

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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FRIDAY,
JULY 24, 2015

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

BEFORE:

CLAY G. GUTHRIDGE
Chief Administrative Law Judge
Federal Maritime Commission

APPEARANCES:

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

2 8:02 a.m.

3 JUDGE GUTHRIDGE: On the record,
4 please. The continuation into the rule-making
5 hearing on the marketing order for pecans is back
6 in session on July 24, 2015, in Dallas. I see
7 Counsel are present, or will be present shortly,
8 if we can go ahead and proceed, Mr. Davis, Mr.
9 Quiros.

10 MR. DAVIS: Yes, Your Honor, we'll
11 proceed. The Proponent will call, as its first
12 witness, Dr. Stephen Norman.

13 WHEREUPON,

14 STEPHEN NORMAN

15 was called as a witness by Counsel for the
16 Proponent and, having been first duly sworn,
17 assumed the witness stand, was examined and
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. DAVIS:

21 Q Good morning, Dr. Stephen -- excuse
22 me, Dr. Norman. Good morning. How are you

1 doing?

2 A Good.

3 Q Good. Would you please state your
4 name and spell it for the record?

5 A I'm Dr. Stephen Norman, and it's
6 S-T-E-P-H-E-N, Norman, N-O-R-M-A-N. My father
7 was a doctor, also. We actually became Dr. Tom
8 and Dr. Steve, so you're not far off there.

9 Q Dr. Norman, I was commenting to
10 somebody this morning that I don't think I've
11 ever had any matter, regardless of how
12 sophisticated or complicated it was, that has as
13 many doctors involved, Ph.Ds. and the like, but I
14 believe you are our first medical doctor. You
15 are a medical doctor, is that correct?

16 A That's right. I'm part time. I still
17 practice medicine part time and practice pecans
18 part time.

19 Q Do you have before you Exhibit 1 to
20 these proceedings? Yes, and then Exhibit 23,
21 which is Executive Summary of the Economic
22 Analysis, by Dr. Palma?

1 A Yes.

2 Q Have you reviewed both of those
3 documents?

4 A Yes.

5 Q Just keep them aside for reference,
6 perhaps. I also understand you have prepared a
7 written statement you would like to deliver?

8 A Yes, I have.

9 Q Would you please do that?

10 A My name is Dr. Stephen Norman. I live
11 in Alexandria, Louisiana. My family owns Rosalie
12 Pecans, which is a pecan farm located about five
13 miles south of Alexandria, Louisiana. In 1973,
14 my parents, Dr. and Mrs. Tom Norman, purchased
15 Rosalie Plantation, and in 1988, we planted 100
16 acres of pecans.

17 We have over 1,400 pecan trees
18 currently in production. On our farm we grow,
19 almost exclusively, improved pecan varieties,
20 Caddos, Kiowas and Sumners are our three main
21 varieties, and a few native pecans that we really
22 don't use commercially. I have attached a copy

1 of my curriculum vitae.

2 We are classified as a small pecan
3 grower, under the Small Business Administration
4 definitions, with less than \$750,000 in gross
5 pecan revenues. We need better prices for our
6 pecan crop and greater price stability. In
7 recent years, we have seen wide variation in the
8 prices we have received for our pecan crop. Such
9 wide variation in pricing makes it extremely
10 difficult to plan for the future operation of our
11 farm. While prices for pecans go up and down
12 dramatically from year to year, our costs of
13 production have steadily increased. The cost of
14 fertilizer, insecticides and equipment have all
15 increased in recent years, regardless of the
16 price I received for our crop.

17 Further, the lack of accurate market
18 information on the anticipated size of the pecan
19 crop in any given year also makes it difficult
20 for us to negotiate a fair price for our crop and
21 to make reasonable business decisions about
22 investments in our farm. Better prices,

1 increased price stability and more accurate
2 market information would greatly benefit our
3 small family operation. I think our farm, and
4 the industry, would also benefit in the future
5 from grade, size, quality, packaging, shipping
6 protocols and other handling requirements as we
7 compete with other tree nuts for shelf space and
8 consumer attention.

9 I understand that under the proposed
10 order, only growers with more than 30 acres of
11 pecans, or more than 50,000 pounds of average
12 production per year over the last four years,
13 will be allowed to vote on the proposed order.
14 In my opinion, this threshold is reasonable
15 because a grower that does not meet this
16 threshold is not really a commercial grower. Any
17 grower that is smaller than the proposed
18 threshold could not justify the costs inherent in
19 such a small production. I have also reviewed
20 the economic analysis summary prepared by Dr.
21 Marco Palma, specifically the projected average
22 price increase from promotion of 6.3 cents per

1 inshell pound versus the average 2.5 cent per
2 inshell pound cost. Overall --

3 (Simultaneous speaking.)

4 Q Dr. Norman, is that Exhibit 23 that
5 you have before there, is that the Economic
6 Analysis you're referring to?

7 A Yes, that is Exhibit 23.

8 Q Thank you.

9 A Overall, I am aware of the costs that
10 the proposed federal marketing order may impose
11 on my farm, and I do not believe these costs are
12 unduly burdensome. Further, I believe that the
13 benefits of the federal marketing order to our
14 farm will greatly outweigh any costs associated
15 with it. I believe I have been informed about
16 the process of securing a federal marketing order
17 and have been given an opportunity to participate
18 in this process. I am currently the president of
19 the Louisiana Pecan Growers Association. I have
20 been authorized by the Board of the Louisiana
21 Pecan Growers Association to testify on its
22 behalf in support of the federal marketing order

1 for pecans, and I have written a letter on behalf
2 of Louisiana Pecan Growers Association to the
3 Secretary of Agriculture in support of the
4 proposed federal marketing order for pecans.

5 I'm also testifying in my individual
6 capacity in support of the federal marketing
7 order for pecans. In conclusion, I fully support
8 the proposed federal marketing order for pecans
9 and encourage the Secretary to implement the
10 order, as proposed by the American Pecan Board.
11 I would be happy to answer any questions.

12 Q Dr. Norman, is the letter from the
13 Louisiana Pecan Growers Association attached to
14 your written statement?

15 A Yes, it is.

16 MR. DAVIS: Your Honor, we tender
17 Exhibit 56.

18 JUDGE GUTHRIDGE: Any objection from
19 USDA?

20 MS. CHILUKURI: No objection, Your
21 Honor. I would note that the resume contains
22 some references to spouse names and birthdate and

1 the like, and we'll redact those before it's put
2 onto the website. To the extent that you have
3 future exhibits that have that information, if
4 you could remove that, and if not, we'll do that
5 on our end.

6 MR. DAVIS: Thank you. We should have
7 caught that, actually.

8 MS. CHILUKURI: No problem.

9 (Simultaneous speaking.)

10 MR. DAVIS: We have agreement with
11 USDA counsel that they're going to redact any
12 potentially confidential information from
13 resumes, and if necessary, we will note on the
14 record which of the exhibits that have already
15 been admitted have been so modified.

16 MS. CHILUKURI: Agreed.

17 MR. DAVIS: Mr. Hill and I discussed
18 that. If I could, if you would get that letter
19 in front of you --

20 JUDGE GUTHRIDGE: I haven't admitted
21 it yet.

22 MR. DAVIS: Oh, I'm sorry.

1 JUDGE GUTHRIDGE: Is there any
2 objection from the audience? Hearing no
3 objection, Exhibit 56 is admitted.

4 (Whereupon, the above-referred to
5 document was received into evidence as Exhibit
6 56.)

7 BY MR. DAVIS:

8 Q Dr. Norman, I'm putting that letter up
9 on the overhead projector. Either from the
10 overhead or from the copy you have in front of
11 you, would you please read that into the record?

12 A Yes, this letter is addressed to the
13 Honorable Tom Vilsack, Secretary of Agriculture.
14 Dear Secretary Vilsack, the Board of the
15 Louisiana Pecan Growers Association, at a recent
16 meeting, voted unanimously to support the federal
17 marketing order for pecans currently being
18 promulgated by the American Pecan Board.

19 Our industry faces issues of price and
20 supply instability in the market. This situation
21 inhibits our effort to provide a consistent
22 quality supply of pecans to domestic consumers at

1 a price that supports a profitable return to
2 producers and processors. We believe that a
3 federal marketing order will contribute to a more
4 stable market environment that is favorable to
5 growers, buyers, shellers and consumers. The
6 Louisiana Pecan Growers Association goes on
7 record in favor of the order and greatly
8 appreciates your support.

9 Q Signed by?

10 A Respectfully submitted and signed by
11 me, as president of the Louisiana Pecan Growers
12 Association.

13 Q Dr. Norman, approximately how many
14 members does the Louisiana Pecan Growers
15 Association have?

16 A We have about 150 members.

17 Q We have no further questions at this
18 time, Your Honor.

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

21 CROSS EXAMINATION

22 BY MS. SCHMAEDICK:

1 Q Melissa Schmaedick, USDA. Good
2 morning, Dr. Norman. Thank you for your
3 testimony. You mentioned that you are the
4 current president of the Louisiana Pecan Growers
5 Association, is that correct?

6 A Yes.

7 Q Could you tell me about the activities
8 of that association? What types of things do you
9 provide for your constituents?

10 A We provide primarily education and
11 training. One of our main goals is to support
12 research in the field of pecan science.

13 Q What type of research are you
14 currently looking at?

15 A We don't actually do the research, but
16 we try to support our pecan scientists. We have,
17 for example, pecan scientists at the LSU ag
18 center pecan research station in Shreveport,
19 Louisiana. We try to provide support to these
20 guys.

21 Q LSU, could you define that for the
22 record?

1 A LSU, Louisiana State University ag
2 center is their agricultural section, I guess.

3 Q Thank you. You mentioned that you
4 have roughly 100 members, is that correct?

5 A We have 100 acres in production. We
6 have about 1,400 trees.

7 Q I'm referring to the membership of the
8 association.

9 A Oh, I'm sorry.

10 Q That's okay.

11 A 150 members.

12 Q Oh, I'm sorry. Okay, 150 members.
13 You're our first witness from Louisiana, so could
14 you tell us about Louisiana and pecans, just an
15 overview of --

16 A Louisiana is one of the states where
17 there are a lot of native pecans. It's a very
18 important part of our crop is the native
19 production. But there are a lot of improved
20 pecans, as well. Most of our growers are small.
21 I'm not sure that we have any growers that would
22 qualify under the Small Business Administration's

1 guidelines as being a large business. I'm not
2 sure that there would be any.

3 Most are small. Most of our members
4 are not doing this full time. In fact, I would
5 guess that about half of our members would fall
6 under the 30-acre distinction, as well. We're
7 primarily small growers. A lot of people that do
8 it on the side, do it part time, and really few
9 that depend on it for their sole source of
10 income.

11 Q You mentioned the 30-acre definition,
12 which is part of the proposed marketing order
13 program -- 30-acre definition for grower, that
14 is. You said roughly half would not even qualify
15 under that definition?

16 A That's my guess, really. We don't
17 collect that information. We really make no
18 distinction between our members between large and
19 small. We encourage anyone with an interest in
20 pecans to be a member. Just my personal
21 observation, I would predict that probably about
22 half would fall under that level.

1 Q Is there, in your opinion, a general
2 awareness of the proposal among your members?

3 A Yes, there is. We've made an effort
4 to inform as many as possible. A lot of that has
5 been through the efforts of the American Pecan
6 Board in actually coming to our meetings. Mike
7 Adams, who has testified earlier, has come to
8 several of our meetings, both our annual
9 conventions and our smaller educational seminars
10 and, over the past couple of years, has come and
11 spoken to our group about this. I actually
12 produce a newsletter about six times a year for
13 the Louisiana Pecan Growers Association. I have
14 written at least one article about it for that.
15 I've sent notices about these hearings to our
16 members. I would say that almost all of our
17 members also subscribe to the Pecan South
18 magazine. We had earlier testimony about the
19 efforts of Pecan South magazine and their efforts
20 to educate everybody on the proposal. I think
21 all of our members are probably familiar with
22 this.

1 Q Thank you. In your experience, have
2 you had any members of your association raise any
3 concerns about whether or not they will be
4 eligible to vote under the proposed program?

5 A Occasionally. In fact, I have -- at
6 one of our meetings down in south Louisiana,
7 which you may be aware is culturally a very
8 distinct part of our country, we were having a
9 discussion. Mike Adams had come and given his
10 talk, and we were having a general discussion
11 about it. One or two of the small growers said,
12 "Why are we even talking about this? We're not
13 big enough to vote on this." One of the fellows
14 said, "My friend, think about it. A rising tide
15 floats all boats." I really liked that a lot,
16 and I tucked it into my notes from that meeting.
17 I think that's a common conception, really, is
18 that these people believe that no matter how
19 small they are, this federal marketing order will
20 have a benefit for them, as well, whether they
21 are large enough to vote on it or not. They
22 really feel like it's going to be a benefit.

1 Q Thank you. You mentioned that the
2 pecan trees down in Louisiana are predominantly
3 native, is that correct?

4 A I'm not sure of the numbers, but I
5 think that we probably have more native pecans
6 than improved.

7 Q Can you talk briefly about the growing
8 environment in Louisiana? Is it similar to
9 Texas, for example?

10 A It's similar to east Texas.
11 Louisiana's a pretty wet state. One of our
12 biggest problems with pecan production is
13 fighting things like fungal diseases. It
14 requires a lot of input into the orchard. That's
15 one of the big expenses that we have. My orchard
16 is not irrigated, and I really don't feel that
17 I've suffered. I probably could squeeze a little
18 more production out of it by irrigating, but even
19 during some of the years that we've called
20 drought years, we've managed to produce crops.
21 In general, I think we have, I guess, more water
22 than most people. The native trees are kind of

1 everywhere, just as you'd expect. If you find a
2 little patch of woods, likely there are going to
3 be a lot of native pecans in it. A lot of row
4 crop farmers, like soybean farmers and cotton
5 farmers -- a lot of these people have pecan trees
6 around the edges of their fields.

7 Pecan trees just tend to grow up in a
8 fence row, where it doesn't get mowed, for
9 example. So they will actually -- a lot of the
10 production is like that. It's sort of
11 accidental. They will make a contract with a
12 small picker, someone who does nothing but
13 harvest pecans in the fall, and they'll come
14 every year and harvest around the edges of the
15 soybean field and harvest the native pecans, and
16 then take them and sell them and have some sort
17 of a share arrangement with the owner of the
18 property. That's a very common arrangement in
19 much of Louisiana.

20 Q Thank you. Are you familiar with the
21 definition of regions under the proposed program?
22 We have them referred to as the Western, Central

1 and Eastern regions.

2 A Yes.

3 Q Based on your experience with the
4 different producing types of environments
5 throughout the production area, are you
6 comfortable with the definition of regions and
7 where you fall in those regions?

8 A Yes, I am. I feel like they really
9 describe three fairly distinct areas in the
10 production, in that the Central area has most of
11 the states that have a lot of natives. That's
12 one of the big distinctions, I think.

13 Then the farther east you go, to the
14 Eastern region, like Georgia, almost exclusively
15 improved pecans, I guess, and big farms that do a
16 lot of intensive management, like the hedging
17 that was described. Then the Western is
18 completely -- their climate is different, and
19 their cultural techniques are vastly different
20 from ours, and they have almost no natives. I
21 think that it makes a lot of sense the way it's
22 been divided up.

1 Q Thank you. Thank you for your
2 testimony. I have no further questions.

3 JUDGE GUTHRIDGE: Any more questions
4 from USDA?

5 BY MR. HINMAN:

6 Q Don Hinman, USDA. Good morning, Dr.
7 Norman.

8 A Good morning.

9 Q Wanted to get some additional details
10 about your views on the benefits of the order.
11 One of the authorities that the order would grant
12 is 986.69, authorities regarding the handling.
13 You had mentioned your support for the size, the
14 quality, and packaging authorities. If size,
15 quality and packaging standards were established,
16 how do you think that would benefit the Louisiana
17 pecan industry?

18 A I'm particularly interested in that
19 part of it. Even though I'm a small grower, I
20 qualify as a handler, I believe, because I take a
21 substantial part of my crop and I shell it myself
22 and package it and sell it mail order. I have

1 Internet sales and direct mail sales. Almost all
2 of our packaging has been developed by us over
3 the past 15 years. Without any standards, I
4 often wonder should I be doing this better? I
5 would welcome guidelines, I think, that would
6 tell me this is really the best way to do this.
7 This is what you ought to do. Through our market
8 research, we know that this presents better to
9 the customers and so forth. I think just on a
10 very personal basis, I think it would be helpful
11 to me. Also, I think, for the industry as a
12 whole, this will help elevate pecans in the eyes
13 of the consumers, which is something that we
14 really need.

15 We have such a wonderful product. One
16 of the biggest problems is that there's no
17 standardization of how it's presented to the
18 public and really very little awareness, I think,
19 of all of the health benefits of pecans and that
20 sort of thing. I've drifted a little bit off
21 topic there, but did I answer your question?

22 Q Yes, that's very helpful and it

1 provided additional insights into your business,
2 which leads me to ask another question on that:
3 So you sell some through other channels?

4 A That's not an answer I can answer with
5 just a few words, either. I actually have an
6 arrangement. I have another grower who -- we
7 have sort of a sharecropping arrangement, where
8 he actually provides the input into my orchard,
9 and he does the harvesting on a shares basis. He
10 takes the larger part of the crop and he really
11 sells it inshell to accumulators and that sort of
12 thing. My share, then, I take and shell and sell
13 retail. I really pretty much sell all of my
14 share retail. Sometimes I will also buy a little
15 bit of his pecans to use in my retail business.
16 I like to only sell my own pecans, or what we
17 call Rosalie pecans, but if I have to buy those
18 from the man who harvests them, they're still
19 Rosalie pecans. Yes, my part of the crop is
20 really all sold that way.

21 Q Thank you. You mentioned that market
22 information. Can you explain your views on how

1 that would benefit the industry?

2 A It's just a mystery right now. It's
3 just a mystery. You really would be amused, I
4 think, if you could attend -- one of the things
5 that I -- I'm sorry, let me back up just a little
6 bit. One of my roles in the pecan business that
7 I think doesn't show up on my resume is that for
8 the past ten years, I have been the convention
9 chairman first for Pecan Producers of Louisiana,
10 and then for the Louisiana Pecan Growers
11 Association. It also means that I've been the
12 convention chairman for all eight of the annual
13 tristate pecan meetings which we've had. The
14 tristate pecan meeting is a combined effort
15 between the Arkansas Pecan Growers Association,
16 the Louisiana Pecan Growers Association, and the
17 Mississippi Pecan Growers Association.

18 For the past eight years, we've had
19 our annual meeting together. Arkansas and
20 Mississippi groups are small and a little bit
21 poorly organized, and they just can't quite put
22 together their own annual convention, so we've

1 joined forces on that. We generally have the
2 meeting in Mississippi one year and Louisiana the
3 next, and Arkansas is sort of the stepchild.

4 The final event of our convention
5 every year is very much looked forward to by all
6 of the members, and actually also draws people
7 from other states to come -- some people just
8 come for our final event, which is -- we call it
9 the Ben Littlepage Pecan Prognostication. You
10 may have heard that word. I think my brother
11 invented that word. Ben Littlepage is an elderly
12 member of our organization. He's been growing
13 pecans for longer than I've been alive, I'm sure.
14 He has a lot of contacts all over the
15 pecan-growing region. He's a big talker and a
16 big listener and quite a character. He has this
17 event. It's, like I say, our culminating event.
18 He stands at the front of the crowd and he asks
19 -- we go down the line. He starts with Alabama,
20 I guess, and he says, "Is anybody here from
21 Alabama?"

22 Somebody'll say, "No, but I'm from

1 Mississippi, and I kind of know what's going on
2 over in Alabama." He'll say, "What do you think
3 about the crop?" They'll say, "Well, I drove
4 through the northern part, and it was pretty
5 good, but in the south, they're kind of having
6 some scab issues. I think they've got a little
7 bit of a small crop this year." So Ben'll say,
8 "I'm going to put down 2 million pounds for
9 them."

10 Then we go to the next state, which is
11 probably Arkansas. We go through all the states
12 like that. That's the way the pecan
13 prognostication works. At the end this year, I
14 think he came up with 283 million pounds. I
15 think you can see there's a lot of room for
16 inaccuracy there. It's pretty much the sum of a
17 lot of guesses. As a result, no one really has a
18 real clue as to what's going to happen. There
19 are bets made, and there are contracts made on
20 those numbers. Really, the veracity of them
21 cannot be established. I asked someone recently,
22 "Wouldn't it be interesting to go back and look

1 at Ben's numbers and compare them to really what
2 the final crop was?"

3 The answer is, "That wouldn't do any
4 good because we don't really have any real data
5 on the final crop." There's a lot of pecans that
6 don't get counted. We'd be comparing apples to
7 oranges or, I don't know, whatever. It just
8 wouldn't even make any sense to try to see if he
9 was right because there's nothing to judge it by.
10 As a result, the prices are so far -- they're
11 just up in the air. I can't tell you right now
12 what the prices are going to be this fall.

13 People ask me that. I don't have a
14 clue. I think if we could have better data and
15 could know really what's going to be in the crop
16 and know really what was in last year's crop and
17 know what was used and what was not used, then I
18 think the decisions that could be made would make
19 so much more sense. I'm probably not the best
20 one to answer that question. I think the people
21 like some of the other -- Ms. Watts that
22 testified knows a lot more about the kind of

1 contracts that you have to make going forward and
2 all that. I'm a pretty little guy in all this,
3 but I do have a lot of experience in watching
4 those numbers get made, and I can tell you that
5 they're pretty much grabbed out of the air.

6 Q We greatly appreciate the richness of
7 your response and thank you. No further
8 questions.

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

11 BY MS. VARELA:

12 Q Good morning, Jen Varela, USDA. You
13 piqued my interest a little when you mentioned
14 the arrangement that you have on your particular
15 farm. If you don't mind informing me -- teaching
16 me some new things this morning, if you could
17 look at the definition of grower, which is
18 Section 986.16.

19 MR. HINMAN: Do you happen to know
20 that section number?

21 MS. VARELA: .16. It's up there on
22 the screen, if that's easier to read.

1 BY MS. VARELA:

2 Q If you could, Dr. Norman, just take a
3 look at that. I'd like to know your impression
4 of who would qualify as the grower in a situation
5 like yours.

6 A That is interesting. I took a look at
7 all this when it first came out with those
8 questions in mind. I think if you look at A,
9 "Grower is synonymous with producer. It means
10 any person engaged within the production area in
11 a proprietary capacity in the production of
12 pecans if such person, A, owns an orchard and
13 harvests its pecans for sale, even if a custom
14 harvester is used." I think under that Part A, I
15 really qualify as a grower because I own an
16 orchard, and I use someone to harvest my pecans.
17 I think I would fit there.

18 B is a lessee of a pecan orchard and
19 has the right to sell the harvest. I think that
20 the fellow I have the contract with to manage my
21 pecans fits under that one. So in a sense, I
22 think that he and I are both growers. You might

1 just say that proportionately, I'm a smaller
2 grower than he is because of our arrangement,
3 that he has a larger portion of the crop.

4 Q Would you characterize that
5 arrangement as a partnership?

6 A Yes, I think it's considered a
7 partnership. We have a contract. Sharecropping
8 is a very old, traditional means of --
9 arrangement in farming, as I'm sure you know.
10 It's nothing unusual at all.

11 Q Would you say that it's pretty
12 prevalent in your area, or in the State of
13 Louisiana?

14 A I think there are just a lot of
15 different arrangements. I don't know how common
16 my arrangement is. I know, for example, the
17 fellow that I have a contract with also has a
18 contract with another owner. Theirs is a little
19 bit different because they don't do any retail,
20 so they simply split the crop and each sell their
21 portions. That's another person. I'm sure there
22 are others, but it's one of many types of

1 arrangements.

2 Q Thank you very much. That was very
3 illuminating.

4 BY MS. SCHMAEDICK:

5 Q Melissa Schmaedick, USDA. Dr. Norman,
6 you mentioned this tristate conference that you
7 are a part of. One of the states that
8 participate, I believe, is Mississippi, is that
9 correct?

10 A Yes.

11 Q I'm not sure if we'll have any
12 witnesses from Mississippi, so I'm wondering if
13 you would be comfortable telling us what you know
14 about Mississippi and the pecan industry or the
15 growing environment in Mississippi?

16 A I know a little bit just from making
17 friends with these people at meetings and
18 whatnot. I think it's very similar to Louisiana.
19 Again, they're sort of a mirror image of
20 Louisiana, being we straddle both sides of the
21 Mississippi River. It's the Mississippi River
22 Valley that has the native pecans. Lots and lots

1 of natives in Mississippi.

2 I do think when they were making the
3 distinction between the Eastern, Central and
4 Western areas that we talked about earlier, I
5 think there was some concern over which zone to
6 put Mississippi in. I believe they did end up in
7 the Central region. That makes the most sense to
8 me. They are much more culturally similar, I
9 think, to Louisiana than to Alabama, for example,
10 on the other side of them. I think their
11 practices are probably similar. I think they
12 have mostly small, part-time growers, very few
13 real large farms.

14 Q Thank you. At these tristate
15 conventions, was the proposed program discussed
16 at all?

17 A Oh, yes. These meetings -- once
18 again, Mike Adams started coming -- as soon as
19 this American Pecan Board was formed, Mike Adams
20 started coming to give us talks. He's really
21 helped illuminate all of this for us at those
22 meetings.

1 Q I realize that you are not from
2 Mississippi or not part of an organization that
3 is based in Mississippi, but in your opinion,
4 would you say that there's a general acceptance
5 of the proposed definition of grower that
6 determines who would be eligible to vote? Is
7 that widely understood in Mississippi, in your
8 opinion?

9 A I'm not sure I'm really qualified to
10 answer that, but I know that the people that
11 attended our tristate meetings from Mississippi,
12 in general, seemed to be of the same mindset as
13 the Louisiana people and were really in agreement
14 and in favor of the order. I'm not sure that we
15 really ever -- I discussed with any of them the
16 actual point of whether they would be eligible to
17 vote or anything, but the ones that I've talked
18 to are all in favor of the federal marketing
19 order.

20 Q Thank you. Yesterday we had testimony
21 from Mr. Dan York. I believe he's from Arkansas.
22 I believe at one point in his testimony he said

1 that the bids for native pecans are below the
2 cost of production oftentimes. Can you speak to
3 that experience in Louisiana?

4 A No because I don't really have any
5 personal experience in production costs for
6 natives. Let me back up, I guess a little bit.
7 We have some natives on our farm, some that are
8 very large and occasionally produce a lot of
9 pecans. But most years, we don't even consider
10 it profitable to go pick the pecans, even though
11 we've not put any other production into the
12 pecan. Just the simple act of picking the pecans
13 we consider to be too much effort for what the
14 price is. That's me. Most of the native
15 production in Louisiana, I think, is simply
16 picked. I think there are very few people in
17 Louisiana that spray natives or fertilize
18 natives. I think in general, people tend to put
19 very little input into the natives, but even the
20 cost of just the harvesting is considered by many
21 to be, some years, just breaking even. Just by
22 the effort of the diesel spent and the man hours

1 spent picking the pecans is not worth it for the
2 price that they're getting.

3 Q Thank you. If the proposed marketing
4 order had the anticipated benefit of increasing
5 prices, both for native and improved pecans, do
6 you think that would have an impact on the
7 current mindset towards whether or not it's
8 profitable to pick those natives?

9 A I really do. I think if we only see
10 the very conservative rise in value that was
11 predicted in Exhibit 23, it might not make very
12 much difference, but I think that there probably
13 will be more benefit from the marketing order.
14 For example, I think that a portion of the
15 efforts by the American Pecan Council could be,
16 and probably will be, spent specifically
17 researching what can be done to improve the
18 marketability of native pecans. I think that
19 could make a huge difference. These pecans are
20 really very wonderful, but they're very tricky.
21 They're hard to deal with. They're very hard to
22 track. They're hard to pick out. It's hard to

1 separate the meat from the wood. But it's a
2 wonderful, wonderful nut, really.

3 I think most people agree it has a
4 higher oil content than the improved pecans.
5 There are going to be some real good uses for the
6 native pecans that I think will really elevate
7 them, but we have to research that and spend some
8 money and time marketing that. I think that in
9 the long run, the benefits from the federal
10 marketing order, the relative benefits may be
11 even bigger for the natives than for the improved
12 pecans.

13 Q Thank you. I have no further
14 questions.

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

17 BY MR. HINMAN:

18 Q Don Hinman, USDA. Follow up on one of
19 your comments. You mentioned the higher oil
20 content of natives. Could you talk more about
21 that and what that brings to the market?

22 A I'm not sure. I think most people

1 agree that the natives have a higher oil content.
2 I don't know the numbers on that. I think a lot
3 of people attribute this to making them taste
4 better, for example. Again, I'm not an expert on
5 taste. I'm not sure I can tell the difference
6 between varieties like some people can in the
7 taste. Some of it may be psychological.

8 I think that natives maybe taste
9 better than improved pecans, but I'm not willing
10 to spend the extra effort to shell one to eat it,
11 to tell you the truth. It's that difficult on
12 most of them, even though there is a lot of
13 variation among natives. Almost all of them, the
14 shell is very hard, and they're very small, and
15 they don't want to release that meat very easily.

16 Anyway, I think there's general
17 agreement there's more oil. Should maybe we just
18 use the natives for producing pecan oil? Maybe,
19 but I think there's a lot more to it than that.
20 In other words, I think that if people could be
21 -- companies, even, could be aware that this
22 product does have maybe a little bit different

1 taste, maybe a little better taste, it could be
2 specifically marketed to make them more
3 attractive to consumers. I'm not sure that's
4 answering your question.

5 Q Yes, that was a fine answer, and I
6 appreciate it. Thank you. No further questions.

7 WITNESS: It's a little bit difficult.

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

10 REDIRECT EXAMINATION

11 MR. DAVIS: Yes, Your Honor, let me
12 follow up.

13 BY MR. DAVIS:

14 Q I think most people in the industry
15 know about the tristate arrangement, but I
16 believe you may be the first witness that has
17 testified about that, so let me get a little bit
18 more information. Do you have a rough idea of
19 approximately how many members there are in the
20 tristate organization?

21 A It's not an organization. The
22 tristate is just a convention. It's just a

1 three-way convention that we have. Those three
2 organizations, the Louisiana, Arkansas, and
3 Mississippi pecan growers associations just get
4 together and have their annual meeting together.
5 We started this, like I say, eight years ago,
6 just partly as an effort to increase our
7 attendance at the Louisiana meeting, and partly
8 as an effort to help out those two smaller
9 organizations, Arkansas and Mississippi.

10 Traditionally and historically, I
11 think before there even -- I may be not real
12 accurate on the details of the Arkansas and
13 Mississippi organization, but I think that before
14 I was involved, I think for a long time, there
15 were no growers' organizations in Arkansas and
16 Mississippi. I think those growers tended to
17 belong to the Louisiana Pecan Growers
18 Association, which is an old organization. Our
19 organization was started in 1926. We're almost
20 as old as Texas. So a lot of those growers
21 belonged to our group.

22 From what I hear, there was an effort

1 to have them form their own state organizations
2 really when things like some federal programs
3 came about that needed to be directed to an
4 individual state. I don't know the names of
5 those programs, but you all probably do. There
6 are sometimes federal funds that can be used for
7 specialty crops in a given state. For example,
8 Arkansas needed to have their own growers
9 association so that they could try to get some of
10 those funds. I think that's probably when they
11 really started their own organizations. Now, a
12 grower in Arkansas, some of those people still
13 belong to Louisiana Pecan Growers because they
14 realized that we were more organized and we do a
15 lot more stuff than Arkansas does, but they're
16 also kind of trying to get theirs off the ground
17 and all that.

18 We really saw this as an opportunity
19 to kind of help them become organized and realize
20 that they like to be part of us, and they could
21 kind of participate with us, even though they
22 were trying to be their own organizations. We

1 had this meeting. It's very simple. It's a
2 two-day meeting. We usually start on a Thursday
3 morning with an orchard tour.

4 Our growers really like to start off
5 with an experience in the field. We meet in
6 someone's orchard and get to look at their trees
7 and hear about their practices and look at their
8 equipment, maybe see some of their equipment run.
9 Then we'll often have lunch right there in the
10 orchard. It's a great social event, too. Then
11 after lunch, we'll migrate back to wherever the
12 convention is really being held. Last month, we
13 met in Natchez, Mississippi. They have a very
14 nice convention center there. We went back in
15 the afternoon on Thursday and we had exhibitors
16 there set up with -- showing us equipment and
17 that sort of thing.

18 Then we broke out and had an hour for
19 the three state organizations to have their
20 annual membership meeting. So each of the three
21 states did that, and then following that, there
22 was an hour for board meetings, so each of the

1 three organizations had their separate board
2 meetings. Then we had a social event Thursday
3 night. Then Friday is all devoted to education.
4 We have an education program with scientists and
5 so forth all day Friday, culminating in the Ben
6 Littlepage prognostication.

7 That's how it's set up. There are no
8 members to the tristate. It's not an
9 organization. It's strictly a convention. Then
10 at the end of it, if we've made a little bit of
11 money, we distribute that to the three
12 organizations and that sort of thing, but there
13 are no members in the tristate. It's just a
14 meeting.

15 Q Thank you, that was very helpful.
16 Give us an idea, in round numbers, how many
17 people attended the tristate meeting this year?

18 A We had about 150 people attend for
19 this year.

20 Q I believe you have touched on this,
21 but Mr. Adams, and perhaps other board members
22 from the American Pecan Board, have appeared at

1 tristate meetings, have they not?

2 A Yes, that's right.

3 Q Was it your testimony that there
4 seemed to be widespread and enthusiastic support
5 for the proposed marketing order from those that
6 attended that meeting?

7 A Yes, I would say that. Certainly
8 there's no vote taken or anything like that, but
9 Mike would give his talk and there's a lot of
10 opportunity to ask questions. Mike's very
11 eloquent at doing that. So people had plenty of
12 time to talk about it and have their questions
13 aired and any concerns and that sort of thing. I
14 would just say from the general tone of the
15 discussion that yes, there seemed to be very
16 general agreement in favor of the marketing
17 order.

18 Q We've asked this question of some
19 other organizations. I'll ask it to you, but
20 first, as president of Louisiana Pecan Growers
21 Association, do you see any potential conflict
22 between the proposed marketing order and the

1 mission and purpose and efforts of the Louisiana
2 pecan growers, or do you see the federal
3 marketing order as complimentary to that?

4 A Oh, I very definitely see it as
5 complimentary.

6 Q How about the mission and work of the
7 tristate organization? Do you see any conflict
8 in that organization's mission or goals and the
9 proposed federal marketing order for pecans?

10 A As I say, there's really no tristate
11 organization, so it has no goals. It's simply a
12 meeting. But I really think that it -- I would
13 have to say that I can't speak for Mississippi
14 and Arkansas organizations, but I do feel that
15 their goals are very similar to ours, so I would
16 have to say that in my opinion, the federal
17 marketing order would be complimentary to those
18 organizations, as well, Arkansas and Mississippi
19 pecan growers associations.

20 Q Thank you so much, Dr. Norman. I have
21 no further questions.

22 JUDGE GUTHRIDGE: Are there any more

1 USDA questions? Does anyone in the audience have
2 a question for Dr. Norman?

3 MR. QUIROS: Your Honor, we'd like to
4 now call Glenn Honaker to the witness stand.

5 WHEREUPON,

6 GLENN HONAKER

7 was called as a witness by Counsel for the
8 Proponent and, having been first dully sworn,
9 assumed the witness stand, was examined and
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MR. QUIROS:

13 Q Mr. Honaker, thank you for being with
14 us today. I understand you're from Ft. Stockton,
15 Texas. Where is Ft. Stockton?

16 A Ft. Stockton's a long way from Dallas.
17 It is 460 miles west on Interstate 10. We are
18 approximately halfway between San Antonio and El
19 Paso, so it's a good watering hole for people as
20 they're traveling.

21 Q I'm not very familiar with the
22 geography of Texas, but tell me approximately how

1 long it took you to get here to testify.

2 A It took me about eight hours.

3 Q Did you have a co-pilot with you, I
4 hope?

5 A Yes, sir, I did. I don't do Dallas
6 traffic well.

7 Q We appreciate you making the effort to
8 be here today. Have a couple of preliminary
9 things that I would like to call to your
10 attention as a basis for your testimony. Have
11 you received and reviewed Exhibit 1 in these
12 hearings, which is a notice prepared by the USDA
13 that contains the proposed federal marketing
14 order for pecans?

15 A Yes, sir, I have.

16 Q Thank you. Have you received and
17 reviewed what's been marked Exhibit 23 in these
18 hearings, which is an executive summary of the
19 analysis -- economic analysis by Dr. Marco Palma?

20 A Yes, sir, I have.

21 Q Thank you. I understand you've
22 prepared a statement for us. Would you please

1 read it into the testimony?

2 A Okay, thank you, sir.

3 Q Thank you.

4 A First of all, good morning, and since
5 we're in Texas, howdy, glad to have you all here.
6 My name is Glenn Honaker. It's spelled G-L-E-N-N
7 H-O-N-A-K-E-R. As was stated, I am from Ft.
8 Stockton, Texas. I've worked at Belding Farms
9 since 1975. I've been farm manager at Belding
10 Farms since 1994.

11 Attached, I believe you all have a
12 copy of my resume. A little bit about Belding
13 Farms. It's a pecan farm located about eight
14 miles southwest of Ft. Stockton, Texas. We have
15 over 2,205 acres of pecans currently in
16 production. Last year we produced over 4.4
17 million pounds of pecans, with a ten-year average
18 of about 5.25 million pounds of pecans. On our
19 farm, we grow improved varieties of pecans, more
20 than \$750,000 of annual gross revenues from
21 pecans.

22 Under the Small Business

1 Administration guidelines, we would be considered
2 a large pecan grower. I have reviewed the
3 economic analysis summary prepared by Dr. Marco
4 Palma. That's Exhibit 23, I believe. The
5 projected average price increase from promotion
6 of 6.3 cents per inshell pound versus the average
7 2.5 cents per inshell pound cost. Overall, I am
8 aware of the cost that a federal marketing order
9 might impose on the farm, and I do not believe
10 these costs are unduly burdensome. Further, I
11 believe that the benefits of the federal
12 marketing order to the farm would greatly
13 outweigh any cost associated with it.

14 In recent years, I have seen wide
15 variation in the prices we have received from our
16 pecan crop. Such wide variation in prices makes
17 it extremely difficult to plan for future
18 operations of the farm. While prices for pecans
19 go up and down dramatically from year to year,
20 the costs of production have all steadily
21 increased over the years. The cost of
22 fertilizer, insecticides and equipment have all

1 increased in recent years, regardless of the
2 price we received for our crop.

3 Further, like of accurate market
4 information on the anticipated size of a pecan
5 crop in any given year also makes it difficult to
6 negotiate a fair price for our crop and to make
7 reasonable business decisions about the
8 investments in the farm. Increased price
9 stability and more accurate market information
10 would greatly benefit the farm. I think our
11 farm, and the industry, would also benefit in the
12 future from grade, size, quality, packaging,
13 shipping protocols, and other handling
14 requirements, as we compete with other tree nuts
15 for shelf space and consumer attention.

16 I understand that under the proposed
17 order, only growers with more than 30 acres of
18 pecans or more than 50,000 pounds of average
19 production per year over the last four years will
20 be allowed to vote on the proposed order. In my
21 opinion, this threshold is reasonable because a
22 grower that does not meet this threshold is not a

1 commercial grower. Any grower that is smaller
2 than the proposed threshold cannot justify the
3 cost inherent in such a small production and is
4 most probably merely a seller of pecans from
5 older trees that happen to be on his or her
6 property.

7 I am currently a board member of the
8 Western Pecan Growers Association and a current
9 board member of the Texas Pecan Board. Also, I
10 am a past president of the Western Pecan Growers
11 Association, as well as the past president of the
12 Texas Pecan Growers Association. The proposed
13 American Pecan Council will in no way conflict
14 with the Texas Pecan Growers Association or the
15 Western Pecan Growers Association, which are
16 local growers' associations. In all cases, I
17 think the American Pecan Council will be a
18 helpful coordinating organization to the man
19 grower associations in the production area.

20 I have been informed about the process
21 of securing a federal marketing order, and I have
22 been given an opportunity to participate in this

1 process. On behalf of the Texas Pecan Board, we
2 have written a letter to Secretary Vilsack
3 supporting the proposed marketing order. I do
4 have a copy of this letter with me and attached.
5 If I may, I would like to read that at this time.

6 Dear Secretary Vilsack, the Texas
7 Pecan Board wishes to express our support of the
8 federal marketing order for pecans being
9 promulgated by the American Pecan Board. Our
10 industry has and continues to face issues of
11 price and supply instability in the market. This
12 situation inhibits our effort to provide a
13 consistent quality supply of pecans to domestic
14 consumers that supports a profitable return to
15 producers and processors. We believe that a
16 federal marketing order will contribute to a more
17 stable market environment that is favorable to
18 growers, buyers, sellers and consumers. The
19 Texas Pecan Board goes on record in favor of the
20 order and greatly appreciates your support. It's
21 signed by Mike Adams, president of the Texas
22 Pecan Board, and myself, Glenn Honaker, vice

1 president of the Texas Pecan Board. I believe
2 you all have a copy of this.

3 Q Thank you, Mr. Honaker.

4 MR. QUIROS: We just had a few
5 questions, Your Honor.

6 BY MR. QUIROS:

7 Q The first is I want to say when we
8 talk about costs, and in your testimony, you say
9 the cost of two and a half cents for improved
10 pecans. You agree that only handlers pay the
11 assessments, is that true?

12 A Yes, sir. The handlers are assessed
13 with -- are required to pay the assessment.

14 Q When you're thinking about the cost,
15 is it true that what you mean is that in a worst
16 case, a handler may pay you two and a half cents
17 less per pound for your crop because of their
18 increased assessment cost?

19 A Yes, sir. As with most things from a
20 new car to a new pair of boots, the cost of doing
21 business is going to get passed on to the
22 consumer.

1 Q Thank you, Mr. Honaker. You gave
2 testimony today with regard to the Western Pecan
3 Growers Association and the Texas Pecan Growers
4 Association is in no way conflicting with the
5 perspective and proposed American Pecan Council.
6 I want to focus your attention. You didn't make
7 a statement about the Texas Pecan Board. I'd
8 like to ask you a little bit, if you can, to take
9 some time to describe what the Texas Pecan Board
10 does, and what their function is inside of the
11 state checkoff program, maybe ask you a question
12 or two about that.

13 A All right, sir. I will attempt to
14 answer that. The Texas Pecan Board is a
15 commodity Board under the auspices of the Texas
16 Department of Agriculture. We are given the
17 authority to assess an assessment on each pound
18 of pecans that is sold in the State of Texas, be
19 it improved or native pecans. The program is, as
20 Glenn Honaker's words, a quasi-voluntary program,
21 in that each grower is -- handler, excuse me, is
22 required to pay the assessment set by the Board,

1 but a simple letter of request for refund can be
2 submitted, and the refunds will be returned and
3 given back to the grower. This Board, through
4 limited funds, has been able to have some
5 promotions of Texas pecans. We specifically
6 promote Texas pecans.

7 We have participated on cooperative
8 ventures within a generic promotion for all
9 pecans, but we feel, as our Board feels, that we
10 have positive influence on the price of pecans in
11 the State of Texas since we've been in existence.
12 I hope that answered your question.

13 Q Yes, I've got a follow up. As I
14 understand it, it's one-half cent per inshell
15 pound. Is that what the requested --

16 A That is correct.

17 Q It's only applied to farms of more
18 than 30 acres?

19 A Fifteen acres (Simultaneous speaking.)

20 Q One of the things that we're curious
21 about is how the proposed American Pecan Council
22 might impact the work of the Texas Pecan Board if

1 part of the authorities, as you've read in
2 Exhibit 1, are promotion -- generic promotion --
3 research, marketing and promotion? How will that
4 be decided? Let me rephrase the question.

5 Knowing that about the proposed federal marketing
6 order for pecans, that promotion is important,
7 and that the Texas Pecan Board's in promotion,
8 how will the work of the proposed American Pecan
9 Council affect the work of the Texas Pecan Board?

10 A I believe -- and I'm one Board member
11 on an 11-person Board representing Texas growers
12 -- but in my opinion, it will greatly enhance the
13 efforts of the Texas Pecan Board. The American
14 Pecan Council will be able to do much greater
15 research than our small Board can do. That
16 research will be available to us to utilize in
17 our promotion to better distribute the
18 information to the consumer. By and large, I
19 think it will greatly enhance the program.

20 Q Will the Board of the Texas Pecan
21 Board ultimately make that decision?

22 A The ultimate decision will be made by

1 the Texas Pecan (Simultaneous speaking.)

