

UNITED STATES DEPARTMENT OF AGRICULTURE

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PUBLIC HEARING

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PROPOSED MARKETING ORDER AND AGREEMENT
FOR PECANS GROWN IN
ALABAMA, ARKANSAS, ARIZONA, CALIFORNIA, FLORIDA,
GEORGIA, KANSAS, LOUISIANA, MISSOURI,
MISSISSIPPI, NORTH CAROLINA, NEW MEXICO,
OKLAHOMA, SOUTH CAROLINA, AND TEXAS

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THURSDAY,
JULY 23, 2015

The hearing came to order at 8:00 a.m. in
the Azalea Room at the Hilton Doubletree Hotel,
located at 1981 North Central Expressway,
Richardson, Texas, Clay G. Guthridge,
Administrative Law Judge, presiding.

BEFORE:

CLAY G. GUTHRIDGE

Chief Administrative Law Judge

Federal Maritime Commission

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

2 8:00 a.m.

3 JUDGE GUTHRIDGE: This hearing will
4 come to order, please. Good morning. My name is
5 Clay Guthridge, I am the Chief Administrative Law
6 Judge of the Federal Maritime Commission and I
7 have been detailed to the Department of
8 Agriculture to preside over this public rule
9 making hearing.

10 Before we go on let me ask you all, if
11 you would, please, as I'm going to do right now
12 and turn off or at least silence your cell phones
13 and other noise-making devices that you might
14 have.

15 Could I have appearances for the
16 Department of Agriculture, please?

17 MR. HILL: Brian Hill, United States
18 Department of Agriculture, Office of the General
19 Counsel.

20 MS. CHILUKURI: Rupa Chilukuri,
21 Department of Agriculture, OGC.

22 JUDGE GUTHRIDGE: And for the

1 proponent group?

2 MR. DAVIS: Dwight Davis, attorney for
3 the proponent group.

4 MS. MYERS: Regina Myers, attorney for
5 the proponent group.

6 MR. QUIR S: Paul Quirós, attorney for
7 the proponent group.

8 JUDGE GUTHRIDGE: And these other
9 folks over here to my right are from Department
10 of Agriculture and they will also be asking
11 questions.

12 We're here today on a proposal to
13 promulgate a marketing agreement covering pecans
14 pursuant to the requirements of the Agricultural
15 Marketing Agreement Act of 1937. The Act is
16 codified at 7 United States Code Section 601
17 through 674. And this is docket number
18 15-0139(a)(o)-FD.

19 The proposal was published in the
20 Federal Register on July 2nd, 2015, at 80 Federal
21 Register 38021 through 38032. And the proposal
22 would create, as I think probably most of you

1 know, an agricultural marketing order for pecans.

2 We -- the hearing began in Las Cruces,
3 New Mexico, on Monday, July 20th, and carried
4 through Wednesday, and is resuming here in Dallas
5 on July 23rd and will be tomorrow, the 24th,
6 possibly on Saturday, the 25th, and then we'll
7 resume in Tifton, Georgia, next week.

8 It's my function and responsibility to
9 conduct the hearing and to ensure that all
10 persons who want to present relevant evidence or
11 otherwise participate in the public hearing have
12 an opportunity to do so. The information
13 presented at the hearing will be compiled into a
14 written record and used by the Secretary of
15 Agriculture to make a decision on the proposal.

16 The decision will be based on the
17 record made at the hearing and consisting of the
18 testimony and statements of the witnesses and any
19 exhibits submitted and entered into the record.
20 Any person may testify, and the testimony may be
21 admitted as long as it's not immaterial,
22 irrelevant, or repetitious.

1 Seated I believe at the back, is that
2 Ms. Andrea Ritchy back there at the back wall?
3 If you want to testify and you're not already on
4 the list to testify, if you would see her at some
5 point during the day and let her know, and she'll
6 let me know.

7 You can also submit a statement in
8 writing. And if you submit such a statement,
9 please identify yourself, your name, address, and
10 other identifying information, and get it to the
11 Department of Agriculture personnel who will get
12 it to Ms. Peggy Brown, who's seated to my right,
13 who's the court reporter for this.

14 She's taking down everything,
15 recording everything that's being said. So if
16 you do testify, please speak clearly into the
17 microphone, so she can understand what you're
18 saying. After you testify, if you do testify, I
19 may ask you to, I will probably ask you to go
20 over and just check with her to make sure that
21 she doesn't have any problems with anything she
22 said needs any clarification or spellings of

1 words.

2 One other thing I wanted to mention is
3 the Department of Agriculture personnel are the
4 persons who are charged with the responsibility
5 of making this decision. And under the
6 regulations they may not talk to you about the
7 proposal, anything substantive about the proposal
8 itself. They may talk to you about procedural
9 matters or the weather but they cannot discuss
10 the merits of the proposal itself. And so if
11 they look a little frightened if you approach
12 them, that's why.

13 There have been 39 exhibits already
14 admitted into the record in the Las Cruces
15 portion of the hearing. And my understanding is
16 that they are all available on line someplace.
17 And if somebody from Department of Agriculture
18 can, if you would let us know what that web site
19 is or how to get to those documents.

20 MS. SHARROW: Yes, Your Honor. The
21 exhibits are available on the Agricultural
22 Marketing Service web site at ams.usda.gov.

1 Michelle Sharrow, USDA.

2 JUDGE GUTHRIDGE: All right. With
3 that, I ask the proponent group to call its first
4 witness unless you have any preliminary matter
5 you want to raise.

6 MR. DAVIS: Your Honor, we're ready to
7 charge right into it. Thank you so much. Good
8 morning, Your Honor and ladies and gentlemen.
9 I'm Dwight Davis, counsel for the proponent
10 group. And the proponent group calls as its
11 first witness Ms. Helen Watts.

12 JUDGE GUTHRIDGE: Ms. Watts, could you
13 please raise your right hand?

14 MS. WATTS: Yes, sir, I do.

15 JUDGE GUTHRIDGE: Mr. Davis?

16 MR. DAVIS: Thank you.

17 Whereupon,

18 HELEN WATTS
19 having been first duly sworn, was called as a
20 witness herein and was examined and testified as
21 follows:

22 DIRECT EXAMINATION

1 BY MR. DAVIS:

2 Q Good morning, Ms. Watts.

3 A Good morning.

4 Q For the record, would you please spell
5 your first and last name?

6 A Helen, H-E-L-E-N, Watts, W-A-T-T-S.

7 Q And where do you reside, Ms. Watts?

8 A I live in Florence, South Carolina.

9 Q Ms. Watts, if I could get this on the
10 record, I believe you are originally from Dillon,
11 South Carolina. Is that correct?

12 A Yes, sir, I am from the great city of
13 Dillon.

14 Q Now, for those in the audience,
15 Dillon, South Carolina is probably best known as
16 the home of South of the Border, a large tourist
17 trap that's right on I-95 with beacons all up and
18 down I-95, everybody knows that. But only
19 slightly less better known is that is the home of
20 Ben Bernanke. Is that not correct?

21 A Yes, sir, that is correct.

22 Q Is there any chance you knew Mr.

1 Bernanke, Dr. Bernanke growing up?

2 A Yeah, Ben and I were classmates, so,
3 you know, I've got some good on Ben that I could
4 disclose at the right --

5 Q You are under oath, so I will not ask
6 you. In fact, I think you and Dr. Bernanke were
7 in the same band. Is that correct?

8 A Absolutely. We were Dillon High
9 School Marching Wildcats, and Ben played the
10 saxophone and I played the flute, and we were
11 rocking.

12 Q Yeah. I would venture to bet that
13 that -- your band, with you and Dr. Bernanke on
14 that band, had the highest average IQ of any band
15 perhaps in the country.

16 A Actually I think that's written down
17 in Dillon.

18 Q As well it should be.

19 JUDGE GUTHRIDGE: I might rule that
20 testimony about Mr. Bernanke would be irrelevant,
21 immaterial --

22 (General laughter.)

1 MR. DAVIS: So noted, Your Honor. Now
2 we're going to get to relevant information.

3 BY MR. DAVIS:

4 Q Tell us a little bit about your
5 educational background.

6 A I went to school and graduated from
7 Womick Selenia Business College back in the early
8 '70s. I began work with Young Pecan about three
9 years after that, and have been with Young Pecan
10 for 35 years.

11 Q What is your current position with
12 Young Pecan?

13 A I'm the Executive Vice President of
14 the company.

15 Q And what are your responsibilities as
16 vice president of Young Pecan?

17 A Primary responsibilities are sales and
18 marketing. That's where I focus most of my
19 attention.

20 Q Okay. And if you would, please
21 explain to us what is Young Pecan?

22 A Young Pecan is a very large processor

1 of pecans founded in 1923. We would be
2 considered a large business as defined by the SBA
3 guidelines.

4 Q Now, does Young Pecan own any pecan
5 orchards?

6 A We do not. We buy 100 percent of our
7 raw material inshell acquisitions from, direct
8 from growers and accumulators.

9 Q Okay. And if you would, please give
10 us just a quick overview of the locations of
11 Young Pecan facilities and kind of the scope of
12 your business.

13 A Well, I'm located in Florence, South
14 Carolina. That's where the company was founded.
15 I still have our inshell buying acquisition and
16 sales offices there, although our shelling
17 facilities are located now in the west Texas
18 region around El Paso.

19 Q All right. Could you tell us some of
20 your associations and affiliation and work that
21 you have done with pecan organizations?

22 A Yes. I have served as the general

1 chairman and as the secretary-treasurer, vice
2 president of the National Pecan Shellers
3 Association. I'm currently again on the board of
4 directors of the National Pecan Shellers
5 Associations. I've served as an ambassador on
6 the International Tree Nut and Dried Fruit
7 Congress, which is a huge organization that
8 promotes all tree nuts and dried fruits
9 internationally.

10 I have been the general chairman and
11 served on the board of the South Carolina
12 international trade conference for many years. I
13 have made many pecan presentations to nut groups,
14 such as the Peanut and Tree Nut Processors
15 Association and others.

16 Q In particular, do you have any direct
17 affiliations with the American Pecan Board?

18 A Yes. I was appointed to the American
19 Pecan Board by the National Pecan Shellers
20 Association. It was once the American Pecan
21 Board was founded both the grower and the sheller
22 communities came together and appointed members

1 of that board for the future hope of finding
2 marketing dollars and ways to promote pecans.

3 Q And do you currently serve as the
4 secretary-treasurer of the American Pecan Board?

5 A Yes, sir, I do.

6 Q Do you have in front of you a copy of
7 your curriculum vitae?

8 A A copy of what?

9 Q Your curriculum vitae, your resume?

10 A Yes, uh-huh.

11 MR. DAVIS: Your Honor, we have marked
12 as Exhibit 40 the curriculum vitae of Ms. Helen
13 Watts, and I tender that into the record at this
14 time.

15 (The document referred to
16 was marked for
17 identification as Exhibit
18 40.)

19 JUDGE GUTHRIDGE: Is there any
20 objection from the USDA?

21 MR. HILL: No objection, Your Honor.

22 JUDGE GUTHRIDGE: Any objection from

1 anyone in the audience?

2 (No response.)

3 JUDGE GUTHRIDGE: Hearing no
4 objection, Exhibit 40 is admitted into the
5 record.

6 (The document previously marked as
7 Exhibit 40 was received in evidence.)

8 BY MR. DAVIS:

9 Q Ms. Watts, now I would like to focus
10 on your work on the American Pecan Board. In
11 particular would you give us an overview of the
12 efforts that you have directly participated in in
13 bringing us here today with the proposed Federal
14 Marketing Order.

15 A Sure. Well, our first effort was a
16 trip to Washington, D.C. where we met with
17 members of USDA, who were very gracious to allow
18 us the time to learn about any and all
19 opportunities for different programs that could
20 help promote our products.

21 Q And approximately when would that
22 meeting have taken place? When did these efforts

1 begin?

2 A Time flies when you're having fun.
3 I'd say it's probably been a year and a half to
4 almost two years ago.

5 Q Okay. Sorry to interrupt. And so you
6 attended this meeting, and at this point you were
7 just exploring different options that the
8 industry might follow or follow up on. Is that
9 correct?

10 A Yes, sir.

11 Q What were some of those options, if
12 you recall?

13 A We looked at a checkoff program, and
14 we also looked at the possibility for a Federal
15 Marketing Order. And under the definitions and
16 the guidelines of both of those programs we
17 determined that the Federal Marketing Order would
18 better fit our industry and what we were trying
19 to accomplish than the checkoff program.

20 Q Now, since that initial meeting what
21 are some of the efforts that you and other
22 members of the American Pecan Board have

1 undertaken to gather information and inform
2 yourself what the industry was looking for in a
3 Federal Marketing Order?

4 A We came back, really reviewed the data
5 that we had learned in Washington, and then we
6 began reaching out to the industry, to all grower
7 groups, to accumulators, to handlers, shellers,
8 everyone that would be affected by this potential
9 marketing order. And we sat down with those
10 groups and we -- actually it was more of a
11 listening where we would try to find from them
12 what did they want to see, what were their
13 worries and their concerns.

14 And we took that data from ever one of
15 those meetings, which were many, and then we came
16 back together on numerous board meetings and
17 tried to gather all of this data, look at the
18 concerns in particular, see what we could do to
19 try to ease those concerns and develop a program
20 that would work and take those concerns away.
21 Ultimately all of that led up to our rules
22 writing meeting that we held in January.

1 Q Let me just stop you right there.
2 Again, you know, rough estimate, approximately
3 how many of these listening meetings did you
4 personally attend?

5 A A lot. I would say probably 10 or
6 more.

7 Q And could you give us some idea of
8 kind of the geographic scope of those meetings,
9 kind of where did you travel to?

10 A All growing regions, basically, from,
11 you know, the Las Cruces, New Mexico region,
12 which was the furthestest west that I attended,
13 all the way to Dallas and meetings and all the
14 way back to Georgia.

15 Q And did you find, as a board member
16 did you find those meetings helpful to you to
17 better understand what the industry was looking
18 for in this Federal Marketing Order?

19 A Extremely. You know, I'm a handler,
20 so to be able to listen to other segments of the
21 industry helped me to better realize what the
22 opportunities were for the Federal Marketing

1 Order and great success that I believe we would
2 have.

3 Q And as a handler and serving on this
4 board, were others in the industry reaching out
5 to you to talk to you in private conversations --
6 or personal conversations, obviously not private.

7 A Yes. Yes, handlers throughout the
8 industry, many would call up or we would be at
9 industry functions and we would talk in private.
10 And so, you know, from every size of pecan
11 handler I was reached out to numerous times,
12 asking specific questions on, you know, how does
13 this affect me, here's some of my concerns,
14 here's what we would like to see.

15 So there was a lot of communication
16 from every segment of the handler community,
17 whether it be small handler or a large handler.

18 Q And again in just a ballpark figure,
19 how many of these conversations and small
20 meetings do you feel like you participated in
21 during the previous two years?

22 A Over the last two years, minimally

1 eight to 12. We are -- because we are a handler,
2 we go to a lot of association meetings, so we see
3 a lot of our comrades at this meeting. So it's
4 not even defined to, you know, a shellers
5 meeting; it's a lot of association contact.

6 Q Well, as a member of the board do you
7 feel like that the board gave the industry
8 adequate opportunity to be heard on this FMO and
9 that their concerns were considered and addressed
10 as the board moved forward in developing this
11 program?

12 A Absolutely. We've reached out with
13 great zeal to make sure that we've reached
14 everyone and that we've listened to everyone in
15 the handler community and tried to answer any
16 concerns that they had and answer any questions
17 that they may have.

18 Q By the way, obviously you have water
19 in front of you. We're both going to get a
20 little dry here, I think. Also if anytime you
21 want to take a break and eat any of the delicious
22 pecans here that are in front of you provided by

1 Royalty Pecan Company, please feel free to do so.

2 A Thank you very much.

3 MR. DAVIS: I will strike that as
4 irrelevant also, Your Honor.

5 Q Now let's flash forward to the not-
6 too-distant past here. In January of 2015 you
7 attended a meeting in Washington, D.C. with
8 representatives of the Department of Agriculture
9 concerning the actual drafting of the FMO. Is
10 that correct?

11 A Yes.

12 Q Tell us about that meeting.

13 A It was a three-day summit. All of the
14 members of the American Pecan Board and many
15 members of the USDA came together in Dallas and
16 we began the process of trying to take all of the
17 data that we had learned from these different
18 meetings that we had been to and try to lay them
19 out into the rules segment of the proposed FMO.

20 It was a long process, it was
21 extremely detailed. The USDA was very helpful in
22 helping us manage through the data and trying to

1 get it written properly. And there was a lot of
2 conversation amongst all of the American Pecan
3 Board members. There are growers on that board
4 and shellers on that board. And so we were able
5 to listen to all of the concerns and come up with
6 the best possible solution that all of us thought
7 would help our industry move forward when we were
8 writing those documents.

9 Q Now, tell us next in the process what
10 happened after that summit in Washington, D.C. in
11 January of 2015.

12 A Well, after that Mike Adams, the
13 president of our association, and Melissa
14 Schmaedick came together and finalized the
15 writing of the rules and then reached out to our
16 legal counsel to assist in making sure that we
17 wrote everything properly.

18 At which time that we then reached
19 back out to the various groups within the
20 industry to try to help them see what the rules
21 look like, to hear if there were any other
22 concerns not addressed in the document. And

1 after that then we moved forward with pushing to
2 the next step.

3 Q Now, during this drafting period as a
4 board member were you kept apprised of the
5 various drafts? Did you have an opportunity to
6 review those drafts and have input on them?

7 A Yes.

8 Q And do you feel like you were given an
9 adequate opportunity to have your concerns and
10 the concerns of your fellow shellers addressed as
11 this proposal was being formulated?

12 A Yes.

13 Q Okay. So at some point you eventually
14 came to a resolution. Was there a vote by the
15 board on the language that was going to be put in
16 the proposed order?

17 A Yes.

18 Q And could you tell us what was that
19 vote, if you recall?

20 A It was unanimous.

21 Q Unanimous vote, okay. Do you have in
22 front of you Exhibit 1 in these proceedings?

1 A Yes, sir.

2 Q And this is the official publication
3 of the proposed Federal Marketing Order for
4 pecans. Is that correct?

5 A Yes.

6 Q Okay. Are you familiar with that
7 document?

8 A Yes.

9 Q Is this the document that you as a
10 member of the board and as a concerned sheller
11 reviewed and tweaked, worked on for over I guess
12 almost five months or maybe for a total of two
13 years really if you are talking to people a long
14 time? Is that the document that the board voted
15 unanimously to proposed to the U.S. Department of
16 Agriculture?

17 A Yes, it is.

18 Q Okay. I want to talk with you
19 specifically about some provisions of the Federal
20 Marketing Order as proposed. And so we will be
21 referring to them as section, by section number,
22 Kind of the lead-in section -- I'll probably try

1 to truncate it a bit but if you were going to
2 have the full citation to the proposed Federal
3 Marketing Order, it would be 986.1 through, I
4 believe, .99. You and I are going to focus this
5 morning on Sections .75 through .99 [sic].

6 MR. DAVIS: It's the number after the
7 point, if anyone's wanting to follow along. And
8 for the benefit of the audience, there are copies
9 of the proposed order in the rear of the room,
10 and we're also going to put it up on the
11 overhead, the sections that Ms. Watts and I will
12 be talking about here this morning. As I said,
13 specifically we'll be talking about paragraph .75
14 through .79.

15 Ms. Watts also, and for the benefit of
16 the audience, will tell you we spent some time
17 with Dr. Randy Hudson, another board member, when
18 we were in Las Cruces, and he testified about the
19 definitions. So a lot of the words that we're
20 going to use in your -- in the sections we
21 discuss today the words have already been
22 defined. And for ease, hopefully, unless there's

1 some confusion about one, we probably will not go
2 back and keep redefining those terms. We would
3 not get finished here. But the terms that are in
4 this have been defined already on this record.

5 BY MR. DAVIS:

6 Q Now, also, since we're going to have
7 it on the overhead and you'll have it in front of
8 you, it might not be necessary to reread or read
9 into the record every single one of these, but
10 sometimes if it would help your thought process,
11 feel free to do so. All right?

12 Now, the first little group of
13 sections we're going to talk about are Sections
14 .75 through .78, reports by handlers. And
15 obviously you are a handler so we thought that it
16 would be appropriate for you to talk about the
17 kind of reports that are envisioned by the
18 Federal Marketing Order as it applies to
19 handlers.

20 If you would, just scan -- you have in
21 front of you Exhibit 1, scan Exhibits 1 Section
22 986.75 through .78 and in general, just in

1 general terms -- we're going to talk about
2 specifics in a second but in general what do
3 these sections address?

4 A Well, one of the principal duties of
5 the council will be to gather information and
6 disseminate this information into accurate market
7 data, and it will then to create the market
8 policy each year. These sections specify the
9 reports that the handlers will prepare to give
10 the council the information it needs to create
11 the market reports and marketing policy.

12 Q Okay. Now, during the formulation
13 period were these reports or reports like this
14 discussed with handlers?

15 A Yes, they were. The general need for
16 reporting was discussed with handlers during
17 various association meetings and in general
18 conversation with handlers through meeting
19 gatherings and phone conversations. The American
20 Pecan Board members, which include handlers,
21 discussed reporting during our board meetings and
22 rules writing summit as well.

1 Q Now, were there any concerns expressed
2 that perhaps these reports might be too
3 burdensome on handlers?

4 A No, there really weren't. And the
5 reason is because even today the handlers provide
6 to USDA on a voluntary basis much of this
7 information. We report our inshell and shelled
8 inventories on a monthly basis. Further, once a
9 year we also provide USDA with a recap of our raw
10 material inshell purchases. So the type of
11 reporting that we've been talking about should
12 not be burdensome to the handlers.

13 I would also like to say that the data
14 collection component of the FMO is one of the
15 most important if not the most important aspect
16 of the FMO. We do not today have enough accurate
17 data to make good business decisions. The time
18 to gather the data outlined in this part will
19 provide the industry much greater benefit than
20 the time spent to produce the reports.

21 The council will work with handlers to
22 develop the reporting format and minimize the

1 burden. And hopefully we'll be able to get this
2 information in such a form so that we can provide
3 it electronically.

4 Q Okay. Do you believe that this, that
5 these reporting requirements will duplicate in
6 any way the current FDA reporting requirements or
7 any state reporting requirements that may exist?

8 A No. Actually I think it's far more
9 comprehensive and would be a help to the groups.

10 Q In particular in this section there's
11 a requirement for a three-year record retention.
12 Why this period?

13 A Well, the information that we gather
14 to try to determine the definition of a grower or
15 a handler encompasses volumes handled over
16 multiple years. So it's important to have the
17 three-year retention data so that we have the
18 ability to go back and confirm that information
19 if we needed to to confirm a grower size or a
20 handler size.

21 JUDGE GUTHRIDGE: I'll move for the
22 record that's in 986.82.

1 MR. DAVIS: 82. Thank you, Your
2 Honor.

3 BY MR. DAVIS:

4 Q Now, has the board begun to draft any
5 of those forms?

6 A No. That would be a function of the
7 council once its seated. We would hopefully have
8 input with USDA and look at other forms that are
9 developed in other industries similar to ours to
10 try to help develop those reports.

11 Q Okay, thank you. Thank you. Yes, so
12 put another way, at this time the American Pecan
13 Board really does not have the authority to
14 develop these forms, do they.

15 A That's correct.

16 Q But ideally or once the council has
17 been elected and put in place that will be one of
18 its functions.

19 A Yes.

20 Q And, of course, there will be handler
21 input in that process at that time. Is that
22 correct?

1 A Yes.

2 Q Okay. All right. Now let's walk
3 through these sections individually.

4 MR. DAVIS: Ms. Myers, if you would us
5 here. Let's put up 986.75, Report of Handler
6 Inventory.

7 Q Now, if you would, please, kind of
8 tell us the thought process or the intent of the
9 board in putting forward a general proposal like
10 this.

11 A Well, it's important to gather
12 accurate data so that we can find out what true
13 crop sizes are and have good data to make good
14 business decisions on. This just requires that
15 handlers report their inventory of shelled and
16 inshell pecans. As stated earlier, we're already
17 doing this on a voluntary basis with USDA. And
18 for the FMO to require this data to be provided
19 by all entities will help us to gather more
20 accurate data.

21 It's important that any growers that
22 are not considered handlers also report the same

1 information. Without a full accounting of all of
2 the inshell and shelled pecans at any given time
3 our data will not provide the overall benefit for
4 the entire industry. So we need all of that
5 gathered.

6 Q Anything else you'd like to add about
7 this particular section and the thoughts on the
8 writing?

9 A Again, you know, it's not a burdensome
10 thing, it's just a continuation of what we're
11 currently doing, but it will be a mandatory
12 reporting instead of voluntary reporting. So
13 it's a good thing.

14 Q Okay. All right. Let's move on then
15 to Section .76.

16 MR. DAVIS: Put up .76 next.

17

18 MS. CHILUKURI: Your Honor, my
19 understanding was that we'd have --

20 JUDGE GUTHRIDGE: Oh, I'm sorry.

21 MS. CHILUKURI: -- an opportunity to

22 --

1 JUDGE GUTHRIDGE: I'm sorry, you're
2 exactly right.

3 Put .75 back up.

4 Any questions from the FDA? Not the
5 FDA, USDA. Is anyone from FDA present? Okay,
6 now we'll turn to the Department of Agriculture.
7 Thank you.

8 MS. VARELA: Jen Varela, USDA.

9 CROSS-EXAMINATION

10 BY MS. VARELA:

11 Q Thank you so much for being with us
12 this morning, Ms. Watts. I wanted to clarify a
13 reference you made to reports that handlers are
14 already making to USDA. First of all, do you
15 know where those reports are going to? My guess
16 is most likely you're referring to maybe cold
17 storage reports?

18 A Yes. That's right.

19 Q And those go to the National
20 Agricultural Statistical Service, which we refer
21 to as NASS?

22 A Correct.

1 Q Okay. And how often do those reports
2 get sent in to NASS?

3 A Monthly. The cold storage report is
4 monthly. And then once a year the first of May
5 they send out a questionnaire asking for
6 information. How many marketable pecans did you
7 purchase, how many did you shell, how many did
8 you sell in the shell. And all of that
9 information is gathered to help the USDA put out
10 the final crop report for the prior harvest.

11 Q Thank you. And are you aware -- I
12 know that you're a handler so you might not know
13 this. But are you aware of any efforts from that
14 agency to collect inventory information from
15 growers or are they just doing cold storage that
16 is already in the market?

17 A I can't definitely say.

18 Q Oh, thank you.

19 JUDGE GUTHRIDGE: Somebody give us a
20 nod if you're --

21 MS. VARELA: No more questions.

22 MR. DAVIS: Any more US -- no more

1 USDA questions? All right. I'll do one quick
2 follow-up.

3 DIRECT EXAMINATION

4 BY MR. DAVIS:

5 Q On the current reports, you had some
6 experience in, I guess in looking at those,
7 they're published. Right? Do you have an
8 opinion on how accurate on an industry-wide basis
9 those reports are?

10 A Having spent 35 years in this
11 industry, I can honestly say that I would believe
12 that there is not one entity that looks at those
13 reports, whether it be a grower or a sheller,
14 that comes away with a complete confidence that
15 the data is accurate. There's just too much --
16 it's too voluntary. So, therefore, you just
17 can't take that to the bank that it's completely
18 accurate.

19 MR. DAVIS: No further questions on
20 this section, Your Honor.

21 JUDGE GUTHRIDGE: Anything else from
22 USDA?

1 MR. HILL: No, Your Honor.

2 MS. VARELA: No, thanks.

3 MR. DAVIS: And from time to time I
4 assume you'll ask if anyone from the audience has
5 any --

6 JUDGE GUTHRIDGE: That's true. Does
7 anyone from the audience have any questions about
8 this particular section or Ms. Watts' testimony
9 so far?

10 (No response.)

11 JUDGE GUTHRIDGE: No?

12 MR. DAVIS: Okay. Thank you. All
13 right. Now we'll move on to Section .76. Thank
14 you.

15 BY MR. DAVIS:

16 Q And this is the report of merchantable
17 pecans handled. Do you see that?

18 A (No audible response.)

19 Q Okay. So this is a second type of
20 report that is contemplated by the proposed FMO.
21 Again give us the board's thoughts on why and
22 what were your intentions in proposing this.

1 A Well, the merchantable pecans is
2 defined as those meeting the regulations --

3 Q I see.

4 A -- for quality, size, et cetera. It
5 is in the document 986.26. This is a valuable
6 market information; however, handlers should be
7 involved with the council in the development of
8 any of these reports to ensure that the data
9 collected does not negatively impact the
10 handler's ability to market these pecans
11 profitably.

12 Q All right. Let me address something
13 that has come up in some of the previous
14 testimony. If you will, look with me for a
15 second as the way Section .76 interfaces with
16 Section 26. So under Section .76 there will be a
17 report of merchantable pecans that they're
18 handled. Okay? And then, of course, as I said
19 earlier, merchantable pecans is defined in this
20 under 26 as -- and I'll just highlight inshell,
21 merchantable inshell pecans means all inshell
22 pecans meeting the minimum grade regulations that

1 may be effective pursuant to Section 986.69,
2 authorities, regulating handling.

3 And the question that kind of came up
4 was, well, how would you do a report on
5 merchantable pecans if the council has not yet
6 had an opportunity or just has elected not to do
7 any of these regulations in defining merchantable
8 pecans.

9 And the question was posed, I suppose,
10 was what do you think as a board member, how
11 would you react if someone were to propose that a
12 friendly clarification to Rule 26 was proposed
13 that said -- and I'm just paraphrasing now --
14 that merchantable pecans will be those that meet
15 the minimum grade regulations.

16 But in the event that such regulations
17 have not been proposed, merchantable pecans would
18 mean grower-cleaned production -- the sum of
19 grower grower-cleaned production and handler-
20 cleaned production as those terms are defined
21 there, paragraph 17 and 19. Would you be
22 amenable to such a --

1 A Yes.

2 Q -- clarification?

3 A Yes, absolutely.

4 Q All right. All right. Anything else
5 you'd like to say about this particular report or
6 the value that you believe that it would bring to
7 the industry?

8 A No.

9 MR. DAVIS: Then no further questions
10 on this section, Your Honor.

11 JUDGE GUTHRIDGE: Does the USDA have
12 any questions?

13 MS. SHARROW: No, Your Honor. No
14 questions.

15 JUDGE GUTHRIDGE: Mr. Davis?

16 MR. DAVIS: All right. Thank you.

17 Let's get all those back in order.

18 There you go, all right.

19 Let's move on to Section .78, Other
20 Handler Reports.

21 JUDGE GUTHRIDGE: Are you going to do
22 .77?

1 MR. DAVIS: Thank you, Your Honor.

2 JUDGE GUTHRIDGE: I'm sorry.

3 MR. DAVIS: No, I am going to do .77.

4 Thank you. Section .77, Reports of Pecans
5 Received by Handler. Again it's now on the
6 overhead projector.

7 BY MR. DAVIS:

8 Q Give us some of the board's thoughts
9 on what they intended by a provision like this.

10 A Well, the handlers will report on all
11 pecans that have been received from whatever
12 source, whether it comes from growers, other
13 handlers or anyone else. This is paramount in
14 helping the industry to get an accurate picture
15 of the entire crop, and it's necessary for
16 accurate accounting of the monies paid to the
17 council, the assessments collected.

18 Q Well, as this draft language was
19 circulated and discussed were there any real
20 concerns about this being too burdensome on
21 handlers?

22 A No. We're already doing it. Again

1 that's the May report that we put out basically,
2 and that's really our handle, what we purchased
3 and where we purchased it from.

4 Q Okay.

5 A So it should not be burdensome.

6 Q Well, once again tell us about what
7 was the intention of the board in proposing a
8 section like this?

9 A To help gather accurate data. Data
10 collection again is the most important segment of
11 this proposed Federal Marketing Order. And we
12 need these rules in place in order to be able to
13 gather accurate data so that we can provide good
14 data to the industry so that they can make better
15 business decisions.

16 Q Ms. Watts, on a couple of occasions
17 already you have emphasized the important of
18 accurate gathering. This might be a good spot to
19 step back for a second and why don't you explain
20 to us as a handler why accurate market data is so
21 important. And in that regard, just maybe
22 explain the chain of commerce in the handler

1 process, if you will.

2 A Okay. Data for the entire industry,
3 grower or handler, is very important. Because
4 you do not know how to market your crop until you
5 know how large the drop is. But for our industry
6 it's very unique. The handler is paying for
7 every load of inshell that they purchase at the
8 time they purchase it. And so all of the risk
9 for selling that material --

10 Q So I mean when you say pay for it,
11 that's like cash transactions.

12 A That's right.

13 Q If you're buying product you give the
14 grower cash at that time for the product.

15 A That's right. You wire the funds.

16 Q In a typical --

17 A Yes.

18 Q So somehow the handler either has to
19 borrow it on a line of credit or have cash
20 reserves, but pays out cash, gets the product,
21 there's a change of ownership. You now own the
22 product. What happens next?

1 A And just as one other bit of
2 information with regard to that. Pecans grow
3 across 15 U.S. states. Almonds and walnuts grow
4 in California, so your harvest is generally in
5 the same time period. For pecans the harvest
6 period is three or more months.

7 So as you are harvesting your pecans
8 and you're selling them, as a handler we're
9 buying them. So we think we know what the crop
10 size is because of the data we've received.
11 We're paying a price based on what we think the
12 supply is. And if that number on the crop size
13 is wrong, we've already committed and purchased
14 those pecans, it's our responsibility as a
15 handler to be able to market 100 percent of those
16 pecans back into commerce.

17 So we think we know what we're doing
18 but it's going to take us three months to gather
19 our entire supply. We don't know what our
20 average raw material price is going to be until
21 we've gathered the majority of what we plan to
22 handle. And so the industry is at risk during

1 that buy-sell period if you are unable to sell
2 100 percent of the output of what you bought that
3 day the next day.

4 So the pecan industry, the shelling
5 industry borrows money to buy that crop every
6 year. And if there is a mistake, if the crop is
7 bigger than the estimates predicted and there's
8 too much supply and the tail end of the harvest
9 comes in and there's either not enough money to
10 buy it because we've overspent the money in the
11 early part of the buy or if the market falls
12 because there's no home for it, then the
13 sheller's at risk for every pound that they've
14 bought and paid for through the course of that
15 time. So it's a very volatile industry.

16 So accurate data is paramount to the
17 sheller's ability to determine what level they
18 should be buying at, and how to turn around and
19 market that product back into commerce.

20 Q Let's see if we can kind of walk
21 through a hypothetical that will have both a
22 geographic span and a chronological span. So you

1 said that, you know, pecans obviously we know
2 from previous testimony grow in 15 states,
3 stretching all the way from North Carolina
4 through the southeast, the midwest, as high as
5 Oklahoma, down to the Rio Grande Valley and
6 Texas, Arizona, New Mexico, on even into southern
7 California.

8 And you say the harvest kind of rolls
9 across that. Is that correct? Or kind of tell
10 us chronologically how the harvest rolls.

11 A Generally the southeast is the first
12 area of the country that's going to harvest any
13 volume.

14 Q And that would be in and around early
15 October?

16 A Mid to late October usually.

17 Q Mid to late October, okay.

18 A Some growers may start shaking trees
19 a week or so early but generally it's the third
20 week of October or fourth week of October before
21 you get any really volume of inshell offerings.

22 Q Okay. And then the harvest, where

1 would it roll chronologically and geographically?

2 A The central part of the U.S. is
3 comprised not only of orchard improved varieties
4 but also of wild native seedling-type pecans, and
5 to a large extent some of those are harvested by
6 hand. So you're waiting for nature really to
7 take them off the trees and put them on the
8 ground where you can pick them up and bring them
9 to market. Generally --

10 Q And those are primarily native, I
11 assume. Is that correct?

12 A Yes. Uh-huh.

13 Q Okay.

14 A So generally the central part of the
15 U.S., eastern Texas, Louisiana, Oklahoma,
16 Arkansas, those regions will be in full swing
17 production in our eyes about the middle of
18 November --

19 Q All right.

20 A -- before you get any volume of
21 offerings coming to you. And then the western
22 U.S., the Las Cruces Valley, the lower valley and

1 El Paso, those nuts really don't even begin to
2 harvest until after the first of December.

3 Q All right. Okay. Now let's follow up
4 on that hypothetical. So the nuts are being
5 harvested in the southeast and you're a handler,
6 you're a sheller, you're wanting to buy those
7 nuts as they become available on the marketplace.
8 Correct?

9 A Correct.

10 Q And at that time in order to set a
11 price for those you've got to make -- you've got
12 to have a estimate of some type about what the
13 overall size of the harvest is going to be as it
14 rolls on October, November, December, maybe even
15 into early January.

16 A Correct.

17 Q Is that correct?

18 A Yes.

19 Q So you set a price, and it's a cash
20 price for the buyer in the southeast. You now
21 own the nuts and are ready to start putting them
22 into commerce. And then the harvest continues to

1 roll on. Now, when you make that initial
2 purchase in the southeast you had to make a
3 estimate, have you not, not just of the southeast
4 crop but the entire United States crop.

5 A That's correct.

6 Q That's correct. Now, do you feel that
7 in recent past years or in your experience that
8 you have enough accurate market information when
9 you start this rolling process?

10 A No.

11 Q And it would be your goal as a member
12 of the -- I guess as a member of this industry
13 that if the FMO is passed you could begin this
14 pricing process with more accurate, both you and
15 the seller would have more accurate information
16 in gathering your information. Right?

17 A Absolutely. And it would also give us
18 the opportunity to work with the consuming
19 community, whether it's a food manufacturer or a
20 retailer, in trying to help them understand what
21 the likely prices will be. So that there's no
22 surprise on their end whenever they get offerings

1 to contract pecans for their needs for the next
2 year.

3 Q Well, in that, since you've touched on
4 that, forward contracting is very common in
5 almost all commodities. Have -- well, first of
6 all, is it common in the pecan industry? And
7 does the lack of more accurate market data have
8 any influence in that?

9 A Yes. In fact, because most of the
10 shelling community has to borrow money from banks
11 in order to acquire their raw material each year,
12 often those banks want some kind of security to
13 know that the output of their handle has been
14 sold profitably. In order to do that you have to
15 show them contracts with the customers that you
16 do business with to show the sales price that you
17 were to sell at, which gives the banks the
18 confidence level and continuing to allow you to
19 borrow money from them.

20 So forward contracts are very
21 important. The shelling industry needs those
22 contracts because their exposure is paramount

1 already. They've already paid for the product.
2 If they can't sell it at a certain price, they
3 can go bankrupt in a year.

4 So the forward contracting is
5 paramount to the success of the sheller to be
6 able to continue to buy raw material and sell it
7 into the marketplace. They have to have the
8 security that they've been able to sell that
9 material. So forward contracting is the way that
10 the industry markets their pecans.

11 Q So once again would more market, more
12 accurate market data assist everyone in this
13 chain of commerce? We've already discussed from
14 the seller of the nuts to the sheller. How about
15 from the sheller to the food processors or the
16 people that are going to be buying on large
17 contracts, will more accurate data help that
18 process?

19 A Absolutely.

20 MR. DAVIS: I believe that those are
21 my questions on Section .77, Your Honor.

22 JUDGE GUTHRIDGE: Are there any USDA

1 questions?

2 MS. SCHMAEDICK: Melissa Schmaedick,
3 USDA.

4 CROSS-EXAMINATION

5 BY MS. SCHMAEDICK:

6 Q Good morning, Ms. Watts.

7 A Good morning.

8 Q Thank you for your testimony. You
9 just gave us some testimony on forward
10 contracting. And I'm wondering if the lack of
11 accurate information has also had an impact on
12 your ability to secure contracts with food
13 manufacturers in terms of not just pricing but
14 knowing if a consistent supply is going to be
15 available to meet their needs. Has that lack of
16 information impacted you at all?

17 A Yes, and it can be on both sides. For
18 instance, if there is a short crop estimate, for
19 instance --

20 JUDGE GUTHRIDGE: What do you mean by
21 short crop?

22 THE WITNESS: A small crop, a small

1 crop. Your customers may want to book very
2 heavy. Because they're scared that they may get
3 to the end of the contract period and not be able
4 to buy additional pecans if it's needed.

5 JUDGE GUTHRIDGE: Could I ask you what
6 does book very heavy mean?

7 THE WITNESS: More than their normal
8 handle, more than they believe that they would
9 use for the contract period.

10 JUDGE GUTHRIDGE: And the reason I'm
11 asking these is I know less about pecans than
12 anyone in the room. And so if I understand it,
13 some other person who is not so familiar with
14 pecans may need that sort of definition.

15 THE WITNESS: Yes.

16 JUDGE GUTHRIDGE: Okay? To understand
17 what you're saying.

18 THE WITNESS: Yes. On the flip side
19 of that, if the crop is estimated to be very
20 large, then a customer may say, well, there looks
21 to me like there's more than ample supply out
22 there, so I don't think I'm going to forward

1 book, I think I'm going to stay on the spot
2 market, which means that when I need something
3 I'll call you and if you've got it I'll buy it
4 from you at that time.

5 Whenever that happens, it can hurt the
6 sheller who has acquired the raw material at a
7 certain level. And if they are not able to
8 contract all of that tonnage at a profitable
9 level, then it leaves them exposed to possible
10 losses during the course of the year. So
11 inaccurate data can cause issues on both sides.

12 BY MS. SCHMAEDICK:

13 Q Thank you. One quick question to
14 clarify what might be included in reports of
15 pecans received by handlers, definition 986.77.
16 Would that also include product that you've
17 received from outside the production area? So
18 imports for example, would that be included in
19 that report?

20 A If the council so develops it that
21 way, yes. And I think it would be very, very
22 meaningful information to have.

1 Q Okay. Thank you.

2 MS. SCHMAEDICK: No further questions.

3 JUDGE GUTHRIDGE: Are there any more
4 USDA questions?

5 MS. VARELA: Yes. Jen Varela, USDA.

6 BY MS. VARELA:

7 Q I would just like to go back to a few
8 things that you just testified to to make sure
9 that I'm understanding everything. You mentioned
10 in a couple different ways the specific geography
11 of this industry and that as a sheller you're
12 buying from multiple places and multiple regions.
13 We heard some testimony earlier this week about
14 how the board defined those regions when you
15 proposed this order.

16 Does -- in your opinion, is having one
17 national program as a marketing order the only
18 effective way to put any of these regulations in
19 place, or would it be possible that smaller
20 orders would work?

21 A I think you need the one order. It
22 needs to be countrywide. Because with fragmented

1 orders I just do not believe you would have the
2 same success in promoting the pecans and data
3 collection or in R&D projects. I think it would
4 be too disjointed. I believe one order would be
5 a better solution.

6 Q Thank you. And in going back to some
7 of the forward contracting concepts, do you see
8 that practice occurring more often in any
9 particular region, or is that pretty much uniform
10 across the industry?

11 A It's uniform across the industry.

12 Q And would you say that both large and
13 small growers and handlers participate in that
14 process?

15 A Yes.

16 Q Okay. And then I just wanted to go
17 back to this definition in particular. When you
18 were describing some of those reports, you
19 mentioned that handlers might receive product
20 from other handlers. And earlier we entered the
21 definition of an inter-handler transfer into the
22 record. Can you tell us a little bit about why

1 the board thought that that was an important
2 concept to include in the order?

3 A There are regions of the country --
4 again 15 to 20 percent of all pecans that grow
5 grow in what we call a casual production
6 environment. Those are not in managed orchards.
7 They are in your back yard, my back yard, they
8 may be in river deltas. They are, to a large
9 extent, picked up by hand and brought to market.

10 And the way that you buy those pecans
11 is by setting up buying stations in a lot of the
12 rural communities across the country. And those
13 guys are just small guys, you know, mom and pop
14 guys that set up at a farm feed store. And as
15 these people pick these pecans up off the ground
16 and bring them to market they get paid for them.

17 Well, this small accumulator isn't
18 necessarily going to do anything with those
19 pecans other than gather them and then turn
20 around and sell them to a larger handler or
21 sheller. So we put the inter-handler transfer
22 definition in place for those guys who can

1 collect the pecans but they really are not
2 sophisticated enough to be able to create the
3 documentation they need to make sure that the
4 assessment is handled right and all of that.

5 So they can choose to follow the
6 handler definition or they can be an inter-
7 handler transfer, which means that they will hand
8 it off to another handler who will then be
9 responsible for the assessment.

10 Q Thank you very much.

11 MS. VARELA: That's all of my
12 questions.

13 MS. SCHMAEDICK: Melissa Schmaedick,
14 USDA.

15 BY MS. SCHMAEDICK:

16 Q Ms. Watts, to further clarify, you
17 mentioned an inter-handler transfer. Is it
18 required that the receiving handler pay the
19 assessments, or is there an option for that
20 assessment to be paid by the first handler?

21 A There's an option. Either the first
22 handler can pay it or they can pass it off so

1 that the next handler pays it, and there will be
2 documentation that would prove which entity was
3 responsible for paying it at the time of
4 transfer.

5 Q Thank you. And if, for example, there
6 were handling regulations in effect, would it be
7 possible for the first handler to pay the
8 assessment but the second handler to be required
9 to meet those regulations that are in effect?
10 Would that be possible?

11 For example, if there were let's say
12 a certain size regulation in effect, so you have
13 handler number one who received --

14 JUDGE GUTHRIDGE: When you say size,
15 you mean size of load or --

16 MS. SCHMAEDICK: Size of pecan, let's
17 just say, okay.

18 BY MS. SCHMAEDICK:

19 Q For example, if there's a pecan size
20 regulation in effect, if handler number one
21 receives pecans and they say, okay, well, I'm
22 going to pay the assessment for that but I don't

1 have the ability to process this load so that it
2 meets the size requirement, so I'm going to sell
3 these pecans to handler number two, and there's
4 an inter-handler transfer that occurs.

5 Is it possible then for handler number
6 two to say, okay, I will be responsible for
7 meeting that size requirement?

8 A I would say yes. Because as handler
9 number two if you make an agreement to purchase
10 the load from handler number one, then you have
11 already looked at the load, you've already tested
12 the load, you know what you're buying. So with
13 that in place, then handler number two knows what
14 he's getting and, therefore, would have to comply
15 with the regulation, the size regulation.

16 Q Thank you. And you mentioned that
17 there would be documentation in place to
18 basically track both the assessment of that load
19 as well as the compliance to the size regulation
20 of that load?

21 A Yes.

22 Q Is that correct?

1 A Uh-huh.

2 Q And so that information would be
3 shared with the council. Is that correct?

4 A Yes. Uh-huh.

5 Q And would that documentation then
6 facilitate compliance, the council's compliance
7 with you of handlers to the order?

8 A Yes.

9 Q Thank you. I do have one question
10 that kind of draws from two sections, the current
11 section 986.77 and a previous section 986.75.
12 986.75 is Reports of Handler Inventory, and
13 986.77 is Reports of Pecans Received by Handlers.
14 And what I'm wondering is where does warehoused
15 pecans fall? Do they -- are warehoused pecans
16 captured in handler inventory or received by
17 handlers or both?

18 A Both. With the sheller reported
19 inventories -- I see that as something that would
20 be reported more often than the handle, I mean
21 how many total pecans did I handle out of this
22 crop. That's data that would be important to try

1 to gain the actual crop size.

2 The inventories would be something
3 that is looked at like it is now, on a monthly
4 basis, that lets you know what your supply is in
5 the industry. Right now it is a voluntary
6 program, and shellers, for instance, report every
7 month, public cold storages are supposed to
8 report every month, and but individual private
9 cold storages that may be held by growers are
10 not. I am not -- it's a voluntary program so are
11 they being reported or not.

