that a major outbreak is going to
2 affect producers all over the country and have
3 an adverse economic effect on them.

4 So we need to come up with sound
5 policy that addresses the small grower and
6 makes it available for them to participate in
7 a food safety program, whether it be the LGMA,
8 or some other governmental regulation.

9 Q You talk about the small grower.
10 And earlier, you mentioned about record
11 keeping being a problem. And discussed a
12 little bit about outreach and education. Do
13 you feel that outreach and education should be
14 a part of this National Leafy Green agreement?
15

16 A I don't know. You know, this
17 agreement that we are talking about is
18 voluntary right now. If we stay strictly at
19 a voluntary state for the next ten years, or
20 so to speak, yes. I think it is definitely
21 going to have to be a component. It is my
22 belief that this is the first step in a

1 national salad and food safety policy.

2 And yes, I do. I think education
3 to smaller growers has to be a chief
4 component. And we have been working in Texas
5 to that point, right now. Where we have been
6 trained to go out and pinpoint some of these
7 smaller growers and show them through
8 education and also, I think we are looking at
9 some monetary help with the third-party audit
10 system to get them involved, because just as
11 I said, it goes back to they are as big of a
12 players in this as the big guys is, because
13 one outbreak -- it doesn't matter how big or
14 how small you are.

15 Q Speaking as a larger shipper,
16 grower and then mentioning the smaller
17 growers, which you handle some of their
18 product, as a shipper grower, why do you feel
19 food safety should not be a marketing ploy?

20 A You know, to this point,
21 unfortunately it is. My company, because we
22 have been in Texas on the forefront of food

1 safety and we were one of the first ones out
2 there, there have been some retailers and some
3 processors look to me because of their
4 requirements that they put upon themselves to
5 find product.

6 Now, the bump that I've received
7 because of that market I think can be negated
8 tenfold if somebody in our area has a major
9 food safety outbreak, where it stops commerce
10 coming from our area.

11 We saw that in the spinach
12 outbreak, where there were a couple of
13 shippers that actually had product in this
14 state, in Colorado, and because of the FDA's
15 ruling which stopped the flow of spinach
16 commerce from all over the country, not from
17 the area it came from, it had a huge economic
18 adverse effect on their business.

19 And so anything that I'm seeing
20 because of food safety I think can be
21 overshadowed 100 percent if we have an
22 outbreak in my area by a small grower or a

1 large grower next door to me.

2 Q Do you grow any product in Mexico?

3 A No, sir. I do not.

4 Q What leafy green products do you
5 farm and do you handle as a shipper?

6 A By far, my biggest product is
7 cabbage. Then we also do some head lettuce
8 and some leaf lettuce.

9 Q You mentioned earlier that you
10 sell to processors? What percentage of
11 product would you say that you sell to the
12 fresh market, and what percentage do you sell
13 to processors?

14 A Presently, about I would say 70
15 percent of my product goes into the fresh
16 market and about 30 percent goes into the
17 processed market.

18 Q You mentioned that you currently
19 have third-party audits? How many different
20 audit organizations do you have to have audits
21 from?

22 A Right now, we have got -- there

1 was two in the past, but we have gotten down
2 to Primus doing audit on the farm all the way
3 to the packing shed. But as I was saying,
4 there are certain retailers that are requiring
5 things -- different practices above and
6 beyond, different amounts of testing.

7 To me, there hasn't -- to this
8 point, there hasn't been enough streamlining
9 of this and enough oversight of this.

10 Q So on your 4,000 acres, on your
11 food safety program, do you have a single food
12 safety program, or does your food safety
13 program differ depending on who you are
14 selling to?

15 A We had a single food safety
16 program. But we were having to supply records
17 in different forms and fashions to different
18 people. And as I said, we are having to do
19 different amounts of testing for different
20 people. We are having to look at different
21 control points for different people that have
22 identified specific areas that they are more

1 concerned about than others.

2 Q So in the cost of your audits --
3 if Primus is your base audit, and then you
4 have some retailers that you have to audit to
5 that have a higher standard, is a larger --
6 what would you say the increase would be from
7 a base Primus audit to those that you have to
8 perform to meet some of your other buyers?

9 A The audit process in itself is
10 overall pretty cheap. The biggest expense to
11 this is the personnel and the team that you
12 put on the ground for food safety. So some of
13 their man hours is what goes to concluding
14 some of the excess requirements, required by
15 different receivers. The audit process, like
16 I said, is fairly cheap in itself.

17 MR. SOUZA: No further questions.
18 Thank you.

19 JUDGE HILLSON: Anyone else? Dr.
20 Hinman?

21 BY MR. HINMAN:

22 Q Okay. Don Hinman, USDA. Good

1 morning.

2 A Good morning.

3 Q In your testimony, you emphasized
4 the point about different metrics for
5 different regions, different characteristics.
6 Do you -- if the national agreement was to go
7 into effect, do you believe that the metrics
8 that would be developed would be appropriate
9 to this region that you're in?

10 A Yes, sir. I -- what I --

11 Q You would like it to be.

12 A Yes, sir. I do, in present form.
13 But I also, at that same time, I think we need
14 to have the ability to tweak and change the
15 metrics as science comes available for
16 regional differences within this program or
17 any other program that comes along.

18 Q And do you think that it is likely
19 from what you have learned about how this
20 might go into effect, that that flexibility
21 would be there?

22 A Yes, sir. I have learned -- to my

1 knowledge, yes, that flexibility is there.

2 Q Okay. You had mentioned that your
3 growing operation is 4,000 acres?

4 A Yes, sir.

5 Q Total? Can you repeat again how
6 much of that is leafy greens in a given year?

7 A About 1,500 acres, annually.

8 Q Okay. If there some way that you
9 could characterize the size of your shipping
10 operation in terms of some broad number that
11 would give some idea about that?

12 A I would be scared to even guess.
13 And within Texas, we are probably on the
14 medium to larger scale. But on a national
15 average, I have no -- I wouldn't want to
16 guess.

17 Q Okay. How many growers sell to
18 you in your operation?

19 A It has fluctuated throughout the
20 years. I mean it has gone from as high as 15
21 down to five. Presently, we probably in the
22 seven to eight range or so.

1 Q I'm going to shift here to the
2 Texas Vegetable Association. Could you give
3 me some broad idea about in terms of the
4 membership, the number of large and small
5 growers and handlers that are members of that?
6 Anything about the sort of diversification of
7 that association?

8 A Okay. Yes. They pretty much
9 encompass most vegetable growers within the
10 state, whether they be involved in cabbage or
11 lettuce. And that goes all the way from the
12 handlers to the individual growers. I would
13 willing to bet that the smallest grower
14 probably, you know, is the 500 type grower to
15 myself, which is one of the larger growers in
16 that.

17 And we -- not only are members as
18 growers, but we are also members as producers
19 also. And the producers range in fact from my
20 size and a little smaller all the way to the
21 Del Monte Corp. I mean, they're a member
22 also. So it is a very wide range of people.

1 Q Thank you. You said that, in
2 general, your shipping is 70 percent of the
3 fresh market and 30 percent to processors?

4 A Yes. Currently, yes, sir.

5 Q Okay. Could you describe a little
6 bit more about what you mean by processed
7 market?

8 A Well, most of the processed market
9 that we are in business with, we ship to them
10 in bulk fashion. And upon receiving our
11 product, they are putting it through a value-
12 added process where they are chopping it down
13 and making it ready to eat by consumers.

14 We are not involved with the
15 value-added process at all. We are still
16 shipping them a whole piece of a commodity.
17 They are the ones that are putting the process
18 into it. So that is -- we are not a big
19 player in the processed market, as far as
20 doing much of the product.

21 But we're supplying them, and they
22 are the ones that are requiring some of the

1 testing and stuff -- some of the tissue
2 testing and stuff, because they are adding it
3 into a bigger function, where it goes into
4 salads that may have three or four different
5 type of items to it, that they are bringing in
6 and mixing it together. So I hope that
7 answers your question.

8 Q That is fine. Thank you. I'm
9 going to bring you a copy of an exhibit from
10 a previous testimony. I want to ask you some
11 brief questions about that.

12 (Pause.)

13 BY MR. HINMAN:

14 Q This was Exhibit 34-A, presented
15 in the Monterey hearing. And it is a
16 representation put to us by the proponent
17 group relating to a broad representation of
18 costs. And according to Table 16, which is
19 intended to be a very broad representation of
20 what would be the likely costs to a handler,
21 a shipper such as yourself, if the national
22 agreement was put into place.

1 And I draw your attention just to
2 the main categories of cost, listed there.
3 There are personnel, water tests, third-party
4 audit, ranch care, and assessments. And then
5 on the left hand column, on a series of
6 numbers trying to present this in terms of a
7 cost per carton.

8 And if you go to the bottom of
9 that, you get -- it mentions that 11.1 cents,
10 and it is cost per carton. And my question to
11 you is, do you believe that that is in a
12 general sense a fair representation of the
13 cost of the national agreement for a shipper
14 such as yourself, representing a large
15 handler.

16 A I have just completed a basic --
17 the same basic thing. And it would just be
18 not only a need-to-know basis but also for
19 this process as it goes forward. Just looking
20 at this real quick and some of the numbers
21 that I came up with for our region, it
22 shouldn't be a whole lot different.

1 The only thing I didn't add in
2 here was the assessment. I think it possibly
3 is a little high, to tell you the truth. I
4 was figuring down probably at a cost of five
5 cents per range per carton, then plus the
6 assessment, is where I'm at.

7 Q Okay. And so that is meant to be
8 a representation, you know, if there was
9 nothing in place at all, and suddenly it went
10 into place. But to further follow up on that,
11 you said five cents per carton. Do you
12 believe that you are already bearing many of
13 these costs now?

14 A Yes. We are already -- on the
15 acreage that I'm growing, we are already at
16 that five cents for cost. It will actually
17 allow me to diffuse some of that costs,
18 because of some of my personnel would be
19 spending time with some offsite producers that
20 we're -- and I guess probably the answer is
21 no, because we are going to be doing that
22 anyway. And it is going to diffuse some of

1 that cost. But I think, you know, it is not
2 going to change for me a lot except for the
3 assessment.

4 Q Okay. Let me back up then. You
5 have mentioned about your field. Now, the
6 table I'm referring to, I'm just going to go
7 through the grower table after this. This is
8 representing handling operations only.

9 A Yes.

10 Q Do you -- you answered five cents.
11 Is that -- from another sense do you think
12 five cents -- the grower is on the page
13 before, if you turn backwards. Yes.

14 A Okay.

15 Q But referring actually to the
16 shipping first --

17 A The shipping first. I'm sorry. I
18 was looking at -- give me just a second. Yes.
19 This is pretty safe, where we are at.

20 And we have been -- the shipping
21 aspect of it, we have been following since, or
22 we have been engaged in the record keeping and

1 the water tests and some of the chlorine we
2 have been using, and our employee training we
3 have been doing since then, I think this is
4 pretty spot on. It is right about five cents
5 per carton.

6 Q As a shipper?

7 A Yes. As a shipper.

8 Q And as a grower on the previous
9 table there? Is that a fair represent --
10 would you -- is that a fair representation of
11 you, or would you state your costs are lower
12 than that?

13 A Lower. I think it is around five
14 cents also, when you figure in the water
15 testing. As I said, the audits in there, the
16 audits are a big cost expense. The expense is
17 the testing and personnel costs.

18 And since we are doing this, but
19 as I mentioned before, that is going to be the
20 cost that is borne by my company. They are
21 going to have to keep up with some of the
22 record keeping.

1 I mean, once again, I think that
2 may be the biggest aspect for these small
3 growers in the record keeping. But the actual
4 boots-on-the-ground person going out and
5 taking the water test, doing the scouting for
6 wildlife and stuff, at this point, would be a
7 responsibility of my company, and the shipping
8 part of it.

9 Q So if you, as a grower and a
10 shipper, were to bear those costs, or
11 something lower as you say may be true with
12 your firm, do you believe that the costs of
13 successfully implementing the marketing
14 agreement would substantially outweigh -- that
15 the benefits would outweigh these costs that
16 you would be incurring?

17 A Yes, I do. I do think it
18 outweighs it, because it starts a process --
19 I think a national process that is duly
20 needed. But I also -- most people are going
21 there and doing this anyway. This just adds
22 a little bit of a broader scope, I think this

1 agreement. But we are going there anyway.

2 It is prudent on our industry to
3 do these things. And if we are going to play
4 in this field, which most of us have said, I
5 have made the commitments for the now and in
6 the future, we are going to have to do this
7 one way or the other.

8 So I don't see a whole -- beside
9 from the assessment, I don't see a whole lot
10 of increased costs to being part of the
11 agreement. And once again, I think this is
12 one of the first steps, in a national food
13 safety policy that we are going to see.

14 MR. HINMAN: Thank you. No
15 further questions, Your Honor.

16 JUDGE HILLSON: Is there anything
17 else that you wish to ask him, Ms. Schmaedick?

18 BY MS. SCHMAEDICK:

19 Q Melissa Schmaedick, USDA. Mr.
20 Carnes, do you believe that contamination of
21 a product can occur in the handling or
22 shipping part of the process?

1 A Yes, ma'am.

2 Q So would you believe that it is
3 equally important to include guidelines for
4 handling and processing, including shipping?

5 A You know, a lot of those things
6 are already, because of the marketplace are
7 being driven by supply and demand currently.
8 And I think that while this agreement and the
9 agreement in California touched upon or
10 touches upon the most needed aspect of food
11 safety right now, and that is the growing
12 aspect of it.

13 But yes, I do believe that
14 contamination can occur in the field, shed,
15 retail level or consumer level. I mean, I
16 think that this is a -- we -- all aspects of
17 this, including consumer level, education are
18 going to be a part of our maximum food safety
19 policy, somewhere down the road.

20 You know, I don't know exactly
21 where that lies. I just think this is a good
22 first step in getting the national ball

1 rolling.

2 Q Do you believe that contamination
3 can be 100 percent prevented from occurring?

4 A Not in fresh produce, I do not.

5 Q Given that, what are the benefits
6 of having this type of program in place?

7 A We as an industry need to do
8 everything in our power to minimize that risk.
9 Without a kill-step process that we had in
10 fresh produce, that risk is always going to be
11 there.

12 What's more risky? Would it be
13 the farm practices or the house practices on
14 the consumer end? I don't know, but I know
15 it's prudent on the industry, not only from
16 being good citizens, but also being -- you
17 know, having a product that has got its --
18 realizes its potential for marketability.

19 Our industry needs to be moving to
20 do everything we can on the farm and on the
21 growing level, and really all the way until it
22 leaves our hands. And whether that be if you

1 are just a producer on the farm or if you are
2 involved in both, or if you are just the shed
3 or the processing point.

4 Q Would the proposed program and the
5 record keeping and the trace-back components
6 of the proposal result in the industry's
7 ability to potentially more quickly identify
8 contamination sources?

9 A Yes. I think that is one of the
10 chief benefits and chief concerns that I have.
11 As I mentioned earlier, the spinach outbreak
12 was extremely -- affected everybody across the
13 country. And I had some neighbors -- I don't
14 grow spinach; I'm not in the spinach business.

15

16 But I had some neighbors that it
17 affected greatly. That had to dump spinach
18 and not harvest -- dump spinach that was
19 already harvested and not harvest product
20 because of the slow response of trying to
21 pinpoint where that product came from.

22 And once again, I think one of the

1 biggest, my biggest concerns is having an
2 outbreak on one of my commodities that we
3 ship, that is traced back to the area, but
4 cannot go any further than that, because of
5 lack of good practices by my neighbor, that
6 does not have traceability. A good
7 traceability system in practice, or good
8 handling practices. You know, it is going to
9 affect me in a large way.