2 Q But this is your opinion as a Board
3 member?

4 A This is strictly my opinion, yes.

5 Q I understand. How much money, just a
6 range, did the Texas Pecan Board collect last
7 year and use in promotion?

8 A We collected -- and this is just round
9 figures. I don't have them with me, but around
10 \$85,000.

11 Q \$85,000 to promote Texas pecans?

12 A Yes.

13 Q And do the other good work that you
14 all have been doing?

15 A Yes.

16 Q Thank you, Mr. Honaker.

17 MR. QUIROS: Your Honor, I'd like to
18 tender Mr. Honaker's testimony at this time.

19 JUDGE GUTHRIDGE: Exhibit 57?

20 MR. QUIROS: Yes, sir, Exhibit 57.

21 JUDGE GUTHRIDGE: Is there any
22 objection from USDA?

1 MS. CHILUKURI: No objection, Your
2 Honor.

3 JUDGE GUTHRIDGE: Is there any
4 objection from the audience? Exhibit 57 is
5 admitted into the record.

6 (Whereupon, the above-referred to
7 document was received into evidence as Exhibit
8 57.)

9 JUDGE GUTHRIDGE: Mr. Quiros?

10 MR. QUIROS: No other questions, Your
11 Honor, at this time. Reserve.

12 JUDGE GUTHRIDGE: Does USDA have any
13 questions?

14 CROSS EXAMINATION

15 BY MS. SCHMAEDICK:

16 Q Melissa Schmaedick, USDA. Good
17 morning, Mr. Honaker. Thank you for your
18 testimony.

19 A Good morning.

20 Q I actually just have one quick
21 question. I think your testimony was very
22 complete, thank you. You did mention that under

1 the Texas Department of Ag Commission for pecans
2 that there is an assessment rate in effect, and
3 that there's also sort of a refund policy there,
4 if that's requested. Do you anticipate that if
5 the proposed program is put into effect and
6 assessments are collected under that program,
7 will that have an impact on the assessment
8 collection under the Texas Commission?

9 A That is a very good question.
10 Personally, I do not know. I do not expect it
11 will. I can speak from my own operation, Belding
12 Farms. That's about the only one I can speak
13 from. I feel the more promotion and research and
14 getting in front of the consumer we can have, the
15 better it is. Our operation will continue to
16 support the Texas pecan. What the rest of the
17 growers decide to do, that's going to be their
18 decision, not mine.

19 Q Right, thank you. I understand that.
20 I just was wondering if you had an opinion to
21 share with us. The other question I have is in
22 general, is it your impression that the current

1 constituents of the Texas Pecan Board, are they
2 satisfied with the activities of the Texas --

3 A I'm sorry?

4 Q Are they satisfied? Do they feel that
5 there's a benefit attached to the assessment that
6 they're paying?

7 A Yes. The majority are satisfied that
8 there is a benefit with the money they're
9 spending. There's always a squeaky wheel out
10 there that is going to be against it if you give
11 them free ice cream on 100-degree day. It could
12 be the wrong flavor. We have always got that to
13 contend with. We're always under that scrutiny.
14 We try to take Abe Lincoln's approach. We're
15 going to please some of the people some of the
16 time, all of the people some of the time, and
17 sometimes we're not going to please any of them,
18 but we try hard.

19 Q Thank you. I have no further
20 questions.

21 JUDGE GUTHRIDGE: Are there any more
22 USDA questions?

1 BY MR. HINMAN:

2 Q Don Hinman, USDA. I'm going to focus
3 on the specific benefits that you have mentioned.
4 Similar to asking other witnesses, you've made
5 clear your views on promotion, and you have
6 mentioned a few other benefits. I wanted to get
7 a bit more details on your views. You mentioned,
8 in particular, the grade, size, quality, and
9 packaging authorities that would come under the
10 order. That would be under 986.69. If there
11 were grade, size and quality standards
12 established, for example, could you explain how
13 you think those standards would benefit the
14 industry?

15 A Yes, sir. To do that, I kind of need
16 to digress a little bit to our current standards.
17 In the industry, it appears, through my
18 experience, I have seen that various processor
19 groups or marketing groups have different
20 standards that are not uniform across the pecan
21 belt. We have different names in Texas for
22 certain qualities of pecans than they do in

1 Georgia. We are not comparing them on a uniform
2 basis throughout the pecan belt. Any time, in my
3 opinion, you can have a descriptive program or
4 procedure and process that is uniformly used
5 across the industry, it will benefit all of the
6 industry in having that uniformity of
7 nomenclature.

8 Q Thank you. One other question. You
9 mentioned something about more accurate market
10 information, and you particularly mentioned crop
11 size. If you could provide some details of what
12 other types of market information would be
13 helpful and how those would benefit the industry.

14 A Yes, I can. Dr. Norman did a fine job
15 of explaining the guesstimates that we have on
16 the crop size. Quite frankly, Louisiana does a
17 guesstimate. Texas does a guesstimate. National
18 pecan seller does a guesstimate. Then they throw
19 them all in the pot and throw them all out,
20 sometimes. In addition to our crop estimates and
21 developing, again, a uniform basis for getting a
22 crop estimate throughout the industry, the pecan

1 belt, a big influence on our crop pricing is the
2 carry-in from the previous year, pecans stored in
3 cold storage and coming out in this marketing
4 year.

5 We have numbers that are very
6 inconsistent with what we see after the fact.
7 There's a large margin of error. In this
8 program, if we could get accurate reporting from
9 each of the storage facilities, it would greatly
10 enhance our knowledge of the crop we have coming
11 in, the supply, and the demand that are going to
12 go inherent with that to assist in our pricing.

13 Q We greatly appreciate your responses.
14 Thank you. No further questions.

15 BY MS. CHILUKURI:

16 Q Mr. Honaker, I had a question for you
17 about the assessments under the Texas Pecan
18 Board. Did you say that growers who have 15
19 acres or more are assessed, is that correct?

20 A Yes, ma'am.

21 Q Obviously under this proposed
22 marketing order growers would not be assessed,

1 but those growers with 15 acres also would not
2 have the opportunity to vote. Do you have an
3 understanding, or have you had a chance to talk
4 to those growers who have 15 to 29 acres and
5 their impressions of how they would benefit or
6 would not benefit from this order, their opinions
7 about it?

8 A I have visited with some of them at
9 our regional meetings. They are in favor of the
10 federal marketing order. I have had no one --
11 the occasional person that says, "I'm not getting
12 a vote," but that is very uncommon. Most people
13 understand the reasons the proposed order was
14 written in the manner it was written, as I stated
15 earlier. Any operation with less than 30 acres
16 is not going to be able to afford the
17 infrastructure and the inputs into the operation
18 that are necessary to have it be considered a
19 commercial operation.

20 Q Thank you. I also have a question
21 about 32 of the marketing order, Regions, if you
22 could take a look at that.

1 PARTICIPANT: It would be 986.32.

2 BY MS. CHILUKURI:

3 Q Texas is listed under the Central
4 region. I understand that you're a current Board
5 member of the Western Pecan Growers Association.
6 Since Texas is such a large state, I just wanted
7 more of an understanding of western Texas versus
8 eastern Texas and the cultural challenges between
9 those two areas, if it's more western, if it's
10 more central, or if it's more eastern.

11 A Texas is a large state. You fold it
12 over and it's in the Atlantic Ocean. You fold it
13 the other way, it's in the Pacific Ocean. We
14 cover the whole band of climatic conditions. The
15 western part of the state -- I'm going to
16 delineate from the Pecos River west -- is very
17 arid. It's a desert-type environment, hot, dry,
18 average rainfall of 11 inches a year. All of our
19 agricultural crops are irrigated.

20 We can't rely on rainfall to have a
21 significant effect on the production of our
22 crops, whether they be pecans or cotton or

1 whatever. The middle part of the state is a mix
2 of the two, having more moderate rainfall. In
3 Texas, we have the eastern part of the state is a
4 mix of native pecan production and improved
5 varieties. The western part of the state is
6 predominantly planted improved orchards. Yes, my
7 cultural practices on Belding Farms are more
8 closely aligned with what they do in the Western
9 growing region -- New Mexico, Arizona, California
10 -- but I think it was a very wise decision made
11 the Board Steering Committee to divide into the
12 regions that we have because we do not want to
13 split the State of Texas into two different
14 regions in this marketing order.

15 We want to be aligned in the proper
16 part that we are. The percentage of the state
17 that falls into the West would be more similar to
18 the Western growing regions. It's much smaller
19 than the part of the state that falls into the
20 states of Oklahoma, Louisiana, Mississippi,
21 Arkansas that is in the Central region. I think
22 it was a very well thought out process to align

1 us in the Central division.

2 Q Thank you, sir.

3 JUDGE GUTHRIDGE: Are there any --

4 WITNESS: You wrote it; I didn't.

5 JUDGE GUTHRIDGE: Are there any more
6 USDA questions? Mr. Quiros?

7 MR. QUIROS: No further questions,
8 Your Honor, for this witness.

9 JUDGE GUTHRIDGE: I do have one
10 question, just out of curiosity. On the
11 assessment that Ms. Chilukuri was just asking
12 about, I think in your testimony you said the
13 payers of the assessment can request its return.

14 WITNESS: Yes, in the Texas.

15 JUDGE GUTHRIDGE: In the Texas, yes.
16 What percentage of that assessment is returned,
17 typically?

18 WITNESS: Actually, I can't tell you
19 exactly. I can tell you this. When we first
20 started the program back in 1998, we had numerous
21 requests for return of their assessment. The
22 last two years, I don't believe we've had any.

1 I'm looking to her to get confirmation, but
2 that's my memory, and she confirmed it. We have
3 had no requests. (Simultaneous speaking) that
4 would convey that they are supportive. We have
5 earned their support.

6 JUDGE GUTHRIDGE: The program has
7 proved itself?

8 WITNESS: Yes.

9 JUDGE GUTHRIDGE: They've recognized
10 its value? Okay, thank you. Mr. Quiros?

11 MR. QUIROS: No further questions.

12 JUDGE GUTHRIDGE: USDA, any more
13 questions? Are there any questions from the
14 audience? With no questions, Mr. Honaker, you're
15 excused. Thank you.

16 MR. DAVIS: Your Honor, the Proponent
17 Group's next witness will be Mr. John Turner. I
18 understand he just selected this time to take a
19 quick break, but he'll be right in. We'll get
20 the exhibits marked for him.

21 WHEREUPON,

22 JOHN TURNER

1 was called as a witness by Counsel for the
2 Proponent and, having been first dully sworn,
3 assumed the witness stand, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. DAVIS:

7 Q Good morning, Mr. Turner. Thank you
8 so much for being here today. Would you please
9 state your full name and spell it for the record?

10 A John Turner, J-O-H-N T-U-R-N-E-R.

11 Q Thank you, and thank you, also, for
12 leaning into the microphone there so everybody
13 can hear you in the audience. Do you also have,
14 at the witness table there with you, a copy of
15 Exhibit 23, which is the Economic Analysis by Dr.
16 Palma?

17 A Yes.

18 Q And Exhibit 1, which is the published
19 version of the proposed federal marketing order?

20 A Yes.

21 Q Okay, thank you. Mr. Turner, do I
22 understand that you have a written statement

1 you'd like to deliver?

2 A Yes.

3 Q Could you please do so?

4 A I live in Texarkana, Arkansas. I am
5 the heir and operator of the Nash-Turner Ranch.
6 In the early 1900s, my maternal Grandfather Nash,
7 and my paternal Grandfather Turner purchased
8 their farms next door to each other. Today, the
9 Nash-Turner Ranch has three pecan farms in Miller
10 County, Arkansas. We have over 250 acres of
11 pecans in production. Last year, we produced
12 80,000 pounds of pecans. On our farm we grow 97
13 percent natives and 3 percent improved variety
14 pecans. Attached is my resume. Nash-Turner
15 Ranch has less than \$750,000 in annual gross
16 revenue from pecans and, therefore, under the
17 Small Business Administration guidelines, we are
18 classified as a small business.

19 Q Mr. Turner, can I interrupt you just
20 for a second? You say that we have your resume
21 here, but there's a couple things on your resume
22 that kind of leaped out at me that I'd like you

1 maybe to explain to the group here. In addition
2 to owning and managing the pecan farms, I believe
3 you've had some direct experience as a county
4 agent, is that correct?

5 A Yes.

6 Q Tell us about how you became a county
7 agent and perhaps what your duties were,
8 particularly as it regards pecans?

9 A Okay. When I finished college, I
10 stayed out of school for one year, then I got a
11 call to be an ag teacher, West Helena, Arkansas.
12 I stayed there 14 years, and I was like the old
13 cow when the gate opened. The first opportunity
14 I got, I quit and moved back to Miller County
15 because of our pecan farms. I worked there as an
16 extension agent for 26 years, over 20 years
17 directly on pecans. Through those years, I
18 worked with planting pecans in place with nuts,
19 planting seedling nuts, grafting, pruning,
20 training, fertilize, pest control. At present,
21 I'm working with crowded native orchards.

22 I'm attempting to show the producers

1 that by thinning those orchards, cleaning out
2 some of those trees, that they'll have a higher
3 production rate. My job, I give them orchard
4 enhancement and maximum production. When I was
5 young, we picked up pecans for everything. We
6 didn't have any management plans, so when the
7 native pecans produced, then we picked them up.
8 If they didn't produce, we'll pick cotton or pick
9 potatoes or tomatoes or whatever we had. We went
10 to college on pecans.

11 When my siblings would get ready to go
12 to college, my mother would tell us all the
13 pecans we pick up, we're going to give it to them
14 to go to college. It was eight of us at that
15 particular time all went to college, but all
16 didn't finish, but pecans helped push us through
17 college. When I got married, my wife, she moved
18 in with my parents and she picked up pecans.
19 Matter of fact, we had a Hatfield and McCoy
20 situation and pecans settled that. I was a very
21 young man and we would pick up all our pecans
22 because we were pecan rustlers. We didn't waste

1 any time. We had ice, snow, it didn't make any
2 difference. We could go get those pecans.

3 I'll say the other side of the fence
4 was the Hatfields, and we were the McCoys. My
5 parents and those older people, they never got
6 along. They would fight. They would cut fence,
7 shoot horses, cows, all type of things, but I was
8 never involved. We picked up all our pecans, so
9 I got on my old bicycle and I rode it over there
10 and asked the guy, I said, "Could I pick up some
11 of your pecans?" I was about maybe this tall.

12 He said --

13 Q Gesturing about three and a half feet.

14 A Yes. He said, "Yes, boy." I said,
15 "Give me two sacks." He looked at me and gave me
16 two sacks. He said when I left, his wife told
17 him, "He's going to steal a sack full." That
18 evening, I came up to his house and said, "Did
19 you go drive over there and pick up my pecans? I
20 had two full sacks standing upside the tree. He
21 said, "Boy, how'd you pick up all those pecans?
22 How did you do it?" I said, "I just picked them

1 up." I said, "May I bring my siblings tomorrow?"
2 I said sisters and brothers. He said, "Yes." I
3 brought the army. We cleaned that place out. We
4 picked up so many he had to give us half of them.
5 He couldn't pay us, so he brought us home.
6 That's when he met my dad on good terms. They
7 started talking. When they both passed away --
8 my dad lived almost 104 years -- they were
9 friends, so pecans settled that dispute.

10 Q Mr. Turner, you have confirmed that
11 your resume does not add the color that is
12 necessary to explain your experience with pecans.
13 It sounds like in summary, pecans educated you,
14 and also led to peace (Simultaneous speaking.)

15 A Certainly did.

16 Q We've had many virtues of pecans, but
17 this is the first we've heard of that, so thank
18 you for that background. If you would continue
19 on, I think in your next paragraph, you refer to
20 the economic analysis, and that is the same as
21 Exhibit 23, is that correct?

22 A Yes.

1 Q Okay, please continue.

2 A I reviewed the Economic Analysis
3 Summary prepared by Dr. Marco Palma, specifically
4 the projected the average price increase from
5 promotion of 6.3 cents per inshell pound for
6 improved varieties and 3.6 cents per inshell
7 pound for natives versus the average 2.5 cents
8 and 1.5 cents per inshell pound costs.

9 Respectfully, overall, I am aware of the cost
10 that the proposed federal marketing order may
11 impose on my farm, and I do not believe those
12 costs are unduly burdensome. Further, I believe
13 that the benefits of the federal marketing order
14 to my farm will greatly outweigh any costs
15 associated with it.

16 Q Let me interrupt you again, if I
17 could. You say you work with a lot of small
18 pecan growers in and around your area, and those
19 are primarily natives. You're working with them
20 on trying to increase their production by
21 thinning and the like, is that correct?

22 A Right, but I also work with improved

1 varieties.

2 Q Let's just focus again -- well either
3 on natives or improved, working with pecan
4 farmers in your area, I believe if we dug down
5 into Dr. Palma's economic analysis here, he was
6 estimating that for a small farmer, if these
7 increases took place, that might increase their
8 income by, in round numbers, around \$2,800,
9 something like this. Would a \$2,800 increase --
10 even at that modest amount, would that positively
11 affect the lives of the pecan farmer you know in
12 your area?

13 A Absolutely it would because a lot of
14 the smaller farms, most years, their profit might
15 not be much more than that. It would certainly
16 help them. Matter of fact, I was working a pecan
17 farm before I got here. I was telling the owner
18 where I was going. He said, "John, if that could
19 happen, that would be good." Something like that
20 could help. He said, "Anything you need, you let
21 me know." He said, "Anything you need," he said,
22 "Just whatever can happen like that," he said,

1 "It would be good for the pecan industry."

2 Q Thank you so much. Go ahead,
3 continue.

4 A I'm trying to see where I stopped. In
5 recent years, I have seen wide variations in the
6 prices I have received for my pecan crop. It is
7 hard to negotiate when you don't know what the
8 price is. Such wide variations in pricing makes
9 it extremely difficult to plan for the future
10 operation of my farm. While prices for pecans go
11 up and down dramatically from year to year, my
12 costs of production have steadily increased.
13 Costs of fertilizer, insecticide and equipment,
14 also in labor, have all increased in recent
15 years.

16 I have been giving advice about pecan
17 farming for over 26 years, but one area that I
18 could not give advice on was the market, due to
19 the instability. The lack of accurate market
20 information on the anticipated size of the pecan
21 crop in any given year also makes it difficult
22 for me to negotiate a fair price for my crop and

1 to make reasonable business decisions about
2 investments in my farm.

3 Increased price stability and more
4 accurate marketing information will greatly
5 benefit my small family operation. I think my
6 farm and the industry would also benefit in the
7 future from grade, size, quality, packaging and
8 other handling requirements as we compete with
9 other tree nuts for shelf space and consumer
10 attention. I also understand that under the
11 proposed order, only growers with more than 30
12 acres of pecans, or more than 50 pounds of
13 average production per year over the last four
14 years will be allowed to vote on the proposed
15 order.

16 Q Let me interrupt you again. I think
17 you misspoke. It's 50,000 pounds.

18 A Right, 50,000 pounds. What did I say?

19 Q Fifty.

20 A Fifty pounds?

21 Q Yes.

22 A Okay, 50,000 pounds of average

1 production per year, over the last four years,
2 would be allowed to vote on the proposed order.
3 In my opinion, this threshold is reasonable
4 because a grower that does not meet the threshold
5 is not a commercial grower.

6 Any grower that is smaller than the
7 proposed threshold cannot justify the costs
8 inherent in such a small production. The
9 American Pecan Board has kept me informed about
10 his efforts to propose a federal marketing order.
11 Then he personally visited with me to explain the
12 federal marketing order. I feel like I have been
13 informed about the process and have been given
14 the opportunity to participate. In conclusion, I
15 fully support the proposed federal marketing
16 order for pecan and encourage the Secretary to
17 implement the order, as proposed by the American
18 Pecan Board, so if there are any questions --

19 Q Mr. Turner, thank you so much.

20 MR. DAVIS: First, let me tender
21 Exhibit 58, the testimony of Mr. Turner and his
22 curriculum vitae.

1 JUDGE GUTHRIDGE: Does the USDA have
2 any objection?

3 MS. CHILUKURI: No objection, Your
4 Honor.

5 JUDGE GUTHRIDGE: I note that this
6 also has some PII in it -- personally
7 identifiable information.

8 MR. DAVIS: Does it?

9 MS. CHILUKURI: Yes, that's correct,
10 and we'll redact that before it's (Simultaneous
11 speaking.)

12 MR. DAVIS: I thought I had scrubbed
13 that one. I'm sorry, Your Honor. I didn't get
14 that.

15 JUDGE GUTHRIDGE: Very first line.

16 MR. HILL: Yes, Your Honor, we intend
17 to scrub it on all of the witnesses who have that
18 personal --

19 JUDGE GUTHRIDGE: Okay. Is there any
20 objection from the audience? No objection?
21 Exhibit 58 is admitted.

22 (Whereupon, the above-referred to

1 document was received into evidence as Exhibit
2 58.)

3 MR. DAVIS: We have no questions at
4 this time, Your Honor.

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

7 CROSS EXAMINATION

8 BY MS. SCHMAEDICK:

9 Q Melissa Schmaedick, USDA. Good
10 morning, Mr. Turner.

11 A Good morning.

12 Q Thank you for your testimony. I've
13 taken a moment to review your resume, which is
14 attached to your statement. I have to say it's
15 very, very impressive, and I would like to ask
16 you about some of your experiences, and also some
17 of your writings and how, perhaps, your
18 experience relates to the proposed program.
19 Would that be okay?

20 A Yes.

21 Q Okay, great. The first direction I
22 want to go is I looked at the list of your

1 writings and it indicates that you have written
2 on the subject of backyard pecan production, and
3 that you have also done some work with farmers'
4 markets. In your testimony, you stated that you
5 do understand the proposed definition of grower
6 to be a minimum of 30 acres and 50,000 pounds of
7 production, but given your background with
8 backyard production, how does background
9 production fit with the proposed definition of
10 grower? Can you describe what background
11 production means (Simultaneous speaking)
12 backyard, I'm sorry. I need more coffee.

13 A Actually, I went from backyard
14 production to landscape production. This is a
15 homeowner got a relatively nice-size yard, maybe
16 one, two, three pecan trees in their landscape.
17 We call this backyard production. We went to
18 landscape production because most -- when you see
19 a pecan tree in a yard, it's part of the
20 landscape. I had people that would call me and
21 ask me questions about pecans, and that was what
22 I would ask them, is this commercial or backyard

1 production or landscape production? Because if
2 it was backyard production, I recommended certain
3 varieties to them, varieties that did not need a
4 lot of doctoring because they didn't have the
5 equipment to spray them or the know-how. The
6 people who had the equipment didn't have time to
7 go and spray one or two trees. I would recommend
8 varieties that would be resistant to certain
9 diseases, mainly diseases.

10 Q Thank you. So the proposed threshold
11 of 30 acres and 50,000 pounds of production, does
12 that fit with your experience of the threshold
13 between commercial production and this backyard
14 production category?

15 A Yes, it does. I started off, when I
16 moved back to our farm -- we were just picking up
17 what comes, so we didn't make enough money to
18 take care of equipment and pesticides and labor
19 and all of that. We couldn't justify being a
20 commercial producer. But as our management level
21 increased our production, then I was able to buy
22 equipment, shakers and harvesters and rakes and

1 so on like that, but I could not have done that
2 making a small amount of production, so I support
3 it.

4 Q Thank you. Can you tell me about your
5 work with producers who produce for a farmers'
6 market?

7 A Producers that produce for the
8 farmers' market?

9 Q Correct.

10 A At present, we don't have any
11 producers at the market that I organize. Our
12 market is what you call a fresh market. You sell
13 it if you produce it only. A lot of our truck
14 patch farmers, they don't produce pecans, but
15 they have sold some there, and there are some who
16 planted pecans waiting on them to get ready to
17 sell at the market. But you can't go out and buy
18 pecans and bring them to our market and sell
19 them. Our theory was that Texarkana is not
20 suffering for vegetables, but Texarkana is
21 suffering for fresh vegetables. We try to keep
22 our market a fresh market.

1 Q Thank you. You also appear to have
2 quite a bit of experience with what I would
3 describe as management of organizations, or
4 perhaps even non-profit type of organizations. I
5 see in your resume that you have experience in
6 writing bylaws, training folks how to run
7 effective meetings, and looking at meeting
8 procedures and parliamentary procedures. If you
9 could take a moment and turn your attention to
10 Exhibit 1 and look at the Sections 986.53 through
11 the end of 986.55, so 986.53 is Powers, 986.54 is
12 Duties, and 986.55 is Procedures.

13 A Okay.

14 Q Yes, sir.

15 A Okay.

16 Q Based on your professional experience
17 and your experience working with different
18 organizations, how important is it to have the
19 authority to write bylaws, for example? What is
20 the purpose of writing bylaws?

21 A The main purpose for bylaws, in my
22 opinion, would be to make sure everybody are

1 playing by the same rules. In the English
2 Parliament, General Roberts, he came up with
3 these bylaws. The reason why they would come to
4 meetings, they would have their knives, their
5 guns, and everybody brought their rules, so there
6 was always confusion. He recommended a set of
7 rules that everybody follow. That was
8 Parliamentary procedures. Bylaws are very
9 important if you're going to move an organization
10 or association anywhere because you're playing by
11 the same rules. My opinion is an association --
12 I wrote the six keys to having an effective
13 meeting. The last key was have your say, but not
14 your way.

15 If you follow a set of bylaws --
16 matter of fact, we are writing some now in our
17 church. It's a large set because we have a large
18 organization. We worked on them about nine
19 months, at present. They are very important if
20 you're going to carry your organization anywhere.
21 Another thing they do, they tell each member what
22 their responsibility is. That's one of the

1 problems with organizations. They get the
2 responsibilities crossed. They don't know what
3 they're supposed to do. The bylaws will keep
4 them on course.

5 Q Thank you. That's very helpful.
6 Could you take a moment to look at Section
7 986.54, which is Duties? I believe there's
8 another set coming. Have you finished reading
9 over that section?

10 A Mm-hm.

11 Q Again, going back to your professional
12 experience and the guidance that you've given to
13 other organizations, the elements that are
14 outlined in 986.54, Duties, how important are
15 these elements to the efficient and accurate
16 functioning of an organization?

17 A They are very, very important. In
18 other words, I'm quite sure -- I have not read
19 the bylaws, but the bylaws probably explain their
20 duties -- the duties of the Council. For
21 instance, like a go between -- say the growers
22 and the Secretary, that's one thing the Council

1 does. I think that's very important, so everyone
2 can keep on course and know exactly what they are
3 supposed to do.

4 I know there are special duties that
5 the Pecan Council or Board -- I haven't
6 distinguished between them yet, but I'm quite
7 sure there are very important responsibilities
8 that only that Board or that Council can do, as
9 far as the minutes, keeping the minutes -- the
10 minutes is a record of history. That's very
11 important to keep those minutes so you can refer
12 back to the minutes. The minutes will solve a
13 problem in an organization or association quicker
14 than anything will. I organized the Red Dirt
15 Master Gardeners in Texarkana, Arkansas. It's
16 over 80 members. We had a meeting one night, and
17 it was a hot discussion. I was sitting in the
18 back. I don't intervene until it becomes
19 necessary. One of the members got up and asked a
20 question. They were getting ready to go to it.
21 They were really, really mad.

22 She said, "May I read what the bylaws

1 say?" Everybody who was really hostile, they
2 hadn't thought about the bylaws. She read what
3 the bylaws said and what the minutes said, and
4 everything -- you could hear a pin drop on
5 cotton. Because Robert's Rules said no one wants
6 to look ignorant. If you go against the rules in
7 anything, this is the way you look. It settles
8 everything down completely. I think all that's
9 important.

10 Q In respect to accurate bookkeeping,
11 what's your opinion on that?

12 A That's part of the minutes. That's
13 part of the secretary's responsibility, accurate
14 bookkeeping, keeping the books. That's just a
15 matter of record. Auditing, my theory on
16 auditing is -- they said, "We're not going to do
17 anything. We're not going to take anything," but
18 you can't let the hungry boy carry the lunch
19 bucket. What I'm saying is you don't put a
20 person in that position. I often tell the people
21 at the church -- I try to do my part, as far as
22 financing our church. They're always trying to

1 get me on something, but I tell them -- I say,
2 "If my mama and I were loaded with money, we
3 wouldn't have this new church because she loves
4 to spend, and I like to spend." You can't just
5 put that money -- also, you put people with money
6 who are used to money. You can't just put
7 anybody over money. It's always good to have an
8 audit of all financial transactions.

9 Q Thank you. In terms of hiring staff,
10 in your opinion, is it helpful to have a certain
11 procedure for receiving applications, identifying
12 the types of positions that you need, the duties
13 that are prescribed to them, the salaries? Is
14 that an important part of running a good business
15 operation?

16 A Well, yes, it's very important. I
17 think No. 1 that is hiring a staff or someone,
18 make sure the job that's to be filled is
19 available -- there's available notice to all
20 people, not just giving it to a selected few, but
21 do a random sample and get some from all, as far
22 as hiring your staff is concerned. Because a lot

1 of times the person that you think may not do the
2 job would be the one that would gladly do the job
3 better than the ones that you think would do it.
4 I think all that's important, too, on how you
5 hire people to work. You're talking about just
6 in general hiring people to work?

7 Q Just do you think it's important for
8 the proposed council to be able to come up with a
9 system to define jobs -- positions in the office
10 and what those responsibilities are for each
11 position, what the salaries might be? Is that
12 something that's important to the --

13 A Oh, absolutely. I think that's very
14 important.

15 Q Thank you. Do you think it would be
16 important for the proposed council to be able to
17 investigate or look into potential issues with
18 folks not paying assessments, or maybe there's a
19 quality issue? Is that the type of authority
20 that the proposed council should have?

21 A I don't know if they'll have time to
22 do all of that, maybe a subcommittee or something

1 to give them that responsibility.

2 Q But in your opinion, is that an
3 important activity?

4 A Oh, absolutely. If I pay, I want
5 everybody to pay.

6 Q Okay, good, thank you. Lastly, I want
7 to draw your attention to Section 986.55. I'll
8 give you a moment to read that over. Mr. Turner,
9 you've just had the opportunity to look and read
10 over 986.55, Procedure. In your opinion -- and
11 again, drawing on your experience of guiding
12 other groups to develop meeting procedures -- the
13 language that's laid out in Section 55, is this
14 an example of how you might instruct a group to
15 develop a process for making decisions?

16 A Yes. I didn't get all of it, but I
17 noticed that it had talked about a quorum.
18 That's a protection device to prevent business
19 being taken by proposals voted on by one or two
20 people. I always use the example you, your
21 sister, your mother, and your brother are part of
22 the organization, and you are the only ones that

1 attend the meeting. Without a quorum, you could
2 be dangerous. A quorum is very important in
3 taking care of business. I saw something there
4 about a two-thirds vote, and also a unanimous
5 vote. That unanimous vote, I think that would be
6 a very hard vote to get. I don't know exactly
7 how that vote would take place because that would
8 -- matter of fact, a two-thirds vote is not an
9 easy vote, but everybody vote the same way, if
10 that's mandatory, I think that would be a hard
11 vote. I don't know if it said that or not. Did
12 it say that?

13 PARTICIPANT: One item is a mandatory
14 vote.

15 BY MS. SCHMAEDICK:

16 Q Again, based on your experience, would
17 it be important to have a higher consensus
18 threshold on issues that are critically important
19 to the industry? For example, something that
20 could have a significant impact on the industry,
21 if you were in a position of making a decision,
22 would you want that decision to be unanimous or

1 have a higher threshold because it's such an
2 important issue?

3 A My experience, if you can get them
4 past a two-thirds vote, that would be enough. I
5 have never recommended calling for unanimous vote
6 because that's a very hard vote. On the bylaws,
7 for instance, if you're going to make changes in
8 the bylaws, then a two-thirds vote would be a
9 good vote to change something that's already in
10 place. But unanimous, I see that as a kind of
11 hard vote.

12 Q But your example of changing the
13 bylaws, is that a decision that you would want to
14 make easy to do, or is that something that you
15 want to actually --

16 A No, I wouldn't want to make it easier
17 than it is, but changing the bylaws carries a
18 special set of rules, also, along with the
19 two-thirds vote. When you're going to change the
20 bylaws, every member must have notice a certain
21 amount of days before this change is going to
22 take place.

1 For instance, say if you have a
2 meeting and you tell them there, but someone is
3 absent, then that person still has to be informed
4 that there's going to be a vote on the bylaws.
5 Every voting member, I would say -- that's the
6 way we say it -- every voting member, you have
7 got to give them opportunity to listen at the
8 change and have time to season it before the vote
9 takes place. The bylaws carry a very special set
10 of rules compared to voting on having a tour or a
11 picnic or whatever. When you're going to change
12 the bylaws, they carry a very special set of
13 rules.

14 Q Thank you. I appreciate your insight
15 on those issues, and I have no further questions.
16 Thank you.

17 JUDGE GUTHRIDGE: Are there any other
18 USDA questions? Mr. Hinman?

19 BY MR. HINMAN:

20 Q Don Hinman, USDA. Good morning.

21 A Good morning.

22 Q You mentioned on your resume that you

1 -- one of your major board assignments is the
2 Farm Service Agency Board.

3 A Yes.

4 Q Is that the FSA board for Miller
5 County?

6 A Yes.

7 Q You also mentioned that you had
8 contact with Dan York in discussing the federal
9 marketing order.

10 A Right, yes.

11 Q Mr. York testified yesterday about an
12 FSA standard relating to acres. The standard he
13 mentioned was 14 trees per acre was an FSA
14 standard in his county. Does the federal
15 standard apply to what you would call a pecan
16 acre in Miller County -- so many trees per acre
17 -- or is there some other standard by which you
18 measure an acre of native, in particular?

19 A Yes, we have a standard. I hate to
20 say exactly what it is because I really can't
21 think of number of trees. When you're dealing
22 with native trees like Dr. Larry Stein yesterday,

1 you may have two trees to make an acre of the
2 large native trees. We have some trees on our
3 farm that are so large that you can park a pickup
4 truck on one side and get on the other side, you
5 can't see the front end of the truck. These are
6 some very large trees. They have to have a lot
7 of room to grow. For instance, two of them on an
8 acre would be a lot.

9 But these standards are -- matter of
10 fact, I was on the Farm Service Agency board when
11 we put these standards together. We kind of just
12 basically sat around and kind of looked at the
13 situation because the native trees, they are so
14 sporadically scattered you can't just go in and
15 say this is an acre or that's an acre. You might
16 have a tree out here, a tree over there, or a
17 tree over there. We had to come up with a number
18 to determine what a native tree acre was. That's
19 why we came up with those numbers. They are in
20 that range what Dan York was talking, but also
21 what Dr. Larry Stein said is also good for
22 determining your native trees because of the size

1 of those trees.

2 Q We also heard testimony on the subject
3 of Oklahoma about cattle grazing on pecan land,
4 the same land as pecan. Does that also occur in
5 your area?

6 A Yes.

7 Q So most of the pecan area has cattle
8 grazing on it?

9 A Maybe -- I have to think here. I'd
10 say around maybe 50/50.

11 Q Thank you. I'm going to shift gears
12 here. I wanted to ask about some of the
13 particular benefits that you mentioned in your
14 statement about supporting the order. One in
15 particular -- if you could pull up the Section
16 986.69. That is the authorities regulating
17 handling. If we could just look at that under
18 (a)(1), handling requirements or minimum policies
19 for particular grades, sizes or qualities. You
20 mentioned in your testimony your support for that
21 authority. If there were, under the marketing
22 order, uniform standards established for grades,

1 sizes and qualities, how do you think that would
2 help the pecan industry with grades, sizes and
3 qualities, and uniform standards established
4 under the marketing order?

5 A I think the size would be very
6 important because some years, the native pecan
7 size is so small that you can barely sell them,
8 but the larger natives sell better than the
9 smaller natives. I think that they should be
10 sized -- in other words, putting the large ones
11 together and the small ones together for a better
12 premium price.

13 As far as quality, natives always --
14 the quality is lower than improved varieties. If
15 you hit 41, 42, 43 cents on natives, then you're
16 in the top of the quality line; whereas improved,
17 48, 50 and better. The quality of them -- if the
18 trees are managed and thinned, then the quality
19 automatically increases because you cut down on
20 disease and insects. I think all of that needs
21 to be addressed. I think with this pecan audit
22 and putting in more money, then the farmer can

1 meet some of these standards.

2 Q Thank you. One other subject that you
3 mentioned was more accurate marketing information
4 about the instability of the market. Could you
5 explain your views of the benefits of more
6 accurate market information through the federal
7 marketing order?

8 A Even though we've had our pecan farm
9 a large number of years, we never knew what the
10 market was, so we had to take what was given, no
11 matter how many pounds you produced. I think my
12 highest production was 120,000 pounds. I still
13 had to take what I was offered because I didn't
14 have anything to tell me what the standards for
15 the market is, so I had to go with whatever was
16 given.

17 Q Thank you for those additional
18 insights. No further questions.

19 JUDGE GUTHRIDGE: Are there anymore
20 USDA questions?

21 BY MS. VARELA:

22 Q Jen Varela, USDA. I don't want to

1 keep you too much longer, Mr. Turner, but I did
2 want to follow up on something that came up with
3 Mr. York yesterday and as somebody in the area,
4 hopefully you can offer some more information, as
5 well. He mentioned that there are some years
6 where the price received for natives just doesn't
7 cover the cost of actually harvesting them or
8 producing them. Have you experienced similar
9 prices in the last few years, or in your
10 experience as a grower?

11 A Oh, absolutely. One year I had to
12 spend my pecans to cold storage because I was
13 offered -- I don't know -- 37 or 47 cents. I had
14 much more than that in them, so I just really had
15 to gamble there, which I basically lost in the
16 long run because they stayed there two years.
17 The next year, the market didn't do much better,
18 so they were taken out, actually, by Mr. York.
19 He shelled them and sold them for me. But I had
20 taken a beating, \$750 a month for a storage fee,
21 so I had taken a beating. Yes, there are some
22 years that the market will not pay for your

1 inputs.

2 Q Thank you very much.

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

5 DWIGHT DAVIS: Thank you, Your Honor.
6 Let me follow up on just a couple of things.

7 REDIRECT EXAMINATION

8 BY MR. DAVIS:

9 Q Mr. Turner, thank you so much for your
10 testimony and coming in today. First, you
11 understand this is a proposed marketing order;
12 therefore, the council has not been put in place
13 so, of course, the bylaws have not been written.
14 But if you would go with me on kind of a
15 hypothetical, let us hope that the marketing
16 order is passed, and then chances are they're
17 going to turn to maybe some lawyers to start help
18 drafting those bylaws. If called upon, would you
19 be willing to help those lawyers in drafting
20 those bylaws?

21 A Absolutely.

22 Q Remember, you're under oath.

1 A Yes.

2 Q We'll be getting back with you on
3 that.

4 MS. VARELA: I would like to say I'm
5 making a note of that.

6 BY MR. DAVIS:

7 Q Again, I think it would be clear from
8 the testimony and the testimony of others, but
9 just to put a fine point on this, you say
10 somebody makes you an offer for your pecans and
11 because it's not accurate market information, you
12 really don't know how to evaluate is that a fair
13 price, is it not a fair price? You just have to
14 take what they're offering, was that your
15 testimony?

16 A That's basically what it is.

17 Q Let's take it to the next step. If
18 there were accurate market information and you
19 knew the size of the crop, maybe you could get
20 some other information on other pricing, you'd be
21 in a much better position to evaluate that offer
22 and say, "Should I take it, or is there going to

1 be something better?" Is that (Simultaneous
2 speaking)?

3 A You'd be in a much better position to
4 negotiate what they offer you. For instance, say
5 if the market said \$1.00 a pound for native
6 pecans, and I'm offered 90 cents, then we could
7 come to a mid-point, maybe \$0.95. I could see a
8 way to make some money. That's basically what it
9 would be.

10 Q What do they say, great minds think
11 alike? My reaction when I first read this was
12 about that unanimous vote. It's only on one
13 item.

14 MR. DAVIS: Ms. Myers, do you mind
15 putting that back up? It's on borrowing.
16 Fifty-five, sorry.

17 JUDGE GUTHRIDGE: The very last page.

18 BY MR. DAVIS:

19 Q Understanding that this, of course --

20 JUDGE GUTHRIDGE: For the record,
21 that's 55(c)(2).

22 BY MR. DAVIS:

1 Q Understanding that this organization
2 will be a new organization, and maybe
3 understanding that there may be some skepticism
4 out there still, people waiting to see how it
5 kind of works out, by putting in the bylaws that
6 before this organization can go out and borrow
7 money -- you see we have it up here, "Actions of
8 the council with respect to securing a commercial
9 bank loan for the purpose of financing startup
10 costs for the council shall require a unanimous
11 vote."

12 A Oh, is that what it says?

13 Q It's a relatively narrow issue, is it
14 not, just borrowing money for a startup, and you
15 agree that is an unusual circumstance, and you
16 only call for a unanimous vote for a really
17 important issue that you really want to make sure
18 you've got complete buy-in of the organization?

19 A Yes. That's a vote that I'm not
20 familiar with, but one thing I learned about
21 organizations and bylaws is if they put that in
22 the bylaws that this vote is required and that is

1 accepted, then that's the way it would go.
2 Because an organization can put things in bylaws
3 that are not right, not necessarily that. I just
4 had not looked at that, and I had not heard about
5 a vote like that. But if that vote be required
6 and put in the bylaws, then we have to say that's
7 a good vote.

8 Q All right. Thanks so much. I have no
9 further questions, Your Honor.

10 JUDGE GUTHRIDGE: Does the USDA have
11 any more questions? Mr. Hinman?

12 REXCROSS EXAMINATION

13 BY MR. HINMAN:

14 Q Don Hinman with the USDA. Your
15 responses continue to be very thorough and
16 helpful. They then led us to another question.
17 I believe you just mentioned that one year there
18 was particularly low price that you decided to
19 store, and that the cost of storage did not
20 really pay for itself. You lost money on that
21 decision, correct?

22 A Yes.

1 Q Tell me a bit more about the cost of
2 storage. What is the cost of storage in maybe
3 some recent typical years, and how does that cost
4 enter some of the decision making -- the cost of
5 cold storage?

6 A Are you asking me what did it cost?

7 Q What did the cold storage cost, and
8 how does that make you decide whether or not to
9 store?

10 A It was a percentage thing. I can't
11 exactly remember, but I remember I stored 80,000
12 pounds, and I was paying \$768 per month. Also, I
13 paid take in fee and take out fee. I paid
14 transportation there. So I was out quite a bit
15 on the initial end of it. They took them from
16 Arkansas to Greenville -- Greenwood or
17 Greenville, Mississippi, but I can't remember
18 exactly how much they charged per pound.

19 Q Okay, that's fine. Appreciate your
20 response. Thank you. No further questions.

21 JUDGE GUTHRIDGE: Any more questions
22 from USDA? Mr. Davis?

1 MR. DAVIS: I'll just say that Dr.
2 Hinman, those storage costs vary across areas,
3 and we may have some testimony on that in Tifton,
4 also, about cost in the Southeast. Nothing
5 further, Your Honor. Thank you so much.

6 JUDGE GUTHRIDGE: Are there any
7 questions from the audience for Mr. Turner?
8 Hearing none, Mr. Turner, you're excused. Could
9 you go check with Ms. Brown over here in case she
10 needs clarification on anything? We've been at
11 it over two hours, 20 minutes, so I think it's
12 time for a break. It's 10:21-10:22, go to 10:35.

13 PARTICIPANT: That sounds fine, Your
14 Honor.

15 (Whereupon, the above-entitled hearing
16 went off the record at 10:22 a.m. and resumed at
17 10:35 a.m.)

18 JUDGE GUTHRIDGE: Okay, back on the
19 record, please.

20 Mr. Massey, could you raise your right
21 hand, please.

22 WHEREUPON,

1 JOE MASSEY

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

5 MR. QUIROS: Dr. Massey, thank you for
6 coming today. As a basis for some of your
7 testimony we understand you have written
8 testimony. I want to ask you a couple of
9 questions.

10 DIRECT EXAMINATION

11 BY MR. QUIROS:

12 Q Have you received and had a copy to
13 review what has been marked as Exhibit 1 in these
14 hearings, which was a notice prepared by the USDA
15 that contains the proposed Federal Marketing
16 Order for Pecans?

17 A That's correct. I received it and
18 reviewed it.

19 Q Thank you. And, Dr. Massey, have you
20 received and reviewed what has been marked
21 Exhibit 23 in these hearings, which is an
22 Executive Summary of the economic testimony of

1 Dr. Marco Palma?

2 A Yes, I received it and reviewed it.

3 Q Thank you. And if you would, please,
4 give us your testimony.

5 A All right, thank you.

6 Good morning. My name is Joseph
7 Massey, and it's spelled J-O-S-E-P-H, M-A-S-S-E-
8 Y. I live in San Antonio, Texas. I've been the
9 owner of J-B Cattle and Pecans since 2000. J-B
10 Cattle and Pecans is a cattle operation and pecan
11 farm located in Uvalde, Texas. I have over 233
12 acres of 45-year old pecan trees currently in
13 production, and my farm is primarily or wholly an
14 improved variety pecan farm. My resume is
15 attached. I'm sure you all have a copy.

16 J-B Cattle and Pecan would be
17 considered a small pecan grower under the Small
18 Business Administration definition. In recent
19 years, I have seen a wide variation in the price
20 that I have received from my pecan crop. Such
21 wide variation in pricing makes it extremely
22 difficult to plan for future operations of my

1 farm.