12 By creating a mandatory report, then
13 the warehouse stock would also be reported at
14 whatever, you know, increment that the council
15 sets up, whether it's monthly or something less
16 than that.

17 Q Thank you. And does Young Pecan
18 warehouse, I mean, yeah, does your company
19 warehouse pecans?

20 A On our property, we have cold storage
21 on our property.

22 Q Okay. I have some further questions

1 about warehousing specifically. Could I ask you
2 those questions?

3 A Sure.

4 Q Thank you. So, first of all, can you
5 explain to me when you warehouse pecans what do
6 you mean by warehousing pecans?

7 A Pecans are harvested, again, basically
8 through a three to four month period of time.
9 Pecans are semi-perishable. In order to maintain
10 the quality and the freshness of the product the
11 raw material, the inshell needs to be stored
12 really, really frozen to maximize that shelf
13 life.

14 So when we talk warehousing for our
15 industry we're talking about cold storage. We
16 bring the nuts in. Every load that backs up to
17 our door, if they're not going to the plant for
18 immediate shelling, then they're placed into zero
19 degree freezer storage. So that's what we call
20 warehousing.

21 In general, that's how the industry
22 handles its raw material. You may find in the

1 heart of the harvest period nuts that are
2 harvested and cleaned that are not yet on the
3 market for sale. And they will be warehoused
4 somewhere, whether it's in a grower location or
5 in a public cold storage. But other than that
6 once the harvest is over everything's under cold
7 storage for sure, and whether it's your own
8 personal cold storage or a publicly held cold
9 storage.

10 Q Thank you. And under the proposed
11 marketing order, would it be possible that an
12 individual, either -- well, would it be possible
13 for a handler to be warehousing both assessed and
14 unassessed pecans?

15 A Yes, it would be possible. Yes.

16 Q Okay. So you mentioned that you were
17 also part of the American Pecan Board. Correct?

18 A (No audible response.)

19 Q So were you involved in the board's
20 discussions about the concept of warehousing,
21 reporting, and what has been referred to in
22 previous testimony as the August 31st date

1 report?

2 A Yes.

3 Q Are you familiar with that concept?

4 A Yes.

5 Q And you were involved in those
6 discussions?

7 A Yes.

8 Q Okay. So I'd like for you to kind of
9 walk through this scenario that I've been trying
10 to clarify in my own mind, and maybe you can help
11 me. So if you're a handler and you purchase
12 pecans and you decide that those pecans need to
13 be put into cold storage, so you're warehousing
14 those pecans, what I'm trying to understand is
15 currently under definition 986.41 -- and I'll
16 read it for you.

17 A Okay.

18 Q It's the definition of warehousing.
19 And it says "warehousing means to hold unassessed
20 inventory." And then if I look at that
21 definition in conjunction with the August 31st
22 reporting requirement under assessments, which is

1 986.61, 986.61 paragraph 8 requires that "every
2 handler warehousing inshell pecans" and then it
3 goes on further to say they shall be required to
4 pay the assessment rate on that date.

5 But if a handler could theoretically
6 be holding or warehousing pecans that are
7 assessed, I'm wondering does that definition of
8 warehousing need to be modified.

9 A The definition of warehousing for --
10 that you read is -- came out of the, more of the
11 growing community. Because let's say that I grow
12 pecans and I handle pecans. Okay? So I am not
13 only growing my own raw material but I'm going to
14 shell that raw material and sell it into
15 commerce.

16 So I may, as a grower, have this
17 volume of pecans, and I don't want to sell it all
18 right now. I want to hold some of it for the
19 future. So, therefore, I am not a first handler
20 in this instance, I am a grower in this instance.
21 So I'm going to warehouse those nuts in cold
22 storage, and I'm going to market them in the

1 future.

2 Those would be unassessed warehoused pecans.

3 The balance of my production, my
4 harvest I am going to market into commerce, I'm
5 going to shell them and sell them into commerce.
6 I at that point become the first handler of those
7 nuts, and I am required to make the assessment
8 for those nuts.

9 So the definition of warehousing may
10 need to be clarified so that it's understandable
11 how one handler, quote unquote, a handler could
12 have unassessed and assessed inventory in their
13 facility or in their cold storage.

14 Q Thank you.

15 A Likewise, you know, if you are a
16 grower and you have your own cold storage or you
17 choose not to market your pecans during the time
18 of harvest or anytime during that crop year, you
19 can store your pecans unassessed. But when you
20 finally do make that sale or move them to a
21 handler then that assessment occurs.

22 Q Thank you for that explanation. So

1 would it be correct to say that the intent of the
2 board in drafting both the definition of
3 warehousing and the sections that are related to
4 warehousing, the intent is to, on August 31st is
5 to report everything that's in cold storage. And
6 if you're a handler that is holding cold storage
7 that has not been assessed, that you pay that
8 assessment at that time?

9 A Yes.

10 Q Okay. And so, again to clarify, you
11 would be comfortable with clarifying changes to
12 make sure that that intent is clear. Is that
13 correct?

14 A Yes.

15 Q Okay. Thank you.

16 MS. SCHMAEDICK: I have no further
17 questions on the sections relating to reports.
18 Thank you.

19 JUDGE GUTHRIDGE: Are there any other
20 USDA questions?

21 (No response.)

22 JUDGE GUTHRIDGE: No? Okay.

1 MR. DAVIS: Let me do one follow-up,
2 and I with great trepidation wade into this briar
3 patch here.

4 DIRECT EXAMINATION

5 BY MR. DAVIS:

6 Q But in your drafting sessions, both
7 with the USDA and as a board, was it not made
8 very clear that there cannot be a direct
9 assessment against a grower. Correct?

10 A That is correct.

11 Q That's kind of a starting, a threshold
12 rule. So when you're addressing this issue of a
13 grower holding product in inventory with that
14 rule in mind it's kind of difficult to say that
15 the grower is going to be assessed.

16 So didn't the board consider that and
17 came up with a tweak that said that for grower
18 inventory, if it's held on August 31st, the
19 consequence of that is it loses that inter-
20 handler transfer exemption so that the very first
21 person that gets it after that will -- it will
22 have been reported, but the very first person

1 that handles it, then that person will be
2 assessed.

3 A That's correct.

4 Q Isn't that correct?

5 A Uh-huh.

6 Q Okay. Now, contrast, compare and
7 contrast that to a handler. If a handler has
8 inventory on August 31st, he or she will be
9 assessed the assessment. Is that correct?

10 A That is correct.

11 Q That's your understanding of how those
12 fit together.

13 A (No audible response.)

14 MR. DAVIS: The witness says yes. I
15 don't know -- any follow-up for that, Ms.
16 Schmaedick?

17 MS. SCHMAEDICK: Thank you for that
18 clarification.

19 MR. DAVIS: Okay. All right. And
20 this last section on handler reports, which again
21 is kind in your wheelhouse and we've taken a good
22 deal of time talking about these others, is the

1 last one, Section .78.

2 Ms. Myers, if you'd put that up for
3 us?

4 MS. SCHMAEDICK: Excuse me. I just
5 have one further question that came to mind.
6 Melissa Schmaedick, USDA.

7 CROSS-EXAMINATION

8 BY MS. SCHMAEDICK:

9 Q Ms. Watts, the term warehousing is
10 also included in the definition of handle, to
11 handle. Let me refer you to that section. It's
12 986.19. But in that definition of to handle
13 there is also a proviso that says "the term to
14 handle shall not include" and then one of the
15 activities is grower warehousing.

16 So based on your work with the
17 American Pecan Board, I want to just again
18 clarify for the record is it your intent that
19 growers who are warehousing their own product,
20 they are not considered handlers in that
21 situation. Is that correct?

22 A That's correct.

1 Q Thank you.

2 MR. DAVIS: Okay, let's take that down
3 and put up Section .78.

4 DIRECT EXAMINATION

5 BY MR. DAVIS:

6 Q Ms. Watts, why don't you tell us what
7 the board was intending by proposing Section .78.

8 A Well, this was, for lack of a better
9 word, a catch-all. It gives the council the
10 flexibility to ask for other information to help
11 it perform its duties. However, handlers must be
12 a part of the development and agree to the
13 suggested reporting as to ensure such requested
14 information does not negatively impact handler's
15 ability to market pecans in a responsible and
16 profitable manner.

17 Q Was there any concern, either from the
18 handler community or raised at the board, that
19 this may be just too open-ended?

20 A No. Again you've got growers and
21 shellers on the council. As long as the shellers
22 are part of the process, we do not feel that this

1 would be too open-ended. It's limited to the
2 information to help the council perform its
3 duties. And the handlers on the council will
4 have to participate in the creation of the
5 documents and the development of those. So as
6 long as they are part of that process, we feel
7 comfortable that that information, as long as
8 it's kept confidential, would be -- would benefit
9 the industry.

10 Q Okay. And when you say confidential,
11 the individual -- information from an individual
12 would be kept confidential but of course
13 collectively, again with permission of the
14 council, could be disseminated. Correct?

15 A Correct.

16 Q Okay.

17 MR. DAVIS: I have no further
18 questions on that section.

19 JUDGE GUTHRIDGE: Does USDA have any
20 questions?

21 MS. VARELA: Jen Varela, USDA.

22 CROSS-EXAMINATION

1 BY MS. VARELA:

2 Q This will be kind of a quick one, just
3 to wrap up this whole reporting section. You've
4 mentioned very clearly that the board understands
5 that there would be a process to creating these
6 reports, and everybody would have input. Do you
7 think the board and the industry members that
8 you've spoken to also have a fairly clear
9 understanding that even when the council makes a
10 recommendation all of these types of reports will
11 still have to go through a government-approval
12 process that will give them notice and comment,
13 to have other people in the industry look at them
14 as well, not just members of the council?

15 A Yes. And that's a very important
16 aspect of the success of the document.

17 Q Great. Thank you.

18 MR. DAVIS: All right. Thank you.

19 JUDGE GUTHRIDGE: Any other USDA
20 questions?

21 MR. HILL: No, Your Honor.

22 MR. DAVIS: Thank you. Your Honor,

1 we'll move on then to Section .79, Verification
2 of Reports.

3 DIRECT EXAMINATION

4 BY MR. DAVIS:

5 Q Just take a second to familiarize
6 yourself with that. Again what was the intent of
7 the board in providing -- it looks to me that
8 they will have the ability to enter up on the
9 premises of various entities and verify the
10 accuracy of reports that they've gotten.

11 A Well, the industry needs accurate
12 information. This section authorizes the council
13 to have access during business hours to locations
14 where pecans and pecan records are kept for the
15 purpose of verifying and checking reports from
16 handlers. It also requires handlers to keep
17 accurate records and make them available for
18 inspection.

19 Most handlers maximize their cold
20 storage freezers so that literally they are
21 stacking them one pallet on the next pallet to
22 the next pallet to the ceiling in order to

1 utilize all of the cold storage space possible.

2 So trying to -- the group, let's say
3 the council comes in and it wants to look at one
4 identified load. That may be difficult in the
5 first half of the year whenever they're stacked
6 to the moon, as I like to call it. And other
7 shellers handle their inshell storage in
8 different ways, like in silos, which would make
9 it impossible to, you know, pull out one specific
10 load.

11 However, having the ability to go on
12 site and talk with the handler, to be able to
13 view its documentation is paramount in verifying
14 the accuracy of the data, which again is
15 paramount to the success of our industry.

16 Q Okay. Any concerns voiced that this
17 may be just too intrusive?

18 A No. The expectation would be that the
19 handler has to report his handle. So obviously
20 with assistance from USDA if there is some
21 question on that handle, then the handler
22 certainly understands that he would need to

1 verify that information, so.

2 MR. DAVIS: Your Honor, I have no
3 further questions on that section.

4 JUDGE GUTHRIDGE: Are there any
5 questions from USDA?

6 MS. VARELA: Jen Varela, USDA.

7 CROSS-EXAMINATION

8 BY MS. VARELA:

9 Q I'm going to try to walk through a few
10 different parts of this process with you, if
11 that's okay, Ms. Watts.

12 A Sure.

13 Q When the board sat down to discuss
14 this language and to write their rules did you
15 look at any other orders to pull out language to
16 try to craft your order?

17 A Yes, we did.

18 Q And is this, to your knowledge is this
19 one section that you really looked closely at
20 some other orders to pull similar language to
21 make sure that it was consistent with what some
22 other industries have done?

1 A Yes.

2 Q Okay. Moving more from the
3 theoretical sense to the practical sense, when
4 you mentioned the council coming in to verify
5 something give me your understanding who would be
6 doing that type of verification. Who are you
7 referring to when you say the council?

8 A It is my understanding that we would
9 set a third-party administrative group in place
10 once the FMO passes and the council is seated.
11 That administrative body would be independent
12 and would not have any direct relationship with
13 any one particular grower or handler. That
14 third-party entity administrative group then
15 would be the body that would verify documentation
16 and any other process that needs to be done with
17 growers and handlers.

18 Q Okay. And to your knowledge is this
19 consistent with the way that most marketing
20 orders are locally administered?

21 A Yes.

22 Q Okay. Thank you. And get to the next

1 slide. Okay. And in your discussions with USDA
2 and maybe with members of other marketing orders
3 have they described what a typical compliance
4 review process is like? Are you familiar with
5 that terminology or that concept?

6 A I am. I have talked with other
7 industries and how they go through a verification
8 process. Ours is not put in place. You know, it
9 would be decided once the council is set, I would
10 assume. But I understand generally how it should
11 work.

12 Q Fantastic. Thank you. So do you
13 envision that the council will -- let me
14 backtrack a little bit. Have you heard anybody
15 mention something called a compliance plan? We
16 had some testimony from Mr. Keck a couple days
17 ago referring to the date committee carrying out
18 a compliance plan. Is that familiar to you?

19 A No, it's not.

20 Q Okay. So let me try to see if some of
21 the other pieces of that were brought up. In
22 discussions with the Department was there some

1 type of discussion about needing to have a
2 regular review of handler information and of
3 council information?

4 A In our planning sessions?

5 Q Yes.

6 A Yes.

7 Q So is this section intended to set up
8 the process by which the council will regularly
9 review the reports that are coming in and its
10 internal processes to make sure that everything
11 is being carried out on the up and up?

12 A Yes.

13 Q Okay. Thank you very much.

14 JUDGE GUTHRIDGE: No?

15 MS. VARELA: No further questions.

16 JUDGE GUTHRIDGE: No further USDA
17 questions?

18 (No response.)

19 JUDGE GUTHRIDGE: Mr. Davis?

20 MR. DAVIS: I'll just do one quick
21 follow-up to Ms. Varela's comment.

22 DIRECT EXAMINATION

1 BY MR. DAVIS:

2 Q Was the use of this third-party
3 verification group, did that address any of the
4 concerns that some handlers and perhaps even
5 growers would have about their business being
6 intruded upon by one of their competitors or
7 whatever? Does this third party setup kind of
8 address those concerns also?

9 A It does. With certain confidentiality
10 that has to be maintained once the administrative
11 body is put in place, it is critical for the
12 confidentiality as any one particular company,
13 whether they're a grower or a handler's
14 information gets published could be detrimental
15 to the company. So it's imperative that that
16 stay confidential.

17 Q We'll touch on that specific thing in
18 just a second.

19 MR. DAVIS: I have no further
20 questions on Section .79 then, Your Honor.

21 JUDGE GUTHRIDGE: USDA?

22 MS. SCHMAEDICK: Your Honor, Melissa

1 Schmaedick, USDA.

2 CROSS-EXAMINATION

3 BY MS. SCHMAEDICK:

4 Q Ms. Watts, when you refer to third
5 party, are you referring to the staff that would
6 be hired by the council?

7 A Yes.

8 Q Thank you.

9 MS. SCHMAEDICK: No further questions.

10 MR. DAVIS: Thank you, Your Honor.

11 Let's move on then to Section 80.

12 Please, Ms. Myers, would you put that
13 up?

14 DIRECT EXAMINATION

15 BY MR. DAVIS:

16 Q Certification of Reports. And what
17 does this requirement address?

18 A Well, what this is saying is that when
19 handlers report the data they are attesting to
20 the accuracy and the completeness of that data.
21 So again, you know, having that certification is
22 there to help ensure that the industry does

1 acquire accurate data.

2 Q Are provisions like this found in
3 other FMOs, similar language?

4 A Yes.

5 Q Okay.

6 MR. DAVIS: No further questions,
7 Your Honor.

8 JUDGE GUTHRIDGE: Does USDA have any
9 questions?

10 MS. SCHMAEDICK: No questions.

11 MR. HILL: No, Your Honor.

12 JUDGE GUTHRIDGE: Mr. Davis?

13 BY MR. DAVIS:

14 Q Now let's go to Section 81. And as
15 promised, you've heard just a second ago to
16 confidential information. Take a look at this
17 section, if you would, please. Now, in the
18 listening tour and in talking with growers were
19 concerns raised about the confidentiality of
20 individual grower and handler data?

21 A Yes. In meetings that we had held
22 with growers, handlers over the course of two

1 years we heard oftentimes concerns that were
2 raised about the information of individual
3 growers and handlers and would that information
4 be held confidentially and would not be
5 disclosed.

6 This section actually addresses that
7 concern and puts the burden on the council to
8 protect the individual grower and handler
9 information. Such information will be treated as
10 confidential and will not be disclosed to anyone
11 other than council staff and the Secretary.

12 It is important to note that while the
13 council will be made up of nine growers, six
14 shellers, and two at-large seats, no grower or
15 sheller would desire to have his specific
16 information shared with any members of the
17 council. The information suggested in the
18 reporting is confidential and no one grower or
19 sheller's information should be provided to other
20 growers or shellers or at-large members on the
21 council.

22 It is my understanding that the

1 council would put a third-party administrative
2 group or staff in place who would manage the FMO.
3 It would be important that the administrative
4 group, which would be independent, would be made
5 up of independent persons not associated with any
6 pecan grower or shellers, be the only part of the
7 council privileged to the individual grower and
8 sheller data provided, and they would only share
9 that individual information with the Secretary if
10 he requested it.

11 Q In your opinion as a business person,
12 a handler and a sheller, is the confidentiality
13 of this individual data important?

14 A It's highly important. Again it could
15 be hugely detrimental to any one particular
16 company should their individual data be exposed.

17 Q And does the assurance of
18 confidentiality affect in any way the accuracy of
19 the data that you hope to get and bring together?

20 A Absolutely. Absolutely. The people
21 providing the data are mandated to give accurate
22 data. But there would be pause, just human

1 nature pause to provide information if you
2 weren't confident that your information would be
3 held close to the vest --

4 Q Thank you.

5 A -- and not exposed.

6 Q Thank you. In your experience, kind
7 of what kind of information should be considered
8 confidential?

9 A Well, pretty much anything to do with
10 the buy, the sell, your operating cost.

11 Virtually all information regarding, you know,
12 the raw material acquisition all the way through
13 the processing and ultimate sell of the product.

14 Pecans, unlike most other tree nuts
15 grown in the United States, are again purchased
16 for cash from the grower at the time of receipt
17 of each load. Further, the sheller may not be
18 able to make 100 percent of the sales of the
19 output of that load at the time of receipt. So
20 the sheller takes a huge risk and burden of
21 acquiring the inshell, paying for it, and then
22 having to make sure that they can market the

1 entire output of the shellout, which is comprised
2 of seven sizes of pecan halves and 21 grades and
3 sizes of pecan pieces.

4 If certain data were available
5 publicly during that time it could jeopardize the
6 sheller's ability to market their supply
7 profitably. This is another example of why
8 accurate data collection is so important to the
9 success of our industry and is a huge component
10 of the proposed FMO.

11 Q Thank you so much for that information
12 and the importance of it. You did just touch on
13 something though that I don't think has come into
14 this record yet. You said that there are seven
15 sizes, you purchase seven sizes of pecan halves
16 and 21 grades and sizes of pecan pieces. Could
17 you elaborate on that a little bit, please?

18 A Well, basically, you know, the pecans
19 grow on a tree. They come into the processing
20 plant or to a pecan sheller in the shell. Now,
21 what's in that shell? It's one of seven sizes of
22 halves and can be one of 21 different grades and

1 sizes of pecan pieces.

2 So as you shell all of these inshell
3 nuts you're producing seven sizes of pecan halves
4 and 21 different grades and sizes of pecan
5 pieces. So when you buy a truckload of nuts
6 you've got to market seven sizes of pecan halves
7 and 21 grades and sizes of pecan pieces back into
8 commerce.

9 So you may not be able to sell 100
10 percent of that output the next day of the load
11 you bought the day before. So it puts the
12 sheller at risk on any unsold inventory that it's
13 acquiring out of that.

14 Q Right. Well, again so just to help
15 put a point on that, you buy a load of pecans,
16 you don't necessarily have a buyer for that load
17 of pecans, you've got find a buyer that wants
18 this size of half or this grade of pieces. Is
19 that correct?

20 A That's correct.

21 Q So you've got to get all of that. And
22 just again as an aside, kind of where do those

1 size and grade standards come from? Who
2 established those grades and sizes, and is it
3 uniform across the entire industry?

4 A Well, there is a USDA standard for
5 shelled pecans, was developed in 1969. And it
6 provides you guidance on how to produce a pecan
7 half, what makes a pecan half, what makes a
8 certain size and grade of pecan piece out there.

9 The industry uses those USDA standards
10 as a general rule. But our industry has also
11 evolved with technology, so that the separation
12 of some of those things is even greater than the
13 specification from 1969 outlines.

14 Q I think there's been some testimony
15 that those guidelines may have been updated in
16 about 1986 or something like that, but they've
17 not been updated since, at least to your
18 knowledge since 1986, have they?

19 A Right. And really I'm not sure what
20 was upgrade at that point in time. We're still
21 using the 1969 document.

22 Q You're using the 1969. And again, if

1 I understand your testimony, there's technology
2 and there have been other developments that have
3 not yet been reflected in those grade and size
4 standards. Is that correct?

5 A That's correct. And because of that
6 the industry, you know, doesn't have continuity I
7 guess across all seven sizes of pecan halves and
8 21 grades and sizes of pecan pieces. There may
9 be some tweaks in what makes one size for one guy
10 and what makes that same size for a different
11 guy.

12 Q Okay. And again just kind of an
13 anecdote, in Las Cruces there was a little bit of
14 testimony, one witness said something about I'm
15 looking for nuts that are 1's and 2's. As kind
16 of both straddling an eastern and being a western
17 handler, is a 1 and 2 a grade or anything, a
18 standard which you're aware, that you know what
19 that would mean?

20 A I don't think it's a published
21 standard. It is a developed standard based on
22 the quality of the nut in the west. You know, a

1 number 1 would be a certain yield and quality
2 where a number 2 might be a lower quality, lower
3 yield.

4 Q And although this will be gone into in
5 more depth with other witnesses, I think it's
6 already been established that one of the
7 aspirational goals of this FMO is for the
8 industry to develop some more standard uniform
9 sizing, grading requirements. As a handler,
10 would that be helpful to you?

11 A Yes.

12 Q You think that'd be a beneficial goal
13 of this FMO to help develop some more standard --
14 uniform standards?

15 A Yes.

16 Q Okay.

17 MR. DAVIS: I have nothing further on
18 that section, Your Honor.

19 JUDGE GUTHRIDGE: Does USDA have any
20 questions?

21 MS. SCHMAEDICK: Melissa Schmaedick,
22 USDA.

1 CROSS-EXAMINATION

2 BY MS. SCHMAEDICK:

3 Q Ms. Watts, you just said that
4 developing uniform standards would be helpful.
5 But why would it be helpful? What would the
6 effect be?

7 A Well, the effect would be that as the
8 handler community is purchasing raw material
9 loads there would be a set standard that would be
10 uniform against the entire industry that would
11 help the handlers be on a more level playing
12 field in purchasing different materials.

13 The standards on kernel output would
14 be more consistent, so that we're all trying to
15 sell the same level of quality item. It would
16 help in hopefully developing a better quality
17 product on a store shelf that could help us to
18 improve the demand on a consumer level.

19 Q So would having a set standard also
20 help consumers in terms of being consistent in
21 what they might expect from a, for example, a
22 premium nut?

1 A Yes, absolutely.

2 Q And would that also level the playing
3 field between handlers that are trying to sell to
4 the same customer?

5 A Yes.

6 Q Thank you.

7 MS. SCHMAEDICK: No further questions.

8 JUDGE GUTHRIDGE: Mr. Hinman?

9 MR. HINMAN: Yeah, Don Hinman, USDA.

10 BY MR. HINMAN:

11 Q Thank you for that testimony. You
12 just mentioned, you know, the different quality
13 standards and that would one -- would a benefit
14 of that be, be that you would pay more for higher
15 quality standards, for higher quality pecans than
16 lower and less than other quality standards?

17 A Yes, sir.

18 Q And that would benefit the overall
19 industry?

20 A Yes, it would benefit the overall
21 industry and it would allow the handler industry
22 to better determine what their shelling cost or

1 their expenses might be in handling a lower
2 quality product versus a premium product. So it
3 would be beneficial, for sure.

4 Q Thank you.

5 MR. HINMAN: No further questions.

6 JUDGE GUTHRIDGE: Are there any more
7 USDA questions?

8 MR. HILL: No, Your Honor.

9 JUDGE GUTHRIDGE: Mr. Davis?

10 MR. DAVIS: Your Honor, let's move on
11 then to Section 82, Books and Other Records.

12 DIRECT EXAMINATION

13 BY MR. DAVIS:

14 Q Again if you would, just please take
15 a look at that section. It appears to put a
16 burden on handlers to retain records. Was there
17 any discussion about this section? What was your
18 intent in this section?

19 A Well, you know, as we discussed
20 earlier, part of the effort in determining the
21 size of a grower or a handler is dependent on
22 multiple year data. So obviously we need to keep

1 a certain amount of data in order to be able to
2 be able to verify that information.

3 But further to that we need ongoing
4 good historical information. As our industry
5 continues to evolve and we begin to get accurate
6 data, then we will actually be able to retain
7 that data and have that good historical
8 information moving forward that can help us to
9 analyze future years and determine best practices
10 or opportunities that may come up.

11 So a three-year retention period is
12 not excessive. Most of the handler community is
13 already keeping these documents for a minimum of
14 three years if not longer. So, you know, it's
15 important to have it for reconciliation purposes
16 and historical preservation.

17 Q No real concern then that this is too
18 burden or a new burden that is being put on the
19 handlers.

20 A No.

21 Q Okay.

22 MR. DAVIS: No further questions,

1 Your Honor.

2 JUDGE GUTHRIDGE: Are there any USDA
3 questions?

4 MS. VARELA: Jen Varela, USDA.

5 CROSS-EXAMINATION

6 BY MS. VARELA:

7 Q Ms. Watts, as a handler are you
8 familiar with upcoming and still-developing Food
9 Safety Modernization Act requirements?

10 A Yes.

11 Q And from what you've seen so far, do
12 those include a good deal of recordkeeping for
13 eligibility?

14 A Yes.

15 Q And as this is written, do you -- is
16 it your opinion that this requirement will be a
17 good complement to some of those and not have an
18 additional burden but rather make sure that all
19 handlers who are following this recordkeeping
20 requirement are a step closer maybe to what might
21 come out of FMO requirements?

22 A Yes.

1 Q Thank you.

2 MS. VARELA: No further questions for
3 me.

4 JUDGE GUTHRIDGE: Are there any other
5 USDA questions?

6 MR. HILL: No, Your Honor.

7 JUDGE GUTHRIDGE: Mr. Davis?

8 MR. DAVIS: Yes, Your Honor. Let's
9 move ahead then. And for those following along,
10 in Exhibit 1 there's a -- the next heading is
11 Additional Provisions.

12 DIRECT EXAMINATION

13 BY MR. DAVIS:

14 Q And in general kind of what do these
15 next sections address?

16 A It's really a catch-all section where
17 we address specific issues that have been raised
18 in industry meetings and which did not already
19 fit into any other section. Several of them are
20 merely administrative requirements of the Act and
21 are here on the advice of counsel and of the USDA
22 staff.

1 Q All right. So let's wade into those,
2 and the first one is .86 with the heading of
3 Exemption. And you'll notice that there's an
4 (a), (b), (c), and (d) subsection of those. Why
5 don't you again tell us what was the board's
6 intent in coming up with this section.

7 A Well, through these grower and handler
8 meetings there was some concern raised that some
9 growers or very small handlers would handle such
10 a small amount of nuts from growers on -- for an
11 individual use basis basically, not in the
12 commercial commerce. And they might as a -- want
13 to give promotional gifts or they might want to
14 give -- selling on roadside stands in the fall of
15 the year.

16 So this section was developed to
17 exempt such small lots from assessment. But we
18 also wanted to make clear that even small lots
19 cannot be distributed via mail order, which mail
20 order to us is a business, is a big business.
21 And that while you may choose to take your
22 product and sell it on the internet, that is a

1 viable business commerce area and, therefore,
2 those nuts needed to be assessed.

3 Q So I guess put another way, the mail
4 order, there's an exemption to the exemption. So
5 if you're going to -- even for these small lots,
6 a thousand inshell pounds or 500 shelled pounds,
7 if you're going to sell them, you know, out of
8 the back of your truck or give them to friends
9 and neighbors, that's exempt. But if you mail
10 order, if you're selling by mail order, even
11 those small lots will be assessed. Is that
12 correct?

13 A Yes, that's correct.

14 Q Okay. And that was primarily because
15 -- that really was not the concern that was
16 raised, was it, by these --

17 A No.

18 Q -- people you were listening to.

19 A Right. It was just the very tiny
20 little guys that just wanted to give their Uncle
21 Sam some pecans and not have to pay an
22 assessment, basically.

1 A All right.

2 MR. DAVIS: No further questions,
3 Your Honor.

4 JUDGE GUTHRIDGE: Does the USDA have
5 any questions on this section?

6 MS. SCHMAEDICK: Melissa Schmaedick,
7 USDA.

8 CROSS-EXAMINATION

9 BY MS. SCHMAEDICK:

10 Q Ms. Watts, could I direct your
11 attention to paragraph (d) of 986.86?

12 A D?

13 Q D, yes (d) as in David. I'll just
14 read for the record this paragraph includes a
15 statement that the council, with approval of the
16 Secretary, may establish rules, regulations and
17 safeguards, and require reports, certifications
18 and other conditions necessary to ensure
19 compliance with this part.

20 So could you explain how or why
21 paragraph (d) is important in relation to
22 paragraph (c) specifically?

1 A Yes. We need a verification rule, I
2 guess is the best way to put it, to ensure that
3 we are not exploiting the opportunity to take
4 pecans and sell them through a mail order
5 environment and escape the duty or escape the
6 assessment.

7 So at the end of the day we needed
8 that verification step in case there is some
9 question of whether or not is this really a small
10 guy who just wants to give his family some pecans
11 or give some promotional gifts or is this truly a
12 business entity and the nuts need to be assessed.

13 Q So, in other words, it allows you the
14 tools that you need to make sure that's not a
15 loophole?

16 A Yes.

17 Q That mail orders are not a loophole?

18 A Yes.

19 Q And you mentioned roadside stands.
20 Can you describe your knowledge of roadside
21 stands, what -- who are they typically selling --
22 who is typically selling at a roadside stand?

1 A Well, most of that comes from again
2 what I call the casual production, the production
3 that's not really orchard-grown environment type.
4 It's more picked up by hand. You may be in rural
5 Georgia somewhere and you may have access to some
6 trees and you've picked them, and you set
7 yourself up a little stand on the side of a
8 highway and you advertise new crop inshell pecans
9 or whatever and the person riding down the road
10 stops and buys those off of you. That's what we
11 call roadside stands.

12 Q Now, are there some growers who
13 perhaps will have their product handled by a
14 customer handler and then they will also sell
15 their product at a roadside stand, quote unquote,
16 but it might be more of a roadside store? Does
17 that happen in the industry?

18 A It can happen, yes, in our industry,
19 yes.

20 Q And those roadside stores, are they
21 selling more than a thousand pounds inshell or
22 500 pounds of shelled?

1 A Yes.

2 Q So would you consider those larger
3 entities to be more along the lines of a
4 business?

5 A Yes.

6 Q An actual business rather than a
7 casual moneymaking venture?

8 A Yes.

9 Q Okay. So in that event the grower who
10 might be then selling his pecans would be
11 considered a handler. If they have a roadside
12 store would they be considered a handler?

13 A They would.

14 Q And so would they be assessed under
15 the order?

16 A Yes.

17 Q Okay. Thank you.

18 MS. SCHMAEDICK: No further questions.

19 Oh, actually I do have a question. My apologies.

20 Q In terms of compliance, when the board
21 was discussing this exemption was the issue of
22 being able to accurately apply or effectuate

1 compliance at very small levels, was that one of
2 the reasons or considerations that you looked at
3 for allowing this exemption?

4 A Yes.

5 Q So would it assist in being able to
6 effectuate compliance within the industry?

7 A Yes.

8 Q Thank you.

9 MS. SCHMAEDICK: No further questions.

10 MR. DAVIS: Just -- oh, sorry,
11 Your Honor. Go ahead.

12 JUDGE GUTHRIDGE: Are there any other
13 USDA questions?

14 MR. HILL: I do have a question.

15 BY MR. HILL:

16 Q Ms. Watts, is there a generally
17 accepted definition of mail order sales that you
18 --

19 A Not a published one that I am aware
20 of.

21 MR. DAVIS: It's not defined in this
22 order but I think -- in fact that may be a good

1 segue.

2 DIRECT EXAMINATION

3 BY MR. DAVIS:

4 Q Young Pecan, the parent company of
5 Young Pecan company is actually a very large mail
6 order pecan company. Isn't it perhaps the
7 largest in the country if not the world?

8 A Well, our parent is King Ranch, and
9 they do have a mail order catalog. Pecans in
10 that catalog are minuscule. They sell very few
11 of them through that catalog.

12 Q Oh. So you're a large mail order
13 company but just not a large mail order pecan --

14 A Pecan, yes.

15 Q -- sort of thing. But I guess as the
16 term infers, mail order as used in this section
17 is in the more common dictionary definition or
18 just the sale of pecans where you mail them to
19 someone. Right?

20 A Right.

21 Q Whether that order comes in through
22 the internet or through a magazine advertisement

1 or something like that, they're just shipped to
2 someone.

3 A Correct.

4 Q And again that was not the concern
5 that you heard from the growers or the handlers
6 and shellers and small growers in your listening
7 tour, they were really just talking about doing
8 small lots for -- and local sales.

9 A Correct.

10 Q Okay. Thank you. All right. Let's
11 move on to Section ,87. And this we have to
12 compliment the drafters in that they got handler,
13 handle and handling all in one small clause here.
14 But what was the intent of this particular
15 section?

16 A Well, this section makes it clear that
17 a handler will not handle nuts that have been
18 prohibited by the Secretary. This could arise if
19 one handler had been notified that there was a
20 problem with a lot of nuts or a group of nuts,
21 and then he tries to transfer them to another
22 handler because he knows that he can't do

1 anything with them. This provision just ensures
2 that if he does provide them to a second handler
3 that that handler is prohibited also from being
4 able to handle those notes.

5 Q This is just a way to try to make it
6 clear that once the Secretary has determined that
7 a nut should not be in commerce that no one in
8 the chain should handle these notes. Is that
9 correct?

10 A Correct.

11 Q Okay.

12 MR. DAVIS: I have no further
13 questions.

14 JUDGE GUTHRIDGE: Are there any USDA
15 questions?

16 MS. SCHMAEDICK: Melissa Schmaedick,
17 USDA.

18 CROSS-EXAMINATION

19 BY MS. SCHMAEDICK:

20 Q Ms. Watts, if, for example, there are
21 handling regulations in effect under the proposed
22 order, let's use that example of a size

1 regulation, could a handler put into the stream
2 of commerce a product that does not meet that
3 size regulation?

4 A If there was a size regulation and the
5 lot of nuts did not meet that size regulation,
6 then could the handler put them into commerce.
7 Is that the question?

8 Q Yes.

9 A They could not put them into commerce
10 under that prohibited regulation. I would
11 question back in that, okay, you have a lot of
12 pecans, they are good pecans, they taste good,
13 there's nothing wrong with them but they don't
14 meet a size regulation. Would there be another
15 regulation where those nuts could be used for
16 some other purpose other than the size regulation
17 that they did not meet the requirement of.
18 Because they -- the lot may have marketable
19 value, just not as that size.

20 Q Ms. Watts, I'd like to draw your
21 attention to Section 986.70 as well as 986.69.

22 MS. SCHMAEDICK: 986.69, for the

1 record, is Authorities Regulating Handling, and
2 986.70 is Handling For Special Purposes.

3 Q If you could look at 986.69, paragraph
4 (a)(ii), and I'll read it into the record. It
5 says "establish different handling requirements
6 or minimum tolerances for particular grades,
7 sizes or qualities or any combination thereof for
8 different varieties, for different containers for
9 different portions of the production area, or any
10 combination of the foregoing during any period."

11 Based on that language, is it your
12 understanding that regulation may be in effect
13 for certain markets and not for other markets?

14 A Yes, if they could be established,
15 yes.

16 Q So in answer to your or going back to
17 your statement about product being -- not meeting
18 a specific size, would this allow for that
19 product not meeting that size to go into a
20 different market?

21 A Yes.

22 Q And looking at 986.70, Handling for

1 Special Purposes, I'll read the introductory
2 paragraph. It says "regulations in effect
3 pursuant to 986.69," which is what we just
4 discussed, Authorities Regulating Handling, "may
5 be modified, suspended or terminated to
6 facilitate the handling of pecans for" and then
7 there are three paragraphs there, "relief or
8 charity, experimental purposes, and other
9 purposes which may be recommended by the council
10 and approved by the Secretary."

11 That language, based on that language,
12 is it your understanding that this would create
13 an authority to allow additional outlets for
14 product that perhaps does not meet a regulation
15 that is in effect?

16 A Yes.

17 Q Thank you. One question I have for
18 you, sort of a theoretical question. In your
19 experience as a handler, would it be appropriate
20 to create an authority perhaps that is -- or, I'm
21 sorry, not authority but let's say a quality or a
22 size regulation that is specific to a destination

1 market such as China, and that requirement might
2 be different than product going to Canada? Do
3 you foresee ever needing that type of
4 flexibility?

5 A The first thing that comes to my mind
6 is just from a handler's point of view, even
7 today you have customer-driven product
8 specifications that require certain quality
9 aspects or other parameters that you must meet in
10 order to be able to sell that product to that
11 customer. Sometimes that requires additional
12 handling of the product that you've shelled, et
13 cetera.

14 So I'm not sure if I understand the
15 question exactly. Can you ask me one more time?

16 Q Certainly.

17 MR. DAVIS: And, Ms. Schmaedick, if I
18 can ask for a clarification. I thought we were
19 under the assumption that this proposed marketing
20 order concerned the regulation of domestic sale
21 of pecans. Was your hypothetical could this
22 board formulate standards for export or -- I

1 didn't understand the question either, so.

2 MS. SCHMAEDICK: I'm not in the
3 position to testify. But I would ask whether or
4 not that would be something that the industry
5 would consider to be important if there were the
6 ability to, let's say -- I mean based on previous
7 testimony, if the Chinese consumer prefers a
8 large pecan, let's say, would the industry want
9 to say, okay, well, we want to make sure that
10 that market is really getting the best of the
11 large pecans that are available.

12 And so you put in a requirement that
13 says only large pecans can go to China. Is that
14 something that you as a handler would be
15 favorable of or not?

16 MR. DAVIS: Your Honor, if I could
17 instruct the witness -- and I believe you can
18 respond to that in your individual capacity. But
19 because of the limitations on the authority of
20 the proposed council, I would suggest that you
21 only answer that in your individual capacity if
22 that would be an item that would be of interest

1 to you and your company. Thanks.

2 JUDGE GUTHRIDGE: In her capacity
3 rather than as a member of the Pecan Board.

4 MR. DAVIS: Board, yes, Your Honor.

5 THE WITNESS: Speaking on behalf of
6 Young Pecan, I do not think that that would be
7 something that would be beneficial to us.

8 BY MS. SCHMAEDICK:

9 Q Thank you. I also wanted to direct
10 your attention to paragraph 2 -- I'm sorry,
11 paragraph (c) of 986.69. I'll read it for the
12 record.

13 It says "the authority to regulate as
14 put forward in this section shall not in any way
15 constitute authority for the council to recommend
16 volume regulation such as reserve pools, producer
17 allotments or handler withholding requirements,
18 which limit the flow of product to market for the
19 purpose of reducing market supply."

20 Can you explain the importance of that
21 paragraph?

22 JUDGE GUTHRIDGE: I'm sorry, I missed

1 what section you were referring to.

2 MS. SCHMAEDICK: 986.69, paragraph
3 (c).

4 JUDGE GUTHRIDGE: Thank you.

5 THE WITNESS: Our industry and the
6 volume of pecans that grow in our industry are a
7 reasonably small industry. We really do not have
8 enough supply to potentially help grow our
9 market. So by not putting any restrictions on
10 volume controls, that eliminates the possibility
11 that we could find ourselves in a position where
12 we can't even supply normal demand much less try
13 to increase demand for our nuts. So that's why
14 we put that in there.

15 BY MS. SCHMAEDICK:

16 Q So in reviewing your testimony on this
17 particular paragraph as well as the statements
18 you made before on grade and size regulation,
19 handling regulation, handling for special
20 purposes, is it correct to say that the intent of
21 the proposal in terms of authority to create
22 handling regulations, that intent is not to limit

1 supply to the market, rather it is to focus on
2 making sure the best quality product is available
3 in the market for consumers?

4 A Yes.

5 Q And, therefore, the way that these
6 sections interact, it allows for all product to
7 continue to flow, yet perhaps a less desirable
8 product might be channeled into another part of
9 the market where that quality is not a deterrent
10 to consumer demand.

11 A That's correct.

12 Q Okay. I'm sorry, what section were
13 you testifying to originally?

14 MR. DAVIS: She had just finished .87,
15 Compliance.

16 MS. SCHMAEDICK: No further questions
17 on this section. Thank you.

18 JUDGE GUTHRIDGE: Are there any more
19 USDA questions?

20 (No response.)

21 MR. DAVIS: Your Honor, we've been
22 going for about two hours. We are about to get

1 into what I think Ms. Watts referred to as
2 administrative matters. I think it will go much
3 more quickly. But perhaps this would be a good
4 time to take perhaps a five or 10 minute break.

5 JUDGE GUTHRIDGE: If we could take 10
6 minutes -- and this part doesn't have to be on
7 the record -- that I need to take care of
8 something to make sure I have a place to sleep
9 tonight. So if it takes a little longer than 10
10 minutes, I apologize.

11 MR. DAVIS: We're adjourned then.

12 Thank you.

13 (A brief recess was taken.)

14 JUDGE GUTHRIDGE: Come to order,
15 please. I'm sure you'll all be relieved to know
16 that I have a place to stay tonight.

17 MR. DAVIS: Wonderful.

18 JUDGE GUTHRIDGE: Mr. Davis?

19 MR. DAVIS: Your Honor, we're ready to
20 proceed. Just to make sure that we're all on the
21 same page, we have completed Section .87 and
22 we're now moving in to Section .88.

1 DIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q And this, I believe, as I said before
4 our break, is the section you may have referred
5 to earlier as kind of the administrative matters
6 or some matters that are in just because of the
7 requirements of the Act and the like. So the
8 first, .88, Duration of Immunities, again what
9 was the intent of putting this section in?

10 A It clarifies that when the order is
11 terminated all rights and immunities under the
12 FMO such as those in 986.91 will end except for
13 acts that occurred before the termination period.

14 Q Is there a provision like this in
15 other FMOs that you reviewed?

16 A Yes.

17 Q Okay.

18 MR. DAVIS: No further questions.

19 JUDGE GUTHRIDGE: Are there any USDA
20 questions?

21 MR. HILL: No, Your Honor.

22 MS. SCHMAEDICK: No questions.

1 JUDGE GUTHRIDGE: Mr. Davis?

2 BY MR. DAVIS:

3 Q Moving right along then, Section .89,
4 Separability, which your lawyers tried to correct
5 to severability but were told that separability
6 would be the better word in an FMO. Again what
7 was the intent of putting this provision in?

8 A This is just one of the administrative
9 requirements. It provides that if one section is
10 found to be invalid, the remained sections remain
11 in effect.

12 Q Once again found in other FMOs?

13 A Yes.

14 MR. DAVIS: No further questions.

15 JUDGE GUTHRIDGE: Any USDA questions?

16 MR. HILL: No, Your Honor.

17 JUDGE GUTHRIDGE: Mr. Davis?

18 BY MR. DAVIS:

19 Q Okay. Let's move along to .90,
20 Section .90, Derogation. Any comments on this
21 particular section?

22 A It's another administrative matter.

1 It makes clear that nothing in this order can
2 supercede the rights and duties of the Secretary
3 of the U.S. under the Act.

4 Q Okay. And this is in the Act and
5 found in other FMOs, I assume.

6 A Yes.

7 Q Okay.

8 MR. DAVIS: No further questions.

9 JUDGE GUTHRIDGE: Any USDA questions?

10 MR. HILL: No, Your Honor.

11 MR. DAVIS: Okay.

12 BY MR. DAVIS:

13 Q Let's go to .91. While this
14 administrative, it might be a little more
15 substantive and important to hopefully future
16 council members and staff. But under the heading
17 of Liability, discuss this section and the
18 importance of it as you believe.

19 A Well, this section, it's very typical
20 in not-for-profit or government boards. It
21 provides that the council and its employees and
22 agents cannot be personally liable for doing his

1 or her job, even if negligent. Such person can
2 be, however, be liable for dishonesty, willful
3 misconduct, or gross negligence. Without such a
4 provision, you probably could not get a
5 reasonable group of people to serve or be
6 employees.

7 Q Once again you found this in other
8 FMOs?

9 A Yes.

10 MR. DAVIS: No further questions.

11 JUDGE GUTHRIDGE: Any USDA questions?

12 MR. HILL: No, Your Honor.

13 BY MR. DAVIS:

14 Q Ms. Watts, let's move to Section .92,
15 Agents. Is this again an administrative matter
16 required by the Act?

17 A It is, yes.

18 Q Any discussion or controversy about
19 this provision?

20 A Well, it just simply provides that the
21 Secretary can appoint an agent or representative
22 in connection to matters covered by the FMO.

1 Q Okay.

2 MR. DAVIS: No further questions.

3 JUDGE GUTHRIDGE: Any USDA questions?

4 MR. HILL: No, Your Honor.

5 BY MR. DAVIS:

6 Q Section .93, Effective Time. Again
7 any comments on this section?

8 A This section just makes clear that
9 nothing herein becomes effective until the
10 Secretary says so, and that what the Secretary
11 does authorize will stay in effect until
12 terminated as provided in 986.94.

13 Q Okay. Which we'll discuss in just a
14 second. Do you find provisions like this in
15 other FMOs?

16 A Yes.

17 Q Was there any controversy or
18 conversation about this section?

19 A No.

20 Q Okay.

21 MR. DAVIS: No further questions.

22 JUDGE GUTHRIDGE: Any USDA questions?

1 MR. HILL: No further questions,
2 Judge.

3 BY MR. DAVIS:

4 Q Next Section .94, Termination. Has
5 subparagraphs (a) through (e), I believe, and I
6 don't even think we can get it all up on the
7 slide. But you have --

8 A Yeah, I've got it.

9 Q -- Exhibit 1 in front of you there.

10 A Uh-huh.

11 Q Again why don't you discuss in general
12 what this section provides.

13 A Okay. This is still an administrative
14 portion of the Act. It sets out exactly how the
15 FMO or parts thereof can be terminated. In
16 general, it can be terminated at anytime by the
17 Secretary. It can also be suspended or
18 terminated by the Secretary if it obstructs or
19 does not tend to effectuate the Act.