10 Q Would the proposed program, let us
11 say hypothetically, if there were a
12 contamination, would the proposed program then
13 allow for the industry to be more responsive
14 to the consumer, in communicating?

15 A Yes, ma'am. I fully believe that.

16 Q One last question. You mentioned
17 that you handle both products for the fresh
18 whole market as well as for the processed
19 market? When you are receiving product, or if
20 you are out in the field looking at product,
21 do you know ahead of time whether or not that
22 product will end up as a whole commodity or as

1 a processed commodity?

2 A Presently, we do have fields that
3 are specifically grown and harvested for
4 processing, because some of the guidelines
5 that had been put upon us that we are
6 currently undertaking. We grow some of that
7 stuff specifically on my farms, because some
8 of the outside growers that I have are not up
9 to where I'm at.

10 Like I said, you know, I hope
11 through this agreement or just through the
12 passage of time, that 100 percent of everybody
13 that I draw product from, whether it be myself
14 or somebody else, I can do whatever I want to
15 with it.

16 But right now, we have product
17 that is specific to some processors,
18 because -- and even some of that, some is
19 available for some processors and some the
20 other, because, you know, at present time,
21 there's a lot of different ideas of how far we
22 should go with food safety.

1 And the example that I'm thinking
2 about, and just to mention real quick, is
3 there is setback requirements that a lot of
4 processors use, about how far you have to be
5 back from animal operations or flood zones or
6 whatever. And some people are using 100 feet;
7 some people are using 300 feet.

8 And that's what I mean by
9 streamlining, that this will help that
10 process, where then I'm able to go out and
11 target individual growers and producers by
12 what they have and use that for my operation.

13 If I go out and see a producer
14 that is right next to a feedlot that only has
15 four fields, and each one of them butt up to
16 a feedlot that has cows on it, for example,
17 I'm going to know ahead of time that I'm not
18 going to be able to use that producer for my
19 program.

20 So once we get some guidelines in
21 place, where I know we would be able to -- and
22 once again, food safety, it is definitely not

1 a one size fits all. But overall, once we get
2 some government oversight, I think we will
3 streamline that process and make it easier for
4 me.

5 And not only -- and if you are
6 using sound oversight that is bringing in
7 scientific process -- practices into it, we
8 will be able to identify what those practices
9 need to be. And that way we will be able to
10 take them in a more concise way to the
11 consumer and say, hey, this is what we are
12 doing. This is what we should be done.

13 We are using science to modify
14 that. As it goes along with -- as a practice
15 comes available, that when we find something
16 out in ten years that we don't know today, we
17 will be able to use that. And it will make
18 for an overall better process, I think, from
19 the producer level to the handling level to
20 the consumer, to retail level to the consumer
21 level.

22 Q Okay. Thank you.

1 JUDGE HILLSON: Is there anything
2 else from the panel? Any questions -- go
3 ahead, Dr. Hinman.

4 BY MR. HINMAN:

5 Q One additional question. Don
6 Hinman, USDA. You mentioned about field
7 setbacks and other things, things you are
8 currently required to do, some of the metrics
9 required of the current market into which you
10 sell?

11 A Yes.

12 Q Given that, would you say that it
13 is the -- and you mentioned that those -- they
14 might be streamlined under a marketing
15 agreement. Correct? And would you therefore
16 say that the marketplace for your products is,
17 in a general sense at least as stringent as
18 would be required under the marketing
19 agreement and therefore there would not be
20 much change, except streamlining?

21 A Yes. And we are already seeing
22 some of that streamlining in the processing

1 end of it. I have a bunch of processors
2 within the last year have gone to the
3 guidelines of making -- that are requiring me
4 to fall under the California matrix, under the
5 leafy green agreement out in California
6 presently.

7 Now, retailers, that's where some
8 of the disconnect is, I think. We have a lot
9 of retailers out there that have different
10 programs, that are wanting different audits by
11 different firms, different processes to do
12 those audits. And I think that that is going
13 to streamline our process.

14 But like I said, if you are
15 involved in some of this business already, you
16 are doing -- it is really not just a monetary
17 requirement that I look at it. But if I'm
18 being required to do that, if that is good
19 practice, if it is good science to do this, my
20 neighbors should be doing it. That's some of
21 my feeling.

22 And like I said, I know this is a

1 voluntary program right now. But we're seeing
2 the marketplace maybe making it a little more
3 than voluntary, which will happen as we go
4 forward.

5 Q And then just to follow up on
6 that, so in general, you would not expect, if
7 there were going to be an agreement in place
8 and you were a signatory, you would not expect
9 that to be any more burdensome than is
10 required under the current marketplace in
11 which you operate?

12 A No. Nothing more so than the
13 assessment.

14 Q Thank you.

15 JUDGE HILLSON: Anything else from
16 the panel?

17 (No response.)

18 JUDGE HILLSON: All right. Any
19 questions from the audience? Redirect?

20 MR. RESNICK: Thank you, Your
21 Honor.

22 REDIRECT EXAMINATION

1 BY MR. RESNICK:

2 Q Mr. Carnes, Jason Resnick for
3 Western Growers. Mr. Carnes, thank you very
4 much for your testimony this morning, and for
5 coming all the way from Texas to testify.

6 I wanted to ask you a little bit
7 also about the third-party audits that you are
8 currently subjected to as a large grower. How
9 many different audits are you currently
10 undergoing annually?

11 A We have luckily, and a lot of that
12 is due to the California Leafy Greens
13 Marketing Agreement which streamlined a lot of
14 that to one audit, where we are actually going
15 above and beyond as far as market, as far as
16 water testing and some set of facts, different
17 things like that. You know we have been able
18 to utilize our third-party audit that we are
19 using that is Primus.

20 And we are being able to utilize
21 that process and then going above and beyond.
22 Now there is, on the retail level, there is a

1 couple of retailers out there that are asking
2 for different audits for a global gaps audit
3 and a couple of different things.

4 And right now, we are being able
5 to show them not only we are third-party
6 audited, but we are doing this under the
7 California Leafy Greens Marketing Agreement,
8 we are doing this process. And that is kind
9 of sufficing right now. Whether that is going
10 to hold, I don't know.

11 And that is why I think this
12 process going to a national process and
13 encompassing all the country is going to have
14 a minimal effect on some of those retailers.
15 Saying, that this isn't just good enough for
16 California, this is good enough for the
17 country. So we are going to adopt this
18 process.

19 And I'm not going to have to go
20 out and have to spend money on five or six
21 different audits. In which, without this
22 going forward, I can see that happening in the

1 next five years, very easily.

2 Q Thank you. Would you -- you had
3 mentioned that there is some differences
4 between California growing practices in water
5 sources, than you use in Texas. Are there
6 aspects of the California LGMA that you are
7 trying to adhere to, but that do not work for
8 your operation?

9 A You know, once again, specific
10 things right now, none comes to my head. But
11 I do think we need to have the ability for
12 some regional modification. Like I said,
13 water testing.

14 Water testing, I don't -- that
15 under the California Leafy Greens Marketing
16 Agreement right now, your water testing, to my
17 knowledge, is you have to have a five-sample
18 water test to create a baseline means for your
19 water sampling. And then have to do so once
20 a month after that. I think that is excessive
21 for my region, because I utilize well water
22 that never has a problem.

1 So that is an expense that I think
2 could be -- at a regional, when we are taking
3 a regional look at this, in which the National
4 Leafy Greens Marketing Agreement fully
5 recognizes and sets up a Board where we have
6 members throughout the country, and it is not
7 just based on solely on a percentage of where
8 the product is coming from. We can look at
9 things like that.

10 Like I said, wildlife, that is a
11 big thing for me. I realize that is a big
12 thing. Whereas, in California, it is probably
13 not as a big of a thing. And once again if we
14 are being prudent and trying to follow the
15 best practices out there, and the best science
16 out there, we need to be pinpointing our
17 biggest critical point.

18 So I think this allows for this.
19 And this is a step in the right direction.

20 Q I appreciate that. Now I'm
21 shifting to your role as a receiver of produce
22 from other growers. You said that your

1 company requires good agricultural practices
2 of your growers. Who sets those standards?

3 A You know, I mean, right now, we
4 are third-party audited on the farm and on the
5 producing level. And some of my producers
6 are, also. So one, they have got that
7 standard.

8 And then two is we are looking at
9 the Leafy Greens Agreement, we are being
10 forced to take some of the practices out of
11 California and apply them to Texas. And I'm
12 pushing that on them as I have said before.
13 That for me to be able to harvest that product
14 and bring it into my program, you know, I have
15 got to get them to follow those practices.
16 And I said, we are bearing all the costs
17 presently to do that.

18 We are going around doing the
19 scouting that needs to be done you know,
20 preplant and preharvest. We are doing the
21 testing, the water testing at the intervals
22 that that products receiver is looking for.

1 And also the tissue sampling. So it is
2 getting set by me. And it is being set on by
3 me by the receiver on the other end.

4 It is definitely a process that is
5 going to go all the way down through. That is
6 why this process although voluntary, I guess
7 it all depends on the business you are going
8 to pinpoint on what your practices are.

9 Q So if I understand you correctly,
10 you are a Texas growers and shipper that
11 sources product from other Texas growers and
12 all of you are being held to the California
13 LGMA standard right now?

14 A Yes, sir. You know, this has come
15 about in the last couple of years, so I
16 presently I still do have a couple of growers
17 that have product at certain places that I
18 know don't fit within that standard, and their
19 product doesn't go into that program.

20 And the benefits of being in that
21 program is the product is worth more. And
22 they all know this, and so they are striving

1 to meet this. And unfortunately, there are
2 some growers that are not going to be able to
3 meet all of it.

4 And, you know, there are some
5 growers that are going to choose not to meet
6 all of it. But they are going to figure that
7 it's easier just to go agreement or I'm going
8 to get out of the vegetable business. But you
9 know, that being said, I mean, you know, it is
10 definitely a process that is occurring through
11 agreement or not.

12 Q So are you saying then that the
13 national LGMA would actually better recognize
14 the regional differences?

15 A Yes. I think, spreading it
16 around. Out of California and making it
17 nationwide, would allow for some regional
18 differences and a streamlining effect. That
19 is not only my hope, definitely my hope, but
20 I think that is a very practical way to look
21 at it.

22 Q You are testifying today as a

1 proponent of the national LGMA? And you
2 recognize that, and it is in your testimony
3 that a one size fits all food safety program
4 cannot be applied equally to all regions of
5 the country. Some of the criticisms we have
6 heard in prior testimony is that the NLGMA is
7 a one size fits all food safety program. Do
8 you agree or disagree with that?

9 A No. I disagree with that. To the
10 best of my knowledge, I think it sets up the
11 ability for oversight for not only handlers,
12 but producers from every region to make
13 modifications as they come about. And as you
14 see, they come about.

15 And we can look at this matrix on
16 a more regional basis. Right now, we are
17 looking at it as a California basis, and it is
18 one size fits all right now, is the way I see
19 it.

20 And, you know, as we go forward --
21 and maybe the LGMA is not targeting a wide
22 range of commodities, but, you know, we have

1 got to see something that is definitely
2 commodity specific as we are looking at food
3 safety as a whole. And there are products out
4 there that are much more -- that have more
5 risk associated than others.

6 And I think even with in LGMA,
7 just take a circumstances, if we have a
8 national agreement that has handlers all
9 across the country that there is some science
10 practice that comes out, six months from now,
11 a year from now that says a specific commodity
12 doesn't have, because of its growing practices
13 or its appearance doesn't have as much risk
14 associated with it, I think the Board as a
15 whole can look at that, and possibly remove it
16 from LGMA. You know, I think that is when
17 those decisions are why I think we need to
18 move forward.

19 Q Thank you. Reading from your
20 testimony, you say, quote, if one of my
21 neighbors had an avoidable food-borne illness
22 outbreak traced back to him, or even worse,

1 traced back to our area, that cannot be
2 pinpointed because of a lack of good
3 practices -- what did you mean by that?

4 A Well, you know, I think that right
5 now, although we are talking about a voluntary
6 process, right now we are lacking much of
7 anything on the field level. And what we do
8 have on the field level has been driven mainly
9 by processors and larger retailers that have
10 been aware of what is going on in the last two
11 or three years and are -- probably for the
12 main reason is they're trying to shift some of
13 the liability away from themselves.

14 And so we've lacked that, and as
15 we are going forward, if a big section of our
16 product within fresh produce is going to be
17 required on that, and it is going to be
18 required doing that, and so if I'm going --
19 somebody is going to supply that. Somebody is
20 going to do that.

21 And so if my neighbor's not doing
22 that, some of these figures that I was shown

1 over here about the costs, if I'm going
2 through all of that cost to have that done,
3 what is the point, you know, if my neighbor
4 can be caught -- if my neighbor has a food-
5 borne outbreak, when I have been trying to
6 follow these guidelines, it seems like to me
7 it is going to be for naught.

8 So through a marketing agreement,
9 although it is being voluntary right now, you
10 know, I see a national scale where commerce
11 drives the amount of participation in it, the
12 participation levels, and then that also
13 drives the level of risk that is out there.

14 The more people that are signing
15 on -- if it just stays out in California and
16 there's just a specific group of processors
17 that are following it, there will be a
18 specific group of retailers that want this or
19 want that, but I see where we are going
20 forward, we are going to stay right where we
21 are.

22 If we bring that agreement

1 national, I think you are going to have more
2 retailers looking -- you know, for lack of a
3 better example, I'm going to use it. There is
4 a retailer in our area right now that has --
5 they have some pretty good food safety
6 handling guidelines, but they're not based on
7 California.

8 Now if we have got a regional
9 aspect that comes out, and they are based in
10 Texas. Well, let's look at this regional
11 deal. Well, they look at that regional deal,
12 they're going to get on the same process as
13 these California producers already are, and so
14 forth and so forth around the country.

15 Well, then the more people there
16 are, you know, involved -- the more receivers
17 there are, the more producers that are going
18 to have to get onto it. And that in turn is
19 going to boost our food safety in this country
20 and the guidelines that we see.

21 Q Thank you. Another criticism that
22 we have heard from other testimony is that the

1 NLGMA is being forced on growers, handlers,
2 and processors around the country. Would you
3 agree or disagree with that notion?

4 A Well, you know, it is obviously it
5 is voluntary at this point. I mean I fully
6 believe that through the marketplace or
7 government regulation that may change in the
8 future. But it is definitely voluntary. You
9 can get into it whether you want to or not,
10 right now, as it is.

11 If you want to stay in the fresh
12 produce game, some regulation is coming. I
13 mean, if you want to look at it as being
14 forced upon you, well, I guess that is your
15 own opinion. But you are going to see
16 something forced upon you eventually.

17 Now this is a voluntary program.
18 To me, it is a good first step. Instead of
19 the first thing out there being said, do this
20 or quit. You know, we have a voluntary
21 program to work people in as they see, and
22 there can be a lonely producer out there are

1 a handler out there that may be smaller that
2 may see some business that they can target
3 that doesn't have these requirements and
4 they're not a signatory.

5 And the ones that do want to
6 target this, they can. And I think it gives
7 the ability for people to work up to this
8 process and these guidelines that not only our
9 nation but you know, as consumers, they are
10 going to mandate it eventually.

11 Q Do you believe that the national
12 LGMA will in any way raise or reduce the
13 likelihood that retailers will want compliance
14 through good agricultural practices?