2 While prices for pecans go up and down
3 dramatically from year to year, my costs of
4 production have been steadily increasing. Cost of
5 fertilizer, insecticides, and equipment has all
6 increased in recent years regardless of the price
7 I receive from my crop.

8 The price instability is compounded by
9 the lack of accurate market information on the
10 anticipation --- excuse me, anticipated size of
11 the pecan crop in any given year. All this makes
12 it difficult for me to negotiate a fair price for
13 my crop, and to make reasonable business
14 decisions about investments in my farm. Increased
15 price stability and more accurate market
16 information would greatly benefit my small family
17 operation.

18 I think my farm and the industry would
19 also benefit in the future from grade, size,
20 quality, package, shipping protocols and other
21 handling requirements as we compete with other
22 tree nuts for shelf space and consumer attention.

1 I have reviewed the economic analysis
2 summary prepared by Mr. Marco Palma, specifically
3 the projected average price increase from
4 Promotion 6.3 cents for in shell pound versus the
5 average of 2.5 cents for in shell pound costs.

6 Overall, I am aware of the cost that the proposed
7 Federal Marketing Order may impose on my farm.

8 And I do not believe that costs are unduly
9 burdensome. Furthermore, I believe that the
10 benefit of the Federal Marketing Order to my farm
11 will greatly outweigh any costs associated with
12 it.

13 I understand that under the proposed
14 order only growers with more than 30 acres of
15 pecans or more than 50 pounds of average
16 production per year over the last four years will
17 be allowed to vote on the proposed order. In my
18 opinion, this threshold is reasonable because a
19 grower that does not meet threshold is not a
20 commercial grower. Any grower that is smaller
21 than this threshold could not justify the cost
22 inherent in such a small production, and most

1 probably seller of pecans from older trees would
2 happen to be on his or her property.

3 The American Pecan Board has kept our
4 organization informed about its efforts to
5 propose a Federal Marketing Order. I believe that
6 I have been informed about the process. I have
7 been given an opportunity to participate. I have
8 been on the Board of the Texas Pecan Growers
9 Association, and I am currently the President of
10 the Texas Pecan Growers Association. I have been
11 authorized by the Board of the Texas Pecan
12 Growers Association to testify on its behalf in
13 support of the Federal Marketing Order for Pecans
14 and we have written a letter of support on behalf
15 of the Texas Pecan Growers Association to the
16 Secretary of Agriculture in support of the
17 proposed Federal Marketing Order for Pecans. I am
18 also testifying in my individual capacity in
19 support of the Federal Marketing Order for
20 Pecans.

21 In conclusion, I fully support the
22 proposed Federal Marketing Order for Pecans and

1 encourage the Secretary to implement the order as
2 proposed by the American Pecan Board. I'll be
3 happy to answer any questions.

4 MR. QUIROS: Thank you, Dr. Massey. A
5 couple of quick questions.

6 BY MR. QUIROS:

7 Q The first is, you mentioned that only
8 growers with more than 30 acres of pecans or more
9 than 50 pounds, did you mean 50,000 pounds?

10 A I meant 50,000. If I said 50, I got a
11 little quick there.

12 Q Thank you. We all do, Dr. Massey, I
13 promise you.

14 Your resume is attached, and also a
15 letter that was written by you on behalf of the
16 Texas Pecan Growers Association, which is
17 attached. It looks like it was sent on June 15th,
18 2015 to the Secretary of Agriculture. Would you
19 read that, please, into the record?

20 A I hate to tell you this, but I don't
21 have a copy of the letter. This letter was
22 written --- excuse me, read into testimony

1 yesterday by Cindy Wise. The letter states that:

2 "The Texas Pecan Growers Association
3 is writing you in support for the Federal
4 Marketing Order for Pecans currently being
5 promulgated by the American Pecan Board. Our
6 industry has and continues to face issues of
7 price and supply instability in the market. This
8 situation inhibits our efforts to provide a
9 consistent quality supply of pecans to domestic
10 consumers, or at a price that supports the
11 profitable returns to producers and processors.

12 We believe that the Federal Marketing
13 Order will contribute to a more stable market
14 environment that is favorable to growers, buyers,
15 shellers, and consumers. The Texas Pecan Growers
16 Association goes on record in favor of the order
17 and greatly appreciates your support." And it's
18 signed by myself and Cindy Wise, Executive Vice
19 President.

20 MR. QUIROS: Thank you, Dr. Massey. We
21 tender this, Your Honor, as Exhibit 59 into the
22 record.

1 JUDGE GUTHRIDGE: Is there any
2 objection from USDA?

3 MS. CHILUKURI: No objection, Your
4 Honor. And, again, I would note that any
5 personally identifiable information will be
6 redacted before this is placed on the AMS
7 website.

8 JUDGE GUTHRIDGE: Thank you. Is there
9 any objection from the audience? Hearing no
10 objection, Exhibit 59 is admitted.

11 (Whereupon, the above-referred to
12 document previously marked as Exhibit
13 59 for identification, was received in
14 evidence.)

15 MR. QUIROS: We reserve any further
16 questions, Your Honor, on this witness at this
17 time.

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

20 MS. SCHMAEDICK: Melissa Schmaedick,
21 USDA. Good morning, Mr. Massey. Thank you for
22 your testimony. Thank you for joining us today.

1 CROSS-EXAMINATION

2 BY MS. SCHMAEDICK:

3 Q You mentioned that you have both
4 cattle and pecans on your farm. In fact, it's
5 called the J-B Cattle and Pecan Farm. So, can you
6 tell us are the cattle and the pecans mixed, or
7 are they separate operations?

8 A They're two distinct operations. For
9 the most part, my orchard is an improved variety
10 which I reference here, but I have sprinklers in
11 between each tree. I have 7,000 plus sprinklers
12 and cattle have a tendency to break them when
13 they go in there.

14 Q Okay.

15 A So, it's --- you can do it. I've tried
16 many different approaches to try to run cattle in
17 there but it's not a practical ongoing basis. I
18 can find unique opportunities here and there, but
19 it's not a routine practice.

20 Q Thank you. The reason I ask is that
21 we've heard some testimony about cattle wandering
22 around among the trees, and I was wondering if

1 that was your situation, as well.

2 A Right.

3 Q I want to talk to you a little bit
4 about your experience in terms of being aware and
5 following the development of the proposed
6 Marketing Order.

7 A Okay.

8 Q You mentioned that you've been kept
9 well informed, but did you have the opportunity,
10 and did you participate in numerous outreach
11 meetings?

12 A Yes. I've actually traveled to New
13 Mexico, Georgia, Alabama. I've been to at least
14 five or six different meetings where these
15 discussions were going on, and so I've had an
16 opportunity to participate, and feel that I
17 probably have an unfair advantage in the sense
18 that I've heard a lot of opinions from the east
19 to the west, as well as Texas.

20 Q Yes, and I'd like to ask you about
21 that unique position you have. Given that you
22 have traveled to all three regions, what is your

1 --- first of all, what's your general impression
2 of the reception of the proposed program?

3 A I think that I saw an evolution just
4 like all programs. I would say that if you asked
5 me on the first meeting there were many concerns,
6 and really questions, you know. When you go out
7 for the first time, what is it that we're really
8 talking about? What's the intent? So, I saw the
9 most amount of apprehension on my very first
10 meeting.

11 As the process went through, and I
12 would say I've participated for at least better
13 than a year now, and just two weeks ago we had
14 the Texas Pecan conference here in Dallas. And I
15 feel that I was most comfortable that we have
16 moved the --- we, but the industry has moved in a
17 very positive outlook as to what this could do
18 for the industry.

19 I think John Turner in his words were
20 that, you know, made a good point. Anything that
21 we can do to know what the market's stability ---
22 anything that stabilizes market, what the

1 quantities are, what the quality is, you know.
2 When somebody calls up and says I'll offer you X
3 for a pound of pecans, you'd like to know what is
4 the going rate, and why, you know. So, I think
5 it's been very good, and I think that's the
6 single most important observation that I have
7 made through the process. While there's been many
8 questions, I think we've all come to the
9 conclusion that if we knew how many pounds, what
10 the quality, what the varieties, and what they're
11 bringing, it would all help us immensely.

12 Q Thank you. So, you mentioned sort of
13 initial trepidation over this proposed program.
14 What were some of the concerns? Do you recall?

15 A Well, you know, the concerns, you
16 know, who is going to control it? Is this a
17 grower's program, is it a sheller's program, is
18 it a cumulative program, so that, you know, the
19 first question is what's the benefit? Who's going
20 to control it, manage it? Those are some of the
21 apprehensions I heard.

22 You know, who gets to vote? Does ---

1 you know, on day one well, you know, I mean,
2 logically and everywhere you go, oh, well, this
3 is only for big growers, which is wrong, but
4 those are the questions that get asked on day
5 one. And, in fact, if you asked me today I'd say
6 the small grower should be more vested than the
7 large grower. I'm a small grower, and I
8 absolutely need this stuff. So, those kind of
9 concerns, and I think those very arguments have
10 been brought up to me. Being President of the
11 Texas Pecan Growers Association, gives people
12 license to just walk up to me and ask me anything
13 they want, or to express an opinion, whichever
14 way they would like. So, I've had many
15 discussions. I feel really good that I would say
16 for the most part when you start explaining the
17 program, it just completely changes people. You
18 know, fear comes from unknown, and sometimes you
19 want somebody to explain it to you rather than
20 just reading it. You want somebody to tell you
21 this is how you think it's going to work.

22 Q So, based on that statement is it fair

1 to say that there was an educational component to
2 the outreach in terms of explaining to folks how
3 the program would work, what the potential
4 benefits are? And then through that educational
5 process, people became comfortable?

6 A I would say that's absolutely right.
7 It's a big educational process, and it works both
8 ways. And I'm sure --- I just participated. I'm
9 not on the American Marketing Board, but if you
10 would talk to Mike and all the other people on
11 the Board, they learned just as much from the
12 growers.

13 There's no doubt that the documents or
14 the outline of the perceived document on day one
15 and what ended up on day 12 was dramatically
16 different, you know. I mean, the intent didn't
17 change, but I think there was good education both
18 ways. It was not a one-way process.

19 Q Thank you. That's a very important and
20 interesting comment, and actually leads into my
21 next question.

22 Do you feel that there was a

1 reciprocal sort of receiving of information, and
2 then addressing concerns as they came up either
3 through an educational process, or through
4 revision or modification of the proposals to make
5 the program more, I guess, better fitting the
6 needs of the industry?

7 A Yes. I think that was the natural
8 occurrence of the process, you know. If you look
9 at the meetings from one region to the other that
10 would follow. If we heard or the group heard a
11 concern in New Mexico and the next one was in
12 Alabama or wherever southeast, well, generally by
13 the time that next session occurred, then that
14 was implemented into the discussions and really
15 taken into consideration, whatever was basically
16 appropriate, I would say, you know. So, yes, it
17 was an ongoing evolutionary process, is the way I
18 would describe it. So, you know, you learn from
19 one, and you don't want to make that mistake the
20 second time, and the third time you get to hear
21 something a little bit different because that one
22 is kind of off the table. So, I think it was a

1 very good process to expose the different
2 concerns the groups would have. And maybe
3 everybody had them all over the pecan belt, but
4 as you were answering the questions, you could
5 move to the next issue systematically.

6 Q Thank you. And at any time --- well,
7 let me back up and recall something I think I
8 heard you say.

9 I believe you said that early on there
10 was a concern that the proposed program was a
11 program for large growers, but that over time,
12 and as a result of the educational and outreach
13 process that opinion changed to this is a program
14 that really is intended to support small growers.
15 Is that an accurate summary of what you ---

16 A Well, I would say that's correct. You
17 know, from my perspective, I am a small grower,
18 and it was a no brainer for me, and I use those
19 terms. You asked me a specific question, so I
20 don't want to get off here too much. But I feel
21 very comfortable that it --- that I went to these
22 meetings, wanted to understand how I was going to

1 be affected. And let's be honest, we get involved
2 because we also want to protect our position or
3 enhance our position. We don't do it just for
4 good bull. So, I left pretty comfortable knowing
5 where I was headed, and had my opportunity to
6 participate, and it allowed me to articulate
7 those stories to other people.

8 So, I generally feel very good about
9 that. And I say this from a real personal
10 experience. I've sold pecans now for 15 years,
11 and I'm going to give you two examples that were
12 just mind boggling to me. One is, I'm kind of
13 early to harvest and I try to start October and
14 be through by Thanksgiving.

15 One particular year we finished up the
16 week after Thanksgiving, and I had a load of
17 pecans to leave after Thanksgiving. And the price
18 dropped almost 70 cents for the same product, and
19 I --- besides blowing my top and talking to the
20 person who bought it, his answer to me was well,
21 you know, it's after Thanksgiving and the guys in
22 West Texas and New Mexico are starting to

1 harvest, the supply is up. And my answer, or my
2 question was well, how do you know it's up, and
3 how much is it up? Well, the answers were we
4 don't know, it's just up, and we're not paying as
5 much, so I didn't --- so, that was pretty --- I
6 mean, that was a slap in the face, you know. So,
7 to me anything that stabilizes price and quality
8 is really important so I know how to negotiate.

9 Another situation, so I thought boy,
10 I'm going to be really clever. I get involved ---
11 and it's the same group, and they came out to my
12 orchard and they saw my pecans, and I was having
13 one of those really good years, and they bought -
14 - we contracted by entire herd in August. Herd,
15 excuse me, I'm ---

16 (Laughter.)

17 MR. MASSEY: You know, I've got to
18 remember where I'm at, because --- anyhow, and I
19 do have national level in the cattle industry. My
20 crop, and I sold my whole crop in really early
21 August, and we didn't --- you know, but the
22 answer is go. Soon as you can get it off let us

1 know and we'll pick it up. And I thought I
2 negotiated a really good price.

3 That particular year supply was down.
4 I started getting calls of people offering me
5 more money than I sold it for. Okay? So, I've
6 been really smart. I've outwitted myself two
7 times there. But I'll tell you something else,
8 I'm a pretty direct person, so I called the
9 person who bought it and I said, I'm a big boy. I
10 cut a deal with you, and I'm going to live with
11 that, but let me tell you, I've been getting
12 these kind of prices. And before I could finish
13 that sentence, that person was a straight up
14 person and he said, Joe, we know that, and we're
15 going to --- I'll call you in a couple of days.
16 We'll tell you how much more we're going to give
17 you and adjust it. So, I mean that was --- that's
18 business, you've got to handle it. But that's two
19 times I outwitted myself because no one could
20 give me an idea what was really happening.

21 BY MS. SCHMAEDICK:

22 Q Thank you for those examples.

1 You mentioned a 70 cent price drop, I
2 believe. Is that correct?

3 A That's right. It was --- without being
4 real specific, it was something like 223 down to
5 169, and I was wow.

6 Q So, roughly ---

7 A That was --- it was --- it could have
8 been --- I may not have that right. It could have
9 been 256 down to about 169, 170. It was around 7-
10 75 cents that particular year.

11 Q So, percentage wise it was a drop of
12 what, between 25 and 30 percent?

13 A Third, you know, roughly, you know. I
14 mean, when you stop and think about it, a little
15 bit more than a third, 35 percent.

16 Q Okay.

17 A So, you know, that was really
18 dramatic. The only thing that was --- the only
19 think that ----I mean, my only salvation was it
20 was kind of my last load or two, but that didn't
21 make me feel any better.

22 Q Thank you for that.

1 I just have one --- have two
2 additional questions. One is, so at any time in
3 the process did you ever get the sense that the
4 American Pecan Board was intentionally trying to
5 cut out small producers?

6 A Oh, absolutely not. You know, I think
7 --- I'm a small producer, and I have roughly ---
8 well, I have 233 acres and it's about 6,200
9 trees, and I have to buy all the equipment. And
10 some days I question the economics of having that
11 size operation with all the equipment and
12 investment. It would be much better for me if I
13 was at least twice as big.

14 So, at some point I have a pretty good
15 understanding. I mean, I think we're being ---
16 this is my opinion now. I think we're being very
17 generous to say that 30 acres, 50,000 pounds is a
18 commercial operation.

19 Q Thank you.

20 My last question is, again, you have
21 the benefit of not only traveling across the
22 production area but following the process for you

1 said at least a year. So, in your opinion, is
2 there --- has there been a general sense of trust
3 that has developed in the industry both in the
4 relationship between growers and handlers, but
5 also in the proposed program and its intent to
6 benefit the industry as a whole?

7 A I would say that maybe the most
8 amazing thing out of the process is that one is
9 there's communication from East to Central Texas,
10 to the West. I think we now know each other
11 better. And the other thing that was an eyeopener
12 is guess what? We all do the same thing, and we
13 all have the same problems. So, communication was
14 absolutely good, very good, maybe the best part
15 of the whole thing.

16 MS. SCHMAEDICK: Thank you. I have no
17 further questions.

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

20 MS. VARELA: Jen Varela, USDA. Thanks
21 again, Mr. Massey, for being here and providing
22 some perspective of someone who's followed this

1 process from start to finish, or at least for
2 most of it. It's really helpful to kind of know
3 how the industry has viewed this.

4 BY MS. VARELA:

5 Q You mentioned that early on there were
6 questions about who was going to control the
7 Board, the Council, or the entire program. Were
8 you referring to the membership on the Board, or
9 on the Council?

10 A No. No, I was referring to the growers
11 per se. You know, I think we have three unique
12 groups in the pecan industry that you deal with
13 on any given day, the grower who --- and then you
14 have an accumulator in many instances, and then
15 you have a sheller processor. And so, you know,
16 on day one, I think the questions are our goals
17 and mission aligned on those three people, and is
18 one getting --- again, it all starts out with am
19 I being protected, not being protected? Is it
20 fair? And how do we control this, and no one
21 group is overly represented, I think?

22 Q And then seeing different versions of

1 say the makeup of the Council, just in your
2 discussions with the people about the program
3 overall, do you get the sense that each of those
4 sectors, for lack of a better term, is pretty
5 satisfied that their interests will be fairly
6 represented?

7 A Yes. This is really my first
8 opportunity to interact with shellers per se,
9 and probably more broader accumulators than just
10 the ones I knew because I was going from east to
11 west in this process, as well. And I would say
12 without a doubt I think that level of trust
13 obviously developed, and it's been very
14 important. And I think that's probably more than
15 anything else, it's the education, it's knowing
16 what's going on. Level of trust I think has been
17 developed.

18 Now, you know, the good thing about
19 trust is once you have it, you can only do one
20 thing with it, and that's lose it, so we've got
21 to make sure we follow through.

22 MS. VARELA: Thank you. Those are all

1 my questions.

2 MR. HINMAN: Don Hinman, USDA. Thank
3 you for your responses. I'm going to ask you a
4 question related to --- similar to what I've
5 asked other witnesses related to the benefits.
6 You already gave a very thorough and helpful
7 response relating to the value of market --- if
8 there's lack of information, and how that would
9 affect your ability to negotiate price. That was
10 a very helpful response.

11 And the other question I want to ask
12 about relates to, you mentioned on page 2 that
13 you would support future grade, size, and quality
14 standards if the market were to establish them.

15 BY MR. HINMAN:

16 Q Could you offer your insights on how
17 you think establishing those would help the
18 industry and your operation?

19 A Well, you know, actually that is
20 equally as important, or maybe more important. I
21 told you that I've sold my pecans in advance, and
22 it was based off the variety, it was based off of

1 the size, it was based off the count, you know,
2 per pound, and the yield. So, all those things
3 start affecting quality. So, you know, if I'm
4 producing what I consider based off variety a
5 number one grade pecan, and it yields 58 percent
6 meat and, you know, it's 47 or 54 pecans to the
7 pound, then I want to be paid for that. I don't
8 want someone to tell me that I can't give you as
9 much, and they're comparing it to somebody who's
10 got a 47 percent yield. You know, so quality is a
11 really important issue. And I think the more
12 information we have, the better we'll able to
13 negotiate. And I think in the long run it's
14 really important to establish a market. You know,
15 what happens the first year is almost a moot
16 point. I'm more concerned what's going to happen
17 the second, third, fourth, and fifth as we start
18 compiling the data and we know what the real
19 tonnage is that we're producing, and what the
20 real quality of what variety, and what price.
21 Then is when we're going to become marketers of
22 pecans, when we can guarantee something and know

1 what we can expect.

2 MR. HINMAN: Thank you. No further
3 questions.

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

6 MR. HILL: Brian Hill. How are you
7 doing?

8 BY MR. HILL:

9 Q You testified earlier in answer to a
10 question of Ms. Schmaedick, you said that you
11 thought the American Pecan Board was very
12 generous in conceding that 30 pecan acres or
13 50,000 pounds would qualify someone as a grower.
14 Just as a point of clarification, are you saying
15 that you could see that number being lower, or
16 you're saying that that number could easily have
17 been higher?

18 A Well, in my opinion, I could build a
19 case that it should be higher.

20 MR. HILL: Thank you very much.

21 JUDGE GUTHRIDGE: Are there any more
22 USDA questions? You're up.

1 MR. QUIROS: Yes.

2 REDIRECT EXAMINATION

3 BY MR. QUIROS:

4 Q Dr. Massey, the definition for grower
5 is really the level of commercial grow. Are you
6 satisfied that 30 acres or 50,000 pounds during
7 the four-year average time that's tested, you
8 think that's appropriate?

9 A I think it's appropriate. I mean, we
10 could debate it plus or minus, but I think it is
11 a very good position to start with.

12 Q And you have to draw the line
13 somewhere?

14 A You've got to draw a line somewhere.

15 MR. QUIROS: Okay, thank you very much.
16 No further questions.

17 JUDGE GUTHRIDGE: Any more USDA
18 questions? Are there any questions from the
19 audience? No.

20 (Witness excused.)

21 MR. QUIROS: Mr. Monte Nesbitt, Your
22 Honor.

1 JUDGE GUTHRIDGE: Mr. Nesbitt, while
2 they're handling that, if you could raise your
3 right hand, please.

4 WHEREUPON,

5 MONTE NESBITT

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

9 JUDGE GUTHRIDGE: Thank you.

10 MR. QUIROS: Mr. Nesbitt, you've been
11 sworn, so I'd like to ask you a few questions
12 before we begin to establish the record.

13 DIRECT EXAMINATION

14 BY MR. QUIROS:

15 Q First of all, what is your name?

16 A My name is Monte Nesbitt.

17 Q And would you please spell it slowly?

18 A It's M-O-N-T-E, N-E-S-B-I-T-T.

19 Q And tell us about your involvement in
20 the pecan industry, and what you do.

21 A I came to Texas A&M as a graduate
22 student in 1988, and I worked under Dr. Benton

1 Storey, who was a noted pecan expert at Texas A&M
2 University. I've been employed either at Texas
3 A&M, or Auburn University, or the USDA Pecan
4 Breeding Program since that time.

5 I currently serve as an Extension of
6 Program Specialist, so my job is outreach to the
7 pecan industry solving problems and some research
8 in pecan production. My expertise area or my
9 trained profession is horticulture, so my focus
10 of expertise would be the growing of pecan trees.

11 Q And when you say you work for the
12 Extension Service, is that in Texas?

13 A Yes, sir, that's Texas A&M Agrilife
14 Extension, and that is the Extension agency that
15 serves the State of Texas.

16 Q We heard from Dr. Larry Stein
17 yesterday. Is that the same agency that Dr. Stein
18 works for?

19 A Yes, sir. That's correct.

20 Q And you all have direct contact with
21 growers?

22 A Yes, we do.

1 MR. QUIROS: Thank you. I want to
2 introduce Exhibit 60, which is a copy of your CV,
3 and we would like to tender that at this time.

4 JUDGE GUTHRIDGE: Exhibit 60 is --- Mr.
5 Nesbitt, that's your Curriculum Vitae.

6 MR. NESBITT: I don't think I --- I
7 don't have that up here.

8 JUDGE GUTHRIDGE: Yes? Does USDA have
9 any objection?

10 MS. CHILUKURI: No objection, Your
11 Honor.

12 JUDGE GUTHRIDGE: Does anyone in the
13 audience have an objection? Hearing no objection,
14 Exhibit 60 is admitted into the record.

15 (Whereupon, the above-referred to
16 document previously marked as Exhibit
17 60 for identification, was received in
18 evidence.)

19 JUDGE GUTHRIDGE: Mr. Quiros.

20 MR. QUIROS: Thank you, Your Honor.

21 BY MR. QUIROS:

22 Q I also want to establish a record on

1 two additional matters. Mr. Nesbitt, you've
2 received a copy of what's been marked Exhibit 1
3 in these hearings, which was a notice prepared by
4 the USDA which contains the proposed Marketing
5 Order for Pecans. Have you had an opportunity to
6 receive it and read it?

7 A Yes, I have.

8 Q Also, have you had an opportunity to
9 receive and read what has been marked Exhibit 23
10 in these hearings, which is the Executive Summary
11 of Dr. Marco Palma's work?

12 A Yes, I have.

13 Q Thank you. I understand you have a
14 presentation to us today with regard to some of
15 the cultural issues that are influential for
16 pecans, and so if you would, if you would give us
17 that testimony and Ms. Myers will show it on the
18 overhead screen. I think you all have a copy of
19 it. If you would please walk us through that, we
20 would appreciate it.

21 A Sure. Okay, this is ---

22 MR. QUIROS: That's Exhibit 61 which

1 we're introducing at this time.

2 (Whereupon, the above-referred to
3 document was marked as Exhibit 61 for
4 identification.)

5 MR. NESBITT: Okay. This is an overview
6 of pecan production and it includes some of our
7 recommendations for Texas production. So, second
8 slide is basically a statement that the pecan is
9 native to Texas, and it's valuable historically.
10 In the picture you'll see a pecan tree that's
11 been named the La Bahia pecan tree. This is a
12 native pecan tree that's believed to have been
13 present when Stephen Austin came and brought
14 settlers to Texas, so this as an example of a
15 200-year old pecan tree. And it has been
16 propagated and it's viewed as valuable for its
17 historical value.

18 And then pecans are also a significant
19 ----- make a significant contribution to Texas
20 agricultural economy. The 2012 USDA census lists
21 87,581 acres of pecan farms, if you will, in
22 Texas.

1 BY MR. QUIROS:

2 Q Mr. Nesbitt, could I turn you back to
3 page 1 of Exhibit 61. Tell me what that is, what
4 that picture is?

5 A That is a pecan orchard in El Paso
6 County.

7 Q And what type of trees are those? Is
8 that improved or native?

9 A That's an improved pecan orchard.
10 Those particular cultivars are Pawnee.

11 Q And do you think that particular
12 orchard is flood irrigated, or do you think it's
13 sprinkler irrigated, or is not irrigated at all?

14 A This would be a flood irrigated
15 orchard.

16 Q Thank you. I just wanted to clarify
17 that.

18 A Okay.

19 Q I think we're beginning on page 3.

20 A Okay. Page 3 is designed to educate
21 the rear on some of the different pecan trees
22 that are encountered in Texas. We have native

1 trees, as I previously stated. These are truly
2 native when they have developed from seed on
3 their own naturally without mankind's help. A
4 seedling tree would be any tree that originated -
5 -- arisen from seed, germinated and grown into a
6 tree from seed, and has not been maimed or
7 propagated by grafting.

8 Following that we have improved
9 cultivars or varieties. The word variety and
10 cultivar is used interchangeably in the pecan
11 industry. Some scientists prefer the term
12 cultivar for some kind of botanical reasons.
13 Variety also can be used, but I'll use them
14 interchangeably. These would refer to trees that
15 have been selected, named, and then propagated by
16 grafting for improve traits. Traits can be size,
17 could be disease-resistance, higher kernel
18 quality, and other traits that are advantageous
19 to the grower.

20 And the fourth one is a controlled
21 cross. The USDA Breeding Program, as well as
22 private growers, and the University of Georgia

1 engage in pecan breeding with a deliberate effort
2 to cross two cultivars of pecans to develop a new
3 hybrid variety, so that is what we see in that
4 fourth category.

5 In that particular category we know
6 both of the parents. An example on the right-hand
7 side of that slide is Pawnee. Pawnee was
8 developed by the USDA Breeding Program, and it
9 was a controlled cross, meaning that pollen was
10 applied by the breeder to a known flower, and
11 they monitor the development of the offspring and
12 ultimately release that as Pawnee.

13 The upper picture, the right-hand just
14 shows the diversity of pecans, was tremendous
15 diversity in and among both the native seedling
16 and improved cultivars that are in existence.

17 The next page I just present an
18 example of Pawnee, which is an improved cultivar.
19 It's used widely in the pecan industry. It was
20 developed by USDA Pecan Breeding Program as a
21 cross between Mohawk and Starking Hardy Giant.
22 That cross was made in 1963, the variety was

1 evaluated to be released ultimately to the
2 industry in 1984.

3 BY MR. QUIROS:

4 Q Mr. Nesbitt, a couple of questions
5 about that, and that would be on page 4 of
6 Exhibit 61. Is that right?

7 A Correct.

8 Q When it was released in 1984, how long
9 did it take growers to start to plant that as
10 part of their --- how long does that acceptance
11 take place after the release?

12 A That acceptance can take decades in
13 some cases. It's a gradual process. It's impacted
14 by changing dynamics within the pecan industry.
15 The pecan industry began to pay high prices for
16 early pecans that mature early and can go to
17 market early, and that has in the last decade to
18 two decades has increased the utilization of
19 Pawnee.

20 Q And it's an early cultivar.

21 A It's an early cultivar.

22 Q Thank you, I'm sorry.

1 A No, that's ---

2 Q Mr. Nesbitt, when I say early
3 cultivar, the harvest is earlier than other
4 cultivars.

5 A Yes, sir. Correct.

6 Q Thank you.

7 A Okay. Page 5 is intended to describe
8 that we have two pollination types in pecans.
9 Some of the cultivars or varieties or natives
10 will be Type 1. They produce male pollen first
11 before the female flowers are receptive. And Type
12 2 would be the reciprocal of that. They produce
13 female flowers that are receptive prior to the
14 shedding of their pollen. So, as we recommend
15 cultivars for orchards we often recommend that
16 they consider pollination needs. The chart shows
17 examples of two Type 1 cultivars, Pawnee and
18 Western, also known as Western Schley, and then
19 Wichita. And Type 2, the bars represent time of
20 pollen shed by date, and then the darker bars
21 show pistil receptivity by date. And what we're
22 trying to do is accomplish overlap of the two.

1 Pawnee in this particular chart is not capable of
2 pollinating itself. Pollen shed occurs before
3 female flowers are receptive; thus, it be
4 advantageous to add Wichita and Oconee with
5 Pawnee in order to get maximum pollination. So,
6 we say plant both Type 1 and Type 2 in the
7 planning.

8 Q Mr. Nesbitt, for people that are
9 viewing this in black and white slides in the
10 future that might read this transcript, the
11 pollen shed with is yellow is the light bars ---

12 A Yes.

13 Q --- and the receptivity is the dark
14 bars?

15 A That's correct.

16 Q Thank you.

17 JUDGE GUTHRIDGE: Thank you for that
18 clarification.

19 MR. NESBITT: The next page, which I
20 believe is page 6. I'm sorry there's not page
21 numbers on these. Describes how we in the
22 Extension Agency view the State of Texas in terms

1 of growing regions, or slight changes that impact
2 production practices and cultivar utilization.

3 So, we have a very diverse climate from east to
4 west, north and central for growing pecans based
5 on our longitudinal and latitudinal diversity.

6 The far west is described as having
7 low disease pressure, talking about diseases of
8 pecan trees. There's a lot of heat and high
9 temperature stress in the environment. It's an
10 area that has such little rainfall that
11 irrigation is required for the trees to live and
12 then to be productive.

13 The upper left I have a box that
14 describes the north growing region as being
15 shorter in terms of its days. The growing season
16 is shorter in the number of days, frost-free
17 days. There's also low disease pressure and
18 irrigation is required.

19 The central region is described in
20 this third box from the left as an area that's
21 transitional, has variable disease pressure,
22 usually that's very low. Irrigation is needed.

1 This is --- generally transitions from about 25
2 inches of rainfall per year to 35 inches of
3 rainfall per year, and I'll describe on some
4 successor slides the impact of that on irrigation
5 needs. But we say irrigation is needed in that
6 region, but there are growers who do not
7 irrigate. The trees will live at that level of
8 rainfall, and there are growers that will
9 supplement or use irrigation as a supplement to
10 natural rainfall.

11 The far east is very much like
12 Louisiana, and Mississippi, and Georgia, and it
13 is typified by rainfall greater than 35 inches
14 per year. That means there's lot of disease
15 pressure on the trees, scab, perry mildew, and a
16 number of other fungi. There's enough rainfall to
17 produce pecans without irrigation, so we say that
18 it is possible to grow pecans without irrigation
19 in this region. We --- so that is an overview of
20 these four regions that we work in in Texas.

21 The next, page 7, I further take these
22 four regions and apply the current recommended

1 cultivars that we recommend for those four
2 regions. And without going into that in detail,
3 there are differences within the regions.
4 Varieties recommended to the east have a high
5 nascar resistance to be recommended for those
6 regions. That's less of a concern in the central,
7 west, and north regions. This can be found on the
8 website that's indicated on the bottom of the
9 page.

10 I would say further that this does not
11 represent all the pecan cultivars that are
12 presently used in the industry in the State of
13 Texas. We have tremendous diversity based on the
14 history of native pecans. The USDA Pecan Breeding
15 Program is housed in the State of Texas, and the
16 length of time that pecans have been a commercial
17 crop in Texas has added over time to the
18 diversity and number of cultivars that we grow,
19 so it is --- our state is rich in terms of
20 cultivar utilization and diversity.

21 JUDGE GUTHRIDGE: Mr. Nesbitt, just to
22 make sure the record is clear, the word after

1 improved, it's mostly obscured, is cultivars?

2 MR. NESBITT: That is correct.

3 The following page, to implement
4 cultivars to pecan orchards that is predominantly
5 done with improved cultivars. Natives exist and
6 they are used opportunistically by growers who
7 acquire property that has natives. We don't plant
8 native trees. In some cases seedling trees are
9 allowed to grow, or may be planted, but the
10 predominant utilization of pecan trees in Texas
11 is for improved cultivars, and so planted
12 orchards will require grafted trees, or a
13 grafting process to be done by the grower.

14 Grafted trees are available in two
15 forms, container grown on the left. We have a
16 longer planting window in the year, we can plant
17 those in the winter, spring, summer, and fall.
18 They typically cost a little bit more, and have
19 good survival. On the right-hand side there are
20 also what we call bare root trees. These are
21 trees that are dug at one location and
22 transferred into the grower's new orchard site,

1 and those are mostly planted in the winter due to
2 perishability. They typically cost a little bit
3 less and they also give growers good survival.
4 So, that's just an example of how trees are
5 obtained by growers in Texas.

6 The next page show a table of
7 recommended or commonly used tree spacings for
8 pecan orchards in Texas, and I would say they are
9 applicable to other states, as well. The far-left
10 column, the word "high density" probably should
11 not be a descriptor for that table. The first
12 couple of spacings, 20 by 40, and 30 by 30, are
13 what we would consider high density, and we move
14 to a more moderate density, and then a standard
15 density at 40 and 50 feet apart. So, that's a
16 little bit of an error in that column descriptor.

17 At those spacings, the next column
18 will tell you how many trees per acre you would
19 have if you planted on those spacings. And then
20 typically if the orchard is thinned, it's reduced
21 to the next number you see in the third column.
22 And that gives the number of trees per acre in

1 the fourth column.

2 There's a lot of diversity in spacing
3 in pecan orchards. The most commonly used in
4 Texas is 35 by 35 in the east and central
5 regions. In the north and west we will see 30 by
6 30 commonly used where they also perform more
7 hedging as a maintenance practice.

8 The next page I just show some
9 representations of how trees grow and develop
10 over time, and the amount of space that they take
11 up as they do. They're quite small when they're
12 planted as a one, two-year old tree. They only
13 have a limb spread of about 1-1/2 feet. And then
14 they progress through that. These are
15 approximations that are designed to give you some
16 idea of the size relations of a pecan tree.

17 The fourth picture on the right shows
18 a 12 or 14-year old tree with a 20-foot limb
19 spread. This is a tree that's beginning to occupy
20 its planted space in the orchard. That will
21 continue as the trees age. Trees continue to grow
22 throughout their life. There's no stoppage of

1 growth completely. The growth rate does slow.

2 On the next page, I depict a tree
3 that's what I say is ultimate tree size. This is
4 a 40-year old tree that has a limb spread of 54
5 to 60 feet. And these trees in this orchard
6 that's depicted are at a 70-foot spacing. So,
7 pecan trees ultimately hit a large size and they
8 will ultimately crowd those initial tree spacings
9 in a pecan orchard that I described the two
10 slides previous.

11 On the next slide, I show ---

12 JUDGE GUTHRIDGE: Mr. Nesbitt, could I
13 ask you a question about that 70-foot spacing?

14 MR. NESBITT: Yes.

15 JUDGE GUTHRIDGE: We can't see it here,
16 but with the 70-foot spacing be going down the
17 rows also? We can see, it looks like 70 feet.

18 MR. NESBITT: This is 70 by 70,
19 correct.

20 JUDGE GUTHRIDGE: Okay, thank you.

21 MR. NESBITT: The next slide says high
22 sunlight must be maintained and tree to tree

1 shading. Once the trees, the limbs begin to
2 touch, the canopies from adjacent trees are
3 touching then there's enough shade that's imposed
4 on the tree canopies that we have --- growers
5 will experience reduced growth, reduced nut
6 production, smaller size nuts, diabetica
7 branches, and greater pest problems. So, this
8 ongoing growth process of pecan trees must be
9 monitored by the grower and he or she must make
10 management decisions to prevent that.

11 So, the next page I describe three
12 strategies to maintain high sunlight throughout
13 the life of a pecan orchard. One would be to
14 plant in a permanent spacing that will not crowd.
15 That would be greater than 70 feet, would be more
16 like 100 feet by 100 feet. And that density is
17 about four trees per acre, and not great enough
18 density for growers to be profitable at that
19 spacing. So, typically that is not a strategy
20 that's utilized in the industry.

21 Second option is to remove trees as
22 adjacent trees crowd, would be to move those, cut

1 them off at the ground, dig them up, possibly
2 move those to another site using a tree spade,
3 but eliminate every other tree in every other row
4 or every other row would be some practice of tree
5 removal to increase the amount of sunlight in the
6 orchard.

7 Third option is hedge pruning. This is
8 an annual practice. It's depicted in the picture
9 on the right side. That is a hedging machine
10 that's used in the industry to cut the limbs
11 back, and to do that every first, second, third,
12 or fourth year. Growers all vary in their hedging
13 practices, but it's an ongoing maintenance of the
14 size of the tree to keep sunlight high in the
15 orchard.

16 MR. QUIROS: Can I interrupt you there?

17 MR. NESBITT: Yes.

18 BY MR. QUIROS:

19 Q Mr. Nesbitt, let's just review real
20 quickly. You've been professionally employed as a
21 horticulturalist in the eastern region of the
22 production area. Is that correct? At Auburn

1 University?

2 A That's correct, State of Alabama.

3 Q And you've been employed in Texas, as
4 well, in a similar position?

5 A Correct.

6 Q And the western part of Texas, that's
7 very much like the western region of the
8 production area in New Mexico, Arizona, and
9 California?

10 A Yes. From Fort Stockton area where
11 there's significant production west to El Paso,
12 that very much looks like what you would see in
13 New Mexico.

14 Q For purposes of hedging, can you
15 describe how the regions at least historically
16 have used hedging?

17 A Well, if we look at the next slide, I
18 think it will provide some insight on that.

19 Q Thank you.

20 A I'll use that as commentary for your
21 question.

22 Q Right.

1 A Mechanical pruning originates in the
2 State of New Mexico. Dean Stahmann, Stahmann
3 Farms in New Mexico is credited with kind of
4 introducing this practice. They planted trees at
5 30 by 60 in the 1930s, 1956 they began thinning
6 those trees to 60 by 60 which was the tree
7 removal strategy for maintaining sunlight. Their
8 yields were disappointing with that practice, and
9 they went and replanted with the intention of
10 cutting the trees back mechanically, which they
11 did. And they originally cut them very hard and
12 allowed them to regrow, and then 10 years later
13 they would cut them again. But that practice
14 evolved, they recognized the need to prune the
15 trees more frequently, and they began to do that
16 on a four-year cycle, where one side is pruned in
17 year one, the top is pruned in year two, the next
18 side is pruned in year three, and they go back in
19 year four or some rotation like that. And that
20 became a standard practice that other growers in
21 the west adopted.

22 The thinking was in the scientific

1 community that that would work in New Mexico and
2 Arizona, and maybe far west Texas, but there was
3 not as much sunlight in central, eastern Texas,
4 as well as Georgia, Alabama, Mississippi. There
5 was also difference in cultivar utilization. The
6 cultivars that Stahmann and others were hedging
7 were cultivars that could not be utilized in the
8 east due to their disease susceptibility.

9 Q Western Schley and Wichita?

10 A Western Schley and Wichita.

11 Q Thank you.

12 A So, there were attempts within the
13 scientific community to hedge prune pecan trees
14 in Georgia, and Alabama, and other places. They
15 were --- at that time were not --- there was a
16 lack of satisfaction with those results. Part of
17 the slow adoption also was that this hedge
18 pruning equipment is large and expensive, and the
19 orchard size in Alabama, Louisiana, Mississippi,
20 and much of Georgia, very small pecan orchards
21 that cannot afford hedging equipment. So, in the
22 last decade to two decades there's been an

1 introduction of hedge equipment that's more
2 affordable to the small grower, more contract
3 hedgers that are available in states like
4 Georgia, and some research that investigated
5 different cultivars and how they should be hedged
6 maybe differently than they were being hedged in
7 the west.

8 So, today we see more adoption of
9 hedging in Georgia, Central Texas, East Texas,
10 and it's -- that is changing. But we have gone
11 through a period of time where we had a western
12 hedged region, and an eastern tree removal region
13 that kind of typified the two areas.

14 Q And then central is sort of mix of
15 both?

16 A Yes, you'd find a little bit of both
17 in the central region.

18 Q Thank you.

19 A Okay, that will allow me to move into
20 the next slide, and I show a map of Texas that
21 shows the 30-year average rainfall in inches per
22 year in these colored transitions. And they have

1 lines that indicate where there is 10 inches of
2 rainfall per year, 15 inches, 20, et cetera
3 across to the highest designation is 55 inches of
4 rainfall in the far eastern side of the state.

5 I'm overlaying with this a statement
6 that says, "Pecan trees need from 48 to 55 acre
7 inches of water either from rainfall or other per
8 year." And this shows that in the far west we
9 don't have that from rainfall. In the far east,
10 we do, in terms of water volume.

11 The next page is a slide that I would
12 credit to Dr. Larry Stein. Dr. Stein, myself, Dr.
13 George Ray McEachern are coauthors on the Texas
14 Pecan Handbook, and included in that is a
15 recommendation for irrigation by months of the
16 growing season. And this shows that March you
17 need five inches per acre per --- for the month
18 of March. And then April needs four, May needs
19 four, June needs four, July needs ten, August
20 needs ten, September needs ten, and October needs
21 eight. That is the growing season, March to
22 October, and it's a lengthy growing season that

1 all tolls to 55 acre inches of water that we
2 recommend per growing season per acre.

3 The next slide shows --- this is a
4 supportive statement. Growers are recommended to
5 provide from 1 to 2-1/2 inches of water per week.
6 If you look at the previous slide, you would see
7 that that works out on a weekly basis to be
8 between 1 and 2-1/2 inches per week. We say
9 especially the mid-August to late-September
10 period, this is when pecan kernel is developing.
11 It's highly dependent on water being available to
12 the roots of the trees, so that's a critical
13 period for watering.

14 So, irrigation is an important
15 practice for pecan orchards in Texas, maybe less
16 so in the eastern part of the state, but it is a
17 vital component to pecan production in the
18 western, central, and north regions of the State
19 of Texas.

20 Q What's the subject of that photo?

21 A That is a pecan that is cross section,
22 and it's showing the kernel in the white center

1 there's some cork material that separates the two
2 cotyledon halves, that have been cut in half. The
3 shell and then the shuck material is the green
4 layer that surrounds the shell.

5 Q Thank you.

6 A Next slide is a statement of overview
7 description of fertilizer needs and practices in
8 a pecan orchard. We have two elements that are
9 needed annually and applied generally by default
10 in actively managed pecan orchards. This would be
11 nitrogen and zinc. The other nutrients are
12 managed or applied according to leaf and soil
13 analysis.

14 On the right-hand side of the page I
15 show a table that shows our recommended
16 sufficiency levels for nitrogen, phosphorous,
17 potassium, calcium, magnesium, or mainly zinc,
18 boron and copper. So, growers will collect leaves
19 in the summer and have their leaves analyzed and
20 make fertilizer applications based on that, as
21 well as from soil samples.

22 The left, I make a statement that the

1 standard annual orchard rates for nitrogen are 80
2 to 200 pounds per acre per ann. That's for ---
3 that's Texas recommendation out of Stein, the
4 coauthors, the Texas Pecan Handbook published in
5 2012. That varies, growers will vary that
6 according to their crop load and cultivars. Some
7 cultivars are deemed to need more nitrogen than
8 others. They're more productive.