20 It can be terminated at the end of a
21 fiscal year or a referendum if a majority of
22 growers producing more than 50 percent of the

1 pecan crop want it terminated. It can be
2 terminated every five years if two-third of the
3 growers participating in the referendum want it
4 terminated. And, of course, it will be
5 terminated if the Act is terminated.

6 Q Do you find termination provisions
7 like this in other FMOs?

8 A Yes.

9 Q Was there any discussion or
10 controversy about this particular section?

11 A No.

12 MR. DAVIS: No further questions.

13 JUDGE GUTHRIDGE: Are there any USA
14 questions?

15 MS. VARELA: Jen Varela, USDA.

16 CROSS-EXAMINATION

17 BY MS. VARELA:

18 Q Just a quick question in looking over
19 the language here. There's a threshold here,
20 provided that the growers have produced more than
21 50 percent of the volume and -- okay, let's just
22 stick with that one. Sorry, I was going to give

1 another order that has more than one. Were there
2 any other thresholds considered or was this an
3 example that the board saw and thought was
4 reasonable and adopted?

5 A It was the one that the board saw and

6 --

7 Q And --

8 A -- it was reasonable.

9 Q And was that coming from the Act?

10 A Yes.

11 Q Okay. And in administering this
12 particular section, who does the board feel is
13 responsible for carrying out these provisions?

14 A I'm not sure I understand the
15 question.

16 A I'm sorry. Not the board, the
17 council. When the board looked at this is it
18 your understanding in your understanding who
19 physically will carry out these procedures?

20 A The council. Right.

21 Q Are you sure about that? Okay.

22 A I'm unsure.

1 MR. DAVIS: No, and if you'll refer to
2 subsection A, it's the Secretary --

3 THE WITNESS: Okay.

4 MR. DAVIS: -- which I think is --

5 THE WITNESS: All right. Let me see.

6 MR. DAVIS: -- these would be the
7 Secretary.

8 THE WITNESS: Ask it a different way.

9 BY MS. VARELA:

10 Q Is it your understanding that the
11 Department will have to physically carry out
12 these procedures on behalf of the Department and
13 later on on behalf of the council?

14 A Yes.

15 Q Thank you.

16 BY MS. CHILUKURI:

17 Q Ms. Watts, I'd like to draw your
18 attention to subsection (d) of .94. If you could
19 --

20 MR. DAVIS: I'm sorry, was that (d)?

21 MS. CHILUKURI: Yes, (d) as in David.

22 THE WITNESS: Uh-huh.

1 BY MR. DAVIS:

2 Q So if you could take a moment to read
3 that over? And do you see the reference to
4 representative period?

5 A The reference to Secretary?

6 Q To representative period in subsection
7 D. If you could tell me what that refers to?

8 A I'm going to read it first. (Pause.)
9 Okay, I've read it now. Ask me again. I'm
10 unsure of what you're asking me.

11 Q Yes. So on that definition and from
12 -- or from that provision and from the
13 definitions in the Federal Marketing Order, the
14 proposed order, what is the representative
15 period?

16 A What is the representative period?

17 Q Yes. Is that a defined term? How do
18 you determine what that period is?

19 A The representative period.

20 Q And the reason I ask is because it is
21 a defined term in .33, and I'm trying to
22 determine if it's that period or, based on the

1 language, if it refers to something else. And
2 I'd like your understanding of that. So if you
3 refer to provision .33, representative period is
4 defined.

5 A Okay, I'm a little lost here so I'm
6 going to need some help. All right. Here we go.
7 Representative period is for four -- okay. The
8 representative -- okay. Now I'm following. Duh,
9 that lightbulb came on. Okay. The
10 representative period for the first council put
11 in place, is that what we're talking about?

12 Q No.

13 MS. SCHMAEDICK: May I attempt at --

14 MS. CHILUKURI: Yes.

15 MS. SCHMAEDICK: -- rephrasing the
16 question?

17 MR. DAVIS: Ms. Watts, I think Ms.
18 Schmaedick may have a question for you.

19 THE WITNESS: I'm sorry.

20 MS. SCHMAEDICK: Melissa Schmaedick,
21 USDA.

22 BY MS. SCHMAEDICK:

1 Q I'm wondering if maybe I could
2 rephrase the question. So in previous testimony
3 we heard a discussion of this term, 986.33,
4 Representative Period.

5 A Uh-huh.

6 Q And the definition is on the overhead.
7 I'll read it in for the record. It says,
8 "Representative period is the previous four
9 fiscal years for which a grower's annual average
10 production is calculated, or any other period
11 recommended and approved."

12 So that representative period, as
13 again we heard in previous testimony, comes into
14 play in terms of eligibility in identifying
15 growers that are captured under the proposed
16 program.

17 A Uh-huh.

18 Q So I believe the question is is it the
19 intent of the Board to use this same
20 representative period when identifying growers
21 who are eligible to vote I a continuance
22 referendum or in a termination referendum. Would

1 it be that same period that you're looking at to
2 qualify a grower to vote?

3 A Yes.

4 Q Okay.

5 MS. SCHMAEDICK: Is that your
6 question?

7 MS. CHILUKURI: That is my question.

8 BY MS. CHILUKURI:

9 Q But in looking at .94 does the
10 language, as its written does it represent that.
11 So it refers to who during a representative
12 period determined by the Secretary. So I'm
13 trying to see if those two definitions are
14 connected. Would --

15 MR. DAVIS: Can I follow up?

16 MS. CHILUKURI: -- would the
17 Performance Committee be amenable to a clarifying
18 change?

19 MR. DAVIS: No. Actually I think
20 these fit together. Ms. Watts, if you and I can
21 look at these together.

22

1 THE WITNESS: Uh-huh.

2 MR. DAVIS: Look at Section .33,
3 Representative Period, it does start off with the
4 four-year fiscal years, but then look at the next
5 clause, or any other period recommended by the
6 council and approved by the Secretary.

7 If you read that last clause in
8 conjunction with paragraph .94, during a
9 representative period determined by the
10 Secretary, is it possible -- it could be the
11 four-year period but it could also be another
12 period.

13 THE WITNESS: Right.

14 MR. DAVIS: As contemplated by Section
15 .33. Correct?

16 THE WITNESS: Correct.

17 MR. DAVIS: Is that a reasonable
18 reading? If it needs clarifying, we're obviously
19 wanting to -- we'll clarify it. But I'm reading
20 them -- I think it can be read together. Mr.
21 Hill or?

22 MR. HILL: What was your question to

1 the witness?

2 MR. DAVIS: Is that a fair reading of
3 those two -- does Section .33 give you the
4 flexibility -- give the flexibility to the
5 Secretary to recommend another period if he or
6 she so desired.

7 THE WITNESS: Yes.

8 MR. DAVIS: Or the Secretary could in
9 fact adopt the four-year average.

10 THE WITNESS: Correct.

11 MR. DAVIS: If he or she so desired.

12 THE WITNESS: Correct.

13 MR. HILL: If the secretary, under .33
14 if the Secretary does adopt the four-year period,
15 let's say the Secretary does adopt a four-year
16 period under Section .33, is it your reading of
17 .94 that the Secretary must then adopt the same
18 four-year period as a representative period to
19 terminate provisions?

20 THE WITNESS: If he has accepted the
21 four-year period under .33, then yes.

22 MR. HILL: So if that were deemed to

1 not be the reading of .94, would you be amenable
2 to a clarifying change to make sure that that was
3 the intent of the board?

4 THE WITNESS: Yes.

5 MR. HILL: Okay.

6 MR. DAVIS: We'll be glad to discuss
7 that with you further about a clarification.

8 JUDGE GUTHRIDGE: Are there any more
9 USDA questions?

10 MS. SCHMAEDICK: Melissa Schmaedick,
11 USDA.

12 BY MS. SCHMAEDICK:

13 Q Ms. Watts, I'd like to draw your
14 attention to 986.94, paragraph (c) and as well as
15 paragraph (d). And I will read in the two
16 portions of the language that I want to ask you
17 about. So in paragraph (c) there's a section of
18 language that says "the Secretary shall terminate
19 if a majority of growers --" actually I'll just
20 paraphrase because it's less complicated for the
21 record.

22 This says the Secretary shall

1 terminate if a majority of producers or growers
2 producing more than 50 percent of the volume of
3 the pecans in the production area, and I want to
4 contrast that language to paragraph (d), which
5 references a referendum every five years that
6 must be favored by two-thirds by number or volume
7 of the growers voting in the referendum.

8 So my question is paragraph (c), is it
9 your understanding that the 50 percent threshold
10 required applies to all production in the
11 production area?

12 A It would be the majority of more than
13 50 percent of the growers that -- of the
14 production for that year.

15 Q Correct. Thank you. And that is
16 different than the phrase in paragraph (d) that
17 says two-thirds by number or volume of growers
18 voting in the referendum. Can you explain your
19 understanding of that phrase?

20 A The (d) is referring to the every five
21 year review of the FMO and a revote, basically,
22 of do you want to continue in this or not. In

1 the initial voting it is two-thirds of growers or
2 two-thirds of the volume. Right? It's the
3 majority of growers or two-thirds of the volume
4 represented to pass.

5 So I believe that (d) is referencing
6 it that way because that is the way the initial
7 order would be voted on. And this would be a
8 five-year review, not something that happened in
9 between that five-year period.

10 Q And is it your understanding that that
11 two-thirds calculation would be two-thirds of
12 those participating in the vote but not
13 necessarily two-thirds of the entire production?

14 A That's correct. You would -- if you
15 were a qualified voter, you have the opportunity
16 to vote, it would be approved based on two-thirds
17 volume -- or two-thirds of the people voting or
18 the majority of the volume.

19 Q So if you have a continuance
20 referendum, for example, and let's say only 25
21 percent of eligible growers vote, would the
22 result then be two-thirds of that 25 percent

1 voting?

2 A Yes.

3 Q Thank you. And is it your
4 understanding that that is different than what is
5 stated in C, which would, based on reading the
6 proposed language, require 50 percent of the
7 entire production?

8 A Yes.

9 Q Therefore, would it be accurate to say
10 that a vote to terminate has a much higher
11 stringency threshold, a higher requirement?

12 A Yes.

13 Q And in your opinion, is that
14 reasonable?

15 A Yes.

16 Q Thank you.

17 MS. SCHMAEDICK: No further questions
18 for me.

19 MR. HILL: I'll ask one more question.

20 BY MR. HILL:

21 Q And it goes back to what I mentioned
22 before, the representative period. Is it the

1 intent of the board that the Secretary has
2 complete discretion to set the representative
3 period under Section .94 irregardless, regardless
4 -- excuse me -- of what the definition of
5 representative period is set as in .33?

6 MR. DAVIS: It's what's written.

7 THE WITNESS: Yes, he does that
8 discretion.

9 MR. HILL: Thank you.

10 JUDGE GUTHRIDGE: Are there any more
11 USDA questions?

12 (No response.)

13 JUDGE GUTHRIDGE: Mr. Davis?

14 MR. DAVIS: We have no further
15 questions on that section, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. DAVIS:

18 Q Let's move on then to Section .95, a
19 rather long section, Proceedings After
20 Termination. Do you recall any discussion or
21 controversy about this particular section, and
22 why was it included?

1 A It's an administrative matter that we
2 were requested to put into the document by USDA,
3 and there was no concern or discussion about it.

4 Q Basically just talks about kind of the
5 wrapping up of the FMO if it has -- if and when
6 it is terminated.

7 A Terminated.

8 Q Correct?

9 A Yes.

10 MR. DAVIS: We have no further
11 questions about that.

12 JUDGE GUTHRIDGE: Are there any USDA
13 questions?

14 MR. HILL: One moment, Your Honor.

15 (Pause)

16 MS. SCHMAEDICK: Melissa Schmaedick,
17 USDA.

18 CROSS-EXAMINATION

19 BY MS. SCHMAEDICK:

20 Q Ms. Watts, could I turn your attention
21 to paragraph (a) of 986.95, please? I'll give
22 you a moment to review it. (Pause.) So is it

1 your understanding that if the program were to be
2 terminated would the council that was seated at
3 that time, would they have the responsibility to
4 stay acting in their capacity as council members
5 until all of the assets and the property of the
6 program were I guess dissolved and appropriately
7 handled?

8 A Yes.

9 Q And would part of that continuing
10 responsibility include a full financial reporting
11 to the Secretary to demonstrate that the
12 dissolving of the assets of the program were
13 handled correctly?

14 A Yes.

15 Q Looking at paragraph (c) of that
16 section, I'll give you a moment to read it.

17 (Pause.) So is it your understanding that in
18 paragraph (c) if there are any funds left over,
19 you know, in the accounts of the program, how
20 would those funds be dealt with?

21 A They would be prorated, the monies
22 left over would be prorated back to the handlers.

1 Q And by prorated, what do you mean by
2 prorated?

3 A Well, you would take the number of
4 handlers and you would divide the monies into
5 that. And then each handler would receive an
6 equal amount back.

7 Q Would they receive an equal amount
8 back or would they receive an amount that is
9 reflective of the percentage of the volume that
10 they handle?

11 A Yes. Each sheller would receive a
12 prorated share of the monies returned but also
13 based on their volume of handling, in other words
14 how much -- how many dollars did they put into
15 it. So then that would calculate into the return
16 as well.

17 Q So it'd be like a proportionate refund
18 then.

19 A Yes.

20 Q Thank you.

21 MS. SCHMAEDICK: I have no further
22 questions. Thank you.

1 JUDGE GUTHRIDGE: Are there any more
2 USDA questions?

3 MR. HILL: No, Your Honor.

4 JUDGE GUTHRIDGE: Mr. Davis?

5 MR. DAVIS: Thank you, Your Honor.

6 Let's put up Section .96

7 DIRECT EXAMINATION

8 BY MR. DAVIS:

9 Q This one is short enough to read into
10 the record here. "Amendments to this part may be
11 proposed from time to time by the council or the
12 Secretary." You see that language?

13 A (No audible response.)

14 Q What do you say to shall we say a
15 cynic that says this gives the council or the
16 Secretary the right to change everything that was
17 previously approved, and so approving this FMO
18 really doesn't amount to much?

19 A Well, all segments of the industry are
20 represented on the council, and they can be voted
21 out if they overreach. Also the whole order can
22 be terminated by a majority that disapproves and

1 must be voted on every five years. This should
2 give everyone a voice if they disapprove. And,
3 finally, I believe that if substantive amendments
4 are made and the amendments should be put to a
5 vote by the growers and approved in the same
6 manner as the original FMO was approved.

7 Q Has there been precedent for that
8 amendment process in other FMOs?

9 A Yes.

10 Q Others have done that?

11 MR. DAVIS: We have nothing further on
12 that section.

13 JUDGE GUTHRIDGE: Are there any USDA
14 questions?

15 MS. SCHMAEDICK: Melissa Schmaedick,
16 USDA.

17 CROSS-EXAMINATION

18 BY MS. SCHMAEDICK:

19 Q Ms. Watts, just to further expand on
20 that concept of amending and requiring input and
21 a vote. For an amendment to an order, would it
22 also require the process of a public hearing to

1 allow full vetting of the proposals and their
2 anticipated impacts, their costs, their benefits
3 to the industry and to consumers?

4 A Yes. And that is a very important
5 aspect of any amendment.

6 Q Therefore amendments which could
7 potentially change the authorities, the scope of
8 the authorities under an order, in your opinion
9 those would be given high importance and
10 considerable forethought, discussion, and
11 deliberation prior to being implemented.

12 A Yes.

13 Q Thank you.

14 MS. SCHMAEDICK: No further questions.

15 JUDGE GUTHRIDGE: Are there any other
16 USDA questions?

17 MR. HILL: No, Your Honor.

18 MR. DAVIS: All right.

19 DIRECT EXAMINATION

20 BY MR. DAVIS:

21 Q We're going to now talk about, I'm
22 sure the audience will be pleased to hear, the

1 last three paragraphs that we're going to discuss
2 this morning. And they are a little bit unusual
3 compared to the others. But let's talk about
4 them one by one.

5 Section .97, Counterparts. Was this
6 section ever actually discussed or contemplated
7 by the council as it was formulating the FMO?

8 A No. The USDA asked us to include this
9 section to facilitate the FMO and comply with the
10 law.

11 Q Okay. And as far as you know, it's
12 just a requirement of the law that it be there.

13 A Correct.

14 Q Okay. In essence, summarize what it
15 provides, if you will.

16 A The section discusses handlers signing
17 agreements, and understand from conversations
18 with USDA that the FMO is binding on handlers
19 even if they do not sign the agreement. So
20 basically it's just saying that you can sign the
21 agreement of a handler, but you're still
22 obligated if you don't sign.

1 Q That's your --

2 A Yes.

3 Q -- your personal understanding.

4 A Yes.

5 Q Okay.

6 MR. DAVIS: No further questions.

7 JUDGE GUTHRIDGE: Are there any USDA
8 questions?

9 MS. SCHMAEDICK: Melissa Schmaedick.
10 No questions on this particular section, although
11 I do have further question of Ms. Watts when we
12 are finished with these three sections.

13 JUDGE GUTHRIDGE: All right.

14 MS. SCHMAEDICK: Thank you.

15 JUDGE GUTHRIDGE: Mr. Davis?

16 MR. DAVIS: And I'll have some more
17 questions for her also, but if you'd like at that
18 time you can -- okay.

19 BY MR. DAVIS:

20 Q Hearing no other questions, let's move
21 on to Section .98, Additional Parties. Again is
22 this similar to paragraph .97 in that it was just

1 -- it was required as part of the law and it was
2 inserted?

3 A Yes.

4 Q Okay.

5 MR. DAVIS: No further questions.

6 JUDGE GUTHRIDGE: Are there any USDA
7 questions?

8 (No response.)

9 JUDGE GUTHRIDGE: No questions. Mr.
10 Davis?

11 BY MR. DAVIS:

12 Q And, finally, on paragraph .99, Order
13 with Marketing Agreement. Is this similar to .97
14 and .98 in it was -- we were told it was a part
15 of the law and had to be included in the proposed
16 FMO?

17 A Yes.

18 Q Okay.

19 MR. DAVIS: No further questions.

20 JUDGE GUTHRIDGE: Are there any USDA
21 questions?

22 MR. HILL: No.

1 JUDGE GUTHRIDGE: No? Okay, Mr.
2 Davis?

3 MR. DAVIS: Ms. Schmaedick, as I said
4 I've got a few other kind of industry questions
5 and background questions for Ms. Watts. But if
6 you'd like to ask any other questions.

7 MS. SCHMAEDICK: Certainly. Go ahead.
8 Perhaps you'll draw out some of the information I
9 need.

10 MR. DAVIS: All right.

11 MS. SCHMAEDICK: Thank you.

12 BY MR. DAVIS:

13 Q Do you have in front of you, Ms.
14 Watts, do you have Exhibit 23, which is executive
15 summary of the economic findings on the FMO
16 reported in these proceedings by Dr. Palma?

17 A Yes.

18 Q Have you reviewed those documents?

19 A Yes, I have.

20 Q Do you agree with Dr. Palma's finding
21 that the benefits of generic advertising would
22 outweigh the cost that would be incurred by the

1 industry, handlers in particular, if this FMO
2 were implemented?

3 A Yes.

4 Q From a handler's perspective, what do
5 you believe about the balance between the
6 benefits of the FMO and the cost of the FMO to
7 handlers?

8 A Right now our industry operates
9 without good data and, therefore, we cannot make
10 good business decisions from one crop year to the
11 next. Nor are we able as an industry to get the
12 great news about pecans, including the incredible
13 health benefits, to the consumer.

14 With the FMO in place I am a believer
15 that we will be able to gather accurate data,
16 advertise and market our pecans to increase
17 domestic consumer demand, and this will increase
18 demand for pecans for both growers and from
19 shellers.

20 If our industry is as successful with
21 our proposed FMO as the almond, pistachio, and
22 other tree nut industries have had with their

1 FMOs in place, the benefits to our industry as
2 well as industry stabilization will greatly
3 outweigh the cost incurred.

4 Q Now, as a handler yourself, having
5 participated in the shelling and handling of
6 pecans for lo these many years, and as a
7 representative selected by your peers to be on
8 the American Pecan Board, what is your opinion
9 about the council's authority through its product
10 handling authority regarding regulation of
11 quality-size packaging of pecans?

12 A Well, of course pecans are an
13 agricultural product, and they're grown across 15
14 U.S. states. The natural quality that comes from
15 the orchards and casual production throughout
16 these states can vary from orchard to orchard or
17 state to state based on uncontrollable conditions
18 such as weather. The handlers can only produce
19 the kernel from within the shell. Handlers have
20 no ability to improve on the quality that is
21 received from the field and must market 100
22 percent of that quality to an end user whether it

1 be a consumer or a food manufacturer.

2 However, with strong input from all
3 shellers serving on the council and input
4 received from all handlers by the shellers
5 serving on the council, I believe that any
6 standards approved by the shellers serving on the
7 council would benefit the overall ability of our
8 industry to market shelled pecans domestically
9 and would ultimately benefit all segments of the
10 industry and increase customer delight.

11 I have had conversations with some
12 smaller shellers within our industry who have
13 concerns that the council could mandate changes
14 and processes that could be too costly for them.
15 This is a valid concern, but again with
16 participation of shellers serving on the council
17 I would believe that no product handling mandate
18 would be put in place that would be detrimental
19 or would unduly burden any size sheller or
20 handler.

21 Q Thank you. Do you think that the FMO
22 has any other benefits to handlers or to the

1 industry in general and the handlers in
2 particular?

3 A Well, as I've stated a few times, I'm
4 sure you all have gotten it, you know, the data
5 collection is very important to the FMO.

6 If you just go back in history 20
7 years and you see that our industry has undergone
8 many negative transitions from growers going out
9 of business to converting orchards into
10 subdivisions in the late '90s and early 2000s due
11 to low returns to a multitude of pecan shellers
12 going bankrupt due to market risk and purchasing
13 raw material at cash prices based on crop size
14 data that turns out to be wrong, and then seeing
15 major kernel market price declines because the
16 total supply is too large to food manufacturers
17 and snack nut producers, removing pecans from
18 their food items and nut mixes due to high kernel
19 prices of pecans compared to other tree nuts, to
20 see major retailers show data where sales of
21 almonds and walnuts increase while sales of
22 pecans decline on the grocery store baking aisle

1 due to the lower cost of these nuts versus
2 pecans, which keeps shellers from being able to
3 sell 100 percent of their out put of shelled
4 pecans, most all of these things occurring from
5 lack of accurate data that anyone can rely on.

6 We have an inherent problem with
7 predicting crop size as pecans grow across 15
8 U.S. states and close to 20 percent of it is
9 grown through casual production, including
10 natives that are not grown in orchard
11 environments. We have a lack of trust with
12 quantities of inshell and shelled pecans that are
13 reported monthly to USDA and published in the
14 monthly cold storage report.

15 We must have good, accurate data for
16 any segment of the pecan industry, grower or
17 handler, to make a good buying and selling
18 decision. We must know how many acres of pecans
19 are planted. We need to know how many are
20 producing, the age of the trees, the plantings
21 not yet producing, et cetera. All of this data
22 will allow our industry to make more educated

1 decisions both for ultimate good health and
2 growth of all segments of our industry.

3 Q Ms. Watts, do you believe that
4 improved data, more accurate data would benefit
5 all parts of the industry in all regions --

6 A Yes.

7 Q -- of this proposed marketing area?

8 A Yes.

9 Q And just in final, are you in favor of
10 the proposed marketing order for pecans?

11 A I am. Our industry is changing.
12 While pecans are indigenous to North America,
13 other areas of the world such as South Africa,
14 Australia and Argentina, are growing pecans and
15 developing new orchards every year. We have new
16 demands for pecans from China and other foreign
17 countries.

18 We have a wonderful nut that is good
19 for you, and we need to get the message out to
20 the consumers so that we can compete with other
21 tree nuts marketed in the U.S. We need to build
22 demand for pecans so that pecan growers and

1 handlers can market their pecans profitably.

2 As we have seen through other FMOs,
3 most particularly the almond FMO, we have watched
4 an industry produce very accurate crop supply
5 data year after year. We have seen that industry
6 grow exponentially with new orchards vastly
7 increasing total supply and at the same time
8 growing demand for almonds at the same pace,
9 resulting in higher prices for growers and
10 resulting in handlers being able to remain
11 profitable and move through ever growing
12 supplies.

13 With an FMO for pecans, we could
14 establish a unified voice, we can market pecans
15 to stimulate domestic demand, and ultimately
16 stimulate prices. We can work to improve
17 packaging, quality, and other things that can
18 increase consumer delight, and we can begin to
19 work and market our pecans based on accurate data
20 year after year after year.

21 Q Ms. Watts, you delayed a well-deserved
22 vacation so you could be here with us today, and

1 we very much appreciate it. And so I'm not going
2 to take up more of your time and don't know if
3 USDA is going to take up any more of your time.
4 But let me conclude we're about to have --

5 JUDGE GUTHRIDGE: It's the Department
6 of Agriculture's fault that you cannot go on
7 vacation.

8 THE WITNESS: I got it.

9 MR. DAVIS: Miss a vacation with your
10 lovely grandchildren.

11 BY MR. DAVIS:

12 Q No, we're about to have, in all
13 seriousness, we're about to have some testimony
14 on the structure and composition of the council.
15 So before you leave I'd like to ask you just one
16 or two questions. You've been involved in this
17 process literally from the birthing of it in your
18 participation in going around and meeting with
19 others. You probably have developed a pretty
20 good idea of the scope of the work that would be
21 done on this council and, to be quite honest, how
22 much work it's going to be.

1 But do you believe that you have the
2 experience and qualifications that might lend
3 itself to being a representative of the handlers
4 on the American Pecan Council?

5 A Yes. And I would be honored if my
6 peers would vote me in to such a position.

7 Q If nominated you would accept, and if
8 elected you would serve.

9 A Yes.

10 Q And serve I know. Thank you so much,
11 Ms. Watts.

12 MR. DAVIS: I have no further
13 questions, Your Honor.

14 JUDGE GUTHRIDGE: Does USDA have any
15 questions?

16 MS. SCHMAEDICK: Melissa Schmaedick,
17 USDA. And I certainly hope that I am not
18 delaying your vacation. And I do have some
19 questions.

20 CROSS-EXAMINATION

21 BY MS. SCHMAEDICK:

22 Q Ms. Watts, we've received testimony on

1 -- from other witnesses in Las Cruces, and there
2 were some questions that were raised. And I
3 wanted to draw on your experience working with
4 the American Pecan Board and see if you could
5 help us by shedding some additional light on
6 these questions.

7 The first is can I draw your attention
8 to Section 986.55? It's Procedure.

9 A Okay.

10 Q So I first want to draw your attention
11 to language that is found in paragraph (c)(I).
12 In the very end of that paragraph, I'll read it
13 for the record, it says "council members --" oh,
14 it says "the following issues shall require two-
15 thirds, parens, 12 members, concurring vote of
16 the council members and must be approved in an
17 in-person meeting." And then there are a list of
18 several types of decisions that might be made.

19 So in your discussions with the
20 American Pecan Board did you feel that it was
21 important that discussions and decisions made
22 about, for example, budges or assessments and

1 these other items that are listed out here, that
2 they be made in person?

3 A Yes.

4 Q And in person, this sounds kind of
5 silly, but that means a face-to-face meeting
6 where you are all physically in one place?

7 A Yes.

8 Q Okay. And now I want to draw your
9 attention to paragraph (c)(ii), which talks about
10 -- I'll paraphrase it for the record. It talks
11 about securing a commercial bank loan, and the
12 halfway through the paragraph there's a proviso,
13 and I'll read that. And it says "granted that in
14 the event of an emergency that warrants immediate
15 attention sooner than a face-to-face meeting is
16 possible, a vote for financing may be taken."

17 Does that mean that a vote for
18 financing may be taken through a method that is
19 an alternative to a face-to-face meeting?

20 A Yes.

21 Q And in your opinion what are those
22 methods? Would it be a phone or video conference

1 or?

2 A Well, the first preference would be a
3 video conference so that you can visually see
4 each other. But if that is not available, then
5 you could do it the audio phone conference.

6 Q Okay. Thank you. Now I want to draw
7 your attention to paragraph (b). And paragraph
8 (b), I'll read this for the record, it says "the
9 council may provide for meetings by telephone or
10 other means of communication, and any vote cast
11 at such a meeting shall be confirmed promptly in
12 writing."

13 So my question is it appears that
14 paragraph (b) gives you authority to meet by
15 other means, but if you read the language in
16 (c)(i) there's a requirement that any discussion
17 or decisions made on the issues listed out under
18 paragraph (c) be made in person.

19 So was it the intent of the board to
20 do require a face-to-face meeting and never allow
21 for any other type of alternative meeting with
22 regard to these issues? Or is it simply your

1 priority and your first preference is a face-to-
2 face and that you would allow for other
3 alternatives under certain circumstances?

4 A Under the (c)(i) and the list of items
5 that we are referring to where we are requiring
6 the two-thirds, 12 member vote, the preference is
7 a face-to-face meeting for those particular
8 items. And if that is not doable, then of course
9 try to do the video conference, or if we have to
10 go via phone we have to go via phone.

11 But (b) is just the more general
12 clause of the council needs to talk, they need to
13 communicate more often than when something
14 significant is going on. And those meetings
15 could be held via phone versus a face-to-face
16 meeting as needed.

17 Q Okay. So to clarify, the board did
18 indeed intend to require that any decisions made
19 regarding the issues outlined under (c)(i), that
20 they truly must be in person.

21 A Yes.

22 Q Okay. And that --

1 A That's the preference except for as
2 it's written down below, that you can do a video
3 conference if you cannot meet face-to-face.

4 Q Okay. So looking at that language
5 again, it says "actions of the council with
6 respect to the following issues shall require a
7 two-thirds concurring vote of the members and
8 must be approved at an in-person meeting."

9 So if I'm understanding your statement
10 correctly, perhaps this language is too
11 restrictive and should be clarified to include
12 the stipulation that the in-person is the
13 priority but that paragraph (b) could be used in
14 certain cases. Is that correct?

15 A Yes.

16 Q Okay. And would you support a
17 clarification to that effect?

18 A Yes.

19 Q Thank you. Next I'd like to discuss
20 -- this is a section that has not yet been
21 addressed by any other witness, but I would like
22 for you to turn your attention to Section 986.50

1 paragraph (b). And that 986.50 is Term of
2 Office.

3 A Yes.

4 Q If you could take a moment and read
5 paragraph (b)?

6 (Pause)

7 A Okay.

8 Q Okay. Do you recall the board's
9 discussion about this topic, term of office?

10 A Yes.

11 Q Okay. So I'm going to read into the
12 record the language that I want to ask you about.
13 It says "council members and alternates may serve
14 up to two consecutive four-year terms of office.
15 Subject to paragraph (c) of this section, in no
16 event shall any member or alternate serve more
17 than eight consecutive years on the council as
18 either a member or an alternate. However, if
19 selected, an alternate having served up to two
20 consecutive terms may immediately serve as a
21 member for two consecutive terms without any
22 interruption in service. The same is true for a

1 member who, after serving up to two consecutive
2 terms, may serve as an alternate."

3 The next sentence says "a person
4 having served the maximum number of terms as set
5 forth above may not serve again as a member or
6 alternate for at least 12 consecutive months."

7 So I want to be clear in my
8 understanding of this language. Is it the intent
9 of the board that a person may complete the full
10 term as a member, follow that by a full term as
11 an alternate member, and then they have to take a
12 break?

13 MR. DAVIS: By full term do you mean
14 two terms?

15 MS. SCHMAEDICK: Yes. I'm sorry.

16 BY MS. SCHMAEDICK:

17 Q The maximum for a member and the
18 maximum for alternate. And then they have to
19 take a break or can they just continue, member,
20 alternate, member, alternate into perpetuity?

21 A Our industry is so small that we're
22 trying to write into the language so that we

1 don't pin ourselves in a corner where we don't
2 have anybody to nominate and appoint as a council
3 member. So the language is there to try to allow
4 for continuation of available members.

5 So to answer your question, it would
6 not mean that they have to take a break. Likely
7 if there's enough members or available people to
8 appoint, then they wouldn't be constantly
9 reappointed. But the reason that we wrote it the
10 way we did is because we have so few people to
11 nominate that we could find ourselves in a
12 position where we don't have enough members.

13 Q Okay. Thank you. I'm going to change
14 directions a little bit here on you, and I'm
15 going to ask you about a term that came up in Las
16 Cruces. The term is disappearance. Are you
17 familiar with that term?

18 A Disappearance?

19 Q Disappearance.

20 A I know what the definition is but I'm
21 not sure how it is in the context of Las Cruces.
22 I didn't hear it so --

1 Q Okay.

2 A -- I'm not sure.

3 Q Is that a term that you use in your
4 business, disappearance?

5 A Well, for me whenever I think about my
6 industry and I think about the word disappearance
7 I'm thinking about movement. In other words, for
8 instance, on the monthly cold storage the amount
9 reported last month versus the amount reported
10 this month, there is a disappearance of
11 inventory. And that's through sales,
12 consumption.

13 Q Okay.

14 MR. DAVIS: Ms. Watts, that isn't the
15 definition of Section 12 I think that Ms.
16 Schmaedick was referring to.

17 BY MS. SCHMAEDICK:

18 Q I have no further questions on that
19 section at this time.

20 A Okay. Well, that's more at the
21 cleaning station. That's coming out of the field
22 into a cleaning plant where you remove sticks,

1 coals, hulls, nuts that where the hull won't come
2 off. That would be unmerchantable pecans. So I
3 guess that would be the weight disappearance
4 between what comes out of the field and what's
5 cleaned and available for market.

6 Q Okay. Thank you. Next I would like
7 for you to think back on the discussions that the
8 board had with regard to the sheller member seats
9 on the council. And if you want to take a look
10 here real quickly, I'm going to be asking you
11 some questions on 986.45, paragraph (b)(ii). And
12 again I'll just read this for the record so that
13 we know what we're talking about.

14 It states "each region shall have a
15 sheller seat one allocated to a sheller who
16 handles more than 12.5 million pounds of inshell
17 pecans in the fiscal year preceding nomination,
18 and a sheller seat two allocated to a sheller who
19 handles less than or equal to 12.5 million pounds
20 of inshell pecans in the fiscal year preceding
21 nomination."

22 I'm wondering if you could talk about

1 your impression of the discussion around that
2 12.5 million pound threshold. How was that
3 number identified? What was the process? Were
4 there alternatives that were discussed? And
5 then, in particular for you representing a large
6 handler, does this number make sense?

7 A When we were in our discussions during
8 our rules writing we talked about this a right
9 good bit. What we want to do is to make sure
10 that we are including small shellers in the
11 process and not penalizing them. Because in a
12 short crop year they may not be able to process
13 as many pecans as they do in an on crop year.

14 So we did look at higher numbers as
15 the threshold between large shellers and small
16 shellers, and decided to lower that number in
17 order to make sure that we are including as many
18 small operating plants as we possibly can.

19 So the 12-1/2 million pounds of
20 inshell, either yield inside -- the shell is
21 varying across different regions of the country.
22 So we felt that 12-1/2 pounds when you calculated

1 out within a yield environment would make sure
2 that it includes the smaller shellers, that we're
3 not excluding anyone that might not make that
4 large shell threshold.

5 Q And the alternative threshold that you
6 considered, were they initially higher than this?

7 A Yes.

8 Q Okay. So then the decision to go
9 lower was again very purposeful.

10 A Yes.

11 Q Okay. Thank you.

12 MS. VARELA: Jen Varela, USDA.

13 BY MS. VARELA:

14 Q Just a very quick follow-up while
15 we're thinking about these sheller seats. As
16 somebody who's very active in the industry, do
17 you -- could you give me just a rough estimate of
18 about how many shellers you think will qualify
19 based on the threshold?

20 A At 12-1/2 million how many would
21 qualify. Above it or under it?

22 Q If you have a rough estimate of above

1 or below, that would be great. But if you could
2 just tell us total how many you think are in the
3 pool of potential shellers --

4 A Shellers?

5 Q -- to be involved, that would be
6 helpful as well.

7 A Throughout the country there's
8 probably more than 250 shellers out there. They
9 are of all vast shapes and sizes. The vast
10 majority of those would be 12-1/2 million pounds
11 or below. Some are below 12-1/2 million pounds.
12 There would be much fewer that would be above
13 that number consistently.

14 Q Thank you very much.

15 MS. SCHMAEDICK: Melissa Schmaedick,
16 USDA.

17 BY MS. SCHMAEDICK:

18 Q Ms. Watts, I just have one question
19 left, and then you can go on vacation. Let's
20 see. I would like for you to look at
21 986.46(b)(v), please. 986.46 is the section
22 called Council Nominations and Voting.

1 JUDGE GUTHRIDGE: I'm sorry, what was
2 that number again?

3 MS. SCHMAEDICK: 986.46, which is
4 Nominations, paragraph (b)(v). (B) is the
5 section Successor Members, and (v) is the
6 paragraph titled Reports to the Secretary.

7 BY MS. SCHMAEDICK:

8 Q So I just want to ask you a general
9 question about the work of American Pecan Board
10 and the general drafting of this entire Section,
11 and the mind set that that board was in when this
12 language was created.

13 What is your understanding of the
14 nomination process and the establishment of
15 council members? Are they nominated by the
16 industry and then appointed by the Secretary? Or
17 are they just nominated by the industry and
18 that's who we get?

19 A They are nominated by the industry and
20 appointed by the Secretary.

21 Q Thank you. And in that process of
22 nominating people is there a possibility for more

1 than one candidate per seat? So you have the,
2 you know, three grower seat per region, two
3 sheller seats per region. Is it possible that
4 you could have more than one person interested in
5 serving in any of those positions?

6 A Yes.

7 Q And in the nomination process would a
8 nomination ballot be -- would that ballot include
9 all of the names of people interested and
10 qualified to serve in those positions?

11 A Yes.

12 Q And would that ballot then be sent out
13 to growers and shellers who are then able to cast
14 a vote for their preferred nominee?

15 A Yes. The grower seats would be voted
16 on by growers, the sheller seats would be voted
17 on by shellers.

18 Q And when you say voted on is it more
19 accurate to say that they're indicating who they
20 would prefer to have seated?

21 A Yes.

22 Q Is there a general understanding that

1 even though they might prefer that person, that
2 really is up to the Secretary to appoint?

3 A Yes. And there is a further
4 understanding that the Secretary may choose to
5 pick not the top recommended or preferred vote
6 getter.

7 Q So based on that statement that you
8 just gave, is it the intent of the council to
9 forward all of the results of the nominations to
10 the Secretary?

11 A Yes.

12 Q And what does all of the results mean?

13 A Well, the group that would be
14 responsible, the American Pecan Board or whatever
15 the party is that would be sending out the
16 ballots, and once that information is discerned,
17 collected, it could be provided to the Secretary
18 in summary form or it could be provided to the
19 Secretary in summary form with a backup to prove
20 the results that are provided to the Secretary
21 for him to make his decision.

22 Q So am I understanding that your

1 impression is that the Secretary would be
2 provided with a list of all the candidates that
3 were considered and the number of votes that each
4 candidate received as well as their background
5 information?

6 A Yes.

7 Q And is it your understanding that the
8 Secretary -- and I believe you've already stated
9 this, but again just for clarification. The
10 Secretary then has -- what does he do with this
11 information?

12 A He reviews the information, he takes
13 into consideration all of the information that's
14 been provided to him from the industry, and then
15 he makes his best assessment on who the members
16 of the founding council should be and that he
17 would appoint them accordingly.

18 Q You said founding council. Is that,
19 is this process the process that would also be
20 used for all other councils?

21 A Yes, the same nominating -- yes.
22 Everything would be the same from a standpoint of

1 future seatings as people roll off.

2 MS. SCHMAEDICK: Thank you very much.
3 I have no further questions.

4 THE WITNESS: Thank you.

5 JUDGE GUTHRIDGE: Does USDA have any
6 more questions?

7 MR. HILL: Vacation delayed.

8 MR. DAVIS: I'll have to end with one
9 last question.

10 DIRECT EXAMINATION

11 BY MR. DAVIS:

12 Q But again based on your experiences,
13 is the nominating and voting procedures that are
14 set forth in this proposed FMO identical to the
15 best of your knowledge to all other FMOs that are
16 in place today, at least on that process?

17 A Yes.

18 MR. DAVIS: Thank you. Okay.

19 JUDGE GUTHRIDGE: USDA?

20 MR. HILL: Yes.

21 CROSS-EXAMINATION

22 BY MR. HILL:

1 Q I want to go back to 986.55 just
2 briefly. I'm going to ask a couple of questions
3 about both (c)(I) and (c)(ii) but I'm going to
4 start with (c)(ii) and work backwards.

5 A Okay.

6 Q And I'm most interested in the
7 proviso. It says "that in the event of an
8 emergency that warrants immediate attention
9 sooner than a face-to-face meeting is possible, a
10 vote for financing may be taken. In such event
11 the council's first preference is a video
12 conference and second preference is phone
13 conference."

14 So the question is does this -- does
15 your reading of this allow the council to conduct
16 a vote by email or some other electronic means or
17 by U.S. mail other than these two preferences
18 that you have here? Because it's stated as a
19 preference. So would you believe that you could
20 also use some other means besides these if they
21 were better, I guess, under the circumstances?
22 Or do you intend these to be exclusive, just only

1 those two?

2 A I believe that these should be
3 exclusive.

4 Q Okay. So just the video conference
5 and just the phone conference. Okay. Going back
6 to (c)(I), a couple of times you used the word
7 preference when talking about the in-person
8 meeting. So my question to you is do you believe
9 that the proviso from (c)(ii) should also be
10 applicable to (c)(I)?

11 MR. DAVIS: No.

12 BY MR. HILL:

13 Q Was it the board's intent for that to
14 be?

15 A No. I believe that (c)(I)) should be
16 an in-person meeting.

17 Q Okay.

18 MS. SCHMAEDICK: Melissa Schmaedick,
19 USDA.

20 BY MS. SCHMAEDICK:

21 Q Following up on Mr. Hill's question,
22 if there's a situation where decisions need to be

1 made with regard to any of the issues listed
2 under (c)(I) and an in-person meeting is simply
3 not possible, would it be important for the
4 council to be able to meet in any of the methods
5 identified in paragraph (b)?

6 A You never say never. And there could
7 be a -- somebody's in Timbuktu and not able to
8 make a face-to-face, you do have to have a
9 secondary provision on how to handle that
10 situation. So with that, I would say yes.

11 Q Okay. Would it be -- in your opinion
12 would it be helpful to use language, the language
13 that is found in (c)(ii), which says the
14 preference first is video conference followed by
15 phone conference, would it be helpful to put that
16 or similar language stating those preference
17 under (c)(I)?

18 A I do think it would be better for
19 clarity purposes, no confusion.

20 Q Okay. So again if a clarifying change
21 that would again state similar language in
22 (c)(ii) were to be included in (c)(I), you would

1 be comfortable with that?

2 A Yes.

3 Q And in your opinion was that the
4 intent of the board?

5 A Yes.

6 Q Okay. Thank you.

7 MS. SCHMAEDICK: No further questions.

8 JUDGE GUTHRIDGE: USDA, any more
9 questions?

10 MR. HILL: No.

11 JUDGE GUTHRIDGE: Mr. Davis, any more
12 questions?

13 MR. DAVIS: Your Honor, we have no
14 further questions for this witness. Thank you.

15 JUDGE GUTHRIDGE: Does anyone in the
16 audience have any questions for Ms. Watts?

17 (No response.)

18 JUDGE GUTHRIDGE: Seeing no
19 volunteers, Ms. Watts, you're excused.

20 THE WITNESS: Thank you very much.

21 (Witness excused.)

22 MR. QUIR S: Your Honor, could we take

1 a five-minute break while we ask Ms. Watts to
2 leave and replace just so -- we've been here
3 almost an hour and a half since our last break.
4 Just a short one.

5 JUDGE GUTHRIDGE: A literal five
6 minute.

7 MR. QUIR S: A literal short break,
8 just so we can get set up.

9 JUDGE GUTHRIDGE: It's 11:26. At
10 11:31 we'll resume.

11 (A brief recess was taken.)

12 JUDGE GUTHRIDGE: Mr. Quirós?

13 MR. QUIR S: Yes. Mr. Mike Adams is
14 here with us.

15 Would you please state your name and
16 spell it?

17 THE WITNESS: Mike Adams, M-I-K-E A-D-
18 A-M-S. Good morning.

19 MR. QUIR S: And, Mr. Adams --

20 And, Your Honor, do we need Mr. Adams

21 --

22 JUDGE GUTHRIDGE: Excuse me.

1 Mr. Adams, you were put under oath in
2 Las Cruces on Monday for this hearing, and you
3 are still under oath.

4 THE WITNESS: Okay. Yes.

5 Whereupon,

6 MIKE ADAMS

7 having been previously duly sworn, was called as
8 a witness herein and was examined and testified
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. QUIR S:

12 Q This next question probably would not
13 require you to be under oath. But, Mr. Adams,
14 are you --

15 A Let me state for the record that I'm
16 not going on vacation. But I haven't done my
17 Christmas shopping yet.

18 Q Mr. Adams , I know you're a Texan.
19 You glad to be back in Texas?

20 A Yes.

21 Q I understand when you were in New
22 Mexico that you met Pepe Pistachio. Is that

1 correct?

2 A I did.

3 Q And how did you feel about knowing
4 that Pepe Pistachio was 20 yards away from the
5 hearing site?

6 A Well, I immediately contacted the
7 pecan fairy and just asked her to show up and at
8 least have an alternative to those that chose to
9 consume the lesser tree nut.

10 Q Thank you. And that's why we have
11 these pecans here with us today?

12 A Yes.

13 Q Thank you very much.

14 A And by the way, she's on call if you
15 run out.

16 Q Thank you, Mr. Adams. Because we were
17 in another location when you first testified, I
18 will ask you just a few brief questions so we can
19 establish a basis for your testimony today.

20 Where do you live?

21 A Henderson, Texas.

22 Q And tell us briefly about your

1 educational background.

2 A Well, I'm going to pull out my CV,
3 which was submitted for the record, and those of
4 you who know me know that I'm uncomfortable
5 talking about myself. I really am. But counsel
6 says it's important, so.

7 I received a undergraduate degree from
8 TCU, Texas Christian University, in mathematics
9 and education. I went on to get a Master's
10 degree in agricultural economics at Texas A&M.
11 I've done some graduate work in mathematics, and
12 I've done some graduate work on a pecan orchard.

13 Q And your complete resume has already
14 been entered in this hearing as Exhibit 7. Is
15 that right?

16 A That's correct.

17 Q Tell us a little bit about your
18 experience, again briefly, in the pecan industry.

19 A We got in the pecan industry 30 years
20 ago, heard just a beautiful pristine piece of
21 property in the Brazos River bottom of Texas. It
22 already had an orchard planted, but honestly the

1 first few years we didn't understand the value.
2 And more recently we have understood the value,
3 we've made the committed, I mean the necessary
4 investment.

5 And so we've been involved in
6 improving that orchard and trying to bring it in
7 its full potential, which we are in the -- we
8 have done. And so we're drip irrigating, we're
9 hedging, trying to manage what every other astute
10 pecan grower, some of whom are seated in this
11 audience, are trying to do.

12 Q And you're familiar with the Small
13 Business Association guidelines for a large --

14 A I am, yes.

15 Q -- and small business? And would you
16 be considered a large or a small pecan business?

17 A I'm a large grower.

18 Q Thank you, Mr. Adams. Would you state
19 for us briefly your experience in the pecan
20 experience trade organizations?

21 A Early '90s -- I joined the Texas Pecan
22 Growers Association early. In the early '90s I

1 was asked to be in the leadership and have been
2 so I guess ever since. I've served as -- in the
3 Texas Pecan Growers Association as secretary,
4 vice president, and president.

