UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

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

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

BEFORE:

JILL S. CLIFTON
Administrative Law Judge

Neal R. Gross & Co., Inc.
202-234-4433
APPEARANCES:

On Behalf of the Proponents:

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On Behalf of the United States
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Also Present:
KENNETH JOHNSON, USDA
MARK MCFETRIDGE, USDA
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JUDGE CLIFTON: We're now on record. We are picking up on a hearing already begun. Today is Tuesday, April 26, 2011. We're in Provo, Utah. The case before me has the following caption: In Re Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

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

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

Capital F, capital V, hyphen, 10, hyphen, 930, hyphen, 5. And the last number, capital a, capital M, capital S, hyphen,
capital F, capital V, hyphen,
10, hyphen, 0087.

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

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

What that means is although you
can talk to these people individually, and not
on the record, about procedural items, you may
not talk with them about the merits of the
You may not lobby them for your point of view, privately. You may do so from the witness stand of course.

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

Ms. Deskins: Yes. My name is Sharlene Deskins. I'm an attorney with the United States Department of Agriculture, Office of the General Counsel. My office is in Washington, D.C., and I represent the Agricultural Marketing Service in this proceeding.

Judge Clifton: Thank you.

Mr. Engeler: My name is Martin Engeler. I'm with the USDA Agricultural Marketing Service, and I work out of Fresno, California.

Ms. Salehi: My name is Parisa Salehi. I am also with Marketing Orders
Administration Branch at the United States
Department of Agriculture.

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

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

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

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

Ms. Deskins, would you explain
what that means.
MS. DESKINS: Yes. Once the notice of hearing was filed in this case, it prohibits anyone who's in USDA, who's involved with the decision making process, from talking about the merits of the case. Everyone from AMS and--well, USDA, who's identified themselves today, cannot discuss the merits of the case with you.

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

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

Mr. Hill, would you begin please.

MR. HILL: Yes. My name is Brian
Hill. I'm with the United States Department of Agriculture's Office of the General Counsel, Marketing Division. I am actually representing the Cherry Industry Administrative Board in this matter.

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

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

JUDGE CLIFTON: All right. Mr. Hedin.

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

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

MR. HILL: Yes. I am representing
the board; correct.

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

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

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

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

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

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

I would like today's pages to be numbered in sequence to those that were begun in Grand Rapids, Michigan.
All right. The way we've done the numbering of the exhibits, we just do it sequentially. So whatever the next exhibit's going to be, I'm going to ask that it be marked as Exhibit 18.

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

All right. What other preliminary matters are there?

Ms. Deskins, is there anything?

MS. DESKINS: Nothing else from us.

JUDGE CLIFTON: All right. Mr. Hill.

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

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

MR. HEDIN: Can I ask one
question?

JUDGE CLIFTON: you may.

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

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

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

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

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

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

JUDGE CLIFTON: Mr. McFetridge,
you may come forward. And you may be seated.
You remain sworn.

Please state and spell your name.

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

WHEREUPON,

MARC MCFETRIDGE

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

BY MS. DESKINS:

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

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

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

A I did.

Q Okay. Can you tell us the name of
the exhibit you prepared.

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

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

A   Yes.

JUDGE CLIFTON: That's Exhibit 7.

MS. DESKINS: Seven. I'm sorry.

Exhibit 7.

BY MS. DESKINS:

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

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

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

A   Sure. That is on page ten.

Q   Do you recall the question that
you were asked?
A: Yes. There was a question raised about the price for Oregon, which— for 2009, which shows up as 84.5 cents, and then also for Washington, which shows up as 46.8 cents.

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

A: Yes.

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

A: Yes.

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

A: Yes.

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

A: Well, for specific regions, the fresh and processed is included in an All price. NASS withholds data without— so that they don't disclose individual operations. So like in Oregon, there's very few producers.
So without—if they published the data, they'd be giving insight to competitors, what people are actually charging, so--

Q    Should anything on page ten be changed?

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

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

A    Exactly.

MS. DESKINS: All right. Judge Clifton, based on what Mr. McFetridge has testified to, we would like to change Exhibit
7, page ten. It would just be a change to the title, not to any of the numbers. Is that correct, Mr. McFetridge?

THE WITNESS: Yes.

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

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

JUDGE CLIFTON: Excellent.

MS. DESKINS: And if we could take out the page ten that's current in there and substitute the new one. Or we could submit as a separate exhibit.
JUDGE CLIFTON: In order for the transcript to make sense, we have to have them both.

MS. DESKINS: Okay.

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

MS. DESKINS: Okay.

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

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

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

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

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

MR. HILL: Just a quick question.