9 And then the standard application of
10 fertilizer timing may be is yearly budbreak,
11 which is March or April depending on cultivar,
12 May, month of May, and month of July and August.
13 We tend to see multiple applications of
14 fertilizer in an orchard each growing season.

15 JUDGE GUTHRIDGE: That word before May
16 is budbreak then.

17 MR. NESBITT: Oh, yes. That's a
18 misspelling. There should be a D injected in
19 there, sir.

20 BY MR. QUIROS:

21 Q That's not a Texas pronunciation for
22 budbreak?

1 A It could be, but ---

2 JUDGE GUTHRIDGE: We learned the Auburn
3 pronunciation.

4 MR. NESBITT: All right. The next page,
5 I state that foliar spraying is an effective
6 approach for annual zinc. In a previous slide, I
7 disclose that zinc is needed in a pecan orchard
8 annually, and here we show a pecan tree sprayer
9 that's spraying a mist, spray solution up into a
10 pecan tree. This is an old picture. It's black
11 and white originally, and open cab tractor which
12 we probably wouldn't see today. But he is
13 spraying zinc into a pecan orchard from the
14 ground sprayer, airblast sprayer to apply it in a
15 pecan orchard. In the mature orchard or bearing
16 trees, those are sprayed in the springtime. And
17 young trees, we spray those spring and summer.

18 The next page, I would --- it's
19 intended to give you some insight. There are a
20 number of pest management challenges for pecan
21 growers, adds to the cost of production. The big
22 five, if you will, include aphids, pecan nut

1 casebearer, pecan weevil, hickory shuckworm, and
2 stinkbugs, and lots of other pecan insects not
3 depicted in this table. These are the major ones
4 that are of economic importance from an industry-
5 wide perspective.

6 And there are some differences in
7 terms of the presence of these particular insects
8 in certain regions of the country. With aphids
9 which is a foliage feeding pest depicted on the
10 lower left picture. Those are found throughout
11 the pecan industry all the way from California to
12 Georgia. Pecan nut casebearer, which is a nut
13 feeding pest shown in the second picture from the
14 left is a pest that is native to pecan trees and
15 developed in the native regions where pecans are
16 grown, and is thus found --- it is dispersed east
17 all the way to Georgia, and has also been found
18 in the El Paso and New Mexico regions despite
19 early attempts to quarantine and prevent it. It
20 is still quarantined in Arizona and California
21 and they do not have it there to date to my
22 knowledge.

1 Pecan weevil, also a native pest to
2 pecan found in some counties of Texas, not in all
3 counties, but is believed to be distributed
4 through much of the State of Texas; however, is
5 not in El Paso. And growers or handlers of pecans
6 must treat pecans with cold storage before pecans
7 can be moved from Central Texas into the El Paso
8 region or further west, because they do not have
9 it. East of El Paso all the way to Georgia, the
10 pecan weevil is distributed.

11 Hickory in pecan weevil is the third
12 picture. The fourth picture from the left is
13 hickory shuck worm. That is not found in Arizona
14 and California, not found in El Paso or New
15 Mexico, although there's some new information
16 that has --- indicates it may be present, maybe
17 on a limited basis, and it is found east of El
18 Paso to Georgia.

19 The last one is stinkbugs. The lower
20 right picture depicts a leaffooted bug which is
21 in the stinkbug complex, and it is found
22 throughout the pecan industry. The growers are

1 challenged to manage and control these insects,
2 as well as other pests, and they will use a tree
3 sprayer or an airplane typically to apply
4 pesticides when they are needed.

5 The next page I say the pecan is
6 alternate bearing. This is a generalization of
7 the production habits of pecans. I'll use for
8 statements to describe why or how that happens.
9 Pecan trees have a tendency to produce a lot of
10 seeds or overbear. When they do that they deplete
11 their carbohydrate energy reserves and, thus,
12 their ability to make strong enough buds to
13 produce flowers the following year, is then
14 diminished if not completely eliminated.

15 The presence of heavy crops also
16 signals certain hormones that suppresses the
17 development of some of the flowering, some of the
18 flowers within buds of pecans, further hampering
19 their ability to return a crop in the following
20 growing season.

21 Stresses on the tree either from
22 weather or pests intensify the drain on the tree

1 if it also has a crop and, thus, we have years of
2 high disease pressure, years of high insect
3 pressure that cause crop loss, maybe then cause
4 heavy crop the following year, so there's weather
5 and pest relationships to this alternate bearing
6 phenomenon in pecans.

7 BY MR. QUIROS:

8 Q Mr. Nesbitt, I have a quick question
9 about that. Without management would all pecans
10 across all regions naturally tend towards this
11 alternate bearing phenomenon?

12 A Yes. Left on their own because of
13 their propensity to produce a lot of flowers and
14 set a lot of fruit they would --- there would be
15 significant alternate bearing.

16 Q Well, help me here a little bit. I've
17 heard about on and off years, and on and off
18 years relate to this alternate bearing
19 phenomenon?

20 A On year is a descriptor of a year
21 where a lot of the trees in a region have a heavy
22 crop, so we say that the trees are on production.

1 Q Right.

2 A Off year would indicate the trees have
3 little production.

4 Q And that would affect supply?

5 A Certainly affects supply because there
6 is different amount of pecans going to market,
7 and that can be significantly different from one
8 year to the next.

9 Q And it would affect price, as well?

10 A I would say that based on my
11 experiences in conversation with the growers and
12 buyers that price is affected by these swings in
13 production.

14 Q So, in an on year price might be lower
15 because the supply is greater?

16 A That is correct.

17 Q And the reverse would be so in ---

18 A Yes.

19 Q Okay. Help me here. With millions of
20 trees planted across a 15-state region why
21 wouldn't it kind of balance out so all years
22 would be the same everywhere? Some trees would be

1 on, some trees would be off, and the supply would
2 be balanced. Why doesn't it work like that?

3 A Over --- it's complicated to answer
4 that. There's --- that's a question we often
5 field. There is --- if you actually look within
6 orchards in an on year, you will find threes that
7 are off but they're typically in the minority.
8 Similar to an off year, you go up and down rows
9 of trees you'll find trees that are on, but they
10 are not -- they're in the minority.

11 We have heavy concentration of pecans
12 in the southern U.S. that experiences a lot of
13 similar dynamics and climate, and those climate
14 dynamics tend to bring a lot of the mature trees
15 into some synchronicity. It's not complete, and
16 there are growers who have an on year and an off
17 year nationally speaking. That happens routinely,
18 but we tend to have years, and it could be late
19 frost. That impacts a lot of the area. It could
20 be drought that affects a lot of the area. It
21 could be scab that affects a lot of the area.
22 That tends to move a lot of trees to one side of

1 that pendulum or the other, so it's not as clear
2 cut where it's all on or all off. Obviously, we'd
3 have to go from zero to, you know, a billion
4 pounds of pecans, but it does swing up or down,
5 and it's affected by some of these factors.

6 Q If consistent supply was important to
7 ingredient buyers and other purchasers, handlers,
8 end-users of pecans you think it's important that
9 we grow pecans across a vast region of this
10 country so that regional weather effects in one
11 part of the country may not affect other regions;
12 therefore, supply is less affected across all
13 production?

14 A I would say yes, you know, having
15 pecans on both the Atlantic coast and the Pacific
16 coast, and all points in between provides a mean
17 of protection to the industry, if you will, from
18 disaster that would eliminate supply completely,
19 and then create a real difficult problem for, as
20 you say, those who utilize pecan for food
21 products.

22 Q We've heard some testimony about

1 increased new plantings of pecans, many of which
2 are not in production. Is that something that
3 you've observed?

4 A I have observed that in small cases.
5 I've not been able to overview that across the
6 country, but the --- when I first worked in
7 pecans in 1980s, early 1990s, went to work in
8 Auburn there was some price stagnation or
9 deflation in the pecan industry. I was even
10 hesitant to take a job with Auburn University
11 because it was an industry that had some more
12 health problems from low prices. The impact of
13 China, high volume exports of pecans, high
14 prices, not saying we didn't have years with
15 occasional high prices in the '90s which would
16 increase grower morale and increase number of new
17 plantings. But from experience late 1990s, early
18 2000s, the influence with China to buy a lot of
19 pecans and increase or kind of eliminate the
20 price deflation and stagnation has certainly
21 bolstered grower morale both in the southeast and
22 in Texas, and in Arizona.

1 Q In general from what you've heard do
2 you think supply will increase in the next 10
3 years?

4 A I think supply will increase. I also
5 am familiar with this industry enough to know
6 that we have a lot of older orchards in the
7 country, both older in terms of tree age, and
8 older in terms of the owner manager of those
9 farms. I've seen turnover --- I've pecan orchards
10 turn into housing subdivisions, so urban growth I
11 think is sacrificing some of our pecan orchards.
12 And I think there will be some replacement
13 counterbalancing of some of that. I think there
14 is --- I get enough phone calls in my office
15 interest in pecans, people that hear about China,
16 hear about, you know, higher prices because to
17 expect that if those factors that are maintaining
18 the price --- maintaining high prices continue
19 that there will be an increased supply in the
20 U.S.

21 Q This is just a general observation
22 question I'm asking. At the time when you were

1 working in the '80s and '90s, what was the
2 average age of the owner managers of pecan
3 orchards? Just a general idea.

4 A Well, I would say they were retirement
5 age, if 62 is --- we could use that as retirement
6 age, I would say it was in that range. I think
7 they have amazing staying power because it looks
8 like the age is still in that age range.

9 Q Have you seen an increase in younger
10 people being attracted to this industry in the
11 last few years?

12 A I have seen --- there are a number of
13 cases of successful pecan farms where the
14 son/daughter, next generation down is assuming
15 some involvement in those operations. We have
16 young investors who are both U.S. born and
17 foreign born who have appeared on the scene to
18 ask questions about pecan, and pecan production
19 in Texas. So, yes, I think that dynamic has
20 changed.

21 Q Are you seeing any training of younger
22 scientists?

1 A That is a whole different subject in
2 terms of some of the challenges we face in
3 academia with funding. We have a decline of the
4 number of scientists working in pecans in the
5 U.S. since I began working in the 1980s.

6 Q Because of a lack of research funding?

7 A Yes.

8 Q Okay. Well, let me get back to your
9 presentation, but thank you for letting me ask
10 you some questions about it.

11 A Okay. All right. We'll turn to the
12 next slide, and it's just a picture of a man
13 observing a pecan tree shaker. This is a picture
14 taken in the summer, and it --- we recommend
15 today as a standard practice that trees be shaken
16 in the summer prior to nut maturity to tend the
17 crop. We do that because we want to prevent that
18 overloaded tree situation that then translates to
19 a lack of production the following year. So,
20 growers are now instead of watching the tree
21 overbear all the way to completion and harvest,
22 they're now interdicting that by going in in July

1 and August and reducing the amount of crop on the
2 tree, if a pest has not done that previously.

3 The following slide says that it is --
4 - I make the statement, to maintain healthy
5 foliage until frost. It is --- pecan growing
6 season is seven plus months, over 210 days.
7 That's a long period of time to have a crop plant
8 have foliage on it, but pecan trees must have
9 good healthy foliage. They must be protected from
10 insects and diseases through that period of time.
11 They must be protected from drought stress that
12 would impact the foliage, because healthy foliage
13 late in the year all the way up until frost
14 occurs in the fall is considered to be a positive
15 thing for next year's crop.

16 The next slide, there's a statement
17 that a pecan harvest is highly mechanized in most
18 orchards today. This equipment is --- carries a
19 fair amount of expense. It is necessary to
20 harvest orchards of substantial size, let's say
21 the acreage values that have been used, 30 acres
22 and above. I tell people that they will need

1 equipment at that acreage of 30 acres, and that
2 it continues up to the orchards of 100s of acres
3 and above. So, it depending on shakers that you
4 see on this page. Second, the next page simply
5 shows pecan harvest, two pecan harvesters on the
6 upper left and lower left, different design, a
7 lot of different style of machinery and brands of
8 machinery, and a lot of diversity of those being
9 employed in pecan orchards.

10 Once the pecans are picked up off the
11 ground there's --- you must separate out on the
12 ground debris, leaves, sticks, rocks, et cetera,
13 so there's a cleaning operation that must happen.
14 So, the two pictures on the right depict pecans
15 being cleaned in an orchard. Some growers use a
16 cleaning plant with the equipment is fixed and
17 maintained within a barn. The equipment is able
18 to be pulled into the orchard, and they are
19 separating not only sticks and debris from good
20 nuts, they're also separating inferior nuts or
21 off nuts from good nuts.

22 The next slide, a statement that

1 drying pecans after harvest maintains quality.

2 Buyers typically want pecans that have a 4 to 4-
3 1/2 percent moisture content, and can penalize
4 growers if that moisture content is higher.

5 Higher moisture contents in pecan kernels in
6 harvest can result in mold and discoloration, and
7 can result in rancidity, and instability of the
8 oil.

9 So, here we show drying wagons. Moldy
10 pecan on the upper right picture from too much
11 moisture and heat, green moisture tester that
12 used to evaluate moisture in a pecan. The small
13 picture sandwiched in the middle of the slide,
14 and then a drying heater/dryer air impeller
15 that's used for drying pecans in the lower right
16 picture.

17 And my last slide, basically two
18 tables that shows the perishability or --- of
19 pecans. The first table show --- it is a study
20 that was done on --- looking at storage
21 temperature of pecans after harvest and relative
22 humidity percentage after harvest. And the number

1 of days it took for mold to develop on the nuts
2 in this particular study which was a cultivar
3 called Stuart. And it shows that at 86 degrees
4 Fahrenheit in high humidity it only took 19 days
5 for those pecans to develop mold on the kernel
6 rendering them unsaleable.

7 There's a progression --- there is an
8 improvement that as temperatures decline and
9 humidities decline, the amount of time it takes
10 for pecans to mold is lengthened. So, pecans at
11 32 degrees at or around freezing takes 208 days
12 for mold development, 80 percent relative
13 humidity and more than 300 days at 72 percent
14 relative humidity.

15 Second table on this slide is a
16 storage study by Wagner, 1977, and he showed that
17 pecans at zero degrees temperature had a life, a
18 shell life --- this would indicate their
19 edibility, consumability that would extend up to
20 24 months either in shell or shelled. You'll
21 notice in that particular table that shelled
22 pecans have a lower storage life than in shell.

1 The shell is actually protection that lengthens
2 the life, but shelled pecans can be stored more
3 efficiently with less space if the shell is
4 removed. So, that's just some generalizations on
5 storage of pecans.

6 Q Mr. Nesbitt, I'd like to ask you a
7 couple of questions, general observation
8 questions.

9 JUDGE GUTHRIDGE: Could I ask one
10 thing?

11 MR. QUIROS: Yes.

12 JUDGE GUTHRIDGE: On that last page,
13 the long-term storage, the last table. Are those
14 in shell or shelled, or either way?

15 MR. NESBITT: That is in shell pecans.
16 They would look at --- they would shell the pecan
17 and look for evidence of mold on the kernel.

18 JUDGE GUTHRIDGE: For the storage
19 they're in the shell?

20 MR. NESBITT: They're in the shell but
21 much of those are at room temperature or above.

22 JUDGE GUTHRIDGE: Thank you. Sorry.

1 MR. QUIROS: Thank you, Your Honor.

2 BY MR. QUIROS:

3 Q Mr. Nesbitt, have you ever observed
4 packages of shelled pecans in a grocery store?

5 A Yes, I have.

6 Q Have they ever been refrigerated to
7 your knowledge?

8 A I have not seen that personally.

9 Q Ever seen them in the freezer?

10 A Never seen that personally.

11 Q And how are they generally packaged?

12 A Generally, a cellophane bag that's
13 clear and you can see the kernels in it.

14 Q Any freshness dating on that bag?

15 A No. I don't know that I could say that
16 I remember looking at that. That didn't jump out
17 off the packaging. I mean, I tend to --- you
18 know, as someone who works with pecans, I look at
19 the color, the condition of the kernel, and make
20 a judgment based on that.

21 Q What are those sort of judgments that
22 you make when you take a look at those kernels?

1 A When I --- when seen in high volume
2 grocers, it's not uncommon to see fairly dark
3 colored kernels. They're not that attractive to
4 me, and understand that I --- we have pecan shows
5 in Texas where we judge pecans, the growers enter
6 pecans for competition so we look for the best
7 and very high, bright kernel color. And that's
8 often absent from what we see, what I see in a
9 lot of big grocers. Now, I do see, you know, nice
10 kernels with retailers, those who are engaged in
11 pecans, or who have a gift shop, or some other
12 business that's maybe trying to sell more
13 attractive product.

14 Q When you see a dark colored pecan that
15 has been shelled what thoughts do you have about
16 its shelf life or rancidity?

17 A Well, it indicates to me that there --
18 - that it has been at room temperature for a
19 period of months because we know that kernel
20 color declines at room temperature after about
21 four months, three to four months be significant
22 color loss. That's ongoing over time unless it's

1 vacuum sealed in some way, frozen, et cetera.

2 Q Will that represent a degradation in
3 the pecan?

4 A Well, color changes is concomitant
5 with some instability of the oil. It's indicating
6 the oil is becoming less stable, and so if the
7 oil is becoming less stable, that means rancidity
8 is happening either at a perceptible or
9 imperceptible level. So, I interpret loss of
10 color with rancidity at some level.

11 MR. QUIROS: Thank you, Mr. Nesbitt. At
12 this time we would like to tender Exhibit 61, and
13 I have follow-up questions, as well, for this
14 witness.

15 JUDGE GUTHRIDGE: All right. Is there
16 any objection from USDA?

17 MS. CHILUKURI: No objection.

18 JUDGE GUTHRIDGE: Any objection from
19 the audience? Hearing no objection, Exhibit 61 is
20 admitted into the record.

21 (Whereupon, the above-referred to
22 document previously marked as Exhibit

1 61 for identification, was admitted
2 into evidence.)

3 JUDGE GUTHRIDGE: If I could ask before
4 Mr. Quiros asks his questions, you have the
5 photos of like tree shaking and things in here.
6 Could a person who is so interested find video of
7 that on YouTube or on the internet, do you know?

8 MR. NESBITT: Some of what --- I have
9 similar pictures in a fact sheet on Improved
10 Pecans that's published by our agency. It's found
11 on Agihorticulture which is a website that is
12 kind of clearinghouse of information. I think you
13 will find YouTube, I'm not a big YouTube --- I
14 haven't looked through that exhaustively. I would
15 think you would find some of those examples on
16 YouTube.

17 JUDGE GUTHRIDGE: Thank you.

18 BY MR. QUIROS:

19 Q Mr. Nesbitt, you work with growers as
20 part of your job. Is that correct?

21 A That's correct.

22 Q And when you have reviewed Exhibit 1,

1 the proposed Federal Marketing Order, I want you
2 to relate it to the challenges that you see face
3 growers on a continual basis. What are some of
4 those challenges that growers face that are
5 addressed by this? But first just tell us about
6 the challenges.

7 A Well, the growers --- a pecan grower
8 is working with a permanent perennial crop. He
9 can't start over like a cotton farmer each year
10 and switch crops, so he's made a commitment to
11 get to the age of production capabilities, so
12 that's one challenge that they have, is they're
13 locked into a crop. There are some advantages to
14 the longevity of pecans, but the grower has trees
15 that are valuable, and he has to try to farm them
16 each growing season. It's a long grown season, as
17 I indicated it's seven months plus depending on
18 the cultivar. That's a long period of time.
19 There's not a lot of farmers who engage in
20 producing a crop where the growing season is that
21 long.

22 This long growing season prohibits

1 pecans being produced in many areas of the world
2 that have too short of a growing season. But with
3 that long growing season comes a number of pests,
4 stress, water management, so growers encounter a
5 lot of annual management costs, production costs
6 through a long growing season with a perennial
7 fixed permanent crop, and they don't know what
8 the price is going to be at harvest generally.

9 So, it allows for growers --- I've
10 seen growers who make shortcuts because they
11 don't know whether this --- you know, what the
12 year is -- how the year is going to turn out.
13 There are lots of leasing arrangements in the
14 pecan business where growers lease an orchard to
15 another operator. And I've seen those lease
16 arrangements be tenuous because they don't know
17 how to commit --- you really need to commit to a
18 pecan orchard for multiple years to get the most
19 out of it, and when price is questionable it's
20 hard for these lease arrangements to be developed
21 to the benefit of both parties, both to the owner
22 and to the lessee. And so, I've encountered that

1 frequently, that lack of price stability impacts
2 those types of basic farm business decisions that
3 lots of farmers encounter. So, I think an effort
4 to market --- I was aware with my advisor as a
5 graduate student, the late Dr. Benton Storey was
6 very motivated in 1989, 1990, 1991 to become
7 engaged in the health promotive act benefits of
8 pecans because he saw the need to increase
9 consumption, because consumption was flat, and a
10 lot of people in the northern states don't know
11 what a pecan is. And he hoped to change that in
12 order to increase prices and make a more stable
13 pricing infrastructure for pecans. So, I see this
14 mirroring his efforts or attempts to make, you
15 know, both domestically and globally awareness of
16 a product that is a healthy product. That should
17 have positive impacts on the growers trying to
18 make year to year decisions whether to stay in
19 the pecan business, how to manage his orchard.

20 Q So, you've observed price instability
21 during your ---

22 A I've observed ---

1 Q And sometimes that price instability
2 has led to people not putting the full inputs on
3 their orchards that they would normally do for
4 good cultural practices?

5 A Yes. And I --- to take a step further,
6 I've seen it cause people to exit the business
7 maybe earlier in their --- you know, these may be
8 some cases retirement age, and they would have
9 farmed longer, but the price being what it is,
10 they just simply gave up. I've seen orchards that
11 have gone out of business for, you know,
12 generally speaking financial reasons, which has
13 to be partly tied to prices.

14 Q Just for clarity, an input that I put
15 on my trees this year might have an effect five
16 years later. In other words, my decision to
17 fertilize, for instance, this year might affect
18 the production several years from now.

19 A I don't know that I would go on record
20 and say that many years out, but certainly we
21 know from research some of the things that are
22 happening within the tree with respect to

1 fertilizer is a two year --- it's very definitely
2 a two-year process. There are certainly big
3 picture improvement things that have farther
4 reaching consequences than five years, but in
5 terms of you have to be engaged for X number of
6 years, I would put it at two as a minimum based
7 on the alternate bearing tendencies of pecans.

8 Q And maybe survival for water and
9 things like that.

10 A Absolutely, yes.

11 Q Thank you. You mentioned that you feel
12 like that there's some issues with promotion with
13 regard to pecans. Do you think it would help if
14 there was more promotion, generic promotion of
15 pecans?

16 A I think so. I'm a nut consumer of not
17 only pecans but other nuts, and I like other
18 nuts, and I evaluate other nuts for sale in
19 grocery stores. And I've observed a big change in
20 the pistachio industry. I've encountered --- I
21 have children that play sports in high school,
22 and I've encountered parents sitting at a

1 baseball game eating pistachios, and I think that
2 has to do with what I see in terms of promotion
3 of pistachios. And I'm doubtful that pecans --- I
4 don't think pecan today is keeping up with some
5 of those efforts that maybe pistachios and other
6 nuts are making.

7 Q Thank you. You mentioned research and
8 the lack of research funding. Do you think that's
9 a problem that is holding the industry back
10 somewhat?

11 A Well, pecan is a relatively new crop
12 in terms of --- if look at history and
13 domestication of pecans, we're only talking about
14 --- we're still in the first 100 years of growing
15 pecans, and many tree crops extend back hundreds,
16 if not thousands of years, citrus for example,
17 thousands of years of domestication. So, we've
18 learned a lot. I've seen a lot of changes since I
19 became engaged in pecan research in the late
20 1980s, but we have a lot of unanswered questions.
21 We have fewer people working on pecans today in a
22 lot of the land grant universities. I've seen

1 Mississippi basically give up having a pecan
2 research effort or program, just as an example.
3 We have fewer Extension Specialists engaged in
4 pecans in Texas today than we did in 1960s, '70s,
5 '80s, so I believe there's still unanswered
6 questions, and I believe our lack of personnel is
7 also tied to lack of research dollars.

8 Q You mentioned one of your mentors
9 talking about health awareness years ago. Would
10 additional consumer research be helpful to this
11 industry?

12 A Consumer research in terms of ---

13 Q Benefits.

14 A Benefits. In terms of market, consumer
15 awareness, or consumer ---

16 Q All of that.

17 A I had a gentleman contact me in
18 approximately 1999. He called my office at Fair
19 Hope, Alabama where I worked for Auburn
20 University, and he said I'm --- he said I wanted
21 to call you because I'm very impressed with what
22 I've --- this is after --- during the time I

1 think the Loma Linda study came out, so I could
2 be off on the dates. But he had seen some of the
3 cholesterol benefits that were published I think
4 in conjunction with the Loma Linda study. He said
5 I've been on cholesterol medication for years, he
6 said. He said my pecan diet is working. He said I
7 think this huge. I think other people need to
8 know about it. And I'm asking you why you're not
9 telling more people about it? I said well, I'm
10 just a horticulturist and that's really not my
11 job, and I get the message. And that's a small
12 anecdote, but certainly when a person off the
13 street tells you their health has been impacted
14 and they think other people ought to know it, to
15 me that speaks to your question, that yes, I
16 think other --- there's room for greater consumer
17 awareness.

18 Q Thank you. You mentioned seeing
19 packages in a grocery store in a cellophane bag
20 with various shapes and coloring. You think
21 handling regulations on sort of packaging and
22 handling, grading, size, updates of maybe grading

1 and size regulation in packaging and handling
2 would help the industry, and help increase
3 prices, maybe saleability to consumers in the
4 future?

5 A Yes, I think so. I think some color
6 standards would be beneficial. We have fielded
7 calls from growers from time to time asking for
8 some of the USDA --- there are some USDA
9 standards. They're old, and many of the people in
10 the industry don't believe that they're adequate
11 for where the industry is today in marketing and
12 sales of pecans.

13 There's a lot of diversity in interest
14 in sizes that are desirable to different
15 consumers, but I think color is something that
16 maybe should be monitored at least by the
17 industry, and communicated to the consumers,
18 because I think there's many consumers that could
19 experience higher quality pecans if they were
20 seeking pecans of a lighter color.

21 Q Thank you, Mr. Nesbitt. Do you work
22 with pecan data and industry data on a regular

1 basis as part of your job?

2 A Yes. In terms of --- you know, we keep
3 abreast of state production levels. We work with
4 growers and communicate with growers on their
5 production levels. I don't monitor consumption
6 regularly, but I do look at it from time to time.
7 But, yes.

8 Q Would improved data in the industry be
9 beneficial to the work that you do and to
10 growers, in general?

11 A Yes. Yes, availability of it, easier
12 access, easier to find would be helpful, sure.

13 Q Thank you. I want to turn your
14 attention to Exhibit 23, which you said you had
15 read and reviewed. This is Dr. Marco Palma's
16 study. Do you know him on the faculty and staff
17 of Texas A&M?

18 A Yes, I do know Dr. Palma. He and I are
19 ----he is at least partial employment in my same
20 agency.

21 Q And you're familiar then with this
22 study and his conclusions, first with the

1 promotion works with agricultural products?

2 A Yes, sir.

3 Q Do you agree with that?

4 A I agree, yes.

5 Q And the midpoint for the assessments
6 with native and seedling is one and a half cents,
7 and the midpoint for --- of assessments for
8 improved varieties is two and a half cents. Is
9 that your understanding from his report?

10 A Yes.

11 Q Thank you. And he shows an expected
12 benefit based on his studies of 6.3 cents for
13 improved pecans expense, if you will, across 2-
14 1/2 cents, and 3.6 cents. Does that seem
15 reasonable to you as a result of ---

16 JUDGE GUTHRIDGE: For the record, could
17 you point out which table that is?

18 MR. QUIROS: Yes, I'd be glad to. Using
19 Table ES-1 of Exhibit 23, which is the midpoint
20 of the price range of assessments for improved
21 and for native and seedling. And then I'm
22 referring to Table ES-4 on Exhibit 23, which is -

1 - he believes is the price benefit per pound, in
2 shell pound through a Federal Marketing Order of
3 6.3 and 3.6 cents. Does that seem reasonable in
4 your opinion?

5 MR. NESBITT: It's a positive outcome,
6 so I think it is reasonable. If you're going to
7 have an assessment and lack of positive outcome,
8 so I think the growers would be receptive to
9 that.

10 BY MR. QUIROS:

11 Q What do you believe about the balance
12 of costs to benefits for the farmers if Dr.
13 Marco's study is correct? Do the benefits
14 outweigh the burdens, or do the burdens outweigh
15 the benefits?

16 A I believe the benefits outweigh the
17 burdens, and I believe --- this is an opinion,
18 but I believe there's additional benefits that he
19 may not be able to justify or demonstrate in this
20 document.

21 Q Right. Such as?

22 A Such as, I think increased consumption

1 that may change the price dynamics depicted in
2 the study.

3 Q Thank you. In a positive way?

4 A Yes.

5 Q Thank you. Do you know any of the
6 members of the American Pecan Board?

7 A I do. I have to admit that the
8 language change and the title of the industry
9 changed, and I can be --- if you had to ask me to
10 name them all, I could stumble with that.

11 Q I understand. I won't do that, and
12 thank you for helping me. I know that I shouldn't
13 do that. But do you think that during the time
14 that the American Pecan Board has been active
15 that you've received regular input on their
16 activities either through Pecan South or through
17 regional meetings, or Texas Pecan Grower
18 Association meetings, or otherwise?

19 A Yes, I think they've done due
20 diligence to be present and grower --- where
21 growers have met both in Texas. I'm aware of some
22 county meetings, as well as the state meetings,

1 and I think all of that speaks to their effort to
2 do this, you know, in a public way, yes.

3 MR. QUIROS: Mr. Nesbitt, I have no
4 further questions, but I just wanted to publicly
5 thank you for your flexibility in being able to
6 come earlier today, and for you being able to
7 prepare these materials on short notice.

8 MR. NESBITT: You're welcome.

9 MR. QUIROS: Thank you. No further
10 questions at this time, Your Honor.

11 JUDGE GUTHRIDGE: Does USDA have any
12 questions?

13 MS. VARELA: Jen Varela, USDA. This
14 might be brief, and I apologize if it seems off
15 course, but it might lead me to a question that's
16 on course.

17 CROSS-EXAMINATION

18 BY MS. VARELA:

19 Q So, I notice that part of your
20 assignments here include citrus?

21 A Correct.

22 Q Citrus work. And I was just curious to

1 know whether any of that work has been in
2 conjunction with the Texas Valley Citrus
3 Committee. Have you had any projects funded by
4 them?

5 A I am stationed, if you will, in
6 College Station, and I'm less engaged with the
7 citrus industry in the valley.

8 Q Okay.

9 A I work in the Gulf Coast area citrus
10 there, which is much smaller component of Texas.
11 I have toured there. I interact with the growers
12 from time to time. I am somewhat aware of
13 cooperative efforts, marketing efforts with
14 citrus there.

15 Q Are you aware of any other research in
16 Agrilife that might be funded by that committee?

17 A Which committee would that be, again?

18 Q The Texas Valley Citrus Committee. I
19 ask because it's another Federal Marketing Order
20 that is currently operating in Texas. But if
21 you're not aware of it, that's fine. I was just
22 curious.

1 A Yes, I probably couldn't speak to that
2 with any experience.

3 MS. VARELA: All right, thank you.
4 That's all right.

5 JUDGE GUTHRIDGE: Are there any more
6 USDA questions? Mr. Hinman?

7 MR. HINMAN: Don Hinman from USDA.
8 Thank you for your testimony.

9 MR. NESBITT: Sure.

10 MR. HINMAN: I just want to ask
11 clarifying questions on several pages.

12 MR. NESBITT: Okay.

13 BY MR. HINMAN:

14 Q On page 3 of your slides, you are
15 using --- you define improved as the key word
16 being grafted and budded. And I'm going to ask --
17 -

18 JUDGE GUTHRIDGE: For the record page
19 3, since the pages aren't numbered, is the page
20 with terminology at the top.

21 MR. HINMAN: Yes, it's Exhibit 61, and
22 the slide that is titled "Terminology." And in

1 the middle of the page here improved varieties
2 cultivars, grafted, budded being as the key
3 characteristic.

4 BY MR. HINMAN:

5 Q And I'm asking you a question because
6 I ran across a third word in this relation that
7 had not heard --- mentioned as of yet in this
8 hearing. And when I submitted as testimony some
9 data from the National Agricultural Statistics to
10 begin this hearing, and they had a third word
11 involved in that. They said grafted, budded, or
12 topworked. Is that phrase familiar to you? Does
13 it mean exactly the same thing as the grafted and
14 budded?

15 A Topwork is language in horticulture
16 for removing the top of the tree, and putting
17 grafts or buds onto limbs, or using the framework
18 of a tree and replacing the top by lots of grafts
19 or budding. A lot of times when you graft or bud
20 a tree it's a one-step process. We take a tree
21 that's a half-inch in diameter and --- the trunk
22 is a half-inch in diameter and we place a bud

1 there or cut it off and graft it, and it's over
2 and done. Topworking implies multiple grafts to
3 change over a variety of a tree that's older and
4 bigger in size.

5 Q Okay, that is a very helpful
6 distinction, so thank you for that.

7 On page 9, yours is not page numbered
8 so it is the page that is titled "Tree Spacing."

9 A Okay.

10 Q And I want to make sure I understood
11 correctly the distinctions in density. Did you
12 say, and correct me if I'm wrong on this, that
13 there was basically three --- the title of that
14 could actually be density, and with the first
15 two, 20 by 40, and 30 by 30 what you would call,
16 and then the next --- and then it was moderate
17 and others. Could you review what the
18 distinctions were in those six different levels
19 of density?

20 A Okay. And there's three --- probably
21 for the record, I don't know how this would
22 happen. We probably should just replace all of

1 that with the word "spacing," because what I'm
2 showing is six sample spacings that are commonly
3 used in pecan orchards.

4 The first --- two of the --- the high
5 density --- we really don't have hard definitions
6 in the pecan industry that high density means so
7 many trees per acre or such and such. It's a
8 little bit of subjective interpretation across
9 the industry, so we don't really have terms ---
10 we use high density really to imply any density
11 where the trees are going to crowd. And really in
12 truth all of these six examples the trees are
13 going to eventually crowd, so they're all high
14 density. But I think that's a little bit
15 misleading in terms of description.

16 High --- what's different is how soon
17 you have to remove trees or begin hedging based
18 on the starting space --- the spacing that you
19 start with. So, I don't know if I'm helping you
20 or hindering your understanding.

21 Q Yes.

22 A But 30 by 30, and 20 by 40 are two

1 examples of spacing used predominantly from El
2 Paso to California. And those are close spacings,
3 and they're going to use a hedger to maintain the
4 sunlight in those plantings. The closer spacing
5 means more nuts per pound produced earlier in the
6 life of that planting.

7 Now I said previously that 33, 35 were
8 moderate spacings. There's not a huge difference
9 between 30 by 30, and 33 by 33, but it might mean
10 two years difference in terms of when trees are
11 removed, or have to be removed.

12 So, I think the point of this slide is
13 there's diversity in terms of grower tree
14 spacings that they implement. And there's
15 different outcomes from that, both on production.
16 We have growers that still plant trees 50 feet
17 apart, 50 by 50, who use half of the trees that
18 are 35 by 35 spacing leaves. And there are
19 growers that prefer that because they don't like
20 to cut trees down when the tree is 15 years old.
21 They prefer to let it get bigger. They feel like
22 they're getting more from that. They're giving up

1 a fair amount of production in the younger life
2 of that orchard, and they'll have to make a
3 decision to hedge or thin later.

4 There's tremendous diversity, and
5 there's a diversity in outcomes based on the
6 strategy that's being employed to maintain
7 sunlight on the spacing that's chosen.

8 Q Thank you, appreciate that. And then
9 one last slide I want to refer to is --- it's
10 number is 21, is "Pecan Is Alternate Bearing,"
11 Pecan Is Alternate Bearing slide.

12 A Okay.

13 Q And I just want to make sure I
14 understand. You talk entirely about improved in
15 this, and is it always strongly a tendency that
16 it is two-year cycle, high-low, high-low, high-
17 low. That is the pattern. Right? For improved.

18 A And I'm making the statement that it's
19 pecan trees in general, native and improved.

20 Q So, the two-year cycle typically
21 applies to native, as well.

22 A Yes.

1 Q Okay.

2 A It can be more distinct in natives
3 because of management inputs, their genetics. We
4 have improved cultivars that have a lower ---
5 little less alternate bearing than others. It's
6 one of their improved traits. They have what we
7 call alternate bearing index is lower, which is
8 what the growers want. So, natives from genetics,
9 and the kind of orchard cultural system, pest
10 management, they very definitely will have --- be
11 alternate bearing, and can be more distinctly
12 alternate bearing than improved based on
13 management inputs that are going in to offset
14 that. These can be managed with a lower level of
15 inputs than with improved, then meaning that
16 they're going to show a lot of alternate bearing.
17 So, this would apply to all pecan trees.

18 MR. HINMAN: Okay, thank you. Thank you
19 for that clarification. No further questions.

20 JUDGE GUTHRIDGE: Are there any more
21 USDA questions?

22 MS. CHILUKURI: Yes.

1 BY MS. CHILUKURI:

2 Q Mr. Nesbitt, I believe at some point
3 you referred to the tremendous diversity of
4 pecans. 986.28 is the definition of pecans, and
5 it distinguishes between native and improved
6 varieties.

7 A Okay.

8 Q So, I was just hoping to learn more
9 about your thoughts as to how easy it is, or
10 difficult it is to distinguish between native and
11 improved varieties in practice?

12 A Okay. Well, the diversity --- let me
13 support that statement to your question. There's
14 tremendous diversity in native, within the native
15 --- what we consider native pecans. They range
16 from more than a thousand per pound in the
17 natives, and that's the smallest, little bitty
18 tiny things. Turkey food is what some people are
19 referring them as, and then we see natives that
20 get up into the 60s per pound, rarely up into the
21 50s per pound, but that can happen. There are
22 impressive natives that have many of the

1 desirable characteristics for marketing, but it's
2 one tree, and there's generally not enough to
3 multiple that desired trait for it to be
4 marketable.

5 But in practice, real thick shell,
6 hard shell is indicative of native. Low percent
7 kernel. You may have a fabulous kernel that comes
8 out of a native pecan, but it's kernel percentage
9 may be 38 percent kernel, which we would deem to
10 be not very good, and it has to do with all that
11 shell thickness and density contributing to the
12 overall weight of the pecan. So, small, generally
13 small, generally thick shelled is what connotes
14 native to those people who are buying pecans.
15 Smaller, thicker shell.

16 Q Thank you. And just to clarify my own
17 understanding of the industry, can you tell me
18 how many growers there are in the industry that
19 would meet the definition set out in 986.16, the
20 definition of grower, so 30 acres or 50,000
21 pounds?

22 A I don't know that, and I've attempted

1 to survey Texas in terms of acreage size, number
2 of trees, et cetera, and very low survey in the
3 one that I'm thinking of. And I would say that
4 Texas is extremely diverse, just speaking about
5 Texas alone. There are lots of orchards of all
6 sizes. And we obviously have fewer --- 2,000 acre
7 orchards, there's a handful of those. We have
8 lots of orchards that are 30, 40, 50, it's every
9 size you can think of. This 87,000 acres that the
10 USDA reports for the 2012 census, while I don't
11 know who --- the breakdown of that in specific
12 based on at least my travels and experience with
13 the growers, and one small survey, that it's
14 extremely diverse. It's every size you can
15 imagine.

16 MS. CHILUKURI: Thank you.

17 JUDGE GUTHRIDGE: Are there any more
18 USDA questions? Mr. Quiros?

19 MR. QUIROS: Yes, just for
20 clarification.

21 REDIRECT EXAMINATION

22 BY MR. QUIROS:

1 Q Topworking is really just a type of
2 grafting or budding on older trees. Is that
3 correct?

4 A Yes, sir.

5 Q And the spacing density is really just
6 about sunlight, so if I plant 50 by 30, and have
7 29 trees on an acre, and then it --- between year
8 15 and 20 take out half of those so that I have
9 approximately 14-1/2 trees per acre, those could
10 actually --- those orchards in year 15 and year
11 20 could produce absolutely relatively speaking
12 the same production. Is that correct?

13 A Yes. The --- what you're attempting to
14 do in tree removal is interdict the shading, I
15 mean, eliminate it, limit it, reduce it so that
16 growth rate of the remaining trees continues to
17 be --- to trend upward, and that production often
18 we see compensation of the remaining trees by the
19 reduced competition and shade impact of those
20 trees that were removed.

21 There tends to be a little bit of a
22 temporary downturn, brief, growers will

1 experience that; hence, the Stahmann's, and what
2 I relayed about their --- what's been written
3 about them. But it then kicks back up as those
4 trees grow and fill in that space, and you have
5 again a thriving productive pecan orchard.

6 Q So, density or spacing alone cannot
7 necessarily tell you about how productive that
8 acre is. It also depends on management practice
9 and spacing of sunlight, et cetera.

10 A Yes.

11 MR. QUIROS: Okay, thank you very much.
12 No further questions at this time.

13 JUDGE GUTHRIDGE: Any further USDA
14 questions? Are there any questions from the
15 audience? No questions.

16 (Witness excused.)

17 MR. QUIROS: Lunch?

18 JUDGE GUTHRIDGE: It's 12:42. That
19 sounds like a good idea to me.

20 (Whereupon, the above-entitled matter
21 went off the record at 12:43 p.m., and resumed at
22 1:51 p.m.)

1 JUDGE GUTHRIDGE: Back on the record,
2 please. We're back on the record and Mr. Adams
3 is back on the stand. Mr. Adams, you've been
4 sworn for this hearing, so I don't need to do
5 that again, and we're going to go back to those
6 exhibits 47 through--

7 MR. DAVIS: 40 to 53, Your Honor.

8 JUDGE GUTHRIDGE: --yes, to whatever
9 is, 53 that were skipped yesterday.

10 MR. QUIROS: That's correct, Your
11 Honor. We were just about--at the point where we
12 broke yesterday, just about at the point where we
13 were just going to have Mr. Adams identify what
14 each of the exhibits are. They've been
15 introduced but not tendered yet.

16 JUDGE GUTHRIDGE: I think they each
17 need to be identified.

18 MR. QUIROS: Yes sir. I'm going to
19 ask the witness to--

20 JUDGE GUTHRIDGE: Do you want to just
21 run through all of them and then admit them all
22 at the end or--

1 MR. QUIROS: Yes sir, that's what I
2 thought I'd do after we discuss them. We just to
3 just refer to them briefly and then tender them
4 at the end.

5 JUDGE GUTHRIDGE: On second thought,
6 maybe--does Department of Agriculture think
7 they'd have any questions on each exhibit as we
8 go through them, or--let's do them one by one
9 just in case.

10 MR. QUIROS: Okay. Again, we're just
11 going to introduce them at this time and just
12 discuss them.

13 JUDGE GUTHRIDGE: Whenever you're
14 ready.

15 MR. QUIROS: Thank you. One moment,
16 Your Honor.

17 DIRECT EXAMINATION

18 BY MR. QUIROS:

19 Q Mr. Adams, I'd like to ask you to turn
20 your attention to Section 986.46, subsection (a),
21 and focus on that language at the end of the
22 first sentence. Take a moment to get it in front

1 of you. It should be on your page 5.

2 A Okay.

3 Q It's the fourth line down, and it says
4 "and shall be submitted on an approved nomination
5 forms;" is that correct?

6 A Yes.

7 Q All right. So in order--we--you
8 understand that what we have that we need to
9 submit is just, if you will, a form that we--your
10 proponent group worked on with the Agricultural
11 Marketing Service, is that correct?

12 A That's correct, yes.

13 Q And you understand these are just
14 drafts now, and that there will be additional
15 comments that the USDA may have in the future, is
16 that correct?

17 A Yes.

18 Q And for the proponent group in the
19 future, is that correct?

20 A That's correct.

21 Q But as part of the duties of the
22 Board, and then later the Council will be this

1 process of the grower referendum and then the
2 nominations and qualifications?

3 A Yes.

4 Q So for purposes of identification, I'd
5 like you to identify Exhibit 47, and Mr. Davis is
6 going to put up the front page of Exhibit 47. If
7 you'd just identify that briefly for the record,
8 what is that?

9 A This is the pecan grower referendum
10 form.

11 Q And this would be used by growers to
12 approve the proposed federal marketing order if
13 it's--if the Secretary gets to that point?

14 A That's correct, yes.

15 Q Thank you. If you take a look at
16 Exhibit 48, and tell us what that is?

17 A It's a call for nominations--

18 Q And that is--

19 A --for the grower nomination ballot.

20 Q Thank you very much. And now if I ask
21 you to take a look at Exhibit 49, tell us what
22 that is?

1 A It's the call for nominations for the
2 sheller nomination ballot.

3 Q Thank you. What is Exhibit 50?

4 A It's the actual ballot for the grower
5 nomination--nominees.

6 Q Thank you. And please identify
7 Exhibit 51?

8 A Ballot for the sheller nominations.

9 Q Thank you. And if you would, please
10 identify Exhibit 53--52?

11 A It's the confidential background
12 statement.

13 Q Thank you. And then please, Exhibit
14 53?

15 A Confidential background statement for
16 the public member or alternate.

17 Q Okay. Thank you. And it was your
18 opinion, was it not, that it might be helpful if
19 the proponent group included those in the record
20 for people that were viewing this information,
21 just so they could see an example or an exemplar
22 of the type of form that would be used?