5 And then when the Texas checkoff was
6 put into place in 1998 I was elected to that
7 statewide board, which is the commodity
8 commission that oversees the checkoff. I was
9 secretary and I currently serve as vice president
10 of the Texas Pecan Board.

11 And I'm going to read in here -- again
12 this is -- I've just had a -- involved in the
13 leadership of the pecan industry from a policy
14 standpoint just by choice. I've served as the --
15 with U.S. Pecans, an international marketing
16 group. I was a member and currently a member of
17 the Oversight Committee.

18 I was on the Organizing Committee of
19 the U.S. Pecan Council, which was the prior name
20 of what is now the American Pecan Board. I was
21 selected by the Texas section to serve as a
22 member of that board and was subsequently elected

1 president of the American Pecan Board.

2 I've also served or been on the
3 National Pecan Research Summit, which was hosted
4 by Oklahoma State University and the Noble
5 Foundation. I was an invited participant. Dr.
6 Rohla in the audience is involved with that. I
7 was invited to serve at the Texas Agricultural
8 Summit from Texas A&M University.

9 I've been awarded the Life Membership
10 Award, which is a -- and I was humbled to be
11 selected for that award by the Texas Pecan
12 Growers Association. And more recently given the
13 Certificate of Merit Award from the Southeastern
14 Pecan Grower Association.

15 And if my wife were here she'd say I wasn't
16 worthy of any of it.

17 Q Mr. Adams, you testified a moment ago
18 that you participated in the organization of the
19 industry effort to get a Federal Marketing Order,
20 which is now the American Pecan Board. Would you
21 explain your subsequent involvement from getting
22 it started?

1 A The first conversation that was the
2 genesis of the what's now the effort that we're
3 here began in a conversation of growers in the
4 summer of 2011. From that conversation of
5 growers we approached the United Pecan Shellers
6 Association that fall to broach the idea of a
7 single entity that would represent the entire
8 industry.

9 Heretofore there were two national
10 organizations, one grower national organization,
11 one sheller national organization, there were
12 three regional pecan grower organizations, there
13 were 14 state grower organizations, and there
14 were two state commodity commissions. And so we
15 felt like that there -- it made sense to bring
16 the industry under a common umbrella because we
17 had a lot of common goals.

18 And that began what's brought us here
19 today. It transitioned into later that fall,
20 because we were favorably received by the
21 shellers, to form an organizational committee of
22 what was then called the U.S. Pecan Council. It

1 was incorporated in December of 2012, organized
2 as a 501(c)(6).

3 That organizing committee actually
4 sought nominations and selections from the
5 constituent groups, shellers. Helen Watts
6 mentioned that she was selected by the sheller
7 group. Cindy Wise, who's Executive Director of
8 the Texas group, conducted a meeting. That's
9 where I was appointed as a grower.

10 So, anyway, the first American Pecan
11 Board was seated in May of 2013. In November of
12 2013 we met with USDA in Washington, and the
13 purpose of the meeting was to -- we realized that
14 to be an effective group we had to have a
15 sustained funding mechanism and we were looking
16 at several options.

17 And so when the board went to
18 Washington in November of 2013 just to find out
19 from USDA what was possible, and some of the
20 members at your table were there and they were
21 very helpful in instructing us. And we were
22 actually looking at five different funding

1 options, two of which the input from USDA, the
2 checkoff and the marketing order, were described
3 to us.

4 And we left there with a consensus
5 that the marketing order was the most favorable
6 one to proceed with because it was adaptable to
7 the commodity. It was customized. And there
8 were some things because of the diversity of the
9 industry, the 15 state production area, the
10 native and improved, there were just a lot of
11 things that made sense from a marketing order
12 that a checkoff, which essentially is one size
13 fits all, did not address.

14 And so we left there again with a
15 consensus that that was the way to go, and that
16 began really a listening tour. That term has
17 been used but that's exactly what it was.
18 Because we were convinced that going forward that
19 it had to be an industry order. We knew from the
20 past efforts that where pecans have attempted a
21 coordinated effort they had failed.

22 And we felt like that some of the

1 reasons was that there not a -- it was not
2 compiled, it was not composed by the industry.
3 And so we were bound and determined that it was
4 going to be the industry growers, shellers,
5 buyers, accumulators would be involved in the
6 construction of the order.

7 And so we began what's now over a two-
8 year tour, and literally sat down with industry
9 groups, with individual companies, with
10 individuals, and we spoke at numerous
11 conferences. And my family accused me -- I guess
12 it goes back to my math background, they accuse
13 me of counting everything. So I've counted the
14 number of times I've spoken. Today makes 46, Las
15 Cruces made 45 that I've made since May of 2013.
16 All voluntary and all glad to do it.

17 But in all of those meetings we
18 learned something. And so when we came together
19 as a board with the able and welcome assistance
20 of USDA, who have been very cooperative and
21 instructive, we came together at the rules summit
22 in January of this year, we felt like that we as

1 a board had a good understanding of the Act, and
2 we had hoped that we had leant good understanding
3 to USDA of our industry.

4 And so we wanted to compose an order
5 that certainly was within the jurisdiction and
6 the provisions of the law, and we wanted to
7 compose an order that the industry had told us
8 would work. And so that's what the rules summit
9 was all about.

10 And the document that we're
11 considering over these three hearings is a result
12 of that listening tour. And we hope that we've
13 heard well. And so that's why this two-year,
14 over two-year effort and this document is really
15 a compilation of thousands of conversations about
16 what the industry thinks will work.

17 And that's not to say that that there
18 weren't some contentious issues. But I can name
19 a number of instances where someone who was
20 either an industry person -- I'm talking about
21 grower, sheller, buyer, whatever -- was either on
22 the fence or against us and now they're

1 supportive. Because they feel like that we've
2 listened to their concerns.

3 And so that's why we feel confident
4 going forward that this will be customized to the
5 pecan industry, and that's why we feel confident
6 that being here today is really the result of all
7 those voices being listened to.

8 Q Mr. Adams, I don't think you mentioned
9 your position with the American Pecan Board or I
10 didn't hear it. Are you the Chair of the
11 American Pecan Board?

12 A Well, I'm president of American Pecan
13 Board.

14 Q President. Thank you. Have you ever
15 been paid any money for this work?

16 A Not any money but a great group of
17 friends.

18 Q That's right. Focusing on your
19 testimony that you're about to give, in
20 particular did you participate in the drafting of
21 the proposed order section of Exhibit 1 dealing
22 with the creation and organization of the

1 American Pecan Council, Sections 986.45 through
2 .58?

3 A Yes.

4 Q And how did you do that?

5 A Participate in the order?

6 Q In developing those sections.

7 A Well, going back to that and I think
8 the listening tour, the rules summit were all a
9 part of for my participation in the order. I
10 worked directly with attorneys, and I publicly
11 thank both of you. We consulted with, as I said,
12 growers, shellers, handlers, all of those in the
13 industry to draft these provisions.

14 Q Thank you. Let's take a look at
15 Exhibit 1. You've had a chance to receive and
16 review that, which was already tendered in this
17 hearing. Is that so?

18 A Yes.

19 Q And I know that you are very familiar
20 with the proposed Federal Marketing Order for
21 pecans. But to facilitate our discussion today
22 I'm going to refer to Exhibit 1, specifically the

1 portions of the Federal Marketing Order Sections
2 .48 to .58. Mr. Adams, I'll now ask you about
3 specific definitions.

4 Since this has already been introduced
5 as an exhibit, the actual definitions are already
6 in the record. I will not ask you to read each
7 one but will refer to each one by its number
8 designation in Exhibit 1 and ask you a few
9 questions about each. Then the USDA will ask you
10 a few questions, the Judge, and perhaps the
11 audience. Is this agreeable to you?

12 A Yes.

13 Q Okay. Please take a look at Section
14 986.45.

15 A Okay.

16 Q Under what authority is the council
17 formed?

18 A The Act, the Marketing Agreement Act
19 of 1937.

20 Q And what's the intent of the Act and
21 the intended role of the council?

22 A It's the governing body, the

1 administrative group with the help of the
2 Secretary that will actually put the order into
3 effect and oversee it.

4 Q Thank you. Should an agency
5 consisting of growers and handlers be established
6 to administer the program locally and assist the
7 Secretary to carry out the purposes of the
8 program under the Act?

9 A Yes.

10 Q Take a look at the first sentence.

11 MR. HILL: Can I please ask the
12 witness to speak a little bit closer to the
13 microphone, just so we can hear?

14 THE WITNESS: I want to compliment the
15 sound man. From Las Cruces I couldn't hear
16 anything. Now I can hear everything.

17 So, sound man, a good job.

18 MR. HILL: Thank you.

19 THE WITNESS: Thank you, Mr. Hill.

20 BY MR. QUIR S:

21 Q Mr. Adams, the first sentence. Why 17
22 members and 17 alternates?

1 A We wanted many voices from each
2 region. And so we talked about -- we looked at
3 other FMOs. We found some governing bodies with
4 over a hundred seats. We found some with seven
5 or eight. But we didn't want so many that it'd
6 be cumbersome, and we wanted all regions
7 represented, we wanted the diversity of the
8 industry represented on the council. And so we
9 thought that the 17 members was a good fit.

10 Q And helpful for the three regions?

11 A Yes.

12 Q How about alternates?

13 A Same answer. You need people that
14 back up the members, and they need to be
15 knowledgeable of what's going on.

16 Q Did you consider alternatives to the
17 17 --

18 A Yes.

19 Q Okay. And why were those not adopted?

20 A For the very reason I described. We
21 wanted a workable board that was large enough to
22 represent the three regions, the diversity, and

1 to carry out what we'd heard over the last two
2 years.

3 Q And do you think that this group is
4 small enough so that they can travel and meet
5 without undue expense or hardship?

6 A Yes.

7 Q Take a look at the second sentence.
8 Why nine growers, six shellers, and two at-large
9 seats, one for an accumulator and one for a
10 public person?

11 A Well, there's more growers than there
12 are shellers. And so, quite honestly, we put
13 those numbers together after consulting with the
14 members of the board, the American Pecan Board,
15 which were well-represented. The -- we wanted
16 all parts of the industry represented. And,
17 quite honestly, we were writing into the order
18 what we'd heard back from the constituents, the
19 stakeholders that we'd spent a lot of time with.

20 Q Have you discussed this provision at
21 grower and sheller meetings now?

22 A Yes.

1 Q And what was the general reaction to
2 this approach with these numbers in? Not just
3 the general discussion but the discussion of
4 these numbers for council?

5 A Well, there have been some suggestions
6 by some shellers that they should have had equal
7 representation. But it was unanimous by the
8 American Pecan Board, and we had sheller
9 representatives on that board, that this was the
10 best way to go forward. I think that the other
11 provision written into the order, i.e. the two-
12 thirds majority, was a satisfaction to the
13 sheller members. And, quite honestly, again we
14 were responding to what we'd heard from the
15 stakeholders.

16 Q We'll get to Section 986.55, which I
17 think you were just alluding to, especially
18 (c)(I), in a few minutes in your testimony. But
19 I do think that's -- was that a critical part of
20 the balance of making the --

21 A Yes.

22 Q -- shellers comfortable? Thank you.

1 A Yes.

2 Q Did the board consider the differences
3 between grower and handler interest with regard
4 to the balance on the council?

5 A Yes.

6 Q What do you think the differences are
7 between grower and handler interests?

8 A Well, there's some differences but I
9 think
10 -- one thing that I was encouraged by was the
11 unanimity and the common interest that we had in
12 those board meetings. And so good data, as Helen
13 Watts has mentioned, marketing would help us all.
14 The interest of the American Pecan Board was
15 aligned in in choosing that number.

16 Q So there's differences in their
17 interests but there's so many commonalities that
18 it was overcome. Is that your testimony?

19 A Exactly. Exactly.

20 Q Let's project into the future when the
21 council's meeting and there are differences. How
22 are those going to be resolved?

1 A There'll be resolved I think by
2 getting good people, what I call big thinkers
3 that have the interest of the industry at heart,
4 and there's just a healthy exchange. And so I
5 think that's what has proven to be effective at
6 the American Pecan Board. We all get in one room
7 and we kind of take our sheller and grower hat
8 when walk in the door and we put on our pecan
9 hat.

10 Q Perhaps it would help now to take a
11 look at 986.55(c)(I). So in their differences
12 you've got big thinkers and they're thinking.
13 But in certain areas we've said that there --

14 JUDGE GUTHRIDGE: Do you mean
15 .45(c)(I)?

16 MR. QUIR S: No, .55(c)(I).

17 THE WITNESS: Which is what? Okay.

18 BY MR. QUIR S:

19 Q Take a moment to take a look at that,
20 please, Mr. Adams.

21 A That's a super majority issue?

22 Q Right.

1 A Okay. So there'll be good people that
2 have broad-minded thinking with regard to the
3 industry even though they might represent regions
4 and certain groups within regions. But tell me
5 what you think about this section, what is it
6 there for?

7 A The super majority issue?

8 Q Yes, sir.

9 A Well, when we were determining the
10 number of seats and we actually gave deference to
11 the number of growers and having a greater number
12 of seats, this was a deference to the shellers
13 that had fewer number of seats, that they would
14 have a strong vote and that there couldn't be one
15 controlling segment of a significant issue to be
16 voted on. And so that's why the two-thirds
17 majority was put into effect.

18 Q And would you say that these are some
19 of the most important duties and authorities of -

20 -

21 A I would.

22 Q -- council?

1 A I would.

2 Q So the establishment and changes to
3 by-laws, appointment of or administrative issues
4 relating to a program's manager, budget,
5 assessments, compliance and audits, redistricting
6 regions, would you consider that to be sort of a
7 council bill of rights list?

8 A Yes.

9 Q These are very important things --

10 A They are.

11 Q -- that we need super majority but we
12 need industry buy-in across all segments. Is
13 that correct?

14 A That's correct.

15 Q Okay. Thank you. Let's turn back to
16 the numbers of 17 and 17. Why just one
17 accumulator?

18 A Well, an accumulator is -- they're
19 important to our industry. We felt like
20 representation on the council was important. But
21 an accumulator really is going to buy across all
22 three regions, and so it's more of a broad-based

1 position, and we thought that was appropriate.

2 Q Are shellers in their own way
3 accumulators?

4 A They can be, yes.

5 Q So a lot of the interest of the
6 accumulator group would already be represented
7 amongst the shellers?

8 A That's true.

9 Q Why one public member?

10 A I think that's in the law. But I do
11 think that that's a positive input.

12 Q Why is that positive?

13 A Well, if you -- let me go back to
14 again what we heard from the industry. A number
15 of things were key. One key issue was that the
16 governing, the administrative group of the order
17 would be competent, would have a real interest in
18 the industry. In other words, you'd have someone
19 that would be committed to improving the industry
20 through this order. And so I think that similar
21 job description for a public member would be
22 appropriate.

1 And so a public member coming from
2 outside the industry looking through another set
3 of glasses, giving another perspective, again if
4 they were interested in what they were doing and
5 not just put there to satisfy, you know, a
6 provision, I think that's tremendously helpful.
7 In fact, we had two public members on the
8 American Pecan Board.

9 Q Would it also allow you to have
10 perhaps greater diversity with regard to the
11 council make-up?

12 A No question.

13 Q Thank you. I'd like you to turn your
14 attention to the third sentence. On the overhead
15 it is the top sentence on the second page that
16 begins "the grower and sheller nominees." Take a
17 moment just to look at that.

18 Mr. Adams, why do they need to be
19 growers and shellers at the time of their
20 nomination and for the duration of their tenure?

21 A They have to have a vested interest in
22 what's going on. I mean they need to be a

1 stakeholder.

2 Q Thank you. Take a look at the next
3 sentence. Mr. Adams, why are the nominees for
4 grower and sheller position to be selected by the
5 Secretary from the nominees submitted to the
6 council?

7 A Ask your question again because I'm
8 not following that.

9 Q Yeah.

10 A I read that.

11 Q Yes, sir. I'm in (m)(I), and I'm
12 asking you why are the nominees for grower and
13 sheller position to be selected by the Secretary
14 from nominees submitted to the council?

15 A Well, we want industry buy-in. We
16 also want diversity. We want different
17 backgrounds, because I think diverse positions,
18 heads, et cetera, come up with a better decision.

19 Q People from all backgrounds, Mr.
20 Adams?

21 A Yes.

22 Q People from all regions?

1 A (No audible response.)

2 Q Okay. People from all regions?

3 A Yes.

4 Q People with good reputations in the
5 industry?

6 A You bet.

7 Q Thank you. Why are the nominees for
8 at-large positions selected by the council
9 without input particularly from accumulators?

10 A Well, as I said, there's not many pure
11 accumulators to pull from. That pool is small.
12 And the seated 15 members would have a good idea
13 of who would best serve in that position. And it
14 would allow the council to ensure that the board
15 had demographic diversity. Again going back to
16 the wisdom of the 15 seated members, I think
17 their wisdom would be important in selecting that
18 position.

19 Q Did you see this in other Federal
20 Marketing Orders that you reviewed?

21 A Yes.

22 Q Why does the Secretary pick the final

1 council and alternates, not the growers and
2 shellers, who just nominate?

3 A Well, that's in the law. But I think
4 the law makes sense. You know, since we're
5 getting the benefit of the Act to make
6 assessments on the entire handler community, the
7 council needs to be a well-run organization. And
8 the oversight of the Secretary is appropriate. I
9 mean I believe that.

10 The benefit, if you will, of uniting
11 the industry is greater than any USDA oversight
12 burden. The oversight of the USDA in the
13 selection of the council and alternates may in
14 fact prove to be very helpful in the future.

15 Q Discuss the regional diversity of the
16 Board as laid out in Section 986.45(a).

17 MR. QUIR S: Would you please put that
18 up on the screen?

19 BY MR. QUIR S:

20 Q Let me let you take a minute to read
21 it, then I'll re-ask my question, Mr. Adams.

22 A Okay, you can ask your question.

1 Q Discuss the regional diversity of the
2 board as laid out in Section 986.45(a).

3 A Well, the regional diversity goes back
4 to the three growing regions in the U.S., and
5 those regions were set up based on common
6 features. There's about a -- the historical
7 production from those three regions has been a
8 third, third, third.

9 There is, as you heard in my testimony
10 on Monday talking about the different farms from
11 east to west. So you've got horticultural
12 differences, you've got production differences,
13 you've got climate differences, you've got any
14 number of samplings that may be different from
15 east, central and west.

16 And so we felt like that that was a
17 way that the industry, the 15 states could be
18 well-represented. And so that's why we chose to
19 divide the regions up that way.

20 Q Thank you. Mr. Adams, if you'd turn
21 and now look at subsection (b) of 986.45?

22 A Did you say (d)?

1 Q (B).

2 A (B).

3 Q Especially (b)(I) and (ii), if you
4 would, please. Let me know when you've had a
5 chance to read those.

6 A Which one are we looking at, (b)(I)?

7 Q I'm looking at (b)(I) and (ii).

8 A Okay, I'm with you. Okay.

9 Q Mr. Adams, were you present for Dr.
10 Hudson's testimony on Section 986.45(b) in Las
11 Cruces?

12 A Yes.

13 Q Okay. When we were discussing the
14 size diversity of grower and sheller seats as
15 described here, there's a provision in number one
16 where it says we want all growers and shellers
17 represented but we specifically protected the
18 small growers and shellers with a reserved seat,
19 one for growers that -- and this says "do not
20 farm more than 175 acres and one for shellers
21 that is less than 12-1/2 million pounds." We'll
22 come back to them later.

1 Do you recall when Dr. Hudson
2 suggested it would be clearer -- I think on the
3 suggestion of the Judge -- that in the language
4 of (b)(I) where it says "acreage does not exceed
5 175," that it would be clearer if it says
6 "acreage is less than 176." Do you recall that?

7 A Yes.

8 Q And do you agree that that would be --

9 A I do.

10 Q -- clearer there?

11 A Yeah.

12 Q Okay. We'll come back to that later
13 in the next section, but I just wanted to confirm
14 you thought that was a good idea to make that
15 change.

16 A I do.

17 Q Thank you. But you do agree with the
18 concept of needing a small grower seat and a
19 small sheller seat. Is that correct?

20 A No question.

21 Q And why is that?

22 A Well, again going back to how diverse

1 the industry is, I think it's appropriate to have
2 representation of large, small, regional. And so
3 by specifying one seat small grower seat and one
4 seat as a small sheller seat would assure again
5 deference to a important part of the industry.

6 Q Thank you, Mr. Adams. And so explain
7 how y'all came to the size qualifications for
8 large and small growers and large and small
9 shellers. How was that arrived at?

10 A There were a number of factors. We
11 ran numbers. We also looked at the definition in
12 the Small Business Administration of what a small
13 and large business is. And, you know, at some
14 point you pick a number. But most of that was
15 done by figuring what the return was in the --
16 what the return was to that small grower and if
17 in fact that kind of captured that group of
18 growers. And that group of shellers same way.

19 Q So, in conclusion, to protect the
20 small growers you think 176 is the right split
21 between large and small growers.

22 A I do, yeah.

1 Q Okay. So to preserve the seat for the
2 small growers. And with the small shellers, you
3 do believe that's between the one million pounds
4 of inshell pecan shelled and the 12-1/2 million
5 pounds.

6 A I do, yes.

7 Q Okay. Thank you. If you'll turn your
8 attention now to subsection (c).

9 A Yes.

10 Q Take a look and review that, please.

11 A I have.

12 Q Why did you include subsection (c)?

13 A Well, again, we don't have a perfect
14 vision forward, and I think that allows for, if
15 conditions change that allows for the Secretary
16 to address the changing times. And so that's why
17 that provision was added.

18 Q You heard Ms. Watts and Dr. Hudson
19 address this issue, but what do you say to a
20 skeptic that says we vote on this system but the
21 rules say that the council can just scrap it all
22 and put in new representation?

1 A Say that again.

2 Q Yes, I'm in (r)(I), and I would say --
3 what do you -- you've heard the testimony of Dr.
4 Hudson and also --

5 A I have.

6 Q -- Ms. Watts, and they've addressed
7 this issue. But what do you say to a skeptic who
8 says we vote on this system but the rules say the
9 council can just scrap it all and put in new
10 representation?

11 MR. DAVIS: Put up .55.

12 (Pause)

13 BY MR. QUIR S:

14 Q Did you understand the question, Mr.
15 Adams?

16 A I'm not sure I do.

17 Q In (c) it says "a council may
18 recommend, subject to the approval of the
19 Secretary, revisions to the above requirements
20 for grower and sheller seats to accommodate
21 changes within the industry."

22 I'm just asking you what was that

1 provision in there for?

2 A Well, I liked Helen's answer better
3 than mine. But I think that's in there --
4 because she gave a good answer. Again it's to
5 allow flexibility for -- to address future
6 problems. The super majority issue and a council
7 that again had the best interest of the industry
8 in mind I think is going to be an overriding
9 factor.

10 But again an answer to that skeptic is
11 that the USDA oversees the order. The Secretary
12 has that discretion. But the order as it's set
13 up, the council that is set up is going to have
14 the best interest in mind, and it would be highly
15 unlikely that the Secretary's going to come in
16 and override the council.

17 Q Thank you, Mr. Adams.

18 MR. QUIR S: I have no further
19 questions of this witness at this time.

20 JUDGE GUTHRIDGE: Are there any USDA
21 questions?

22 MS. VARELA: Jen Varela, USDA.

1 CROSS-EXAMINATION

2 BY MS. VARELA:

3 Q Mr. Adams, I want to follow up on that
4 same paragraph you were just talking about, and
5 specifically responding to that idea that it
6 might be too easy to make changes to something so
7 important. Knowing what you've learned about the
8 process of amending an order when it's already in
9 place, what's your understanding of what the
10 alternative would be if there were some changes
11 in the industry that needed to be reflected in
12 the order? What would that process be if the
13 industry changed and you needed to make some
14 changes to this makeup here?

15 A How would that be done?

16 Q How would that be done if you didn't
17 have this provision here?

18 A Well, I'm not sure how it would be
19 done. But I think there's an amendment section
20 in the order that would allow for that.

21 Q And what is your understanding of the
22 usual timeframe for putting an amendment in

1 place?

2 A I don't have one.

3 Q Okay. Thank you.

4 MS. SCHMAEDICK: Melissa Schmaedick,
5 USDA.

6 BY MS. SCHMAEDICK:

7 Q Mr. Adams, I kind of had the same
8 question that Ms. Varela had, but let me approach
9 it in a different way. So based on your
10 statement, you said that in this proposed
11 paragraph (c) that it would allow the council to
12 make recommendations subject to the approval of
13 the Secretary. Right?

14 Again based on your experience, is
15 that -- based on your experience as well as the
16 intent of the board in terms of drafting the
17 guidelines for making such decisions, is that
18 type of recommendation or decision something that
19 could be done quickly and easily without any
20 discussion?

21 A No.

22 Q So would there be a process involved?

1 A Yes.

2 Q Yes. But is it important for the
3 future council to be able to have the authority
4 to make recommendations?

5 A I think so, yeah.

6 Q Does that provide some flexibility to
7 adapt to future changes?

8 A It does.

9 Q So if this paragraph (c) didn't exist,
10 would that council have that flexibility?

11 A No.

12 Q So if that flexibility wasn't there
13 and something really needed to be changed in
14 terms of -- USDA terminology, we refer that to a
15 formal amendment. So if there was a structural
16 change that needed to happen and you didn't have
17 this flexibility, in order to make that change
18 would a whole new process of a public hearing and
19 everything that we're doing now, would that be
20 required?

21 A Right. And I see the reason. In
22 fact, we were well-advised during the process to

1 put this flexibility in, and I think it makes
2 sense. Because we don't know what the production
3 area's going to look like, and we don't know if
4 the production is going to change. So yes, that
5 was done so that we wouldn't paint ourselves in a
6 corner.

7 Q All right. But having said that, that
8 flexibility, there's still a process and a due
9 process that needs to be followed. Correct?

10 A Yes.

11 Q Right. And are you confident that
12 through that process there won't be irrelevant or
13 inappropriate changes made without forethought?

14 A I would sure hope so.

15 Q Okay. Thank you.

16 MS. SCHMAEDICK: No further questions.

17 JUDGE GUTHRIDGE: Are there any more
18 USDA questions?

19 (No response.)

20 JUDGE GUTHRIDGE: Mr. Quirós?

21 MR. QUIR S: Yes, just one follow-up.

22 DIRECT EXAMINATION

1 BY MR. QUIR S:

2 Q So if in the future, just say
3 practically, you determine that you were not
4 getting enough small sheller seat or small grower
5 seat nominations because small growers or small
6 shellers had changed from 176, below 176 acres or
7 below 12-1/2, you could make adjustments to make
8 sure you had a diverse council. Is that correct?

9 A Yes.

10 Q All voices of the industry would be
11 heard.

12 A Yes.

13 Q Thank you.

14 MR. QUIR S: No further questions on
15 this section.

16 JUDGE GUTHRIDGE: Any USDA questions?

17 CROSS-EXAMINATION

18 BY MS. CHILUKURI:

19 Q Mr. Adams, do you have any estimates
20 as to how many shellers fall above and below the
21 12.5 million pounds threshold?

22 A It is a rough estimate, but yes. I

1 made -- we actually polled the industry, and the
2 numbers, the best numbers that we could come up
3 with is that there were probably 250 handlers of
4 which only 50 -- or I mean shellers of which only
5 50 would be above the million pounds. And of
6 that only about 14 or 15 would be above the 12-
7 1/2.

8 Q Just so I'm understanding. You said
9 15 to 15 are above 12.5 million?

10 A Uh-huh.

11 Q And 50 would be above one million?

12 A One million.

13 JUDGE GUTHRIDGE: Fifty in addition to
14 the 14 to 15?

15 THE WITNESS: No. Again, you need to
16 understand this was just rough. I had to come up
17 with a number based on the polling that we did.
18 But 50 that were above the -- 50 above the
19 million pounds and of those 50, 14 to 15 were in
20 that large sheller category.

21 BY MS. CHILUKURI:

22 Q And the original number of 250 refers

1 to the one million pound threshold in the
2 definition section?

3 A Below the -- yeah. That would be just
4 a very small -- I mean that could be a roadside
5 sheller. I mean that's just a --

6 Q So 250 is not necessarily the sheller
7 definition that --

8 A Right.

9 Q Okay. So just to clarify once again.
10 So 50 refers to the commercially viable shellers.

11 A Yes.

12 Q Thank you.

13 BY MR. HILL:

14 Q Can you please look at Section
15 986.53(d) as in David.

16 A What?

17 Q .53(d).

18 A Say that again, Mr. Hill.

19 Q 986.53 --

20 A Three?

21 Q -- (d), yes, as in David.

22 A .53(e).

1 Q D.

2 A Okay. Powers. To recommend to the
3 Secretary amendments to this part, is that it?

4 Q Yes.

5 A Okay.

6 Q (d) says to recommend to the Secretary
7 amendments to this part. Do you read that to
8 give you some of the same powers, the same leeway
9 that you stated in Section .45(c)? Would you
10 read that -- would you interpret that the same
11 way?

12 (Pause)

13 A .45(c)?

14 MR. DAVIS: I've got it up on the
15 overhead now.

16 THE WITNESS: Oh.

17 MR. DAVIS: I finally found it.

18 MR. HILL: And related to 45(c), Mr.
19 Davis, if you have it.

20 THE WITNESS: Yes. Yes.

21 MS. SCHMAEDICK: Your answer is yes,
22 it is different?

1 THE WITNESS: No. No, no.

2 MR. DAVIS: If it's the same.

3 THE WITNESS: It's the same. All
4 right. I mean in the context where the, again
5 where the Secretary would have discretion, that's
6 what I was answering to.

7 MS. SCHMAEDICK: Could I -- Melissa
8 Schmaedick, USDA. Could I follow up Mr. Hill's
9 question?

10 THE WITNESS: Yes.

11 BY MS. SCHMAEDICK:

12 Q So -- I'm trying to formulate this
13 question, so give me a minute.

14 A And I'm trying to understand the
15 difference, so.

16 Q Okay. So, Mr. Adams, when you were
17 working with the American Pecan Board did you
18 discuss the need to have flexibility in terms of
19 making recommendations to USDA, the Secretary for
20 consideration and the importance of having a
21 method which was relatively short compared to
22 this process of a formal hearing? Is it -- let

1 me rephrase that.

2 So in your work with the board were
3 there some areas where the board felt that the
4 future council needed flexibility to make
5 suggestions and to have those suggestions still
6 go through the process of a public comment but to
7 have that public comment and then the, if
8 supported, the effectuation of that change happen
9 relatively quickly, let's say three months?

10 Was that the intent in terms of adding
11 in language similar to the language that was
12 described in paragraph (c) that we were just
13 talking about, the council being able to make
14 recommendations to the Secretary and having that
15 flexibility?

16 A Let me see if I can state where I
17 think you all are going. And then -- because
18 I've studied some other marketing laws. Take
19 almonds, for instance. Almonds has the -- I
20 don't know what they call their council but they
21 have the discretion to set an assessment rate
22 based on prior year numbers. And they do that

1 relatively easily. Okay?

2 In other cases there are more
3 substantive provisions that take -- they're going
4 to have a longer range effect that need to be
5 considered in a more deliberative manner, that
6 take more discussion by the -- they require
7 greater process.

8 So there are some issues like an
9 assessment rate that you can describe pretty
10 easily, and there are others that take more
11 deliberation. And so I think that's the intent
12 here. Now, how -- what it relates to .45 or
13 .5(c) or .13 or .45 I don't know. But I'm
14 telling you that's what the intent was.

15 There are some issues that are more
16 long-range and take a little more vision that we
17 would take to the Secretary or make
18 recommendations to the Secretary. And there are
19 others that I think that he wouldn't want us to
20 bother him with or she wouldn't want us to bother
21 her with.

22 So that's kind of where I come down.

1 Now, how it relates to these numbers. I'm hoping
2 that's where you're headed, Ms. Schmaedick.

3 Q Thank you for that explanation.
4 That's very helpful. So just to clarify then, in
5 your opinion there is a difference between the
6 sort of quick recommendation and not flexibility
7 and then the more substantive weighty issues that
8 need to have full attention and a public hearing
9 and the full process.

10 A You bet. There's two broad
11 categories, yes.

12 Q And both of those processes have
13 importance, they just are appropriate in
14 different contexts.

15 A That's correct.

16 Q Okay. So is it important for the
17 council to be able to have that flexibility for
18 the shorter process?

19 A Yes.

20 Q And is it important for the council to
21 be able to also make recommendations that require
22 the longer process?

1 A Yes.

2 Q So in 986.53 in your opinion does that
3 statement give the future council the authority
4 to make recommendations for the longer amendment
5 process?

6 A Yes.

7 Q Thank you.

8 MS. SCHMAEDICK: No further questions.

9 JUDGE GUTHRIDGE: Is there any more
10 USDA questions?

11 (No response.)

12 JUDGE GUTHRIDGE: Mr. Quirós?

13 MR. QUIR S: Yes, thank you,
14 Your Honor.

15 DIRECT EXAMINATION

16 BY MR. QUIR S:

17 Q Please turn to Section 986.46, Council
18 Nominations and Voting.

19 JUDGE GUTHRIDGE: Mr. Quirós?

20 MR. QUIR S: Yes.

21 JUDGE GUTHRIDGE: Could I ask at this
22 point it's 12:25, do you want to get into another

1 section now or is there any preference on
2 breaking for lunch at this time?

3 MR. QUIR S: Your Honor, there may be
4 wisdom on breaking for lunch. This is probably
5 the longest section that we will ask Mr. Adams
6 about. And subject to USDA's preference, it
7 might be better to take a break now. Because I
8 think it may take a while to go through this
9 section.

10 JUDGE GUTHRIDGE: All right.

11 Ms. Ritchy? Where'd she go?

12 MS. RITCHY: Hi. I'm sorry.

13 JUDGE GUTHRIDGE: Has anybody signed
14 up to --

15 MS. RITCHY: No.

16 JUDGE GUTHRIDGE: Okay. All right.
17 It's 12:26. Come back at 1:30.

18 MR. QUIR S: Thank you, Your Honor.

19 JUDGE GUTHRIDGE: Recess until 1:30.

20 (Off the record at 12:26:24 p.m.)

21 (On the record at 1:30:41 p.m.)

22 JUDGE GUTHRIDGE: Back on the record.

1 MR. DAVIS: As we mentioned during the
2 break, we appreciate your accommodation, the
3 accommodation of the USDA. We would like to hold
4 the rest of Mr. Adams's testimony for a later
5 time in order to accommodate witnesses that have
6 to be at other places and had only allotted a
7 certain amount of time.

8 So we would like to call Ms. Cindy
9 Wise.

10 JUDGE GUTHRIDGE: And I assume there's
11 no objection from USDA.

12 MR. HILL: There's no objection,
13 Your Honor.

14 JUDGE GUTHRIDGE: Please raise your
15 right hand.

16 (The oath was administered.)

17 JUDGE GUTHRIDGE: Thank you.
18 Whereupon,

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

1 DIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q Good morning, Ms. Wise. Would you --
4 you've been sworn but please state your full name
5 and spell it for the record.

6 A Right. Cindy, C-I-N-D-Y, Wise, W-I-S-
7 E.

8 Q Ms. Wise, let me hand you what has
9 been introduced in this record as Exhibit 1 and
10 Exhibit 23. We may refer to those. Exhibit 1 is
11 the proposed marketing order for pecans. And I
12 just ask if you had an opportunity to review
13 that?

14 A Yes.

15 Q Okay. And then Exhibit 23 is the
16 summary of the economic analysis of the proposed
17 order by Dr. Marco Palma. And again have you had
18 an opportunity to review that?

19 A Yes.

20 Q Ms. Wise, I understand that you may
21 have a prepared statement that you would like to
22 give to the tribunal.

1 A I do.

2 Q Please proceed.

3 A As stated, I'm Cindy Wise. I live in
4 Bryan, Texas. I'm currently the Executive Vice
5 President of the Texas Pecan Growers Association
6 and serve as editor of our industry's national
7 publication, Pecan South Magazine.

8 I have been authorized by the board of
9 the Texas Pecan Growers Association to testify on
10 its behalf in support of a Federal Marketing
11 Order for pecans, and I've written a letter on
12 behalf of my organization to the Secretary of
13 Agriculture in support of the proposed Federal
14 Marketing Order. It was co-signed by myself and
15 our current president Joe Massey. I'm also
16 testifying in my individual capacity in support
17 of the Federal Marketing Order for pecans.

18 Texas Pecan Growers was formed in 1921
19 and incorporated in 1967 --

20 Q Let me interrupt you just one second,
21 if I could. Your resume is attached to your
22 statement?

1 A Yes, it is. Sorry.

2 Q And your -- the letter from the Texas
3 Pecan Growers Association is also attached to
4 your statement. Is that correct?

5 A I provided that, yes.

6 Q We have it.

7 A Yes.

8 MR. DAVIS: Your Honor, the proponents
9 tender Exhibit 41, the statement, resume, and
10 letter from the Texas Pecan Growers Association.

11 (The document referred to
12 was marked for
13 identification as Exhibit
14 41.

15 JUDGE GUTHRIDGE: Is there any
16 objection from USDA?

17 MS. SCHMAEDICK: No objection.

18 JUDGE GUTHRIDGE: Any objection from
19 the audience?

20 (No response.)

21 JUDGE GUTHRIDGE: Hearing on
22 objection, Exhibit 41 is admitted into the

1 record.

2 (The document previously marked as
3 Exhibit 41 was received in evidence.)

4 MR. DAVIS: Thank you.

5 BY MR. DAVIS:

6 Q Now proceed, if you would, please.

7 A All right. The purpose of the Texas
8 Pecan Growers Association is to assist Texas
9 pecan growers in growing pecans profitably
10 through education, research, and promotion of
11 consumption.

12 It has over 600 members.
13 Approximately 50 percent of our members are
14 classified as small businesses under the
15 guidelines provided by the Small Business
16 Administration, which is less than \$750,000 in
17 annual gross revenue from pecans.

18 The American Pecan Board has kept our
19 organization informed about its efforts to
20 propose a Federal Marketing Order. We have been
21 informed about the process and we have been given
22 an opportunity to participate in that process.

1 The American Pecan Board's information has been
2 often reproduced or reported on in Pecan South
3 Magazine.

4 Q Let me interrupt you again, and I'm
5 sorry.

6 A That's okay.

7 Q Tell us a little more about pecan
8 growers magazine, how is it distributed and in
9 what geographic areas and how is it physically
10 distributed?

11 A Right. Pecan South -- I'm holding up
12 a copy of right here -- it's a monthly magazine,
13 it's owned and published by the Texas Pecan
14 Growers Association. It serves as basically the
15 national publication for the pecan industry.

16 It's distributed, our current
17 distribution is, any given month, between 4300
18 and 4400. The vast majority of those are pecan
19 growers, and that includes other industry
20 participants as well. It goes to members of most
21 all of the pecan growers associations across the
22 United States, from California, Arizona, New

1 Mexico, Oklahoma, Louisiana, Alabama, Georgia,
2 Florida. We cover all the pecan states, and we
3 have some international distribution as well.

4 Q Would it be accurate to say that you
5 have some recipients of the magazine in each of
6 the 15 states that comprise --

7 A Yes.

8 Q -- the territory covered by this
9 proposed FMO?

10 A Yes. We're all -- we have subscribers
11 in all of the pecan states.

12 Q And is Pecan South also available on
13 line?

14 A It is.

15 Q Approximately how many articles
16 concerning, referring, relating to the proposed
17 FMO would you say that Pecan South has run in the
18 last two years?

19 A I didn't count them up but I would
20 estimate anywhere from six to 10 articles, more
21 than six I believe, probably eight to 10 articles
22 over the last two years.

1 Q And in particular did Pecan South
2 provide notice to the industry about these
3 hearings?

4 A We did. It's been reported in --
5 since the hearings were announced it has been
6 included in every magazine that's been published
7 since the announcement.

8 Q Thank you so much. Now, returning to
9 your statement, do you have before you Exhibit
10 23?

11 A Right.

12 Q Okay. Is that the economic analysis
13 proposed, the proposed order by Dr. Marco?

14 A Yes.

15 Q Okay. Please continue then.

16 A All right. And I have reviewed that
17 analysis of the proposed order by Dr. Palma. The
18 Texas Pecan Growers Association is fully aware of
19 the anticipated cost that will be incurred by its
20 members if the Federal Marketing Order for pecans
21 is implemented. And we do not believe that these
22 costs will be unduly burdensome on our members

1 regardless of their size.

2 Further, we believe that the benefits
3 of such an order will result in increased
4 marketing, more accurate data of crop production,
5 and increased domestic demand for pecans, and
6 will greatly outweigh any burden that would be
7 placed on our members.

8 The Texas Pecan Growers Association
9 does not believe that the American Pecan Council,
10 which will be formed as a part of the Federal
11 Marketing Order, will in any way conflict with
12 the goals and purposes of the Texas Pecan Growers
13 Association. To the contrary, we believe the
14 American Pecan Council will complement our
15 efforts.

16 Finally, we understand that under the
17 proposed Federal Marketing Order only growers
18 with more than 30 acres or 50,000 pounds of
19 pecans will be eligible to vote to approve or
20 disapprove of the proposed order.

21 We have discussed this among the
22 membership of the Texas Pecan Growers

1 Association, and we believe that this is a
2 reasonable and fair classification. Because any
3 grower that is smaller than this would not be a
4 commercial entity. It's the commercial pecan
5 growers who really move the pecan industry
6 forward.

7 In conclusion, the Texas Pecan Growers
8 Association fully supports the proposed marketing
9 order for pecans, and I will encourage our
10 members to vote in favor of it. And I personally
11 endorse the proposed Federal Marketing Order for
12 pecans, and I encourage the Secretary to
13 implement it as soon as it is approved.

14 Q If I could ask you to take a look at
15 -- I'm putting up now what is attached to Exhibit
16 41, the letter from the Texas Pecan Growers
17 Association. And if you would not mind reading
18 that into the record, I would appreciate it.

19 A Okay. I forgot to bring my, didn't my
20 coffee. All right.

21 Yes. The letter that we authored to
22 Secretary Vilsack states: "The Texas Pecan

1 Growers Association is writing you in support of
2 the Federal Marketing Order for pecans currently
3 being promulgated by the American Pecan Board.

4 "Our industry has and continues to
5 face issues of price and supply instability in
6 the market. This situation inhibits our effort
7 to provide a consistent quality supply of pecans
8 to domestic consumers at a price that supports a
9 profitable return to producers and processors.

10 "We believe that a Federal Marketing
11 Order will contribute to a more stable market
12 environment that is favorable to growers, buyers,
13 shellers, and consumers. The Texas Pecan Growers
14 Association goes on record in favor of the order
15 and greatly appreciates your support."

16 Q Thank you so much, Ms. Wise. Time is
17 short but I would like to devote just one second
18 on -- in the winter edition of Pecan South was
19 there a cover story, and dare I even say an
20 inspirational cover story about a new pecan farm
21 that had been started in Georgia called Key
22 Springs Pecans?

1 A There was.

2 Q And it's owned by a Mr. Quirós and a
3 Mr. Davis?

4 A That's correct.

5 Q Would you agree with me that Mr.
6 Quirós was quoted extensively in that article?

7 A He was.

8 Q And there was a picture of Mr. Quirós
9 in that article, was there not?

10 A Yes, there was.

11 Q Now, I'll remind you you're under
12 oath. Did Mr. Quirós in any way influence you to
13 come and interview him while Mr. Davis was on
14 vacation?

15 A It was strictly a matter of the
16 opportunity arose.

17 Q Okay. Well, thank you very much for
18 the article, it was very good. Thank you.

19 MR. DAVIS: We have no questions at
20 this time, Your Honor.

21 JUDGE GUTHRIDGE: Does USDA have any
22 questions?

1 MS. SCHMAEDICK: Melissa Schmaedick,
2 USDA.

3 CROSS-EXAMINATION

4 BY MS. SCHMAEDICK:

5 Q Good afternoon, Ms. Wise.

6 A Hello.

7 Q Thank you for your testimony. So you
8 stated that you are currently the Executive Vice
9 President of the Texas Pecan Growers Association.
10 Is that correct?

11 A Correct.

12 Q How long has this organization been
13 around?

14 A In existence?

15 Q Uh-huh.

16 A Since 1921. We claim to be the oldest
17 agricultural commodity organization in the state.

18 Q Fabulous. Thank you. And how long
19 have you been with the organization?

20 A Over 30 years.

21 Q Thank you. So I first want to ask you
22 about your constituents, the growers of Texas.

1 And you mentioned the study by Dr. Palma. Have
2 you read that study?

3 A I have -- I could not give that back
4 to you in a lot of detail but I have read it.

5 Q Okay. That's okay. So but in terms
6 of your general impressions of the study, did Dr.
7 Palma accurately capture the profile of your
8 constituents in terms of looking at costs and
9 sort of their general operation, the challenges
10 and the things that impact their operations?

11 A Yes, I think so.

12 Q So based on your understanding of the
13 study and your knowledge of your constituents, do
14 you think that study was an accurate reflection
15 and therefore the conclusions that were reached,
16 do you think those are applicable?

17 A I do. And I think it was a fairly
18 conservative approach, not overstated in any way
19 by Dr. Palma.

20 Q Thank you. You mentioned briefly that
21 your organization does -- well, you support Texas
22 pecan growers in growing pecans profitably

1 through education, research, and promotion of
2 consumption. Can you give me an example of some
3 of the activities that you do other than the
4 magazine?

5 A Yes. One of our biggest projects each
6 year is to host an annual conference and a trade
7 show, which we just completed last week in fact.
8 It's a large event each year. We have two full
9 days of educational programming and a trade show
10 that corresponds with that. We have -- we
11 usually conclude that event each year with a
12 field day where growers are able to see out in
13 the field things either related to growing or
14 processing.

15 Q And you mentioned research. Do you
16 have any current research projects?

17 A We are giving funds to researchers who
18 are doing research through Extension at Texas
19 A&M.

20 Q Thank you. And so on page 2 of your
21 testimony you say "we believe the American Pecan
22 Council will complement our efforts." Does that

1 mean that -- do you anticipate any sort of
2 negative impact on your organization if this
3 program were to become effectuated?

4 A No, I don't. Our resources, since
5 we're only a state organization our resources are
6 fairly limited. I anticipate that the resources
7 that a federal order would generate would be much
8 more significant, and they would be able to
9 expand the scope of those activities far greater
10 than what we do.

11 Q For example, in the area of research
12 would you consider maybe cooperative pooling of
13 resources? Would that be beneficial?

14 A Absolutely.

15 Q And is that the type of cooperation
16 that you were --

17 A Yes.

18 Q -- anticipating?

19 A Yes.

20 Q Okay. Thank you. Based on your -- so
21 let me just again make sure that you've read
22 Exhibit 1, which is the proposed program. So

1 you're aware of the proposed council and the
2 regions that are identified?

3 A Yes.

4 Q So in your opinion does the proposed
5 council and the representation of growers per
6 region and shellers per region, are you confident
7 that that accurately or will accurately and
8 fairly represent your area in the program?

9 A Yes, very confident that it does.

10 Q Thank you. And then, lastly, given
11 your extensive experience with working with an
12 association and in your reading of the proposed
13 program, were you able to follow the certain
14 sections that have to do with the administrative
15 functioning of the program? I guess I'm
16 referring to the types of responsibilities that
17 the council and the staff would have.

18 A Yes.

19 Q Do you think that those are reasonable
20 and necessary for a effective program?

21 A I believe so.

22 MS. SCHMAEDICK: That concludes my

1 questions. Thank you.

2 MR. HINMAN: Don Hinman, USDA.

3 BY MR. HINMAN:

4 Q Good afternoon.

5 A Hi.

6 Q You had clearly testified about
7 representing the views of the Texas Association
8 in regard to the promotional benefits as
9 specified in Dr. Palma's study. So I want to ask
10 you about two other benefits that have been the
11 subject of testimony by the proponents.