15 A They already do. Am I hearing
16 this right?

17 Q Will it have any effect on
18 retailers wanting to see good agricultural
19 practices?

20 A I think if it is -- if a retailer
21 is -- if they are involved now, they are going
22 to be involved later, one way or the other.

1 They realize that it is either their economic
2 message is to be involved in the food safety
3 discussion or liability wise, or consumer
4 driven. They are going to be in it
5 regardless, one way or the other.

6 I think the LGMA is going to
7 hopefully streamline that as it is going to
8 take a process out nationwide that is more
9 recognized. And obviously it is going to have
10 a greater following if it is nationwide, than
11 if it is just based in California.

12 Q Well, thank you very much for your
13 testimony. I have no further questions.

14

15 JUDGE HILLSON: Mr. Giclas?

16 BY MR. GICLAS:

17 Q Hank Giclas. Western Growers.
18 Mr. Carnes, thank you very much for your
19 testimony this morning. And like my
20 colleague, thanks for coming all the way from
21 Texas to participate this morning. I just
22 have a couple of questions.

1 One of them is, you know, you
2 talked about the costs of the food safety
3 program. And I think you suggested that you
4 know, under -- under a Leafy Greens Marketing
5 Agreement there would not be significantly
6 different than what you're paying for your own
7 food safety program today, with the exception
8 of the assessment rate.

9 And I just wanted to ask you, you
10 know, relative to that increase, whether you
11 feel like there's any return on that
12 investment associated with the marketing
13 agreement, I mean, through either reduced
14 third-party demand or --

15 A Yes. I mean, I think it's going
16 to streamline it, and one that -- I see a
17 situation coming about in the next three or
18 four years where, you know, we handle a lot of
19 different -- a lot of processors out there who
20 are different processors or retailers
21 requiring specific things, there is going to
22 be a cost on that.

1 And then also, you know,
2 whether -- my food safety team and I employ,
3 if they have basically one process to look at,
4 that's definitely going to be cheaper. I
5 mean, you know, it is going to be cheaper from
6 my standpoint of the number of people, the
7 number of personnel that I have to hire. This
8 is what we have to follow, guys. This is what
9 we have to do right here, and this is going to
10 suffice for all these, you know, A, B, C and
11 D customers that I have.

12 So, yeah, I mean there are some
13 things that presently we are doing, some of
14 the water testing, that I think there is room
15 for modification. But I think overall,
16 there's some other stuff that is going to be
17 streamlined that is going to end up costing
18 less in the long run.

19 Q Thank you. I have another
20 question. In response to one of Mr. Souza's
21 questions, you said something about a bump I
22 received from buyers. And I wanted to ask you

1 about that.

2 I mean, I think the gist of your
3 answer that I heard was that, you know, there
4 are buyers who are looking to you, you know,
5 because of your leadership in food safety in
6 kind of the Texas region. And you talked
7 about a bump that you were getting in
8 conjunction with that recognition.

9 I'm curious. Is that an increase
10 in price per carton that you receive or is it
11 in better access to the market? I mean, what
12 do you mean when you say, a bump?

13 A Yes. I mean, it's all of the
14 above. I mean, it is pretty much supply and
15 demand economics. I mean, you've got
16 processors out there that can only pull from
17 a smaller pool of producers and handlers;
18 they're going to pay a higher price. and they
19 know that; they're paying a premium on that
20 account.

21 So yes. We are seeing that in the
22 processing level. We are seeing that in the

1 retailing world. So it is definitely out
2 there. We are receiving -- there is some
3 marketability right now to food safety. But
4 once again, I think that can be negated
5 tenfold, a hundred times over if as an
6 industry as a whole, we are not following good
7 agricultural practices.

8 Q Sure. But do you believe that, I
9 mean, based on your experience, that there is
10 a willingness in the marketplace, from the
11 standpoint of the buyers to actually help
12 defray the costs if you will, of food safety
13 programs or pay more for them?

14 A Right now, yes. To this point, I
15 have seen a willingness to pay me a little
16 better because of some of my practices. And
17 you know, I surely hope that exists in the
18 future.

19 Q And I know, I'm curious, do you
20 think that the national marketing agreement
21 would expand that phenomenon among producers
22 or not?

1 A You know, I think it is going to
2 make more producers out there to be able to
3 play on a market that requires a very
4 stringent food safety guidelines. So in that
5 regard, yes. I think they will be able to
6 play in it.

7 I think you know, and some of it
8 is -- I guess some of it goes back to the
9 consumer. As far -- you know, the more aware
10 consumers are of where their product comes
11 from, and then if that retailer or processor
12 is taking those thoughts and concerns into
13 example, into consideration when they are
14 purchasing that product, yes. I think they
15 are going to pass it on down the line.

16 Q Thank you.

17 JUDGE HILLSON: Go ahead Mr.
18 Resnick.

19 BY MR. RESNICK:

20 Q Thank you. I just have a couple
21 more questions, Mr. Carnes. You said that you
22 are currently absorbing the costs, paying the

1 costs for audits of your growers. Is that
2 correct?

3 A Yes.

4 Q And is it your understanding as a
5 handler, you would be paying an assessment
6 that would pay for the cost of audits?

7 A Yes.

8 Q So would you expect then, if you
9 were paying an assessment that the costs you
10 are currently paying now for audits would be
11 essentially a wash to what you are paying in
12 assessments later?

13 A For the most part, yes.
14 Obviously, if I'm going to become a signatory
15 to this agreement, I'm going to have to
16 require all of my handlers to follow this.

17 So there is going to be some
18 increased audit costs with it, yes. Because
19 there are some of the growers in our area that
20 aren't to this point yet. So yes. It is my
21 hope that a lot of it is a wash.

22 And you know, on the grand scheme

1 of things, for a practice, we are not talking
2 about big dollars here. I mean, when you look
3 at it, ten cents, whatever it is. Really,
4 that is not big numbers for the amount of
5 money in the marketplace that we are being
6 able to command now for being able to abide by
7 these guidelines.

8 Q Would you expect then, if you were
9 to be a signatory to the marketing agreement,
10 that your individual audit costs on individual
11 farms would be eliminated and substituted for
12 audits paid for by assessments?

13 A Yes.

14 Q Okay. Thank you. I have no
15 further questions.

16 JUDGE HILLSON: Anything else?
17 Any other questions from the USDA panel?

18 (No response.)

19 JUDGE HILLSON: Okay, sir. Thank
20 you, Mr. Carnes. You may step down. Thank
21 you for testifying.

22 THE WITNESS: Thank you.

1 (Whereupon, the witness was
2 excused.)

3 JUDGE HILLSON: I know you have
4 another witness. It is almost 10:00.

5 MR. RESNICK: This would be a
6 great time to break.

7 JUDGE HILLSON: Let me take a --
8 it is about ten of. Let's take about a ten
9 minute morning break.

10 MR. RESNICK: Thank you, Your
11 Honor.

12 (Whereupon, a short recess was
13 taken.)

14 JUDGE HILLSON: And Mr. Resnick,
15 you have your next witness, please?

16 MR. RESNICK: Thank you, Your
17 Honor. The Proponent Group calls Amy Kunugi.

18 JUDGE HILLSON: Come on up.

19 MR. RESNICK: An extra copy.

20 JUDGE HILLSON: I need a copy and
21 they need a few copies if you have them.

22 MS. KUNUGI: Okay. I only have

1 three.

2 JUDGE HILLSON: Only three copies?

3 MS. KUNUGI: Sorry. I was going
4 to read this?

5 MR. RESNICK: Yes. So you will
6 need a copy to read. Here, you can use this
7 one.

8 JUDGE HILLSON: Okay.

9 MR. RESNICK: No one asked you to
10 bring more copies?

11 MS. KUNUGI: No. I'm sorry.

12 MR. RESNICK: No, you didn't know.

13 MS. KUNUGI: I didn't get the
14 message.

15 JUDGE HILLSON: We need to mark
16 Ms. Kunugi's written testimony as Exhibit 75.

17 (The document referred to was
18 marked for identification as
19 Exhibit 75 and received in
20 evidence.)

21 Whereupon,

22 AMY KUNUGI

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

4 JUDGE HILLSON: Okay. Can you
5 please state your name, and spell it for the
6 record?

7 THE WITNESS: my name is Amy
8 Kunugi. And Kunugi is spelled K-U-N-U-G-I.

9 JUDGE HILLSON: Okay. And you
10 have a statement you want to read into the
11 record. Correct?

12 THE WITNESS: Yes, I do.

13 JUDGE HILLSON: Go right ahead.

14 DIRECT TESTIMONY

15 THE WITNESS: My name is Amy
16 Kunugi. And my testimony is in support of the
17 National Leafy Greens Marketing Agreement.

18 I'm the General Manager of
19 Southern Colorado Farms, Nature Fresh Organic,
20 and SemTec, LLC, a large farming operation in
21 the San Luis Valley of Colorado. I have grown
22 with this company for 13 years, and worked

1 within the produce industry for over 20 years.

2 Annually, my company produces
3 between 1,000 and 2,000 acres of iceberg
4 lettuce, Savoy spinach, Romaine lettuce,
5 cabbage and spring mix. 40 percent of our
6 total acreage is certified organic and we have
7 grown leafy greens organically as well. My
8 farm is considered by SBA definitions a large
9 growing operation.

10 As a participant in California's
11 Leafy Greens Marketing Agreement for the last
12 three years, I have seen this program in
13 action. The California LGMA has resulted in
14 a new focus on food safety in which we as
15 growers/handlers abide by best practices that
16 are consistent, specific, measurable and
17 verifiable in the field.

18 Historically, without uniform
19 safety requirements, we are dependent on the
20 safety practices of all other growers and
21 shippers in the county, state and beyond.
22 Outbreaks such as the E. coli outbreak in

1 September 2006 affect the entire industry.
2 And we destroyed crops and experienced
3 financial losses when consumers lost
4 confidence in our industry to put forward the
5 safest products possible.

6 The Leafy Green Marketing
7 Agreements governing fresh leafy greens in
8 Arizona and California respectively assist us
9 in doing just that. While they are voluntary
10 programs, the requirements of those agreements
11 are mandatory for all signatory handlers and
12 shippers. Signatories undergo regular and
13 random audits conducted by their state's
14 Department of Agriculture based on specific
15 good agricultural practices that are both
16 protective and practical.

17 Participation is renewed on an
18 annual basis. Those enrolled handlers agree
19 to purchase only leafy greens grown according
20 to the accepted good agricultural practices.

21 As a signatory to the California
22 Leafy Green Agreement we believe we are less

1 likely to be detrimentally impacted by the
2 safety performance of another grower or
3 shipper. We also believe we are effectively
4 minimizing the potential for contamination,
5 and that the state LGMA's position the industry
6 to engage directly with FDA and state public
7 health agencies to facilitate the rapid
8 identification and mitigation of any
9 contamination as well as to refine the program
10 with an eye towards continual improvement.

11 The implementation of the
12 California and Arizona Leafy Greens Marketing
13 Agreements provides our buyers with a science
14 based safety program. They now know the full
15 scope of what we look for, test and monitor
16 when implementing food safety programs. Thank
17 you. And can have confidence that our efforts
18 are consistently and constantly verified by
19 state government inspectors. While some
20 buyers still have unique requirements, the
21 marketing agreement has fostered consistency
22 in safety requirements.

1 With approximately 90 percent of
2 all leafy greens already being covered by the
3 California or Arizona LGMA, the implementation
4 of a national marketing agreement should bring
5 about nominal incremental costs for both
6 growers selling to handlers, and handlers who
7 are signatories of those states agreements.
8 Involvement in a national program could be
9 financially beneficial with improved buyer and
10 consumer confidence.

11 I do not expect our costs to
12 increase significantly under the Leafy Greens
13 Marketing Agreement, since we have already
14 made the necessary investments to comply with
15 the California and Arizona LGMA. The addition
16 of a national agreement will not result in
17 additional personnel, capital or testing
18 costs.

19 My experience with the California
20 and Arizona LGMA agreement has been positive
21 and I would expect the same kind of experience
22 nationally. The national agreement will bring

1 the same standards to all companies growing,
2 packaging or selling leafy greens across the
3 U.S. This is a huge leap forward for produce
4 safety. With national standards in place,
5 industry buyers can now see the issues on food
6 safety much more clearly, and thus address
7 these issues with a consistent and cost
8 effective direction or plan.

9 I would therefore like to go on
10 record as supporting the National Leafy Green
11 Marketing Agreement which should bring
12 standardization across the country to our
13 industry that will improve all aspects and
14 phases of growing, handling, processing and
15 shipping, thereby allowing consumers, the
16 final end users, confidence and trust in these
17 nutritious products.

18 JUDGE HILLSON: Okay. Ms. Kunugi,
19 I'm going to receive your written statement as
20 Exhibit 75. Mr. Resnick, do you have any
21 further direct of this witness?

22 MR. RESNICK: Not at this time,

1 Your Honor.

2 JUDGE HILLSON: Okay. Let me turn
3 it over to the panel then. Any questions from
4 our panel? Ms. Schmaedick?

5 CROSS-EXAMINATION

6 BY MS. SCHMAEDICK:

7 Q I'm Melissa Schmaedick, USDA. Is
8 this loud enough.

9 A Uh-huh.

10 Q Can you hear me?

11 SPEAKER: Barely.

12 MS. SCHMAEDICK: Is this better?

13 SPEAKER: Yes.

14 MS. SCHMAEDICK: Okay. Excuse me.
15 I have a bit of a cold.

16 BY MS. SCHMAEDICK:

17 Q Good morning, Ms. Kunugi and thank
18 you for your testimony. I want us to clarify
19 that you are -- are you only involved in
20 farming, or do you do any handling type of
21 functions as well.

22 A We only are growers. We grow the

1 produce, and then we will do the cooling. And
2 we don't own a shipping company. And so I
3 would just say we are producers.

4 Q Do you, would you be involved in
5 the harvesting and possibly packing into boxes
6 in the field, for example?

7 A Yes.

8 Q You would be doing that?

9 A So we will harvest the product and
10 cool it, and then load it onto the trucks that
11 go to the processors that are using our leafy
12 greens. Mostly what I'm going for is like the
13 salad industry. And on our Savoy spinach, it
14 also goes to plants where it gets washed and
15 repacked.

16 Q So one of the questions that have
17 come up repeatedly over the course of the past
18 hearing locations is the difference between a
19 whole product and a processed product. Can
20 you explain to me your understanding of the
21 difference of those two?

22 A Okay. Well, in my case, I

1 don't -- we don't consider ourselves
2 processors of the product, although we do do
3 some minimal trimming of the product in the
4 field. But it is always going to another
5 facility where it is going to be processed and
6 washed and packaged.

7 So we don't -- we are not the last
8 step to the consumer. There is another
9 handler in between the farm and the consumer
10 where the product is being processed; chopped
11 up, washed, packaged. So in my mind, we are
12 producers because while we do trimming and the
13 product has like a chlorine spray put upon it,
14 we are not the last step before the product
15 reaches the consumer.

16 Q Okay. And you state that you are
17 involved with, it is like three different
18 business identities?

19 A Yes.

20 Q Southern Colorado Farms, Nature
21 Fresh Organics and Sem Tech.

22 A Yes. The company is Southern

1 Colorado Farms, but we do business as Nature
2 Fresh Organics and Sem Tech. Nature Fresh
3 Organics is what we market our organic line
4 under, and Sem Tech is for my seed potato
5 business.

6 Q And what percentage of your
7 production of leafy greens would be considered
8 organic?

9 A This year, well 2009, I had none.
10 Back in 2006, it was 50 percent of my acreage
11 of leafy greens, which was over 2000 acres of
12 leafy greens. So it varies from year to year
13 depending on what contracts we have that year.