1 A Yes.

2 Q Okay, thank you. All right, I'd like
3 to turn your attention back, if you would, to
4 Section 986.46(a), and please take a look at the
5 second sentence in (a), it begins with the word
6 "eligibility." Please take a look at that.

7 A Okay.

8 Q Explain what you were trying to do
9 with that sentence.

10 A Make sure that the candidates
11 qualified for the position, and we're also--
12 again, we're reflecting the diversity across the
13 three regions and reflecting in the Board seats,
14 the Council seats, a diverse representation that
15 makes up the three regions and the large and
16 small parties.

17 Q And you believe those are reasonable
18 procedures based on other federal marketing
19 orders that you've reviewed?

20 A I do.

21 Q And it also follows the advice that
22 you received from the USDA on how to conduct a

1 nomination?

2 A Yes.

3 Q Thank you. When it says "the
4 nomination shall follow procedures in this
5 section," what do you mean, under (a)?

6 A It means that we would follow the same
7 procedures for both--for each of the subsequent
8 nominations, we would repeat the procedures as
9 just--we don't have to repeat it in the language,
10 but do it the same way.

11 Q Okay, so both for the initial nominees
12 and then the successor--

13 A That's correct.

14 Q --member elections?

15 A That's correct.

16 Q Okay.

17 MS. CHILUKURI: Excuse me, we're not
18 sure where you are.

19 MR. QUIROS: Okay, thank you. We're
20 in 986.46(a), the second sentence. And there's a
21 phrase that says "shall follow the procedures set
22 forth in this section," and he was just

1 discussing what he thought it meant by this
2 section. You all got it? Okay, thank you.

3 BY MR. QUIROS:

4 Q Let's look at the third sentence of
5 (a) that begins "The Secretary shall select and
6 appoint;" do you see that?

7 A Yes.

8 Q Why include that?

9 A It states the obvious; the Secretary
10 is responsible for the selection of the nominees
11 and the alternates.

12 Q Thank you. Any other comments on this
13 section 986.46(a)?

14 A Yes, the process of seeking
15 nominations and then voting on the nominations to
16 put forth nominees for the Council and the
17 alternates and for the Secretary to then pick the
18 Council and the alternates from the nominees is a
19 bit foreign to most Americans. Most of us are
20 used to voting for nominees, and then they are
21 absolutely elected absent voting fraud or other
22 error. Here we nominate, then we vote on the

1 nominees to get a refined list of nominees that
2 the Secretary may choose from. We think this is
3 the law as set forth in the Act, and it makes
4 sense, and we support it, but it is different. I
5 also bring it up to say if the Board were
6 drafting this section again, we would have
7 inserted the word "votes on" after the word
8 "casts" in the second sentence to help in part
9 decide the nomination and then voting on the
10 nomination ballots. So the first part of the
11 second sentence in 986.46(a) would read
12 "Eligibility to cast votes on nomination
13 ballots."

14 Q Thank you, Mr. Adams. Let's move on
15 to Section 986.46(d), Successor Nominees. Before
16 we go through each subparagraph, tell us what is
17 the overall plan for getting nominations and for
18 voting on those nominations?

19 A We want an open, inclusive process
20 that will encourage participation and buy-in by
21 all segments of the industry, but we also want
22 procedures that ensure diversity in size large

1 and small, geographic from all regions, and
2 industry growers and shellers. Accordingly, we
3 say in general that growers in one area will
4 nominate growers from that area and likewise,
5 shellers in one area will nominate sheller
6 representatives from that area.

7 Q Okay Mr. Adams, let's address each
8 section. First, the call for nominees in
9 986.46(b)(1), subsections (i)through (ii). What
10 do these address?

11 A It addresses the nominees or growers
12 from each region and it addresses where a grower
13 will be deemed to reside for these purposes if he
14 or she has trees in more than one region.

15 Q Did you consider other plans?

16 A We did.

17 Q What were some of those plans?

18 A Well some of them were voting across
19 the entire production area, dividing it up
20 different ways, but the Board voted unanimously
21 to proceed with the way it's written.

22 Q And why did you reject some of those

1 other alternatives?

2 A It didn't make sense. I mean, it
3 wouldn't give us, again, the representation
4 across the geographic area, large/small, it
5 wouldn't address the diversity that the industry
6 reflects.

7 Q Okay, if I could ask you now to turn
8 your attention to Section 986.46 (b)(iii) to
9 (iv); what is this?

10 A Same process for shellers. How to
11 establish where a sheller resides and if she
12 handles in more than one region.

13 Q Did you consider other options?

14 A We did.

15 Q What were some of those?

16 A Same thing. We were looking at taking
17 a vote across the entire production area, but
18 again, we chose to reflect the diversity, the
19 large/small sheller--I think this has been
20 represented in the testimony, that we've address
21 the large/small sheller, the large/small grower.

22 Q So you were trying to properly reflect

1 the industry as it is now?

2 A No question.

3 Q And also large and small businesses as
4 defined under the Small Business Administration
5 Guidelines?

6 A Correct.

7 Q Thank you. Let's--Mr. Adams, let's
8 move on to Section 986.46(d)(2), Voting for
9 Nominees. Please take a look at that. Again,
10 before we discuss the subsections and the
11 individual subsection, what was the intent of the
12 Board here?

13 A To have as wide open participation as
14 we can handle in the selection of members while
15 ensuring Board members will be elected by those
16 they represent. We'll have for example large
17 grower voting for large grower and small grower
18 voting for small grower representation.

19 Q Thank you. Take a look at Section
20 986.46(d)(2)(i).

21 A Okay.

22 Q Why is this included?

1 A We wanted clarify that each grower
2 will have only one vote, even though they may
3 have several employees or owners or managers.

4 Q Thank you, Mr. Adams. Now if you
5 would, take a look at--I just lost my place
6 somehow. Look at the second sentence if you
7 would, please of that section, that begins at
8 "Each grower shall be entitled to cast only one
9 nomination ballot." What does that mean?

10 A Well, it means they can just vote
11 once, but they can vote once for each of the
12 three candidates, I mean each of the three
13 positions.

14 Q Okay, each of the three grower seats
15 in his or her region?

16 A That's correct.

17 Q Okay. Did you consider other
18 procedures or other ideas?

19 A We considered a lot of them, but
20 again, the time spent on this particular section
21 was extensive, but the Board voted unanimously
22 with this format.

1 Q Great, thank you. Let's move on to
2 Section 986.46 (d)(2)(ii); what does this
3 provide?

4 A That ensures that the grower only
5 votes in one region, even if they've got pecans
6 in multiple regions.

7 Q So if they have operations in more
8 than one region, they can only--they have to
9 elect which region they vote in?

10 A Yes. Now they can vote their volume
11 in all three regions--

12 Q Okay. But this is so that we just
13 don't have the same grower voting multiple times
14 in multiple regions?

15 A They've got to vote for one grower
16 seat--I mean one--the three seats in one region.

17 Q But all of their volume will be
18 accounted for because of that?

19 A That's correct.

20 Q Okay thank you. Next, let's address
21 Section 986.46 (d)(2)(iii) and (iv). Why did you
22 include those?

1 A Those are the provisions for the
2 shellers, and they pretty much mirror what we did
3 with the growers, taking into account that the
4 grower pool is different from the sheller pool.

5 Q Okay, but they're just really mirrors
6 of the grower?

7 A Yes.

8 Q And you felt like the same values that
9 were applicable to the--that are established by
10 these for the grower were the same ones that
11 should be applicable to the sheller?

12 A Yes.

13 Q Thank you. Next, let's address 986.46
14 (d)(2)(v). Tell us why you included this.

15 A This, if a vertically integrated
16 person is a grower and a sheller, this requires
17 that they elect to vote one way or the other;
18 they can't vote both as a grower and a sheller,
19 they've got to pick.

20 Q And who decides that?

21 A They do.

22 Q Okay. Thank you. Let's move on if we

1 can then to Section 986.46(d)(3)(i) through (iv),
2 the Nomination for Grower Seats. Let's stop at
3 the final sentence of (i) if you will. This is
4 (i). It says "The Council will mail ballots to
5 all growers." How will the Council identify
6 growers?

7 A Work with the USDA using industry data
8 that's out here and it's cooperative effort, but
9 the USDA will actually compile the list.

10 Q Next, it refers to voting
11 instructions; where do the voting instructions
12 come from?

13 A They are from the procedures set forth
14 in the order. We work with the Council and USDA
15 staff to make sure they are clear and fair; you
16 can refer to Exhibit 48, which is the grower
17 nomination petition to see how that's been
18 reduced to verbiage.

19 Q In the draft that is part of Exhibit
20 48?

21 A Yes.

22 Q Thank you. Has the instruction been

1 introduced in these proceedings?

2 A Yes, in the draft form of the Grower
3 Nomination Form that we just introduced.

4 Q Thank you. Let's now turn to the
5 second and third sentence of 986.46(d)(3)(i).
6 Take a look at that for a moment. Again, it's
7 "Growers may cast their ballots," do you see
8 that?

9 A Yes.

10 Q Discuss that, please? What does it
11 describe?

12 A Well, that's just how the--I mean we
13 give the voters options as to how to cast their
14 ballots, so that describes how ballots are cast.

15 Q Okay. Who will oversee if a ballot is
16 complete and properly signed?

17 A I think the USDA or the Secretary's
18 staff.

19 Q Thank you. Will there be an appeals
20 process if there is a contest?

21 A We don't have anything in this order,
22 but they can always petition the Secretary. I

1 think that--if they feel they were not fairly
2 treated, they go to the Secretary. They go to
3 USDA.

4 Q Thank you. If you would please, could
5 you discuss the sections 986.46(d)(ii) through
6 (v); what are these?

7 A You said (d)(3)(ii)?

8 Q Yes sir, let me do that again. It
9 would be 986.46(d)(3)(ii) through (v), beginning
10 with "On the ballot."

11 A Ready?

12 Q Yes sir.

13 A These are the detailed instructions on
14 how growers will vote according to the seat
15 numbers and by grower size. It might have been
16 clearer if the FMO had said, and I would
17 recommend that the language of (d)(3)(ii) be
18 written to say "On the ballot, growers shall
19 indicate their vote for the grower nominee
20 candidates for the grower seats, and also
21 indicate their average annual volume of in shell
22 pecan production for the preceding four fiscal

1 years." We have but this on the ballot form,
2 Exhibit five-zero, 50.

3 Q Thank you. And so you think it would
4 be a clarification to add the words "vote for the
5 grower nominee candidates," is that correct?

6 A Yes, that's correct.

7 Q Because of the previous--they had
8 already previously nominated or signed forms,
9 petitions for nominations, so we're making clear
10 that this is where you're voting as opposed to
11 where you're nominating?

12 A We think it would make it clearer,
13 yes.

14 Q Thank you.

15 MS. CHILUKURI: Mr. Adams, could you
16 repeat the change so we could--

17 THE WITNESS: Read the change?

18 MS. CHILUKURI: Yes, repeat the
19 change. Or repeat the whole sentence with the
20 change.

21 MR. QUIROS: May I give that to you?

22 MS. CHILUKURI: Yes.

1 MR. QUIROS: On (ii), it says now "On
2 the ballot, growers shall indicate their
3 nomination." Strike the word "nomination" and
4 add in the phrase "vote for the grower nominee
5 candidates." So (ii) would now read on the
6 ballot "Growers shall indicate their vote for the
7 grower nominee candidates for the grower seats."
8 Mr. Adams--is that clearer?

9 MR. HILL: Yes, that's good thank you.

10 BY MR. QUIROS:

11 Q Mr. Adams, in your opinion, why these
12 suggested changes in 986.46(d)(3)(ii)?

13 A For clarity through the section to
14 strike the word "nomination" and replace it with
15 "vote for the grower nominee candidates," since
16 the grower nomination process has already
17 occurred.

18 Q Thank you, Mr. Adams. Take a look at
19 the next subsection, which is 986.46(d)(iii); why
20 did you select the cutoff of 176 acres as the
21 line between small and large growers?

22 A Again, that was a lot of discussion

1 among growers, not only the American Pecan Board,
2 among growers, we polled growers as to what,
3 again, to be inclusive of the small grower, and
4 it was going to be somewhere above the 30 acres,
5 but in a category that would include small
6 growers, small commercial growers. And we ran
7 numbers, we looked at Small Business
8 Administration definition, and we came up with
9 that one, which is actually lower than small
10 business requires, but we felt that that would be
11 inclusive of that group of the industry, and 176
12 was what we felt like was appropriate.

13 Q Mr. Adams, that's very interesting.
14 How does your proposal--how did your proposed
15 definition of small grower being less than 176
16 acres compare or contrast to the Small Business
17 Administration's standard for a small business,
18 pecan grower business? Can you take us through
19 the math on that?

20 A I can if you give me a calculator.

21 Q Yes sir, I will. And Mr. Adams, as
22 you're doing that, will you give us the values

1 that you're using to help us understand how you
2 all arrived at your calculation?

3 A Well again, the comparison is the
4 \$750,000 as defined by Small Business as a small
5 business. I'm going to multiply 176 acres times
6 \$2.12 a pound, which is the average 2014 price
7 published by the statistics, and then compare the
8 result of that calculation with 750 and--

9 Q Mr. Adams, can I walk you through what
10 I think I heard you say?

11 A You can, yes. Go ahead.

12 Q So you're going to use the 176 acres
13 that's in this subsection?

14 A Yes.

15 Q And you're going to multiply it by
16 1,666.67 inshell acres--I'm sorry, pounds per
17 acre, which was the testimony you got from
18 Exhibit 19 from Dr. Marco Palma?

19 A Yes.

20 Q And then you're multiplying that times
21 the 2014 per inshell price across the production
22 area of Exhibit 6 that you received from the USDA

1 of \$2.12?

2 A Correct.

3 Q And what do you get there as a gross
4 revenue from that size farm?

5 A \$621,867.91.

6 Q And that's less than \$750,000?

7 A It is.

8 Q And so by using 176 acres, then you're
9 preserving that as a small business--a small
10 grower's seat, but also a small business under
11 the SBA definition?

12 A We are; that's correct.

13 Q So prices could go up, and it would
14 still be a small business--

15 A Yes.

16 Q --for some time. Thank you. I want
17 to draw your attention to the language change
18 that we had in--which I think the Judge actually
19 pointed out in the previous section, which was
20 986.45. Sorry guys, may have gotten the wrong
21 section.

22 JUDGE GUTHRIDGE: Are you talking

1 about the one, the 176--

2 MR. QUIROS: Yes.

3 JUDGE GUTHRIDGE: --175 acre?

4 MR. QUIROS: Yes, I'm about to--yes,
5 we're about to get--yes sir.

6 JUDGE GUTHRIDGE: That's (b)(1). 45
7 (b)(1).

8 MR. QUIROS: Thank you.

9 BY MR. QUIROS:

10 Q As the Judge just referenced, do you
11 recall that we had an issue with regard to the
12 seat 2--I'm sorry, seat 3 allocated to a grower
13 whose acreage does not exceed? Do you recall
14 that? Specifically, Mr. Adams, I may have been
15 unclear. Do you recall that we were trying to
16 take away any--

17 A I thought you were addressing the
18 Judge.

19 Q Sorry, Mr. Adams.

20 (Off the record comments)

21 BY MR. QUIROS:

22 Q I think we want to make a consistent

1 correction, I guess. If you take a look at
2 986.46 (d)(v), where it says "seat 3," it says "a
3 grower with 175 or fewer acres. The Judge
4 pointed out yesterday in another section that it
5 would be clearer if we said less than 176 instead
6 of 175 or fewer; is that true?

7 A That's true, yes.

8 Q And you would recommend if this was
9 being voted on today by the proponent group that
10 this language should be changed to less than 176;
11 is that correct?

12 A Yes.

13 Q Thank you very much. Let's get back
14 to the 176 as the dividing line between large and
15 small growers; did you consider any other sizes?

16 A Yes.

17 Q Why were they not adopted?

18 A Again, it was the unanimous vote of
19 the Board that we take all the options that we
20 had considered larger than 176 and smaller than
21 176, we felt like--I mean, you've got to make a
22 decision, and we felt like that that was the

1 appropriate number.

2 Q Thank you, Mr. Adams. In each one of
3 these sections, 986.46 (d)(3)(iii) through (v),
4 we have a phrase in there that says we're
5 selecting the top two nominee vote getters to
6 send to the Secretary; why are you doing that?

7 A We think that comports with the law,
8 but we also think it comports with the industry.
9 The industry will have nominated candidates that
10 they think can serve well, and they'll vote on
11 them, and we think that the names we submit, the
12 top vote getter and the second place vote getter
13 will be the appropriate recommendation to the
14 Secretary, who will make the decision.

15 Q Have you seen that in other federal
16 marketing orders?

17 A Not specifically.

18 Q Have--is this the--was this
19 communicated to the industry when your--in your
20 listening and solicitation of support
21 discussions?

22 A Well, it was heard first from the

1 industry, and so as--again, the way this process
2 worked is we were out there a year and a half or
3 more listening to what the constituents, the
4 stakeholders in pecans wanted. And so when we go
5 back in January and begin to actually put down
6 on paper the rules, this rule reflected what the
7 industry had indicated strongly that they wanted.

8 Q Were other numbers of nominees
9 discussed?

10 A They were discussed, but again, I
11 won't say we had a mandate, but we had a real
12 strong opinion among the constituents, the
13 stakeholders that this was what they preferred.

14 Q Was it ever suggested that four
15 nominees should be sent to the Secretary?

16 A The Board considered this, but we felt
17 it was highly unlikely that four really well
18 qualified nominees for all of these positions
19 would be nominated, which could lead to a rather
20 lackadaisical board members or to someone who had
21 very little support from the representative
22 group, which could lead to lack of enthusiasm and

1 support for the Board decisions. Also remember
2 these procedures apply to the initial
3 nominations, so we'd be talking about four
4 nominees for nine spots or 36 member nominees.
5 This would be very cumbersome to manage and for
6 the Secretary to sort through. Some have
7 suggested four nominees would lead to more
8 diversity, but there's no proof of this. You
9 could still end up with four non-diverse
10 nominees. The Secretary can always address
11 diversity if there's a problem, and we don't
12 think there will be.

13 Q All right, thank you, Mr. Adams.

14 Let's move on to Section 986.46(d)(4), this is
15 the sheller section, (i) through (iii), if you'll
16 please discuss this.

17 A Well this is just addressing the same
18 issues with the sheller nominees, and it mirrors
19 what I've just described for the grower seats.

20 Q Again, why was 12.5 million pounds
21 used as the divider between large and small
22 shellers?

1 A We really--we sought input from the
2 sheller community, and I talked personally to
3 National Pecan Shellers, I talked to individual
4 shellers, and quite honestly the members, the
5 sheller members of the American Pecan Board
6 contacted their--so we probably looped in 20
7 different shellers on this conversation, and we
8 were starting out with higher numbers. We
9 actually--one compromise was a lower number, but
10 we came back to the 12.5 and then polled the same
11 group, and they felt like that this was a
12 representative dividing line between large and
13 small shellers.

14 Q Why is it important to have a large
15 sheller seat?

16 A Well again, diversity, so that we can
17 ensure that the industry is well represented from
18 the processor community.

19 Q Mr. Adams, applying the Small Business
20 Administration definition as a small business
21 sheller would be one that creates less than \$7
22 million per year of gross revenue; would a small

1 sheller as it is described in the proposed order
2 generate more or less than \$7 million?

3 A It would be less. I mean, he would
4 fall into that category.

5 Q Or some at some portion between 1
6 million pounds and 12.5 million pounds though
7 would be room for small shellers?

8 A Correct.

9 Q At some point in that going between 1
10 million pounds and 12.5 million pounds, do you
11 think it would cross over the threshold between
12 small--in the SBA definition between being a
13 small business and a large business?

14 A Yes.

15 Q Thank you. Tell us again, Mr. Adams,
16 Was there discussion about the number of nominees
17 that would be forwarded to the secretary in this
18 section?

19 A Yes, but our discussions showed that
20 there were simply not enough shellers of the
21 various sizes and geographic dispersion to have
22 more than two nominees for six positions. And as

1 with growers, but even more so, if we discussed
2 the numbers, we risked having insufficient
3 candidates for some seats in some regions and
4 nominating lackadaisical candidates or candidates
5 with little support.

6 Q Thank you, Mr. Adams. Let's move on
7 to Section 986.46 (b)(5); take a minute to look
8 at that, please. It's entitled at the head
9 "Reports to the Secretary." What does this
10 section provide?

11 A This specifies that the nomination
12 voting process must be completed before July 15
13 of each year in which the elections are held.
14 The nominations and results of the votes on the
15 grower and sheller nominees must be certified and
16 forwarded to the Secretary by that date, along
17 with other information requested by the
18 Secretary. The Secretary will then select the 15
19 members and alternates for the grower and sheller
20 seats.

21 Q Again, was there discussion of
22 forwarding more nominees?

1 A There was, but for the reasons
2 discussed above, the Board unanimously voted in
3 favor of two nominees per council member seat.

4 Q Is this section designed to provide
5 for the selection of the council membership by
6 the Secretary as required by the Act?

7 A Yes.

8 Q What type of information is the
9 proponent group anticipating forwarding to the
10 Secretary along with the names of nominees?

11 A Well again, sharing lots of
12 information. Again, share with the information
13 that the Board had collected. I think that's
14 summarized in 52 and 53.

15 Q So some of that information that you
16 would forward to the Secretary would be
17 summarized in Exhibits 52 and 53?

18 A Of course, yes.

19 Q Thank you. Regarding the date for
20 submittal to the Secretary, will this date
21 provide ample time for the nominations to be
22 submitted to the Secretary and for him or her to

1 select the members and alternates prior to the
2 beginning of the next fiscal year or term of
3 office?

4 A I think so, yes.

5 Q Is the proponent group aware of the
6 need to promote diverse membership on the
7 Council?

8 A Yes, absolutely.

9 Q Thank you. Let's move on to Section
10 986.46 (b)(6), which begins "At Large Members."
11 Would you take a moment to review that section
12 before I ask you questions?

13 A Okay.

14 Q Would you discuss this section for us,
15 Mr. Adams?

16 A These are procedures for the public
17 member and the accumulator member, and the
18 qualifications for each. These nominees will be
19 made to the Board; in our discussion we have
20 recognized that this will allow for the Board to
21 nominate diverse members in the event that the
22 grower/sheller process has not adequately

1 addressed that issue.

2 Q Let me see if I get that correct. One
3 of the ways in which you can make sure that
4 there's ample diversity with regard to your Board
5 is to use these at-large member selections to
6 make any re-balancing of the Board that you need
7 to?

8 A Yes, I think that relies on the wisdom
9 of the seated Board--seated Council.

10 Q Mr. Adams, were there other procedures
11 discussed that were not adopted in Section 986.46
12 (b)(6)?

13 A We did; I don't think there's a
14 sentence in this order that wasn't discussed
15 extensively. We discussed using an open
16 nominating process, and that was not practical in
17 either the public member or the accumulator
18 member since we could not easily identify who
19 would be qualified to nominate an vote;
20 accordingly, we opted for this procedure.

21 Q Thank you, Mr. Adams. Let's move on
22 to Section 986.46(b)(7), Nomination Forms. Take

1 a minute to study that please, and then I'll
2 start to ask you questions.

3 A Okay.

4 Q Why don't you discuss this section.

5 A Okay, it's the kind of representative,
6 but it says we'll distribute the nominating form
7 in a manner directed by the Secretary, and the
8 information on each type nomination form. As
9 entered into evidence, the proponent group has
10 worked with the Secretary to propose these forms,
11 Exhibit 48 through--and 49.

12 Q Thank you, Mr. Adams. Why do growers
13 have to have two seconds to nominate in (i) and
14 (ii), but shellers need only one second in
15 subsection (ii) ?

16 A Well, it's a simple factor of numbers.
17 There are more growers, and so a grower nominee
18 would be nominated by a grower and the two
19 supporting grower signatures would indicate that
20 it was a well recommended nominee. And on the
21 sheller side, there's just not as many shellers,
22 and so they would follow the same process, but be

1 supported by only one supporting nominator.

2 Q Finally on this section, discuss
3 section 986.46 (b)(8), Changes to the
4 Procedures.

5 A Give me a second.

6 Q Tell us about that section.

7 A Well, we noted earlier these are the
8 best procedures we can propose where we recognize
9 that if problems are encountered or if there is
10 perceived unfairness, the Board should be allowed
11 to propose changes to the Secretary.

12 Q Should growers and shellers be allowed
13 to vote again if there are changes?

14 A I don't think in all cases. This is
15 a representative democracy; besides, if the
16 grower and sheller don't like an action, they can
17 vote out members every four years, and they can
18 vote in the federal marketing order in five
19 years. If a proposed amendment is truly
20 substantive, like changing the number of seats or
21 qualifications, the Secretary will call for a
22 referendum to approve.

1 Q Thank you, Mr. Adams. Mr. Adams, do
2 you think it would help if we went through all of
3 the changes that the proponent group has proposed
4 in the language of Section 986.46 to make sure
5 that we were all on the same page?

6 A I think it would be very helpful, yes.

7 Q Maybe I will ask you questions, and if
8 you could respond in the affirmative, that might
9 be helpful. Is the first change, Mr. Adams, in
10 section 986.46(a), beginning at the second
11 sentence?

12 A Yes.

13 Q And we have added the word "votes on"
14 after the word "cast," is that correct?

15 A That's correct.

16 Q Thank you. In the second--

17 MS. CHILUKURI: We suggest--could you
18 read that completely for the record so we all
19 have a clear understanding of what the change is?

20 MR. QUIROS: That is really good idea,
21 thank you, counsel. Yes, so that sentence, the
22 second sentence of Section 986.46(a) will now

1 say--Mr. Adams, please let us know if this is
2 correct--will now say "Eligibility to cast votes
3 on nomination ballots, a counting of nomination
4 ballot results, and identification of member and
5 alternate nominees shall follow the procedures
6 set forth in this section, or by any other
7 criteria deemed necessary by the Secretary." Is
8 that correct?

9 THE WITNESS: That's correct, yes.

10 MR. QUIROS: Thank you, Mr. Adams.

11 Mr. Adams, just--

12 JUDGE GUTHRIDGE: Mr. Quiros, could I
13 ask you, does the proponent group intend to
14 submit these in writing also? That might be--

15 MR. QUIROS: Your Honor, what we--
16 there have been several changes suggested by both
17 the USDA and the proponent group as we have gone
18 through these matters. We thought we would have
19 somewhat of a caucus at the end of the
20 discussions in Tifton; we haven't talked with the
21 USDA to see if they'd accept these terms, but
22 just to sit and go through it together to see

1 what changes have been proposed, what changes may
2 not have been discussed but might need to be
3 discussed after we've had seven or eight days of
4 testimony by that time. So that was what our
5 hope was, to make sure that we left with all of
6 the information, at least have a complete
7 understanding of what--so that the USDA would
8 know what the best thinking was, and we would--
9 we're willing to discuss any other way, but we
10 just thought if you will, a form of conference
11 committee would be helpful for us all to make
12 sure we got any language changes confirmed.

13 JUDGE GUTHRIDGE: That may be, but it
14 seems to me as part of that though, it would
15 probably be helpful to have all those changes set
16 froth perhaps maybe with the language in the
17 original proposal, followed by the new language
18 in written form, so rather than people trying to
19 scramble to write down changes--

20 MR. QUIROS: Whatever Your Honor
21 suggests, we'd certainly be willing to go on the
22 record with regard to anything, assuming counsel

1 for the USDA agrees.

2 JUDGE GUTHRIDGE: Does the USDA think
3 that would be--

4 MR. HILL: I would support having that
5 myself, because with ex parte there's only so
6 much we can do off the record, and I would rather
7 have that in writing.

8 MR. QUIROS: Your Honor, maybe what we
9 should do, just as a suggestion is meet with
10 counsel for USDA and other members of the USDA
11 and the proponent group go through any changes,
12 and then submit them as an exhibit, even if it's
13 handwritten in a copy to Exhibit 1 of changes
14 that we've agreed to at the end so that they
15 could be posted for all to see.

16 JUDGE GUTHRIDGE: I'm not sure whether
17 that would violate the ex parte prohibition.

18 MR. HILL: I would rather not be part
19 of that; you can put it together and submit it.

20 JUDGE GUTHRIDGE: Yes, that's--

21 MR. QUIROS: Thank you, well we'll put
22 together and submit a sort of a revision to

1 Exhibit 1 after consultation with counsel for the
2 USDA and other parties just to make sure that we
3 all heard the same thing.

4 JUDGE GUTHRIDGE: That's what they--I
5 think they don't want to sit with you elsewhere
6 out of the public hearing--not that they don't
7 think--

8 (Simultaneous speaking.)

9 MR. HILL: I'm not going to be part of
10 that process, so you're going to have to do what
11 you need to do.

12 MR. QUIROS: I understand, thank you.
13 I was a little dense on that one; I wasn't
14 following you there. We would be please to
15 submit a revision of Exhibit 1 at the end of all
16 testimony that we think properly reflects the
17 discussions that witnesses have had as part of
18 the testimony.

19 JUDGE GUTHRIDGE: And it may not
20 necessarily have to be the entire Exhibit 1 with
21 strikeouts and new language, maybe just the
22 particular sections or subsections for which

1 you're proposing changes, otherwise you would
2 have another however many page document. It's
3 sort of like looking--I don't know if you've ever
4 been through legislative history, and looked at
5 the original draft of a bill, and then they
6 publish a new one that has all these strikeouts
7 and all this other stuff; if you did the whole
8 proposal that way, that might be kind of
9 cumbersome. If you would just--would it be
10 acceptable to USDA if it were just the sections
11 that were being--that had proposed changes?

12 MR. HILL: That would be fine. One
13 suggestion I would make though is if we could
14 possibly get this by early in Tifton so we could
15 have a chance to look at this, other witnesses
16 could have a chance to look at this in Tifton,
17 and comment.

18 MR. QUIROS: We would be pleased to--
19 we are first of all thankful for--we're
20 appreciative of all the suggestions of the USDA
21 and Your Honor with regard to this. Just for
22 clarifying purposes, I would like to finish with

1 this witness on these changes to this section,
2 but I felt like it was proper for the USDA to
3 hear those once again before they had an
4 opportunity to question this witness on this
5 section for their own reference points.

6 BY MR. QUIROS:

7 Q So Mr. Adams, the second change that
8 the proponent group is suggesting is on 986.46
9 (b)(3)(ii); is that correct?

10 A Yes.

11 Q And it currently uses the word
12 "nomination" in the first line, and you would
13 strike the word "nomination" and add the phrase
14 "vote for the grower nominee candidates;" is that
15 correct?

16 A That's correct.

17 Q And so (ii) would now read "On the
18 ballot, growers shall indicate their vote for the
19 grower nominee candidates for the grower seats
20 and also indicate their average annual volume of
21 inshell pecan production for the preceding four
22 fiscal years." Is that correct?

1 A That's correct.

2 Q Thank you, Mr. Adams. And Mr. Adams,
3 finally, the changes the proponent group is
4 suggesting for the section 986.46(d)(3)(v), you
5 have replaced the words "175 or fewer" with the
6 words "less than 176," is that correct?

7 A That's correct.

8 Q And so now (v) would read "Seat 3
9 (grower with less than 176 acres of pecans)." Is
10 that correct?

11 A That is correct.

12 MR. QUIROS: Thank you. No further
13 questions at this time of the witness on this
14 section.

15 JUDGE GUTHRIDGE: I don't imagine the
16 USDA has any questions?

17 MR. HILL: No questions.

18 JUDGE GUTHRIDGE: No questions?

19 MS. SCHMAEDICK: Melissa Schmaedick,
20 USDA. Thank you Mr. Adams for your testimony.
21 You've covered quite a bit of information, so I'm
22 going to just try to break it down step by step;

1 I believe we do have several questions for you.
2 So I'll try to ask in a logical manner here.

3 CROSS EXAMINATION

4 BY MS. SCHMAEDICK:

5 Q So my first question is, taking a step
6 back, understanding the process here, if I
7 understand correctly, you will have a ballot on
8 which there will be names of nominees for either
9 grower seats or seller seats; correct?

10 A Correct.

11 Q And the eligible persons will cast
12 their nomination ballots with their votes, those
13 votes will be tallied, and then the highest vote
14 number, the candidate with the--

15 A This is on the grower and seller
16 ballots?

17 Q Correct.

18 A Okay, I'm with you.

19 Q So the individual receiving the
20 highest number of votes then becomes the
21 Council's nominee for that member seat?

22 A Yes.

1 Q And then the individual receiving the
2 second highest number of votes, or in certain
3 cases, volume, would become the alternate member?

4 A Correct.

5 Q Nominee?

6 A Yes.

7 Q Okay. So just for a point of
8 clarification, I want you to look at Section
9 986.45, entitled "American Pecan Council."

10 A I'm sorry, which section was that?

11 Q 986.46, American Pecan Council. Okay.
12 So I'm going to read into the record the very
13 first sentence. "The American Pecan Council is
14 hereby established consisting of 17 members
15 selected by the Secretary, each of whom shall
16 have an alternate member nominated and selected
17 in the same way and with the same qualifications
18 as the member." My question is to me, that
19 statement sounds--it seems to indicate that there
20 would be a nomination ballot for the alternate
21 member as well as for the member, and if that is
22 not the intent of the proposal, would you be

1 amenable to making a modification that would
2 clarify that the way you have the ballot voting--
3 the ballot counting laid out in your nomination
4 section is indeed the process you want to follow?

5 A Well the process--I mean I think it
6 would be repetitive to have an alternate ballot
7 and a voter ballot.

8 Q Okay.

9 A So if you're asking would I like to
10 include the nominee and the alternate on the same
11 ballot--

12 Q That's not--

13 A --I mean the same ballot used for both
14 processes?

15 Q That is not exactly what I was trying
16 to ask, so let me rephrase it. Is it your intent
17 that through the nomination process, you would
18 identify the nominee for the member seat by
19 identifying the recipient of the highest number
20 of votes?

21 A Yes.

22 Q And is it your intent that you would

1 identify the nominee for the alternate member by
2 identifying the recipient of the second highest
3 number of votes?

4 A Yes.

5 Q So in Section 45, that statement does
6 not reflect that process that you have described
7 in nominations, so my question is would you be
8 amenable to a modification of the language? For
9 example, if we were to remove the words
10 "nominated and selected in the same way," that
11 would clear up the confusion, so that the first
12 sentence of 45 would read "The American Pecan
13 Council is hereby established consisting of 17
14 members selected by the Secretary, each of whom
15 shall have an alternate member with the same
16 qualifications as the member."

17 A Read that again. I think we're right,
18 but go ahead and do that again. Let me hear it.

19 Q Okay. Would you be comfortable with
20 a clarifying change that would remove "nominated
21 and selected in the same way" so that the revised
22 sentence would read "The American Pecan Council

1 is hereby established consisting of 17 members
2 selected by the Secretary, each of whom shall
3 have an alternate member with the same
4 qualifications as the member."

5 A I think that would be acceptable, yes.

6 Q Thank you. Now I want to--

7 A I need to find the person that wrote
8 this, though.

9 Q I guess so. So before I start my next
10 line of questioning, I want to talk to you about
11 diversity. So you've said several times and
12 other witnesses have said several times that
13 diversity is important to the American Pecan
14 Board, but also to the proposed council, is that
15 correct?

16 A (No audible response.)

17 Q And is it correct that the intent is
18 to capture diversity, which currently exists in
19 the industry, in the membership on the proposed
20 council?

21 A Yes.

22 Q Okay. So my concern is that I heard

1 you state that the public member and the
2 accumulator member could be used as seats to
3 satisfy diversity on the proposed council. My
4 question is do you have any other thoughts about
5 the merit of having a public member, other than
6 to serve as a diversity member on your council?

7 A Ask that again. And again--

8 Q Are you having a hard time hearing me?

9 A Yes.

10 Q Okay. Do we need to increase the
11 volume, Mr. Adams? Do you want to increase the
12 volume?

13 A We need to go up with that mic.

14 Q Thank you. Can you hear me now?

15 A Yes, much better.

16 Q Okay. So again, I'll go back to you
17 stated that one of the reasons for having a
18 public member and the accumulator member was that
19 because these individuals would be identified and
20 nominated by the council, that they would serve
21 as a way to enhance diversity on the council. My
22 question to you is, is that the purpose for

1 having a public member?

2 A No, I don't think so. I think those
3 are just--that's an ancillary comment.

4 Q Okay.

5 A For those--because I think those two
6 positions have real reasons, you know. So no, I
7 would not say that that was the primary reason.

8 Q Thank you. So I'm not sure if you did
9 get into a discussion as to why the council
10 elected to have a public member on--

11 A I think that's in the Act.

12 Q Is that the only reason why you have
13 it?

14 A No.

15 Q Okay.

16 A And I think that's evidenced by the
17 fact that before we even considered a federal
18 marketing order in the Act, we had two public
19 members on the American Pecan Board before we
20 even began this process. So I think that--no, no
21 ma'am, that's not a correct reason.

22 Q So what is the value of a public

1 member, in your opinion?

2 A Well, let me go back to the--that
3 issue with the American Pecan Board, because that
4 was the--and we wanted someone outside the
5 industry--now is this on the public member, not
6 the accumulator member?

7 Q We're starting with the public member,
8 yes. Thank you.

9 A Okay. We wanted someone outside the
10 industry, who could--number one, who was
11 qualified, had the expertise, could look at the
12 issues through a different lens, and could assist
13 the other members, the seated members, with
14 another view of things. And for example, we
15 chose a gentleman who had been Executive Vice
16 President with Tyson Foods to be on the American
17 Pecan Board. Nothing with pecans, but we thought
18 his experience would bring more wisdom to the
19 Board. And so I would say that's a similar
20 answer to why a public member would be of
21 benefit. Again, a public member that was
22 qualified in all respects but just not in the

1 pecan business.

2 Q Okay. And since you mentioned the
3 accumulator seat, can you describe why that
4 accumulator seat is considered an at-large seat,
5 and why the council would have the responsibility
6 of identifying that member nominee?

7 A Let's see. Accumulator, and again
8 you've learned that that's kind of a label that
9 's unique to the pecan industry, but that label
10 is self-evident. That guy is accumulating
11 product. It is a big part of our industry. It's
12 the buyer, it the almost--it's not broker, but
13 it's similar, okay. Because that's such an
14 important segment of the industry, because it's
15 not specific to a region, and both grower and
16 shellers deal with accumulators, we just felt
17 like that was an important seat to have
18 representation.

19 Q And so you mentioned that the
20 accumulator is not region-specific?

21 A No. It could be, but not necessarily.

22 Q Okay. Because based on previous

1 testimony, it's my understanding that generally,
2 there are fewer accumulators in the West, and
3 there are generally more in the Central and
4 Eastern regions.

5 A That's true, but that's reflective of
6 the size of the operations. A buyer or
7 accumulator can go to five farms in the West, and
8 fill up a bunch of containers, but he's got to go
9 to a lot more in the East to fill up the same
10 number of containers.

11 Q So would it be also possible that it
12 would be more difficult to have the number of
13 candidates to satisfy the nomination process and
14 the eligibility requirements and the terms of
15 office guidelines with accumulators?

16 A Ask that again.

17 Q Okay. So let me rephrase that. For
18 the grower seats, in each region there are many
19 growers that would be eligible to fill the seats?

20 A Yes.

21 Q And ideally, there would be several
22 candidates who would be interested in becoming

1 nominees for those seats?

2 A Hopefully.

3 Q So the process of having a nomination
4 process and a ballot with candidates and the
5 ability to recreate that process every term and
6 have a cycle of new folks available, that is
7 going to be doable with your grower population
8 because there are so many of them?

9 A Yes.

10 Q And with the sheller seats, it's the
11 same idea; you have a population that's large
12 enough to satisfy all of those elements. It's my
13 understanding that the accumulator community may
14 be too small to be able to allow for that process
15 to happen.

16 A I see where you're going. Let me
17 elaborate. Accumulator--well, going back to your
18 growers/shellers. Growers, we're in this for the
19 long haul. If we've got a tree, if we have made
20 the investment to get a tree productive, and
21 we're year 15, 20 or whatever, that's not a
22 casual decision. Same thing with the shellers.

1 A sheller makes huge investment, capital
2 investment to be able to buy the equipment, to
3 develop a customer base, and so they are more
4 established. An accumulator is a different deal.
5 If you want to be an accumulator this coming
6 season, just go get you a bank loan, and you can
7 become an accumulator. And if you make money,
8 you'll do it again next year; if you don't,
9 you'll go sell shoes. So the accumulator
10 position, the ease of entry and the ease of exit
11 is easy. All you need is a pocket full of money
12 and go buy pecans.

13 So the grower and sheller are much
14 more established pools of candidates, whereas an
15 accumulator, it's a fluid position, and so
16 relying on the selected 15--the other 15 seats to
17 select an accumulator position, we--the wisdom of
18 the American Pecan Board was that we would rely
19 on the wisdom of the 15 nominated seats to really
20 establish who are legitimate, in it for the long
21 haul accumulators, someone that would bring
22 wisdom, bring the knowledge, the experience to

1 the Board in that capacity, and not someone that
2 was just in there for a short period of time.

3 Q Thank you, that's very helpful. I'm
4 going to ask you about another sort of broad
5 conceptual issue.

6 MR. DAVIS: Before you move on to a
7 new area, may I ask a question of the Judge for a
8 second? Your Honor, may I approach the witness
9 just for one second? IF that's all right?

10 JUDGE GUTHRIDGE: Sure.

11 MR. DAVIS: Thank you, Your Honor.

12 BY MS. SCHMAEDICK:

13 Q So I'll start my question again. I
14 want to ask you another sort of broad, conceptual
15 question. So you described your nomination
16 process and how you would identify your nominees,
17 and under the Reports to the Secretary, you
18 talked about the type of information that you
19 would forward to the Secretary. Can you explain
20 to me again what exactly do you intend to
21 forward to the Secretary?

22 A I think we would forward to the

1 Secretary any information that we have. I mean,
2 there's nothing we want to keep back from them;
3 we want to be open in the process, and so
4 whatever the--to be specific, the nominating--
5 these exhibits where a grower would nominate a
6 grower, or a sheller would nominate a sheller,
7 those would be examples of what we would share.
8 I think anything that the ultimate decision was
9 based on would certainly be shared.

10 Q So just to clarify, under 986.46, I
11 think it's five--

12 A Reports to the Secretary.

13 Q Reports to the Secretary--

14 MR. QUIROS: It's also on the screen,
15 Mr. Adams, if you--

16 BY MS. SCHMAEDICK:

17 Q So I'm going to read this first
18 sentence into the record. It says "Nominations
19 in the foregoing manner received by the Council
20 shall be reported to the Secretary on or before
21 15 of each July of any year in which nominations
22 are held, together with a certified summary of

1 the results of the nominations and other
2 information deemed by the Council to be
3 pertinent, or requested by the Secretary." So
4 let's break down that first sentence there. It
5 says "Nominations in the foregoing manner shall
6 be reported to the Secretary." Does that term
7 "nominations," is that in your opinion all
8 inclusive of, as you just indicated, all of the
9 call for nomination forms, perhaps the background
10 and acceptance statements of the nominees, as
11 well as the ballots and the nomination results?

12 A Yes.

13 Q So that's the intent that the American
14 Pecan Board had when they said "nominations," and
15 then "shall be reported to the Secretary?"

16 A Again, all of the information in the
17 forms that were received by the--I guess at this
18 point, the proponent group, I'm really not sure
19 on that but whatever group, I think anything that
20 the proponent group has received would be what we
21 would share. I would hope that this would be a
22 collaborative effort.

1 Q Okay, thank you. And then again just
2 to clarify, it says "together with a certified
3 summary of the results of the nominations." So
4 again, does that--is it your intent that as we've
5 already established, your intent and the American
6 Pecan Board's intent is again to be very
7 transparent and send all of that information,
8 along with a tally of the nomination results, to
9 the Secretary?

10 A I hope we've not indicated otherwise.

11 Q Well, this is a process of just
12 clarifying, so thank you for your answers. So
13 when we look at the second sentence in that
14 paragraph, and I'll again read it in the record,
15 it says "From those nominations, the Secretary
16 shall select the 15 grower and sheller members of
17 the council and alternate member for each member,
18 or an alternate for each member." So again, just
19 for clarification, when you say "from those
20 nominations," are you referring to the same
21 nominations that we already discussed in that
22 first sentence? And we've already described that

1 that is all of the information, all of the names,
2 background statements, voting tabulations?