12 A Okay.

13 Q You mentioned more accurate crop data
14 and, you know, market data. Could you say a bit
15 more about what you think the Association members
16 feel about the benefits of more accurate crop and
17 market data?

18 A I think our members feel much like Ms.
19 Watts expressed this morning, that the lack of
20 accurate data is very important -- I mean the
21 lack of it is very apparent in our industry, and
22 having accurate data would be of great value to

1 growers as well as to processors, which she
2 represented.

3 But growers would benefit equally from
4 that, would allow them to have better ideas of
5 the prices that they should be selling their
6 pecans for. And so it would be tremendously
7 beneficial for growers.

8 Q Thank you. And one additional benefit
9 is the one that has been discussed by the various
10 proponent witnesses, relates to 986.69,
11 Authorities Regulating Handling. And in that
12 authority what would be, what could be adopted
13 through a Federal Marketing Order would be, for
14 example, standards for grade sizes and qualities.

15 Now, was that benefit also discussed
16 by the Texas Association and did they discuss the
17 -- was it the view of the organization that there
18 was substantial benefit to be gained from -- if
19 those were implemented, that those would result
20 in substantial benefits to the industry? That
21 would be standards for grade sizes or qualities.

22 A I think growers would concur that it

1 would be a benefit to have those standards
2 established. It would allow proper recognition
3 of the value of their product. It would be able
4 to allow categories to be distinguished and
5 values established for various categories.

6 Q Thank you.

7 MR. HINMAN: No further questions.

8 BY MS. CHILUKURI:

9 Q Ms. Wise, you say that 600, you have,
10 the Texas Pecan Growers Association has 600
11 members?

12 A Right.

13 Q And approximately 50 percent of those
14 members are small businesses. Of that 50
15 percent, do you know how many would meet the
16 grower definition in the proposed order?

17 A The grower definition being that was
18 it established on acreage?

19 Q Either acreage or pounds.

20 A So --

21 MS. SCHMAEDICK: Minimum 30 acres,
22 50,000 pounds.

1 THE WITNESS: I don't know that I
2 could tell you precisely. Because we don't
3 require that information from our members. We do
4 -- probably at least half of our members fall in
5 our smallest membership -- our membership is
6 categorized by how many trees, bearing trees that
7 the grower has. And we don't do any type of
8 verification process to determine whether the
9 category they selected is accurate or not. But I
10 do know that over half of our members fall into
11 our smallest category of membership, which is
12 under the 30 acres.

13 BY MS. CHILUKURI:

14 Q And I suppose with those members have
15 any of them that you know, have they expressed
16 any concern about the threshold or not being able
17 to participate?

18 A We have probably had comments, one or
19 two comments expressing concern over that, but
20 very few.

21 Q Okay. Thank you.

22 MS. VARELA: Jen Varela, USDA.

1 BY MS. VARELA:

2 Q Ms. Wise, I just wanted to ask you a
3 couple of follow-up questions based on some of
4 the work you've done with Pecan South over the
5 last year as this process has come through.
6 You've been present at a number of the different
7 association gatherings and trade shows that the
8 American Pecan Board has presented at. Correct?

9 A That's correct.

10 Q And how would you characterize the
11 information exchange at those with members of the
12 industry? Was it kind of one-way description or
13 was there a lot of question and answer?

14 A I observed quite a bit of interaction.
15 I've been present when both you and Ms.
16 Schmaedick have presented information and have
17 been available to answer questions, and have seen
18 the interaction and questions presented there.

19 I've also been present when Mike Adams
20 or other members of the American Pecan Board have
21 just presented information about this effort, and
22 they have been entirely, completely available to

1 answer questions. And questions have been posed
2 and answered. So I think there's been a good
3 exchange of information.

4 Q And would you say that was consistent
5 across all of the regions that they visited?

6 A Yes, I would.

7 Q Thank you.

8 MS. VARELA: There are no other
9 questions from --

10 JUDGE GUTHRIDGE: Are there any other
11 USDA questions?

12 MR. HILL: No, Your Honor.

13 MR. DAVIS: I may have just a couple
14 of follow-ups, if I may, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. DAVIS:

17 Q Let me pick up on Dr. Hinman's
18 question about reliable information. Does Pecan
19 South Magazine publish from time to time
20 estimates on the current crop or upcoming crop?

21 A Yes, we do.

22 Q And are there in fact more than one

1 estimate published from time to time?

2 A Yes, there is. We have several
3 informal ones and then we also publish the data
4 that USDA releases.

5 Q Would you say that there is
6 consistency or inconsistency within a given year
7 among and between those estimates?

8 A I would say there's inconsistency.

9 Q Is that an annual recurrent event --

10 A Yes.

11 Q -- that there just seems to be a great
12 difference amount? So there really -- in your
13 opinion, is there currently any really accurate,
14 reliable estimates on the current crop year
15 that's available to the industry?

16 A No.

17 Q Okay. And do you believe that through
18 the workings of the council and the authority
19 that they've been given that they could perhaps
20 come up with much accurate estimates?

21 A Yes, sir.

22 Q And would that be a benefit to your

1 members --

2 A That'd be --

3 Q -- in Texas?

4 A -- tremendously helpful.

5 Q Okay. Let's go back to that -- I'll
6 refer you back to your statement at the bottom of
7 page 2 and the top of page 3 that you understand
8 the qualifications or definitions of grower in
9 this proposal as being 30 acres or 50,000 pounds
10 of pecans. And if I understood your testimony,
11 you have some significant number of members that
12 may be less than 30 acres. Was that your
13 testimony?

14 A Yes.

15 Q But you don't have any data on how
16 many of your members would have less than 50,000
17 pounds of nuts during a given year, would you?

18 A We do not.

19 Q And again would you reiterate your
20 statement that you still believe that those are
21 fair, that's a fair way to determine what kind of
22 grower would be a commercial grower as opposed to

1 more just a hobby grower or a yard orchard?

2 A Yes, I do.

3 Q Thank you.

4 MR. DAVIS: I believe those are all
5 the questions I have, Your Honor.

6 JUDGE GUTHRIDGE: USDA have any
7 questions?

8 MS. SCHMAEDICK: Melissa Schmaedick,
9 USDA.

10 RE CROSS EXAMINATION

11 BY MS. SCHMAEDICK:

12 Q Ms. Wise, I forgot to ask you when I
13 was asking about the potential impact of the
14 proposed marketing order on the Texas Pecan
15 Growers Association do you anticipate your
16 activities, your current activities -- do you
17 anticipate them changing in any way?

18 A No, I do not.

19 Q Okay. Thank you.

20 MS. SCHMAEDICK: No further questions.

21 JUDGE GUTHRIDGE: Any more questions
22 from USDA?

1 (No response.)

2 JUDGE GUTHRIDGE: Mr. Davis?

3 MR. DAVIS: And none from the
4 proponent, Your Honor.

5 JUDGE GUTHRIDGE: Does anyone in the
6 audience have any questions for Ms. Wise?

7 (No response.)

8 JUDGE GUTHRIDGE: Seeing none, Ms.
9 Wise, you're excused.

10 THE WITNESS: Thank you.

11 (Witness excused.)

12 MR. QUIR S: Your Honor, we'd like to
13 call Dan York.

14 JUDGE GUTHRIDGE: While he's handling
15 that, could you please raise your right hand?

16 THE WITNESS: Yes.

17 (The oath was administered.)

18 JUDGE GUTHRIDGE: Mr. Quirós?

19 Whereupon,

20 DAN YORK

21 having been first duly sworn, was called as a
22 witness herein and was examined and testified as

1 follows:

2 DIRECT EXAMINATION

3 BY MR. QUIR S:

4 Q Thank you for joining us today, Mr.
5 York. I understand that you're from Arkansas.
6 Is that true?

7 A That's correct.

8 Q Thank you. We'll get to that in just
9 a moment. As part of the basis for the testimony
10 you're going to give I'm going to ask you if
11 you've received and reviewed a copy of what's
12 been marked Exhibit 1 in these hearings, which is
13 the notice prepared by the USDA and published in
14 the Federal Register that contains the proposed
15 Federal Marketing Order for pecans?

16 A Yes, I have.

17 Q And have you received what's been
18 marked as Exhibit 23, which is an executive
19 summary of the economic testimony that was given
20 by Dr. Marco Palma in these hearings?

21 A Yes, I have.

22 Q Thank you. Mr. York, I understand

1 that you have testimony for us today that you'd
2 like to read that has been introduced in the
3 court. But if you would please go ahead and read
4 it, we would appreciate it.

5 A All right. My name is Dan York. It
6 is spelled D-A-N Y-O-R-K. I live in Little
7 River County, Arkansas. I am the owner of the
8 York Pecan Company. York Pecan Company has a
9 pecan farm in Foreman, Arkansas.

10 We have over 250 acres of pecans
11 currently in production, which are mostly native
12 and seedlings. We are also planting 30 acres of
13 new pecan trees that will not be io production
14 for another seven years, which are improved
15 variety pecans. In 1999 we began the shelling
16 segment of our pecan business.

17 A copy of my resume is attached. I am
18 a fourth generation farmer, and my roots go back
19 to 1887 when my great-grandfather James L.
20 Patterson bought land in Red River Township in
21 Red River County. It was my father Bill York who
22 introduced the family to the pecan business in

1 the 1950s by clearing the bottomland timber and
2 carefully leaving the native pecan trees
3 untouched.

4 Under the Small Business

5 Administration guidelines, we would be classified
6 as a small pecan grower and a small sheller,
7 grower revenue less than \$750,000 and sheller
8 gross revenue less than \$7 million, although a
9 few times in recent years we would have been
10 classified as a large sheller business.

11 I have reviewed the economic analysis
12 summary prepared by Dr. Marco Palma, specifically
13 the projected average price increase from
14 promotion of 6.3 cents per inshell pound for
15 improved and 3.6 cents for native seedling versus
16 the average 2.5 cents and 1.5 cents per inshell
17 pound respectively.

18 As a grower, I am aware of the costs
19 that the proposed Federal Marketing Order may
20 impose on my farm, and I do not believe those
21 costs are unduly burdensome. I believe as a
22 grower that the benefits of the Federal Marketing

1 Order to my farm would greatly outweigh any costs
2 associated with it.

3 I am aware that the proposed order may
4 impose some direct costs on my shelling
5 operation, such as the 1 to 3 cent per pound
6 assessment.

7 I am also aware that there may be some
8 indirect costs, such as the obligation to keep
9 records of the amount of product we handle and
10 the calculation and remittance of assessments to
11 the American Pecan Council. I believe these
12 costs are reasonable are not unduly burdensome.
13 I believe as a sheller that the benefits of the
14 Federal Marketing Order outweigh the costs.

15 In recent years I have seen wide
16 variation in the prices we have received for our
17 pecan crop. Some years late in the season native
18 seedling pecan offerings would receive bids below
19 the production costs or no bid at all. Such wide
20 variation in pricing makes it extremely difficult
21 to plan for my pecan growing operation and even
22 more difficult for my industrial customers to

1 make long-term plans for their use of pecans.

2 Research and development for new
3 pecan-containing products is adversely impacted
4 by this price volatility. While prices for
5 pecans go up and down dramatically from year to
6 year, our costs of production have steadily
7 increased.

8 Also the lack of accurate market
9 information on the anticipated size of the pecan
10 crop in any given year increases the market
11 volatility and makes it difficult for me to
12 negotiate a fair price for my crop or buy pecans
13 fairly from others. The marketing policy
14 information provided for in 986.65 with a
15 required two-thirds vote of the council is
16 exactly the correct way to improve this
17 situation.

18 Increased price stability and more
19 accurate market information would greatly benefit
20 my small family pecan operation. I think my farm
21 and the shelling business would also benefit in
22 the future from grade, size, quality, packaging,

1 shipping protocols and other handling
2 requirements as we compete with other tree nuts
3 for shelf space and consumer attention. We need
4 to have a complete discussion of this
5 industrywide, and the American Pecan Council
6 would be an excellent forum.

7 I understand that under the proposed
8 order only growers with more than 30 acres of
9 pecans or more than 50,000 pounds of average
10 production per year over the last four years will
11 be allowed to vote on the proposed order. In my
12 opinion, the threshold is reasonable because a
13 grower that does not meet this threshold is not a
14 commercial grower. Any grower that is smaller
15 than the proposed threshold would lack the
16 commercial viability to make the required
17 investments to produce pecans.

18 I also understand that only shellers
19 who handle more than one million pounds of
20 inshell pecans per year will be allowed to vote
21 on the proposed order. I believe this is a fair
22 threshold. A sheller below this level would most

1 likely be a seasonable producer serving a small
2 retail customer base whereas a commercial sheller
3 above this threshold would employ a full-time
4 labor force and have extensive capital invested,
5 making year-round production necessary.

6 I also participated in the debate of
7 where the line should be drawn on large and small
8 shellers for the council seats for shellers in
9 each region. I agree that the 12-1/2 million
10 inshell pounds is an appropriate distinction
11 between large and small or medium-size shellers.

12 I am currently the Vice President of
13 the American Pecan Board, and I have been
14 actually involved in the entire process of
15 proposing the Federal Marketing Order.

16 In conclusion, I fully support the
17 proposed Federal Marketing Order for pecans and
18 encourage the Secretary to implement the order as
19 proposed by the American Pecan Board.

20 I'll be glad to try to answer any
21 questions that anyone may have.

22 Q Mr. York, we have a few questions.

1 It's in regard to your resume. If you would
2 please turn to that and help me with that.

3 A Yes, sir.

4 Q Tell me what the Miller-Bowie Co-op
5 is.

6 A Miller-Bowie's a local farmers
7 cooperative in Texarkana, Arkansas.

8 Q And what does BOD mean?

9 A I'm sorry, could you repeat that,
10 please?

11 Q Yes. It says, after that it says BOD.
12 Does that signify --

13 A Oh, that's board of directors.

14 Q And you're on the board of directors
15 --

16 A Yes, I am.

17 Q -- for that group. And tell me about
18 the Red River Valley Association BOD, what is
19 that?

20 A The Red River Valley Association is a
21 four state association of individuals along the
22 Red River who work to improve and develop the Red

1 River Valley.

2 Q And does BOD also mean board of
3 directors?

4 A Yes.

5 Q So you're in a leadership capacity in
6 both of those organizations?

7 A Yes, sir.

8 Q And tell me about the Arkansas Red
9 River Commission Chair, what is that?

10 A The Arkansas Red River Commission is
11 a commission appointed by the governor to again
12 promote and develop the Red River Valley, and I'm
13 the Chairman of the commission.

14 Q And tell us about the last one says
15 National Pecan Shellers Association SEC. I know
16 that you all are in the SEC, I just didn't know
17 what -- explain to us what that is.

18 A Well, thank you for throwing that in.
19 But that's secretary.

20 Q And so you're the Secretary of the
21 National Pecan Shellers Association?

22 A Yes, sir, that's correct.

1 Q And that organization is what, what do
2 they do?

3 A The National Pecan Shellers is
4 comprised of pecan shellers, of course, and we
5 fund research and development projects to try to
6 improve the awareness and improve the consumption
7 of pecans. And we also estimate the crop size
8 and try to do what we can to improve the
9 information for crop size and crop acreage.

10 Q Thank you, Mr. York.

11 MR. QUIR S: Your Honor, we tender now
12 what has been marked Exhibit 42.

13 (The document referred to
14 was marked for
15 identification as Exhibit
16 42.)

17 JUDGE GUTHRIDGE: Any objection from
18 USDA?

19 MS. CHILUKURI: No objection,
20 Your Honor.

21 JUDGE GUTHRIDGE: Is there any
22 objection from the audience?

1 (No response.)

2 JUDGE GUTHRIDGE: No objection having
3 been heard, Exhibit 42 is admitted into the
4 record.

5 (The document previously marked as
6 Exhibit 42 was received in evidence.)

7 MR. QUIR S: We have no further
8 questions of the witness at this time.

9 JUDGE GUTHRIDGE: Are there any
10 questions from USDA?

11 MS. SCHMAEDICK: Melissa Schmaedick,
12 USDA.

13 CROSS-EXAMINATION

14 BY MS. SCHMAEDICK:

15 Q Good afternoon, Mr. York.

16 A Good afternoon.

17 Q Thank you for your testimony. I
18 believe that you are the first witness that we've
19 had the pleasure of speaking with who is a
20 producer of native pecans.

21 A Okay.

22 Q Would you mind if I asked you about

1 native pecans?

2 A No, not at all.

3 Q Okay. So just based on some of the
4 information that we've had already given to us,
5 it's my understanding that native pecans, they
6 self-propagate and they are not always planted in
7 very neat or intentional rows. Is that
8 descriptive of some of your pecan acreage?

9 A Yes, that's a good description. They
10 came up naturally randomly.

11 Q So you indicate that you have over 250
12 acres --

13 A Yes.

14 Q -- of pecans. Can you tell us what
15 those acres look like?

16 A Well, they -- in Little River County
17 the definition of an acre of seedling or native
18 pecans is 14 bearing trees. So you count the
19 trees on the land that you own and divide it by
20 14, and that's how many acres you have. But
21 they're spread over more than 250 acres.

22 Q So the actual physical land is more

1 than 250 acres?

2 A Yeah.

3 Q Okay. Now, you just said 14 trees.

4 Based on testimony that I've heard from other
5 growers who have improved pecans, that doesn't
6 seem like a lot of trees per acre. Is that less
7 than what you would find per acre on an improved
8 farm?

9 A Yes, I think so.

10 Q So why 14 acres?

11 A Well --

12 Q I mean why 14 trees? Excuse me.

13 A It's hard to say exactly. That's been
14 in, that's just been in existence for quite a
15 while. One reason though would be your native
16 trees are very large, often very large. And
17 that's part of the reason. Whereas if you, you
18 know, have your improved trees planted closely
19 and you hedge them, well, they never really get
20 very large.

21 Q What do you mean by hedging?

22 A Hedging is a practice to cut the outer

1 extremities of the limbs and force the crop back
2 in towards the main stems of the tree and let
3 more sunlight in to the canopy.

4 Q Do you do that with native trees?

5 A No.

6 Q And are you familiar with a term that
7 we had discussed in Las Cruces, the term is FSA
8 pecan acre, FSA being the Farm Service Agency.
9 Are you familiar with that term?

10 A Yes, I'm familiar with FSA. And
11 that's where the 14 trees per acre came from.

12 Q Great. Thank you.

13 MR. QUIR S: Mr. York, I put that up
14 too, that definition, if sometime if you want to
15 refer to it.

16 THE WITNESS: Thank you.

17 BY MS. SCHMAEDICK:

18 Q So, Mr. York, can you tell us about
19 the production of native trees. Is it cyclical
20 like the improved varieties?

21 A It can be. Yes, it is. There's
22 certain management practices that would help that

1 and not let it be so extreme, but for the most
2 part they're cyclical.

3 Q Now, what is the average yield for a
4 native tree? At least in your area.

5 A In my area, actual production history
6 that I've been able to produce is about 500 to
7 600 pounds per acre.

8 Q So how does that compare to, let's
9 say, the average yield of improved varieties in
10 the central region?

11 A Well-managed improved varieties would
12 probably make more than that, and undermanaged
13 could easily make less than that.

14 Q And improved varieties of the east?

15 A I would say the same for eastern
16 region also.

17 Q Okay. Thank you. So you mentioned
18 that you -- oh, wait, before I --

19 MR. HILL: Just could you please move
20 the microphone a little closer --

21 THE WITNESS: Yes, sir. I'm sorry.

22 MR. HILL: -- so we can --

1 THE WITNESS: Is that better? Okay.
2 Sorry.

3 BY MS. SCHMAEDICK:

4 Q So you mentioned a couple of things.
5 On page 2 of your testimony at the very, very
6 bottom, I'll read the sentence for you. You say
7 "some years late in the season native seedling
8 pecan offerings would receive bids below cost of
9 production or no bid at all."

10 Can you talk to us about what your
11 cost of production is? What goes into your cost
12 of production?

13 A Well, you have machinery and labor,
14 and you have the opportunity cost on your land,
15 fuel. And, you know, beyond that if you
16 fertilize your pecan trees or if you spray
17 pesticides on them or -- that would be an
18 increased cost.

19 Q And are those costs of production
20 different from what you might typically find on a
21 improved farm?

22 A In my opinion the cost to produce

1 native pecans is lower than the cost to produce
2 an improved pecan.

3 Q What's the major difference? What
4 causes it to be --

5 A The native pecans are indigenous and
6 they just are less susceptible to diseases and
7 insects. And they are quite hardy and have very
8 expansive root systems, and they can stand swings
9 in the climate quite well. And for those reasons
10 you have less input.

11 Q You mentioned that you're a fourth
12 generation farmer. Is that correct?

13 A Yes, that's correct. Yes.

14 Q So how old do you think your trees
15 might be?

16 A Oh, I think the oldest tree, I read
17 recently someone said is around a thousand years
18 old.

19 Q No way. Seriously?

20 A Yeah. Eight hundred to a thousand.
21 And we had some trees bored in the 1976
22 bicentennial, and they were 300 years old.

1 Q Wow. That is impressive. I am very
2 impressed. So I'm curious, you know, in this
3 statement at the bottom on page 2 you say you
4 receive bids below the cost of production, yet
5 your cost of production is lower than the cost of
6 production on improved varieties.

7 A That's correct.

8 Q So why are the bids so low?

9 A Well, there can be, you know, several
10 reasons. But late in the year like on a big
11 crop, if there's a large crop, late in the year
12 the buyers may be low on cash would be one thing.
13 The end users may have all the bookings that they
14 need for the coming year, so they're not really
15 pursuing additional bookings.

16 So then if you're a handler and you're
17 low on money and no one really wants to buy the
18 pecans, you're speculating and chances are you're
19 not going to pursue them as strongly as you would
20 if you had a bona fide buyer willing to buy them
21 from you. And those factors stack up to create
22 volatility.

1 Q So are there attributes of the native
2 pecan that would cause a buyer to choose an
3 improved variety over a native variety at the
4 onset of the marketing year?

5 A Some buyers, a few buyers prefer
6 native, some buyers, a lot of buyers prefer
7 improved pecans. Improved pecans are going to be
8 more reliable. And the native pecans come off
9 later in the year.

10 Your improved varieties are grown
11 further south, they come off sooner, and they're
12 actually selected because they mature earlier, a
13 lot of them are. So you get early into the
14 holiday trade also with improved orchards that
15 are early maturing.

16 If you have a late maturing, which
17 often they almost are, especially up in Arkansas
18 and Oklahoma, Missouri, north Texas, well, then
19 you're going to be in probably November 10 to
20 November 15 before you really get into harvest.
21 It'll be a month behind or more from the large
22 improved orchards further south.

1 Q So if I'm understanding correctly,
2 your production cycle is different from the
3 improved varieties, for the most part, in the --

4 A They overlap but it's a little
5 different. It's a little later. And the rule of
6 thumb is the later the pecan comes off it's going
7 to have less value.

8 Q I see. Thank you. So I'm just
9 curious, how common is it to get a bid that's
10 below the cost of production?

11 A Well, a lot of factors come into play,
12 but in the last five years we've seen some fairly
13 low prices two of those years, quite low. I
14 would say below production.

15 Q So in your --

16 A Late in the year.

17 Q Late in the year. So in your
18 testimony you mentioned some of the, some of your
19 anticipated benefits of the program, but I'm
20 wondering if you could talk about the benefits
21 specific to the native industry. It appears that
22 the native industry is struggling quite a bit of

1 you're getting bids below the cost of production.
2 How would this marketing order help you and your
3 fellow native producers?

4 A Well, of course now natives, they
5 don't have the exclusive on getting a low bid.
6 You can get a low bid for other pecans too. But
7 you can also get a high bid. And if we increase
8 the awareness of pecans and manage our affairs to
9 minimize price volatility so that they'll be more
10 appealing to end users, by doing that then we
11 will raise the market.

12 And even your later pecans will be
13 desirable because pecans will be more predictable
14 and people will plan out further. And so the
15 demand then would be evened out throughout the
16 year better. That's my opinion.

17 Q And for that reason you're -- I guess
18 I'm paraphrasing here, but is it that reason why
19 you are in favor of the marketing order and you
20 see it not just benefitting the improved pecan
21 portion of the industry but the native portion as
22 well? Is your --

1 A Yes.

2 Q -- if I understand what you're saying
3 is that you're elevating all pecans regardless of
4 native or improved.

5 A Exactly. And it may be that the
6 native pecans actually gain more.

7 Q Thank you. Now, you mentioned that
8 you were also part of the American Pecan Board.
9 Is that correct?

10 A That's correct.

11 Q So were you involved in the
12 discussions that resulted in the proposed
13 language that is in exhibit number 1?

14 A Yes, I was.

15 Q Thank you. I wanted to ask you about
16 your experience on the American Pecan Board,
17 specifically again given your perspective as a
18 native grower but also as a small sheller. And
19 so I want you to think back to the discussions on
20 the assessments.

21 A Yes.

22 Q And can you recall the deliberations

1 that were had on the different thresholds of the
2 assessments that were finally recommended and
3 sort of what some of the concerns were and how
4 you arrived at the thresholds? And the
5 thresholds that I'm referring to are in Section
6 986.61 in paragraph (c).

7 MR. QUIR S: Mr. York, I have that up
8 for you as well, if you would like to take a look
9 at it.

10 THE WITNESS: Okay. I do recall some
11 fairly heated debates regarding assessment. And
12 I think I kind of got the reputation of being
13 hard-headed, but in my opinion and what I felt
14 was that the assessment should be less on the
15 seedling pecan.

16 Because if you were a seedling
17 producer and you received, for simplicity sake,
18 50 cents a pound for your product and you were
19 assessed three cents. And on the other hand you
20 were an improved producer and you had early
21 pecans that were sought after for the export
22 market, and you received substantially higher

1 price for them and you were assessed 3 cents a
2 pound.

3 Then the onerous part of the
4 assessment was being placed on the seedling
5 producer. So I lobbied for less assessment on
6 seedlings.

7 BY MS. SCHMAEDICK:

8 Q Thank you. So to recap what I think
9 you're saying is that the proposal to come out
10 with a tiered assessment rate, having different
11 categories of assessments for the different
12 categories of pecans, was that a result of
13 wanting to have a more equitable burden,
14 assessment burden?

15 A Yes. Those were my thoughts.

16 Q Okay.

17 A And every -- that's -- yes. Yes.

18 Q And why did you come up with a range
19 I see there in paragraph (c) that says "native
20 and seedling classified pecans shall be assessed
21 at 1 cent to 2 cents per pound." Why did you
22 come up with a range rather than a specific

1 number?

2 A I think the actual assessment will be
3 something that the council, the seated council
4 would set. We just put that range in so that in
5 the referendum the grower base would have some
6 idea of what the cost would be or the investment
7 would be.

8 Q And is it fair to interpret that the
9 1 cent would be the lowest that the assessment
10 rate would be and the 2 cents would be the
11 highest that the assessment rate would be?

12 A I think that's correct.

13 Q Okay. So at the end of that paragraph
14 (c) there's a sentence, and I'll read it for the
15 record. It says "these assessment ranges shall
16 be in effect for the initial four years of the
17 order."

18 And then it is -- that sentence is
19 followed by paragraph (d), which reads
20 "subsequent assessment rates shall not exceed 2
21 percent of the aggregate of all prices in each
22 classification across the production area based

1 on council data or th average of USDA-reported
2 average price received by growers for each
3 classification."

4 So can you explain to me what the
5 American Pecan Board was thinking when they put
6 that language in?

7 A Well, the board -- we don't want this
8 to be onerous for the growers. We want the
9 growers to feel like this is an investment in
10 the industry and something that's affordable.
11 And we felt like 2 percent, anything over that
12 was beginning to be burdensome. And so we wanted
13 to set a range and put a ceiling on it.

14 Q And so referring back to the initial
15 four years of the order, would you consider that
16 to sort of be a test run for the program?

17 A Yes, I would.

18 Q So then is paragraph (d) sort of the
19 board's attempt to create some flexibility for
20 the future council to operate outside of the
21 prescribed thresholds for the native and improved
22 assessment rates?

1 A Well, once the council's seated and
2 with what they have the power to address, well,
3 then if they can muster a two-thirds majority,
4 well. But the way I read it, the 2 percent would
5 still be in effect.

6 Q Correct. But I guess what I'm asking
7 is that paragraph, is the intent to allow
8 flexibility to redefine -- for example, for
9 native pecans you have the lower threshold of 1
10 cent and the higher threshold of 2 cents. If the
11 council finds that those thresholds aren't quite
12 right, they can reset those thresholds as long as
13 they stay under the 2 percent.

14 A Yes.

15 Q And so that paragraph is intended to
16 allow for flexibility --

17 A Yes.

18 Q -- in the future.

19 A Yes, it is.

20 Q Thank you. My last question, I'd like
21 for you to draw on your experience as a sheller,
22 specifically a small sheller. Now, you mentioned

1 that you're part of the National Shellers
2 Association. Is that correct?

3 A Yes, that's correct.

4 Q So were you part of any discussions
5 around the -- two topics. One is the threshold
6 for identifying what constitutes a commercially
7 viable sheller as well as the threshold between a
8 small sheller and a large sheller. That's sort
9 of one area I want to ask you about. The second
10 area is sheller representation on the council.

11 So were you part of discussions on
12 those topics?

13 A Yes, I was.

14 Q Can you first speak to the threshold
15 in the proposed definition of sheller, it's a
16 threshold of one million pounds? In your
17 opinion, is that appropriate and why, what was
18 the discussion around that number?

19 A Well, the shellers, they'll be in the
20 handler camp. And if you're only shelling a
21 million pounds or less, you're just not going to
22 have the investment and the year-round aspect of

1 a full bona fide business. You're just going to
2 be more seasonal. And not a hobby actually but
3 it's not going to be a full-time concern. And
4 it's not going to have like a labor force or
5 large investments in capital and machinery.

6 Q And then with regard to the 12.5
7 million threshold that separates those that
8 qualify for the small sheller seat and those that
9 qualify for the larger sheller seat, how did you
10 guys identify that 12.5 million?

11 A That bounced around quite a bit, and
12 we -- I think we did the math in our head. But
13 it's -- you know, we have to have -- we need two
14 camps to represent the shelling industry on the
15 council. And we felt like that was a good
16 delineation just from knowing the different
17 shellers and their operations.

18 Q So when you say bounced around, does
19 that indicate that there was a very robust
20 discussion and that --

21 A Yes, there was a very robust
22 discussion.

1 Q And that that 12.5 is a -- it's not
2 just a number you sort of picked out of the air.

3 A No, it was refined three, I think
4 three times.

5 Q Okay. Thank you. And my last
6 question for you is your experience in
7 discussions with the shellers association and
8 representation on the future council. What were
9 some of the concerns that you heard from shellers
10 about representation on the council?

11 A Well, some shellers wanted equal
12 representation. That was discussed quite a lot,
13 more earlier than later. I can say though that
14 in recent conversations within the industry that
15 we have strong support for the marketing order.
16 There are questions about details, which really
17 can't be answered at this point until we have a
18 council seated. But the consensus is that the
19 marketing order will be a benefit.

20 Q Thank you. So would it be fair to say
21 that perhaps in the initial discussions of the
22 proposed program there were fairly weighty

1 concerns from sellers --

2 A Yes.

3 Q -- but that through the outreach and
4 the activities of the American Pecan Board you
5 all were able to come to an acceptable
6 representation for the sheller community?

7 A I think the end numbers indicate the
8 willingness of the shelling community to proceed
9 ahead with the marketing order, judging by the
10 compromise position.

11 Q Thank you.

12 MS. SCHMAEDICK: No further questions.

13 JUDGE GUTHRIDGE: Mr. Hinman, before
14 you ask some questions could I ask a couple of
15 questions to clarify a couple things that popped
16 in my mind?

17 You said -- when Ms. Schmaedick asked
18 you about number of trees per acre and it was 14
19 trees per acre, and I thought you said it the
20 Little River County definition. Is that -- is
21 literally the next county might have another
22 definition or was that the FSA definition?

1 THE WITNESS: Well, it's really hard
2 for me to answer that. I don't know the -- it's
3 just sort of a county -- it actually is a county
4 committee who are members -- citizens of the
5 county or on that committee. They set that rate.
6 But I've heard other people speak, and I think
7 that I've heard of other counties having
8 different rates.

9 JUDGE GUTHRIDGE: All right. And then
10 in your statement you say you're going to plant
11 30 acres of improved variety.

12 THE WITNESS: Yes, sir.

13 JUDGE GUTHRIDGE: Do you have an
14 estimate on the number of trees per acre that
15 will be there on those acres?

16 THE WITNESS: There will be
17 approximately 50.

18 JUDGE GUTHRIDGE: And would you expect
19 those trees to be harvested at about the same
20 time as your natives, or would they be earlier
21 because they're improved?

22 THE WITNESS: We selected a variety

1 that will be earlier.

2 JUDGE GUTHRIDGE: Okay, thank you.

3 THE WITNESS: Yes, sir.

4 MR. HINMAN: Don Hinman, USDA.

5 BY MR. HINMAN:

6 Q Good afternoon, Mr. York. I actually
7 want to follow up on that question.

8 MR. HINMAN: And could proponent
9 counsel offer a calculator? -- because I want to
10 walk through a calculation and see if I
11 understand exactly again this issue of the trees
12 per acre.

13 THE WITNESS: Yes, sir.

14 BY MR. HINMAN:

15 Q All right. So I can --

16 A I use my glasses to hear you, and I'm
17 going to have to take them off. I apologize for
18 not having a hearing aid. I'll do my best.

19 Q And I'll do my best to speak clearly,
20 and we'll get this question completed.

21 A Okay.

22 Q Again there are 14 -- actually Judge

1 Guthridge's question about the county was
2 helpful, because now I understand that better.
3 So I'll be more specific.

4 For your county 14 trees per acre is
5 the standard for pecans. Right?

6 A Yes.

7 Q Set by the county committee of the
8 Farm Service Agency. Right?

9 A That's correct.

10 Q So my question is this. So you have
11 250 acres, and I guess you would call those 250
12 pecan acres. Right?

13 A Yes, that'd be a good way to describe
14 it.

15 Q All right. So 250 -- this is the
16 calculation: 250 times 14. I come up with 3500.

17 A Yes, sir.

18 Q Is that -- in your testimony you said
19 most of your acreage is -- most of your trees are
20 native. But is that a rough approximation of the
21 number of trees that you're growing?

22 A That's a really close number, and I

1 have very few improved trees on my property.

2 Q All right. And then a related
3 calculation related to the yield is if you
4 multiply 40 pounds times 14 trees, there's 560
5 pounds, which is within the 5- to 600 pound range
6 that you mentioned. Is that a representative
7 yield computation?

8 A Let me do the math --

9 Q Or not?

10 A Let me do the math on that.

11 Q Yeah, 40 times 14.

12 A That's 560, yes, sir.

13 Q So that's consistent. So that would
14 be one way to represent yield, typical yield on
15 your operation.

16 A It's pretty hard to define a typical
17 yield.

18 Q Okay.

19 A Let me paraphrase of it. We had a
20 terrible ice storm --

21 Q Okay.

22 A -- in the year 2000, and that changed

1 my entire operation. We had heavy damage. Prior
2 to the 2000 ice storm we had significantly more
3 production off the same trees than we do today.

4 Q Okay. So that little complexity helps
5 me understand the great differences here. So
6 thank you for that response. In your testimony
7 on page 3 you were discussing the issues of price
8 volatility --

9 A This in my testimony? Okay, yes, sir.
10 Yes, sir, price volatility.

11 Q And you've addressed this briefly but
12 I wanted to get a bit of a more detailed answer.
13 You mentioned the problems of a price volatility
14 is that it makes it difficult for industrial
15 customers to make long-term plans.

16 A Yes, sir.

17 Q And you also said it impedes research
18 and development for new products.

19 A Absolutely.

20 Q Could you say a bit more about those
21 aspects of the market? And then perhaps you
22 could do that by fast forward a few years, your

1 order's in place, price volatility is reduced.

2 How do those conditions change in that new
3 market?

4 A Oh, yeah, I love to talk about that.
5 The -- if you're a major food company and you're
6 looking -- you're going to have a new product and
7 you start doing research and development, you're
8 not going to choose the ingredient off the shelf
9 that can fluctuate 25 or 30 percent per year.

10 You're going -- you want to have a
11 five year plan and you want to develop your
12 product, get it in the market, increase the
13 acceptability of it, and there's no reason to
14 shoot yourself in the foot initially. So you're
15 going to pick an ingredient that's stable and
16 it's affordable.

17 And that's why I feel so strongly
18 about the marketing order and adding stability.
19 And decreasing the volatility in the price of
20 pecans, especially at this time when we're faced
21 with a lot of new plantings. I'm not the only
22 one planting trees, there's a lot of people

1 planting trees in the pecan industry. So we
2 anticipate more production.

3 And so it's important that we can
4 present ourselves as a stable commodity, a stable
5 ingredient to increase the demand, increase the
6 number of products that pecans are in.

7 Q Thank you.

8 A Yes.

9 Q One final question. You increased my
10 understanding of a native -- you know, a sheller
11 that engages in shelling of native pecans. It's
12 my understanding that the native pecans are
13 considerably smaller and considerably harder than
14 improved. So if you could just discuss a bit the
15 challenges of being a sheller of native pecans in
16 that regard.

17 A You crack the pecans one at a time, so
18 if it takes 130 to make a pound or, on the other
19 hand, say 50 to make a pound, you can see how
20 your production could be lower, so. But that's -
21 - we -- our area is a good area for native
22 production, and so that's -- we shell native

1 pecans. And we just have to dive in there and do
2 it.

3 Q Thank you.

4 MR. HINMAN: No further questions.

5 THE WITNESS: Yes, sir.

6 MS. VARELA: Jen Varela, USDA.

7 BY MS. VARELA:

8 Q Mr. York, if you don't mind, I'd like
9 to delve a little deeper into Dr. Hinman's
10 questions. Because I also want to know some more
11 about shelling natives specifically, and I think
12 you're our expert on that.

13 So you mentioned that -- we've covered
14 that
15 the shells tend to be harder, and you mentioned
16 that you're going to have to go through more of
17 them to get to a pound. Is that also because the
18 nuts tend to be on the smaller side?

19 A Yes, they're small.

20 Q So it's a combination of the hard
21 shell and the size that helps you get to that
22 tonnage.

1 A That's correct.

2 Q Okay. And do you shell exclusively
3 native or just mostly native?

4 A Mostly.

5 Q Mostly. So could you describe to me
6 a little bit of your process in how you identify
7 the differences when you're buying them, when
8 you're processing them?

9 I imagine that you can't do them
10 together at the exact same time because they're
11 requiring different processing. So how do you
12 make sure that you're keeping them separate?

13 A Our rule of thumb is you size pecans
14 by the cross-section of the pecan, perpendicular
15 cross-section. So it's -- and we size them in
16 sixteenths of an inch. So a number 8 pecan is a
17 half inch in diameter, and a 16 is one inch in
18 diameter. And the demarcation that we use is 12;
19 that's our largest native pecan or what we would
20 classify as a native pecan. And the smallest
21 improved would be a 13. So 13, 14, 15, 16, we
22 call those improved pecans.

1 Q So in your opinion and the practical
2 sense of functioning if the order is in place,
3 will it be difficult for you to make the
4 distinction between how -- with the tonnage that
5 you're handling in native versus improved?

6 A No, it won't be difficult. No.

7 Q And since it won't be a burden for
8 you, can I -- is it reasonable to take the step
9 further to say it won't be a big burden on the
10 average sheller?

11 A I would say that's correct.

12 Q Okay. Thank you.

13 A May I add something to that?

14 Q Yes, please.

15 A We have to keep all these numbers. We
16 already do this. You have to do it for your bank
17 and for your -- to estimate what you're going to
18 shell out of these pecans, because you start
19 trying to sell them the day you buy them. We
20 already -- that's something we do, we have to do.
21 So we're already doing it.

22 Q That's very helpful. Thank you.

1 MS. SCHMAEDICK: Melissa Schmaedick,
2 USDA.

3 BY MS. SCHMAEDICK:

4 Q Mr. York, you just explained to us
5 that in your shelling operation you differentiate
6 native and improved pecans by the size of the
7 diameter.

8 A That's a rule of thumb, yes.

9 Q A rule of thumb. So my question is
10 under the proposed program the difference between
11 a native and improved pecan is whether or not the
12 tree is grafted.

13 A That's true. But it also -- you have
14 to have the 70 percent threshold --

15 Q I'm not --

16 A -- to have a straight load like -- a
17 straight load of one variety would require that
18 it would have to be 70 percent that variety.

19 Q You've now jumped into a area I don't
20 understand. Can you explain that?

21 A I apologize. But by and large the
22 pecans 13 and larger are going to be from an

1 improved variety or a grafted variety. It would
2 be very unusual to see a pecan that large come
3 from a seedling or a native pecan tree.

4 Q Okay. So where does the 70 percent
5 come in?

6 A In representing what you have for
7 sale. For instance if you had an order for a
8 load of Wichita pecans, at least 70 percent of
9 the load would have to be Wichita to say that,
10 and preferably much higher but at least 70
11 percent.

12 Q And how do you know they're Wichita as
13 opposed to an Elliott?

14 A I would know that from my experience
15 in handling pecans. It'd be real easy for me to
16 distinguish between a Wichita and an Elliott.

17 Q So there are characteristics that are
18 distinctly different --

19 A Yes.

20 Q -- between the two?

21 A Yes.

22 Q The reason I'm asking this is that

1 let's say you had a handling regulation in effect
2 and you had an inspector that had to go to your
3 plant. You know, what would be helpful in that
4 situation is for that inspector to be able to
5 have visual characteristics that indicate this is
6 an improved variety or this is a native variety.
7 And you've indicated you can do that by size to a
8 certain extent --

9 A Yes.

10 Q -- and that there are other visual
11 cues. But in the proposed order the distinction
12 between the two is whether or not it's grafted,
13 which you can't really see if you're an inspector
14 in a plant. You don't see the tree, you just see
15 the product of the tree.

16 A That's correct.

17 Q So I'm trying to understand how the
18 definition in the order for native versus
19 improved is going to work on a practical level in
20 the plant when someone who maybe does not have a
21 lifetime experience with pecans is going to have
22 to be able to separate them out.

1 A We could have visual aids for the
2 inspector.

3 Q Correct. And perhaps some examples.

4 A Yes. And he could also come into the
5 conference room and we could talk.

6 Q All right. Thank you very much.

7 MS. SCHMAEDICK: No further questions.

8 JUDGE GUTHRIDGE: Are there any more
9 USDA questions?

10 MR. HILL: There are not.

11 MR. QUIR S: Just a couple of follow-
12 ups.

13 REDIRECT EXAMINATION

14 BY MR. QUIR S:

15 Q Thank you, Mr. York, for all your
16 helpful testimony. At one point when you were
17 testifying about the small sheller seat and the
18 large sheller seat you said that there were two
19 camps. Did you mean a camp of large shellers and
20 a camp of small shellers when you said that?

21 A I just meant that in a nomination
22 process there would be a small sheller and a

1 large sheller.

2 Q And do you believe that's fair, given
3 the industry that you're working in as a sheller?

4 A I believe so.

5 Q And do you believe that's fair across
6 all regions?

7 A I believe so.

8 Q Do y'all electronically sort or
9 mechanically sort with regard to size?

10 A Mechanically.

11 Q Okay. So mechanically you could sort
12 what is a 12 and below from a 13 and above. Is
13 that right?

14 A That's correct.

15 Q Very hard to do?

16 A We do that all day every day.

17 Q Exactly right. So the chance of you
18 getting mixed up between a native and seedling
19 and improved variety is very rare, would you say?

20 A We write letters of employees who mix
21 them up.

22 Q So you don't intend to pay improved

1 prices for native and seedling, do you?

2 A No, I don't.

3 Q Okay. You have every incentive to be
4 clear, absolutely clear when you're buying those,
5 what those are.

6 A Yes.

7 Q So it shouldn't be hard for the
8 average handler to be able to place the right
9 assessment based on whether it was a native, a
10 seedling, or an improved variety. Is that
11 correct?

12 A No, it shouldn't be.

13 Q Thank you very much for your
14 testimony.

15 MR. QUIR S: No further questions of
16 this witness at this time.

17 JUDGE GUTHRIDGE: Any further
18 questions from USDA?

19 MS. SCHMAEDICK: No further questions.

20 JUDGE GUTHRIDGE: Are there any
21 questions from the audience?

22 (No response.)

1 JUDGE GUTHRIDGE: Hearing none, you
2 are excused.

3 THE WITNESS: Thank you, sir.

4 (Witness excused.)

5 MR. DAVIS: Your Honor, with the
6 Court's permission, the Proponent group calls as
7 its next witness Ms. Lotsee Spradling.

8 Whereupon,

9 LOTSEE SPRADLING

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

13 DIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q Good afternoon, Ms. Spradling. Thank
16 you so much for coming in todFay. If you would,
17 please state your name for the record and spell
18 your name.

19 A Lotsee Spradling, L-O-T-S-E-E,
20 S-P-R-A-D-L-I-N-G.

21 Q Ms. Spradling, do I understand that
22 you have prepared a statement that you'd like to

1 give today?

2 A Yes, sir.

3 Q Also, for purposes of your
4 questioning, you have before you Exhibit 1 to
5 these proceedings, the proposed Federal Marketing
6 Order, and also Exhibit 23, the economic
7 testimony of Dr. Palma.

8 A Yes, sir.

9 Q Thank you. If you'd like to proceed
10 with your statement.

11 A Yes.

12 My name is Lotsee Spradling. I live
13 near Sand Springs, Oklahoma. It's just west of
14 Tulsa, Oklahoma. My family is Comanche and lived
15 in Anadarko Indian Territory until statehood. My
16 parents began to assemble the Flying G Ranch in
17 the early '20s. The Flying G Ranch has a pecan
18 orchard located near the Verdigris River in
19 Oklahoma which we purchased in 1986. We have
20 just over 950 acres of pecans currently in
21 production. On our farm we grow 50 percent
22 improved variety pecans and 50 percent native

1 pecans. We also own a retail shop that is open
2 during harvest time, which runs November through
3 December, where we sell pecans retail as a cash
4 crop. I was born and reared on the Flying G
5 Ranch and I went to Oklahoma State University. A
6 copy of my resume is attached.

7 Under the Small Business

8 Administration guidelines, we are classified as a
9 small pecan grower which means we produce less
10 than \$750,000 in gross pecan revenue. In recent
11 years I have seen a wide variation in the prices
12 that I have received for my pecan crop,
13 especially with our native seedling crop. Such
14 wide variation in pricing makes it extremely
15 difficult to plan for the future operation of the
16 farm. While prices go up and down on pecans
17 dramatically from year to year, my costs continue
18 to increase. Cost of fertilizer, insecticides
19 and equipment have all increased in recent years
20 regardless of the price I have received from my
21 crop. Some years we can barely sell our native
22 seedling crop.

1 Lack of accurate market information or
2 any crop forecasts on the anticipated size of the
3 pecan crop in any given year also makes it
4 difficult for me to negotiate a fair price for my
5 crop and to make reasonable business decisions
6 about investments on my farm. Most of the crop
7 estimates I see are guesses and they are always
8 wrong. Increased price stability and more
9 accurate market information would greatly benefit
10 my small family operation. I think my farm and
11 the industry would also benefit in the future
12 from grade, size, quality, packaging, shipping
13 protocols and other handling requirements as we
14 compete with other tree nuts for shelf space and
15 consumer attention.

16 I have reviewed the economic analysis
17 summary prepared by Dr. Marco Palma, specifically
18 the projected average price increase from
19 promotion of 6.3 cents per inshell pound for
20 improved varieties and 3.6 cents per inshell
21 pound for native seedlings versus the average 2.5
22 cents and 1.5 cents per inshell cost,

1 respectively.