MR. HILL: Fresh and processed.

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

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

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

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

MR. HILL: Okay. So on the new 7, Exhibit 7, page 10A, that's going to be
reflected in the rest of the numbers as well?

THE WITNESS: Yes.

MR. HILL: All right.

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

Mr. Hedin.

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

THE WITNESS: Yes; that's correct.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

MR. HEDIN: Okay. Thank you.

MS. DESKINS: You need to say "yes" for the record.
THE WITNESS: Yes.

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

(No response)

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

MR. ROWLEY: We all agree.

(Laughter)

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

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

MR. HEDIN: Yes.

JUDGE CLIFTON: You may proceed.

MR. HEDIN: But in that regard, I did speak with both with a processor and a
board member from Oregon, and the Oregon Ag Statistics Service, about the 85 cent posting, in particular, and the processor indicated that he felt that the citations for the prices for 2008 and 2010 were correct. But he too had spoken with Oregon Ag Statistics about the 85 cent price, and asked that they revisit that.

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

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

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

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

(No response)
JUDGE CLIFTON: Mr. McFetridge, is there anything you'd like to add?

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

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

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

THE WITNESS: No.

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

THE WITNESS: No.

JUDGE CLIFTON: All right. All right. Ms. Deskins, how would you like to handle those pages?
MS. DESKINS: Mr. McFetridge, you have copies of the changes that you've made?

THE WITNESS: Yes.

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

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

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

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

MS. DESKINS: Okay.

JUDGE CLIFTON: "A" might stand for amended.

MS. DESKINS: Okay.

JUDGE CLIFTON: But just some way for a person to actually look at them side by side.
MS. DESKINS: Okay.

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

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

(Discussion off the record)

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

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

MR. HEDIN: Okay.

JUDGE CLIFTON: All right. Also while we were off the record, the court reporter asked about the spelling of NASS. Mr. McFetridge, would you describe not only the spelling of that but what it means.
THE WITNESS: Sure. It is N-A-S-S, all capital letters, and it stands for the National Agriculture Statistic Service.

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

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

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

MS. DESKINS: Yes. I do.

JUDGE CLIFTON: Is there any objection?

MR. HILL: No.

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

(Whereupon, Exhibit 7, page 10A, page 9A, and page 13A, previously marked for identification, were received in evidence)
JUDGE CLIFTON: Thank you, Mr. McFetridge.

(Witness excused)

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

MS. DESKINS: I have no further witnesses.

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

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

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

(Discussion off the record)

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

Would you please state and spell your full name.

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

WHEREUPON,

RAY ROWLEY

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

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

MR. HILL: Yes. I'll start.

Well, I'm actually not going to question you right now since I see you have a prepared statement, so I'll let you read it, and I'll let you field some questions afterward. So you can begin.

THE WITNESS: Okay. My name is Ray Rowley. I'm a cherry grower in the Santaquin area, which is in the south end of Utah County, State of Utah. I'm affiliated with Cherry Hill Farms, Inc. It's a family-
owned business that grows tart cherries, apples and peaches. My brothers and I own and operate the farm. We are affiliated with the Payson Fruit Grower Co-op, which handles our cherries. We would be considered a large tart cherry grower by your standards. I believe your standards—okay.

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

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

Cherry Hill Farms has used in-orchard diversions in past years to generate diversion certificates for our handler. An example of that is in the 2009 crop year. We in-orchard diverted 1.9 million pounds of tart
cherries, about 15 percent of the crop.

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

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

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

This seems just opposite of what it should have been. The incentive was to not in-orchard divert in this large crop year. This is one of the biggest reasons for the amendment, I believe, to give growers an incentive to put some cherries on the ground
in large crop years, to bring supply and
demand back into balance.

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

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

All other credits--exports, new
market, new products, and those other credits,
are all counted as bottom line, and taken at
a one to one face value. The top-line credits
are usually discounted in value because more
cherries that are harvested, the greater the
restriction. As a fixed number of orchard
diversion certificates are spread over the
increasing number of total gross cherries,
they become less valuable.

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

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

It kind a threw the industry into
a turmoil.

On February 16, 2010, there was a
meeting between CIAB leaders and USDA representatives that oversee the market order. We were in the office there with Mr. Shipman, Mr. Durando, and others.

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

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

The idea of in-orchard diversion credits equal to all other credits, to encourage more diversion on the ground in high production years, was discussed as a possible solution again, and brought to the forefront.
as a viable alternative to help reduce the overall production.

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

Okay.

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

Perry can probably straighten that one out.