14 Q For the product that you grow that
15 is certified organic, are there practices that
16 you follow on the conventional growing acres
17 of your land that would be directly in
18 conflict with the organic production side?

19 I don't know if I'm phrasing that
20 correctly. But since you are involved in both
21 conventional and organic production, do you
22 ever find yourself in a situation where those

1 two types of production systems are in
2 conflict with each other?

3 A Obviously, it is two different
4 production systems, and they can't overlap.
5 And you have to maintain buffers and all the
6 produce has to be handled separately.

7 But I don't find that organic
8 production is in conflict with good food
9 safety practices. They are not in conflict.
10 So as far as the LGMA and organic production,
11 I do not find that they conflict. I find that
12 people that buy organic produce want safe
13 produce just as much as people that are buying
14 conventional produce.

15 Q And you stated that you are a
16 participant under the California Leafy Greens
17 Marketing Agreement. Is that correct?

18 A Well, the people that buy, the
19 companies that buy our produce are based out
20 of California. The large salad companies like
21 Fresh Express and Dole and other, Taylor
22 Farms. We have grown for Earthbound. And so,

1 because they are bound to the California Leafy
2 Green Marketing Agreement, and I'm supplying
3 them, I have been required to grow under those
4 standards since that was put into place.

5 Q In past testimony, we have heard
6 statements that indicate that certain private
7 growing standards might result in actions that
8 would be in direct conflict with conservation
9 practices or would be harmful to wildlife.
10 What is your opinion on that?

11 A Well, I agree with that somewhat.
12 There were, okay. In 2006, when the E. coli
13 outbreak happened, the following growing
14 season, 2007, everybody was I would say, like
15 hyper reactive to what had happened the
16 preceding year. And people came in and wanted
17 me to do things that in my mind were
18 unreasonable, and were not going to add to the
19 food safety of the product that was growing.

20 Like they wanted no vegetation
21 anywhere near the field. And I use those for
22 windbreaks. And you know, they wanted me to

1 knock down any kind of habitat or weeds that
2 could be considered a hiding place for
3 animals.

4 And they were, because there was
5 no science, and because there was no plan in
6 place at the time, everybody kind of made up
7 their own set of rules. So each supplier that
8 I was growing for had a different food safety
9 person that came and wanted different things
10 from me. And that is part of why I'm here,
11 and a proponent of the national program.

12 Because much like the organic
13 program, when there was so many different
14 agencies certifying whether you were organic
15 or not, there was lots of different rules that
16 people were playing by. I think it is better
17 when there is one set of rules that everybody
18 plays by.

19 And so this was prior to the
20 California LGMA being put in place. There was
21 all the different companies kind of had their
22 own set of rules. And each food safety person

1 that was coming out and auditing me was asking
2 for different things.

3 And so yes, there was people that
4 were -- they didn't want me to use any compost
5 on my fields. And they didn't want me to have
6 any possible habitat for many, many feet away
7 from any growing area. And I think since that
8 time, things have settled down.

9 And there has been more science.
10 And the LGMA has come into play. And people,
11 the different companies are abiding more by
12 the one set of rules, than everybody kind of
13 leaping out there and just setting an
14 arbitrary buffer zone or I don't know. It was
15 a little bit of pandemonium following that.

16 And I do have to say that we were
17 very much directly impacted by the 2006 E.
18 coli in the spinach. The previous witness
19 mentioned that he knew there was people in
20 Colorado that were growing spinach, and I was
21 one of them.

22 And in 2005, we produced over

1 300,000 blues, which was a bushel and a half
2 unit. Probably 330,000 blues. And in 2006,
3 because that happened at the tail end of our
4 season, even though that was baby leaf spinach
5 coming out of California, and I grow Savoy
6 spinach in Colorado.

7 My production for 2006, because it
8 caught me during my growing season, was
9 reduced by 1/3. And then the two years
10 subsequent to that, we still have not gotten
11 back to the level that we were prior to that
12 event. And we are probably still down 40
13 percent in 2007 and 2008 of what we used to be
14 producing and selling.

15 Because the customers lost
16 confidence, and they just don't buy Spinach
17 like they used to. And this year, finally we
18 are seeing like a slight increase. And I'm
19 probably still down to 2/3 of what we were
20 prior to that E. coli event that happened in
21 2006. That was extremely hurtful to my
22 operation.

1 And Savoy spinach in Colorado
2 versus baby leaf spinach out of California, it
3 made no difference. People just stopped
4 buying and eating spinach in the same way that
5 they had before that event.

6 And we already were doing food
7 safety practices prior to that event. But as
8 a result of that event, there was many more
9 requirements put upon us by all the customers
10 that we grow for.

11 Q Did you see the same type of
12 reaction and the same drop in consumer
13 purchases of spinach, regardless of whether it
14 was conventional or organic?

15 A At the time, I didn't have any
16 organic spinach. So I only saw it on the
17 conventional side. I have grown organic
18 spinach, but it was a much smaller program.
19 Primarily, we do conventional spinach.

20 But still, 2009, we still are not
21 back to the level of sales that we had prior
22 to that event. States away and years later,

1 that was horribly hurtful. You know, one bad
2 player in my mind, you know, has had this much
3 impact on our industry, all this time later
4 and this many miles away.

5 Q In your testimony, you state that
6 a national agreement will bring the same
7 standards to all companies growing, packing or
8 selling leafy greens. My question goes to the
9 topic of geographic differences across the
10 country, and how growing environments might be
11 different, or cultural practices might be
12 different. In your opinion, is it possible to
13 have a standard that allows for these
14 differences to be considered?

15 A Yes. I think it is possible, and
16 I think it is necessary. Because I grow
17 organically, I very much envision something
18 happening similar to the national organic
19 program. Where there is a Board that deals
20 with issues as they come up.

21 And I think you start with a
22 program, and then you have a mechanism built

1 in that can adjust to issues as they arise.
2 But it very much has to be a living document
3 and has to have the ability to change with the
4 times, and with the science. And with the
5 differences in growing practices in different
6 areas.

7 I very much agreed with the
8 previous witness about the water testing
9 requirements that I'm under right now. They
10 make no sense to me in some ways, because I
11 also am using exclusively well water up in the
12 Rocky Mountains of Colorado. And it is
13 beautiful pristine water that I have. And I
14 have zero coliform bacteria, much less E. coli
15 coming out of my wells.

16 But I'm still required to take
17 five samples prior to putting any seed in the
18 ground, because that is what they are required
19 to do in California where the irrigation water
20 is largely coming out of canals. So it makes
21 sense there, because their water source is a
22 different type than mine.

1 I'm doing it, because that is what
2 the rules are, that I have to play by right
3 now. But I'm hoping for a national program
4 where things like what your water source is
5 will be taken into account.

6 Q So then, this standard would be
7 that you as a grower, use a quality water
8 source. But how you prove that you are using
9 a quality water source might depend on where
10 you are getting your water from. Is that what
11 you are saying.

12 A Yes. You know, that I have a
13 historical basis, I can prove from my wells
14 over all this testing that I have been doing
15 that I have never had an issue. So maybe I
16 don't have to pull five water samples before
17 I put any seed in the ground. Maybe one is
18 going to be enough. Something like that.

19 And then when people have problems
20 with their water source, maybe they need to do
21 more than five. There has to be something
22 built in, where different circumstances can be

1 taken into account.

2 Q Are you familiar with the
3 components of the proposed agreement that
4 addressed the Administrative Committee and
5 technical review boards?

6 A Not specifically, no.

7 Q Okay. Thank you.

8 JUDGE HILLSON: Other questions
9 from the USDA panel? Ms. Carter?

10 BY MS. CARTER:

11 Q Good morning. Antoinette Carter
12 with the USDA. All right. Antoinette Carter
13 with USDA. Good morning. Again, just a few
14 followup questions for you. You indicated
15 that you, prior to -- I guess the -- I guess
16 that buyers that you are sourcing on becoming
17 signatories to the California Leafy Green
18 Agreement, that you were currently engaged in
19 some best practices?

20 A Uh-huh.

21 Q Could you explain what some of
22 those were?

1 A Sure. We have been using compost
2 for many many years on our ground, because it
3 is a good nutrient source, and a good organic
4 material source for our soils. And I produce
5 my own compost and we already were doing the
6 microbiological testing of the compost to show
7 that there was no pathogens left in the
8 compost after the composting process.

9 We already were doing water
10 testing, just not at the same frequency that
11 was required by the California LGMA. We
12 already were doing a lot of record keeping, as
13 far as you know, cleaning our equipment, the
14 training of our employees.

15 The people that we were hiring
16 from outside companies to sell us fertilizer
17 that they were certified, and that their
18 equipment had been cleaned. And we were
19 already keeping those kinds of records. And
20 you know, doing self audits on our property
21 and making sure that the bathrooms were
22 maintained and things like that.

1 I think that happened as a result
2 of the California LGMA was just the volume of
3 requirements got to be greater. We were
4 already doing many of the things. But it was
5 just the frequency and maybe the details just
6 became more.

7 Q So in terms of any additional
8 costs that you experienced in terms of
9 implementing the requirements of that program.
10 Are you able to give an estimate of what that
11 cost was to your operation?

12 A When we went from prior to the
13 California we made to after, I don't want to
14 just throw a dart and I would say that maybe
15 we spent 25 percent more than we were spending
16 before. So it was probably more testing, more
17 man hours for record keeping.

18 A third-party audit that we didn't
19 have to do before. But as far as all the
20 sanitation that we were doing and the basic
21 record keeping, we already had that in place.
22 So that is -- it is kind of throwing a dart.

1 And I don't have a specific number for you.

2 So yes, we did end up doing more.

3 But we had the base in place already. And I
4 do think that if a national program came into
5 effect, that it actually might have the
6 potential of reducing what we are spending
7 right now by satisfying all of our customers
8 at the same level. Instead of having
9 customers having specific requirements
10 slightly different from each other.

11 Q Okay. Thank you. You mentioned
12 that in terms of one of the differences in
13 terms of that you experienced in terms of your
14 water source, are there any other distinct
15 differences with regards to what you are
16 currently required to do under the -- I guess,
17 the California Leafy Green Agreement. That
18 isn't really applicable to your forming
19 operation.

20 A No. I think the water source is
21 probably the best example of that. There
22 hasn't been anything else. We have been asked

1 to do, that doesn't apply.

2 Q All right. I think you may have
3 touched on this, but on page 2 of your
4 statement, you state involvement in the
5 national program could be financially
6 beneficial with improved buyer and consumer
7 confidence. Could you expand?

8 A Well, I think referring back to
9 the spinach incident, if people felt that the
10 industry had the food safety well in hand,
11 maybe the consumption of spinach would start
12 to increase again, back up to what it had been
13 previously. That is probably my best example
14 of that.

15 As far as from the consumer side
16 back. From my side, that way would be the
17 streamlining of what I have to do so that I'm
18 not having different requirements from
19 different clients of mine, so that I can do
20 one audit instead of multiple audits.

21 Q Okay. Thank you.

22 JUDGE HILLSON: Any other

1 questions from the panel? Dr. Hinman.

2 BY MR. HINMAN:

3 Q I'll bring you the table that I'm
4 going to refer to.

5 A Okay.

6 Q Before I get into the specifics of
7 that table, I want to ask you, you mentioned
8 about the differences that you were
9 experiencing, for example, with the water
10 testing requirements that you take part in,
11 because you have to, although you would like
12 to see more flexibility on the national
13 marketing agreement. Is that correct?

14 A Yes.

15 Q And if the national agreement were
16 to go into effect, do you believe that the way
17 you understand how that the Board would be set
18 up and would operate, that flexibility would
19 be there for your input and your suggestions,
20 your differences in regional characteristics?

21 A I'm trusting that the people that
22 set up the Board are going to make it be that

1 way.

2 Q Thank you. Referring to the table
3 in front of you, Ms. Kunugi, Table 14 on page
4 14 under Exhibit 34-A presented at the
5 Monterey hearing. And as you likely haven't
6 seen this before and it may be hard for you to
7 answer this, but this is proponent testimony
8 prepared for the purpose of trying to, in a
9 very broad way, characterize grower costs.

10 Characterize grower costs with a
11 national marketing agreement. And you stated
12 in your testimony the basic -- since you are
13 signed already into the California marketing
14 agreement, that you are essentially already
15 incurring these costs and that you would not
16 expect them to increase under a national
17 marketing agreement. Is that correct?

18 A That is correct.

19 Q Given that, could you pick out
20 one -- there is columns there that represent
21 on the bottom there, the total costs giving
22 these categories presented there. And

1 different costs per acre; two, three and five
2 cents per carton is the way they have
3 summarized it.

4 Can you state, even though this is
5 an example of a larger farm than yours, that
6 you think that one of those is representative
7 of what you are currently doing, so it's not
8 simply the cost of participating in a national
9 marketing agreement, but it is a reasonable
10 representation of your costs of complying with
11 food safety at this time?

12 A I see this table refers to a large
13 producer of 10,000 acres, which would be about
14 five times the size I'm, at my maximum, as far
15 as production of the leafy greens. But I
16 would say that if I took 20 percent of this,
17 that the total cost at \$20 per acre looks
18 reasonable to me.

19 Q So how about can you -- in terms
20 of a cost per carton sold that you think that
21 might be in that range for any of those
22 figures, what you're currently doing, is that

1 not possible for you to guess?

2 A I guess I'm looking at the column
3 that says total costs at \$20 per acre, and
4 taking 20 percent of that cost, because I
5 have -- I'm saying 2,000 acres instead of
6 10,000 acres.

7 Q Right.

8 A And saying that looks like
9 something that I'm already doing.

10 Q Okay. All right. Thank you. And
11 you would expect under a national marketing
12 agreement that if the metrics that you were
13 subject to under that agreement that these
14 were the costs that you were incurring, that
15 you would expect a return of that investment.

16 You would expect that the benefits
17 of participating in a national agreement would
18 substantially exceed the costs, as you have
19 just stated, represent you. Is that correct?

20 A I feel like I'm already spending
21 this money. And I just feel like the national
22 program is very necessary, because there needs

1 to be one set of rules that everybody adheres
2 to. And much like the organic program, when
3 there was so many differing sets of rules,
4 with differing organic certification agencies,
5 it was very hard to -- so I wanted to market
6 my organic product to somebody that used one
7 organic certification agency but I use a
8 different organic certification agency.

9 I couldn't market my product to
10 them until I met the requirements of their
11 organic certification agency because it was
12 probably printed on their packaging, that that
13 is the one that they used, or something like
14 that. And when it went to the national
15 program, all of those kinds of issues, for me,
16 fell away.

17 And I feel like a national program
18 for the LGMA will have the same effect, where
19 there won't be the questions of well, you are
20 growing in Colorado, so you don't have the
21 same rules that we do in California. Or you
22 don't have the same rules that we do in

1 Florida.

2 And since I'm already spending the
3 money, I think having spending the same amount
4 of money and maybe having things more
5 streamlined is advantageous to me in my
6 business. But I also think as a consumer that
7 it is -- I would be happy to know that there
8 is one set of national rules that I understand
9 that I know is protecting the safety of the
10 produce that I'm buying.

11 I mean, I'm not just a producer;
12 I'm also a consumer, and I want to have
13 confidence as a consumer that when I buy
14 something at -- say I buy it at a Safeway, and
15 Safeway says, we are going to buy produce that
16 has this standard. That I'm being protected.

17 Q Thank you. One more question.
18 Other growers in Colorado, do you know of
19 others that are not shipping through the
20 California agreement, to other marketplaces.
21 And if so, could you state their views on what
22 they think maybe the benefits and costs of

1 having a national agreement would be?