2 BY MR. QUIR S: If I could just
3 interrupt just for a second. That summary is
4 Exhibit 23. Is that correct?

5 A Yes, sir.

6 Q All right. Thank you.

7 A Overall, I am aware of the costs that
8 the proposed Federal Marketing Order may impose
9 on my farm, and I do not believe those costs are
10 unduly burdensome. I do believe that the
11 benefits of the Federal Marketing Order to my
12 farm will greatly outweigh any costs associated
13 with the Federal Marketing Order. I understand
14 that under the proposed order, a grower with more
15 than 30 acres of pecans or more than 50,000
16 pounds of average production per year over the
17 last four years will be allowed to vote on the
18 proposed order. In my opinion this threshold is
19 reasonable because a grower that does not meet
20 this threshold is not a commercial grower. Any
21 grower that is smaller than the proposed
22 threshold could not justify the cost in such a

1 small production.

2 I've been a member of the Oklahoma
3 Pecan Growers Association since 1970. The
4 American Pecan Board has kept our organization
5 informed about its efforts to propose a Federal
6 Marketing Order. I feel like I have been
7 informed about the process and I have been given
8 an opportunity to participate.

9 In conclusion, I fully support the
10 proposed Federal Marketing Order for pecans and
11 encourage the Secretary to implement the order as
12 proposed by the American Pecan Board. I would be
13 glad to answer questions if you have any.

14 BY MR. DAVIS:

15 Q Ms. Spradling, I may preempt a couple
16 of questions here. I'm kind of fascinated based
17 on that last testimony. Is there a standard in
18 your county or area for how many native pecans
19 per acre constitute a pecan acre?

20 A There's really not a standard. Most
21 of the time in the native orchards they're
22 usually in our area -- we're in northeast

1 Oklahoma -- quite crowded, so there are quite a
2 few trees per acre. The natives are randomly
3 planted, there's no rhyme or reason, they've just
4 come up and are producing, so there's really no
5 standard in our area.

6 Q You heard Mr. York's testimony where
7 he said there is a county standard of about 14.
8 Would you say on your land, on average, is it
9 more or less than 14 trees per acre in your
10 native?

11 A More. On rare occasion, when someone
12 is buying or selling native pecan ground,
13 oftentimes they'll use an aerial photograph and
14 literally count trees.

15 Q And let's compare and contrast that to
16 you also have about 50 acres of improved variety,
17 did you say?

18 A About half our orchard is improved.

19 Q And about how many trees per acre
20 would you have in your improved?

21 A About 50 per acre.

22 Q You also mentioned that you have a

1 small -- or it's presumptuous of me to say small,
2 but a retail operation.

3 A It is.

4 Q And you also sat here and heard some
5 of the testimony about an exemption for sales of
6 less than a thousand pounds. Would you, again
7 without disclosing any proprietary information,
8 in general are you selling more or less than a
9 thousand pounds of nuts.

10 A Inshell, shelled or cracked?

11 Q I honestly can't remember how that
12 exemption -- inshell, let's assume it's inshell.

13 A More.

14 Q So you would be selling more, so
15 you're aware that while you might have an
16 exemption for sales of less than a thousand
17 pounds, you, in fact, might have to be assessed
18 on the sales at your retail store of more than a
19 thousand pounds?

20 A I fully understand that and I think it
21 would be -- if this marketing order would go
22 through would be just a very good thing. Yes, we

1 are aware of the costs associated. It's rather
2 like the costs associated with beef checkoff.
3 That program probably increased beef consumption
4 by over a billion pounds of beef per year. I can
5 see similar things happening in the pecan
6 industry should we be able to obtain a marketing
7 order for pecans.

8 Q So you don't believe that it would be
9 unduly burdensome to have this assessment?

10 A I do not.

11 Q And you believe that the benefits
12 would outweigh the burdens of any such
13 assessment?

14 A Yes.

15 Q Do you believe that the proposed
16 marketing order would help both your native crop
17 and your improved crop?

18 A Yes, sir, I do.

19 MR. DAVIS: Your Honor, the Proponents
20 tender Exhibit 43, which is the testimony and the
21 curriculum vitae of Ms. Spradling.

22 (The document referred to

1 was marked for
2 identification as Exhibit
3 43.)

4 JUDGE GUTHRIDGE: Is there any
5 objection from USDA?

6 MS. CHILUKURI: No objection.

7 JUDGE GUTHRIDGE: Is there any
8 objection from the audience?

9 (No response.)

10 JUDGE GUTHRIDGE: Then hearing no
11 objection, Exhibit 43 will be admitted into the
12 record.

13 (The document previously marked as
14 Exhibit 43 was received in evidence.)

15 MR. DAVIS: And we have no further
16 questions of the witness at this time.

17 JUDGE GUTHRIDGE: Are there any USDA
18 questions?

19 MS. SCHMAEDICK: Melissa Schmaedick,
20 USDA.

21 CROSS-EXAMINATION

22 BY MS. SCHMAEDICK:

1 Q Thank you, Ms. Spradling, for your
2 testimony.

3 A You're welcome.

4 Q It's nice to hear from Oklahoma.

5 A Thank you.

6 Q So you mentioned that you are, I
7 believe, a member of the Oklahoma Pecan Growers
8 Association?

9 A Yes, ma'am.

10 Q Are you an officer with that
11 association?

12 A No, ma'am.

13 Q But you're just a member.

14 A I'm a member. My husband is an
15 officer. One of us has to stay home and work.

16 Q I understand. So as a member of the
17 association, can you describe what the
18 constituency is like or how many members you
19 have?

20 A Well, we just had our annual
21 conference just a few weeks ago, and actually
22 chatter was very excited and actually a lot of

1 it. I have not heard anyone that was opposed in
2 my little circle and at the conference that would
3 be opposed to this. I think everyone is very
4 excited that this may be reality.

5 Q Thank you. The membership of the
6 association, I guess I should say growers in
7 Oklahoma, would you characterize them as small
8 businesses predominantly?

9 A Predominantly. We do have some larger
10 growers, we have some that are really basically
11 just a hobby farmer but they're coming there for
12 information, because as Texas does, we have
13 several speakers that offer new information, but
14 mostly we're all small growers.

15 Q And what types of activities does the
16 Oklahoma Pecan Growers Association do?

17 A Well, they bring in the speakers.
18 Some of them are professors from some of the land
19 grant universities that are doing pecan research,
20 they bring in nutritionists, they bring in
21 extension, they're out in the field seeing what's
22 being planted, kind of giving you new techniques.

1 Sometimes there are companies that sell
2 pesticides and fertilizers that will give you a
3 new wrinkle or a new pesticide coming out that's
4 gained approval. We always do an orchard tour
5 and those are always really interesting because
6 you always want to see how the next person does
7 it, and nearly everyone that owns an orchard also
8 has a cleaning plant of various sizes so we
9 always want to see what kind of equipment they're
10 running. And then, of course, they have the
11 equipment display, and then at the orchard tour
12 several of the companies will bring the equipment
13 out and you can actually see it run.

14 So it's just kind of a few days short
15 course, real short but very informative, on all
16 different aspects of raising pecans, harvesting
17 pecans, shelling pecans, cracking pecans.

18 Q Thank you. So I know you're not an
19 officer with the association but I'm wondering in
20 your opinion as a member of the association do
21 you see the proposed marketing order in any way
22 conflicting or overstepping the Oklahoma Pecan

1 Growers Association?

2 A Oh, absolutely not. If anything, it
3 would benefit our organization. Our members
4 would actually reap the benefit from it and we'd
5 probably actually gain some more members.

6 Q And is there any form of assessment
7 currently collected in Oklahoma?

8 A No, ma'am.

9 Q So then the association runs on
10 membership dues?

11 A Yes, ma'am.

12 Q So I am particularly intrigued by your
13 statement that you have 950 acres yet under the
14 SBA definition you're a small grower.

15 A I am.

16 Q So the 950 acres that you mentioned,
17 those are actual physical acres.

18 A Yes, ma'am.

19 Q And so for the native portion of it,
20 you don't really know how many trees you have but
21 you think the density is more than 14?

22 A Yes, ma'am, on our orchard. That is

1 not true everywhere.

2 Q And in Oklahoma would you say that
3 your yield experience is different from Mr.
4 York's in terms of yield per tree or per acre?

5 A There are so many variables. It's
6 going to depend on the age of the tree, you're
7 going to have a seedling that's in production
8 this big, one that I can't reach my arm around
9 three times, say a four-inch diameter tree up to
10 a four-foot diameter tree. I understand the
11 question but the answer is very difficult because
12 the younger trees, the smaller trees, they may
13 produce, if they're all young they may only
14 produce 50-100 pounds of pecans per acre, but
15 then you get up to the bigger trees and it goes
16 up dramatically, so I don't know how to exactly
17 answer your question. And especially when you're
18 doing an improved planting they're nearly all the
19 same age. Now, you may lose a tree or two and
20 you'll fill in the gap the next year, but they're
21 nearly all the same age.

22 So in a native planting and the trees

1 are of the 20-year-old variety, you're probably
2 going to have 500 pounds to the acre or better as
3 long as you've cared for them well, but in a
4 native setting you're going to have young ones
5 and gigantic ones. It's really hard to answer
6 that. But as a general rule, the natives do not
7 yield pounds per acre as much as the improved
8 varieties.

9 Q Thank you. So you just mentioned a
10 four-foot in diameter tree. It seems to me that
11 might be a pretty old tree.

12 A It's probably a very old tree, and in
13 actuality, when they get up that big, we normally
14 take them out.

15 Q Really?

16 A Because they get to a point where they
17 require more nutrients than they're producing
18 pecans as far as dollars and cents. So they're
19 sucking up more dollars than they're dropping
20 down at harvest time when they get to be a
21 certain size, so we will take those out and then
22 plant new trees and we try to put those in an M-

1 line so that at some point in the future they'll
2 be much easier to care for, to harvest, to maybe
3 get water to. Most native orchards are not
4 irrigated, many improved orchards are irrigated,
5 and the irrigation really helps your bottom line
6 if you're able to do that.

7 Q Thank you.

8 A Yes, ma'am.

9 Q And you mentioned that your family, or
10 your parents began to assemble your ranch in the
11 1920s.

12 A Yes, ma'am.

13 Q And was that in the same area? You
14 referenced her that your family is Comanche, they
15 lived in the Anadarko Indian Territory.

16 A Yes. My parents were born and reared
17 in Anadarko and it was Indian Territory when they
18 were born. They were almost 50 when they had me.
19 I'm kind of an oddball generation, my parents are
20 like everybody else's grandparents. But anyway,
21 and then when the Depression was starting they
22 moved to the Sand Springs area for my dad to go

1 to work and my mom's family had always raised
2 cattle so they put the ranch together to have a
3 place to bring the cattle to, and so there were
4 native pecans on the ranch so they started taking
5 care of them. There's a creek that runs through
6 and we butt up against the Arkansas River. And
7 the trees were native and oddly spaced, but we
8 just kept taking care of them and cleaning around
9 them and improving them over the years. And then
10 when I married, my husband really liked working
11 with the pecan trees, so in '86 we bought an
12 orchard, which really increased our pecan
13 production.

14 Q Thank you. So as Mr. Davis has
15 already discussed with you, you mentioned that
16 you have a store where you sell your pecans.

17 A Yes, ma'am.

18 Q And the level at which you're selling
19 classifies you as a handler.

20 A Yes, ma'am.

21 Q So I again just wanted to clarify and
22 make sure that you do fully understand that and

1 that in that capacity you would be subject not
2 only to assessments but if there were regulation
3 in effect, that would also apply to you.

4 A Yes, ma'am. Probably can't get any
5 more strict than the Tulsa County Health
6 Department.

7 Q I believe that is all the questions I
8 have for the moment. Thank you.

9 A Thank you.

10 MS. VARELA: Jen Varela, USDA.

11 BY MS. VARELA:

12 Q I have a couple more little follow-
13 ups, specifically about your store. Some of it's
14 just curiosity, and we also just want to get an
15 idea of how this will practically be in place.

16 Are you selling only pecans that you
17 and your husband produced or are you also buying
18 from other growers?

19 A Okay. I only sell pecans that we have
20 produced in the store. I do, however, bring in
21 from a distributor walnuts and almonds and some
22 trail mixes, and I buy peanuts from southern

1 Oklahoma, so that -- because we do some gift
2 boxes and baskets, so that my customers have a
3 variety of things to choose to make up a gift or
4 just to take home for personal use or cooking.

5 But the pecans we sell in our shop are
6 only ours. Many years ago we had a weather
7 disaster, which we're the biggest gamblers in the
8 world when you're in farming, many years ago, and
9 we really did not have enough paper-shells for
10 our shop, and we thought we were looking really
11 good and bought some and we just were not happy
12 with the quality.

13 We made a decision at that time if
14 that ever happened again, we would just tell our
15 customers we're sorry we don't have enough,
16 because we want to be in charge of quality
17 control in our shop and we only want to sell top-
18 rate pecans, and we know we've cleaned them
19 thoroughly, we've taken care of the orchard the
20 entire year, and so we know we have a high
21 quality product. The pecans are ours
22 exclusively.

1 Q And for the record, can you define a
2 little further what you mean by paper-shells?

3 A Improved varieties.

4 Q Thank you very much.

5 A You're welcome.

6 Q And in dealing with different
7 varieties and different sizes, can you describe
8 to us a little how you think potential grade and
9 size regulations would apply to your business?
10 Are you already sorting by grade and size when
11 you're packaging to sell in your shop?

12 A Yes. Only the A grade goes through
13 into the shop. We do in our cleaning system pull
14 off a B grade that sometimes the shellers will
15 buy. Those are processed and chopped; they're
16 just a little bit lighter pecans.

17 And we do size. Anything 12 to 16th
18 of an inch and lower is a native. We harvest our
19 improved varieties by section so we know whether
20 we're pulling in a Pawnee or a Kanza or one of
21 the other varieties that we have.

22 Of course, you can tell by looking, if

1 you know what to look for, which variety you're
2 harvesting or sizing or cleaning or cracking or
3 processing that day. But yes, ma'am, we do clean
4 very stringently and then they always go across
5 an inspection table where we hand sort and look
6 before they're bagged.

7 Q And we've heard a few people testify
8 that there aren't -- the standards that exist
9 right now maybe aren't necessarily relevant or
10 helpful to the industry. Do you see the
11 potential for some of these regulations under the
12 order as being beneficial for your business in
13 particular? Is it something that would help your
14 business?

15 A I think that it would be beneficial to
16 everyone to have a uniformity, especially that
17 your consumer could count on. And also, it would
18 just make packaging and handling and the whole
19 gamut of things that we deal with, if we had
20 uniformity in everything, I think it would be a
21 real benefit to everyone involved.

22 Q And I'm intrigued by the fact that you

1 purchase other types of nuts to sell. Do you see
2 that uniformity in those other industries? Is
3 that of why there's still a demand for those?

4 A Yes. When I contact the broker I'm
5 given in several of the different nuts different
6 qualities. Some of them have X amount of pieces
7 and halves combination, so you're given a choice,
8 and of course, there's a price difference, which
9 that's fine. But yes, we see kind of a standard
10 that they have kind of come up with for their nut
11 and you're given the choice of how much you want
12 to pay and what that nut is going to kind of look
13 like and the quality and the grade.

14 Q And in your experience, at least over
15 the last few years, are people buying a lot of
16 those nuts?

17 A Yes.

18 Q Thank you very much. Those are all
19 the questions I have.

20 A Thank you.

21 BY MS. CHILUKURI:

22 Q Ms. Spradling, during your testimony

1 you referred to shelling and cracking.

2 A Yes, ma'am.

3 Q Can you give me just more descriptions
4 on what those are so I can clarify for my own
5 education.

6 A Cracking is we take the whole nut and
7 you can do it by hand. Of course, probably
8 everybody here, we all have pecan crackers and
9 they'll crack the pecan, they go in one at a
10 time, they're cracked, they're on a chain belt
11 with a little pocket, they're cracked end to end,
12 and that blows the shell away from the nutmeat.
13 And if we don't have to process them further,
14 then we can charge less for that product per
15 pound, and basically the consumer then picks them
16 out. A lot of my customers like to do that. A
17 lot of my customers are my age or older and so
18 they like to sit around and do that.

19 Shelled, of course, is absolutely no
20 shell, it's a nutmeat or a piece, we sell pieces
21 and halves. And I don't shell onsite but there
22 is a small sheller about an hour and a half from

1 me, and so I take my pecans up and he shells them
2 for me and then I bring them back and sell them
3 in the store, but we sell a lot cracked. We have
4 a few customers that have their own shop but they
5 don't have their own trees, so we will sell whole
6 pecans to them. The majority of our crop, we're
7 kind of at the mercy of whatever the shellers are
8 offering the day we have a semi load go out, and
9 if they're going to buy them. We have seen in
10 the past very difficult sometimes especially at
11 the end of pecan harvest to move our native
12 seedling crop. They're just not as popular, of
13 course, as the improved varieties.

14 Q Do you work at all with accumulators?

15 A Yes. Usually they'll send -- the end
16 buyer will send an accumulator to your area and
17 they'll look at your pecans. They'll grade them
18 which means they weigh out a pound of pecans and
19 they crack them and we keep every morsel and
20 piece, we pick out the nutmeats, you weigh the
21 nutmeats, you weigh the shell that's left, and
22 that's your grade, your yield. Typically 42 to

1 45 percent on natives, Stewart is around 48-50,
2 some of the other improved varieties a little
3 more than that, and they buy on grade and yield.
4 And so when we have at least a semi load
5 accumulated in our warehouse or maybe two, those
6 accumulators will go around and they'll offer you
7 X amount of dollars for your crop based on your
8 yield, and then they will send a truck and you
9 load them up and off they go.

10 Q And that reference to grade that you
11 just made, what are the standards associated with
12 that, or are there standards associated with
13 that?

14 A No standards, it's just the percent
15 nutmeat yield per pound of whole nut.

16 Q And last question. You mentioned that
17 with your retail shop you would be a handler and
18 that you understand that you would be assessed?

19 A Yes, ma'am.

20 Q Can you tell me a little bit more
21 about other responsibilities that you may have or
22 other obligations that you may have under the

1 proposed order?

2 A I don't know if I understand. I know
3 that we're a grower so we'll have the assessment,
4 and then as a handler we will as well. I'm not
5 clear on what your question is.

6 Q Well, as a handler, as an operator of
7 a retail shop you said you would not be exempt
8 because of the amount that you're producing, so
9 I'm just wondering in terms of having reviewed
10 other provisions of the order, are there any
11 other provisions that you'd have to abide by in
12 terms of reports or record keeping or anything
13 else that you know of.

14 A Well, not that I know of per se, but
15 we always keep records of everything that's gone
16 through the shop, whether it's whole, cracked or
17 shelled, so we already keep our own records for
18 our own use. So I mean, it's not like it would
19 be anything extra beyond what we already do that
20 I'm aware of.

21 Q And I think you said something earlier
22 about your status as a grower. Is it your

1 understanding that you would or would not be
2 assessed under this order?

3 A Initially I think we will be.

4 MS. CHILUKURI: Thank you for your
5 testimony.

6 JUDGE GUTHRIDGE: Are there any more
7 USDA questions?

8 MS. SCHMAEDICK: Yes. Melissa
9 Schmaedick, USDA.

10 BY MS. SCHMAEDICK:

11 Q Ms. Spradling, I have a few more
12 questions, and I appreciate your patience. Your
13 testimony has been very, very informative, and so
14 I have a few more follow-up questions for you.

15 First of all, to follow up on Ms.
16 Chilukuri's question, when you read through the
17 proposed order, which is Exhibit 1, did you read
18 it with the eyes of a grower or with the eyes of
19 a handler?

20 A Mostly a grower.

21 Q But now that it's been clarified that
22 given the level at which you're selling you would

1 be a handler, if you were to reread that, would
2 you be perhaps more aware of some of the sections
3 that would apply to you as a handler?

4 A I don't think so. It's pretty
5 straightforward, I think, and we're just -- I
6 don't know to answer you exactly.

7 Q Well, for example, if you were to
8 reread the proposed program at this point and if
9 there were a section talking about, let's say,
10 handler reporting requirements and now that you
11 understand that you might be subject to those,
12 would you maybe pay more attention to those and
13 develop an understanding of those specific
14 requirements?

15 A Well, yes, ma'am, but like I said, we
16 keep all those records, and there will be a fee
17 involved, obviously. So the record keeping, we
18 do that anyway.

19 Q Great. So in your opinion then, the
20 burdens that might be placed on you as a handler,
21 you do not see them as burdens, rather as
22 something that you're already doing?

1 A Pretty much we're doing all that
2 anyway, and it shouldn't really be much different
3 than what we're doing now.

4 Q Thank you. And do you have a copy of
5 Exhibit 1 in front of you?

6 A Yes, ma'am.

7 Q Just a moment, I'm getting myself
8 organized. If you could turn your attention to
9 986.61, the title of the section is Assessments,
10 and your counsel will be putting it on the
11 overhead. So Ms. Spradling, if I could just turn
12 your attention to that very first sentence in
13 paragraph (a), and I'll read it for the record
14 here: "Each handler who first handles inshell
15 pecans shall pay assessments to the Council."

16 So based on this sentence, who pays
17 the assessment?

18 A Well, it's all a catch 22, you see,
19 because if I'm in my little shop, what I run
20 through there I am first handling the pecans, but
21 even as a grower when you're marketing your
22 pecans that will probably reflect a little price

1 difference in the beginning because of the
2 assessment to the person that picks them up. So
3 all in all, we're all going to pay for the
4 marketing order.

5 Q Thank you. I appreciate your
6 statement. So what I want to clarify maybe, if
7 I'm understanding you correctly, is are you
8 saying that you understand that the handler pays
9 the assessment but as a grower you might feel
10 that assessment burden as a reflection in the
11 price that you receive from the handler?

12 A It's kind of all that, I think that
13 will probably be true. The deal is none of us in
14 the pecan industry are particularly concerned
15 with that small fee because the benefits are
16 going to far outweigh that cost. Pecans are
17 probably one of the healthiest things in the
18 world you can eat but very few people know that.
19 If all the marketing order did was gain enough
20 money to advertise the health benefits of pecans,
21 I think we would see increased usage and consumer
22 stability. I think they would use pecans more

1 instead of just like a seasonal Christmas-type
2 thing. I think it would be more incorporated
3 into their diets year round if they understood
4 the benefits. So I don't know if I've answered
5 your question, but we're all pretty excited that
6 we hope this goes through.

7 Q Thank you. That was very helpful. I
8 have one other question for you. So in your
9 testimony -- and this is more for my education
10 and understanding production.

11 A You may be asking the wrong person,
12 but I'll try.

13 Q No. I have confidence in you. So in
14 your statement, I want to go back to the
15 discussion of the Anadarko Indian Territory. I'm
16 not familiar with that area.

17 A Anadarko is southwestern Oklahoma near
18 Lawton, south and a little bit west of Oklahoma
19 City, but my parents were born before statehood
20 so on their documents it lists Anadarko Indian
21 Territory and then, of course, it's Anadarko,
22 Oklahoma after that. I still have my mother's

1 original allotment, the patent is still on it,
2 and it's near Anadarko. Oklahoma is one of the
3 few states that does allotments, most states do
4 reservations for their tribal members.

5 Q I see. So the Anadarko Indian
6 Territory is now part of the State of Oklahoma.

7 A Yes, ma'am.

8 Q And that's what you refer to when you
9 say until statehood.

10 A Yes, ma'am.

11 Q Okay. But you're not currently
12 producing in the Anadarko region of Oklahoma.

13 A No, ma'am.

14 Q To your knowledge, are there pecan
15 trees that are producing in that region?

16 A Yes, ma'am. The Volks have a pecan
17 orchard there, I know them personally, but there
18 are other orchards there, not as many as are up
19 in my area just because it's a little more dry
20 and a little more arid, but yes, ma'am, there
21 are pecans in Anadarko as well.

22 MS. SCHMAEDICK: Thank you. No

1 further questions.

2 JUDGE GUTHRIDGE: Any more questions
3 from USDA?

4 (No response.)

5 JUDGE GUTHRIDGE: Mr. Davis.

6 MR. DAVIS: Your Honor, if I could
7 follow up on just a few things.

8 REDIRECT EXAMINATION

9 BY MR. DAVIS:

10 Q First of all, I admit both of these
11 are maybe my note-taking error here, but Ms.
12 Schmaedick asked you if you had an idea of
13 approximately how many members there were in the
14 Oklahoma Pecan Growers Association. Do you have
15 a ballpark figure on that?

16 A I don't know. Maybe like 250, I
17 think, but don't quote me.

18 Q Just a ballpark. But you may have a
19 better idea. You said you just recently attended
20 a meeting. Approximately how many people were
21 there, how many members were there?

22 A We had about 120, I think. Now,

1 that's for both days. Some people made it to one
2 and not the other.

3 Q And you said that there was a great
4 deal of excitement about the FMO?

5 A Yes.

6 Q And you heard no opposition?

7 A I did not. I'm sure with everything
8 there probably may be some, but in all the
9 conversations that I participated in and heard
10 and was involved in, no, everyone was really
11 hopeful.

12 Q Thank you. The other error that I may
13 have made, when you came in today to meet with
14 us, you delivered to us your tribal ID card. Did
15 you intend for us to include that?

16 A I just gave it to you so you would
17 have it for reference.

18 Q Would you mind if we introduce that
19 along with the other?

20 A I don't care, that's fine.

21 MR. DAVIS: Then I will hand out to
22 everyone, I just got the copies, Exhibit 44 would

1 be Ms. Spradling's tribal ID card.

2 (The document referred to
3 was marked for
4 identification as Exhibit
5 44.)

6 MS. SCHMAEDICK: Your Honor, if I may
7 quickly interrupt. This is Melissa Schmaedick
8 from USDA. My concern is does that copy of the
9 ID have any personal information?

10 MR. DAVIS: She very thoughtfully
11 blanked out her Social Security number on it.

12 MS. SCHMAEDICK: My concern is USDA is
13 posting exhibits on the internet, and I did not
14 want to expose Ms. Spradling.

15 BY MR. DAVIS:

16 Q With that proviso.

17 A You're the expert. I don't think
18 there's anything on there that would be a
19 problem, but whatever you all think.

20 Q Let's not introduce it then. We'll
21 say for the record you handed me a copy of it.

22 A I did.

1 MS. SCHMAEDICK: We believe you about
2 your heritage. Thank you very much.

3 THE WITNESS: You're very welcome.

4 BY MR. DAVIS:

5 Q I have two quick things to follow up
6 on and we'll get you out of here, Ms. Spradling.
7 How many miles did you travel to come to this
8 hearing, by the way?

9 A I don't know.

10 Q From near Tulsa?

11 A I'm near Tulsa. It's about a four-
12 hour drive.

13 Q Well, thank you again so much for
14 coming down.
15 You said that you take some of your product to a
16 sheller and then take it back from them to sell
17 or whatever.

18 A Yes, sir.

19 Q There's been use of a term in this
20 record called custom shelling. Have you heard
21 that phrase before, are you familiar with that?

22 A Yes, sir. That's basically what we're

1 doing.

2 Q And in that transaction title to that
3 product does not change, you get them to shell,
4 get them the fee for it and get the product back.

5 A I pay them a fee to shell my pecans.

6 Q And your understanding under the order
7 that would not be assessed.

8 A True. Hopefully I read it right, but
9 yes.

10 Q Okay. Thank you. And then finally,
11 you said something, you said when you do sell to
12 a sheller, now this is a proprietary transfer,
13 you sell to the sheller.

14 A It would be the accumulator comes by
15 and offers you a price for your pecans.

16 Q And I think, if I took it down
17 correctly, you said, I just have to take what
18 they offer. Was that your testimony?

19 A That's pretty much it.

20 Q Would better crop information and a
21 better idea of the prices that are going for your
22 products help you make a more informed decision

1 as to whether you would sell or not?

2 A Yes, sir, and it would eliminate the
3 myth that oftentimes goes around: there's going
4 to be a huge crop and the shellers have 20
5 million pounds in cold storage so they're
6 offering X amount of dollars per pound. When you
7 get toward the end of season, oftentimes those
8 statistics disappear, change dramatically, so the
9 shellers are thinking we have this huge crop when
10 we don't, so they're going to offer based on what
11 they have in cold storage, then they think
12 somebody else has a lot. It's a very complicated
13 process but if we had accurate information,
14 everybody could make a better -- we could make
15 better decisions in our end of it and the
16 purchasers of our crops could also make better
17 decisions.

18 Q Would improved data like that helping
19 you make more informed decisions have a
20 meaningful impact on your small business?

21 A Oh, yes.

22 MR. DAVIS: I have no further

1 questions. Thank you.

2 JUDGE GUTHRIDGE: Any more USDA
3 questions?

4 RECROSS EXAMINATION

5 BY MS. VARELA:

6 Q We appreciate you being here so I hope
7 you don't mind just one more question. Earlier
8 when we were asking about your retail business
9 and we were asking about volume, you offered a
10 few different categories there. I believe you
11 were asked if it was shelled, inshell or cracks.
12 Can you describe what you mean by cracks when you
13 use that term?

14 A Yes, ma'am. The shell has been
15 cracked from end to end so the shell pops away
16 from the nutmeat and pretty much those are very
17 easy to pick out. Occasionally it will break
18 them and you'll have some pieces; usually they
19 come out in halves. But when you buy five pounds
20 of, say, natives cracked, depending on the year
21 and the quality, you're going to pick out, say,
22 two pounds or so of meats and you'll do the work

1 yourself, so we charge less for those than we do
2 for the shelled but we charge a little more for
3 those than we do for the whole pecan because we
4 have actually gone to the process of cracking it
5 and running it through the machinery and someone
6 has had to do that physically so we've paid some
7 labor.

8 Q Okay. So it's been cracked on
9 purpose, it's not an accidental coming through
10 the system.

11 A No, ma'am. Anything that's cracked on
12 accident goes out.

13 Q Thank you very much for that
14 clarification.

15 A Yes, ma'am.

16 MS. VARELA: No further questions from
17 me.

18 JUDGE GUTHRIDGE: Are there any more
19 USDA questions?

20 MR. DAVIS: I think we may have to
21 have one more clarification of a clarification.

22 FURTHER REDIRECT EXAMINATION

1 BY MR. DAVIS:

2 Q I think we may have to have one more
3 clarification of a clarification.

4 A I have confused everybody. I'm sorry.

5 Q You have not, but there has been
6 discussion, and it's in the order that if a
7 pecan, if the outer shell has been inadvertently
8 perforated in some way during the harvesting
9 process or something like that, those are
10 referred to in the industry as cracks also,
11 aren't they?

12 A They're called cracks, S, and I'm
13 telling you cracked, E-D, cracked on purpose,
14 cracks are out in the field, which is why they go
15 over the table and I stand there all day long and
16 roll them around, and if there's anything like
17 that, it's tossed.

18 Q So again, in the industry there would
19 not be any confusion about a crack, something
20 inadvertently cracked, being a substandard or
21 inferior product which may be discarded, may be
22 used in oil or something like that, or some feed

1 or something, but that is distinguished from an
2 intentionally cracked pecan which you sell in
3 your shop and otherwise. Right?

4 A All true. No one in the industry
5 would be confused by the two different terms; if
6 you're not familiar with pecans you may be.

7 MR. DAVIS: Anybody else want to
8 follow up? But I think it's clarified in my
9 mind, and for the record, more importantly.

10 JUDGE GUTHRIDGE: USDA, the ball is
11 back in your court.

12 MS. CHILUKURI: Thank you so much for
13 bearing with us on this.

14 THE WITNESS: You're welcome.

15 JUDGE GUTHRIDGE: Actually, I have a
16 couple of questions I want to clarify in my own
17 mind, if I could, and they deal with 986.86, the
18 exemptions, and Mr. Davis asked you about your
19 store and a number of the Department of
20 Agriculture questioners asked about the store and
21 the fact that you sell more than a thousand
22 inshell pounds during a fiscal year. I infer

1 from the fact that there is an exemption that
2 there are some folks who do the same thing who
3 sell less than a thousand pounds in a year. Is
4 that correct?

5 THE WITNESS: Yes, sir, that's true.

6 JUDGE GUTHRIDGE: And my question is
7 do you read this where it says that they become a
8 handler if they handle quantities more than a
9 thousand inshell pounds during any fiscal year,
10 that if somebody who is generally less than a
11 thousand pounds per fiscal year in a particular
12 year goes above that to, say, 1,100 pounds for
13 one fiscal year, are they going to be assessed on
14 the 1,100 pounds or just the 100 pounds for that
15 year?

16 THE WITNESS: Honestly, I'm not sure.
17 I really don't know. It's not clear to me. I
18 mean, in black and white if they do 1,100 pounds
19 in that year, in my opinion they would pay in the
20 assessment and then if they drop back down the
21 next year I'm assuming they would not, but I'm
22 not 100 percent on that.

1 JUDGE GUTHRIDGE: Thank you.

2 Any further questions from USDA or Mr.

3 Davis?

4 MS. SCHMAEDICK: Melissa Schmaedick,

5 USDA.

6 FURTHER RECROSS EXAMINATION

7 BY MS. SCHMAEDICK:

8 Q Ms. Spradling, if you could look at
9 paragraph (d) of that section, 986.86. It's on
10 the overhead and I'll read it into the record.

11 It says: "The Council, with the approval of the
12 Secretary, may establish such rules, regulations
13 and safeguards and require such reports,
14 certifications and other conditions as are
15 necessary to ensure compliance with this part."

16 Would a fair summary of that paragraph
17 be that if the program were implemented that the
18 Council would have the authority to create some
19 clearer guidelines on how to address a situation
20 such as a person who does 1,100 one year and a
21 thousand another year?

22 A Yes, ma'am. In my opinion, (d) does

1 give them that discretion and probably should
2 because you know it's going to happen. To me
3 that gives them the discretion to decide how to
4 handle that situation. But like I said, black
5 and white, if they go over one year, then that
6 year they would be assessed, I assume. But yes,
7 that does give them the discretion, and I'm glad
8 that's there because I'm sure it's going to
9 happen.

10 MS. SCHMAEDICK: Thank you. This time
11 no further questions.

12 MR. DAVIS: And no further questions
13 from the Proponents.

14 JUDGE GUTHRIDGE: And no further
15 questions. Are there any questions from the
16 audience?

17 (No response.)

18 JUDGE GUTHRIDGE: Ms. Spradling,
19 you're excused.

20 THE WITNESS: Thank you.

21 (Whereupon, the witness was excused.)

22 MR. QUIR S: Your Honor, before we

1 call our next witness, Dr. Larry Stein, perhaps a
2 five-minute break would be in order.

3 JUDGE GUTHRIDGE: All right. We'll
4 recess, it's 3:47 till 3:55.

5 (Whereupon, a brief recess was taken.)

6 JUDGE GUTHRIDGE: Back on the record,
7 please.

8 Mr. Quirós.

9 MR. QUIR S: Dr. Stein, have you been
10 sworn by the Judge?

11 JUDGE GUTHRIDGE: Not yet.

12 MR. QUIR S: We're ready, Your Honor.

13 JUDGE GUTHRIDGE: He is your next
14 witness?

15 MR. DAVIS: Yes, Your Honor.

16 Whereupon,

17 LARRY A. STEIN

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

21 DIRECT EXAMINATION

22 BY MR. QUIR S:

1 Q Dr. Stein, please state your name.

2 A Larry Stein.

3 Q Would you please spell it slowly into
4 the record?

5 A L-A-R-R-Y, S-T-E-I-N.

6 Q And where do you live?

7 A I live in Castroville, Texas.

8 Q Thank you. And what is your
9 involvement in the pecan industry?

10 A I work for Texas A&M AgriLife
11 Extension Service.

12 MR. QUIR S: Your Honor, I have
13 introduced what would be Exhibit 44, which is a
14 CV of Dr. Larry Stein.

15 (The document referred to was marked
16 for identification as Exhibit 44.)

17 BY MR. QUIR S:

18 Q Dr. Larry Stein, this is your CV?

19 A Yes, sir.

20 Q And tell us a little bit briefly about
21 your education and your background?

22 A I went to school at Texas A&M and I

1 have a BS, MS and a PhD from Texas A&M.

2 Q And how long have you focused on the
3 pecan industry?

4 A I did my PhD research on pecans and so
5 I got my PhD in 1985, so three years before that,
6 and then I went t work for Texas AgriLife --
7 well, it used to be Texas Agricultural Extension
8 Service in 1985, and so I've been working on
9 pecans every since about 1985.

10 MR. QUIR S: Thank you, Dr. Stein. I
11 understand you're going to help us this morning
12 understand a little bit more about native and
13 seedlings, and we appreciate you coming here and
14 taking time to do that.

15 Your Honor, at this time we would also
16 like to introduce Exhibit Number 45, which is Dr.
17 Stein's presentation.

18 (The document referred to was marked
19 for identification as Exhibit 45.)

20 BY MR. QUIR S:

21 Q Dr. Stein, please describe each one of
22 these pages as we turn them and let us know when

1 we should turn pages.

2 A All right. I'm going to tell you a
3 little bit about native pecans and I'm going to
4 speak primarily from Texas on trees and things,
5 but we will talk about the native pecan belt as
6 well. Those are massive native pecan trees,
7 typically they inhabit the rivers and streams and
8 they sit on some 20-plus feet of soil so they are
9 on very good sites.

10 Next slide, please. And the ideal
11 native pecans -- there's been a lot of talk about
12 native pecans today, and I'm happy to see that --
13 the ideal native pecan would be about 50 per
14 pound, but they would shell out in perfect
15 halves. I mean, that's the key, you want them to
16 shell out in halves and so that's what we're
17 after, that would be the ideal one.

18 Next picture, please. When you look
19 at this picture here, that is the native range of
20 the pecan, and when I research native pecans,
21 what I'm talking about is these are the ones that
22 the Good Lord planted, these are native trees and

1 that's how they're named. And so you see they go
2 up into the states where you see the dark there.
3 That is the native pecan range. We differentiate
4 those from seedling pecans, and seedling pecan,
5 you know one of the parents, one of the parents
6 is known on a seedling pecan and so there's a
7 total difference between natives and seedling
8 pecans and I wanted to make that distinction.

9 Next picture. Now, when you look at
10 native pecans, there's a lot of good attributes
11 associated with native pecans. There was some
12 discussion today about numbers of trees per acre
13 and the number was 14 that was used. In Texas we
14 don't really use a number, what we use is canopy
15 size. We mean here is one pecan tree, one native
16 pecan tree there, you can't read the number but
17 it's 984 pounds. We figure a good average yield
18 on native pecans is anywhere from 5- to 800
19 pounds per acre, so if you have these massive
20 trees at times, you don't need that many trees
21 per acre. So here is a slide from the 1950s
22 where these gentlemen were working with pecans,

1 and so you can see that they can be quite
2 productive.

3 Natives are located on some of the
4 best soils in the whole world, like I told you
5 before, they're already established, and they
6 will respond to management. You can take care of
7 native pecans and they will respond. The
8 challenge has always been they will produce but
9 the big challenge has been the price per pound
10 doesn't offset the costs that you have per acre,
11 and so that has always limited native guys on
12 what they could afford to put into these pecans.

13 Next picture. Now, there are a lot of
14 challenges, there's downsides to native pecans.
15 Obviously, they're on the rivers and streams, and
16 when it floods and we've had several situations
17 where the crop is on the ground ready to be
18 harvested, flood, goes down the river. So you
19 have up and down production as well. That's been
20 mentioned today. The Indians were the first ones
21 to come up with that. They would visit the river
22 bottoms every other year because the pecans were

1 alternate there. But the big thing, the big
2 downside to native pecans has always been the low
3 price.

4 Now, when you look at the challenges
5 that you have with native pecans, you have all
6 these trees per acre out there and the problem
7 comes in that these trees are so crowded that the
8 only production is on the top of the tree. And
9 so when you look at these native pecan bottoms,
10 you have some trees that are very valuable, you
11 have a nice strong trunk there, whereas, on the
12 next picture you have a very weak tree and this
13 tree here is not going to be near as productive
14 as that other tree. The top on this has been
15 blown out and it may have had a lightning strike,
16 it has heart rot, and so that tree is not going
17 to make any pounds is what's going to happen.

18 So the big challenge on native pecans
19 is we need to thin out these trees -- next
20 picture -- so that we have -- go to the next one
21 after that one -- you have all these trees and
22 you see there are so many trees that you don't

1 have sunlight hitting the full canopy of the
2 trees. Go on to the next one, please. Yes, here
3 is the one that I wanted. Ideally when you go
4 out into these bottoms at high noon you would
5 like to have half sun and half shade. That means
6 all the limbs are getting a full gamut of
7 sunlight and that way the trees will be most
8 productive.

9 And so when you have these native
10 groves you don't thin them today and you're done,
11 it's an ongoing process. You start today, you
12 take some out, you get them light and then as
13 these trees grow you're going to have to continue
14 to take trees out. And so the lady a while ago
15 she made the comment, well, they get too big to
16 manage. And that's true. Some of these trees
17 get so large you can't get the spray to the top,
18 you also can't shake the trees. And there's been
19 some reference about the times and harvest, I
20 mean, that's basically related to these native
21 trees, they're so big you can't shake a native
22 tree until the leaves come off, and so why the

1 production cycle is pushed back. The nuts are
2 typically mature at the same time, you just can't
3 get them off the tree.

4 As you thin these trees out, a lot of
5 them are going to be bean poles, and so they're
6 not going to be very productive, but as you thin
7 them out and you get more light into these
8 groves, they will fill out and the limbs will
9 become more productive. So we recommend that you
10 thin these things

11 Next picture. As far as the
12 management program on these things, we think you
13 need to get them thinned out. When you start
14 this process it's not a one-year deal, it takes
15 pecan trees sometimes five years to respond so
16 you need to start the process and you need to
17 continue it. And a big part of managing native
18 pecans is fertility. They need to make annual
19 shoot growth every year and so a big part of
20 making that happen is fertilizer. In Texas
21 typically we will see a pretty good native crop
22 about every three to five years regardless of

1 what happens, and so if you can step up your
2 management program, you can decrease the
3 downsides of production.

4 So we typically recommend that native
5 growers put some on a bud break and then if you
6 have a crop come back and put on. That's
7 typically our recommendation per year, about 60
8 units of actual nitrogen per acre per year is
9 typically what we recommend. Also, when you do
10 this, when you get these trees to grow fast with
11 ground fertilizer, nitrogen, the trees may not
12 take up enough zinc and so you may have to apply
13 zinc as well to native pecan trees. That's a
14 picture of zinc rosette on native pecans and so
15 you may have to spray.

16 Next picture. And so obviously you
17 would have equipment, these air blast sprayers
18 where you would come in and you would actually be
19 spraying the zinc onto the pecan trees. We
20 recommend at least two zinc applications on
21 native pecans, and typically one of those will
22 correspond with a very important insecticide

1 spray that we would typically put out on pecans.

2 Native pecans have the same pest
3 complex as improved pecans, and so the challenge
4 is that you need to be controlling these.

5 Weevils can be a big problem and there's actually
6 parts of our state and other states that don't
7 have weevils, and so getting a weevil out of a
8 shelled pecan is very, very hard to do, and so
9 we're hopeful that maybe some day in the future
10 you could have a premium pay for pecans coming
11 from non-weevil areas.

12 Wildlife is the other big thing. I
13 said up and down, you have alternate bearing, you
14 have low price, but then wildlife is a tremendous
15 drain on native pecans because you have the
16 squirrels, the racoons, the turkey, the deer, the
17 Blue Jays, the crows, and so in a short crop year
18 they always get their share and so that's always
19 a challenge for these native guys.

20 One of the things that you will find,
21 though, and the take-home lesson from this
22 particular picture right here is that's data of

1 analysis of a native pecan bottom over a nine-
2 year period, and the main line that I wanted you
3 to focus on there was yield in pounds per acre.
4 And notice we start with 700, 725, 900, 1,065,
5 and so all this is data to show that under a
6 management program you can make these things
7 produce pecans on a regular basis. This data is
8 about 35 years old and so the price there is low
9 but you also see how the price does fluctuate
10 from year to year and that has always been a
11 challenge.

12 And then my last picture is a picture
13 of a massive native tree and it's my opinion,
14 it's our opinion in Texas that natives have a
15 vast potential and the biggest challenge that we
16 have to overcome typically is the low price.

17 MR. QUIR S: Thank you, Dr. Stein. I
18 have some follow-up questions, but before I do,
19 technically I'd like to go ahead and tender
20 Exhibits 44 and 45, Your Honor.

21 JUDGE GUTHRIDGE: With regard to
22 Exhibit 44, any objection from USDA?

1 MS. SCHMAEDICK: No objection.

2 JUDGE GUTHRIDGE: Any objection from
3 the audience?

4 (No response.)

5 JUDGE GUTHRIDGE: 44 is admitted.

6 (The document previously marked as
7 Exhibit 44 was received in evidence.)

8 JUDGE GUTHRIDGE: Addressing 45, any
9 objection from USDA?

10 MS. SCHMAEDICK: No, Your Honor.

11 JUDGE GUTHRIDGE: Any objection from
12 the audience?

13 (No response.)

14 JUDGE GUTHRIDGE: 45 is admitted.

15 (The document previously marked as
16 Exhibit 45 was received in evidence.)

17 MR. QUIR S: Thank you.

18 BY MR. QUIR S:

19 Q Dr. Stein, you have received and read
20 what has been marked as Exhibit 1 -- you have it
21 in front of you, I see -- which is a copy of the
22 notice prepared by USDA which was published in

1 the Federal Register. Is that true?

2 A Yes, sir.

3 Q And you know that as part of a
4 proposed commercial Federal Marketing Order for
5 pecans, we treat native and seedlings together
6 and we treat them differently from improved
7 varieties based on cultural differences, but more
8 importantly, based on the commercial differences
9 between native seedling nuts and nuts from
10 improved varieties. Is that true?

11 A Yes, sir.

12 Q And so you're trained as a scientist,
13 a botanist, and so when you make a distinction
14 between native and seedlings, you're making a
15 scientific distinction. Is that true?

16 A Yes.

17 Q And that scientific distinction, for
18 instance, the native you say we don't know kind
19 of how it got there, it could have been a crow
20 dropped that seed and it sprouted in the ground.
21 Is that true?

22 A Right, but I mean, that nut would be

1 coming from a native tree where we don't know any
2 parentage.

3 Q We have no idea where it comes from.

4 A Right. Now, if a crow drops a Success
5 pecan, then we have a Success seedling, so we
6 call that a seedling as opposed to a native.

7 Q So if I have a crop of Successes and
8 I decide that I want some nuts and go poke a hole
9 in the ground and drop a nut in, if it happens to
10 germinate and sprout and survive those early
11 years, that will be a seedling.

12 A That will be a seedling, that is
13 right.

14 Q So that's the biology. Right?

15 A Right.

16 Q Now, a seedling, what's the chance
17 that that seedling, if we don't know how it's
18 pollinated or otherwise, what's the chance that
19 that Success seedling will be a Success?

20 A Zero.

21 Q One in a million?

22 A Not even that. It will not be a

1 Success, it will be a seedling of Success.

2 Q Okay, perfect. So if I have a field
3 of Desirables -- and those get as much money as
4 anything in the east. Is that correct?

5 A Right.

6 Q And I take every one of those seeds
7 and I plant them, I'm not going to get a field of
8 Desirables, I'm going to get a field of
9 seedlings.

10 A You're going to get a field of
11 seedlings. Correct.

12 JUDGE GUTHRIDGE: Mr. Quirós, are
13 Success and Desirable, are those --

14 MR. QUIR S: Improved varieties.

15 JUDGE GUTHRIDGE: Those are specific
16 varieties. They also have sort of ambiguity:
17 you've had a successful tree of some sort.