Anyway, 16 to one to adopt this
concept of making in-orchard diversions equal
to bottom line credits. It was the intent of
the board to get this into place as soon as
possible, and try to get it into place for the
2010 years, if at all possible.

We were thinking of informal
rulemaking at that point.

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

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

If you go back under point number
two there, those five points that we talked
about. We wanted to go back and tell them the
progress that we'd made as a board, how we
come—you know—what's going on here.
Anyway, we met there on July 20th.

Among other things--and we talked about all those other things, but it's not pertinent today--but among other things, the in-orchard diversion and bottom line credits issue was discussed.

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

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

Other amendments to the order have taken four and five years, and we didn't want to wait that long. We wanted this thing in place, if at all possible.
Mr. Shipman seemed open to the idea and was ready to move forward on it from all the indications that we could get from him.

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

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

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

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

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

We felt that if we could get the proper incentive to the growers, and give them real value for putting excess cherries on the ground in high crop years, then the supply and
1 demand would be closer.

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

   Ten. Another purpose of the proposed amendment is to make the order less confusing. As the order is written currently, the two different types of credits, top line and bottom line credits, have different values to growers and processors. The value of the top line credits is a moving target and is dependent on the total crop size, and also the restriction percentage. The value of the bottom line credits is usually different from the top line credits. If we pass this amendment, it increases the value of the top line credits and makes them similar in value to the bottom line credits.

   Eleven. Another purpose of the proposed amendment is to make it more equitable to growers. The only market for diversion credits is the processors. This proposed amendment makes it so the grower can
get similar value from in-orchard diversion certificates as bottom line credits--exports and new markets. This amendment will help growers get a better return on diversion certificates.

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

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

Thirteen. Benefits to handlers of the proposed amendment. Handlers know that the in-orchard credits have a fixed, pound-for-pound worth as a compliance tool. They can use more accurately in-orchard diversions
as a part of their compliance plan. Handler compliance plans should be more accurate with this tool in place.

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

Fifteen. Benefits to the industry of the proposed amendment. Industry handlers and growers can still elect to use the in-orchard diversion process if it fits their business models and compliance plans. Inventory reserves will be reduced. There should be fewer surplus cherries processed for the sake of processing. Less expense will be incurred for processing of cherries and storing finished goods in reserves.

Conclusions. Growers are able to undertake diversions with confidence that their diversion credits will retain their
relative worth. Handlers will be free to take
diversion credits, knowing that the credits'
worth as a compliance tool will remain
constant. The optimum supply formula will
continue to function and the free market will
be properly supplied. The amendment process
should be supported by all and implemented as
soon as possible.

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

MR. HEDIN: Crop statistics.

THE WITNESS: Crop statistics.

I'm not sure if they pull from the
same pool of numbers. I think they do. But
if you look at this and look at that thing red
line, that thin red line is the average price
to growers. And the other two lines are the total production and the total sales.

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

I also included in this two pages of a spreadsheet. I think you've been through it in Michigan, time and time again. I don't mind answering questions on that but I'm not going to go through it with you. Okay? I helped put it together with all you guys, and if you've got questions on it, I don't mind
answering it. But there's no sense spending
another 20 minutes going through that again.

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

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

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

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

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

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

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

THE WITNESS: We're in Utah.

MS. SALEHI: Well, when you're
referring to the red graph--
JUDGE CLIFTON: The one colored one needs to be with her for the record copy.

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

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

(Discussion off the record)

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

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

THE WITNESS: Not at this time.

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

Mr. Hill?

MR. HILL: Yes.

BY MR. HILL:

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

The SBA, Small Business Administration definition says that a small grower is below
750,000 gross receipts per year. So would that mean you're a large grower?

A Large.

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

A Yes.

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

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

Q And basically unanimous is what you're saying?

A Yes.

Q Let's look at your number two, which starts Cherry Hill Farms on your document. You mention how your in-orchard diversion--basically, that the value of it was reduced. Could you tell us how a one-to-one
credit would have helped you in determining
what you were going to do for that crop year.

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

Okay. We--it would have made our
compliance plan easier, because we put our
compliance plan in as we started to pick.

Okay? And so we said okay, we need X amount
of cherries from each grower in our co-op on
the ground, or about that many. That's where
we want it to be. Okay?

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

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

And so had we been using a
strictly financial incentive, we wouldn't have
put any on the ground. And yet with such a
huge crop in 2009, we probably should have put
more on the ground. And so the incentive
wasn't there to put more on the ground. Does
that make sense?