2 A Of course, I can't speak for other
3 people. I do know that there is other growers
4 in my area that do not comply with the
5 California LGMA. Because I can see that they
6 don't comply with the California LGMA. It is
7 nothing that we have discussed.

8 But I can see by their proximity
9 to animal production and animal waste, that
10 they are not playing by the same rules that
11 I'm playing by. But they have the same access
12 to the market that I do.

13 And it scares me to death that
14 there could be an E. coli event out of
15 Colorado, say Colorado spinach with E. coli.
16 And that would kill my business, because they
17 are not being held to the same standard.

18 And I'm hoping that as more of the
19 clients require this, that more of the
20 producers will be encouraged to be brought
21 into the process. There is just a lot of
22 people that do things because it is the way

1 they have always done things. And change is
2 hard, but I just think change is necessary.

3 And our industry can't sustain
4 another E. coli outbreak. We just can't. It
5 almost put us right out of business.

6 Q Thank you. And it is duly safe to
7 say that under the -- you have heard the
8 previous SBA definition of \$750,000 that you
9 are --

10 A That is receipts. Right?

11 Q Yes.

12 A That is why I said a large
13 operation. And compared to these, I'm not a
14 large operation.

15 Q Right.

16 A But yes, that is why I use that.

17

18 Q Thank you very much. No further
19 questions.

20 JUDGE HILLSON: Anything else from
21 the panel? Mr. Souza?

22 BY MR. SOUZA:

1 Q Anthony Souza, USDA. Good
2 morning. You mentioned you had a food safety
3 program pilot or participating in the
4 California Leafy Greens Marketing Agreement.
5 What measures have you had to put in place to
6 comply as a participant in the California
7 leafy greens that you didn't -- that you were
8 not doing prior to your participation?

9 A Well, I think the third-party
10 audit, we used to have our -- we didn't used
11 to have a specific third-party audit required
12 of us. And so we do that now. And then the
13 additional testing that we have been required
14 to do, we did testing before, just not the
15 same frequency that we were required to do
16 after the implementation of the California
17 LGMA.

18 And then the volume of record
19 keeping and the depth of the record keeping
20 became greater as a result of the California
21 LGMA. I would say that they were asking us to
22 do things with fencing and buffers and rodent

1 control programs that we weren't doing prior
2 to the advent of the California LGMA that we
3 have also started since them.

4 Q So other than record keeping and
5 the aforementioned practices that you just
6 mentioned, you pretty much had a program in
7 place that blended right into this program?

8 A Yes. It was a good base, but the
9 California LGMA took it to another level, I
10 would say.

11 Q You mentioned third-party auditor?

12 A Uh-huh.

13 Q You have a third-party auditor
14 conducting the audits for you?

15 A Right. Well, it is required. And
16 so we try to get anywhere, what we try to do
17 is have our clients agree upon on third-party
18 auditor that will satisfy them, so that we can
19 do one. But the dilemma is, if two clients
20 want one company to do the third-party audit
21 and another client wants a different company
22 to do the third-party audit, I have to do what

1 the client is asking me to do in order to be
2 able to sell to that client.

3 It would be nice if there was a
4 national program, and there was certain
5 approved third-party auditors that everybody
6 had to recognize so that it would make it so
7 that I had to do less audits, because it is
8 time consuming for me.

9 It is not that they ask different
10 questions. You go over the same set of
11 questions with all of the different visitors
12 that come.

13 Q So it would be beneficial if there
14 was one auditing organization conducting the
15 audits.

16 A Or a list of approved auditors.

17 Q Okay.

18 A Does that make any sense?

19 Q Yes.

20 A Okay.

21 JUDGE HILLSON: Ms. Schmaedick?

22 Are you all done, Mr. Souza?

1 MR. SOUZA: Yes.

2 BY MS. SCHMAEDICK:

3 Q Melissa Schmaedick, USDA. I was
4 wondering if you could tell us a bit about
5 leafy green production in Colorado, just in
6 general, since you are our Colorado
7 representative today.

8 A Well, I can speak to what I've
9 been doing.

10 Q Uh-huh.

11 A Probably our two biggest leafy
12 green commodities that we're producing are
13 iceberg lettuce and Savoy spinach. We've
14 grown many other kinds of leafy greens in
15 different years, depending on what our
16 contracts ask us to do, but those are the two
17 things that I grow every year.

18 And we start planting in April,
19 early April, because of the cold weather. I'm
20 growing in the San Luis valley of Colorado, so
21 we're up at 7,600 feet elevation. It is very
22 cold, a very long winter. So, you know, as

1 soon as it gets warm enough, we're trying to
2 put some seed in the ground.

3 My first harvest occurs the first
4 week of June, with the Savoy spinach. And I
5 still am harvesting Savoy spinach at this
6 point, at this time in October. So we will go
7 as late as we can in October with the spinach.

8 My iceberg lettuce program usually
9 is a two-month harvest window from about the
10 10th of July until the 10th of September. And
11 the romaine lettuce program would be about
12 that same harvest window. So there's about
13 two months of the year where we really put out
14 a very high quality product for the salad
15 plants.

16 And we're a lot closer to a lot of
17 the salad plants that are in the East than
18 having to ship from the western states. And,
19 so you know, when the fuel prices were high,
20 we had a freight advantage in Colorado over
21 other areas.

22 And I know there's also a push for

1 more locally grown produce. But at certain
2 times of the year, there is only production
3 areas of a certain size in certain areas. I
4 guess what I'm saying is, I'm probably the
5 closest commercial production area, during my
6 window of production, for some of the salad
7 plants.

8 So as far as food miles, and
9 things like that, I know people are looking at
10 those issues more. And Colorado has a nice
11 little niche where we fit, and we can fill
12 some of that requirement.

13 Q Is most of the state's production
14 in the southern part of the state?

15 A Well, for the leafy greens, I
16 probably am -- I'm not certain that I'm the
17 largest iceberg lettuce producer, but I
18 believe I'm in the state. There's other
19 vegetable farms in the northern part of the
20 state. I would say that in my area, potatoes
21 are the big vegetable being produced.

22 And in the northern part of the

1 state, there's a lot of onions. And then
2 there's, of course, the melons and the corn
3 being grown in Colorado as well. But as far
4 as the leafy greens, I think I'm probably one
5 of the largest growers in the state.

6 Q And when did you first become
7 aware of this proposed national agreement?

8 A Last year.

9 Q So it is something that you have
10 been aware of over the course of its
11 development, over the past year?

12 A Yes. I think it is just a logical
13 next step. You know, in 2006, when the E.
14 coli event happened. You know, it happened in
15 California. And you know, most of the leafy
16 green production is California or Arizona.

17 And so it is very logical that the
18 program started there, and is you know,
19 fanning out or blossoming out from that point.
20 But it is something that needs to be dealt
21 with nationally. And it is not only leafy
22 greens that are going to have to have these

1 food safety programs in place. But I think it
2 is good that leafy greens is taking the lead,
3 because it doesn't have a kill step.

4 Q Would you say that the other leafy
5 green producers or handlers in your area are
6 also aware of this proposal?

7 A There is not many of us in my
8 area. And yes, I believe everyone is aware of
9 it.

10 Q Thank you. That is all the
11 questions I have.

12 JUDGE HILLSON: Anything else from
13 the USDA panel?

14 (No response.)

15 JUDGE HILLSON: Anything from the
16 audience? Any redirect? Mr. Giclas.

17 REDIRECT EXAMINATION

18 BY MR. GICLAS:

19 Q Hank Giclas, Western Growers. Ms.
20 Kunugi, thank you very much for your testimony
21 this morning. I just had one question really.
22 You say that you are selling mostly, I think,

1 but not exclusively to signatories to
2 California companies that are signatories to
3 the California agreement. Is that correct?

4 A Mostly, yes.

5 Q And because they are signatories,
6 they are asking you to comply with you know,
7 the metrics that are associated with the
8 California agreement?

9 A Absolutely, or they wouldn't buy
10 from me.

11 Q So but buyers also, I think you
12 said, often times maybe have their own unique
13 specifications. Their own, above and beyond
14 kind of requirements as well.

15 A That is a yes.

16 Q So I was going to ask, I mean, you
17 talked about I think fencing and rodent traps
18 and those types of things. Do you know if
19 those are unique buyer requirements or if they
20 are actually part of the California leafy
21 green metrics?

22 A I believe that the California

1 leafy green metrics has a standard, but I have
2 clients that have standards slightly different
3 from the California LGMA. And I'm hoping that
4 when there is a national program, that
5 everyone will adopt the national program.

6 And unless there is some science
7 behind what they are asking for, and then that
8 they would take it to the national program and
9 say this should be part of the national
10 program. If they find through science that a
11 buffer zone of 600 feet is the appropriate
12 buffer zone, then I would ask that they go to
13 the Board that I hope will be running the
14 national program and saying, our science shows
15 that 600 feet is the appropriate buffer zone.

16 Q Okay. Thank you.

17 A That is just an example.

18 Q Yes. Thank you. That is my only
19 question.

20 MR. RESNICK: I have no questions.

21 JUDGE HILLSON: Okay. Mr. Souza,
22 you have another question?

1 REXCROSS-EXAMINATION

2 BY MR. SOUZA:

3 Q Thank you. Anthony Souza, USDA to
4 follow up on Mr. Giclas question. And a
5 question I asked earlier.

6 You mentioned that you did not
7 have many changes, except for your buffering
8 areas, vegetation and fences. Those are not
9 in line with the California leafy green --
10 those are put on by other retailers?

11 A I think what I said was, prior to
12 the California LGMA, that we have a program in
13 place. And then when the California LGMA came
14 into place -- you were asking about what we
15 did, what changed for us.

16 And I said, well, I probably had
17 different requirements as far as buffer zones,
18 fencing, rodent control than what I had been
19 doing previously. And then in addition to
20 that, even with the California LGMA, there are
21 some clients who have slightly different
22 standards than California LGMA. They want a

1 little bit more than the California LGMA.

2 And what I'm hoping for in the
3 future is that when there is a national
4 program, because I do feel that this will come
5 about. That the national program is going to
6 say you know, show us the science, and then we
7 will set the appropriate -- I mean, you have
8 to start somewhere. You start with something
9 that science has proven so far.

10 But then if somebody comes and
11 says, well this product isn't appropriate, or
12 you need a buffer zone of this distance, and
13 has the science to back it up, then there is
14 a way to address that. Or if somebody says,
15 no, you really do need five water samples
16 before you put any seed in the ground,
17 regardless of what your water source is, and
18 here is the science that shows that, then they
19 go to the program and say here is the science
20 that shows that.

21 And it becomes part of the rules
22 of the program, because it is a living,

1 working program. It is not carved into stone
2 and immovable. It has to be something that
3 can change with new science and over time.
4 And you know, where you are growing and what
5 your system is. So am I answering your
6 question, or did I go too far around?

7 Q You answered it somewhere in
8 there. Thank you very much.

9 A Okay. Sure. I'm sorry if I spoke
10 too long.

11 JUDGE HILLSON: You wouldn't be
12 the first, if that was the case. Okay. I
13 don't see any further questions for you. So
14 thank you very much for testifying, Ms.
15 Kunugi. You may step down.

16 THE WITNESS: Thank you. I just
17 wanted to ask, did everybody who needed copies
18 of my testimony, get copies? Because if not,
19 I can go have a couple printed.

20 JUDGE HILLSON: I think, didn't
21 you -- some copies were made while you were
22 testifying.

1 THE WITNESS: I think the reporter
2 need a copy. Do you have one? Okay.

3 JUDGE HILLSON: We will be okay.
4 We are okay. Thank you.

5 THE WITNESS: Okay. Thank you.

6 JUDGE HILLSON: You may step down.
7 My understanding is, Mr. Resnick, is that you
8 don't have any more witnesses to call. But we
9 do have at least one other witness who wanted
10 to testify. So if the witness would come on
11 up.

12 (Pause.)

13 JUDGE HILLSON: I need one. Do
14 you have any others for the panel? If not, we
15 can take a minute.

16 MR. ANCISO: This is all I have.
17 Sorry.

18 JUDGE HILLSON: Do you want to
19 take two minutes, and make a few copies? Or
20 should we have him proceed? Okay. Let's just
21 take a two-minute break so he can get a couple
22 of copies made.

1 MR. RESNICK: Does anyone else
2 have testimony today, that we should copy at
3 the same time?

4 JUDGE HILLSON: I think this
5 gentleman is the last witness that we have.
6 Make a few copies. And while the copies are
7 being made, I will mark, is it Anciso?

8 MR. ANCISO: That is correct.

9 JUDGE HILLSON: Okay. Every once
10 in a while I get it right. I will mark your
11 written testimony as Exhibit 76.

12 (The document referred to was
13 marked for identification as
14 Exhibit 76 and received in
15 evidence.)

16 JUDGE HILLSON: And we will just
17 wait two minutes. Give it ten, to make some
18 copies. So we will go off the record for
19 these next couple of minutes.

20 (Whereupon, a short recess was
21 taken.)

22 JUDGE HILLSON: And Doctor, I will

1 swear you in, if you will please raise your
2 right hand.

3 Whereupon,

4 JUAN ANCISO

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

8 JUDGE HILLSON: Okay. Could you
9 please state your name and then spell it for
10 the record?

11 THE WITNESS: Yes. My name is
12 Juan R. Anciso. I'm an associate professor
13 and extension vegetable specialist for the
14 Texas Agrilife Extension Service, which is
15 part of the Texas A&M University system.

16 JUDGE HILLSON: Okay. I marked
17 your written statement as Exhibit 76. And I
18 presume you want to read that statement. Is
19 that correct?

20 THE WITNESS: That is correct.

21 JUDGE HILLSON: You may do so.

22 DIRECT TESTIMONY

1 THE WITNESS: And for the record,
2 my stance on this National Leafy Greens
3 Marketing Agreement is neutral. If the
4 National Leafy Greens Marketing Agreement is
5 implemented, the decision of whether or not to
6 participate will be up to individual handlers
7 and their producers. I'm not a producers or
8 a handler, but I would like to comment in
9 three areas that may or may have not been
10 addressed in these hearings, but I feel are
11 important to Texas.

12 Number one, in the proposed
13 National Leafy Greens Marketing Agreement
14 there will be metrics, or values that will be
15 used to determine water use, soil amendments
16 and environmental assessments which can be
17 found at the National Leafy Greens Marketing
18 Agreement website. These metrics are not
19 spelled out in the proposed agreement, but
20 will likely be patterned to some extent with
21 the current California/Arizona Leafy Greens
22 Agreement. Again, as identified by the

1 California leafy greens website.

2 In the Leafy Greens Marketing
3 Agreement proposal document, it mentions audit
4 metrics, Section 970.42, where the metrics are
5 to be developed by the Committee and its
6 technical board and recommended to the USDA.
7 It also mentions that metrics may vary to
8 accommodate regional differences in
9 production, handling, manufacturing and/or
10 leafy green product.

11 This could be a critical area of
12 the document to the other regional areas
13 and/or zones because these metrics were
14 developed for California Arizona conditions.
15 And we need to be sure that there is
16 flexibility to allow for variation in these
17 metrics for other production regions where
18 such changes are justified by science.

19 An example would be that Texas on
20 average uses more surface water compared to
21 California where more well water is used to
22 irrigate these leafy greens. We do not

1 believe the metrics currently used in
2 California are appropriate for other regions,
3 especially when it comes to the single
4 exceedant values.