18 MR. QUIR S: Yes, they do have funny
19 names. They're actually listed under pecan as
20 part of the improved varieties, but it's a good
21 point. Their industry usage is common but
22 otherwise it is confusing. I'm not sure why we

1 choose names that sound like something else but
2 the pecan industry does.

3 BY MR. QUIR S:

4 Q I need your help here. On a
5 commercial sense, as a grower and then a handler
6 and a consumer, how are natives and seedlings
7 similar? We've talked about how they were
8 dissimilar for the science, but how are they
9 similar from a commercial standpoint, from a
10 grower-handler-consumer?

11 A Well, they're similar in the respect
12 in the way they shell out. I mean, not all
13 seedlings shell that great, not all natives shell
14 that great.

15 Q How about size?

16 A Typically seedlings are much larger
17 than natives.

18 Q And they're both smaller than
19 improved?

20 A No. You can have seedlings that are
21 the same size as improved.

22 Q Did you hear Mr. York's testimony that

1 natives and seedlings tend to be 12 and below and
2 improved 13 and above? He's a sheller. Do you
3 think that's reasonable?

4 A I think so.

5 Q It's just that natives would be
6 smaller than seedlings inside a small range.

7 A That is correct.

8 Q Okay. Thank you. And how are native
9 and seedlings dissimilar from improved varieties
10 from a commercial standpoint, from the standpoint
11 of a grower, a handler and a consumer?

12 A How are they dissimilar?

13 Q Yes. How are native and seedlings on
14 the one hand and improved varieties different
15 from each other on a consumer standpoint?

16 A Well, typically improved varieties are
17 going to shell out at a higher percent than your
18 natives and seedlings.

19 Q They're bigger?

20 A Typically improved are bigger.

21 Q They get more money in the market?

22 A Usually that's right.

1 Q And seedlings get less?

2 A Usually that's right.

3 MR. QUIR S: Okay. Thank you.

4 JUDGE GUTHRIDGE: Is the term shell
5 out, it's not defined, that's not one of our
6 defined terms. What do you mean by shell out?

7 THE WITNESS: Shell out is when you
8 crack the pecan and you get the percent shell and
9 the percent nutmeat, and the higher the shell
10 out, higher percent kernel, the better.

11 JUDGE GUTHRIDGE: Thank you.

12 BY MR. QUIR S:

13 Q Dr. Stein, have you received a copy of
14 the Executive Summary of the Economic Analysis of
15 the Implementation of a Federal Marketing Order
16 for Pecans that was prepared by Dr. Marco Palma
17 which has been marked Exhibit 23 to these
18 hearings?

19 A Yes, sir.

20 Q And in that he discusses the issue of
21 promotion. Do you believe promotion works in
22 agricultural products?

1 A Indeed I do.

2 Q And any evidence that you're aware of
3 that suggests otherwise?

4 A No, sir.

5 Q With a crop that has never been
6 promoted broadly and well through generic
7 promotion, do you think it can especially have an
8 impact?

9 A I think it can.

10 Q Specifically, Dr. Marco finds that
11 based on other tree nuts, walnuts and almonds,
12 that if you spent the midpoint of the assessment
13 of 2-1/2 cents on improved, that you would get
14 6.3 cents in benefit or increased price, and then
15 on -- just to refresh your memory -- and then on
16 native and seedling a penny and a half is a
17 midpoint and get 3.6 cents. Do you agree that
18 that's likely or reasonable?

19 A I think so.

20 Q Good. I provided you a section of
21 Exhibit 19 which is the full report in which he
22 discusses certain specific research that has been

1 done in the past with regard to consumer
2 preference for native and seedlings where he
3 projects with some promotion you might be able to
4 get an increase of up to 13 cents per pound if
5 it's marketed correctly because of the idea that
6 the natives or seedlings are more natural than
7 maybe the improved. Are you familiar with that?

8 A Yes, sir.

9 Q Do you think that that's reasonable?

10 A I think that is reasonable.

11 Q In Exhibit 6 in these hearings, the
12 USDA put forth some information that showed that
13 the average price for native and seedlings last
14 year was 88 cents per pound. So 13 cents per
15 pound plus may 3.6 cents a pound, that would be a
16 fairly significant increase, would it not, for
17 native and seedling?

18 A Yes, sir.

19 Q So if the Council was able to get
20 promotion money and focus some of that promotion
21 money on native and seedlings, it could have as
22 much as 13 plus 3.6 cents on 88, somewhere

1 between 15 and 20 percent improvement, fairly
2 dramatic impact, potentially, on the native and
3 seedlings.

4 A Absolutely.

5 Q Okay. Thank you. Have you had an
6 opportunity to hear presentations by the American
7 Pecan Board over the last several years?

8 A I have.

9 Q Have you stayed up wit the
10 developments of the American Pecan Board?

11 A Oh, I wouldn't say 100 percent but I'm
12 aware of what's going on.

13 Q Do you read Pecan South Magazine?

14 A Yes, sir.

15 Q Have you read those articles?

16 A Yes, sir.

17 Q Do you know Mike Adams?

18 A Very well.

19 Q Do you know any of the members of the
20 American Pecan Board?

21 A Oh, I know a few but not everybody.

22 Q And do you meet them regularly at

1 association meetings, et cetera?

2 A A lot of them were at our meeting last
3 week. Sure.

4 Q And you feel like you've had an
5 opportunity, if you needed to, to ask them any
6 questions with regard to the proposed marketing
7 order?

8 A Absolutely.

9 MR. QUIR S: Good. Thank you.
10 Appreciate you coming in and giving us an
11 education on native and seedling pecans, Dr.
12 Stein, and for all your energies on behalf of the
13 Texas pecan growers.

14 We don't have any further questions of
15 this witness at this time.

16 JUDGE GUTHRIDGE: Does USDA have any
17 questions?

18 MS. SCHMAEDICK: Melissa Schmaedick,
19 USDA.

20 CROSS-EXAMINATION

21 BY MS. SCHMAEDICK:

22 Q Dr. Stein, thank you for your

1 testimony. Actually I just have one question for
2 you. Are there different varieties of native
3 trees, or are they just sort of all lumped into
4 one category called native?

5 A Every native tree is different, every
6 native pecan is different, there are no two the
7 same, so they're all different.

8 Q Okay. Thank you. I will have to
9 think about that for a little bit.

10 A The only way that you can have two of
11 them the same is if you take one and graft it
12 onto another tree, and then you have two that are
13 the same. But all native pecan trees growing on
14 their own root system are distinctly different
15 from each other. It's just like everybody in
16 this room, all genetics.

17 Q So when you say about the difference
18 between a native and a seedling, a seedling you
19 know at least one parent, that's the context.

20 A That's right.

21 Q Okay. I may have some other questions
22 but I'm going to stop for now. Thank you.

1 A Okay.

2 JUDGE GUTHRIDGE: Are there more
3 questions from USDA?

4 MR. QUIR S: I've got a question in
5 the meantime, if they don't.

6 JUDGE GUTHRIDGE: All right.

7 DIRECT EXAMINATION (RESUMED)

8 BY MR. QUIR S:

9 Q Dr. Stein, I know I should have asked
10 you about this sooner. Mike Adams, who is
11 actually a pretty good lawyer, came up to me and
12 told me I'd forgotten a question. Appreciate
13 that, Mike.

14 If you'd please turn to the Authority
15 986.68 which is the Authority for Research and
16 Promotion Activities. This is one of the main
17 authorities that's available for the Council.
18 I'll let you take a minute to look at it there.
19 It would be on page 38030 and it's of Exhibit 1
20 and it would be at the bottom left-hand corner
21 beginning. If you'll take a minute just to read
22 it. Just let me know when you've had a chance to

1 read it, Dr. Stein.

2 A Okay.

3 Q Dr. Stein, do you think it would be
4 helpful if there was additional research funds
5 available to do pecan research? I know Texas is
6 well funded, but overall do you think that would
7 be helpful?

8 A Who told you Texas was well funded?
9 Absolutely it would help.

10 MR. QUIR S: Okay. Great. Well, as
11 you know, one of the main issues for us is
12 research and promotion, and I failed to ask.
13 Thank you very much for your answer. Pass it
14 back to USDA.

15 JUDGE GUTHRIDGE: Does the United
16 States Department of Agriculture have any more
17 questions?

18 MS. VARELA: I'll give it a try. Jen
19 Varela, USDA.

20 CROSS-EXAMINATION (RESUMED)

21 BY MS. VARELA:

22 Q Dr. Stein, could I direct you to

1 Section 986.28 under Definitions, the definition
2 of pecans.

3 A Okay.

4 Q Have you had a chance to look it over?

5 A Okay. Ill read it.

6 Q In your opinion, being somebody who is
7 very familiar with all the different types of
8 varieties, does this definition seem sufficient
9 to cover all of the pecans that are commercially
10 produced in the United States or at least in the
11 production area that we've defined?

12 A I think so, yes.

13 Q And looking specifically at the list
14 in paragraph 2 there that lists some of the most
15 popular improved varieties, is that pretty
16 comprehensive in terms of what you see being
17 grown most often?

18 A Yes, it is.

19 Q Those cover the major ones.

20 A Right.

21 Q Is there any -- to your knowledge, is
22 there ongoing research developing new varieties

1 that have the potential to be as popular as some
2 of these?

3 A Absolutely. We have a USGA pecan
4 breeding station and they're continually working
5 to create new pecans and they have some that
6 they're testing hoping to release.

7 Q Are any of those varieties cross-bred
8 with anything other than another type of pecan?

9 A No. Pecan, you have to cross pecan
10 with pecan.

11 Q So even if it wasn't necessarily on
12 this list yet, a tree that's now being developed
13 would still probably fall under this genus?

14 A I would say that's right. I have to
15 amend my statement. You know, certain hickories
16 can cross and pecan is a hickory, so you can have
17 some of these exotic hickory crosses.

18 Q And I think we heard some testimony
19 about hicans, and is that an example of when you
20 would have a hickory cross?

21 A Well, pecan is a hickory and then
22 there's other types of hickories, like there's

1 shag bark, shell bark, and so pecan in its native
2 habitat with other hickories could theoretically
3 cross, and so you would have a different type of
4 nut out there.

5 Q There again, to your knowledge, the
6 way this is defined covers everything that's
7 being produced commercially?

8 A I think so, yes.

9 Q Thank you very much.

10 A You're welcome.

11 JUDGE GUTHRIDGE: Any more questions
12 from USDA?

13 BY MS. CHILUKURI:

14 Q Yes. Dr. Stein, I had a question for
15 you about the production area that's proposed in
16 the marketing order as I'm comparing it against
17 the math in your presentation. So I see it seems
18 like there are native pecans outside the proposed
19 production area. Is that correct?

20 A I would say that's probably right.

21 Q And do you know why those areas were
22 excluded from the proposed production area?

1 A Have you got the proposed production
2 areas?

3 Q Yes. So that's set out in number
4 986.30.

5 A So I'm not sure I understand your
6 question.

7 Q So I was just asking in terms of your
8 presentation, the map. If I'm understanding the
9 map correctly, I see, for instance, that Illinois
10 and Indiana and there's other areas would have
11 native production.

12 A Right.

13 Q I don't know whether or not they have
14 improved pecans.

15 A It's limited. Their production would
16 be limited because of how far north they are.

17 Q Okay.

18 A I mean, you can have pecan trees grow
19 far north but they won't fruit because you don't
20 have enough growing degree days. I mean, it's
21 not hot enough, basically.

22 MS. CHILUKURI: Okay. Thank you very

1 much.

2 BY MR. HINMAN:

3 Q Don Hinman, USDA.

4 A Yes, sir.

5 Q Dr. Stein, you drew a contrast between
6 Mr. York said something about the standard of 14
7 trees per acre and then you used, I believe, the
8 term canopy size.

9 A Right.

10 Q Could you explain how that applies?

11 A Well, if you had five big trees and
12 they covered an acre or were sitting on an acre,
13 what I'm saying is you could have less than 14
14 trees, it doesn't necessarily have to be 14, it
15 could be based on canopy size. And then you
16 would use shade and sun, you want sun all around
17 the trees. So what I'm saying is you could take
18 a massive native pecan tree, have total sun all
19 the way around it, and it may produce 800 pounds.
20 So theoretically you could have one tree per acre
21 and you would come up with our average yields.

22 The biggest problem we have with

1 native pecans is there's too many trees per acre,
2 and it's expensive to take them out, it costs
3 money to saw them down, haul them off, burn them
4 up, and so people don't thin them. So all I'm
5 saying is you could thin these trees and they
6 will become more productive, but you can only
7 afford to do that if the price is more
8 consistent.

9 Q Thank you. Because of this large
10 variation in production that the Farm Service
11 Agency often is involved in determining acres or
12 pecan acres for native trees in particular, does
13 this canopy size measurement standard apply in
14 some of the Farm Service Agency designations of
15 trees per acre or yields and things of that
16 nature?

17 A I'm not sure what those numbers are.
18 I mean, we recommend different spacings but it's
19 all based on whether you're going to hedge them
20 or you're going to let them become big trees, so
21 as the trees grow you're actually going to have
22 less trees per acre, so it's a changing area

1 really.

2 Q Thank you. And then shifting gears,
3 on one of the slides named Management Program,
4 you used the phrase -- you used this sentence:
5 Natives crop every three to five years
6 regardless. Can you explain a bit more about
7 what is meant by that statement?

8 A All right. It turns out that there's
9 a lot of people that don't understand why you get
10 a big crop followed by nothing, it's alternate
11 bearing, and we think fertilizer has a lot to do
12 with that and management. But it turns out that
13 we have a lot of native trees that aren't managed
14 and about every three to five years they have a
15 crop, and basically we think what happens is they
16 don't have anything, don't have anything, finally
17 store up reserves and then they have a crop. And
18 in the year that they crop all the other trees
19 have a crop so the insects are dispersed so
20 insect pressure is less as well, and so you end
21 up with a crop even though your management
22 program is very minuscule.

1 Q Does the term masting apply to this
2 phenomenon?

3 A M-A-S-T?

4 Q M-A-S-T-I-N-G, masting. I think it
5 was equated to alternate bearing in some previous
6 testimony.

7 A I've never used masting as a term in
8 pecans.

9 MR. HINMAN: Okay. Thank you. No
10 further questions.

11 JUDGE GUTHRIDGE: Are there any more
12 USDA questions?

13 MS. SCHMAEDICK: Melissa Schmaedick,
14 USDA.

15 BY MS. SCHMAEDICK:

16 Q Dr. Stein, we had a question earlier
17 about the native production map that showed --
18 well, hold on a second. Can we have that map
19 back up there, please? Exhibit Number 45, page
20 2. So does this map show where native pecan
21 trees grow?

22 A That is correct. The dark areas are

1 where native pecans are found.

2 Q But from your second statement about
3 the trees that are found up further north perhaps
4 not bearing fruit, so this map characterizes
5 where the trees grow but not necessarily where
6 the commercial production is.

7 A That's correct.

8 Q Okay. And so if you can turn your
9 attention to Exhibit 1 and if you can find
10 Section 986.30, Production Area. Now, if you
11 look at that list of states, Alabama, Arkansas,
12 Arizona, California, Florida, Georgia, Kansas,
13 Louisiana, Mississippi, Missouri, North Carolina,
14 New Mexico, Oklahoma, South Carolina and Texas,
15 and you compare that list to your map of where
16 native trees grow, in your opinion and based on
17 your expertise, does this list capture the states
18 that have the conditions that are amenable to
19 producing native pecans at a commercial level?

20 A Yes, I think so.

21 Q Thank you. And is there a state
22 that's missing from this list that is on your map

1 of where the native trees are growing? Is there
2 anything missing from that list in terms of
3 producing at a commercial capacity?

4 A To my knowledge, no.

5 MS. SCHMAEDICK: Thank you. No
6 further questions from me.

7 JUDGE GUTHRIDGE: Any more questions
8 from USDA?

9 (No response.)

10 JUDGE GUTHRIDGE: Mr. Quirós.

11 REDIRECT EXAMINATION

12 BY MR. QUIR S:

13 Q Just an informative question. You
14 mentioned that there was a USGA breeding station.
15 From start to finish with a new cultivar, an
16 improved cultivar that's being developed because
17 of characteristics that are important to the
18 industry, how long does that take?

19 A Loaded question. Anywhere from 20 to
20 40.

21 Q Twenty to 40 years?

22 A Yes, sir.

1 Q So the USGA breeding station might be
2 at work on some new cultivars but it might be a
3 generation or two before those are brought out.

4 A Absolutely.

5 Q And from the time they're brought out
6 until they're commercially accepted by growers
7 and by handlers and you can prove them up in the
8 field circumstances, how much longer does that
9 take?

10 A Well, that pretty much took all that
11 into consideration.

12 Q So you feel like between 20 and 40
13 years is a good time before you could probably
14 get new cultivars in the field?

15 A Right.

16 MR. QUIR S: Thank you very much. I
17 think we have no further questions. Again, we
18 appreciate your testimony, Dr. Stein.

19 JUDGE GUTHRIDGE: USDA, any further
20 questions?

21 MS. SCHMAEDICK: No further questions.
22 Thank you for your testimony.

1 JUDGE GUTHRIDGE: Are there any
2 questions from the audience?

3 (No response.)

4 JUDGE GUTHRIDGE: Hearing none, Dr.
5 Stein, you may be excused.

6 (Whereupon, the witness was excused.)

7 MR. DAVIS: Your Honor, the Proponents
8 will next call Mr. Kinley Sorrells.
9 Whereupon,

10 KINLEY SORRELLS

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

14 DIRECT EXAMINATION

15 BY MR. DAVIS:

16 Q Good afternoon, Mr. Sorrells. Thank
17 you again so much for coming in today. Would you
18 state your full name and spell it for the record?

19 A Kinley Sorrells, K-I-N-L-E-Y, S-O-R-R-
20 E-L-L-S.

21 Q Do I understand that you have a
22 prepared statement you'd like to give today?

1 A Yes, sir.

2 Q You also have in front of you Exhibit
3 1 and Exhibit 23. There may be a question about
4 those.

5 Before we gets started with your
6 statement, and I believe it is included in your
7 statement, in addition to pecans you also grow
8 some other crops. Is that correct?

9 A Yes, sir.

10 Q And you tell me you're right in the
11 middle of your watermelon harvest right now. Is
12 that correct?

13 A That's correct.

14 Q All right. So we'll try to get you
15 out of here and back to work as soon as we can.
16 Again, thank you.

17 If you have your statement in front of
18 you, why don't you go ahead and deliver that for
19 the Court.

20 A All right. As I said, I'm Kinley
21 Sorrells. I live five miles east of Comanche,
22 Texas. I am the owner of Sorrells Farms which is

1 also located in Comanche, Texas.

2 Since 1977 Sorrells Farms has been a
3 major producer of pecans, watermelons,
4 cantaloupes, tomatoes, jalapenos and peaches to
5 the wholesale markets. We own over 1,400 acres
6 of pecans. Currently they're in production. We
7 produce an average of 1.3 to 2.5 million pounds
8 of pecans each year. We've also planted 50 acres
9 of new trees that will be in production in the
10 next four to seven years. On our farm we grow 85
11 percent which will be the improved variety pecans
12 and 15 percent will be native. Under the Small
13 Business Administration definitions we would be
14 considered a large business, more than \$750,000
15 in annual gross revenue.

16 I have reviewed the economic analysis
17 summary prepared by Dr. Marco Palma, specifically
18 the projected average price increase from
19 promotion of 6.3 cents per inshell versus an
20 average 2.5 cents per inshell cost. Overall, I
21 am aware of the costs that the Federal Marketing
22 Order may impose on my farm and I do not believe

1 that these costs will be unduly burdensome.

2 Further, I believe that the benefits of the
3 Federal Marketing Order on my farm will greatly
4 outweigh any costs associated with it.

5 Q If I could interrupt you just for a
6 second. That summary of the economic analysis is
7 Exhibit 23 that you have in front of you there?

8 A Yes, sir.

9 Q Thank you.

10 A In recent years I've seen a wide
11 variation in the prices that I've received for my
12 pecan crop. Such wide variation in pricing makes
13 it extremely difficult to plan for the future
14 operation of my farm. While prices for pecans go
15 up and down dramatically from year to year, the
16 cost of my production has steadily increased.
17 The cost of fertilizer, insecticides and
18 equipment has all increased in recent years
19 regardless of the price I receive for my crop.

20
21 Further, the lack of accurate market
22 information on the anticipated size of the pecan

1 crop in any given year also makes it difficult
2 for me to negotiate a fair price for my crop and
3 to make reasonable business decisions about
4 investments on my farm. Increased price
5 stability and more accurate market information
6 would greatly benefit my farm. I think my farm
7 and the industry would also benefit in the future
8 from grade, size, quality, packaging, shipping
9 protocol and other handling requirements as we
10 compete with other tree nuts for shelf space and
11 consumer attention.

12 I also understand that under the
13 proposed order, only growers with more 30 acres
14 of pecans or more than 50,000 pounds of average
15 production per year over the past four years will
16 be allowed to vote on the proposed order. In my
17 opinion, this threshold is reasonable because a
18 grower that does not meet this threshold is not a
19 commercial grower. Any grower that is smaller
20 than the proposed threshold could not justify the
21 costs inherent in such a small production.

22 I am currently a member of the Texas

1 Pecan Growers Association and a past board member
2 of the Texas Pecan Board, serving 12 years. The
3 American Pecan Board has kept me informed about
4 its efforts to propose a Federal Marketing Order.
5 I feel like I have been informed about the
6 process of securing a Federal Marketing Order and
7 have been given an opportunity to participate in
8 this process.

9 In conclusion, I fully support the
10 proposed Federal Marketing Order for pecans and
11 would encourage the Secretary to implement the
12 order as proposed by the American Pecan Board.
13 I'd be glad to answer any questions that anyone
14 might have.

15 MR. DAVIS: Thank you so much, Mr.
16 Sorrells.

17 Your Honor, the Proponent group would
18 tender Exhibit 46, which is the statement of Mr.
19 Sorrells.

20 (The document referred to
21 was marked for
22 identification as Exhibit

1 46.)

2 JUDGE GUTHRIDGE: Is there any
3 objection from USDA?

4 MS. SCHMAEDICK: No objection.

5 JUDGE GUTHRIDGE: Any objection from
6 the audience?

7 (No response.)

8 JUDGE GUTHRIDGE: No objection, and
9 Exhibit 46 is admitted into the record.

10 (The document previously marked as
11 Exhibit 46 was received in evidence.)

12 BY MR. DAVIS:

13 Q Mr. Sorrells, let me just ask one or
14 two questions because you've got this mixture of
15 improved and native pecans. I've noticed you
16 here in the audience, you've heard some of this
17 testimony today. Perhaps give us your point of
18 view on how you calculate your pecan acreage for
19 your native pecans.

20 A Well, as a rule of thumb we use 14
21 trees per acre. It has a lot to do with what Dr.
22 Stein said, the size of trees in my part of the

1 country are large and many times there will be
2 less than 14 per acre, but in our county the FSA
3 uses 14 trees.

4 Q And do you know of any county
5 differences in your surrounding counties? I know
6 in Texas counties can be pretty big.

7 A No, sir, I don't know of any that do
8 it any differently.

9 MR. DAVIS: I don't think I have any
10 further questions at this time, Your Honor.

11 JUDGE GUTHRIDGE: Does USDA have any
12 questions?

13 MS. VARELA: Jen Varela, USDA.

14 CROSS-EXAMINATION

15 BY MS. VARELA:

16 Q Thank you so much for being here
17 today, Mr. Sorrells. Certainly very busy right
18 now so we appreciate your time and your
19 perspective here.

20 I want to ask you a few quick
21 questions about your time on the Texas Pecan
22 Board. We've had a little bit of testimony

1 already from people who serve on some other
2 organizations that do a few of the activities
3 that we might see something similar happening in
4 the American Pecan Council if it comes into
5 place. Can you tell me a little bit about the
6 type of activities that the Texas Pecan Board
7 does right now?

8 A Well, I've been off of it for a few
9 years, but I was at the start of it. When it
10 began, I was one of the first members of it, and
11 of course, the main thing we're doing is we're
12 promoting pecans. We do an ad and also a bake
13 show. The ad is in the Texas Co-op Power
14 magazine, and it's pretty expensive to do but it
15 seems to be worthwhile. All of this is about
16 money. It takes money to promote our product.
17 We feel like we have the best -- there's no doubt
18 we have the Cadillac. The pecan is the Cadillac
19 and the promotion of it, it's just getting it
20 before people. The bake contest has been
21 something that's been real catchy, people like
22 that and they like the little bit of money that

1 we give them for being involved in that. Those
2 are a couple of things that come to mind that we
3 do.

4 Q And how are those activities funded?

5 A They're funded by a half cent a pound
6 assessment.

7 Q And is that collected at the state
8 level?

9 A Yes.

10 Q Is it voluntary or mandatory?

11 A Well, both. That's not a very good
12 answer. It's mandatory but you have the ability
13 to ask for a refund if you so desire.

14 Q Thank you. And do you anticipate that
15 the Texas Pecan Board's activities would in any
16 way be hindered by having a nationwide promotion
17 program under the American Pecan Council?

18 A Well, I believe that if the American
19 Pecan Board goes into place that Texas will
20 not -- in my mind they'll dispense, it will only
21 be one assessment. Now, I may be wrong, I
22 haven't discussed this with anyone, but that

1 would be what I would think would happen.

2 Q In your opinion do you see a role for
3 having generic promotion of the product on the
4 nationwide level and the existence of a maybe
5 more locally grown state promotion program? Is
6 it possible that those could complement each
7 other?

8 A Sure. I think any generic promotion
9 that you do, it benefits all. Naturally, being a
10 Texan and growing Texas pecans, I feel like my
11 pecans are better, that's just the way we are.
12 I'll get a little argument from around the room
13 and probably and all, but they're wrong and I'm
14 right so it's okay. I think whether it's done
15 locally, statewide or nationwide, I guess the
16 biggest deal is when you promote your product
17 everybody benefits. If you do it nationwide, if
18 I'm correct, only Texas and Georgia have a
19 marketing order where they're assessing the
20 grower to promote their product, so if everybody
21 else gets in on the action, well, it would
22 certainly be of benefit.

1 MS. VARELA: Thank you very much.

2 MS. SCHMAEDICK: Melissa Schmaedick,
3 USDA.

4 BY MS. SCHMAEDICK:

5 Q Good afternoon, Mr. Sorrells. Thank
6 you for your testimony. I want to continue
7 asking some questions about your involvement
8 with the Texas Pecan Growers Association as well
9 as the Texas Pecan Board.

10 So just for clarification, what is the
11 relationship between the Texas Pecan Board and
12 the Texas Pecan Commission?

13 A Well, the Texas Pecan Growers Board is
14 just a group of growers that they just promote --
15 well, they really don't promote, they're just a
16 group that oversees our state conferences and
17 all, but Texas Pecan Board is a totally -- there
18 may be some of the same people on each board but
19 the assessment board is strictly for paid
20 promotion and advertisement. Their duties are
21 different than the ones that serve on the Texas
22 Pecan Growers Board.

1 JUDGE GUTHRIDGE: Ms. Schmaedick, did
2 you ask about a Texas Pecan Commission?

3 MS. SCHMAEDICK: Yes.

4 BY MS. SCHMAEDICK:

5 Q I'm sorry. Maybe I'm not clear on
6 this question, but if you turn to page 3 of your
7 testimony you say I am currently a member of the
8 Texas Pecan Growers Association.

9 A Right.

10 Q And a past board member of the Texas
11 Pecan Board. And then you just mentioned a Texas
12 Pecan Growers Board.

13 A Well, the Texas Pecan Growers
14 Association is the same.

15 Q As the board?

16 A Well, they have a board. The Texas
17 Pecan Growers have a board, and the Texas Pecan
18 Board, they have a board of directors.

19 Q Okay. So there's a growers
20 association that has a board.

21 A Yes.

22 Q And then there's the Texas Pecan

1 Board.

2 A That's correct. Two different
3 organizations.

4 Q Do they do different things?

5 A Yes.

6 Q Can you just explain that real quickly
7 for me so I can get it straight in my mind?

8 A The Texas Pecan Growers Association is
9 a board, they promote pecans but they get it not
10 from grower assessment. The Texas Pecan Board
11 uses the money that comes from the growers
12 assessment.

13 Q And is that assessment the assessment
14 that's authorized under the state commission?

15 A Yes.

16 Q So currently when the Texas Pecan
17 Board which collects and uses assessments
18 collected at the state level, that money is spent
19 on activities that are specific to Texas. Is
20 that correct?

21 A Correct.

22 Q So if the Federal Marketing Order came

1 into existence and promotion activities were
2 taken on and generic promotion occurred at a
3 national level, in your opinion would it be
4 important to continue to promote Texas pecans?

5 A Oh, you caught me there. It would be
6 hard to not promote Texas pecans.

7 Q Okay. Thank you. So there could be
8 a continued reason to keep that Texas Pecan
9 Board.

10 A That's possible, yes.

11 Q And given that the Federal Marketing
12 Order is focused on generic promotion nationally,
13 would they be duplicating what the Texas Pecan
14 Board does in terms of advertising Texas pecans?

15 A In many ways they would be duplicated.
16 Any time you're promoting pecans, generic or as a
17 specific state, you're helping the pecan
18 industry. I probably ought to back up a little
19 bit. In my mind, and I'm not for sure, if this
20 passes, the American Pecan Board passes, the
21 Texas Pecan Board would go away. Now, that
22 hasn't been discussed, I don't know for sure, but

1 in my mind that's what I believe would happen.

2 Otherwise, we're going to be assessed in Texas

3 two times, and that probably won't work.

4 Q Okay. Thank you for that. I want to
5 talk about you as a member of the Texas Pecan
6 Growers Association. You're a member, grower
7 member. Is that correct?

8 A Yes.

9 Q How familiar are you with the other
10 members in that association?

11 A Well, pretty familiar. We're not that
12 big a group, and I don't see many of them but
13 once a year, but I communicate with them many
14 times throughout the year. And there's a lot of
15 growers and I'm in the central part of the state
16 and a lot of pecans are grown there, so fairly
17 familiar with many of them.

18 Q To your knowledge, are there many
19 producers that have less than 30 acres or produce
20 less than 50,000 pounds?

21 A There are some. The ones that I'm
22 most acquainted with produce more.

1 Q So in your discussions with your
2 fellow members, have you heard of any concerns
3 that are coming specifically from those producers
4 that are less than 30 acres large and produce
5 less than 50,000 pounds?

6 A No, I have not.

7 Q But would you say that they're aware
8 of the marketing order proposal?

9 A I think so. Most all of them will be
10 receiving the Pecan South and they've had ample
11 opportunity because it's been in there multiple
12 times, and I would think that they're probably
13 aware of it.

14 Q Thank you. And you have a copy of
15 Exhibit 1 in front of you. Is that correct?

16 A Yes.

17 Q Have you had time to read Exhibit 1?

18 A Yes.

19 Q Do you feel fairly comfortable with
20 its content?

21 A Yes.

22 Q So I want to ask for your opinion as

1 a business owner, a large business owner. Based
2 on your understanding of Exhibit 1, do you feel
3 that what I will refer to as the administrative
4 structure, so it's the language that pertains to
5 how the business should function, have you taken
6 time to read those sections?

7 A I've read all of it but I haven't
8 totally concentrated on just that part.

9 Q Based on your reading of Exhibit 1, is
10 there anything that strikes you as not being a
11 good business practice?

12 A No.

13 Q So are you confident in the program
14 that's being proposed in terms of its ability to
15 run and function effectively?

16 A I would have to say yes. I think any
17 business on the startup there has to be some
18 adjustments and some things that you might want
19 to change, and I think from my reading, that's in
20 here if something was to come up that needed
21 adjustment or change it could happen, and so from
22 that point of view I feel comfortable with it.

1 Q And so taking your last statement, you
2 understand that there's a proposal and you also
3 understand that there's flexibility to make
4 adjustments and you're okay with that flexibility
5 being there?

6 A Yes.

7 MS. SCHMAEDICK: I have no further
8 questions. Thank you.

9 JUDGE GUTHRIDGE: Any more questions
10 from the USDA?

11 (No response.)

12 JUDGE GUTHRIDGE: Mr. Davis.

13 REDIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q If I could just go back and touch one
16 or two topics. I think you mentioned in passing
17 that there are only two states that have their
18 own promotional program right now, that's Texas
19 and Georgia. Georgia, I believe, is the Georgia
20 Pecan Commodity Commission. Does that roughly
21 sound right?

22 A I believe so.

1 Q And having read Exhibit 1, you
2 understand that there's certainly nothing in that
3 proposed marketing order that would require
4 either of those states to stop that promotion.
5 Is that correct?

6 A No. That's correct.

7 Q And of course, that would be left up
8 to the decision of those commissions as to
9 whether they would commit. Right?

10 A Yes.

11 Q Let me ask you hypothetically, if the
12 State of Georgia were to continue putting out the
13 good word that Georgia pecans are in fact the
14 superior pecan, do you think Texas might also
15 continue?

16 A We'd have to definitely get the truth
17 out.

18 MR. DAVIS: All right. Thank you very
19 much. I have nothing else.

20 JUDGE GUTHRIDGE: USDA, any more
21 questions?

22 MR. HILL: I didn't quite hear the

1 answer. I believe he asked there's nothing
2 that -- it would be left up to the commissions or
3 the states whether they would disband or remain
4 in business. Did you answer that question?

5 MR. DAVIS: He said yes.

6 THE WITNESS: I said yes. And then I
7 had to add my Texas comment.

8 (General laughter.)

9 JUDGE GUTHRIDGE: Any more USDA
10 questions?

11 (No response.)

12 JUDGE GUTHRIDGE: Mr. Davis, anything
13 else?

14 MR. DAVIS: Nothing further, Your
15 Honor. Thank you so much.

16 JUDGE GUTHRIDGE: Are there any
17 questions from the audience?

18 (No response.)

19 JUDGE GUTHRIDGE: Hearing none, Mr.
20 Sorrells, you may be excused.

21 (Whereupon, the witness was excused.)

22 MR. QUIR S: Your Honor, I'd like to

1 recall Mike Adams at this time to continue the
2 earlier testimony.

3 JUDGE GUTHRIDGE: Mr. Adams, I remind
4 you you're still under oath for this testimony.

5 THE WITNESS: I understand.

6 Whereupon,

7 MIKE ADAMS

8 having been previously duly sworn, was recalled
9 as a witness herein and was examined and
10 testified further as follows:

11 DIRECT EXAMINATION

12 BY MR. QUIR S:

13 Q Mr. Adams, first of all, thank you for
14 letting me interrupt your earlier testimony so
15 that we could get witnesses that had scheduling
16 issues.

17 A And I appreciate you doing that. I
18 thank Your Honor for allowing that.

19 Q And we appreciate the Judge and the
20 USDA accommodating that.

21 Now I'd like to turn your attention to
22 Exhibit 1, Section 986.46, Council Nominations

1 and Voting. This is, I think, the longest
2 section and there are a lot of values that are
3 expressed here, and so we're going to take our
4 time to go through this, Mr. Adams, if we can.

5 A Okay.

6 Q Mr. Adams, did you look at other
7 Federal Marketing Orders before you began
8 drafting this?

9 A We did.

10 Q And did you study those Federal
11 Marketing Orders?

12 A We did.

13 Q And do you feel like this is a similar
14 form to what you've seen in other Federal
15 Marketing Orders?

16 A Yes, to the extent that it's within
17 the Act, although it's adapted to our industry.

18 Q So the whole concept of voting for
19 nominees that are then selected by the secretary
20 is not something you've seen in other businesses
21 you've been in, have you?

22 A No.

1 Q So this is a bit unique to Federal
2 Marketing Orders. Is that correct?

3 A That's correct, yes.

4 Q And so you were sensitive to some of
5 those issues and concepts in order to comply with
6 the Act. Is that correct?

7 A That's correct.

8 Q Thank you. Let's start sort of at the
9 beginning. What give the industry the authority
10 to conduct a nomination vote?

11 A The Act.

12 Q And how will nomination outreach be
13 conducted to ensure that all parties affected by
14 the order are notified and have had an
15 opportunity to participate in the nominations?

16 A How will they be contacted?

17 Q Yes. How will the nomination outreach
18 be conducted?

19 A Well, it's my understanding that's
20 going to be a responsibility of the USDA in
21 addition to the Proponent group.

22 Q How about trade magazines?

1 A Yes. Any way that -- well, we've
2 mentioned Pecan South, Georgia Pecan, there are
3 various state newsletters, there's any number of
4 ways that growers can -- that lists can be built
5 of growers.

6 Q And does the industry anticipate
7 holding nomination meetings?

8 A I can't answer that, I'm not sure.
9 It's allowed but I'm not sure that that's been
10 proposed.

11 Q Why would that be practical or
12 impractical in your mind?

13 A Well, it would be when growers or
14 constituent groups would be together.

15 Q Would you hold one across the entire
16 production area?

17 A No.

18 Q So to the extent that we have grower
19 meetings, should those grower meetings be held in
20 a region as opposed to the entire production
21 area?

22 A Correct. Yes.

1 Q Should a handler meeting or meetings
2 also be held for the entire production area?

3 A No. Again, they should be regional to
4 reflect the industry.

5 Q So the idea is you have a large
6 production area over 15 states, and so the idea
7 of nomination hearings is less practical than it
8 might be if you were in four counties in
9 California.

10 A Correct.

11 Q Okay. Thank you. Let's go to the
12 very first sentence. Please take a moment to
13 read that and then I'd like to ask you some
14 questions about it. Why is that included?

15 A After input from the industry, the
16 board felt like these procedures were fair. We
17 want to retain flexibility, as we discussed
18 earlier, in case there are problems along the
19 way.

20 Q Thank you. Take a look at the next
21 sentence. Explain why you added that sentence?

22 A Well, to make clear that the nominees

1 first meet the industry and the geographic
2 diversity as set forth in 986.45 and .45 before
3 they're nominated.

4 Q Thank you. Let's move on now then to
5 the first sentence -- well, the entire section of
6 Exhibit 1, Section 986.46(a). Describe why the
7 board recommends this procedure to nominate the
8 initial council?

9 A First, there's no council at the
10 beginning so we need someone to organize the
11 nomination, so we selected the Secretary because
12 he or she will be fair and his or her staff has
13 had experience in this. Second, we're adopting
14 by reference the nominating process set forth in
15 986.46(b) through the approved nomination forms.
16 And third, we wanted to give as much flexibility
17 as possible to the Secretary to run a fair and
18 open process so we provided many options such as
19 the meetings and mailings and so forth, whatever
20 is convenient to get the word out.

21 Q Thank you. You used the term, you
22 quoted the term "approved nomination forms."

1 That's approved by whom?

2 A The Secretary and I'm assuming the
3 Secretary's staff.

4 Q That's right. Have these forms been
5 developed?

6 A Yes, in conjunction with USDA and we
7 have developed some forms, and I think we
8 probably need to introduce them.

9 MR. QUIR S: Thank you. Your Honor,
10 I'd like to take a moment to just introduce some
11 forms. We've given these earlier to the USDA but
12 we have multiple copies now.

13 (Pause to mark exhibits.)

14 JUDGE GUTHRIDGE: Mr. Quirós, before
15 you start, is it your intention to finish Mr.
16 Adams tonight, or should we be sort of thinking
17 that there might be a place where we would recess
18 and continue at a later time?

19 MR. QUIR S: Your Honor, I think
20 that's a great question. We have Mr. Adams with
21 us the entire time. I felt like it was a very
22 important section and maybe some people had

1 traveled to hear this particular section, I
2 understood perhaps from USDA, so I wanted to make
3 sure that we finished this section this evening
4 as a courtesy. If people want to stop, we're
5 willing to stop. I'm not sure we'll be able to
6 get through all of Mr. Adams's testimony in a
7 reasonable hour, but I thought we would make a
8 good faith try. I was not aware of any public
9 persons that wanted to identify so I thought we
10 could use the last hour or so of the say to try
11 to move through this. If it becomes ungainly or
12 takes up too much time, I'll be glad to do what
13 Your Honor wishes to do and so will our client.

14 JUDGE GUTHRIDGE: By this section you
15 mean 986.46.

16 MR. QUIR S: That's right, Your Honor.
17 If we move quickly through that, perhaps we could
18 get another several, but I think that's an
19 appropriate place at the end of this to ask
20 ourselves whether or not we should continue this
21 evening.

22 MS. SCHMAEDICK: And Your Honor,

1 Melissa Schmaedick, USDA. Just for the record,
2 all of the USDA people who are here today will be
3 here tomorrow and most of us will be here on
4 Saturday. Thank you.

5 MR. QUIR S: Your Honor, then maybe I
6 should ask the question of the USDA if they have
7 a preference to continue or not, as a courtesy.

8 JUDGE GUTHRIDGE: While they're
9 caucusing, your witnesses tomorrow, you have
10 eleven on the list for tomorrow. Do you have any
11 prediction on the amount of time for each of
12 those?

13 MR. QUIR S: No, Your Honor. It's
14 exactly why we were a little bit, I would say,
15 pushing to go ahead and get Mr. Adams. We do
16 have a fairly full schedule. If you ask me how
17 much the base testimony of each one of them would
18 take, I would say normally about 20 minutes.
19 It's the questions that add additional time.

20 JUDGE GUTHRIDGE: I think I've heard
21 that in the past.

22 MR. QUIR S: Yes, sir. And it's

1 appropriate, it's important. Each one of them
2 brings new testimony, it's appropriate for
3 everybody to ask questions. So I don't know how
4 long it will take. This is a jigsaw puzzle and
5 we are going to cover every section amongst board
6 members of the American Pecan Board. Just to
7 give you a preview, after Mr. Adams has
8 testimony, we'll hear from two other board
9 members in Tifton with regard to important
10 sections, Sections 60 through 65 and then 67
11 through 70, and then we will have a complete --
12 we will have touched all the sections. Again,
13 it's a jigsaw puzzle and we're trying to fit it
14 together.

15 JUDGE GUTHRIDGE: I understand.

16 MR. QUIR S: Unfortunately, if we
17 don't finish Mr. Adams today or tomorrow, I
18 cannot tell you whether there's wisdom in staying
19 on Saturday morning and finishing Mr. Adams
20 before we go to Tifton. We'll have plenty to do
21 in Tifton and we will have two sections, as well
22 as about 19 other, 20 other witnesses to take in

1 Tifton. Again, this is your court and we'll do
2 what you think is best. Glad to hear, though,
3 from USDA on what they think is best.

4 MR. HILL: I think it's our position
5 that we'd like to recess for the evening, and we
6 have Saturday, we can try Saturday, and if not,
7 we'll resume there.

8 JUDGE GUTHRIDGE: My expectation was
9 to stay here Saturday also. My flight, my
10 reservation is on Sunday to get to Atlanta, I had
11 no plans on going home. So it sounds like that's
12 what you folks from Washington, anyway, what your
13 plans were.

14 MS. SCHMAEDICK: Melissa Schmaedick,
15 USDA. My concern is that based on my experience
16 and the level of importance in this section and
17 the extensive nature of this section, it is the
18 largest section and probably the most
19 complicated, that I am very doubtful that we
20 would finish in less than an hour. My guess is
21 that it will probably be another minimum two
22 hours, maybe three.

1 JUDGE GUTHRIDGE: Just on Section .46?

2 MS. SCHMAEDICK: Yes, Your Honor. It
3 covers almost a page and a half of the Federal
4 Register.

5 JUDGE GUTHRIDGE: I saw just less than
6 four columns. Well, I think one of the concerns
7 that Mr. Quirós said a few minutes ago was that
8 someone may have come here just to hear that
9 section or discussion of that section, and let me
10 ask that. Is there anyone in the audience who
11 came for the sole purpose of hearing the
12 discussion of 986.46 who would expect to hear
13 that tonight? Is there anyone who came here just
14 for that section and expects to hear it tonight?

15 (No response.)

16 JUDGE GUTHRIDGE: I don't see any
17 response.

18 MR. QUIR S: Your Honor, I have a new
19 piece of information I didn't realize, and that
20 is that Mr. Adams will not be here Saturday, and
21 so I wish to give the USDA a chance to think
22 about that. When these things are over we go and

1 prepare witnesses for the next day so the day is
2 not over for us and I know it's not over for the
3 USDA, but I didn't realize Mr. Adams was not
4 going to be available on Saturday, so I'd like
5 them to have a chance to rethink that issue.

6 MS. SCHMAEDICK: Your Honor, I have a
7 question. Does Counsel anticipate that any of
8 their witnesses will be available on Saturday?

9 MR. QUIR S: Sorry, Ms. Meyers is not
10 in here. She's been really handling most of the
11 scheduling issues with our witnesses.

12 JUDGE GUTHRIDGE: Is she outside?

13 MR. QUIR S: We'll step outside and
14 see.

15 MR. DAVIS: We'll check with her but
16 we do know all those witnesses have been told to
17 be here tomorrow and at this late hour I've heard
18 some people driving four and five hours to get
19 here.

20 MR. QUIR S: We do have three days in
21 Tifton and we could work longer in Tifton if we
22 had to. Again, we do have two witnesses that

1 will have substantive testimony on the proposed
2 Federal Marketing Order in Tifton. You'll hear
3 from Dr. Hudson again with regard to the
4 authorities, and you'll hear from Larry Wilson, a
5 member of the American Pecan Board with regard to
6 the budget issues and assessments and some of
7 those inter-handler transfers, some of those
8 significant issues.

9 (Whereupon, a brief recess was taken.)

10 JUDGE GUTHRIDGE: It's now 5:43.

11 We've been off the record for about 40 minutes
12 discussing procedural matters. Mike Adams had
13 been called to continue his testimony, and
14 instead of taking that, we're going to take
15 witnesses that were previously scheduled for
16 tomorrow on July 24, starting with Dr. Rohla, in
17 an attempt to be able to take Mr. Adams's
18 testimony in one straight stretch, beginning
19 Friday, perhaps continuing over on Monday in
20 Georgia.

21 Whereupon,

22 CHARLES ROHLA

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

4 JUDGE GUTHRIDGE: Mr. Quirós.

5 MR. QUIR S: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. QUIR S:

8 Q Dr. Rohla, have you had an opportunity
9 to receive and review what has been marked
10 Exhibit 1 in these hearings, the notice from the
11 United States Department of Agriculture that was
12 published in the Federal Register that contains
13 the proposed Federal Marketing Order for pecans?

14 A Yes.

15 Q And have you received what has been
16 marked in this hearing Exhibit 23 which was the
17 Executive Summary of the Economic Analysis of the
18 Implementation of the Federal Marketing Order for
19 Pecans, prepared by Dr. Marco Palma?

20 A Yes, sir.

21 Q Thank you. And I understand that you
22 have prepared testimony for us that you would

1 like to deliver. Is that correct?

2 A Yes, sir.

3 Q If you would please proceed.

4 A Okay. My name is Dr. Charles Rohla.

5 It is spelled C-H-A-R-L-E-S, R-O-H-L-A. I live

6 in Roff, Oklahoma. I am testifying in my

7 individual capacity in support of the Federal

8 Marketing Order for pecans. I am a fourth

9 generation agriculture producer who ones a

10 diversified agriculture operation and works with

11 pecan growers throughout Oklahoma and Texas. I

12 received my PhD in crop production and hold a

13 position as an assistant professor and manager

14 for the Center for Pecans and Specialty Ag at the

15 Samuel Roberts Noble Foundation which is the

16 largest independent nonprofit institution

17 conducting agriculture and plant science research

18 in the United States. I am the past president

19 and current board member for the Oklahoma Pecan

20 Growers Association, and I am the Oklahoma state

21 representative for the U.S. Pecan Growers

22 Council. A copy of my current CV is attached.

1 I have received and reviewed the
2 proposed Federal Marketing Order for pecans, as
3 published in the Federal Register. In my
4 opinion, the benefits of the proposed Federal
5 Marketing Order for pecans are several.