3 A Well again, the ultimate authority is
4 with the Secretary. Now what we've written later
5 that you'll probably get to, what we've said is
6 that those will be submitted to the Secretary,
7 all the nominations, all the information will be
8 submitted to the secretary. But from those
9 nominations, the top vote getter will be the
10 nominee, and as we discussed earlier, the second
11 vote getter would be the alternate.

12 Q Right, and those would be the nominees
13 from the industry and from the council; you're
14 saying these are our preferred people?

15 A Yes.

16 Q This is--the industry has spoken, and
17 we have identified these folks as our chosen
18 people, and we hope you choose them, too. Is
19 that your understanding?

20 A Exactly. In other words, that's--it's
21 almost--it's a dual step. The industry has
22 nominated what they think are competent and

1 people that will serve them well for the
2 positions, and then the industry gets to vote.
3 And so reflective of the industry, two different
4 times it's been reinforced; first by the
5 nomination process, and then second by the voting
6 process. And so there's been a strong signal
7 sent to the industry, these are the people that
8 we think should serve on--should represent us on
9 that council.

10 Q Okay, thank you. And so at that
11 point, it's your understanding that they are
12 only nominees, and is it also your understanding
13 that the Secretary then has the authority to make
14 the final selection and appointment of those
15 members to the council?

16 A The ultimate authority is the
17 Secretary to select the members. However, what
18 we've said in this order is that they'll be
19 selected from the first vote getter and the
20 second vote getter.

21 Q So it is your intent to limit the
22 Secretary's power to only choose between the

1 first and second vote getters?

2 A Yes.

3 Q I would like to turn your attention to
4 946, first paragraph.

5 JUDGE GUTHRIDGE: You said 946? You
6 mean 986--

7 MS. SCHMAEDICK: 986.46, first
8 paragraph, the last sentence prior to paragraph
9 (a), and I will read it into the record. "All
10 nominees must meet the requirements set forth in
11 986.45, American Pecan Council, and 986.48,
12 Eligibility, or as otherwise identified by the
13 Secretary to serve on the Council." Then I would
14 like to draw your attention to the bottom of
15 paragraph (a), Initial Members. The last
16 sentence says "The Secretary shall select--

17 THE WITNESS: Let me get with that.
18 Where are you now?

19 MS. SCHMAEDICK: Paragraph (a), last
20 sentence.

21 THE WITNESS: Initial Members?

22 MS. SCHMAEDICK: Uh huh.

1 THE WITNESS: Okay. I'm with you.

2 MS. SCHMAEDICK: The last sentence
3 reads "The Secretary shall select and appoint the
4 initial members and alternate members of the
5 Council." And then if you go to 986.45, the
6 sentence before the last sentence in that
7 introductory paragraph, I will also read that
8 into the record. It says "Grower and sheller
9 members and their alternates shall be selected by
10 the Secretary from nominees submitted by the
11 Council." Is it your understanding that the
12 Secretary has the authority to select and appoint
13 members?

14 THE WITNESS: Now say that again?

15 BY MS. SCHAMEDICK:

16 Q Is it your understanding that the
17 Secretary has the authority to select and appoint
18 members to the Council?

19 A The Secretary has the ultimate
20 authority to select the members. I think the
21 reason we're going through this whole process is
22 to give the Secretary some indication of the

1 wishes, the preferences of the industry. And so
2 that's why I go back to the nominees being the
3 top vote getter and the second vote getter, okay.
4 Now the Secretary can I guess appoint either of
5 those to the seat, and the other one to the
6 alternate, but that's why those are recommended
7 to the Secretary, because what we've indicated as
8 an industry, that those are the nominees that are
9 the preference of the industry. And then from
10 those, he can select the Council.

11 Q In your opinion, does the Secretary
12 have the authority to select a name from the list
13 of the nominees that maybe didn't get the first
14 or second highest votes? Does the Secretary have
15 that authority?

16 A I guess the Secretary has that
17 authority, but if he has that authority, why are
18 we going through this process?

19 Q I am not in a position to answer
20 questions; I guess that's my question to you.

21 A My answer is that we're recommending
22 two nominees to the--to each of the seats. They

1 have been thoroughly recognized or vetted by the
2 industry in a--to be representative of the
3 industry, and someone that can serve in each of
4 those seats and serve the constituency well. And
5 as I said, it's a dual process; they've not only
6 been nominated through a process, they have been
7 voted on by the industry. And so we're
8 indicating to the Secretary that those are
9 persons that will serve well and administer this
10 order that we have submitted well.

11 Q So if it were established that the
12 Secretary does have the authority to select a
13 name that was not one of the top two candidates,
14 would you still find value in the nomination
15 process?

16 A If that were the case, it would
17 severely diminish the integrity of this order.

18 Q Have you had a chance to review other
19 marketing orders?

20 A Not as extensively as this one, but I
21 have read other orders, and I've also consulted
22 with other commodity groups that are that are

1 under an order.

2 Q And is it your understanding that all
3 other boards and councils who operate under a
4 federal marketing order are required to forward a
5 complete list of candidates, and that the
6 Secretary has the authority to select candidates
7 that may not be the nominees for those positions?

8 A I was not aware of that.

9 Q Have you not participated in
10 discussions with USDA counsel that raised a
11 concern about this section?

12 A At the first time that we were aware
13 of it was at the 11th hour, almost at the 1130
14 hour, when this became an issue. When we had
15 gotten all along, we has an industry and as a
16 representative board of the industry, the
17 American Pecan Board, we understood that the
18 nominating process was to be as we described it
19 in the order, and was to be reflective of what
20 the industry had indicated to us over the last
21 year and a half or two years, that they wanted
22 competent council that would oversee this order.

1 And I think that in the testimony even today, as
2 I think it was maybe it was Mr. Massey had
3 indicated that over a period of time, as the
4 industry began to warm up to the idea of a
5 federal marketing order, one of the indications
6 of why someone that may have been skeptical or
7 opposed to the order finally has grown--received
8 a comfort level with what the order is and now
9 written was because they were very adamant that
10 the--I think he used the term "who was going to
11 control the order" was a big factor. And so
12 that's what the industry has indicated to us, and
13 that's what is reflected in us writing the rules
14 of the order.

15 Q Mr. Adams, were you present for the
16 testimony of Ms. Watts?

17 A I was.

18 Q Were you present for the testimony of
19 Mr. Hudson?

20 A I was. Not all of it; I was not there
21 for the session on Wednesday morning.

22 Q Were you--I'll just use those two,

1 because I know definitively, or I recall
2 accurately what they did say. Based on my
3 understanding of their testimony, they indicated
4 that in the drafting of this section, it was
5 understood by the American Pecan Board that while
6 this process would yield two top nominees, this
7 process also would result in a complete package
8 of information being sent to the Secretary, and
9 that the Secretary would have the authority to
10 select from any of those individuals.

11 A Well if that was their testimony, then
12 I'm in deference to their testimony, because that
13 was not my understanding.

14 Q And that's never been your
15 understanding?

16 A It's never been my understanding.
17 Again, let me reiterate, and you may--this is--I
18 don't mean it to be repetitive, other than for
19 the sake of emphasis. We go to the industry, we
20 being the American Pecan Board. And we begin to
21 propose what we decided, we the Board--when I use
22 the term "we," it was the American Pecan Board--

1 had understood to be the most viable and the
2 avenue that had the greatest chance of success
3 for a sustained funding mechanism for the pecan
4 industry that it had never before had. And so we
5 came away from the November 2013 meeting with the
6 understanding that the federal marketing order
7 could be customized to the pecan industry based
8 on the Act as we understood it. And then we got
9 an understanding of the Act, with the able and
10 help of the USDA staff, and then we go to the
11 industry. In meeting after meeting after meeting
12 as you've heard described and testified to. And
13 we were listening to see what the industry would
14 want, realizing that there were diverse regions,
15 diverse segments, i.e. growers, shellers,
16 accumulators, buyers, et cetera. And what they
17 would prefer in an order that would fit the
18 industry and serve the purposes of the industry,
19 okay.

20 And one of the things that they said,
21 as Mr. Massey testified to, is who's going to
22 oversee this order? And so our response was,

1 understanding the order that pecan people were
2 going to oversee the order, because this is not a
3 tax program. This money doesn't go to some
4 government entity to be passed down. This is
5 pecan money, and pecan funds were going to be
6 overseen and administered by pecan people for the
7 benefit of the pecan industry. And so they were
8 saying that group of pecan people were very
9 important to them. And so that was a primary, a
10 driving factor in these skeptics that said hey,
11 maybe we've got a good idea, and maybe this
12 industry is going to benefit, but they were real
13 keen on the fact that the overseers of that were
14 pecan folks.

15 That's what I'm describing to you
16 here, because they've been vetted by the
17 industry, they've been nominated by the industry,
18 now they've been voted on by the industry, and if
19 you just throw out the first and second vote
20 getter from what the industry has spoken that
21 they wanted, you're slapping them in the face.
22 And I'm not being representative and faithful to

1 those thousands of growers and shellers that have
2 indicated to me as a representative of the
3 American Pecan Board what they wanted. So I
4 would be letting those folks that have decided to
5 jump on this effort and ride with us, I'd be
6 letting them down.

7 And so that's why I'm indicating to
8 you that the Secretary should choose from those
9 two top vote getters.

10 Q So you just stated that the Secretary
11 should choose from those two; is he obligated to
12 under the Act, to your knowledge?

13 A Under this order.

14 Q This order is a proposal and it is
15 subject to the authority set out under the Act;
16 is that your understanding?

17 MR. QUIROS: We're going to object to
18 the form of the question if it's asking him for a
19 legal conclusion with regard to the Act. He's
20 not a lawyer and we'd prefer if maybe another
21 question be submitted in that case, Your Honor.

22 BY MS. SCHMAEDICK:

1 Q Is it your understanding that all
2 marketing orders are subject to the authority of
3 the Act of 1937?

4 A Yes.

5 Q If it were true that the Act does not
6 outline any requirement on the Secretary to
7 select the individuals put forward by an
8 industry, would that change your understanding?

9 A You've got to ask that again. I'm
10 trying to follow you, but do it again.

11 MS. SCHMAEDICK: One moment; we are
12 securing a copy of the Act.

13 JUDGE GUTHRIDGE: I have a copy.

14 MS. SCHMAEDICK: You have a copy of
15 the Act?

16 JUDGE GUTHRIDGE: I'm a well-prepared
17 Judge.

18 MS. CHILUKURI: Your Honor, do--can we
19 take a recess for five minutes? We--

20 JUDGE GUTHRIDGE: Well, we've been an
21 hour and 45 minutes almost on Mr. Adams right
22 now; why don't we take more like 12 minutes?

1 MS. CHILUKURI: Very good, thank you.

2 JUDGE GUTHRIDGE: Come back at 3:42.

3 MR. QUIROS: Thank you, Your Honor.

4 (Whereupon, the above-entitled matter
5 went off the record at 3:29 p.m. and resumed at
6 3:39 p.m.)

7 JUDGE GUTHRIDGE: Back on the record.
8 Okay, back on the record. Where are we? I think
9 so, from USDA.

10 MR. HILL: Mr. Adams, how you doing?

11 THE WITNESS: I'm good. How you
12 doing, Mr. Hill?

13 MR. HILL: I'm pretty well. Thank
14 you. What is your understanding on who will be
15 running the program if this proposed order
16 becomes an actual order?

17 THE WITNESS: Who will be overseeing
18 the, who will be the administrative body of the
19 federal marketing order for pecans? Was that the
20 question?

21 MR. HILL: My question is who do you
22 think is going to be running this program?

1 THE WITNESS: American Pecan Council.

2 MR. HILL: So you mentioned something
3 about overseeing. What were you going to say?
4 When you said who's overseeing, is that a
5 different, would you have a different answer if I
6 asked you who's overseeing the program?

7 THE WITNESS: No.

8 MR. HILL: I'm going to read for you
9 a statement from the Act. It's 7 U.S.C. 602,
10 Section 602.

11 MR. DAVIS: Give us a second to get
12 that.

13 MR. HILL: Sure.

14 MR. DAVIS: 602?

15 MR. HILL: 602, correct.

16 PARTICIPANT: You have it by that
17 stuff?

18 PARTICIPANT: No, I don't have it by
19 that.

20 PARTICIPANT: Thank you.

21 PARTICIPANT: I have it 601. I have
22 the original Act but I don't have it broken down

1 by that U.S.C.

2 PARTICIPANT: What's the subheading or
3 the heading that you --

4 JUDGE GUTHRIDGE: I have in mine
5 "Declaration of policy, establishment of price
6 basing period, marketing standards, orderly
7 supply flow, circumstances for continued
8 regulation."

9 MR. DAVIS: That Section 2 of the Act?
10 Is that what the notes say?

11 MS. CHILUKURI: We may have different
12 variations in the sense that this is from Westlaw
13 so we're relying on the U.S.C. response but I
14 imagine it would be Section 2 if the headings
15 match up.

16 PARTICIPANT: And "Declaration of
17 policy" is the heading that you have?

18 MS. CHILUKURI: Yes, that's correct.

19 JUDGE GUTHRIDGE: That's the catch
20 line and it begins "It is declared to be the
21 policy of Congress."

22 MS. CHILUKURI: Correct.

1 JUDGE GUTHRIDGE: Mr. Hill.

2 MR. HILL: Okay, so I'm going to read
3 the line that Your Honor was just starting. "It
4 is declared to be the policy of Congress, one,
5 through the exercise of the powers conferred upon
6 the Secretary of Agriculture under this chapter,
7 to establish and maintain such orderly marketing
8 conditions for agricultural commodities in
9 interstate commerce as will establish, as the
10 prices to farmers, parity prices as defined by
11 Section 1301(a)(1) of this title."

12 From that sentence, would you still
13 say that the Pecan Growers or the Pecan Board or
14 the Pecan Council is the overseer of this program
15 or is the Secretary of Agriculture the overseer
16 of this program?

17 JUDGE GUTHRIDGE: And I assume you're
18 asking for his understanding?

19 MR. HILL: That is correct.

20 THE WITNESS: Mr. Hill, first I'm not
21 an attorney.

22 MR. HILL: I understand.

1 THE WITNESS: Let me give you a little
2 background. Now, we've heard this before. I'll
3 say it again. When we broached this topic, I'm
4 talking about the American Pecan Board and the
5 industry, and made the decision to go forward
6 with the federal marketing order under the Act
7 that you just referred to, we realized that there
8 were things that we needed to learn about the
9 Act. We were farmers. We're not attorneys.

10 And so when we informed the Secretary
11 through USDA staff that we were going to go
12 forward, we realized there were two broad ideas
13 that needed to come together. The industry
14 needed to understand the Act and the USDA needed
15 to understand the industry. Okay?

16 And so to try to bring together
17 information on the Act for the industry and the
18 industry to the USDA staff, we were assigned USDA
19 personnel to help us better understand.

20 And we spent a year and a half with
21 the assigned personnel who we thought were
22 educating us to the provisions of the Act under

1 which we would be operating.

2 And, in fact, Ms. Schmaedick, Ms.
3 Varela, Mr. Henman, Ms. Luke (phonetic), had at
4 one time or another been with us on this
5 information exchange tour, okay?

6 And so what we've done as an industry
7 is try to familiarize the USDA with our industry,
8 relying on USDA to familiarize us with the Act,
9 and that included answering questions on this
10 listening tour. It included sessions of the
11 board with USDA staff.

12 And so we were relying on the
13 information being imparted to us on USDA and this
14 issue that has been raised today, we're hearing
15 some things for the first time.

16 And, again, I'm not an attorney. I
17 have read the Act but I didn't read it as an
18 attorney. I read it as a farmer. And so we're
19 hearing some things today for the first time,
20 which is quite surprising because we had relied
21 on USDA staff to guide us in that process.

22 MR. HILL: Okay, understood. Maybe

1 I'll be able to help you a little bit here. If
2 you look at Exhibit Number 1, Section 986.94,
3 just run you through a few sections.

4 THE WITNESS: 986 point --

5 MR. HILL: 94. It's on Page 38-031 in
6 the right-hand, top right-hand corner.

7 PARTICIPANT: Termination?

8 PARTICIPANT: It's up there.

9 MR. HILL: Termination, correct.

10 PARTICIPANT: It's on the board if you
11 need to look at it.

12 BY MR. HILL:

13 Q Okay. Could you read the very first
14 sentence under termination?

15 A "The Secretary may at any time
16 terminate this part."

17 Q And that's Paragraph A. Can you read
18 Paragraph B, please?

19 A Paragraph B?

20 Q That's correct. Right under it.

21 A "The Secretary shall terminate or
22 suspend the operation of any or all of the

1 provisions of this part whenever he or she finds
2 that such operation obstructs or does not tend to
3 effectuate the declared policy of the Act."

4 Q So what is your reading of that? I
5 hate to be obvious, but what is your reading of
6 that?

7 A I mean, it speaks for itself.

8 Q And that is that the Secretary has
9 discretion to end this program whenever he or she
10 feels like it?

11 A That's correct.

12 Q So would you consider that, in your
13 opinion, as basically the ultimate oversight?

14 A I would say yes, with this caveat. We
15 should have been informed of this before we ever
16 began this process, okay, that an issue like this
17 was going to come up today that would destroy the
18 effort of the industry over the last two and a
19 half years to petition the Secretary for a
20 program that's going to help the industry. If
21 this is going to be thrown in our face today,
22 it's being done at the 11th hour.

1 Q Let me ask this question. Are you
2 accepting right now of the fact that the
3 Secretary, that USDA is the overseer of this
4 program? Are you changing your answer?

5 A I'm reading that to, and, again, I'm
6 not an attorney.

7 Q I understand.

8 A And I'm reading that in a literal
9 fashion with just what I've repeated and written
10 into the record today.

11 Q But now I'm asking for your opinion,
12 for your opinion. Do you believe that the
13 Secretary is the ultimate overseer of this
14 program?

15 A I've got to believe what I just read,
16 yes.

17 Q We've had a lot of talk about 986.46
18 about the nominee situation and proffering
19 persons to the Secretary. It was your testimony
20 that the council intends, if this proposal goes
21 forward, that the council intends to offer the
22 Secretary two nominees. Is that correct?

1 A That's correct, yes.

2 Q And those two nominees are for the
3 member seat and for the alternate seat?

4 A That is correct, yes.

5 Q It was also your testimony that, in
6 your opinion, that the Secretary's discretion was
7 just over who was the member and who became the
8 alternate, is that correct?

9 A Say that again. I think I understand
10 what you said, yes.

11 Q Was it your testimony that the
12 Secretary's discretion was not over who to seat
13 in those two seats as a whole but over which one
14 was the member and which one was the alternate?

15 A So out of the two, he could pick a
16 seat and the alternate, yes.

17 Q That's your testimony?

18 A Yes, yes.

19 Q Did the board consider what would
20 happen if the Secretary did not select either of
21 those two persons?

22 A No.

1 Q They did not?

2 A No.

3 Q Does the board understand, what would
4 the board in, well, I can't ask the board because
5 the board isn't here. I'll ask you. What do you
6 foresee happening if the Secretary does not
7 select either of those two nominees because other
8 nominees were not presented to him or her?

9 A It would seriously put in jeopardy the
10 referendum of the growers.

11 Q But what would the board, what would
12 the council at that time, if there was a sitting
13 council, what would the council do? Would they
14 have to go back to work or what would they do at
15 that point?

16 THE WITNESS: What would they do --

17 PARTICIPANT: What do you mean by go
18 back to work?

19 THE WITNESS: -- if you didn't --

20 MR. HILL: Go back to work on finding
21 -- I don't know. What would the council do if
22 two, if the two nominees went forward and there

1 was a non-selection, what will you envision the
2 council would then do?

3 THE WITNESS: Well, I think that
4 scenario is premature because if -- No. Because
5 if that was the, if there was language in the
6 order that was different from the current
7 language, I seriously doubt we'd ever seat a
8 council.

9 MS. VARELA: Jen Varela, USDA. Mr.
10 Adams, I'd like to re-approach. I think what Mr.
11 Hill is trying to get to from a different way and
12 maybe from my perspective as a specialist who is
13 on the ground with these types of committees and
14 this is a question that we would have to ask
15 anyone.

16 What we're trying to get to overall,
17 which I know you understand, is making sure that
18 your vision of how things work is what's written
19 down here, correct? We're on the same page
20 there?

21 THE WITNESS: Can we --

22 MS. VARELA: Oh, sorry. Do I need to

1 be louder?

2 THE WITNESS: Yes.

3 MS. VARELA: Okay, so I'm asking you
4 to go ten years into the future and the council
5 has been functioning, we've been rotating people
6 on and off.

7 But one of those years you hold your
8 nominations exactly the way they're written here
9 and I send up the memo like I normally would and
10 the Secretary decides not to make a selection
11 from, the Secretary says I'm not accepting what
12 you sent in this time. How do you envision the
13 process from that point forward?

14 THE WITNESS: If it was written that
15 way, I don't think we'd ever get there.

16 MS. VARELA: But in a practical sense,
17 what I'm asking is what would the next steps be?

18 THE WITNESS: We'd have to go back and
19 consider rewriting that section. I mean, it's
20 not, I mean, this is what the board, this is the
21 conclusion the board reached as being --

22 MS. VARELA: Right.

1 THE WITNESS: -- appropriately
2 represented and that's why I wrote it this way
3 and for me to tell you what the American Pecan
4 Board is going to do as an alternate --

5 MS. VARELA: No, no. I'm asking you
6 to imagine that the council is in place and it's
7 been running, but one year when, say, only part
8 of the council is up for election or their term
9 is up, if the Secretary sent me a memo back that
10 said, sorry, Jen, I don't accept this one, what
11 do you envision the process is after that? Are
12 we going to have another round of elections? Do
13 you envision that the council would just nominate
14 some alternatives? I'm just --

15 THE WITNESS: You're asking me to
16 speculate on something --

17 MS. VARELA: -- trying to imagine how
18 it would work.

19 THE WITNESS: You're asking me to
20 speculate on something that we hadn't considered
21 as a board and so I don't have an opinion.

22 MS. VARELA: Okay. That's fine.

1 Thank you.

2 MS. CHILUKURI: Mr. Adams, just to
3 clarify my own understanding of your testimony,
4 what information will be -- Oh, I'm sorry. Just
5 to clarify my own understanding of your
6 testimony, what information will be sent to the
7 Secretary under the Reports to the Secretary
8 paragraph?

9 THE WITNESS: What information would
10 be what?

11 MS. CHILUKURI: Would be forwarded to
12 the Secretary.

13 PARTICIPANT: 65.

14 PARTICIPANT: She's referring to --

15 MS. CHILUKURI: Yes.

16 PARTICIPANT: -- 46.

17 MS. CHILUKURI: 46. I believe it's
18 (b)(5), Reports to the Secretary.

19 THE WITNESS: I think any information
20 that had been developed by the American Pecan
21 Council in the nomination process.

22 BY MS. CHILUKURI:

1 Q Okay, can you take a look at the
2 paragraph, sir, and then specify for me which
3 types of information will be sent?

4 A And give me the paragraph again.

5 Q Sure. It's 986.46(b)(5), Reports to
6 the Secretary.

7 A Well, I hate to be simple but I think
8 that lays out the information that would be
9 passed along. I mean --

10 Q So can you tell me for the record what
11 that information would be?

12 A As I said, any information that was
13 developed by the American Pecan Board in the
14 nomination process.

15 Q Which would include, sounds like the
16 nominations, a certified summary of the results
17 and other information deemed by the council to be
18 pertinent or requested by the Secretary.

19 A Yes.

20 Q Okay. Thank you. What is the purpose
21 of sending all of that information to the
22 Secretary?

1 A You'd have to ask the Secretary.

2 Q Can you explain that statement?

3 A The recipient, being the Secretary,
4 would have to tell me why he wanted that or she
5 wanted that.

6 Q Okay, so you're intending to send this
7 because you understand that the Secretary wants
8 this information? Is that what I'm hearing you
9 say?

10 A Again, I'm not sure why some of this
11 is written in there but apparently that
12 information is important so we'll send it. We
13 don't want to hold anything back. We're going to
14 send everything we got but what the Secretary
15 does with it I guess is up to the Secretary.

16 Q Okay, and you intend to send all of
17 those types of information to the Secretary as
18 we've just discussed, but from the reading of
19 this language the Secretary cannot rely on all of
20 that information to --

21 A He can use it however, he can use it
22 and, again, without being redundant, we have a

1 male Secretary so I'm going to use he.

2 Q Sure.

3 A Female Secretary came in, I would use
4 she.

5 Q I understand and I appreciate that.
6 Thank you.

7 A But anyway, I think he would treat it
8 however he wanted. I mean, that would be up to
9 the Secretary.

10 Q Would you be open to allowing the
11 Secretary the flexibility to look at that other
12 information in addition to the nominations to
13 select the grower and sheller seats?

14 A Not for the purpose of the selection
15 of the grower alternate seat because that would
16 be in deference to what was in the order as it's
17 now written.

18 Q But would it be possible to allow the
19 Secretary to have the flexibility to include that
20 information? That doesn't mandate that he go
21 beyond your nominations but to give him that
22 flexibility.

1 A No.

2 MR. HILL: If a council were seated,
3 if a council were seated and for some reason one
4 of the shellers, let's say, had to give up his
5 seat for some reason, maybe a health issue, by
6 what process would you intend to fill that seat
7 or would you want to fill that seat?

8 THE WITNESS: We would want to fill
9 the seat obviously. Wouldn't want to, you know,
10 make it vacant.

11 MR. HILL: Okay. So what process
12 would you use to fill that seat?

13 MR. QUIROS: Excuse me just a second.
14 Just for there is a vacancy section that we are
15 going to cover with this witness later that
16 covers that exact same issue.

17 And my preference would be if you
18 would consider withholding that question until we
19 get to that vacancy. It is spelled out by the
20 proponent group, how they're to fill that vacant
21 seat in that section, just we may be jumping a
22 section or two on that.

1 PARTICIPANT: 986.51 seems to address
2 vacancy.

3 MR. QUIROS: And, Mr. Hill, if you
4 would like to ask that question, I'd like to put
5 up 5.1 for my client and let him have a chance to
6 read that and then consider how you're tying it
7 back to 4.6.

8 MR. HILL: Okay. Sure.

9 MR. QUIROS: If you want to pursue
10 that, Brian.

11 MR. HILL: Okay.

12 PARTICIPANT: Can't we limit this to
13 4.6? I mean, that is --

14 (Simultaneous speaking.)

15 PARTICIPANT: And we're not walking
16 very fast through them.

17 PARTICIPANT: That's true.

18 JUDGE GUTHRIDGE: You know, filling
19 the vacancy doesn't seem to be related to the
20 4.6, to Section 4.6 at this point.

21 MR. HILL: They are a bit different
22 but I am trying to get to the point. I'm trying

1 to get to the point where we're discussing and
2 trying to figure out how -- again, my question
3 before was if the Secretary made a non-selection,
4 what would the council do at that point? So now
5 I'm trying to elicit some testimony on how he
6 feels other seats would be filled.

7 JUDGE GUTHRIDGE: And I think his
8 response a minute ago was under the proposal, as
9 now written, the Secretary would not have that
10 power, I think was his understanding.

11 Whether a proposal or whether a
12 marketing order can, whether the Act permits a
13 marketing order to have a provision that
14 prohibits the Secretary from refusing the
15 nominations of the council I think is a separate
16 legal question that probably, as Mr. Adams says,
17 he's not a lawyer and he might not be able to
18 answer.

19 And I think that's, if I may, it seems
20 to me that seems to be the sticking point where
21 the Department of Agriculture says or believes,
22 maybe correctly, I'm not familiar with the Act,

1 that the Act would prohibit a provision in a
2 marketing order that prevented the Secretary from
3 choosing as a member of the council someone other
4 than the submissions of the council or of this
5 election process.

6 And Mr. Adams' and apparently the
7 American Pecan Board's understanding was that
8 they could propose and, in fact, promulgate a
9 marketing order that had that restriction in it.

10 Do I correctly summarize the positions of the
11 sides? Mr. Quiros?

12 MR. QUIROS: Yes, sir. We have a
13 different reading of the Act. We would love to
14 respond. We know we have to wait till they
15 finish. We would ask the judge for a few minutes
16 to get our client ready, but we think we
17 understand how the Act works.

18 Though we know our client is not a
19 lawyer, we would like to tell you that he, we
20 have a basis upon which we understand that the
21 American Pecan Board wrote this submission and we
22 would love to do it.

1 We view it differently from, I think
2 what we've just heard from the USDA and their
3 questions but I don't know since they are just
4 asking questions and not arguing a position.

5 JUDGE GUTHRIDGE: Yes, but I'm not
6 sure that this hearing is the place to resolve
7 that. I don't know under, as part of a
8 rulemaking hearing do I have the power to decide
9 this question and I don't think so. But so we've
10 got a proposal that says one thing that
11 Department of Agriculture thinks might not be
12 permissible and --

13 MR. QUIROS: I can ask our, I can ask
14 the questions of our witness. I'd love to
15 prepare him for it so that it's more cogent.

16 But we do, we think we understand the
17 difference between the two parties and we think
18 we understand the authority of the American Pecan
19 Board to have written the proposal as they did
20 and comply with the law as well as the intended
21 wishes of the industry.

22 So we would love, at the point it's

1 appropriate, we would love to ask questions of
2 our witness so that we can more clearly define
3 the areas in which we agree or disagree if there
4 is any disagreement at all. But once the witness
5 is tendered back to us, we'll attempt to do that,
6 Your Honor.

7 JUDGE GUTHRIDGE: But, again, what I'm
8 wondering is whether this is, if there is a
9 difference and my -- I have now what, a two-week
10 familiarity to, you know, like I did before I
11 came with this whole issue, but there is a
12 proposal and the Department of Agriculture has
13 to, the folks working for the Secretary, if I
14 understand correctly, will do, in the end, a
15 report to the Secretary on the, I guess the legal
16 and the practical effects of the proposal and
17 then the Secretary will make a decision as to
18 whether it goes forward.

19 It might be that the proposal is
20 written, as written, if I'm understanding the
21 argument or what's going on so far correctly,
22 that this proposal might be, as written, might be

1 something that would not pass legal muster.

2 MR. QUIROS: We don't believe that,
3 Your Honor, and we would like to ask questions of
4 the witness to see if we can draw that out of him
5 at the appropriate time when the USDA has had an
6 opportunity to finish their questions.

7 JUDGE GUTHRIDGE: You have a response,
8 Mr. Hill?

9 MR. HILL: If he wants to ask
10 questions, I welcome him asking questions.

11 JUDGE GUTHRIDGE: Well, do you have
12 any more questions of Mr. Adams?

13 MR. HILL: Well, we will have more
14 questions. I mean, I don't think we finished the
15 entire section. If you want to move on to some
16 other questions while we debate this, maybe we
17 should do so.

18 MS. SCHMAEDICK: Melissa Schmaedick.
19 It may be helpful to hear the council's questions
20 of the witness and if we have permission to ask
21 further questions after that?

22 MR. QUIROS: That would be fine with

1 us, Your Honor.

2 JUDGE GUTHRIDGE: If we could
3 concentrate on this issue right now. Are you
4 through with your questions now, Mr. Hill, or
5 USDA --

6 PARTICIPANT: For right now.

7 JUDGE GUTHRIDGE: -- on this
8 particular issue?

9 PARTICIPANT: And then after they --

10 MR. HILL: For right now.

11 PARTICIPANT: -- complete their
12 examination, we may have follow up.

13 MR. QUIROS: Just five minutes to
14 consult with the witness.

15 PARTICIPANT: Okay, thank you.

16 JUDGE GUTHRIDGE: Off the record.

17 (Whereupon, the above-entitled matter
18 went off the record at 4:36 p.m. and resumed at
19 4:45 p.m.)

20 JUDGE GUTHRIDGE: Okay, back on the
21 record. That wasn't on the record.

22 (Laughter.)

1 JUDGE GUTHRIDGE: Mr. Quiros.

2 MR. QUIROS: Thank you, Your Honor.

3 Mr. Adams, I'd like you to turn in the
4 Agricultural Marketing Agreement Act of 1937 as
5 defined as the Act to a section that's headed
6 Terms Common to All Orders, Section 7, subsection
7 (c), and I'd like you to please read that into
8 the record if you will.

9 And I'm going to ask you to read the
10 heading of 7, both the title, the heading of 7,
11 (c) and all the subparts of (c) down through "no
12 person acting as a member of an agency
13 established pursuant to this paragraph." Okay?

14 PARTICIPANT: Give the judge a second
15 to find it.

16 JUDGE GUTHRIDGE: You're talking about
17 7 United States -- no, you're talking about the
18 Act.

19 PARTICIPANT: The Act.

20 MR. QUIROS: I'm talking about the Act
21 which is 7 U.S.C. 601, Your Honor.

22 JUDGE GUTHRIDGE: And what's your

1 section? You're saying --

2 MR. QUIROS: I don't have it in the
3 same way that you might have it but it's --

4 MS. CHILUKURI: So, Your Honor, it
5 would be --

6 MR. QUIROS: -- headed Terms Common to
7 All Orders.

8 MS. CHILUKURI: Yes, it's 608(c),
9 7(c).

10 JUDGE GUTHRIDGE: 608(c).

11 MS. CHILUKURI: And 7 is Terms Common
12 to All Orders. C starts with "providing for the
13 selection."

14 JUDGE GUTHRIDGE: Is this 608, Powers
15 of the Secretary or 608(c)?

16 MS. CHILUKURI: 608(c).

17 JUDGE GUTHRIDGE: Orders. Okay. That
18 always throws me off on these things when they
19 throw an extra letter in there. 608(c), Terms --

20 PARTICIPANT: Common to All.

21 MR. QUIROS: To All Orders.

22 JUDGE GUTHRIDGE: 608(c), Terms Common

1 to All Orders in the case of agricultural
2 commodities. That's where we are.

3 MR. QUIROS: Yes.

4 JUDGE GUTHRIDGE: Okay. Thank you.

5 BY MR. QUIROS:

6 Q Mr. Adams, would you please --

7 A Okay, beginning with the heading and
8 going through what?

9 Q I'd like you to read the head of (c),
10 of 7 rather, and then read (c) and then the four
11 romanettes under (c) please, just so we can get a
12 perspective of this section.

13 A Okay. Terms Common to All Orders, 7,
14 "In the case of the agricultural commodities and
15 the products thereof specified in subsection (2)
16 orders shall contain one or more of the following
17 terms and conditions, (a) --

18 Q No, just read (c).

19 A Just read (c). All right, let me for
20 continuity, "shall contain one or more of the
21 following terms and conditions, (c) providing for
22 the selection by the Secretary of Agriculture, or

1 a method for the selection, of any agency or
2 agencies and defining their powers and duties,
3 which shall include only the following powers.

4 "(I), To administer such order in
5 accordance with its terms and provisions, (ii),
6 to make rules and regulations to effectuate the
7 terms and provisions of such order, (iii), to
8 receive, investigate and report to the Secretary
9 of Agriculture complaints or violations of such
10 order and, (iv), to recommend to the Secretary of
11 Agriculture amendments to such order."

12 Q Thank you, Mr. Adams. Mr. Adams,
13 you're not a lawyer are you?

14 A No, I am not.

15 Q Have you ever been legally trained?

16 A No.

17 Q Do you read legislative documents as
18 part of your work or in the past as part of your
19 work?

20 A No.

21 Q And so you rely on lawyers and experts
22 with regard to these matters --

1 A I do.

2 Q -- with regard to their
3 interpretation. Let me ask you a series of
4 questions and let's go slowly and if you do not
5 understand any of these questions please stop me
6 and ask for clarification.

7 A Yes.

8 Q Let's start with the big man,
9 Congress. Is it your understanding that Congress
10 has delegated the authority under this act to the
11 Secretary of Agriculture?

12 A Yes.

13 Q And then the Secretary, is it your
14 understanding that the Secretary of Agriculture
15 has designated to councils of industry members
16 some of the responsibilities to fulfill the terms
17 under this act?

18 A Yes.

19 Q And do you understand in this section
20 that, under 7(c), that the selection by the
21 Secretary of Agriculture of those agencies that
22 define the powers to take the actions necessary

1 for federal marketing orders is the right of the
2 Secretary of Agriculture?

3 A Yes.

4 Q And does this section where it says I
5 want to point your attention to this phrase or a
6 method for the selection of these agencies. So
7 in some ways the Secretary, under the law, the
8 Act, the Secretary delegates his authority to
9 make the selection of those agencies. Is that
10 how you understand this?

11 A Yes.

12 Q And did you also understand that this
13 federal marketing order selection for the council
14 was part of this delegated responsibility in
15 7(c)?

16 A Yes.

17 Q And when you met with officials for
18 the USDA and they were telling you that the
19 federal marketing order for pecans would be
20 overseen by industry people elected, you
21 understood that the Act gave authority from the
22 Secretary to that council to help oversee it.

1 A Yes.

2 Q Thank you. Let's talk about the
3 overall issues that I think are important. Do
4 you believe that the nomination process and the
5 votes on the nominees are to be completely
6 transparent and fair under the Act?

7 A Absolutely, yes.

8 Q To the USDA?

9 A Yes.

10 Q To the industry?

11 A Yes.

12 Q And so when you read those sections
13 that I think were pointed out to you by counsel
14 of the USDA, that you're to send all pertinent
15 information to them about all nominees, is that
16 part of the fairness and transparency that you
17 think is required by the Act?

18 A Certainly.

19 Q And that's important for you to do as
20 well towards the industry, that they know how
21 this process.

22 A That's the motivation, yes.

1 Q And why is that important?

2 A After listening to the industry and
3 getting a consensus that this was going to be
4 good for the industry, as we began to construct
5 the rules, it was a compilation of what we had
6 heard that the industry wanted and felt like was
7 fair to abide by and that's why we wrote the
8 order the way we did.

9 Q And does that give the industry
10 confidence with regard to this?

11 A Yes.

12 Q And would that give the USDA and the
13 public confidence that your power to assess
14 handlers was done properly?

15 A Yes.

16 Q And that this was a process in which
17 the industry could select its best
18 representatives.

19 A Yes.

20 Q Its most diverse representatives.

21 A Yes.

22 Q From all regions.

1 A Yes.

2 Q From different sizes.

3 A Yes.

4 Q If the proposed federal marketing
5 ordering for pecans is approved and it contains
6 the proposed language of the election of the
7 council in the form that it's been published in
8 the federal register, then do you think, I know
9 you're a layman, but do you think that it
10 operates properly under the Act?

11 A That's my impression.

12 Q During your time of communication this
13 spring once the draft of the proposed federal
14 marketing order was finalized by the proponent
15 group in the USDA, has the industry been told
16 that the top two vote getters would be the
17 council member and the alternate?

18 A Yes.

19 Q And do you see any conflict with the
20 top two vote getters being the council member and
21 the alternate and also given the USDA all the
22 information on all the nominees and that the

1 process was followed fairly?

2 A We think so, yes.

3 Q There's no conflict in those two.

4 A No.

5 Q Thank you. Is it a good idea to make
6 sure that the Secretary and the members of the
7 USDA believe this is a fair and open process?

8 A Of course.

9 Q And is it a good idea that the
10 industry select its own representatives and also
11 believe that this is a fair and open process?

12 A Of course.

13 Q Let's go back a little bit to the
14 history of the industry. Has this industry been
15 at peace and operating cooperatively with itself
16 over the last three decades?

17 A No.

18 Q And the progress that's been made in
19 the last two years, how was that made? How was
20 the progress made? Was it --

21 A It was made because I think that we
22 conveyed a sincere concept to the industry that

1 we were working for them. We were listening to
2 them and we wanted to come together as an
3 industry with this single entity, the American
4 Pecan Board, for the benefit of the American
5 Pecan Board.

6 And so in that communication task, I
7 mean, we laid it all out there. We tried to
8 answer all the questions as fairly as we could,
9 the best we knew how and tried to build an
10 element of trust so that we could bury some
11 hatchets.

12 And the response that we've gotten
13 back, just as Mr. Massey testified to today where
14 some of the doubters, actually some of the
15 beginners, have come over because they had
16 confidence in the American Pecan Board that
17 represented all segments of the industry and was
18 proceeding with the best interests of the
19 industry in mind.

20 Q How important is the law in the United
21 States?

22 A It's ultimately important.

1 Q Would you be disappointed if this
2 turned out not to operate under the law and in
3 the best spirit of the law?

4 A We wouldn't do it.

5 Q Wouldn't do it. If you found out that
6 the council was not operating in a fair and
7 transparent manner with regard to its own
8 elections of its own people, would you oppose the
9 continuance of the federal marketing order for
10 pecans?

11 A Yes.

12 Q I want to take you back just to one
13 section. I think it's (a) but I need to read it
14 real quick to find it, yes.

15 I should say now a few hours ago you
16 testified with regard to Section 986.46(a) and
17 I'm going to show it to you. It's the sentence
18 that begins "eligibility."

19 And, Mr. Adams, for your benefit I'm
20 looking at your outline, Page 10, Subsection K,
21 and if you'll read that sentence into the record
22 that begins "eligibility" and then I'll ask you a

1 question about that.

2 A Here?

3 Q Yes, sir.

4 A "Eligibility to cast nomination
5 ballots, accounting of nomination ballot results,
6 and identification of member and alternate
7 nominees shall follow the procedures set forth in
8 this section, or by any other criteria deemed
9 necessary by the Secretary."

10 Q I'd ask you to turn to your outline
11 and then I'll ask you a question about it. I
12 think this mirrors the testimony you gave several
13 hours ago. When it says the "nomination shall
14 follow procedures in this section," what do you
15 mean?

16 A We did not need to repeat the
17 procedures for both initial nominees and
18 successor members so we just say here that the
19 procedures for successor nominees in this section
20 will also be used in the initial nomination.

21 Q So, Mr. Adams, you do not believe
22 these initial nominees will not be subject to a

1 process of nomination do you? Let me rephrase
2 it. That was confusing. I confused myself on
3 that.

4 A My answer to that is I agree with your
5 confusion.

6 Q You agree that both under this initial
7 election and any subsequent elections of the
8 council that there is to be a process of
9 nomination by the growers and the shellers and
10 then a second election by the growers and the
11 shellers of a recommendation for those nominees.

12 A Yes.

13 MR. QUIROS: Thank you. I hope that's
14 clarifying but that's the testimony of our client
15 on this matter and, Judge, we turn it back over
16 to the USDA, reserving any further questions we
17 might have in response to theirs.

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

20 MR. HILL: I hate to do this to you,
21 Your Honor, but can we have a five-minute break?

22 JUDGE GUTHRIDGE: We've had more break

1 this afternoon than we had testimony.

2 MR. HILL: I understand.

3 JUDGE GUTHRIDGE: And the last five-
4 minute break was more like ten.

5 MR. HILL: This will be short.

6 PARTICIPANT: I want one too.

7 PARTICIPANT: I want to leave.

8 JUDGE GUTHRIDGE: Do you have any
9 objection to another --

10 MR. QUIROS: No, sir, if it would be
11 helpful to the USDA.

12 JUDGE GUTHRIDGE: Five-minute break.
13 I'm setting my stopwatch.

14 (Whereupon, the above-entitled matter
15 went off the record at 5:01 p.m. and resumed at
16 5:06 p.m.)

17 JUDGE GUTHRIDGE: Back on the record.
18 Mr. Hill.

19 MR. HILL: Thank you, Your Honor. I'm
20 just going to ask maybe one or two follow-up
21 questions, and thank you for your testimony so
22 far and thank you for your previous statements.

1 I just want to make sure that your
2 understanding, what is your, is it your
3 understanding that the Secretary can choose not
4 to select the nominees that you put forward?

5 THE WITNESS: Let me repeat your
6 question, make sure I got it.

7 MR. HILL: Yes.

8 THE WITNESS: Is it my understanding
9 that the Secretary can choose neither of the --

10 MR. HILL: That the Secretary may
11 choose not to select those two people, may choose
12 I'm not making a selection here from the two
13 people that you suggested.

14 THE WITNESS: I think if he did he
15 wouldn't follow the order as written.

16 MR. HILL: So you're saying that you
17 believe that the Secretary cannot do that, is
18 that what you're saying?

19 THE WITNESS: We can't force the
20 Secretary.

21 MR. HILL: So your answer is, yes, you
22 do believe that the Secretary can decide not to

1 choose either of your nominees?

2 THE WITNESS: Yes.

3 MR. HILL: Thank you.

4 JUDGE GUTHRIDGE: Are there any
5 further questions from USDA on this issue?

6 MS. CHILUKURI: No, Your Honor.

7 MR. HILL: No, Your Honor.

8 MR. QUIROS: Your Honor, should we
9 proceed to 47 or are there any other questions on
10 46?

11 JUDGE GUTHRIDGE: About this issue.
12 We're not sure that I was conveying all of
13 Section 46.

14 MR. QUIROS: We're open to any other
15 questions on 46.

16 JUDGE GUTHRIDGE: Are there any other
17 questions on 46?

18 MR. HILL: We'll move on from that,
19 Your Honor.

20 JUDGE GUTHRIDGE: So we go into 47
21 then.

22 MR. QUIROS: Thank you, Your Honor.

1 Let me get reorganized. Just one second.

2 Mr. Adams, would you please turn to
3 Section 986.47? I think on your outline that's
4 16.

5 THE WITNESS: Okay.

6 MR. QUIROS: Take a moment, Mr. Adams,
7 to read that section, please.

8 THE WITNESS: Okay.

9 BY MR. QUIROS:

10 Q What do you understand Subsection (a)
11 to mean?

12 A That will ensure the maximum
13 representation even if a member has a conflict,
14 even if alternates usually won't vote they still
15 attend meetings and can voice their views, thus
16 expanding the industry participation.