Q     It makes sense to me.
A     Okay.
Q     So would you say that it not being
one to one, it essentially made it harder to
comply?
A     Right.
Q     And would you say it provided a
moving target of what your compliance number
would be?
A     Of course. Yes; yes.
Q     Now it has been asked, several
times before: Do you think that passing this
amendment would essentially incentivize people
to just, as a first option, put cherries on
the ground?
A     I don't think growers grow
cherries to just put 'em on the ground. Okay?
I think the people will look at their
restriction percentage and use this as another tool to help meet that restriction. But they will use it in a way that they say, okay, it's fair for everybody now, it's more equal, it's an opportunity for us to use it as a tool, rather than hate it and, and be belligerent about it, and call the New York Times, or Washington Post, or whatever, and have 'em come out and look at all the cherries we're dumping on the ground and blame USDA. You know? I don't think that will happen. I think we'll use it as a tool to put those we need on the ground.

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

A Yes.

BY MR. HEDIN:

Q Ray, in your discussion about grower pricing, how, actually, do you think that the reduced amount of inventory will impact the grower pricing as a result of your diversions?
A     I think it will raise the price, but you know, that we say we have so many in reserves, okay, and we do, but I believe, in the back of our buyers' minds, they look at everything. They don't look at just what's on the market. They look at what's in reserve and then they try and beat the price down from there. If they're not in reserve, they're not there to begin with, it doesn't put that downward pressure on price.

Q     Ray, it appears that Utah has been a pretty--in general, has been a pretty strong area for use of diversion credits. Why do you think that Utah does more than, proportionally, than most of the other states?

A     Like a herd a sheep. Okay. If one grow--if one packer in Michigan is packing everybody's fruit, everybody else follows along. Pretty soon, they have the opportunity to take it to one handler, another handler, and if he's going to take all the fruit, then
they do it, and pretty soon they're at the end
of the harvest and not very many's gone on the
ground.

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

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

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

A Yes.

Q -in the worth of those compliance
credits?

A Yes. They have, because it's,
like I said before, it's a "moving target."

You never know exactly where you're going to end up, and the more you put on the ground, the less it's worth, so--

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

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

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

A Yes.

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

A Yes.

Q --ascertained the compliance tools?

A Yes.
Q Does Payson have the same— Payson Fruit Growers. that is, have the same opportunity to deal with some of the post-harvest credits as processors from other districts?

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

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

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

Q Is it fair to suggest that the use of diversion credits in the orchard is a last resort rather than the first resort?
A       Yes.

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

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

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

Between 250 and 300, I think we would be in the middle there. Where those other certificates might handle, we might consider putting some on the ground for in-
orchard diversion for certificates. Would
have to see. Above a 300 million pound crop,
almost definitely, we would have to consider
putting some in-orchard diversions, some on
the ground for credits there. that's just my
"gut feel" for right now, depending on, you
know, how it all shakes out in sales, and
everything else.

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

A Time. Formal rulemaking, or the
amendment process, seemed to be like forever.
Okay. We've had other amendments in the
process, and it just goes on and on and on.
It never seems to get there until finally, it
does, and, you know, informal rulemaking would
make this change effective this year. We have
the potential, this year, with a small crop
last year, if history repeats itself, to have
well over 300 million pounds in the country.

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

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

A     So do I. So do I.

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

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

A     You know, Mr. Shipman and Mr. Durando, as we spoke there in that meeting,
they--we talked five things, and this route here puts the incentive back in to the orchard, on the grower level, to take care of excess cherries before there's even one single cent put into processing, or storage.

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

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

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

But after that meeting with Mr.
Shipman and Mr. Durando, it became very clear that we had to do something, and this saved the grower and the handler the most money, and increased revenues for doing it. So that's why we went down that road.

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

A Yes.

Q --put this together?

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

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

A Yes; yes. You know, we looked at lots of things. I mean, lots of people have lots of ideas on how to help solve this, and as our committee met several times, and we
said, okay, this is the best one, this is
where we ought to go, let's start putting our
efforts down this road, and that's where we
put our efforts, and this is--this is what's
come of it, so far.

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

JUDGE CLIFTON: Mr. Hill?

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

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

Ms. Salehi.

MS. SALEHI: Sure.

BY MS. SALEHI:

Q Mr. Rowley, this is Parisa Salehi
with USDA again. I just wanted to ask you to
please describe the cherry industry in this
part of the country for me a little bit, just
so I'm familiar, as far as how many handlers,
growers, there are, to your knowledge.
Okay. Utah really has one major tart cherry area, and it's just south here, 10 to 20 miles—10, 25—you know, it's along the foothills here. There used to be a growing area north of here. It's mostly houses now, so most tart cherries are grown just south of here, anywhere from 10 to 25 miles away; okay? It's pretty concentrated. It's on the foothills.