6 First, with the 15 states growing
7 pecans being unified and working together to
8 address pecan industry issues, it would be very
9 powerful. Second, when safety issues arise, and
10 they will, the pecan industry will be able to
11 speak as one united voice. And third, we really
12 need to unify and commit to generic promotion.
13 It works and we will need to move forward to
14 market pecans. Finally, we need to cooperate to
15 fund research, especially research that increases
16 the demand for pecans in the domestic U.S.
17 market.

18 I further believe that the issues
19 related to the separate regional representation
20 and treatment of improved cultivars and native
21 seedlings have been properly addressed. I'm
22 aware the Federal Marketing Order is for a

1 domestic program, while the goals of and the
2 future work of the American Pecan Board and the
3 U.S. Pecan Growers Council differs, they are
4 complementary. While the U.S. Pecan Growers
5 Council is focused internationally, the American
6 Pecan Board is focused domestically, both are
7 focused on improving pecan prices by opening
8 markets and enabling the selling of more U.S.
9 pecans.

10 I've received the economic analysis
11 summary provided by Dr. Palma and in the
12 projected average price increase for promotions
13 of 6.3 cents per inshell pound versus the average
14 2-1/2 cents per inshell pound cost. Overall, I
15 am aware of the cost that is proposed by the
16 Federal Marketing Order may impose. At least in
17 the context of my farm, I do not believe that
18 these costs are unduly burdensome. Further, I
19 believe that the benefits of the Federal
20 Marketing Order for my farm would outweigh any
21 costs associated with it.

22 Finally, acknowledgment and

1 understanding that under the Federal Marketing
2 Order only growers of more than 30 acres or
3 50,000 pounds of pecans and accumulators with
4 more than one million pounds of pecans will be
5 eligible to vote to approve or disapprove the
6 proposed order, I believe that this is a
7 reasonable and fair classification because any
8 grower or accumulator that is smaller than this
9 would not likely be a sustainable commercial
10 entity.

11 I'd be glad to answer any questions.

12 BY MR. QUIR S:

13 Q Thank you, Dr. Rohla. I know that
14 you're giving this only in you individual
15 capacity, but what is the Samuel Roberts Noble
16 Foundation and what do you do?

17 A The Samuel Roberts Noble Foundation
18 was founded by Lloyd Noble in 1945 to assist
19 farmers and ranchers to stay on the farm. We are
20 the largest institute doing plant and agriculture
21 research in the United States. We're made up of
22 three divisions: a plant division that does

1 research on the basic cell level of plants, a
2 forage division that does improving mainly
3 grasses or forage crops, and then an agriculture
4 division that does basic research, applied
5 research on a farm level, and also a consulting
6 firm.

7 Q Thank you. And what do you do there?

8 A I am the manager for the Center for
9 Pecans and Speciality Ag, a new effort that we've
10 just established this past year, and I've been a
11 consultant and a researcher.

12 Q And what does that Center for Pecan
13 Ag, what do you do there?

14 A Again, it's new, but we're trying to
15 fill the void of other institutes, mainly land
16 grant universities that have lost funding to
17 assist growers in the different states, and so
18 we'll promote pecan research, give basic
19 information on best management practices that
20 will assist producers to be more successful and
21 profitable with their operations.

22 Q And how long have you been a pecan

1 scientist?

2 A Nine years.

3 Q Thank you. In your opportunity to
4 review Exhibit 1 there's some authorities there
5 with regard to research and promotion. Most
6 people focus on the promotion piece, but just
7 elaborate a little bit about the research and
8 sort of the benefits of having the proposed
9 American Pecan Council have funds to do research.
10 Would that be helpful to the industry?

11 A It would be extremely helpful. The
12 funding sources for research with pecans, really
13 you have one source, the USDA specialty crop
14 grants, and having a unified entity through the
15 American Pecan Board that could support and offer
16 money for matching for that would be essential
17 for future projects. Right now with all the
18 states, there's mainly four states that do a lot
19 of research on pecans but they're scattered
20 across the nation, and so unless we can all do
21 the same type of work together, it's been very
22 difficult to get funding for research.

1 JUDGE GUTHRIDGE: Mr. Quirós, I assume
2 you're referring to 986.68?

3 MR. QUIR S: .68, yes, sir. Thank
4 you, Your Honor.

5 BY MR. QUIR S:

6 Q You think that would be helpful across
7 all regions?

8 A Definitely will be.

9 MR. QUIR S: Your Honor, I'll now
10 tender what has been marked Exhibit 54 into the
11 record.

12 JUDGE GUTHRIDGE: Is there any
13 objection from USDA?

14 MS. CHILUKURI: No objection.

15 JUDGE GUTHRIDGE: Any objection from
16 the audience?

17 (No response.)

18 JUDGE GUTHRIDGE: Exhibit 54 is
19 admitted into the record.

20 (The document referred to
21 was marked for
22 identification as Exhibit 54

1 and received in evidence.)

2 JUDGE GUTHRIDGE: And let me note for
3 the record at this point that Exhibits 47 through
4 53 have been marked but have not yet been
5 submitted for admission. That will occur later.

6 (The documents referred to
7 were marked for
8 identification as Exhibits
9 47 through 53.)

10 JUDGE GUTHRIDGE: Mr. Quirós.

11 MR. QUIR S: I have no further
12 questions of this witness at this time.

13 JUDGE GUTHRIDGE: Any questions from
14 USDA?

15 MS. SCHMAEDICK: Melissa Schmaedick,
16 USDA.

17 CROSS-EXAMINATION

18 BY MS. SCHMAEDICK:

19 Q Thank you, Dr. Rohla, for your
20 testimony. Thanks for joining us today. I'm
21 just curious, in your testimony you mentioned
22 that you're a fourth generation producer and you

1 own a diversified agriculture operation, and you
2 work with pecan producers. Are you yourself a
3 pecan producer?

4 A I am. My orchard is young so I'm not
5 in production yet, but I am a hopeful producer in
6 the future.

7 Q Okay. And so if you don't mind me
8 asking, how many acres of pecans do you have?

9 A Total between natives and planted
10 trees, right now I'm at about 15 acres.

11 Q Fifteen?

12 A Fifteen.

13 Q One five?

14 A Yes, ma'am.

15 Q So is it your understanding that under
16 the proposed definition for grower you would not
17 qualify as a grower?

18 A Yes, ma'am.

19 Q And how do you feel about that?

20 A I actually was one of them that kind
21 of pushed for those numbers because of my
22 dealings with the growers within Oklahoma. I

1 think it's a fair basis for that. Especially in
2 Oklahoma we have so many large ranches that just
3 happen to have pecan trees located on their
4 ranches but they're not pecan producers, and so
5 my feeling was that those people that aren't
6 actively managing pecans probably didn't have an
7 actual need or a say and they're not interested
8 in the promotion of pecans. They don't manage
9 them, they actually have a custom harvester come
10 in and harvest the pecans, so they're totally
11 hands off, and so I think it's a reasonable
12 suggestion for that.

13 Q Thank you. That's very helpful. So
14 to summarize your experience as a member of
15 Oklahoma Pecan Growers Association and based on
16 your familiarity with producers in Oklahoma, you
17 feel that the 30 acres and 50,000 pounds is
18 appropriate?

19 A Yes, ma'am.

20 Q And in your opinion it does not
21 disenfranchise growers below that threshold?

22 A Not a commercial grower, no.

1 Q Thank you. I looked at your resume
2 that is attached and I see that for the Noble
3 Foundation it indicates that you do best
4 management practices, that you develop best
5 management practices. Can you talk about what
6 that means?

7 A We do research to look at mainly
8 nutrient management, irrigation management, pest
9 management, all those that would assist the
10 producer in being more successful and more
11 profitable. We evaluate those techniques, look
12 at what's currently being done and then what's
13 really being addressed or questioned by the
14 growers and then we evaluate those to assist the
15 growers with their production.

16 Q Thank you. And you also mentioned
17 food safety. What is your experience in having
18 to address food safety concerns?

19 A Well, with the recent food safety
20 regulations being proposed, we actually started a
21 research study with Oklahoma State University to
22 look at the grazed orchards versus non-grazed and

1 the potential contaminants with
2 E. coli and salmonella. And we've done a little
3 twist on the previous studies where they just
4 looked at grazing animals, we actually worked
5 with a wildlife discipline so we actually looked
6 at wildlife potential contaminants too. And so
7 what we've seen from that initial study, we've
8 actually had four years of that study and we've
9 got two more years that's just currently been
10 funded to actually address where the contaminants
11 are coming from, but we've seen that wildlife
12 actually has a bigger potential as a contaminant
13 for E. coli or salmonella than grazing livestock
14 does.

15 Q And that potential for contamination,
16 you're looking at that in the orchard?

17 A Yes, ma'am.

18 Q Prior to harvest?

19 A Yes, because the regulations was to
20 remove cattle 180 days before harvest, so in
21 Oklahoma, Oklahoma is about 85 percent native
22 production and almost 90 percent of that acreage

1 is grazed under and very seldom do growers remove
2 cattle from those acres. And so to assist our
3 growers in Oklahoma we've conducted a study
4 because if it was regulated it would actually
5 pretty much kill the industry within Oklahoma
6 because of the native production.

7 Q Thank you. So do your best management
8 practices also or could they also at some point
9 include what we refer to as good handling
10 practices, good growing practices?

11 A Yes, ma'am. We work with Oklahoma
12 State University. They have a specialist that is
13 devoted to that area and we do a lot of
14 educational events where we'll bring in an expert
15 like him and teach growers best management
16 practices. And we actually follow -- Georgia has
17 already developed a lot of that and so we utilize
18 what they've developed for Oklahoma and North
19 Texas.

20 Q Thank you. And so based on the
21 research that either you have conducted or that
22 you are aware of, is there then a significant or

1 a potential for contamination such as salmonella
2 or E. coli in pecans?

3 A There is a potential, we've seen it in
4 the orchard. There's no way to keep wildlife
5 out, and we've tested feral hogs, squirrels,
6 crows, birds, even dogs, cats, raccoons. All of
7 them are potential carriers and most of them that
8 we tested, over 50 percent of the animals we
9 tested, tested positive for either E. coli or
10 salmonella or both, so the potential is there.

11 Luckily we haven't had a confirmed
12 case of E. coli or salmonella coming out of the
13 orchard itself. There is some research that
14 shows that pecans, some of the chemical in pecan
15 itself might kill E. coli and salmonella, but
16 that research is still pretty lacking and we will
17 continue to look at that.

18 But the threat is there, and that's
19 one benefit of this marketing order is that if
20 there ever was a case, then this unified voice
21 instead of 15 voices from 15 different states
22 making a comment about concern, it would be one

1 unified voice making that comment.

2 Q Thank you. To your knowledge, is
3 there a kill step in the handling process?

4 A At the sheller level there is a kill
5 process, and from what I understand, it's one of
6 the most -- it's at a higher level than is
7 actually required by some of the other crops, and
8 so that is taken into consideration and so we
9 think we've got it covered at that level. The
10 area that's of concern to most of us in the
11 scientific world is what's been referred to this
12 morning as mom and pop stores or the roadside
13 stores or stands where they're not processing
14 them or sterilizing the pecans and selling
15 directly to consumers. That's probably our
16 biggest threat for the future for those concerns.

17 Q Thank you. And in your opinion, could
18 the proposed program offer a tool or a potential
19 vehicle for creating standardized good
20 agricultural practices and good handling
21 practices throughout the pecan industry?

22 A Yes, ma'am, definitely could be that

1 source that would unify all across the pecan
2 belt.

3 MS. SCHMAEDICK: Thank you. I have no
4 further questions.

5 MS. VARELA: Jen Varela, USDA.

6 BY MS. VARELA:

7 Q Thanks so much for staying late with
8 us, Dr. Rohla.

9 A No problem.

10 Q We appreciate your perspective. You
11 mentioned the speciality crop block grants
12 program which is slightly familiar to us because
13 it's a sister division to us. Could you describe
14 a little what those grants are used for and what
15 the process is of applying for them?

16 A Okay. There's actually two different
17 programs, one through the USDA where you can
18 apply for a specialty crop directly from
19 Washington, or there's a specialty crop block
20 funding -- block program through the individual
21 states. So there's actually two ways a
22 researcher could get money through that program.

1 One of the challenges with a big grant
2 through Washington, it could be a sizable grant
3 but over the past nine years that I've been
4 involved with it, it's very difficult for an
5 individual researcher to get that, they want a
6 multi-state, multi-disciplinary research project,
7 and so that makes it a little bit more difficult.
8 The other real big hurdle is it's 100 percent
9 matching, where most of the grants are usually 20
10 or 25 percent matching, and so that's been a
11 challenge. I know the last four grants that I've
12 been a part of were not funded because of lack of
13 industry matching, dollar matching. We received
14 one grant proposal, I think we only had about
15 \$10- to \$20,000 of actual cash from grower
16 associations and it was about a \$3 million grant
17 and that was not enough to satisfy the selection
18 committee. So if this passed and there was money
19 there to back up some of the research proposals,
20 it would definitely help with future research
21 projects.

22 Q So given that information, is it your

1 opinion that the authorities that have been
2 presented in this order for promotion and
3 research might be opportunities to create
4 projects that could qualify for some of those
5 grants?

6 A It would be a huge opportunity for us
7 in the research rolls.

8 Q And similarly, you mentioned that
9 there's a void in research that in part the Noble
10 Foundation is trying to fill because of projects
11 that have fallen out of land grant universities.
12 Could you give just a couple of examples of some
13 of those projects that were useful and maybe
14 don't exist anymore?

15 Q Well, I'll give you a great example.
16 Whenever I started in pecans, working on pecans
17 about 15 years ago, Texas A&M had almost -- I
18 think there was over 12 scientists and I believe
19 there was at least four of them devoted to pecan
20 production. Right now in the U.S. there are 13
21 scientists that's devoted to pecan production
22 research: four of those only have a partial

1 appointment for pecans and it's a very small part
2 of what they're doing, two of them are retiring
3 next year, one will probably not be replaced, and
4 then there's another two that will retire within
5 the next five years most likely, so that really
6 leaves five to six of us left. And right now,
7 one of those that are retiring did get a position
8 with Oklahoma State University that's going to
9 replace that. So that's one of the things the
10 Noble Foundation has seen in that lack of
11 scientists going back into the field, and so we
12 are actually trying to devote a program to fill
13 that void.

14 Q And do you have a couple of examples
15 of research that those people have been producing
16 that benefits growers on a practical level?

17 A Nutrient management would be one that
18 has been done by several of the scientists that
19 have left or retired. Another one that you heard
20 earlier about alternate bearing from Dr. Stein.
21 That is one of the biggest problems in pecan
22 production and trying to figure out what causes

1 that and how do we mitigate the pressures of
2 alternate bearing on our production chain. It
3 would have a huge impact in the industry if we
4 could figure that out.

5 Q And I have one quick clarification to
6 ask for from you. On page 3 of your testimony,
7 the last page there, you were describing some of
8 the thresholds that have been put in the
9 definitions, and in previous testimony from some
10 of our other witnesses they have referenced a
11 threshold for shellers with more than one million
12 pounds and here I see accumulators. Was that
13 just a misstatement there?

14 A Yes, ma'am, it was an error. Sorry.

15 MS. VARELA: I will make the
16 correction. Thank you. That's all I have.

17 JUDGE GUTHRIDGE: Any more questions
18 from USDA? Mr. Hinman

19 BY MR. HINMAN?

20 Q Good evening, Dr. Rohla. Don Hinman,
21 USDA. You've given very thorough testimony about
22 your views of the benefits of research and you're

1 very involved in that, and on the views of the
2 value of promotion. I want to ask about two
3 other benefits that have been cited frequently by
4 other witnesses of the proposed marketing order,
5 and one of those is more accurate and detailed
6 market information. Could you comment on your
7 views, since you have such extensive contacts
8 across the industry, your views on that benefit?

9 A It would be a great benefit to the
10 industry to have better reports. With the
11 growers I work with, especially in the native
12 fields or the native areas, there's a lot of
13 growers that will call me right before harvest
14 and ask me what the price of pecans are going to
15 be, and if I tell them it's going to be, say,
16 less than a dollar, they will not even harvest
17 and they'll let them go. And so if we had better
18 records of what the crop estimates could be so we
19 could kind of look at what the prices should be,
20 we could actually increase our production -- it's
21 estimated in Oklahoma we could probably increase
22 our production at least 30 percent, maybe up to

1 50 percent by just managing pecans that are
2 already manageable but just aren't managed right
3 now. And a lot of that has to do with the
4 market, and so it's a year-to-year deal with a
5 lot of the producers because they are livestock
6 producers, they're not pecan growers, and so
7 having those records that should help with the
8 prices and figuring out where the prices are
9 going to be. That would be a huge bump for our
10 industry within Oklahoma.

11 Q Thank you. That is a very helpful
12 additional perspective. I appreciate that. And
13 then the additional question is that under 986.69
14 it can be established handling requirements that
15 could result in standards for grades, sizes and
16 qualities. This is 986.69 on page 38030. The
17 possibility of a future marketing order having
18 standards of grades and size and qualities.
19 Could you comment on the potential benefits you
20 see with having such authority?

21 A You know, I'm not for sure exactly
22 when those standards were developed but I know

1 it's been several years, and with all the
2 international exports we've had to go back and
3 address some of those issues, and so having a
4 unified, up-to-date regulation on size standards
5 would be very beneficial so whenever one person
6 talks about a grade one jumbo mammoth half,
7 everybody in the industry would know exactly
8 what's being talked about. Either here in the
9 U.S. or somewhere in foreign lands it would all
10 be identical, and so that would be a big benefit
11 for promotions and for the growers that are
12 growing them.

13 MR. HINMAN: Thank you. No further
14 questions.

15 JUDGE GUTHRIDGE: Any more questions
16 from USDA?

17 (No response.)

18 MR. QUIR S: Yes, Your Honor. I just
19 want to confirm I did tender that document. It
20 has been tendered, has it not?

21 JUDGE GUTHRIDGE: 54? Yes, it's been
22 admitted.

1 MR. QUIR S: Thank you.

2 REDIRECT EXAMINATION

3 BY MR. QUIR S:

4 Q Dr. Rohla, if there was an outbreak of
5 E. coli in pecans, how would the industry address
6 it now?

7 A Right now it would probably
8 determine -- it would depend on where the
9 outbreak occurred so if it occurred in Georgia,
10 the Georgia grower group would probably handle
11 that, but the scary thing is if it occurred,
12 every station or news person would pick that and
13 might ask somebody within another grower state
14 that might not be familiar with the correct
15 things to say to alleviate problems. And so that
16 could be a big problem for the industry because
17 there wouldn't be one unified voice to speak on
18 behalf of the growers.

19 Q As an agricultural scientist, have you
20 ever studied or observed other outbreaks,
21 recalls, et cetera of agricultural products,
22 cantaloupes or other things?

1 A Cantaloupes, peanuts, all those I've
2 been aware of, and that was one thing that we've
3 been worried about within the industry.

4 Q So as far as you know, there's no
5 entity that would speak for the whole industry.

6 A No, sir, not right now.

7 Q No entity is prepared for any
8 emergency with regard to this commodity?

9 A The only ones would probably be Cindy
10 Wise or Janice Dees with one of the magazines
11 would be one of the main point people because of
12 their publicity with their magazines.

13 Q How coordinated over all 15 states in
14 the production area is pecan research? You said
15 that there was some diminished resources, but how
16 coordinated do you think it is over all 15
17 states?

18 A I would say over the last nine years
19 we've got a lot better at it. There's four young
20 scientists that I'm part of that we are trying to
21 do projects together, but most of that funding
22 comes from individual states so each one of us

1 are focused on areas that the growers within
2 those states are interested in, and if you look
3 at the difference between growing techniques in
4 New Mexico or Texas versus Georgia and then
5 Oklahoma with the natives, it's very diverse
6 management skills and so it's been a little
7 difficult for us to agree on some projects but
8 there are overall projects, like the alternate
9 bearing or increased flowering of pecans, that we
10 are all trying to address.

11 Q Across all regions?

12 A Yes, sir.

13 Q Would it be helpful if there was one
14 group that kept track of all pecan research over
15 the entire production area?

16 A Yes, sir.

17 Q Do you know anything about the
18 Ambrosia Beetle that attacks pecans?

19 A A little bit. I haven't had to deal
20 with them yet so I've just kept up with them in
21 literature.

22 MR. QUIR S: They are killing

1 approximately 100 trees on our farm that are
2 assigned to my partner and he's very interested
3 in Ambrosia Beetles, so perhaps we can speak
4 about that in the hall. Thank you.

5 We have no further questions of Dr.
6 Rohla.

7 JUDGE GUTHRIDGE: USDA have any more
8 questions?

9 (No response.)

10 JUDGE GUTHRIDGE: Does anyone in the
11 audience have a question?

12 (No response.)

13 JUDGE GUTHRIDGE: Then Dr. Rohla,
14 you're excused.

15 (Whereupon, the witness was excused.)

16 MR. DAVIS: Your Honor, the Proponents
17 are ready to call their next witness.

18 JUDGE GUTHRIDGE: All right.

19 MR. DAVIS: We call Scott Landgraf.
20 Whereupon,

21 SCOTT LANDGRAF

22 having been first duly sworn, was called as a

1 witness herein and was examined and testified as
2 follows:

3 DIRECT EXAMINATION

4 BY MR. DAVIS:

5 Q Good evening, Mr. Landgraf.

6 A Good evening to you.

7 Q Thank you so much for jumping in here
8 at the end of the day. I very much appreciate
9 your being here. Would you please state your
10 name and spell it for the record?

11 A My name is Scott Landgraf, S-C-O-T-T,
12 Landgraf, L-A-N-D-G-R-A-F.

13 Q And do you have beside you there on
14 the stand Exhibit 1 and Exhibit 23?

15 A I do.

16 Q Exhibit 1 being the proposed FMO and
17 Exhibit 23 being the executive summary of Dr.
18 Palma's economic analysis.

19 A I do.

20 Q Have you had an opportunity to review
21 those?

22 A Yes, I have.

1 Q Just keep those handy. I understand
2 you have a prepared statement you'd like to give.

3 A I do.

4 Q Why don't you go ahead with that if
5 you're ready.

6 A I live in Madill, Oklahoma. I am the
7 owner of Landgraf Farms and retired as a pecan
8 specialist from the Noble Foundation after 30
9 years of service. I have attached a copy of my
10 resume.

11 Landgraf Farms is a pecan farm located
12 in Madill, Oklahoma. IN 1976 I planted my first
13 pecan trees. I have over 260 acres of irrigated
14 pecans currently in production. Last year we
15 produced approximately 120,000 pounds of pecans.

16 Q Could I interrupt you just for a
17 second there? I could do this at the end, but
18 we've heard a lot of testimony about improved
19 varieties and the expected production per acre,
20 and that just strikes me as rather low for 260
21 acres and 120,000 pounds. Is there anything in
22 particular that caused that last year?

1 A There's two factors that should be
2 considered in that number. First of all is that
3 about half of that 260 acres is below 12 years of
4 age so I'm rather young in the process but they
5 are making nuts. The other factor is we had an
6 extremely hard freeze, and I just feel very
7 blessed to have had any pecans at all.

8 Q I'm sorry for the interruption. Go
9 ahead. Thank you.

10 A On my farm we grow improved varieties
11 of pecans and custom manage mostly native pecans.
12 In 2000 we built a new retail shop with a
13 cleaning and processing facility in the same
14 building.

15 I am a second generation pecan farmer.
16 In 1965 my father began grafting small pecan
17 trees in south central Oklahoma. By the early
18 1970s he was harvesting enough to begin marketing
19 them which my mother marketed out of our garage.
20 Landgraf Farms would be considered a small pecan
21 grower and a small sheller under the Small
22 Business Administration definition, less than

1 \$750,000 grower and \$7 million sheller annual
2 gross revenue.

3 I have received the economic analysis
4 summary prepared by Dr. Marco Palma.

5 Specifically, he projected an average price
6 increase from promotion of 6.3 cents per inshell
7 pound versus the average of 2.5 cents per inshell
8 pound cost. Overall, I am aware of the costs the
9 proposed Federal Marketing Order may impose on my
10 farm and I do not believe those costs are unduly
11 burdensome. Further, I believe that the benefits
12 of the Federal Marketing Order to my farm will
13 greatly outweigh any cost associated with it.

14 Also, I am aware that the proposed
15 order may impose some direct costs on my
16 operation as a sheller, such as the 1 to 3 cents
17 per pound assessment. I am aware that there may
18 be some indirect costs, such as the obligation to
19 keep records of the amount of product I handle
20 and the calculation and remittance of assessments
21 to the American Pecan Council. I believe these
22 costs are reasonable and not unduly burdensome.

1 Overall, the benefits of the Federal Marketing
2 Order outweigh the costs.

3 In recent years I have seen wide
4 variations in the prices I have received for my
5 pecan crop. Such wide variation in pricing makes
6 it extremely difficult to plan for the future
7 operation of my farm. While prices for pecans go
8 up and down dramatically from year to year, my
9 cost of production has steadily increased. The
10 cost of fertilizer, insecticides and equipment
11 have all increased in recent years regardless of
12 the price I receive for my crop.

13 The lack of accurate market
14 information on the anticipated size of pecan crop
15 in any given year also makes it difficult for me
16 to negotiate a fair price for my crop and to make
17 reasonable business decisions about investments
18 in my farm. Increased price stability and more
19 accurate market information would greatly benefit
20 my small family operation. I think my farm and
21 the industry would also benefit in the future
22 from grade, size, quality, packaging and shipping

1 protocols and other handling requirements as we
2 compete with other tree nuts for shelf space and
3 consumer attention.

4 I understand that under the proposed
5 order only growers with more than 30 acres of
6 pecans or more than 50,000 pounds of average
7 production per year over the last four years will
8 be allowed to vote on the proposed order. In my
9 opinion this threshold is reasonable because a
10 grower that does not meet this threshold is not a
11 commercial grower. Any grower that is smaller
12 than the proposed threshold could not justify the
13 costs inherent in such a small production.

14 I also understand that only shellers
15 that handle more than one million pounds of
16 inshell pecans per year will be eligible to
17 nominate and to be elected to the sheller seats
18 on the Council. I believe this is a fair
19 threshold. First, I am not aware of any sheller
20 in my area which handles less than one million
21 inshell pounds per year that is in the commercial
22 shelling business. Further, if there is such a

1 sheller, I do not believe it would be
2 commercially viable because such a small
3 operation could not invest in the required
4 equipment and turn a profit on such a small
5 production.

6 I am a member of the American Pecan
7 Board and I am the grower-sheller member for the
8 central region. I have been actively involved in
9 the American Pecan Board's discussions to secure
10 a Federal Marketing Order and I have been given
11 the opportunity to participate in the board's
12 meetings.

13 In conclusion, I fully support the
14 proposed Federal Marketing Order for pecans and
15 encourage the Secretary to implement the order as
16 proposed by the American Pecan Board. I would be
17 glad to answer any questions anyone may have.

18 MR. DAVIS: Your Honor, the Proponents
19 tender Exhibit 55 which is a statement by Mr.
20 Landgraf and his curriculum vitae.

21 JUDGE GUTHRIDGE: Is there any
22 objection from the USDA?

1 MR. HILL: The USDA does not have any
2 objections, however, there is some personally
3 identifiable information on the resume and we
4 would make a note that we're going to redact
5 that, and to the extent that it appears on any
6 other resumes on previous exhibits, we're going
7 to do that as well.

8 JUDGE GUTHRIDGE: Could you define
9 what you mean by personally identifiable
10 information?

11 MR. HILL: Well, he has his birth date
12 here which clearly we cannot have on the website.

13 MR. DAVIS: We concur to that and if
14 you would make those revisions before you post
15 them on the website, that would be greatly
16 appreciated.

17 JUDGE GUTHRIDGE: Any objection from
18 the audience for admission of Exhibit 55?

19 (No response.)

20 JUDGE GUTHRIDGE: Hearing no
21 objection, 55 is admitted to the record.

22 (The document referred to was marked

1 for identification as Exhibit 55 and
2 was received in evidence.)

3 BY MR. DAVIS:

4 Q Just one quick follow-up. I noted
5 that you say you have a retail operation. You've
6 sat in the audience today, you've heard some of
7 our discussions about exemptions for small retail
8 sales of less than 1,000 inshell pounds. Do you
9 exceed that 1,000 pounds annually?

10 A Yes.

11 Q So you are well aware then that if
12 this proposal were to go through, then you would
13 be assessed on those particular retail sales that
14 you make?

15 A Yes.

16 Q And even with that proviso, you still
17 believe that the benefits of the proposed
18 marketing order would outweigh any burdens that
19 you would incur?

20 A Absolutely.

21 MR. DAVIS: No further questions at
22 this time.

1 JUDGE GUTHRIDGE: Any questions from
2 USDA?

3 MS. SCHMAEDICK: Melissa Schmaedick,
4 USDA.

5 CROSS-EXAMINATION

6 BY MS. SCHMAEDICK:

7 Q Good evening, Mr. Landgraf.

8 A Good evening to you.

9 Q Thank you for your testimony. I
10 believe you state that you are a member of the
11 American Pecan Board.

12 A That is correct.

13 Q And in that capacity did you
14 participate in the discussions that were had
15 relating to the proposed language?

16 A I was.

17 Q Would you be comfortable answering
18 some questions to further explain certain
19 sections?

20 A I would be happy to.

21 Q Thank you. The first question I have
22 for you kind of draws from your experience, your

1 scientific background. There is a section in the
2 proposed order, Section 986.58 that's entitled
3 Reapportionment and Redistricting. And Mr.
4 Landgraf, if you could take a moment to read that
5 over, I'd like to ask you some questions.

6 MR. HINMAN: Don Hinman, USDA. I'd
7 just make a comment. I did already speak with
8 the people next door about the noise level and it
9 is a party going on and I'm not sure exactly what
10 we can do about it.

11 JUDGE GUTHRIDGE: Are we invited?

12 MR. HINMAN: They actually did say
13 yes, we're invited.

14 JUDGE GUTHRIDGE: Talk fast, Mr.
15 Landgraf.

16 THE WITNESS: Sounds great.

17 (General laughter.)

18 BY MS. SCHMAEDICK:

19 Q Okay. So my question for you is based
20 on your knowledge of the production area and how
21 things maybe have evolved in the production area
22 over time, with regard to this proposed section,

1 Reapportionment and Redistricting, in your
2 opinion, is this an important authority to have
3 in terms of flexibility?

4 A Yes. The industry is continuing to
5 evolve, it's not going to stay the same.
6 Lightning strikes take out native trees, just
7 things happen, water shifts, the water laws will
8 cause pecan trees to follow that water in some
9 direction. And so this is a dynamic thing that
10 there has to be the flexibility to realign this
11 and this verbiage had to be in this FMO.

12 Q And do you have an example of how the
13 production area has shifted over time?

14 A In the early part of my professional
15 career, the southeast U.S. was where the pecans
16 were grown, or at least that's where the
17 production was headed, and I saw plantings occur
18 in the southwest U.S. and it appears that that
19 production is continuing to shift to the
20 southwest, and so because of the dynamics there
21 must be some kind of provision to make the board
22 seats fit the production, the voice has to fit

1 where the production is at.

2 Q Thank you. And that actually leads me
3 into my next question. When you and the American
4 Pecan Board were drafting the distribution of
5 regions and seats among regions, was it
6 intentional to capture sort of an even
7 distribution per region?

8 A There was quite a discussion about
9 that and we took poundage and tried to equalize
10 poundage of production over time to get these
11 lines the way that we drew them in this proposed
12 order.

13 Q And so currently, based on previous
14 testimony, the three regions represent roughly
15 one-third of the production, one-third of the
16 total U.S. production.

17 A Roughly, yes.

18 Q And therefore, representation in each
19 region is roughly one-third of the proposed
20 Council

21 A That's the way that it's set up with
22 the 17 members the way that it's proposed.

1 Q So if, for example, production were to
2 dramatically increase in the western region, then
3 in your opinion would it be appropriate to either
4 increase representation on the board or readjust
5 the regional boundaries?

6 A I guess the way this is written up, it
7 would be in the hands of the Council to decide
8 that.

9 Q Yes.

10 A But it would be my opinion that it
11 should shift to be weighted heavier towards that
12 region or at least the lines moved that way.

13 Q And in your opinion would that be a
14 fairly significant decision?

15 A I think it is just the correct
16 decision.

17 Q Is it a decision that would definitely
18 require some analysis and deliberation?

19 A Well, I think there would have to be
20 a lot of data collection first and then there
21 would have to be a presentation and I fully
22 expect that it would require the Secretary to be

1 involved in that process.

2 Q And the elements that are listed in
3 this section, so starting with shifts in acreage,
4 importance of new production, equitable
5 relationship, changes in industry structure, are
6 those the types of things that should be included
7 in the analysis to decide whether or not to make
8 a change?

9 A Yes. I think you would have to take
10 all of that into consideration. It shouldn't be
11 just production but it should be the
12 demographics, numbers of people in that area that
13 are growing pecans, just look at the big picture
14 of it all.

15 Q Thank you. Were you also present
16 during the discussion of assessments?

17 A Yes.

18 Q Can you describe your impression of
19 those discussions and how the different tiers of
20 assessments were formulated and whether in your
21 opinion the tiers, as well as the thresholds
22 within each tier are appropriate? And I'll refer

1 your attention to Section 986.61, Assessments, in
2 particular paragraph (c).

3 A Okay.

4 Q So given your experience as a producer
5 and as a handler in the central region, are these
6 classifications and the assessments assigned to
7 those classifications appropriate?

8 A I think so. I think that it's very
9 much appropriate that we have a differentiation
10 between native pecans and improved varieties. I
11 know on my farm native pecans in the last five
12 years probably averaged 60 cents, maybe, a pound,
13 and through my retail store my improved varieties
14 have been selling for \$3 and \$4 a pound. And so
15 with the differentiation between those prices, I
16 don't know that there's really enough gap between
17 the natives and the improved varieties. I know
18 in the wholesale world these numbers we approved
19 are right or as close as we can come up with.
20 And again, I think it's appropriate that the
21 Council has the right to set those exact prices
22 and that they're given the flexibility to decide

1 that those numbers should actually be.

2 Q And you just said set prices. Did you
3 mean assessment rates?

4 A Yes, assessment rates. I'm sorry.

5 Q Thank you. So based on your
6 statement, are you concerned that the 1 to 2 cent
7 range might be too much of a burden for native
8 pecans?

9 A It's my perspective that it might hurt
10 the first year or two but I think the effect is
11 going to be what Dr. Palma has said, the
12 investment will provide returns. And so from my
13 perspective, I'm willing to invest and I expect
14 to see returns. I'm convinced that we're going
15 to see good returns for it, and in talking to the
16 native growers in my area, they share that view
17 and they're ready to invest, and basically they
18 say this is our only hope.

19 Q Thank you. So in your discussions
20 about the proposed program, both within the
21 American Pecan Board but also out in the
22 industry, was there any concern about the

1 potential or the perceived potential for volume
2 regulation?

3 A I've heard some concern about
4 regulating acres or those kinds of regulations,
5 yes.

6 Q Was there a concern that producers
7 might not be able to sell all of their product
8 that you're aware of?

9 A I think their concern was not so much
10 about selling their product, they still want
11 there to be an economic -- you know, a marketing
12 environment there that there is opportunity to
13 develop markets and to put product into those
14 markets. So they want free enterprise still in
15 the system, they don't want it just, what do you
16 say, just cut and dried. I mean, there needs to
17 be some dynamics but we need to get the message
18 out. We've got to have some money somehow to get
19 the message out, and this is the tool with which
20 to do that.

21 Q And by getting the message out, do you
22 mean promotion?

1 A Yes.

2 Q If you turn your attention to 986.94,
3 paragraph (d), and I'll quickly read the first
4 sentence here for you so you know what we're
5 talking about. So the first sentence of
6 986.94(d) says: "The Secretary shall conduct a
7 referendum within every five-year period
8 beginning from the implementation of this part to
9 ascertain whether continuance of the provisions
10 of this part applicable to pecans is favored by
11 two-thirds by number or volume of growers
12 voting."

13 So in previous testimony we've seen
14 that referred to as a continuance referendum. In
15 your opinion, is this an important element to
16 have in the program?

17 A I do. I like the idea of being able
18 to go back and revisit. To me it's a check and
19 balance, and I think it's very important.

20 Q And to your knowledge, did this
21 particular element in the proposal help build
22 some confidence among folks who might have had

1 some concerns about the program that if they
2 didn't like it they could maybe get rid of it?

3 A When I first read that in the
4 proposal, I was like: Do we really need that?
5 And then I had those conversations that you just
6 mentioned of people saying: Wow, if we don't
7 like this, we can get rid of it. And so their
8 confidence really built up in the discussion that
9 I was able to have with them with that included
10 in this product.

11 Q Thank you. And do you have any other
12 experiences that you want to share with us
13 regarding the development of the proposal and
14 particular elements that stand out as being
15 especially relevant to the industry, other than
16 the ones we've spoken about?

17 A Well, I think that this is very
18 critical to our industry right now, and I think
19 that in Oklahoma and I think it goes on into
20 Kansas and Missouri, maybe even northern
21 Arkansas, could even creep over into Texas, but
22 they're feeling like this is what we're waiting

1 on. I mean, in the native world they're saying
2 this is our hope and we really need to see this
3 put in place so that we'll have some way to
4 market our product. And I know the discussions
5 that I'm having with fellow growers and people
6 that are calling me about harvesting their
7 pecans, I'm having a little bit of difficulty
8 saying: Sure, I would love to harvest your
9 pecans because I could sell them 50 cents a pound
10 and it costs me 60 cents to do it. And I can't
11 do that. And a lot of people are saying I think
12 we're just going to leave them lay because we
13 don't have the infrastructure with which to get
14 them into the market, as such, or the demand is
15 not out there. And so we really need this
16 program as an industry, or the native industry,
17 and I think the improved industry needs it too
18 but the native industry really needs it.

19 Q We did hear testimony from another
20 witness that stated that basically the success of
21 the proposed marketing order would help that
22 individual decide whether or not to keep their

1 ranch. Is that a similar sentiment that you've
2 seen?

3 A I don't know that I've heard any
4 discussions about keeping their ranch but about
5 buying equipment, about maybe buying additional
6 property, especially giving credit to the pecan
7 trees that might be on the adjacent ranch. And I
8 know a lot of native pecan trees that have
9 actually been pushed out in order to plant other
10 crops because of what's been going on the last
11 few years, and I think that if this order comes
12 into place that it could very well save a lot of
13 pecan trees' lives.

14 Q Thank you. And in your discussions
15 have you had any interactions with the folks from
16 Kansas, producers in Kansas?

17 A Some, to a limited amount.

18 Q And would you say that your statements
19 also reflect those folks?

20 A I would have to say you could probably
21 find some opposition, but the guys that are
22 really into the business, yes, they reflect what

1 I just said.

2 Q Thank you. My last question for you,
3 I'm going to touch on food safety and I know our
4 previous witness spoke quite a bit at length
5 about good agricultural practices and good
6 handling practices and the work that the Noble
7 Foundation is currently doing, and I see by your
8 resume and by your statement that you are a
9 retired scientist from the Noble Foundation.

10 A Correct.

11 Q So do you have any further experience
12 or statements with regard to the issue of food
13 safety and the pecan industry and sort of the
14 eventuality, if it exists, to be able to address
15 food safety?

16 A Well, food safety for myself, my
17 family, for our operation is utmost importance,
18 and we sell pecans that we grew ourselves so we
19 know where they came from, what they've been
20 associated with, and so we've got control of
21 that. When you start venturing out and not
22 knowing where something came from there is

1 concern. I just don't know what the answers to
2 all those problems are. I just know it exists
3 and I really don't have a lot of answers for it;
4 it's a concern.

5 Q Thank you. No further questions.

6 Thank you for your testimony

7 A Thank you.

8 JUDGE GUTHRIDGE: Are there any more
9 USDA questions?

10 (No response.)

11 JUDGE GUTHRIDGE: Mr. Davis.

12 MR. DAVIS: Just a couple of quick
13 things to follow up on.

14 REDIRECT EXAMINATION

15 BY MR. DAVIS:

16 Q Let me go back to something that you
17 said and make sure we're comparing apples and
18 oranges here. You said in your retail shop
19 you're selling improved pecans for about \$3 to \$4
20 a pound at retail. Is that correct?

21 A Correct.

22 Q And then you said 60 cents per pound

1 for natives. That's a wholesale price. Correct?

2 A Correct.

3 Q Okay. So if we're going to compare
4 wholesale to wholesale, obviously those improved
5 prices would be lower. Correct?

6 A The improved prices, we usually don't
7 send out best quality out to wholesale, but
8 wholesale a lot of times would be a dollar,
9 dollar and a quarter.

10 Q All right. And then, again to
11 reiterate for the record, you are on the board of
12 the American Pecan Board. Correct?

13 A Correct.

14 Q And that board voted unanimously to
15 propose this proposed marketing order. Correct?

16 A They did.

17 Q And you still agree with that?

18 A I do agree.

19 Q Thank you. And including the level of
20 assessments and the flexibility that's in it?

21 A I agree with the assessments.

22 Q Thank you. Again, just to clarify --

1 and Mr. Quirós, get this ready, Section .68(c) --
2 you say in you conversations that you had with
3 other growers and things, there was some concerns
4 expressed about this new board or this new
5 council putting any kind of restrictions on
6 supply or limits on acreage and things to that
7 effect. Is that right?

8 A Yes, some concerns about having the
9 authority to have us push out some of our trees
10 and stuff. And they had that perception about
11 orders, marketing orders.

12 Q If you would take a look at Exhibit 1
13 that you have before you -- and I think my
14 nimble-fingered assistant is going to put that up
15 on the overhead any minute -- and look at Section
16 .68(c), and Section .68, as you can see from the
17 Exhibit 1 there, is the authorities and the
18 powers that the -- do you have that section (c)
19 in front of you?

20 JUDGE GUTHRIDGE: I'm sorry. Which
21 section?

22 MR. DAVIS: Section 968.68(c)

1 JUDGE GUTHRIDGE: I don't have a
2 .68(c).

3 MR. DAVIS: Maybe that's why we're
4 having trouble finding it.

5 MR. QUIR S: It's .69(c).

6 MR. DAVIS: I'm sorry. My eyes are
7 growing weary. Section .69(c), and .69, the
8 heading of that is Authorities, is it not, Mr.
9 Quirós?

10 MR. QUIR S: Yes, and .69 is
11 authorities regulating handling.

12 BY MR. DAVIS:

13 Q If you have subsection (c) there
14 before you, you understand that to be basically
15 that the authority to regulate, as put forward in
16 this subsection, shall not in any way constitute
17 authority for the Council to recommend volume
18 regulations such as reserve pool, producer
19 allotments or handler withholding requirements
20 which limit the flow of the product to the market
21 for the purpose of reducing market supply. Do
22 you see that?

1 A I do.

2 Q Do you feel that in drafting the FMO
3 the board was conscious of the concerns you heard
4 and sections like this address that concern?

5 A I do, yes.

6 MR. DAVIS: I have no further
7 questions, Your Honor.

8 JUDGE GUTHRIDGE: More questions from
9 USDA?

10 (No response.)

11 JUDGE GUTHRIDGE: I have a question,
12 if I could ask. Ms. Schmaedick questioned you
13 about Section 986.58, Reapportionment and
14 Redistricting.

15 THE WITNESS: Yes.

16 JUDGE GUTHRIDGE: In your answer you
17 talked about things like shifts in water and such
18 things as that that as part of your answer which
19 triggered a thought in me.

20 We've all read in the last number of
21 years about climate change, and I've read reports
22 of plants' growing range moving northward.

1 THE WITNESS: Yes.

2 JUDGE GUTHRIDGE: And I look at a map
3 here that was in one of the exhibits, 45, I note
4 that Tennessee touches six of the states that are
5 in the production area. Would Section .58 give
6 the Council the authority to increase the size of
7 the production area to include other places where
8 pecan production may begin?

9 THE WITNESS: The way I understand it,
10 there is provision in this order to do most
11 anything with the appropriations. It might
12 require that it has to be in the referendum that
13 it's re-voted on, but it can be, and if it's
14 necessary, I think it should be. There should be
15 that leniency or that ability to reappropriate
16 areas.

17 JUDGE GUTHRIDGE: Thank you.

18 Mr. Davis, anything else?

19 BY MR. DAVIS:

20 Q MR. Landgraf, is your understanding
21 that if such a shift in the production area were
22 to be made, would that be the type of decision

1 that would require what we've referred to here as
2 the super majority of the board to make under
3 Section .55(c)(1)(vi)?

4 A Yes.

5 MR. DAVIS: Thank you. No further
6 questions.

7 JUDGE GUTHRIDGE: Any more questions
8 from USDA?

9 MS. SCHMAEDICK: Melissa Schmaedick,
10 USDA.

11 Mr. Quirós, could you put that slide
12 back up on the screen? I apologize. I was
13 speaking to the redistricting .58. Mr. Quirós,
14 you can put up the other one that you had, that's
15 fine too.

16 RECROSS EXAMINATION

17 BY MS. SCHMAEDICK:

18 Q Mr. Landgraf, if you could look at
19 that first introductory paragraph of 986.58, and
20 I'll read it in for the record. It says: "The
21 Council may recommend, subject to the approval of
22 the Secretary, reestablishment of regions,

1 reapportionment of members among regions, and
2 revise the groups eligible for representation."

3 What I want to focus on is
4 reestablishment of regions. In your opinion, is
5 reestablishment of regions the same as redefining
6 the production area?

7 A Well, I think production is one factor
8 maybe, but to me it's bigger than maybe just
9 production. I think production should drive it.
10 That's my opinion. It's up to the Council to
11 decide that.

12 Q Right. So let me try to restate my
13 question. So in your discussions with the
14 American Pecan Board, you identified a production
15 area. Is that correct?

16 A Correct.

17 Q And the current production area, as it
18 is set forth in the proposal, is 15 states.

19 A Right.

20 Q And then you took that production area
21 and you divided it up into regions.

22 A Right.

1 Q So if you look at the authority to
2 reestablish regions, am I correct in saying that
3 reestablishing regions means shifting the
4 boundaries within the production area?

5 A I think so. I think that it would be
6 either broadening or moving maybe those lines a
7 little bit, but I visualize that there will still
8 be the same alignment on the board as far as
9 numbers of Council members.

10 Q Yes. Thank you, and you did state
11 that earlier. But I wanted to clearly
12 differentiate between the authority to
13 reapportion regions which here the Council may
14 recommend that subject to approval of the
15 Secretary, as opposed to the redefinition of the
16 production area which is a different action. Is
17 that your understanding?

18 A Right.

19 MS. SCHMAEDICK: Thank you. No
20 further questions.

21 MR. DAVIS: We have nothing further,
22 Your Honor.

1 JUDGE GUTHRIDGE: Nothing further?

2 Does anyone in the audience have a
3 question for Mr. Landgraf?

4 (No response.)

5 JUDGE GUTHRIDGE: Hearing nothing, you
6 may be excused.

7 (Whereupon, the witness was excused.)

8 MR. DAVIS: Exhibit 55 was tendered?
9 That's right, we had the discussion about his
10 birth date. Thank you, Your Honor.

11 JUDGE GUTHRIDGE: Is there anything
12 else tonight? We'll recess until eight o'clock
13 in the morning.

14 (Whereupon, at 7:00 p.m., the hearing
15 was recessed, to resume at 8:00 a.m. Friday, July
16 24, 2015.)

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This is to certify that the foregoing transcript

In the matter of: Proposed Marketing Order and
Agreement for Pecans

Before: USDA

Date: 07-23-2015

Place: Richardson, Texas

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