17 Q So you don't see alternates as just
18 being silent people in the background, do you?

19 A No. Very important to the process,
20 right.

21 Q And that's because they will have
22 heard all that information and you want their

1 voices?

2 A Yes.

3 Q Thank you. Let's discuss Provision D.
4 Why add Provision D?

5 A It provides when and under what
6 circumstances an alternate will serve as a
7 member. Pretty standard provision and it will
8 cut down on vacancies and missed votes due to
9 member absences.

10 Q Thank you. Let's take a look at
11 Section (c). It looks like Section (c) could be
12 called an alternate for the alternates. Please
13 explain Section (c) to us.

14 A We provide that if a member and an
15 alternate are both unavailable, another alternate
16 can sit as that member provided the alternate is
17 of the same group as the absent member and the
18 alternate.

19 For example, if a grower member and an
20 alternate representative were absent, another
21 grower alternate could sit so as, or could sit as
22 that absent member.

1 Again, the reason is to avoid
2 frustrating meetings with no representatives and
3 the ability to vote when necessary.

4 Q Does the alternate's alternate have to
5 be the same size member or grower as the member
6 alternates that are absent?

7 A Not clear if it doesn't appear, like.

8 Q Thank you. Who selects the
9 alternate's alternate in this case?

10 A Not clear. Normally I think probably
11 the chairperson would.

12 MR. QUIROS: Okay, thank you. No
13 further questions at this time on this section.

14 JUDGE GUTHRIDGE: Are there any
15 questions from USDA?

16 (No audible response.)

17 JUDGE GUTHRIDGE: No? Mr. Quiros.

18 MR. QUIROS: Yes. Section 986.48,
19 Eligibility. "Each grower member and alternate
20 shall be at the," I'm sorry. I lost my place.

21 PARTICIPANT: I got it up here. Got
22 it up here.

1 MR. QUIROS: Thank you. That's the
2 section I'm referring to, if you will, Mr. Adams.

3 THE WITNESS: Okay.

4 MR. QUIROS: Discuss grower
5 eligibility in Subsection (a).

6 THE WITNESS: This makes clear that
7 each grower member and alternate must be in the
8 group that they represent. No selection
9 throughout their tenure on the council.

10 MR. QUIROS: Consider alternates as
11 well.

12 THE WITNESS: Yes, just a member of
13 the group when selected but we want a real
14 representative throughout the tenure, people that
15 are vested in the process.

16 BY MR. QUIROS:

17 Q Discuss sheller eligibility in
18 Subsection (b).

19 A Mirror image of the grower members and
20 alternates. They must be and remain in the group
21 that they represent.

22 Q Why have provision Subsection (c)?

1 A We want to address every possibility
2 we could think of. We don't want one person
3 running for two positions so we let the nominee
4 decide which one he wants to pursue.

5 Q Can employees of a grower or a handler
6 business serve?

7 A Yes.

8 Q Why is that?

9 A Because they represent that business.

10 Q Does this allow for a greater pool of
11 candidates?

12 A Yes.

13 Q Is Helen Watts an executive of a
14 sheller?

15 A Yes.

16 Q So she would be an example of that?

17 A She would.

18 Q Should members and alternates be
19 residents of the proposed production area?

20 A Oh, yes, yes.

21 Q And why is that?

22 A Again, representation.

1 Q If a grower or handler member or
2 alternate ceased to be engaged in the production
3 of or handling of pecans, would he or she become
4 ineligible to serve on the council?

5 A Yes.

6 Q What happens if a member or an
7 alternate cease to be employed by their grower or
8 handler employee?

9 A They'd no longer be eligible.

10 Q I meant to say employer, excuse me.

11 A Beg your pardon?

12 Q I meant to say employer. You
13 understand the question. Let me repeat the
14 question, may I? What happens if a member or
15 alternate cease to be employed by their grower or
16 handler employer? I said employee, excuse me,
17 the first time. Did they cease to be a member or
18 an alternate?

19 A Yes.

20 Q Thank you.

21 A But I thought that's what I answered
22 but I --

1 Q Yes, sir. It's my misspeaking. I'm
2 sorry.

3 Should grower members be allowed
4 ownership interests or be employees of a handler
5 organization?

6 A Yes. No, no, wait, whoa, whoa, whoa.
7 Should grower members be allowed ownership
8 interest or employees of a handler organization?

9 Q Let me withdraw that question. I
10 think it was a little confusing.

11 A Well, I think they could but under the
12 provisions they have to select the, whether
13 they're a grower or a sheller --

14 Q Thank you.

15 MR. HILL: Can you please repeat the
16 question?

17 MR. QUIROS: Yes.

18 MR. HILL: Between the question and
19 the answer I was confused.

20 MR. QUIROS: Yes, let me withdraw the
21 question. I think if it's that confusing, maybe
22 we shouldn't use it.

1 This one is kind of difficult to
2 understand but please explain Subsection (d) of
3 Eligibility, .48.

4 THE WITNESS: Okay. Again, that is
5 somewhat difficult to write as a simple concept
6 but we want true representation so we provide
7 that if the elected person was employed by an
8 entity that falls into the represented group but
9 after the election quits or is fired from that
10 entity then he or she has to resign from the
11 council.

12 MR. QUIROS: Thank you. Please take
13 a look at the final section of Section 986.48
14 which concerns the public member position. Why
15 do you have this requirement in (e)?

16 THE WITNESS: Well, I think I answered
17 that earlier about the public member, what value
18 that a public member would bring to the council.

19 MR. QUIROS: And that's a value of
20 perspective?

21 THE WITNESS: Yes.

22 MR. QUIROS: Thank you. No further

1 questions at this time on this section.

2 JUDGE GUTHRIDGE: Are there any USDA
3 questions?

4 (No audible response.)

5 JUDGE GUTHRIDGE: I have one thing.
6 I think in answer to one of the questions you
7 said the member had to be a resident of the area?

8 THE WITNESS: Of the production area.

9 JUDGE GUTHRIDGE: Of the production
10 area. Did we have a witness in Las Cruces who
11 lived in Chicago?

12 PARTICIPANT: Yes.

13 JUDGE GUTHRIDGE: Was he an owner or
14 a grower? I don't remember.

15 PARTICIPANT: He was a grower.

16 MR. HILL: He was a grower.

17 MR. QUIROS: He was an owner of a
18 grower in California I thought.

19 PARTICIPANT: No.

20 JUDGE GUTHRIDGE: Does that mean that
21 that gentleman would not be eligible to be on the
22 board since he lives in Chicago or would the

1 residency of the, I guess it's probably a
2 corporation. It's a business.

3 THE WITNESS: Yes, I think the way, my
4 understanding is the entity, his entity, excuse
5 me, his entity is in California. His farm, his
6 orchard's in California.

7 JUDGE GUTHRIDGE: So although he is
8 personally a resident of Chicago, he could still
9 be a member?

10 MR. QUIROS: He could be because he
11 was a grower in the region which if you want to,
12 it's not so much his residency but that he's a
13 grower in the region, if you will. He was
14 nominated from the West. Do you think there
15 needs to be a clarifying question on that?

16 PARTICIPANT: I don't know.

17 PARTICIPANT: Look at (a). I think
18 (a) addresses that.

19 MR. QUIROS: It's (a) is the --

20 MR. HILL: Can we get that answer from
21 Mr. Adams?

22 MR. QUIROS: Well, I'm just asking the

1 Judge. Would it help to clarify, Judge, in your
2 mind?

3 JUDGE GUTHRIDGE: I guess so, yes. I
4 mean, because, I mean, there's a personal
5 residency that he has and also the business
6 residence and actually, well, residency would, of
7 the area would mean, could be Central and West as
8 --

9 MR. QUIROS: Mr. Adams, will you turn
10 and read Subsection (a), please? It's on the --

11 (Simultaneous speaking.)

12 MR. QUIROS: Mr. Adams.

13 THE WITNESS: Read it?

14 MR. QUIROS: Yes, sir, before we ask
15 a question and Mr. Hill may wish to ask a
16 question.

17 THE WITNESS: Okay.

18 MR. QUIROS: Mr. Hill, we had turned
19 it over. I didn't know if you wanted to ask
20 questions --

21 MR. HILL: Just a follow-up question.
22 Was it your answer then that in that situation

1 that was just brought forward, that someone who
2 physically lives in Chicago but has a business in
3 California, a growing business, he would be
4 eligible to be --

5 THE WITNESS: He would be eligible
6 because his business is in the production area.

7 MR. HILL: And that's the intent of
8 the Pecan Board?

9 THE WITNESS: Yes.

10 JUDGE GUTHRIDGE: Any more USDA
11 questions?

12 MS. VARELA: Sure. Jen Varela, USDA.
13 Mr. Adams, again, because I have a special
14 interest in the practical application of your
15 authorities here, Paragraph (c) here in
16 Eligibility refers to a situation where a grower
17 might be nominated for more than one seat.

18 THE WITNESS: Yes.

19 MS. VARELA: And how do you envision
20 how that grower would make the determination?
21 How would he notify, who would he notify and when
22 would he notify that person which seat he wanted

1 to qualify for?

2 THE WITNESS: It is my understanding
3 that person is you.

4 MS. VARELA: All right.

5 THE WITNESS: I don't mean to --

6 MS. VARELA: No, that's fine.

7 THE WITNESS: I don't mean to be
8 flippant but that's the way I've understood it.

9 MS. VARELA: And that's fine. I'm not
10 criticizing your answer. I just wanted to know
11 what the understanding was.

12 Kind of a parallel question to that,
13 we also might find a similar situation where
14 someone who is a grower and a sheller is going to
15 have to make a determination about which category
16 they want to be in. Do you envision the same
17 type of process?

18 THE WITNESS: About when they select?

19 MS. VARELA: About when they --

20 THE WITNESS: When there's a choice to
21 be made, either grower or sheller or region or
22 whatever, yes, that's my understanding.

1 MS. VARELA: Do you imagine that they
2 would do it before the nomination started? Or
3 would we wait until after some nominations had
4 come in?

5 THE WITNESS: I think we would make
6 that consultation with the appropriate USDA
7 official.

8 MS. VARELA: Okay. That's fine.
9 Thank you. That's a fine answer.

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

12 MR. HILL: Yes. If you look at the
13 definition of grower, 986.16, and I'm looking
14 mostly after the proviso and I'll read it. It
15 says, "Provided, that the term grower shall only
16 include those who produce a minimum of 50,000
17 pounds of in-shell pecans during a representative
18 period (average of four years) or who own a
19 minimum of 30 pecan acres according to the FSA,"
20 and it continues on.

21 My question is in (c) where it says,
22 86.48(c), Eligibility, it says, "A grower can be

1 a nominee for only one grower member seat," and
2 in (a) it says each -- well, my question
3 essentially is each year, each time you have a
4 nomination at whatever interval is chosen, is it
5 the intent of the board that a grower being
6 eligible is based upon his last four years of
7 harvest?

8 THE WITNESS: Yes.

9 BY MR. HILL:

10 Q So, for example, if the previous year
11 a grower loses much of his crop and his average
12 is over the 50,000 pounds or well under, well
13 under for that previous year, he is still going
14 to be eligible to be a nominee under 986.48?

15 A In your example, for which seat?

16 Q For a grower seat.

17 A Well, there's three grower seats.

18 Q Well, true. So for the lowest level
19 grower seat.

20 A Okay. The small grower?

21 Q That's correct.

22 A And you're referring to (c)?

1 Q For any grower nominee seat, the
2 smallest grower nominee seat.

3 PARTICIPANT: I think (a) may be
4 appropriate for --

5 MR. HILL: (A) may be the appropriate
6 one.

7 THE WITNESS: I think, if I understand
8 your question, I think the answer is they have to
9 be eligible for that seat at the time of the
10 selection.

11 MR. HILL: Okay, so the eligibility is
12 tracking the grower definition?

13 THE WITNESS: Yes.

14 MR. HILL: Okay.

15 JUDGE GUTHRIDGE: Mr. Quiros, you have
16 questions?

17 MR. QUIROS: Just when the USDA
18 finishes.

19 MR. HILL: No more questions at this
20 moment.

21 BY MR. QUIROS:

22 Q Mr. Adams, can I ask you to turn to

1 Pol Exhibit 48 and 50? Mr. Adams, we talked
2 about these earlier as drafts, did we not?

3 A Yes.

4 Q And can I ask you, on Exhibit 48
5 underneath the nomination section there is a star
6 and then there's some bold language, almost
7 nearly the bottom that begins "signature
8 certifies." Would you please read that sentence
9 for me?

10 A "Signature certifies that I have a
11 proprietary interest in 30 acres or more of
12 pecans or produce an annual average of at least
13 50,000 pounds of in-shell pecans and I am a
14 grower in the region of which I am nominating or
15 supporting a nomination."

16 Q Thank you, Mr. Adams. Mr. Adams,
17 would you please turn to Exhibit 50 which you
18 have described as a ballot for grower nomination?

19 A Okay.

20 Q And would you please turn to the
21 fourth page of that exhibit?

22 A Okay.

1 Q And under the certification statement,
2 would you please look at the first full paragraph
3 that begins "I certify," and would you please
4 read that, Mr. Adams?

5 A "I certify that I, or my employer,
6 currently produce or produces pecans for market
7 in the blank region and that I have voted in only
8 one region for this election process.

9 "I further certify that I, or my
10 employer, produced an average of at least 50,000
11 pounds of in-shell pecans during the past four
12 years or have a minimum of 30 acres of pecans,
13 including areas calculated by the Farm Service
14 Agency based on pecan tree density.

15 "If I am casting a ballot on behalf of
16 my employer, I certify that I have such authority
17 to do so."

18 Q Thank you, Mr. Adams. And these
19 drafts were prepared in cooperation with the
20 USDA, is that correct?

21 A Yes.

22 Q And you understand that these are just

1 drafts and there may be further refinement of
2 this language as necessary.

3 A I do, yes.

4 Q And you think this might be helpful at
5 some point for members of the public to be able
6 to see these.

7 A Yes.

8 MR. QUIROS: Thank you. No further
9 questions.

10 JUDGE GUTHRIDGE: Any further
11 questions from USDA?

12 MS. VARELA: Jen Varela, USDA. Mr.
13 Adams, do you still have those two forms in front
14 of you?

15 THE WITNESS: Yes, I do. Yes.

16 MS. VARELA: While we have them here,
17 I'll go ahead and ask you a few questions about
18 them if that's all right with you.

19 THE WITNESS: Yes.

20 MS. VARELA: Okay, first I'm looking
21 at Exhibit 48, the call for nominations. About
22 how many people do you think would fill out one

1 of these forms in a given year once the council
2 is operating?

3 THE WITNESS: That's a hard one. I
4 have no idea.

5 MS. VARELA: Let's assume that every
6 grower wanted to fill one out.

7 THE WITNESS: Okay.

8 MS. VARELA: Would you say we're
9 looking at maybe 3,000 or 4,000?

10 THE WITNESS: You're assuming those
11 3,000 or 4,000 have got two friends that'll sign
12 on with him, so I'd say no.

13 MS. VARELA: Okay. How about if I cut
14 that in half? Would you say, or even just in a
15 third --

16 THE WITNESS: No. I mean, no. I
17 mean, if you want --

18 MS. VARELA: -- realistically.

19 THE WITNESS: -- my honest opinion,
20 no. It's not going to be in the thousands.

21 MS. VARELA: Okay. But what would be
22 your upper guess? If you had great

1 participation, how many call for nominations do
2 you think will be filled out in a given year?

3 What I'm trying to get at is that to
4 approve these forms, we're going to have to
5 calculate the burden of time, of how many people
6 are going to fill it out and how much time it's
7 going to take.

8 THE WITNESS: I understand that but --

9 JUDGE GUTHRIDGE: Ms. Varela, to
10 clarify that in my mind, are you talking about
11 for OMB purposes?

12 MS. VARELA: Yes, correct.

13 JUDGE GUTHRIDGE: For OMB purposes.

14 MS. VARELA: These will, eventually a
15 finished draft will be sent to OMB for approval
16 and we'll have to give them an idea of the burden
17 for each one.

18 JUDGE GUTHRIDGE: And does that, and
19 I don't know this, but does that OMB burden
20 address the time burden for the individual
21 filling it out or the time burden for USDA or
22 whoever --

1 MS. VARELA: I was going to get to
2 that one. It's the time that it would take an
3 individual to read the instructions and fill it
4 out.

5 THE WITNESS: Ms. Varela, I've just
6 got to say I don't know. I have no idea.

7 MS. VARELA: Okay. Well, we'll just
8 do some more research on that number. And you
9 took a look at these drafts earlier, correct?

10 THE WITNESS: Yes.

11 MS. VARELA: Yes. Thank you. And,
12 let's see, and when you looked at them is it your
13 understanding that we tried to keep them similar
14 to forms that are being used in other marketing
15 orders that had already been approved for use?

16 THE WITNESS: That's my impression,
17 yes.

18 MS. VARELA: Okay, so if you take a
19 look just at this call for nominations, I'll just
20 stay on this one first, I think the similar form
21 that it was based off of, oh, actually I don't
22 have the number from that approval here to tell

1 you for sure but what would you estimate the time
2 it would take to fill out just this form?

3 THE WITNESS: By the nominator?

4 MS. VARELA: Correct. By the
5 nominator.

6 THE WITNESS: By the individual that's
7 making the nomination?

8 MS. VARELA: Correct.

9 THE WITNESS: Well, I think there's
10 more time involved than just filling out the
11 form. I think it would be appropriate that he or
12 she contacted the person that he was going to
13 nominate and then, so that it would get consent.
14 He's not going to nominate someone that wouldn't
15 serve and he's going to have to get two
16 supporting signatures, but just to fill out this
17 form once he's gotten consent from the other
18 individuals, ten minutes.

19 MS. VARELA: Okay. And similarly,
20 could you take a look at the ballot for grower
21 nominees?

22 THE WITNESS: Okay.

1 MS. VARELA: And you see that it is a
2 couple of pages. It's got some instructions.
3 The actual space to vote, another space to sign.
4 Would you anticipate that this form would take
5 about the same amount of time to fill out?

6 THE WITNESS: Yes. Yes.

7 MS. VARELA: Or maybe even less
8 because it's, you're not having to get other
9 signatures on it. So I'll go ahead and note that
10 you think this will take about ten minutes.

11 THE WITNESS: That's my best guess.

12 MS. VARELA: Okay. Thank you very
13 much. No further questions on these two forms.

14 JUDGE GUTHRIDGE: Any more questions
15 on Section 48? What we were on, right?

16 MR. HILL: No questions, Your Honor.

17 JUDGE GUTHRIDGE: Mr. Quiros.

18 MR. QUIROS: Thank you, Your Honor.
19 Mr. Adams, please turn your attention to Section
20 986.49, Acceptance. Would you please take a
21 moment to review that and then I'll ask you some
22 quick questions.

1 THE WITNESS: Okay.

2 BY MR. QUIROS:

3 Q It seems rather straightforward but
4 please explain to us why this was included.

5 A To ensure that the elected people
6 actually want the job and will make a commitment
7 to serve. We also have prepared and offered into
8 evidence a form that we use for this purpose
9 called a Confidential Background Statement.
10 That's Exhibit 52.

11 Q And also Exhibit 53?

12 A 53, yes. Yes because --

13 Q It's both of those?

14 A Grower and sheller, yes, 52 and 53.

15 Q And then 53 is for the public members?

16 A Yes.

17 Q Thank you. Should members and
18 alternates selected by the Secretary qualify for
19 his or her position by filling a written
20 background statement --

21 A Yes.

22 Q -- for the Secretary?

1 A Yes.

2 Q How shall a nominee advise the
3 Secretary that, if selected, they agree to serve
4 in the position for which the nomination was
5 made?

6 A I think that's part of the background
7 statement.

8 Q Thank you. Does this express a desire
9 to work for improvement of the industry and
10 verify the appointment?

11 A Yes.

12 MR. QUIROS: No further questions of
13 this witness on this section at this time.

14 JUDGE GUTHRIDGE: Are there any USDA
15 questions?

16 (No audible response.)

17 JUDGE GUTHRIDGE: No?

18 MS. VARELA: Oh, just a quick one.
19 Just a quick one for the record.

20 JUDGE GUTHRIDGE: Yes.

21 MS. VARELA: Mr. Adams, in looking at
22 these two statements, can you verify for the

1 record that you reviewed these before, as they
2 were created, you had a hand in looking at them
3 and working on them?

4 THE WITNESS: Are you talking about
5 the exhibits?

6 MS. VARELA: The background
7 statements, the --

8 PARTICIPANT: Exhibit.

9 MS. VARELA: 52 and 53.

10 THE WITNESS: I have read them once
11 but to say that I could take a test on them --

12 MS. VARELA: Okay. Let me ask a
13 little different question. To your knowledge
14 were these based on already existing and approved
15 forms?

16 THE WITNESS: Yes. I mean, that's my
17 impression and that's working with USDA staff.

18 MS. VARELA: Okay. Thank you very
19 much.

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

22 JUDGE GUTHRIDGE: Nothing else?

1 (No audible response.)

2 JUDGE GUTHRIDGE: On 49? But you have
3 further questions on --

4 MR. QUIROS: None on 49. I'm ready to
5 go to 50 if the USDA has no further questions.

6 MR. HILL: Yes.

7 JUDGE GUTHRIDGE: Yes.

8 MR. QUIROS: Thank you, Your Honor.
9 Mr. Adams, please turn to Section 986.50, Terms
10 of Office, and take a moment to look at that and
11 when you're finished reading it, I think Mr.
12 Davis has it up, then I'll ask you a few
13 questions about it.

14 THE WITNESS: Okay.

15 BY MR. QUIROS:

16 Q Why don't you discuss this provision
17 in general before we go to specific sections?

18 A The problem that we faced, I think
19 that all boards face, we need a term of office
20 and in this case it's four years but if you give
21 everyone four-year terms in the new board you'll
22 have a complete turnover every four years. So

1 we'll allow everyone elected for the first time
2 to serve the full four years so that we can get
3 up and running.

4 However, for the second election, we
5 were creating a staggered board to try to be fair
6 about it, but as a result in that after the first
7 term approximately 40 percent of the board would
8 be elected every two years but the whole purpose
9 to get a staggered board and then as the terms
10 were staggered they would be equally staggered
11 among regions and the different seats.

12 Q Thank you, Mr. Adams. Couple quick
13 questions. Four of the grower and three of the
14 sheller seats in the second term elections will
15 only be for two years to start the staggering but
16 what about the seat for the accumulator and the
17 at-large member and the alternates?

18 A They stay four years.

19 Q Why a difference?

20 A Well, it's hard to divide 17 by 2 and
21 come up with a whole person so we have 17
22 members. There's a public and accumulator seat

1 and that both will be elected every 4 years and
2 we have 15 grower and sheller seats of which 7
3 will be elected in the second election cycle and
4 8 will be elected in the third election cycle.

5 Q Thank you. Has the staggered board
6 and procedure been used in other federal
7 marketing orders?

8 A I think so. I think it's a common
9 practice in most boards, that you have a
10 staggered term of office. I mean, a staggered
11 election so that you don't have a complete wipe-
12 out and a new board start.

13 Q Is there a value in institutional
14 knowledge that people have on boards?

15 A Yes. I think, again, it's common. It
16 keeps your continuity of the board. It keeps a
17 fresh board. It'll retain institutional
18 knowledge of the issues which could be lost in a
19 situation where everyone was seated, again, every
20 four years. The continuity is the issue. I
21 mean, you need the continuity.

22 Q So specifically for the growers as an

1 example, is the staggered grower seats will elect
2 four in Election Cycle 2 and five in Election
3 Cycle 3?

4 A Yes, that's right, due to the odd
5 number of the growers.

6 Q Couldn't you have provided for the
7 initial council that one half of the terms expire
8 in one year and one half the next and then get on
9 the four-year track?

10 A We considered a lot of alternatives
11 but felt that this was too disruptive, to have
12 elections in the first few years so as to get it
13 organized, making regulations, proposal would
14 give four-year stability and then the staggered
15 board would kick in.

16 Q Okay. Let's move on to Section (b).
17 Why do you have this provision?

18 A We want experience on the board but we
19 don't have, but we don't want an entrenched
20 board. So we allow for a member or an alternate
21 to serve eight consecutive years but no more.
22 Now, this will bring in new people and new ideas.

1 Q After sitting out one year, can a
2 member or alternate be nominated again and serve?

3 A Yes.

4 Q Explain about alternates serving as
5 council members after serving as alternates.

6 A Well, they have the experience but
7 they haven't been actual members so we thought
8 they should be eligible for the position.

9 Q Is this a type of rule that you
10 believe was used in other federal marketing
11 orders?

12 A I think so, yes.

13 Q Please take a look at Subsection (c).
14 Can you explain this? Take a minute to look at
15 it.

16 A This addresses the relatively narrow
17 and rare condition where there is some question
18 or problem when electing a replacement. Rather
19 than have a vacancy, this provides that a sitting
20 member or alternate will continue to sit until
21 their replacement is selected and qualified.

22 Q Explain Subsections (d) and (e) for

1 us, Mr. Adams.

2 A It allows a board or Secretary the
3 flexibility of setting the beginning date for a
4 term of office and that's usually done in the
5 bylaws.

6 Q Is this used in other federal
7 marketing orders to your knowledge?

8 A To my knowledge, yes.

9 MR. QUIROS: No further questions of
10 this witness at this time on this issue.

11 JUDGE GUTHRIDGE: Are there any USDA
12 questions?

13 MS. VARELA: Jen Varela, USDA. Mr.
14 Adams, I want to go back to the beginning of this
15 section and just ask you about the number four,
16 how you all decided on the four-year term. Were
17 there other terms considered?

18 THE WITNESS: Yes.

19 MS. VARELA: Can you describe to me
20 what some of those were and what your
21 conversations were about, how you settled on
22 four?

1 THE WITNESS: Two is too short. Three
2 is an odd number. Four seemed like a likely
3 number. Five is too many.

4 MS. VARELA: Can you tell me a little
5 more about two years being too short? Tell me
6 what you mean by that.

7 THE WITNESS: I don't know if you've
8 ever served on a board but by the time a two-year
9 term just gets up to speed they go off. And so I
10 think, again, sitting on a board just to get
11 acclimated, understanding what's going on and
12 then if at the end of two years they are off, I
13 just think that's an insufficient time to be a
14 productive council member.

15 MS. VARELA: Okay. Thank you. No
16 further questions.

17 JUDGE GUTHRIDGE: Any other USDA
18 questions? Mr. Quiros.

19 MR. QUIROS: Yes. And so because of
20 that two, your idea about two years, there is a,
21 that was why you wanted there to be a first term,
22 to be four year before you started staggering, is

1 that right?

2 THE WITNESS: Yes.

3 MR. QUIROS: But isn't it true that
4 after that election, that first election, that if
5 they were not reelected you could have people
6 that just served for two years before they were
7 replaced for that group before it starts
8 staggering. Could that happen?

9 THE WITNESS: Say that again.

10 MR. QUIROS: Sorry. To the extent
11 that you're having an election after 4 years, 4
12 years people, everybody has served, and then
13 you're having another election but knowing that
14 that's only for 40 percent of the board, that's
15 only a 2-year cycle, it is possible in that case
16 that you might only serve for 2 years, is that
17 true? Unless the entire board was reelected for
18 the second term and --

19 THE WITNESS: I think the way it
20 works, I think half or approximately half the
21 board is going to serve for six years.

22 MR. QUIROS: That may be likely but

1 there will be an election after four years and it
2 could be that there's a member that just serves
3 in one of the seats for just two years. Is that
4 possible?

5 THE WITNESS: I got to read that. I
6 don't think that's possible but I can re-read it.

7 MR. QUIROS: Put it back up, please,
8 if you would.

9 JUDGE GUTHRIDGE: Mr. Quiros, are you
10 saying that at the end of the four-year term one
11 of those persons could lose to somebody else or
12 be voted out and there would be a new board
13 member elected for a two-year term in the first
14 election after the board is created?

15 MR. QUIROS: Yes, Your Honor. That's
16 what I was suggesting. I agree with Mr. Adams.
17 It may be likely at the beginning that people, if
18 they've done a good job, might continue in their
19 post but there is the possibility that there
20 could be that turnover.

21 But I guess my follow-up question,
22 that would be worth it, though, to have a

1 staggered board, wouldn't it, the benefits of
2 having a staggered board?

3 THE WITNESS: Yes, the benefits of a
4 staggered board are, I think, maybe not obvious
5 but they're certainly understandable.

6 MR. QUIROS: And you had the wisdom of
7 the entire American Pecan Board in thinking
8 through the issue of representation?

9 THE WITNESS: We did, yes.

10 MR. QUIROS: Thank you, and there are
11 no further questions we have on this section at
12 this time.

13 JUDGE GUTHRIDGE: Does USDA have any
14 questions?

15 MS. VARELA: Sorry. I have one more
16 follow-up. This is Jen Varela, USDA. Given the
17 special situation, when the staggering begins and
18 there is just a two-year term, is it your intent
19 that those two years count towards the two-term
20 maximum? Does the shortened two-year term count
21 as a full term when you're calculating that term
22 limit?

1 THE WITNESS: Without a lot of
2 reading, digesting, yes, that would be the
3 impression.

4 MS. VARELA: Okay. I'm just trying to
5 see if you can recall what your thought process
6 was there. Thank you.

7 JUDGE GUTHRIDGE: Ms. Varela, if I
8 could, I think I understood that. You're talking
9 about somebody who's on the first board, four-
10 year term, and then goes into a two-year seat.
11 Is that the two terms that they're permitted to
12 fill? And then after six years, they have to
13 leave the board. Is that what you're asking?

14 MS. VARELA: That case and the other
15 possibility where someone was elected for the
16 first time in the two-year term and then got a
17 four-year after that. Have they completed the --
18 in either case have they completed?

19 THE WITNESS: Again, recalling that
20 conversation, and I think you're correct the way
21 you've interpreted that, we didn't want a ten
22 year. I mean, someone who served two eights and

1 a two. We thought that would move toward the
2 entrenched board, which we didn't want.

3 MS. VARELA: Okay. Thank you very
4 much. That's very helpful.

5 MR. QUIROS: So let's put up (d) real
6 quickly, just put a cap on this. So when it says
7 that council members and alternates may serve up
8 to two consecutive four-year terms in office or
9 eight years, you didn't mean that they all had
10 to?

11 THE WITNESS: No.

12 MR. QUIROS: It was just up to.

13 THE WITNESS: Yes.

14 MR. QUIROS: No further questions on
15 this section at this time.

16 JUDGE GUTHRIDGE: USDA.

17 MR. HILL: I just didn't hear the
18 answer. Did you answer yes to that last
19 question? I saw you nod your head but I need
20 your answer.

21 THE WITNESS: Yes.

22 JUDGE GUTHRIDGE: Any further

1 questions?

2 PARTICIPANT: No.

3 JUDGE GUTHRIDGE: Mr. Quiros.

4 BY MR. QUIROS:

5 Q Mr. Adams, can I turn your attention
6 to Section 986.51, Vacancy, and just ask you to
7 take a minute to please read it before I ask you
8 questions.

9 A Okay.

10 Q Explain to me the reason you added
11 this section.

12 A It addresses the board or alternate,
13 addresses board or alternate vacancies. Allows
14 the board to select the replacement for the rest
15 of the term provided the replacement meets the
16 qualifications for the seat.

17 In other words, large grower, large
18 grower seat; small grower, small grower seat.
19 Same for all of the other seats, right region.
20 All of this is subject, of course, to the
21 Secretary's approval.

22 Q Did you consider alternative to those

1 things?

2 A We did. We could hold the election
3 but we think that would be costly. I think this
4 was an efficient way to solve that issue. We
5 could have similarly qualified board and
6 alternate members to self-select. Only growers
7 would select for grower vacancy, in other words,
8 select within the board. But this would be a
9 very narrow and small selection group. We felt
10 that more participation in selection is better.

11 Q Thank you. Is this consistent with
12 Section 986.47 which says alternates will serve
13 if there is a member vacancy?

14 A No. It's not consistent. 986.47 says
15 alternates will serve until election or the seat
16 is filled with a qualified replacement.

17 Q If the council votes to elevate an
18 alternate, will another alternate be selected?

19 A Yes. That would be a vacancy on the
20 council and the council could fill with a
21 qualified person approved by the Secretary.

22 Q Are the requirements or qualifications

1 of a nominee to fill an unexpired term the same
2 as those for the original member or alternate?

3 A Yes.

4 Q Should a reasonable time be set to
5 fill vacancies?

6 A I think so, yes.

7 MR. QUIROS: Thank you. No further
8 questions on this section at this time.

9 JUDGE GUTHRIDGE: Any questions from
10 USDA?

11 (No audible response.)

12 JUDGE GUTHRIDGE: No questions? Mr.
13 Quiros.

14 MR. QUIROS: Thank you. Mr. Adams,
15 turning to Section 986.52, Council Expenses,
16 please take a moment to look at that.

17 THE WITNESS: Okay.

18 MR. QUIROS: Explain that section to
19 me.

20 THE WITNESS: It makes it clear that
21 the council serves without compensation but can
22 have necessary expenses, such as travel or

1 lodging for official council business
2 reimbursement.

3 MR. QUIROS: Thank you. Is this a
4 typical provision?

5 THE WITNESS: It is. It's common I
6 think for non-profit and public boards.

7 MR. QUIROS: Thank you. No further
8 questions on this Section at this time.

9 JUDGE GUTHRIDGE: Any questions from
10 the USDA?

11 (No audible response.)

12 JUDGE GUTHRIDGE: No questions. Mr.
13 Quiros?

14 MR. QUIROS: Yes, sir. Mr. Adams,
15 Section 986.53, Powers, would you please review
16 that?

17 THE WITNESS: Okay.

18 MR. QUIROS: Do you want to discuss
19 that and tell us why you added that?

20 THE WITNESS: It's a pretty typical
21 provision empowering the counsel to administer
22 the Federal Marketing Order, make bylaws, address

1 complaints or violations of the order, and
2 recommend amendments to the Secretary.

3 MR. QUIROS: I'm now going to hand you
4 a copy of the Act. Your Honor, if you'd allow
5 Mr. Davis to hand him a copy of the Act.

6 JUDGE GUTHRIDGE: Sure.

7 MR. QUIROS: I'd like you to turn,
8 please, to the section you reviewed a few minutes
9 ago, Section 7, and tell me when you've gotten
10 there.

11 THE WITNESS: I am there.

12 JUDGE GUTHRIDGE: Seven, as I recall
13 is that 608(c), Orders?

14 MR. QUIROS: Yes, Terms Common to All
15 Orders.

16 JUDGE GUTHRIDGE: 608(c) for the
17 record 7 United States Code 608(c)(7), Terms
18 Common to All Orders.

19 MR. QUIROS: Mr. Adams, do you
20 remember our discussion about the delegated
21 authority of the Secretary to the proposed
22 American Pecan Council that we had about an hour

1 ago?

2 THE WITNESS: Yes.

3 MR. QUIROS: Do you recall reading
4 under that delegated authority a method for the
5 selection, which selects the authority, can you
6 please compare the provisions romanette (i)
7 through (iv) in that section with Section 986.53,
8 subsections (a) through (d), would you look at
9 that, compare those?

10 (Off the record comments.)

11 THE WITNESS: Yes, okay.

12 BY MR. QUIROS:

13 Q Do you see any similarity in that
14 language? It's nearly identical, is it not?

15 A It what?

16 Q It's nearly identical, is it not?

17 A Well that's what I was -- Yes.

18 Q And so one of the reasons that you
19 added it in was so that you could comply with the
20 Act, is that right?

21 A That's true, yes.

22 Q Because this is important that it's in

1 here because you are a delegated group under this
2 section of the Act, are you not?

3 A Yes.

4 Q And it really proves that you are a
5 delegated group under this Section of the Act
6 because the duties that are applied to these
7 groups are the duties that are applied to you
8 here?

9 A Yes.

10 Q And that's why you put it in?

11 A Yes.

12 Q And that's why we would counsel to put
13 it in by the USDA, thank you. Makes sense to me,
14 does it make sense to you?

15 A It makes sense to me.

16 Q Okay. Let me ask you a few more
17 questions. Are certain powers necessary for the
18 council to carry out its functions under the Act?

19 A Yes.

20 Q Is the primary purpose of the council
21 to administer the program locally on behalf of
22 the Secretary and therefore should be authorized

1 to do so?

2 A That's correct, yes.

3 Q To successfully carry out some of its
4 administrative duties and to administer the
5 program is it necessary to authorize the council
6 to make rules and regulations in this delegated
7 authority?

8 A Yes.

9 Q What rules and regulations might be
10 necessary?

11 A Well I think as they -- You don't know
12 exactly but as they come up, as they come to the
13 administrative body you would respond
14 appropriately.

15 Q Thank you. Because compliance is
16 necessary if the program is to be effective
17 should the council be authorized to receive,
18 investigate, and report to the Secretary
19 complaints or violations?

20 A Of course, yes.

21 Q Is it conceivable this order might
22 need amending in the future?

1 A It might. It sure might.

2 Q Is the council a logical agency for
3 recognizing needed amendments?

4 A I would think so, yes.

5 Q Why?

6 A Because it represents the industry.
7 It represents cross sections of the industry and
8 it should have it's pulse on what's going on.

9 Q Are the powers specified in the Notice
10 of Hearing the same as those that are given to
11 the council under the Act?

12 A Yes.

13 Q Similar provisions in other FMOs?

14 A To my knowledge, yes.

15 MR. QUIROS: Again -- No further
16 questions on this Section at this time.

17 JUDGE GUTHRIDGE: Are there any
18 questions from USDA?

19 MS. VARELA: Yes. Jen Varela, USDA.
20 Mr. Adams, I want to ask you a question about
21 Paragraph (b) here, in particular, under Powers,
22 specifically rules and regulation to effectuate

1 the terms and provisions of this part.

2 I think we've touched on this a little
3 in different sections, but could you describe to
4 me overall how you understand the process of
5 putting those rules and regulations in place?
6 How will the council do that?

7 THE WITNESS: Now I think that would
8 be in the normal course of implementing the
9 order.

10 MS. VARELA: Right. So I'm asking you
11 to give me your understanding of what that
12 implementation looks like.

13 I imagine it would start with the
14 council having a discussion on a specific issue.
15 Is that what you intend?

16 THE WITNESS: Yes.

17 MS. VARELA: And to your knowledge
18 would the council, once they came to a decision
19 would they make a recommendation to the
20 Secretary?

21 THE WITNESS: Yes. I mean I think
22 it's going to work. Again, I envision it to be a

1 collaborative effort between the council and the
2 Secretary.

3 MS. VARELA: And is there -- Let me
4 try to get this question right. Okay. Yes, let
5 me ask you to compare that process with Paragraph
6 (d).

7 And, again, I think in bits and pieces
8 we talked about this in other parts of the order
9 language.

10 THE WITNESS: On a violation?

11 MS. VARELA: No, (d), sorry, D as in
12 dog, to recommend amendments. In your
13 understanding what are the differences between
14 the procedures that the council will have between
15 when it's recommending rules and regulations
16 versus recommending amendments to the order?

17 THE WITNESS: I'm thinking that the
18 recommendation of amendments would be some
19 provision that would, it would be longer lasting
20 or something that -- Just like if the regions
21 change, we talked about the regions needing --

22 MS. VARELA: Exactly.

1 THE WITNESS: Yes. And that would be
2 treated in the form of an amendment I would
3 think.

4 MS. VARELA: And you just used the
5 word "formal," did you just say a formal
6 amendment or a form of an amendment?

7 (No audible response.)

8 MS. VARELA: Okay.

9 THE WITNESS: Ask the --

10 MS. VARELA: Just trying to make sure
11 we have an understanding.

12 THE WITNESS: You know, that was four
13 words ago so I don't know.

14 MS. VARELA: Okay. No further
15 questions at this time.

16 JUDGE GUTHRIDGE: Are there anymore
17 USDA questions?

18 MS. CHILUKURI: I had a question just
19 as it relates to 986.53(b). Can you talk a
20 little bit about the -- I'm sorry. Can you talk
21 a little bit about the rules and regulations that
22 you envision that the council may need, not

1 exhaustively, but a few examples?

2 THE WITNESS: For me to speculate on
3 that I think if you want to talk about pecan
4 production I can spend a long time, but I can't
5 envision those rules and regulations.

6 I mean I think it would be in
7 accordance with what the, you know, that council
8 has understood the order and carrying out the
9 order, but, again, to try to -- I'd be
10 speculating on that. I mean I --

11 MS. CHILUKURI: Okay.

12 MS. VARELA: Can I ask one more
13 question?

14 MS. CHILUKURI: Sure.

15 MS. VARELA: Sorry, this is Jen Varela
16 again, USDA. Let me give you a specific example
17 and you let me know how you think this is going
18 to work. If you look at Section 61, Assessments
19 --

20 THE WITNESS: Okay.

21 MS. VARELA: And I'm just, I'm not
22 going to ask you to look at specific words there,

1 but I think you are familiar with it enough to
2 know that there are a couple of different spots
3 where it says that the council is going to make
4 some recommendation to the Secretary to set some
5 rates.

6 THE WITNESS: Yes.

7 MS. VARELA: So you envision that
8 assessment is one authority under the order where
9 you envision the council will regularly want to
10 establish rules and regulations to carry this
11 out?

12 THE WITNESS: Yes.

13 MS. VARELA: Okay. Are there any
14 other sections that come to mind that you think
15 will be used regularly to establish rules and
16 regulations, maybe recommendations for certain
17 reporting requirements?

18 THE WITNESS: I think reporting
19 requirements would come under that, yes.

20 MS. VARELA: Okay. I think that
21 satisfies my question. Rupa, did you have
22 anything else?

1 MS. CHILUKURI: No additional
2 questions.

3 JUDGE GUTHRIDGE: No additional USDA
4 questions?

5 MS. CHILUKURI: No.

6 JUDGE GUTHRIDGE: Mr. Quiros?

7 MR. QUIROS: No further questions
8 under that Section, Your Honor. Just --

9 JUDGE GUTHRIDGE: Oh, I'm sorry, go
10 ahead.

11 MR. QUIROS: Mr. Adams, would you
12 please turn to Section 986.54, Duties?

13 THE WITNESS: Yes.

14 BY MR. QUIROS:

15 Q We're going to have that put up, if
16 you'd take a look at that, please, refresh your
17 memory on it and I'm going to ask you some
18 questions.

19 A Okay.

20 Q What is the difference between Powers
21 in the previous section and Duties in this
22 section?

1 A Well Powers are the things that the
2 council can do and Duties are the things that
3 they must do, that they are expected to do.

4 Q Thank you. Are the duties specified
5 in the proposed program primarily those functions
6 that an organization must perform if it is to be
7 operated in a business-like basis?

8 A Yes.

9 Q Are the duties reflective of those
10 duties outlined for administrative councils under
11 the Act?

12 A Yes.

13 Q Do duties impose obligations on the
14 council?

15 A They do.

16 Q Is this a good thing or a bad thing?

17 A That's a good thing.

18 Q In order to operate must a council
19 organize, elect officers, hire staff, arrange for
20 office space, and other essentials necessary for
21 carrying out its functions?

22 A Yes.

1 Q Should the council be authorized to
2 select subcommittees?

3 A Yes.

4 Q Should such subcommittees be composed
5 of council members or should other persons be
6 eligible for such selection, or both?

7 A I think that would be addressed in the
8 bylaws.

9 Q Under which circumstances should a
10 subcommittee be established?

11 A If you've got a specific issue, a
12 specific problem that you want to target.

13 Q So, for example, industry people
14 making a recommendation to the council with
15 regard to a matter that they may have studied?

16 A Yes.

17 Q Thank you. What type of a decision-
18 making power would subcommittees have?

19 A I think they have recommending power.

20 Q Thank you. Would subcommittees be
21 required to review any decision-making action
22 with the full council prior to any substantive

1 changes being made?

2 A I would think so.

3 Q Should the council be authorized to
4 adopt rules and regulations necessary for the
5 conduct of its business?

6 A They should, yes.

7 Q Such as bylaws?

8 A Correct.

9 Q You heard Mr. Turner testify today
10 with regard to the importance of bylaws and
11 rules, do you think his testimony was true and he
12 was on?

13 A He was right on target.

14 Q Thank you. Should the council be
15 authorized to adopt bylaws for the conduct of its
16 business as other federal marketing orders have?

17 A Yes.

18 Q And would you expect those bylaws to
19 be reflective of the wisdom of other federal
20 marketing orders that --

21 A Yes, of course.

22 Q Should the council as a local

1 administrative agency in this delegated authority
2 that we've established act as an intermediary
3 between the Secretary and any producer or
4 handler?

5 A Yes.

6 Q Isn't this the purpose of the council
7 and in turn will not the Secretary look to the
8 council for advice relative to local matters?