5 For example, an individual sample
6 is greater than 235 mpms of generic E. coli per
7 hundred milliliters for a foliar water
8 application, or greater than 576 mpms of
9 generic E. coli per hundred mils for a non-
10 foliar application. In addition, will any
11 metric change that is necessary for a regional
12 area or zone require one or numerous
13 scientific studies to demonstrate that a
14 current metric value is not appropriate for a
15 regional area or zone.

16 Number two, fresh cabbage is a
17 crop that is part of this proposed agreement
18 because some is used in a minimally processed
19 form for bagged leafy greens or salad blends.
20 Most of the cabbage in Texas is not grown for
21 this purpose, and the nature of a cabbage head
22 with tight wrapper leaves and nearly always

1 dry packed in the field or packing shed may
2 not make it a candidate crop for this leafy
3 greens agreement in Texas.

4 In leafy greens 970.13, because
5 individuals have suggested both additions and
6 deletions from the list of regulated products,
7 the industry through the Marketing Committee
8 has been empowered to modify this list by
9 recommending additions or deletions for the
10 Secretary's approval. The California Arizona
11 marketing agreements have already set a
12 precedent for the list of crops.

13 Producers in Texas would like to
14 know if these recommendations, and the process
15 to add or delete crops covered in this
16 agreement will be transparent. Regional areas
17 or zones through the Zone Marketing Committee
18 should be responsible for recommending to the
19 Secretary to add or delete crops based on
20 producer and handler input from that area.

21 Number three, small producers,
22 large producers and handlers all have an

1 interest in providing the safest leafy greens.
2 The safety of the product for consumers should
3 drive this process. But this agreement also
4 needs to be cognizant of whether some metrics
5 really assure a safer product.

6 While signing up for this is
7 voluntary, the program, if implemented
8 properly will have a positive impact on the
9 safety of all leafy greens by encouraging a
10 common food safety standard, and avoiding the
11 tendency for using food safety as a marketing
12 tool, or the continuation of multiple food
13 safety standards used by third-party
14 companies. In the absence of one universally
15 accepted set of standards, producers and
16 handlers are often faced with having to comply
17 with a different set of standards for
18 different customers, resulting in increased
19 costs with little evidence of a corresponding
20 increase in the price of the product.

21 This effort of implementing a
22 National Leafy Greens Marketing Agreement has

1 the potential to help develop a universally
2 accepted set of standards at least for leafy
3 greens. We must realize that leafy greens are
4 grown in different agro-ecological
5 regions/zones. And it is important that all
6 standards and metrics allow for variations in
7 metrics in different regions, so as to take
8 into account the zones or regions.

9 These differences in standards and
10 metrics for each of the regional areas or
11 zones that might exist, will not jeopardize
12 this one universally accepted set of standards
13 and metric that the National Leafy Greens
14 Marketing Agreement is striving for.

15 JUDGE HILLSON: Okay. Thank you,
16 Doctor. I will receive your testimony into
17 evidence as Exhibit 76. And I will ask the
18 USDA panel. Mr. Hill?

19 CROSS-EXAMINATION

20 BY MR. HILL:

21 Q Brian Hill. Can you hear me?

22 Okay. On the bottom of your first page, you

1 mentioned 235 mpms for a hundred milliliters
2 for foliar and another number for non-foliar.
3 Can you explain the terms foliar and non
4 foliar please?

5 A Yes. That would be if the water
6 makes contact with the foliage or the product
7 that is edible for foliar. And non-foliar
8 would be a water application which would not
9 make contact with the product that is being
10 consumed.

11 Q Okay. Thank you very much. I
12 also see that you have mentioned that you
13 don't really agree with the same metrics being
14 used in Texas as are used in California,
15 because of the different water -- well water
16 as opposed to surface water, et cetera.

17 Do you have any opinion on this, a
18 specific opinion on how the different metrics
19 would work? Have you formed an opinion on how
20 that would be implemented?

21 A Well, that is a very good
22 question. I think, in terms of a lot of these

1 metrics -- and I can certainly speak to the
2 water metrics, because I have been involved
3 with trying to ascertain where we stand in
4 Texas -- I think there is little science to
5 say where the numbers should be at.

6 And it will take some time to get
7 those numbers to see where we are at. I just
8 want to make sure that you know, I agree that
9 it is a place to start. But I want to make
10 sure that there is flexibility to show that if
11 that is not the case, that is not something
12 well; we cannot change that. We are too far
13 into the situation.

14 Q Right. And in looking at the
15 agreement as it stands now, do you think the
16 flexibility is in there, to apply these
17 different metrics to different regions? Or
18 have you not gotten to that conclusion?

19 A Well, you do have it in the
20 metrics as language, as 970.42. It is in
21 there. I just -- you know, as a scientist,
22 you know, I mean, we could fill the room with

1 scientist, and there ain't going to be 100
2 percent agreement.

3 So you know, is it going to take
4 one study, one peer-reviewed study, numerous
5 studies? I mean, those are all things to see
6 where the numbers are really at.

7 And so I really think that that is
8 an issue that we struggle with in science, you
9 know. In the sense of, as things come along,
10 you know, things change. But we could never
11 get everyone to agree on the same page, even
12 though we throw that term out there; the
13 scientific evidence.

14 Q All right. Thank you. That is
15 all I have for now.

16 JUDGE HILLSON: Anyone else from
17 the panel have any questions? Ms. Schmaedick?

18 BY MS. SCHMAEDICK:

19 Q Good morning. Melissa Schmaedick,
20 USDA. Good morning.

21 A Good morning.

22 Q Thank you for your testimony. My

1 first question is, do you have a current copy
2 of the Federal Register notice in front of
3 you?

4 A Yes, I do.

5 Q Okay. In your testimony you were
6 referred to a couple of sections in the
7 proposed language.

8 A Yes.

9 Q The first one that you referred to
10 is on page 1. Audit metrics Sections 970.42.

11 A It is on the first page?

12 Q On the first page.

13 A Uh-huh.

14 Q In looking at the Federal Register
15 notice, at Section 970.42, that section
16 actually refers to term of office. So I'm
17 wondering if in fact you were referring to
18 Section 970.67?

19 A Okay.

20 Q Do you have that in front of you?

21 A I see where it is broken down on
22 the third page, where it says duties and

1 responsibilities of the signatories. So let
2 me move on down. Yes. 970.67, Audit metrics.

3 Q Okay. So that is the section that
4 you were referring to.

5 A Yes.

6 Q Okay. And then similarly, you
7 referred to Section 970.13.

8 A The numbers have changed.

9 Q Yes. I believe that, if I
10 understand your statement --

11 A Yes.

12 Q You were referring to Section
13 point 15?

14 A That is correct. I'm trying to
15 think back where -- I believe I got this
16 information from the National Leafy Greens
17 Marketing Agreement document that says
18 "summary draft."

19 Q Yes.

20 A So that is where those numbers
21 come from and not from the actual code of
22 Federal Register. So that is where I get

1 those numbers from.

2 Q Thank you. And that statement you
3 just made leads me to my next question. How
4 long have you been aware of this proposal?

5 A Well, I couldn't tell you exactly,
6 as far as -- I mean, I'm a vegetable
7 specialist. I've worked in all aspects with
8 vegetables, including pest management, but
9 certainly food safety since the year, since
10 the late '90s, 2000. I have been involved
11 with research and food safety.

12 I've not been involved with
13 providing any language or so forth, but I have
14 been a reviewer on many food safety manuals.
15 So I have been aware of the National Leafy
16 Greens metrics in terms -- as an outsider, but
17 not someone involved with it directly.

18 Q Thank you. And out of curiosity,
19 you mentioned that you have a PhD. Could you
20 tell me what area you have -- what discipline
21 you have your PhD in?

22 A Yes. Plant pathology.

1 Q Plant pathology. In your
2 statement, you have a sentence that says, Will
3 any metric change that is necessary for
4 regional area or zone require one or numerous
5 scientific studies, et cetera.

6 Do you have an opinion on how many
7 scientific studies would justify a decision?

8 A Well, I think that has always been
9 a tough issue to deal with. Does it take one?
10 Just one person comes out; I have this peer-
11 reviewed article that shows -- you know, so I
12 will go back to what I've have said. There is
13 little research in terms of getting these
14 numbers actually being scientifically
15 validated. Okay.

16 So I think that is a big issue
17 when we use -- that there is a scientific
18 approach. And I would say that, you know,
19 time is of the essence. We can't sit and wait
20 for ten years to get that information. So I
21 would say, maybe one.

22 And if more information comes

1 along, you have got to be able to change.
2 Because it is an area that is, you know, that
3 we have not had the scientific information on.

4 Q Are you familiar with the
5 Technical Review Board as it is proposed?

6 A No. Other than there will be a
7 Technical Review Board.

8 Q Okay. Could I direct your
9 attention to Section 970.45?

10 A Okay.

11 Q This section describes the
12 proposed Technical Review Board. If you could
13 take a moment to scan that, and look at the
14 proposed membership of that Board. I have a
15 followup question.

16 A Okay. So there will be a national
17 board of 13 members with one representative
18 from each zone that will be a producer and
19 handler. And then there will be one produce
20 safety expert from a land grant university
21 with each of the zones. There will be a
22 representative from USDA, NRCS appointed by

1 the Secretary, a representative from EPA, and
2 a representative from FDA.

3 Q In your opinion, does this
4 proposed membership provide a solid foundation
5 for creating a review panel of scientific
6 information?

7 A Well, I think it is good that
8 there is a technical board to address the
9 technical questions. But certainly, I want to
10 make everyone realize that we have a national
11 GAPS committee that is in Cornell University.
12 We have already signed.

13 So there is a pool of information
14 and data that you know, they could pull from,
15 and use as resources. And you know, of
16 course, you know, I think in terms of
17 committees, you don't want to have lots of
18 people involved.

19 But maybe I would make a
20 recommendation of some one from that national
21 GAPS aspect. Since you know, we have been
22 involved with that for numerous years.

1 Q Certainly. So if I'm
2 understanding you correctly, you might advise
3 the addition of a representative from that
4 group?

5 A From that group, and any other
6 groups that have good handling practice. I
7 think there might be some other folks at the
8 table that you know, haven't been engaged and
9 are providing information and working in an
10 international scale. You know, I can tell you
11 for the national GAPS committee, we have been
12 trying to work on a water database nationally,
13 which it still, as far as I know, not up on a
14 website.

15 But we have contributed
16 information from Texas. New York has done
17 theirs. I'm sure that several other states --
18 so I mean -- there are some databases. There
19 are some areas to go and get some information.
20 So it is not totally you know, zero.

21 But I think those committees and
22 folks that have worked on that need to be

1 engaged in some fashion. Either meeting, the
2 technical board meeting with them on a yearly
3 basis to gather information like we are doing
4 here today. And help guide that technical
5 board.

6 Q And you are from Texas A&M?
7 Correct? Or you are affiliated?

8 A I'm with Texas Agrilife Extension
9 Service. We are an agency of the University.
10 So I won't say that I'm Texas A&M University
11 professor, which I'm not. I'm an extension
12 specialist with an Associate professorial
13 title.

14 Q And is Texas A&M a land grant
15 university?

16 A Yes, it is.

17 Q I'm curious, if within your
18 experience in working in this area, if you
19 might have a definition that you could propose
20 for the term "region" and how region might be
21 used to define how certain metrics might be
22 adapted for different areas?

1 A Well, for example, in Texas, we
2 are a large state. I come from the very tip
3 of Texas, the Lower Rio Grande Valley. We use
4 the Rio Grande river primarily to irrigate our
5 crops.

6 There is another large vegetable
7 growing area that I would call Central Texas,
8 to draw a dot in the central part of Texas.
9 But move over just slightly to the west of
10 that dot is another large vegetable growing
11 area. They use primarily deep wells.

12 Then we have another large
13 vegetable growing area in the Panhandle, which
14 would have similar, I guess -- they also use
15 well water to irrigate their crops. And
16 probably similar season to maybe Colorado in
17 terms of when they market their leafy greens.

18 And then we have another very
19 large area that is composed of small growers,
20 what I would call small growers. That is
21 North Central Texas and East Texas, that
22 primarily collect rainwater in ponds to

1 irrigate their vegetable crops to truck to
2 local farmers markets and even retailers that
3 have -- you know, they provide some type of
4 product.

5 That is well, local of nature.
6 But usually of high quality in the sense of
7 its eating quality. So you know, so even in
8 Texas. We are easily four different regional
9 areas. And then to combine the zones with
10 multiple states.

11 So to me, original area, those
12 areas that I described are regional areas.
13 And so I think regional areas is a critical
14 point to understand than zones, in terms of
15 dealing with metrics.

16 Q Under point two of your testimony,
17 you state that you are talking about the
18 definition of leafy greens. And you state
19 that producers in Texas would like to know if
20 these recommendations and the process to add
21 or delete crops covered in this agreement will
22 be transparent. Can you describe to me what

1 you mean by the term "transparent"?

2 A Well, I mean it in the basic
3 terms. I mean, if cabbage is currently in the
4 California Arizona Leafy Greens Agreement, is
5 it going to be next to impossible to remove it
6 in the sense that -- you know, again, it is a
7 voluntary program. You know. Cabbage
8 producers could volunteer to do it or not to
9 do it.

10 As an extension specialist, I get
11 tugged on by different folks. I'm being
12 tugged on by the larger guys. I'm being
13 tugged on by the smaller guys. I think they
14 all have equal points to make in here.

15 And I would say that that has been
16 an area that I have been tugged on a lot in
17 Texas, is about cabbage. And I would say that
18 we grow cabbage and spinach and lettuce in
19 Texas. You know, maybe cabbage is the larger
20 acreage of those three leafy greens.

21 So I would say that we want to
22 make sure that if it is in the document -- in

1 this document, that there can be additions and
2 deletions. We want to make sure that that is
3 a very true statement, and not something that
4 it is almost an act from somebody above to
5 change it. And what would it take to get that
6 change.

7 Q I believe that concludes my
8 questions. Thank you.

9 JUDGE HILLSON: Thank you. Any
10 other questions from the USDA panel? Mr.
11 Souza.

12 BY MR. SOUZA:

13 Q Thank you. Anthony Souza. USDA.
14 Good morning.

15 A Good morning.

16 Q A question following up on Ms.
17 Schmaedick's question on cabbage. Is it your
18 opinion that the proposed rules should be
19 flexible enough to allow for the products
20 covered under the definition of leafy greens
21 to fluctuate, depending on the regions in
22 which they are grown?

1 A Yes, sir.

2 Q What would be your opinion if,
3 let's say, cabbage is grown in one of the five
4 regions that you mentioned earlier, if that
5 were to be. And it were to be shipped to a
6 processor in different regions.

7 And that processor is a signatory,
8 stating that they will not handle any
9 product -- which definition would they fall
10 under? The definition within their region, or
11 the definition within the region that the
12 product is grown, would you --

13 A Well, I think these are some of
14 the difficult things as we progress, and take
15 it on the national scale, is to understand.
16 I mean, again, I will go back. That it is a
17 voluntary thing.

18 A cabbage producer can choose not
19 to be part of it. But you know, let's say we
20 are dealing with zones with multiple states,
21 or we are dealing with regions. And some
22 region, you know, 99 percent of the acreage or

1 99 percent of the growers don't want it there,
2 I think there should be reasons for them to
3 decide.

4 I really believe it is their
5 decision to decide what occurs in their area.
6 So I would say that I understand the question.
7 For example, in Texas, say the guys in the
8 south do not care to include cabbage. And the
9 guys in the north do.

10 So I would say that it is a
11 regional document and regional and tailor-made
12 to those specific people, and not saying,
13 well, Texas does this and so forth. And so I
14 really think it is a tailor-made process and
15 not a, well, everyone in Texas follows this.

16 Q Do you know of any science based
17 information out there which would substantiate
18 the removal of cabbage from leafy green on a
19 region to region basis?

20 A Well, I have done peer-reviewed
21 studies with the CDC and Emory where we had
22 followed the -- basically the microbial

1 content, whether it is aerobic bacteria,
2 Enterococci, generic E. coli, and one other
3 that escapes my mind at this time, from the
4 field until it gets loaded on the truck.

5 And I would say, you know, there
6 is a pretty much a stair-step effect as a
7 whole. But certainly, when you look at for
8 example, generic E. coli, we never detected
9 that in any of the product in the samples that
10 we did. But if you looked Enterococci, which
11 is another fecal indicator, a fecal
12 indicator -- a potential fecal indicator that
13 is out there.

14 And there is even you know, more
15 and more emphasis of trying to use that one as
16 the indicator for water for example. You
17 know, cabbage as a whole does not -- you do
18 not see that stair-step effect. So there is
19 some scientific stuff.

20 And I'm not the only one. There
21 is many other states that have conducted
22 studies. I couldn't tell you all their

1 studies and all their results.

2 Q Thank you. One last question. In
3 the end of point number three, you talk about
4 standards and metrics. Could you explain what
5 your interpretation of the difference of the
6 two are?

7 A Well, standards could mean for
8 example, how you handle a product. How you
9 educate your growers. I don't mean educate
10 your growers. Educate your entry level
11 workers. I mean, I don't think there is a
12 metric.

13 In other words, if a metric was
14 established, you much teach your entry
15 level -- 90 percent of the entry level workers
16 must undergo this entry level food safety
17 training. That way there is no member tied to
18 it. There is no quantitative aspect.

19 And when we talk about metrics,
20 there is a quantitative, you know, did it meet
21 that quantitative number? Was it above or
22 below? So I think they are different.

1 They are part -- they belong part
2 to each other in the sense that you have a
3 program. But standards are qualitative, and
4 metrics are quantitative.

5 Q Thank you.

6 A Uh-huh.

7 JUDGE HILLSON: Anything else from
8 the panel? Dr. Hinman?

9 BY MR. HINMAN:

10 Q Don Hinman, USDA. Good morning.

11 A Good morning.

12 Q I want to look at a couple of
13 clarification questions. You just used the
14 phrase stair-step effect.

15 A Yes.

16 Q Could you explain that, please?

17 A Yes. For example, you know, if it
18 was, you know, I'm a microbiologist, because
19 I'm a pathologist. But there is no doubt, my
20 main role in that study was to collect the
21 samples from the field and send them to CDC,
22 and am are related to things.

1 So you know, you went from say one
2 log, two logs, three log, four log. Basically
3 stair-step with the certain indicator
4 bacteria -- certain fecal indicator bacteria;
5 for example, generic E. coli was flat.

6 You know, we did detect salmonella
7 in -- we did multiple vegetable crops. Leafy
8 greens, cantaloupes. We did a bunch. For
9 example, in canteloupes, there was three
10 positives on salmonella of about a hundred
11 samples that we did.

12 So and that also brings into, when
13 you are dealing with this water, and you are
14 looking at generic E. coli as your indicator,
15 it almost says nothing about salmonella. And
16 that is what we are finding out,
17 scientifically.

18 So now we have got another beast
19 to grab our arm around, that is not following
20 an indicator of good and bad or of potential
21 contamination by a fecal contaminant. Okay.

22 Q A followup. Just to get -- I have

1 almost no science background. But stair-step
2 effect implies that some level is higher for
3 some reason.

4 A Yes.

5 Q Could you explain what's higher
6 and for what reason?

7 A Well, that is a good question. I
8 mean, I don't know that we know why things
9 start to increase as -- you know, maybe it
10 could be easily expressed that more hands
11 begin to touch it, more contact with surfaces
12 and so forth. Again, those other indicator
13 bacteria are very common in nature.

14 So in some ways, to use them you
15 know, can be misleading. But it does tell us
16 something about the product as a whole. As a
17 product moves through the chain, things are
18 occurring microbially. Okay. And these are
19 fresh packed products in the sense that they
20 are going in there fresh; they were not
21 minimally processed.

22 So there is something -- and for

1 example, I will give cantaloupes as an
2 example, even though this is the leafy greens.
3 It was pretty standard procedure at that time
4 to wash them in a dump, in a chlorine dump.
5 And you would see the immediate effect of a
6 reduction pretty much of these four indicator
7 bacteria.

8 But once we grabbed a sample as it
9 was about to be loaded in the truck, it just
10 exploded. It just went, did this little dip
11 and went back up. So I mean, I think there's
12 a -- I'm trying to understand the ecology
13 microbiology.

14 What it's taking is not going to
15 be easy. Whether we look at the fresh
16 product, or we look at water, or we look at
17 distances, you know, I think those are all
18 hard questions to say, this is the safe
19 number.

20 But those are areas we cannot
21 ignore. We can't just throw them out and say,
22 well, we can't work on it. We need to work on

1 them.

2 Q Okay. You used the word -- one
3 thing about stair steps is the likelihood of
4 it being higher as it moves further down the
5 marketing chain. Is that correct?

6 A Yes. At least we followed it to
7 the truck. We made them open a box, take --
8 we did not follow it into the grocery chain.
9 Okay.

10 Q Good. Thank you for that.
11 Another followup. You were asked earlier to
12 explain foliar and non-foliar. I'm going to
13 cite an example, and you tell me if I'm
14 correct. Foliar would be pipes in an overhead
15 irrigation system and non-foliar would be drip
16 irrigation. Are those fair examples?

17 A That would be a fair example.
18 Yes, sir.

19 Q Okay. Thank you. On the bottom
20 of the first page of your testimony, you are
21 referring to specific test thresholds there.
22 You cite some specific numbers for foliar and

1 non-foliar.

2 A Yes.

3 Q And seeing that these are not
4 appropriate for Texas, or may not be.

5 A May not be.

6 Q May not be. Do you have some
7 initial idea? You cited specific numbers. Do
8 you have some initial idea on what a better
9 number might be? Or how you would get at it?

10 A Well, you know, I certainly posed
11 that question to microbiologists in Arizona
12 and everywhere else, you know, and, you know,
13 it is a difficult number.

14 So, and I know that these numbers
15 were basically taken out of the Fresh Water
16 Act.

17 They are not actually numbers that relate to
18 irrigation studies and say this irrigation
19 number is a correct number.

20 So they basically -- they took the
21 high and the low of the Fresh Water Act as a
22 starting place. That is fine. I have no

1 problem with starting there. But let's make
2 sure that that is not written in concrete as
3 we find out more things.

4 Q Thank you. Let's skip ahead to
5 the future. Let's assume that the agreement
6 is going into effect, and there are certain
7 water metrics proposed for example.

8 A Uh-huh.

9 Q Do you see a -- could you explain
10 how you might be involved, or Texas Extension,
11 in saying okay. You mentioned that we need
12 more science.

13 A Yes.

14 Q So what would be the role of Texas
15 Extension research in creating that additional
16 science that you would then pass on to the
17 Technical Review Board. Could you describe
18 how that might occur?

19 A Well, you know, when you deal with
20 science, a lot of it gets put in a peer review
21 to churn and kind of gets dusty and packed
22 away. So I guess again, engaging those folks

1 that are involved, and whether that is a
2 direct invitation.

3 Or like I said, we all -- you can
4 basically find us. But certainly the role of
5 the Extension aspect is certainly dealing and
6 helping the growers adjust to changes that
7 come with farming.

8 And this is part of the changes
9 that we going through, the struggles of
10 accepting you know, these new things. This
11 was not done before, so now some can view it
12 as added thing -- added regulation, whatever
13 terminology you want to use.

14 Others can view it, this is great.
15 I can't afford to have one individual affect
16 the industry so hard, or I'm out of the
17 business. And there is no doubt that there is
18 a zero tolerance when it comes to the fact
19 that when we sit down and eat, we can't
20 tolerate contamination.

21 So the role of Extension is
22 certainly helping them. For example,

1 currently in Texas we have done water testing,
2 and we have given that through a private
3 laboratory, not through the University where
4 they just go unpublished. So the grower could
5 use that in his audit systems.

6 We have been also doing, basically
7 providing small growers, all growers, orchard
8 growers, food banks, you know. We have a
9 whole -- greenhouse growers, with their
10 standard operating procedure, which is
11 basically that farm safety plan that they have
12 got to have before they undergo anything.

13 So I think the role of Extension
14 is helping them you know, move on to the next
15 level. But we are also involved with the
16 consumers, letting them know what is a better
17 way to handle that product, once they get it
18 and so forth. So I think, you know, I think
19 Extension in terms of educating the adults,
20 whether they are farmers or consumers is
21 certainly a key, at least in Texas. I would
22 say, the rest of the states.

1 Q To follow up on that same line of
2 questioning, you mentioned that a lot of these
3 rubrics may be in journals or may be somewhere
4 accessible or may need to be done in the
5 future. But if the agreement is in place and
6 the Board is asking for your input, you've
7 stated that the water conditions may be very
8 different by -- just within Texas.

9 A Uh-huh.

10 Q And they said, okay. We would
11 like the Texas University and Extension system
12 to give us recommended numbers for each zone
13 or each water -- different source, or by zone.
14 Would you think that you could gear up to do
15 that? Given, well, if you disagree with
16 certain numbers, give us different ones, and
17 then that Board could consider them.

18 A Yes. I think that we can. I
19 think the fact that we have county agents, at
20 least in Texas. We have county -- I mean, a
21 lot of this was done with the cooperation of
22 county agents, which are the extension folks

1 at the local level, working with their
2 producers and so forth. So I think this also
3 costs money.

4 And whether someone is driving
5 over there to get that sampling, that water
6 sample costs money. As we found out in very
7 rural areas, there is really no next-day
8 delivery type systems, because, for example,
9 water samples, they must be analyzed at
10 exactly 24 hours from the time of collection
11 to be a valid EPA acceptable number and so
12 forth.

13 So here we are, we have folks out
14 in very rural areas waiting on the UPS guy and
15 a box that never shows up. You know, so I had
16 some of my -- some of the agents in very rural
17 counties had to drive it two or three hours
18 from their location to get the water there.

19 So there are some logistical
20 issues of you know, trying to get some of this
21 stuff, and costs. So I mean, I think we can
22 do as much as we can in terms of education and

1 manpower. But if there is other additional
2 costs, we would need those costs to come in
3 from somewhere. Yes.

4 Q Thank you. On your second page,
5 under your number three section there.

6 A Uh-huh.

7 Q You use the phrase "cognizant of
8 whether some metrics really assure a safer
9 product." You have cited some very thorough
10 example in here about water. Can you perhaps
11 discuss some other metrics where you think
12 there may be currently in place or likely to
13 be in place that you think might not produce
14 a safer product, yet be required of growers or
15 handlers?

16 A Well, I think some of the earlier
17 testimony pointed that, in terms of buffer
18 areas, fences. Weeds. So some of the land,
19 what I would call the land distances, you
20 know, because, you know, if you are high or
21 you are low, you know, you are supposed to,
22 you know, add to that.

1 So you know, when I originally got
2 involved or understood the leafy, California
3 Arizona Leafy Greens Agreement, you know, when
4 I saw that, I said wow. They want to take out
5 production zones that use surface water, by
6 just looking at those numbers.

7 So my number one flag that came to
8 me was to start at the water. So that is
9 really what I have been focusing on the water
10 side of things.

11 Q To cite the examples you just
12 made, and then thinking about Texas Extension
13 and research, you mentioned buffers and the
14 presence of fences.

15 A Uh-huh.

16 Q Would Texas be prepared to provide
17 a Technical Review Board with views on if a
18 buffer is maybe too large, and some initial
19 views. Would you be prepared to provide, or
20 would the system be prepared to do research on
21 what would be perhaps a different buffer that
22 would have -- perhaps a smaller one that would

1 have a beneficial effect?

2 A Well, I couldn't tell you the
3 specific numbers, whether it is more or less.
4 But you know, we do have wildlife experts that
5 we really haven't engaged in this food safety
6 aspect, in terms of how to manage entry of
7 wildlife. We haven't really engaged other
8 disciplines to help us answer these questions.
9 They are coming on board.

10 But like I said, there is more
11 questions than there are answers. So it is
12 difficult. But as far as cooperation, having
13 people provide you what they know, to the best
14 of their ability, that is a done deal. I
15 mean, you will have folks that will be glad to
16 participate and give input.

17 Now, whether they have a study, a
18 peer-reviewed study to back that up, that I --
19 you know, I would probably say in most times,
20 certainly with the land metrics and wildlife,
21 that is probably not going to be there.

22 Q You used the word "catalyst" for

1 engagement. Would the creation, if it
2 occurred, of a marketing agreement -- can the
3 Board be a catalyst for engagement of those
4 other scientists for those other metrics?

5 A I would hope so. I would hope so.
6 I think that you know, the example that I gave
7 you, the national GAPS committee. You know,
8 I don't know how much they have been engaged
9 in this process. You know, maybe very little.

10 So maybe when you get to New York
11 you will find out more in the hearings there.
12 But I think that there is -- there is folks
13 working on food safety all across the country.
14 And we need to engage that aspect of -- in
15 some way, without bogging it down with many
16 studies and who disagrees with who and all,
17 and so on and so forth.

18 Q Thank you. I'm going to go to,
19 again, number three, towards the middle of
20 that paragraph.

21 A Uh-huh.

22 Q You used the phrase "increased

1 costs with little evidence of a corresponding
2 increase in the price of a product."

3 Now, previous witnesses have
4 testified to the effect that, in their view,
5 their food safety measures taken under
6 agreements or just on their own based on the
7 marketplace have resulted in increased prices
8 for their products based on those additional
9 improved standards.

10 Do you have any examples where --
11 are you saying that in Texas there have been
12 examples where that has not occurred? What is
13 your -- explain to me that point.

14 A Yes. I will be glad to. I mean,
15 they have the checkbook. They know more. But
16 I can tell you for one thing, in the sense as
17 far as them being producers or shippers or
18 handlers. But I can certainly say that they
19 both you know, constantly repeated the fact
20 that they do multiple things for multiple
21 customers.

22 There is no way that people

1 carrying all of this is a cost-effective
2 effort in food safety. So, you know, that is
3 what I'm hoping that if we develop a national
4 aspect of it, that there is, you know, some
5 sort of criteria that reels in these private
6 companies and say this is how it is done, and
7 you don't need to go beyond this.

8 Or the retailer or a buyer says
9 this one is just as good as that one. You
10 know, and we can take -- so there is some sort
11 of, I don't know, certification. I don't know
12 what to call it; some USDA stamp on these
13 third-party companies saying they meet the
14 requirements, so something that we are not
15 going around.

16 That has been the number-one issue
17 with whether you are dealing with handlers or
18 you are dealing with growers, that they are
19 doing multiple things. And one person wants
20 you to do something different. Keep two sets
21 of books, three sets of books to justify your
22 selling to the different customers.

1 So that theoretically is not going
2 to be -- that is what I'm talking about in
3 terms of it not really a reward or
4 compensation for that. And also, as things
5 process and more and more producers adopt
6 these food safety things, it becomes the norm.
7 and then it is whatever the price of the
8 market is for the given date.

9 So they don't actually say, we
10 will give you ten cents per unit more. So it
11 is another costs that is beared at the
12 producer level to hopefully the market figures
13 out how to compensate that.