9 A I would hope so, yes.

10 Q Should the council because of its
11 position assemble and furnish data to the
12 Department that is necessary for the proper
13 administration of the program?

14 A You bet, yes.

15 Q What kind of data does the proponent
16 group anticipate assembling and providing to the
17 Secretary?

18 A We've heard it enumerated by various
19 officials, market data -- Ask you question again
20 and I'll get on them.

21 Q Yes, I'm sorry. My assistant was
22 distracting you, I'm sure. What kind of data

1 does this proponent group anticipate assembling
2 and providing to the Secretary? What kind of
3 data, Mr. Adams?

4 A I would think any data that the
5 council had in the normal course of business and
6 any data that they collected that was relevant to
7 the operation of the council.

8 Q Thank you. And especially perhaps the
9 data relating to Section 986.65 under the
10 marketing policy, the estimate of crops, et
11 cetera, that type of data as well?

12 A Yes, yes.

13 Q Thank you, Mr. Adams. Is or will this
14 data be relative -- Let me repeat my question
15 again, tongue tied. Is or will this data be
16 readily available?

17 A No. No, I mean that's what we'll have
18 to collect.

19 Q Will the gathering of this data
20 present an extra burden on growers and handlers?

21 A An extra burden? It'll require some
22 effort.

1 Q And they'll have to tell the truth?

2 A Well of course.

3 Q Okay, thank you. Will it be necessary
4 for the council to hire employees because council
5 members as producers and handlers are usually not
6 able to devote a large amount of time for the
7 administrative council functions?

8 A Yes.

9 Q Should the council be authorized to
10 hire such employees and establish salaries?

11 A Yes.

12 Q Should the council have the authority
13 to borrow funds?

14 A Yes.

15 Q Are there certain limitations on these
16 funds?

17 A Yes.

18 Q What can they be used for and how much
19 can be borrowed?

20 A It's very specific because that
21 requires a unanimous vote, I remember that.

22 Q At the beginning, right?

1 A Yes, and after that the startup.

2 Q Right. After the startup that's the
3 situation for the startup after that. How is the
4 borrowing determined?

5 A The needs of the council.

6 Q The needs and the council vote?

7 A Yes.

8 Q Thank you. Should the council have
9 the duty to investigate and assemble data on the
10 growing, harvesting, shipping, and marketing
11 conditions for pecans so as to provide a basis
12 for its recommendation for regulations under
13 986.65?

14 A Yes.

15 Q Should the council have the duty to
16 notify handlers of each meeting of the council to
17 consider recommendations for regulations and of
18 all regulating action because these might affect
19 the operations of handlers?

20 A Yes.

21 Q Should producers be notified because
22 these might affect their operations?

1 A Yes.

2 Q How should such notifications be made?

3 A To the producers and the handlers?

4 Q Yes, sir.

5 A I think it said in writing or by
6 email.

7 Q In ways that the cannot miss --

8 A Right. Making sure that they get the
9 information or get the notice.

10 Q Plenty of time between the notice and
11 the meetings?

12 A Yes.

13 Q Thank you. Should the Secretary be
14 given the same notice of meetings of the council
15 and its subcommittees as is given to members
16 because the Secretary is responsible for the
17 administration of the Act?

18 A Of course, yes.

19 Q Should the council prepare a marketing
20 policy?

21 A Yes.

22 Q Is this necessary to -- Let me say

1 this again, it's been awhile. Is this necessary
2 to arrive at appropriate regulations?

3 A It is.

4 Q What type of information would be
5 included in a marketing policy? Again, refer to
6 Section 986.65.

7 A Well I will read it because it's
8 important. This is important. "An estimate of a
9 grower claim production and handler claim
10 production, estimate of disappearance, estimate
11 of improved native and substandard pecans,
12 estimate of handler inventory, trade supply,
13 handler inventory, the August 31 count rule," all
14 of those things that are relevant to the report.

15 Q So all of the subsections of Section
16 986.65 are appropriate, are they not?

17 A That's correct, yes.

18 Q Thank you. Is one of the main
19 objectives of the order to facilitate the orderly
20 marketing of pecans by recommending marketing
21 regulations to the Secretary?

22 A Yes, I think so.

1 Q Go to the top of Page 26. Should the
2 council keep adequate books, minutes, and
3 records, so that they can clearly reflect the
4 transactions and status of the council at all
5 times?

6 A Of course, yes.

7 Q Should such minutes, books, and
8 records be subject to examination at any time by
9 the Secretary or his or her authorized agent or
10 representative?

11 A Yes, certainly.

12 Q Will the council's financial
13 statements be audited on a regular basis?

14 A Yes.

15 Q Is this a good practice?

16 A It is.

17 Q Did you hear Mr. Turner's discussion
18 of that today?

19 A I did.

20 Q And does --

21 A I took notes.

22 Q You took notes. Did his experience

1 concur with your experience that it's a good idea
2 to audit?

3 A You bet.

4 Q Thank you. What will the audit
5 include?

6 A Financial statements, which are
7 reflective of receipt of the assessments, how the
8 money is spent and how the funds are dispersed.

9 Q Thank you. Will periodic statements
10 of the financial operations of the council be
11 available to industry members, growers, and
12 handlers alike?

13 A Yes.

14 Q How will this information be
15 disseminated?

16 A I think in the normal course, you
17 know, email, mail.

18 Q Is this to ensure that the USDA and
19 the industry that the purposes of the Act are
20 being properly fulfilled?

21 A Yes.

22 Q Should the council make available to

1 growers and handlers the council voting record on
2 recommended regulations?

3 A I would think so.

4 Q On matters of policy?

5 A I would think so.

6 Q Are producers and handlers entitled to
7 know how their representatives on the council are
8 voting?

9 A You bet.

10 Q In order to provide a basis for fixing
11 the rate of assessment and the expenditures for
12 the crop year will it be necessary for the
13 council to submit a budget to the Secretary at
14 the beginning of each fiscal period?

15 A Yes.

16 Q Are loans authorized?

17 A Yes.

18 Q Under what circumstance would a loan
19 be taken out?

20 A If the projected expenditures were to
21 be necessary or accrued before the budget was
22 fully funded by assessments.

1 Q Thank you. I know we've talked about
2 a lot of things and I've asked you a lot of
3 questions. Why don't we see if you can summarize
4 for me (a) through (h) and why this is important?

5 A The council will act as an
6 intermediary, keep minutes and books, report to
7 the Secretary, appoint employees and affix
8 compensation, secure audits, investigate
9 activities of the industry, investigate
10 compliance with the marketing order, recommend
11 bylaws, rules, and regulations for the marketing
12 order.

13 And, you know, this is the normal
14 course of business that would be conducted
15 efficiently to run an organization and to be
16 accountable.

17 Q Thank you, Mr. Adams. Is this similar
18 to duties set forth in other Federal Marketing
19 Orders?

20 A To my knowledge, yes.

21 Q Is this necessary in your opinion and
22 in the opinion of the American Pecan Board?

1 A Yes.

2 MR. QUIROS: No further questions on
3 this Section at this time.

4 JUDGE GUTHRIDGE: Are there any USDA
5 questions?

6 MS. CHILUKURI: Mr. Adams, under
7 Paragraph (g) there is a reference to investigate
8 compliance with the provisions of this part. Can
9 you talk a little bit about how the council
10 intends to do that?

11 THE WITNESS: With my limited
12 knowledge of actually the operations of other
13 marketing orders, it's my understanding they have
14 a compliance staff that actually go out in the
15 field and investigate.

16 I guess they follow up on complaints.
17 I'm not sure how they would establish their
18 leads, but I think a compliance staff is one of
19 the necessary components of staff.

20 BY MS. CHILUKURI:

21 Q Can you think of any examples in which
22 participants in a marketing order, growers,

1 handlers, shellers, would not comply?

2 Like what are some potential
3 compliance issues that the council may face?

4 A I don't know of any. But, again, my
5 knowledge, I don't have any knowledge of other
6 compliance issues with other marketing orders,
7 no.

8 Q What about some compliance issues that
9 you currently have in your own industry, just in
10 the market? Can you think of any that you may
11 anticipate in the future?

12 A Any other examples of non-compliance?
13 Can we use Washington D.C. examples?

14 Q I was hoping for pecan-specific
15 examples, but if you find that an analogy would
16 be helpful then feel free to do so.

17 A Is speeding on the highway an example?

18 Q If you don't --

19 A And, again, I do not mean to be
20 flippant on this. I'm really not sure that I
21 understand what you are asking, but basically in
22 some organizations someone that doesn't comply

1 with the rules and regulations, I think that's
2 what you are asking, and you are asking for an
3 example of that?

4 JUDGE GUTHRIDGE: I think she's asking
5 what areas do you think that the pecan growers or
6 shellers might have a tendency not to be in
7 compliance.

8 THE WITNESS: Okay.

9 JUDGE GUTHRIDGE: Well is that a --

10 MS. CHILUKURI: Yes, that's a fair
11 characterization.

12 THE WITNESS: I would retract my
13 earlier inappropriate example. If a handler just
14 didn't want to comply and didn't report, say
15 correct volume, or let's say he may report a
16 category of --

17 He may remit an assessment on an
18 improved lot rather than a -- I mean remit an
19 assessment on a native lot rather than an
20 improved lot, something like that, I mean that's
21 --

22 BY MS. CHILUKURI:

1 Q Okay, thank you for those examples.

2 A Again, without this being in place I'd
3 have to speculate.

4 Q Can you elaborate a little bit on
5 Paragraph (a), "To act as intermediary between
6 the Secretary and any handler or grower," what do
7 you envision that role is or what do you envision
8 that role as?

9 A Give me the number and I'll read it.

10 Q Yes.

11 A Because I didn't understand. I didn't

12 --

13 Q Paragraph (a), "To act as intermediary
14 between the Secretary and any handler or grower."

15 A And you're asking for an example of
16 that intermediary role?

17 Q Yes.

18 A Again, it would be my expectation that
19 the council would handle most of the issues of
20 violation keeping the Secretary well informed,
21 but the routine issues where someone just
22 inadvertently or out of misinformation was in

1 violation the council would handle those issues,
2 again, keeping the Secretary and the Department
3 well informed.

4 But, again, it's not that you wouldn't
5 want to bother the Department or the Secretary,
6 that they got other things to do, but we would
7 keep them informed and the council would handle
8 those routine issues where there was non-
9 compliance.

10 Q Okay, thank you. As it relates to
11 Paragraph (c), "To furnish to the Secretary a
12 complete report of all meetings and such other
13 available information as he or she may request"
14 can you, I don't know, can you envision some
15 examples of the types of meetings that you'll be
16 having as you start up the council or as you
17 proceed through the administration of the order?

18 A A complete report of all meetings, I
19 think everything that would be generated would be
20 sent to the Secretary. There would some kind of
21 regular communication.

22 But I think the minutes, any of the

1 motions, the actions that were taken would be
2 communicated to the Secretary.

3 Q And as it relates -- This sort of
4 related back to 53, Powers, and under 54, Duties,
5 I just wanted to ask a question again about the
6 duties of the council include recommending
7 bylaws, rules, and regulations, and rules and
8 regulations for the purpose of administering this
9 part.

10 And just to clarify my own
11 understanding of your testimony what is it, how
12 do you anticipate those rules and regulations
13 will be implemented?

14 Do you have an understanding of that
15 process, or what is your understanding of that
16 process?

17 A Let me see if I understand. How would
18 the rules, how would the bylaws be implemented or
19 --

20 Q The rules and regulations. And if you
21 don't have an understanding or would like more
22 time to think about that that's fine, I'm just

1 asking the question.

2 A I mean to me that -- And, again, it
3 don't mean -- To me that would be obvious that
4 whatever was required of the counsel would be
5 carried out and then communicated to the
6 Secretary.

7 MS. CHILUKURI: Okay. Thank you very
8 much.

9 JUDGE GUTHRIDGE: Are there anymore
10 USDA questions?

11 MR. HILL: No more questions.

12 JUDGE GUTHRIDGE: Any questions?

13 MR. QUIROS: I have a few questions
14 just as a follow up. Please take a look at the
15 list of the duties that you have, and I want to
16 follow up to some questions by the USDA.

17 They asked you about the duty to
18 investigate and what it says, it says "To
19 investigate the growing, shipping, and marketing
20 conditions with respect to pecans and to assemble
21 data in connection therewith."

22 That's similar to investigating so

1 that you could report under your responsibilities
2 in 986.65, is that true?

3 THE WITNESS: Yes.

4 BY MR. QUIROS:

5 Q Thank you. I want to tie that in also
6 to (g), which a question was asked about to
7 investigate compliance with the provisions of
8 this part.

9 Now, Mr. Adams, you understand when
10 they say "part" they mean this entire Federal
11 Marketing Order?

12 A Yes.

13 Q Okay, thank you. Just as a drafting
14 convention. Let me just give you a for instance.
15 Do you think it would be appropriate to
16 investigate compliance if there was a suspicion
17 that someone, a handler, was not paying their
18 proper assessments?

19 A That's true, yes.

20 Q And that would be the responsibility
21 of the council to do?

22 A Yes.

1 Q I want to tie that in a little bit
2 with a question that was asked also by the USDA
3 counsel to act as an intermediary between the
4 Secretary and any handler or grower.

5 I'm going to give you a detailed
6 example, stay with me. Let's say the council,
7 under its authorities for, its handling
8 authorities under 986.69, establish that in a
9 load of pecans it had to have a certain humidity,
10 okay.

11 Let's say -- We heard 4 to 6 percent
12 today, we heard that humidity number, because we
13 learned today as well, did we not, that there is
14 mold at a certain level, okay. Stay with me on
15 the example and I'll ask the question.

16 What if a load of pecans was delivered
17 that did not contain that humidity and they were
18 wet and when they were --

19 A Moisture content.

20 Q Moisture content. And when they were
21 shipped by the grower to the handler and when
22 they arrived there they were not in the quality

1 condition that had been required by the council,
2 would it be the council's responsibility under
3 this section to be an intermediary between the
4 grower and the handler as part of its delegated
5 authorities from the Secretary?

6 A Yes.

7 Q Would that be an example?

8 A It would.

9 MR. QUIROS: Thank you. No further
10 questions at this time on this Section.

11 JUDGE GUTHRIDGE: USDA, anymore
12 questions?

13 MS. CHILUKURI: And just to clarify
14 your statement, Mr. Quiros, I think you said act
15 as an intermediary between the grower or handler.
16 Did you intend to say between the Secretary and
17 the handler or grower?

18 MR. QUIROS: Actually, both. But, Mr.
19 Adams, it would be necessary as part of the
20 delegated responsibility for you to act as an
21 intermediary between the grower and the handler,
22 is that correct?

1 THE WITNESS: Yes.

2 MR. QUIROS: And then, also, between
3 that controversy, the grower and the handler and
4 the Secretary, is that right?

5 THE WITNESS: Yes.

6 MR. QUIROS: Thank you. No further
7 questions.

8 JUDGE GUTHRIDGE: Anymore USDA
9 questions?

10 MS. CHILUKURI: No.

11 MR. HILL: No.

12 MR. QUIROS: Your Honor, we do not
13 have much time left on the sections, depending on
14 the questions asked and we've been going at a
15 little over 2-1/2 hours I think since our last
16 break.

17 Could we just take a 5-minute break.
18 It's about 6:30 now and just a short break, a
19 biology break let's say.

20 JUDGE GUTHRIDGE: I may disagree with
21 the 2-1/2 hours since the last break, but if you
22 want a break, is there any objection from USDA to

1 take a short break?

2 MR. HILL: No. No objection.

3 MS. CHILUKURI: No objection.

4 JUDGE GUTHRIDGE: All right.

5 MR. QUIROS: Okay. I'll withdraw the
6 characterization of 2-1/2 hours, maybe it just
7 feels like that many, Your Honor.

8 JUDGE GUTHRIDGE: Do I need to set my
9 stopwatch again?

10 MR. QUIROS: You can set your
11 stopwatch.

12 JUDGE GUTHRIDGE: Off the record.

13 (Whereupon, the above-entitled matter
14 went off the record at 6:27 p.m. and resumed at
15 6:34 p.m.)

16 JUDGE GUTHRIDGE: We're back on the
17 record. Mr. Quiros?

18 MR. QUIROS: Yes, Your Honor?

19 JUDGE GUTHRIDGE: Ms. Brown reminded
20 me and perhaps I have been remiss in letting you
21 refer to the contents of the Exhibits 47 through
22 53, but they have not yet been admitted in the

1 record.

2 MR. QUIROS: Yes, sir. Well I'm not
3 going to tender them until the end of my
4 questions. Well, heck, if the Judge wants them,
5 I've been instructed -- Your Honor --

6 JUDGE GUTHRIDGE: Usually one is not
7 permitted to refer to the content of an exhibit
8 if it hasn't been admitted, technically speaking.

9 MR. QUIROS: Yes, Your Honor. We had
10 introduced those --

11 JUDGE GUTHRIDGE: And so at least in
12 an adjudicatory hearing.

13 MR. QUIROS: Thank you. Your Honor,
14 we had introduced those, so all parties have had
15 them, but we would now like to tender what has
16 been marked Exhibits 47 through 53.

17 JUDGE GUTHRIDGE: All right. Does
18 USDA have any objection to 47?

19 MS. CHILUKURI: No objection, Your
20 Honor.

21 JUDGE GUTHRIDGE: Forty-seven is
22 admitted. Does the USDA have any objection to --

1 Oh, does anyone in the audience have an
2 objection? Let me ask that. I was supposed to
3 ask that, too.

4 (No audible answer.)

5 JUDGE GUTHRIDGE: So no objection to
6 47, 47 is admitted.

7 (Whereupon, the above-referred to
8 document was received into evidence as
9 Proponent's Exhibit No. 47.)

10 JUDGE GUTHRIDGE: USDA have any
11 objection to 48?

12 MS. CHILUKURI: No objection, Your
13 Honor?

14 JUDGE GUTHRIDGE: Any objection from
15 the audience?

16 (No audible response.)

17 JUDGE GUTHRIDGE: No objection.
18 Forty-eight is admitted.

19 (Whereupon, the above-referred to
20 document was received into evidence as
21 Proponent's Exhibit No. 48.)

22 JUDGE GUTHRIDGE: USDA have an

1 objection to 49?

2 MS. CHILUKURI: No objection.

3 JUDGE GUTHRIDGE: Does the audience
4 have any objection?

5 (No audible response.)

6 JUDGE GUTHRIDGE: No. Forty-nine is
7 admitted.

8 (Whereupon, the above-referred to
9 document was received into evidence as
10 Proponent's Exhibit No. 49.)

11 JUDGE GUTHRIDGE: Does the USDA have
12 any objection to 50?

13 MS. CHILUKURI: No objection.

14 JUDGE GUTHRIDGE: Does the audience?

15 (No audible response.)

16 JUDGE GUTHRIDGE: No objection. Fifty
17 is admitted.

18 (Whereupon, the above-referred to
19 document was received into evidence as
20 Proponent's Exhibit No. 50.)

21 JUDGE GUTHRIDGE: Does the USDA have
22 an objection to 51?

1 MS. CHILUKURI: No objection, Your
2 Honor.

3 JUDGE GUTHRIDGE: Does the audience?
4 (No audible response.)

5 JUDGE GUTHRIDGE: Fifty-one is
6 admitted.

7 (Whereupon, the above-referred to
8 document was received into evidence as
9 Proponent's Exhibit No. 51.)

10 JUDGE GUTHRIDGE: USDA have objection
11 to 52?

12 MS. CHILUKURI: No objection.

13 JUDGE GUTHRIDGE: Does the audience?
14 (No audible response.)

15 JUDGE GUTHRIDGE: No objection.
16 Fifty-two is admitted.

17 (Whereupon, the above-referred to
18 document was received into evidence as
19 Proponent's Exhibit No. 52.)

20 JUDGE GUTHRIDGE: Does USDA have
21 objection to 53?

22 MS. CHILUKURI: No objection.

1 JUDGE GUTHRIDGE: Does the audience?

2 (No audible response.)

3 JUDGE GUTHRIDGE: No objection to 53,
4 53 is admitted.

5 (Whereupon, the above-referred to
6 document was received into evidence as
7 Proponent's Exhibit No. 53.)

8 MR. QUIROS: Thank you. Thank you,
9 Your Honor. Mr. Adams, I'd like to turn you now
10 to Section 986.55, Procedure. Take a moment to
11 read it, please.

12 THE WITNESS: Okay.

13 BY MR. QUIROS:

14 Q Thank you. Mr. Adams, in general what
15 does this section provide for?

16 A The general guide to procedures for
17 the council to follow in its meetings and for
18 votes.

19 Q Address Sections (a) and (b) for me,
20 please. What does that provide?

21 A This provides the council to select a
22 chair and officers and permit flexibility on how

1 meetings should be conducted.

2 Flexibility is limited for certain
3 important issues that are set out in Section (c),
4 which requires a person voting, or a person --
5 Which requires in-person meetings to vote on
6 certain topics and certain super majority votes.

7 Q Okay. We've heard a lot of discussion
8 about (c) from a number of witnesses, but let's
9 get into it. First discuss for me the quorum
10 issue. Why did you all include that?

11 A We first set a quorum at 12 out of 17
12 to conduct business and then specify for
13 important issues specifically set forth a super
14 majority, not just a majority of these present,
15 but of at least 12 and 17 for bank loans and a
16 unanimous vote under 2(c) must approve.

17 Again, this super majority was put in
18 place to assure there is support in both grower
19 and the sheller groups. Neither group can act
20 without at least support from the other.

21 Q How is this list of items requiring
22 the super majority in Section 986.55(c)(1)

1 arrived at?

2 A Well it was a consensus after a
3 discussion with growers, shellers, attorneys. We
4 wanted all important issues included and we felt
5 like we have them making regulation for size and
6 quality, modifying territories or definitions,
7 research projects. Again, the important items
8 that will come before the council.

9 MR. QUIROS: I want to turn your
10 attention to Section 986.55(c)(2), it begins
11 "Actions of the council." Will you take a moment
12 and look at that. Mr. Davis, could you please
13 put that up?

14 MR. DAVIS: Yes.

15 THE WITNESS: Okay.

16 MR. QUIROS: Why are unanimity and in-
17 person requirements under 986.55(c)(2)?

18 THE WITNESS: We think that financing
19 is an extreme important issue. It does not have
20 flexibility -- Well it does have flexibility for
21 dire emergencies and then a call-in or a
22 videoconference can be called, but we just felt

1 like that financing rose to a level of importance
2 that required everybody on board.

3 BY MR. QUIROS:

4 Q Thank you. So in such emergencies
5 meetings by telephones or other means of
6 communication should be utilized if it's a
7 necessary --

8 A Yes. Just, again, to accommodate the
9 situation.

10 Q Okay. The rapid changes in
11 conditions, administrative matters, et cetera?

12 A Yes.

13 Q Okay, thank you. Should such votes
14 cast by telephone or other means of communication
15 be confirmed promptly in writing so that there
16 will be a written signed evidence of the vote of
17 each member on the file in the council office and
18 also to be presented to the Secretary?

19 A That's an important procedure, yes, to
20 be followed.

21 Q And you heard testimony on that today
22 earlier?

1 A Yes.

2 MR. QUIROS: Okay, thank you. From
3 one of our other witness, thank you. No further
4 questions on this Section at this time.

5 JUDGE GUTHRIDGE: Any questions from
6 USDA?

7 (No audible response.)

8 JUDGE GUTHRIDGE: No questions.

9 MS. CHILUKURI: I have a question.

10 JUDGE GUTHRIDGE: Oh, wait. We think
11 there's a question.

12 MS. CHILUKURI: So, Mr. Adams, with
13 respect to 55(c)(2), what is your understanding
14 of how many members have to unanimously vote at
15 this in-person meeting? You couldn't hear? I'm
16 sorry.

17 THE WITNESS: I can't hear you.

18 BY MS. CHILUKURI:

19 Q So under 55(c)(2) how many members
20 that are present at this in-person meeting
21 regarding securing commercial bank loans for the
22 purpose of financing, how many members have to

1 unanimously vote on that issue?

2 A I think all. If I understood, and,
3 again, I'm having difficulty hearing, but I think
4 the answer is all if I understood the question,
5 yes.

6 Q Okay. Another question that I had,
7 and I'm not sure who's testimony this was, but
8 Ms. Watts, or maybe some others, referred to
9 having instead of in-person face-to-face meetings
10 for some of the actions set out in (c)(1) she
11 referred to the possibility, I think, a
12 videoconference or phone conference, meetings for
13 that instead of in-person meetings for emergency
14 purposes.

15 A Yes.

16 Q I just wanted to hear your thoughts on
17 that.

18 A Right. In other words these were
19 issues that needed to be addressed in a timely
20 manner, and so first choice was videoconference.

21 If a videoconference is not possible
22 then a conference call with immediate follow up

1 with written documentation.

2 MS. CHILUKURI: Okay. I'm sorry, so
3 did proponents suggest a revision to the language
4 or the clarifying language, or do you have
5 suggestions in mind?

6 JUDGE GUTHRIDGE: Are you talking
7 about the language in (c)(1) now or in (c)(2)?

8 MS. CHILUKURI: I was referring to
9 (c)(1).

10 JUDGE GUTHRIDGE: To (c)(1). Ms.
11 Chilukuri, is the question whether Mr. Adams is
12 comfortable with language that would permit
13 videoconferencing or something on one of the
14 (c)(1) issues rather than an in-person --

15 MS. CHILUKURI: Yes. My understanding
16 was that Ms. Watts testified to that effect, and
17 perhaps some others as well, and I wanted to hear
18 Mr. Adams's thoughts on that.

19 THE WITNESS: My thoughts about
20 videoconferencing and conference calls?

21 MS. CHILUKURI: Yes, as it relates to
22 the issues under (c)(1).

1 JUDGE GUTHRIDGE: Rather than require
2 a strictly in-person physical presence that
3 somebody could be present for a (c)(1) issue by
4 video or some other means.

5 And I think she's asking whether that
6 would be a good idea, is that correct?

7 MS. CHILUKURI: In your opinion, and
8 if not that's --

9 THE WITNESS: No looking at that list
10 I don't see anything there that would require an
11 emergency meeting and I think when there's not an
12 emergency meeting then the in-person meeting is
13 the method.

14 I think the videoconference and the
15 conference call was in the case where you had to
16 make a decision in a hurry and you weren't able
17 to get together.

18 MS. CHILUKURI: Okay, thank you.

19 THE WITNESS: The look on your face
20 indicates I didn't answer your question very
21 well.

22 MS. CHILUKURI: No, no, I just thought

1 I had recalled that other people had said, talked
2 about their preferences, so I wanted to just hear
3 your opinion, so, thank you.

4 THE WITNESS: Yes.

5 JUDGE GUTHRIDGE: Are there anymore
6 USDA questions?

7 MR. HILL: No.

8 JUDGE GUTHRIDGE: Mr. Quiros?

9 MR. QUIROS: Just a few. Mr. Adams,
10 these are very important matters under this
11 Section 986.55, are they not?

12 THE WITNESS: Yes.

13 MR. QUIROS: And can you envision a
14 time in the future because of an increase in
15 technology or the comfort that the Secretary and
16 the members have with the operations of this
17 group that there might be suggestions for
18 revisions to this section even though it's very
19 important?

20 THE WITNESS: Yes.

21 MR. QUIROS: And do you think that the
22 establishment of bylaws with regard to the

1 procedure of how the council operates might be
2 helpful with regard to some of these issues in
3 the future so long as they do not conflict with
4 the proposed federal marketing order terms?

5 THE WITNESS: Yes.

6 MR. QUIROS: Thank you. No further
7 questions, Your Honor.

8 JUDGE GUTHRIDGE: Any further
9 questions from USDA?

10 (No audible response.)

11 JUDGE GUTHRIDGE: No questions. Mr.
12 Quiros?

13 MR. QUIROS: Yes. Mr. Adams, please
14 turn to Section 986.56, Right of the Secretary.
15 Take a moment to review that, please.

16 THE WITNESS: Okay.

17 BY MR. QUIROS:

18 Q Congress gave authority to the
19 Secretary, the Secretary delegates authority to
20 this council, but the Secretary is responsible
21 for the Act, is that correct?

22 A Correct.

1 Q So why is this provision important?

2 A Well he is required by the Act.

3 Again, it hadn't been a problem before, we don't
4 anticipate any problem. It makes sense that the
5 Federal Marketing Order was an entity setup for
6 the benefit of the pecan industry.

7 If a council member, alternate, or
8 agent was self-dealing or not exercising due care
9 they should be subject to removal.

10 Q Does it uphold the intent of the Act?

11 A Yes.

12 MR. QUIROS: No further questions on
13 this Section at this time.

14 JUDGE GUTHRIDGE: Any further
15 questions from USDA?

16 MR. HILL: No, Your Honor.

17 JUDGE GUTHRIDGE: No questions. Mr.
18 Quiros?

19 MR. QUIROS: Yes. Mr. Adams, Section
20 986.57 (a) through (d), Funds and Other Property,
21 would you take a look at that, please? Take time
22 to read it.

1 THE WITNESS: Okay.

2 BY MR. QUIROS:

3 Q Why did you all include this
4 provision?

5 A It's required by the Act. It states
6 the obvious that all funds received as a result
7 of this marketing order shall be used only for
8 the purpose as specified in the order and the
9 council will be responsible to the Secretary for
10 accounting for those funds.

11 Q Why is it important?

12 A Transparency to prevent mission creep
13 and acts that are, you know, they should be
14 communicated. In other words, total transparency
15 and shaking hands with the Department on whatever
16 issue.

17 Q Thank you. Please turn your attention
18 to Section (d), take a look at that, please.

19 A Okay.

20 Q Why is that in there, Mr. Adams?

21 A Makes it clear the books and records
22 belong to the council and provides for the

1 transfer of books and records in an event a
2 member of an employee, officer leaves.

3 MR. QUIROS: Thank you, Mr. Adams. No
4 further questions on this Section at this time.

5 JUDGE GUTHRIDGE: Any questions from
6 USDA?

7 (No audible response.)

8 JUDGE GUTHRIDGE: No questions?

9 MR. HILL: No questions.

10 JUDGE GUTHRIDGE: Mr. Quiros?

11 MR. QUIROS: Thank you. Mr. Adams,
12 Section 986.58, Reapportioning and Redistricting,
13 if you'd take a moment to look at that section.

14 THE WITNESS: Okay.

15 BY MR. QUIROS:

16 Q Thank you, Mr. Adams. We've heard
17 testimony on this section before, but in general
18 what does this section attempt to do?

19 A It simply gives the council the
20 flexibility and some guidelines as to what to do
21 if there is significant changes in the industry
22 that call for reapportionment of regions or

1 groups to make the voting fair.

2 Q Does the proponent group anticipate
3 ever needing to revise the region boundaries?

4 A There is a possibility, but that's in
5 the future, pretty far into the future.

6 Q Under what circumstances would this
7 type of change in the regions be merited?

8 A If there was a significant change in
9 production, harvest, climate, all of those things
10 that would have to be established over a period
11 of time, not just a one year or a two year
12 phenomena.

13 Q What do you think factors would be
14 taken into account at that time?

15 A Production, harvest, you know, when
16 and what volume was coming in at the time, and
17 right now the harvest moves from east to west, if
18 that trend changed significantly.

19 Q Thank you.

20 A It would be the same factors on which
21 the regions were established to begin with.

22 Q All right. Why is the authority for

1 reapportion on this?

2 A To not paint ourselves in a corner, to
3 not paint the council and the industry in a
4 corner, to allow for flexibility for future
5 changes.

6 Q And under what circumstances would
7 reapportionment, which I understand to be this
8 reallocating members between regions, when would
9 that be appropriate?

10 A When there were significant changes in
11 the factors I just talked about.

12 Q Thank you.

13 A That we used to establish them to
14 begin with.

15 Q Would such changes still be subject to
16 the super majority quorum requirements in --

17 A Yes.

18 Q -- Section 986.55(c)(1)?

19 A 986.55, yes, (c).

20 Q Yes.

21 A Or in (6) and (7), that specifically
22 requires a super majority for changes to regions

1 and definitions of growers and sellers.

2 Q Can you think of changes like this
3 that might occur?

4 A If there was a significant change in
5 the number of growers in one region or another,
6 acreage change, increase in the number of
7 shellers, those changes are set forth in (1)
8 through (4). Again, the kind of the fundamental
9 issues on those matters.

10 MR. QUIROS: Thank you. I know that
11 you've said this before but I wanted to repeat
12 some questions, general questions, for you. Oh,
13 I'm sorry.

14 (Simultaneous speaking.)

15 MR. QUIROS: Your Honor, that's all
16 the questions I have on that Section at this
17 time.

18 JUDGE GUTHRIDGE: On Section 58?

19 MR. QUIROS: Yes, sir.

20 JUDGE GUTHRIDGE: Are there any USDA
21 questions?

22 MR. HILL: No questions specific to

1 this Section.

2 JUDGE GUTHRIDGE: Mr. Quiros?

3 MR. QUIROS: Yes. Just, again, we're
4 in a different region and I think it might be
5 helpful for this different audience, are you
6 familiar with Exhibits 19, which was the report
7 prepared by Dr. Palma, and Exhibit 23, which was
8 the executive summary prepared by Dr. Palma?

9 THE WITNESS: Yes.

10 BY MR. QUIROS:

11 Q Do you agree with Dr. Palma's findings
12 that the Federal Marketing Order is likely to
13 increase pecan prices?

14 A Yes.

15 Q What do you believe as a grower about
16 the balance between the benefits of the Federal
17 Marketing Order and the cost of the Federal
18 Marketing Order?

19 A The benefits outweigh the cost.

20 Q From all you've learned in the
21 industry form talking with handlers, from a
22 handler perspective what do you believe about the

1 balance between the benefits of the Federal
2 Marketing Order and the cost of the Federal
3 Marketing Order?

4 A The same. I think that the benefits
5 outweigh the costs and I think the handling
6 community agrees with that.

7 Q What do you think of the council's
8 authority through its product handling authority
9 regarding quality, size, packaging of pecans,
10 would that lead to improved prices?

11 A It would.

12 Q Do you think that the Federal
13 Marketing Order has any other benefits to it?

14 A Has any other what?

15 Q Has any other benefits to it besides
16 the product handling authority that we just
17 discussed?

18 A I think all of the authorities in
19 986.68 and 69 are essential and benefit to the
20 industry. One other benefit is the Federal
21 Marketing Order collection of pecan product data
22 for publication and delivery to the USDA.

1 For too long this industry has
2 operated without accurate data on supply, demand,
3 prices, and inventories. An important benefit of
4 the proposed Federal Marketing Order is data
5 collection for the benefit of industry
6 participants, which are growers, handlers, and
7 consumers.

8 Q Thank you. In general are you in
9 favor of the Federal Marketing Order for pecans?

10 A I am.

11 Q And tell us why?

12 A For the very reasons that the American
13 Pecan Board was established initially to have a
14 unified voice for the pecan industry, which we
15 have not had up until recently, to learn from
16 what almonds and pistachios and walnuts have done
17 and increase their demand, which is a simple,
18 it's a simple concept, but it takes a concerted
19 effort in the marketing and promotion field.

20 We need better measurements and market
21 information, better data. We need all the
22 council authorities of the Federal Marketing

1 Order that have been mentioned in 986.67 through
2 69 to improve pecan product for all parties and
3 to compete with the other tree nuts.

4 We need to research component for
5 things like product development, as you've heard
6 testimony to. So for all of those things I think
7 that the Federal Marketing Order will benefit the
8 pecan industry.

9 Q Thank you. Mr. Adams, you've been
10 active in other industry organizations, have you
11 not?

12 A I have.

13 Q Can you tell us about that?

14 A Well I began this by saying I don't
15 like to talk about myself, but I guess I will.
16 I've been in the Texas Pecan Growers Association,
17 the American Pecan Board, Texas Pecan Board.

18 I've served in various officer
19 positions of all of those organizations. I've
20 been intimately involved in not only growing
21 pecans but in the policy side of it, just because
22 I think it's important, since the early '90s.

1 Q Mr. Adams, let me specifically refer
2 your attention to the Texas Pecan Growers
3 Association and the Texas Pecan Board.

4 Will the proposed American Pecan
5 Council's mission and duties conflict with the
6 mission and duties of any of those organizations?

7 A Not at all. Not at all.

8 Q A couple of last things, Mr. Adams.
9 Mr. Adams, did Bob Knight contact you about his
10 desire to be here today?

11 A He did, yes.

12 Q And why did he tell you that he could
13 not come?

14 A He was spraying his orchard into the
15 wee hours of the morning and he said he would get
16 up at 4:00 a.m. and drive down from Oklahoma and
17 I told him to keep spraying and we would do
18 without him.

19 Q And he sent you a letter from the
20 Oklahoma Pecan Growers Association, did he not?

21 A He did.

22 MR. QUIROS: May I -- I'm going to

1 tender this into the Court, Your Honor, as
2 Exhibit 53.

3 JUDGE GUTHRIDGE: Well I think we
4 already have a 53.

5 MR. QUIROS: I'm sorry, 54.

6 JUDGE GUTHRIDGE: I think we have a --
7 (Simultaneous speaking.)

8 JUDGE GUTHRIDGE: We have up through
9 60 I think, 61.

10 MR. HILL: You already had 61 so it
11 would be 62.

12 MR. QUIROS: So sorry.

13 (Off the record comments.)

14 MR. QUIROS: It would be 62?

15 JUDGE GUTHRIDGE: That seems to be the
16 next number.

17 (Whereupon, the above-referred to
18 document was marked as Proponent's Exhibit No. 62
19 for identification.)

20 MR. QUIROS: Thank you. Mr. Adams, is
21 this a letter that you received from Robert
22 Knight?

1 THE WITNESS: It is.

2 MR. QUIROS: And would you read it
3 into the record for us, please, sir?

4 MR. HILL: Your Honor, I'm going to
5 have to object to this. Mr. Knight isn't here.
6 I can't verify this document and he's not here to
7 either read this or to take questions on this, so
8 I'm going to have to object to this piece of
9 evidence.

10 MR. QUIROS: Your Honor, we're
11 offering it because it was received by Mr. Adams.

12 MR. HILL: But it's being offered for
13 the truth of a statement.

14 JUDGE GUTHRIDGE: Yes, it's being
15 offered for the truth of the matter, so --

16 (Simultaneous speaking.)

17 MR. QUIROS: Yes, sir, the weight, not
18 the admissibility as evidence, just the --

19 JUDGE GUTHRIDGE: I'm sorry?

20 MR. QUIROS: Just the weight of it not
21 the admissibility of the evidence.

22 JUDGE GUTHRIDGE: For what other

1 purpose would it be offered other than to what it
2 states?

3 MR. DAVIS: Mr. Quiros, may I -- Your
4 Honor, may I address that.

5 MR. QUIROS: Please.

6 MR. DAVIS: I think my position would
7 be this witness could say that he received it, he
8 could testify that he had a telephone
9 conversation with Mr. Knight, that Mr. Knight was
10 sending it, and then, therefore, I think that
11 counsel's concern would go to the weight and not
12 the admissibility because this witness could say
13 he received it and that he had a conversation
14 with Mr. Knight telling him that it was his
15 letter.

16 JUDGE GUTHRIDGE: Well that would be
17 hearsay, too.

18 MR. HILL: Right.

19 MR. DAVIS: Not if the witness isn't
20 here under oath. He could say I received that
21 call from --

22 MR. QUIROS: Yes.

1 JUDGE GUTHRIDGE: Would perhaps a
2 better way to handle this if Mr. Knight could
3 submit this document directly to the --

4 MR. DAVIS: I think he --

5 MR. QUIROS: He has already filed it
6 with the Secretary, Your Honor. A witness cannot
7 send a letter in and be held and testify without
8 his presence.

9 We're not asking Mr. Knight to testify
10 without his presence, we're just asking Mr. Adams
11 to verify that he received this letter from Mr.
12 Knight.

13 JUDGE GUTHRIDGE: Well this testimony
14 is -- I mean this letter is, in effect, testimony
15 it seems to me and there is an objection. It's
16 pretty classic hearsay it seems to me.

17 And I assume, you know, this is the
18 only adjudicatory I've ever done, but if the
19 Federal Rules of Evidence were applied to this
20 letter it seems to me it would be hearsay.

21 Why don't we do this, why don't you,
22 I mean it will become part of the record as an

1 exhibit, the admission -- The objection to the
2 admission was sustained, but maybe between now,
3 we have the foundation that you are arguing on
4 the record and I can check Federal Rules and also
5 rules relating to admissibility of hearsay in
6 rulemaking hearings.

7 Like I say it's something I don't know
8 about and revisit this next week.

9 MR. DAVIS: Your Honor, again, if we
10 could, and perhaps if counsel for USDA would --
11 Mr. Hill, let me, I would just say first I do not
12 believe that we received any notice that the
13 Federal Rules of Evidence were going to apply to
14 this proceeding.

15 I would second say after five days of
16 this I think all the lawyers here would say the
17 Rules of Evidence have not been observed very
18 well, there's been a great deal of hearsay
19 testimony.

20 But I think all of that is for the
21 purpose of getting information into the record.
22 Now if something were irrelevant, if we were

1 going to try to introduce coloring books or
2 something like that, you, Your Honor, could
3 clearly exclude irrelevant evidence, but I do not
4 believe that the Rules of Evidence have been
5 applied to these proceedings correctly.

6 The witnesses are under oath. They
7 know that they've got an obligation to tell the
8 truth, and this witness is just going to testify
9 that he received this letter.

10 He could also testify about his
11 conversations with Mr. Knight.

12 JUDGE GUTHRIDGE: But I think Mr.
13 Hill's point is that Mr. Knight was not under
14 oath when he wrote the letter.

15 MR. DAVIS: That is correct and we're
16 not, but --

17 JUDGE GUTHRIDGE: And the contents of
18 the letter is what's important regarding the
19 submission, is it not? I mean isn't that --

20 MR. DAVIS: That the Oklahoma
21 Association has in fact voted --

22 JUDGE GUTHRIDGE: Yes.

1 MR. DAVIS: -- but I mean could not
2 Mr. Adams simply say the Oklahoma Association has
3 voted in favor of the proposed Marketing Order?

4 JUDGE GUTHRIDGE: Is there a
5 foundation for that?

6 MR. DAVIS: Yes, this letter, and a
7 telephone conversation with Bob Knight.

8 (Simultaneous speaking.)

9 MR. QUIROS: Your Honor, this is -- We
10 are certainly subject to your ruling, but part of
11 the reason we are having these hearings and
12 posting this information is so that the public
13 can be aware of the things that are happening.

14 Pawnee trees need spraying for scab,
15 and that is the basis for Mr. Knight not being
16 here.

17 JUDGE GUTHRIDGE: I understand all
18 that, Mr. --

19 MR. QUIROS: And so our real desire
20 was to post this so that the public could be
21 notified of the receipt by Mr. Adams of a letter
22 from Mr. Knight regarding the Oklahoma Pecan

1 Growers Association.

2 We're willing to be subject to
3 whatever your ruling is, of course, but we --

4 JUDGE GUTHRIDGE: Well, thank you, but
5 the rules, and as I said at the very beginning of
6 this when I announced the opening in Las Cruces,
7 the rules as I understand it provide for
8 submission of statements in the form of affidavit
9 for someone who does not testify, and I think
10 that this would fit in that category.

11 There is a way to get this in, but I
12 just don't think it is -- Over the objection of
13 USDA I don't think it's through a letter that's
14 been received by Mr. Adams, so I'm going to
15 sustain the objection, but as I say I'll do a
16 little looking at the rules over the weekend and
17 see if -- And we can revisit it on Monday if
18 you'd like and -- right?

19 FEMALE PARTICIPANT: Yes.

20 JUDGE GUTHRIDGE: Mr. Adams?

21 THE WITNESS: Can I make a comment?

22 MR. HILL: Okay.

1 JUDGE GUTHRIDGE: I don't think a --
2 So, again, I think that the Oklahoma Pecan
3 Grower's Association and the President of that
4 group submit an affidavit stating this, and since
5 the rules permit that I am going to sustain the
6 objection.

7 MR. QUIROS: Thank you, Your Honor.
8 No further questions of Mr. Adams at this time.

9 JUDGE GUTHRIDGE: Anything else from
10 USDA? Anymore questions?

11 MR. HILL: No questions, Your Honor.

12 JUDGE GUTHRIDGE: Are there any
13 questions from the audience?

14 (No audible response.)

15 JUDGE GUTHRIDGE: No questions from
16 the audience. Mr. Adams, you are excused. Is
17 there anything else today?

18 (Off microphone discussion.)

19 JUDGE GUTHRIDGE: So, yes, the Dallas
20 -- Because there are no witnesses tomorrow, so
21 the extra day that was provided for as potential
22 is not needed, so we'll recess from now until we

1 reconvene in Fifth and Georgia on Monday the 27th
2 at 8:00 a.m. 8:00 a.m., and off the record.

3 MR. QUIROS: That's correct.

4 JUDGE GUTHRIDGE: We're adjourned, or
5 recessed rather.

6 (Whereupon, the above-entitled matter
7 went off the record at 7:09 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Proposed Marketing Order and
Agreement for Pecans

Before: USDA

Date: 07-24-2015

Place: Richardson, Texas

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