14 Q Okay. Thank you. Go back to
15 number two in your statement there. You are
16 referring to this example of cabbage with
17 outer leaves, dry packed in the field. Are
18 you stating that as an example of something
19 that you might -- that somebody might want to
20 exclude from the agreement, as you understand
21 it. And if so, could you expand on that issue
22 of why it would be excluded?

1 A That is a good question. I would
2 say not in the sense to take it in a negative
3 standpoint in saying that is more of a food
4 safety hazard. I would say that water is a
5 key aspect of having one contaminated product
6 contaminate a whole lot of products -- a lot
7 or many, or the whole batch.

8 Any process, and we have
9 certainly, through the studies of cantaloupes
10 and so forth, we have shown that if you pack
11 it dry, it is like looking for the needle in
12 the haystack. And you did not -- that one
13 thing did not go and spread it to others.

14 By using water, either to wash up
15 that product, even when you are using
16 chlorine, which chlorine has been shown to be
17 ineffective, even if you use it three times.
18 So it is not 100 percent. You know, it is
19 99.9 percent. But that is still basically a
20 three log reduction which, microbially
21 speaking, is not enough in terms of a kill
22 step. Okay.

1 So it is not a kill step. So by
2 the fact that you are packing things dry, and
3 packing things in the field, you almost reduce
4 the -- at least based on samples, the levels
5 of these four indicator type bacteria of what
6 is going on the produce.

7 Q Thank you. No further questions.

8 JUDGE HILLSON: Anything else from
9 our panel from the USDA?

10 (No response.)

11 JUDGE HILLSON: Okay. Let me ask
12 the proponents panel if they have any
13 questions, Doctor.

14 Mr. Giclas?

15 REDIRECT EXAMINATION

16 BY MR. GICLAS:

17 Q Yes. Hank Giclas, Western
18 Growers. Dr. Anciso, thank you for your
19 testimony this morning. And thank you also
20 for coming from Texas to participate in this
21 hearing.

22 A You are welcome.

1 Q I just had a couple of questions.
2 I mean, it is hard to follow USDA. They take
3 all of my questions. And so I will try not to
4 be redundant. Do you know, is Cornell a land
5 grant university?

6 A I'm not sure, but I believe they
7 are. I don't know.

8 Q Okay.

9 A I'm not sure.

10 Q Ms. Schmaedick referred you to the
11 Technical Review Board section of the proposed
12 agreement.

13 A The Federal Register?

14 Q Right. 970.45.

15 A Yes.

16 Q And you walked through the
17 specific seats if you will or membership of
18 that.

19 A Yes, sir.

20 Q But I wanted to direct you to the
21 very last kind of part of that, right below
22 the specific, where it talks about

1 subcommittees, and just ask you if you believe
2 that that phrase would allow the latitude
3 necessary to engage groups like the GAPS
4 program at Cornell, or the Extension Service
5 in different states, those types of things.

6 A Yes, sir. I didn't read that far
7 down. I thought it was a very specific Board.

8 Q I would also -- okay. Thank you.
9 I also have one question. I mean, I know we
10 struggle all the time with how to reach
11 scientific consensus.

12 What is -- I mean, as a scientist
13 that is engaged with the agricultural
14 industry, what is your recommendation to the
15 production industry in terms of trying to
16 establish some sort of metric or value when
17 the science is either not there, or not
18 mature. I mean, do they approach it from a --
19 I mean, if there is a known risk like water or
20 something, and the science isn't there to tell
21 you definitively what the numeric threshold
22 should be, how should a producer approach

1 that, do you think?

2 A Well, it is difficult. And it is
3 difficult because you know, I do these
4 trainings for food safety for retailers. And
5 it is difficult to say, these are the numbers
6 but there is no data.

7 So as a scientist, you know, you
8 are treading on ground as a scientist that
9 they are not comfortable with like myself.
10 But certainly, I have discussed this issue
11 with the national GAPS committee, the National
12 Vegetable Crop Initiative, which where we have
13 a food safety subcommittee. Yes.

14 I agree that we need to start at
15 some place, and we cannot wait ten years, 20
16 years, however long before the science comes
17 along.

18 I guess my only point I want to
19 make is that if we do move forward, that and
20 these -- some day, you know, there may be
21 agricultural irrigation water standards that
22 are written into law. We want to make sure

1 that science go to those numbers, and not just
2 a starting springboard. That is my only
3 concern.

4 Q Okay. Just out of curiosity, I
5 think you said this already. But relative to
6 pathogens and not TDS or any of those other
7 things, are you aware of any state or region
8 in the country that has established any
9 irrigation standards for water?

10 A No. The only irrigation water
11 standard, which is a NAFTA standard between
12 Canada, United States and Mexico is a use of
13 grey water, which is sludge water. That is
14 the only standard. You can't use that to
15 irrigate food crops. So that is the only
16 standard we know.

17 But other countries across the
18 world do have irrigation standards. So it
19 could come to bear that I could see in the
20 future that there will be irrigation water
21 standards. I just want to make sure how they
22 get those numbers is based on studies, based

1 on studying the props and the irrigation
2 water, and not a number taken out, you know,
3 as a place to start.

4 Q You stated that Texas -- a lot of
5 parts of Texas, anyway, rely on surface water.

6 A Yes, sir.

7 Q Are you aware of the desert
8 regions of California and Arizona?

9 A Yes, sir.

10 Q And would you say that they are
11 reliant on surface water as well?

12 A No, sir. And I cannot -- I have
13 been to California. And I have been to the
14 production areas of California.

15 But part of my comment is in
16 regards to why I say that, is because on the
17 Leafy Greens Agreement, there was once a slide
18 looking at 2000 water samples. It has been
19 pulled off the web site. But I kept it. I
20 pulled it off the web site. And you know, I
21 can't tell you the exact percent.

22 But it was 80 or 90 percent of

1 those water samples was generic E. coli of
2 less than two, which to me means one thing;
3 they came from a well, or they came from
4 municipal water. They did not come from a
5 surface area.

6 Q Okay. Well --

7 A So that is why I kind of based
8 that aspect, you know. If those first 2000
9 numbers that were being reported were so low
10 from California, to me that only indicates
11 that those folks participating or those folks
12 using the wells or water systems that are
13 enclosed, where there is really not a chance
14 for contamination.

15 Q Do you know anything about how the
16 date for that slide was developed?

17 A No, sir. I don't know. No. I
18 just know that it was there, and it was pulled
19 off.

20 Q If I suggested to you that growers
21 were asked to volunteer that information --

22 A Yes, sir.

1 Q Would you have a feeling about
2 what kind of numbers mind come up relative to
3 a voluntary submission if you will, of data?

4 A Yes, sir.

5 Q And what do you think it would be?

6 A Well, obviously, we would not want
7 to put the 1,500 count on there. But you
8 know, if it is to as briefly paint a picture
9 of California for those folks that visited
10 that website on those days, you know, they
11 were misinformed in some aspect and walked
12 away with a different idea.

13 Q Okay. Thank you. My last
14 question is, if, as the national agreement
15 contemplates, we can get to a basic sort of
16 standardized system with some regional
17 variations to reflect the different production
18 environments and different inputs and those
19 types of things, do you think that that is
20 a -- do you think that empowers the Extension,
21 the Ag Extension Service across the country to
22 you know, I guess help producers that would be

1 engaged in this, deal with it, better than say
2 a piecemeal approach on a state by state
3 basis?

4 A Well, I mean, I know that the
5 Extension Service in many states are going
6 through tough times financially. And some
7 states have -- in Texas we are still very
8 strong in Extensions. So I couldn't speak for
9 the other states. But as the scope and goal
10 and mission of Extension, I would say that if
11 they are there in any particular state, that
12 is part of their mission and goal is to
13 implement new technologies, information.

14 And so they would be a good
15 resources to utilize. So I would certainly
16 not ignore them.

17 Q No, I agree with that. I guess
18 I'm just asking if you know, there was sort of
19 a single standard, does that facilitate
20 Extension's role as opposed to multiples?

21 A I would think so. I would think
22 so. I would think you would have a whole lot

1 more people to the table. Again, all of them
2 wouldn't agree, but you would have more people
3 at the table, and we would communicate the
4 same language.

5 And I think that is important for
6 us in Extension, that we communicate the same
7 language, whether we are in Minnesota,
8 Colorado, Texas and so forth. So we don't,
9 you know -- it is just part of the --

10 Q Thank you. I have no further
11 questions.

12 JUDGE HILLSON: Mr. Resnick?

13 BY MR. RESNICK:

14 Q Thank you, Your Honor. Jason
15 Resnick, Western Growers. Thank you very
16 much, Dr. Anciso for coming all the way from
17 Texas to testify this morning.

18 Just very briefly, you mentioned
19 in your testimony that you believe that the
20 national LGMA should it e into effect, should
21 recognize regional differences for purposes of
22 adopting metrics. Do you believe that the

1 proposed agreement as written provides a
2 framework to accomplish that goal?

3 A Yes, it does. I believe the
4 proposed agreement does provide that framework
5 to accomplish that goal. And that is why I'm
6 here at this hearing to make sure that you
7 know, that there is a clear understanding of
8 some of the statements in there, you know,
9 because the statements may be interpreted to
10 be there to say, well, we have something to
11 accommodate for that, you know, and in reality
12 it is just one thing that occurs in California
13 and Arizona.

14 And, you know, I think that would
15 at least from a states' acceptance and
16 growers' acceptance and handlers' acceptance
17 could become an issue, but the framework is
18 there.

19 Q And would you also agree that the
20 absence of contamination in leafy greens is a
21 food quality issue?

22 A Well, you can't have food quality

1 if you don't have a safe product to eat. So
2 food safety and food quality are hand in hand.
3 I mean, it is a quality aspect. Yes.

4 Q Thank you. And just for the
5 record, would you just briefly recount your
6 educational and professional background?

7 A Yes. I'm a social professor with
8 the Texas Agrilife Extension Service. I'm a
9 vegetable specialist for the southernmost
10 district, which has 24 counties, the
11 southernmost 24 counties that you can find in
12 the state of Texas.

13 I have been with the Extension
14 Service since 1989. I have worked on food
15 safety since the late 1990s and certainly
16 through all the 2000s.

17 Q And your education? Bachelor's
18 and --

19 A Yes. My bachelor's is in biology,
20 my master's is in plant protection, and my PhD
21 is in plant pathology.

22 Q And where did you attend school?

1 A All of those degrees are from
2 Texas A&M University.

3 Q Very good. Thank you very much.
4 Again, I have no further questions.

5 JUDGE HILLSON: Anything else?

6 (No response.)

7 JUDGE HILLSON: Okay. Thank you
8 very much for your testimony, Dr. Anciso. So
9 before you head out the door, you might want
10 to check with our court reporter, because you
11 did use a few terms that she will probably
12 need to check the spelling on.

13 THE WITNESS: Okay.

14 JUDGE HILLSON: Okay.

15 (Whereupon, the witness was
16 excused.)

17 JUDGE HILLSON: You don't have any
18 more witnesses. Right? Neither party has any
19 witnesses to call? I'm going to say neither
20 party.

21 MR. RESNICK: That is correct.

22 JUDGE HILLSON: The Proponents

1 have no more witnesses and there don't appear
2 to be any other witnesses here. It is only
3 noon, and the hearing is supposed to go from
4 8:30 to 5:00.

5 But in the absence of anyone
6 giving us any indication that they can only
7 come in the afternoon as opposed to some of
8 the things that happened in previous weeks,
9 I'm suggesting that we adjourn. Does anyone
10 think that that is the wrong thing to do?

11 (No response.)

12 JUDGE HILLSON: Hearing silence, I
13 will say that -- we will close today's hearing
14 in Denver, and we will continue the hearing to
15 October 14, 2009 in Yuma, Arizona. Thank you
16 very much.

17 MR. RESNICK: Your Honor, just
18 some housekeeping issues too.

19 JUDGE HILLSON: I was on a roll,
20 too. What?

21 MR. RESNICK: Just to discuss
22 Yuma. And in anticipation of those hearings,

1 we expect to have quite a few witnesses that
2 are coming from Salinas. Remember those
3 witnesses were not afforded the opportunity to
4 testify in Salinas just due to time
5 constraints that we experienced there.

6 Our suggestion, recommendation,
7 request would be that the first day of
8 hearings be scheduled for proponent group; the
9 second day of hearings would be scheduled for
10 opposition and that we maybe put a notice or
11 indicate on the website, USDA, AMS website --

12 JUDGE HILLSON: Well, without
13 there being any opposition people here to
14 discuss that with you, I'm not sure. I mean,
15 the goal of any of these hearings is that the
16 proponents go first and that the opposition
17 will follow.

18 But once again, I would be
19 accommodating people who show up and can only
20 testify on a certain day. I mean, I don't
21 know how we could put a notice up on the
22 website.

1 Ms. Carter, do you have any
2 thoughts on that?

3 MS. CARTER: What does he
4 recommend?

5 MR. RESNICK: My recommendation
6 would be to just notify the public that it is
7 anticipated that the proponent group will be
8 going first in Yuma, and that we anticipate
9 that we will be utilizing that entire day.

10 So for opponents who don't wish to
11 show up and not have the opportunity to
12 testify, they should plan on appearing the
13 second day in Yuma and not coming to the first
14 day, if they anticipate testifying.

15 JUDGE HILLSON: Anyone on the
16 panel have any thoughts on that? I'm
17 certainly not going to direct you to do that.

18 Mr. Hill?

19 MR. HILL: It is difficult to say,
20 because the opponents may want to hear what
21 the proponents want to say.

22 JUDGE HILLSON: Well, they will

1 show up to listen, but in terms of testifying,
2 I mean, we had a lot of logistical issues in
3 Monterey when a lot of the opponents showed up
4 on the first day, and they could only testify
5 that day. That sort of threw the proponents'
6 testimony a little bit off track.

7 And it flows a lot better if the
8 proponents have their say, and then the
9 opponents have their say. So I will leave it
10 up to the USDA to whether they want to put a
11 notice on the website. My intention would be
12 that the proponents would go first and then
13 the opponents and/or neutrals would go second.

14 But that I still have the duty and
15 obligation to, if someone shows up and they
16 can only testify on that day, they have a
17 plane to catch or whatever, then I'm going to
18 try to squeeze them in. As we know, in
19 Monterey, there was one point where, I think
20 it was six witnesses came to me during the
21 morning break, and said they all had to
22 testify in the next hour and a half to two

1 hours. And it just couldn't happen.

2 MR. RESNICK: And I agree with
3 that. And I think that is why putting a
4 notice out so that people realize that they
5 shouldn't have the expectation of testifying
6 on the first day, that they should make travel
7 arrangements to come on the second day, that
8 they will have virtually a guaranteed
9 opportunity to testify on the second day.
10 Whereas the first day is really going to
11 because of the number of witness we are
12 introducing.

13 JUDGE HILLSON: I will leave it up
14 to the USDA panel to decide whether they want
15 to do that. Given that it is only a few days
16 away anyway, it is -- I don't know how often
17 people check on the USDA website anyhow.

18 And if somebody shows up and they
19 need a plane, I'm going to try to accommodate
20 them. My goal is to accommodate the proponent
21 group first.

22 MR. RESNICK: I appreciate that.

1 JUDGE HILLSON: And we can try to
2 do it that way. But I think -- I'm not going
3 to order anyone to do anything. Okay? Was
4 there any other housekeeping besides that?

5 MR. RESNICK: No, Your Honor.

6 JUDGE HILLSON: Okay. Now we will
7 adjourn until next week in Yuma. Off the
8 record.

9 MR. RESNICK: Thank you.

10 (Whereupon, at 12:08 p.m., the
11 hearing was recessed, to resume in Yuma,
12 Arizona.)

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