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

JUDGE CLIFTON: Would you spell them both.

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

Payson Fruit Growers is larger than McMullin Orchards. There are a couple of
smaller handlers that handle their own individual fruit. Fowers. And I'm not sure what name they pack under, but it is the Fowers family.

JUDGE CLIFTON: Spelled...?

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

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

MR. HILL: What was his name?

"Woodie"?

THE WITNESS: Woodyatt.

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

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

MR. HILL: Okay.

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

THE WITNESS: Yes.
JUDGE CLIFTON: Spelled?

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

JUDGE CLIFTON: Thank you.

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

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

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

BY MS. SALEHI:

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

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

Q Yes.

A I would say there's five or six
large growers, and the rest would be
considered small growers.

Q    Okay.

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

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

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

Q    Okay.

A    Okay. So anything we put on the
ground, and only have to either shake on the
ground with one machine, rather than all the
other machines involved in harvest, or pick
ten trees and five thousand trees, and leave
the rest to fall, we save all that cost.

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

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

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

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

BY MS. SALEHI:

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

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

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

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

THE WITNESS: Just my perspective?

MS. SALEHI: Yes.

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

But we wanted to make sure, that
in the end, the same amount of carry in and
carry out--it was the same. We didn't put any
burden from what we did this year on to the
next year.

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

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

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

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

THE WITNESS: Okay.
MS. SALEHI: Thank you.

Martin.

MR. ENGELER: You done?

MS. SALEHI: Yes.

JUDGE CLIFTON: Mr. Engeler.

MR. ENGELER: Yes.

BY MR. ENGELER:

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

A Any excess inventory; yes.

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

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

(Laughter)

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

THE WITNESS: Let's just put it
so everybody can see it here; okay? Cause I
don't know that everybody here has seen these
boards. Okay. What I was referring to is the
bottom lines here. All right.

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

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

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

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

So we take the 30 million pounds
that would have gone on the ground, and

instead of putting them as top line, we move 'em down here on this line, which is your--I can't read that, Perry. Okay? Okay.

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

So that was important for us, not to have any more pounds restricted. Carry that through with the whole optimum supply formula, and you see right where it comes off-
-right here. It shows the 30 million as an in-orchard compliance, and then it shows, right here, with the impact on the reserves.

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

So that's how we put it together.

Does that answer it, Martin?

MR. ENGELER: Yes; that's helpful.

BY MR. ENGELER:

Q Would it be safe—or accurate to say that the reserve—or the cherries in reserve would be reduced because handlers were
utilizing those grower diversion certificates as part of their compliance tool?

A Yes.

Q To satisfy that restricted requirement?

A Yes.

MR. ENGELER: Okay. Thanks.

That's good. Thank you.

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

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

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

MR. HILL: Just as a note--

JUDGE CLIFTON: Go ahead. Mr. Hill?

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

MS. SALEHI: Exhibit 15.
MR. HILL: Yes, and I don't have what number--what exhibit number is that again?

MS. SALEHI: Fifteen.

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

JUDGE CLIFTON: That is very helpful. Thank you.

Now Ms. Salehi, did you want to add?

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

JUDGE CLIFTON: Good job. Mr. Engeler.

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

BY MR. ENGELER:

Q You had mentioned in your
testimony, that Utah probably participates in
grower diversion more than other parts of the
country, and I was wondering--in the past,
during the current situation, under the
current order--but I was wondering if this
proposal were to go into effect, if you think
that, overall, the industry would participate
in this program more. In the grower diversion
aspect.

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

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

Q     Would there be an expectation that
there would be more--

A Yes.

Q --participation, industry-wide?

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

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

A Yes.

Q And do you--can you foresee any difference in the impact on, on this kind of a proposal, on growers that may not be a
1 member of a co-op?

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

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

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

19 And I was wondering, in those
20 discussions and in all your meetings, if there
21 has been any concerns, or any things that have
22 come up, that would indicate that this might
cause problems for people, or may not benefit, may not be a benefit?

A To somebody out in the industry?

Q Yes. Just--

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

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

Q Okay.

A More fair. I don't know.

Q I've got some handler-related
questions. Would it be better for me to save those for somebody later? Are you involved in a handling operation, or--

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

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

THE WITNESS:   All right.

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

JUDGE CLIFTON: Mr. Johnson.

BY MR. JOHNSON:

Q     Hey, Ray.

A     You be nice, Ken.

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

Would this similar value help you
receive a return above your costs of
production?

A    You know, that's a--that's a hard

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

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

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

MR. JOHNSON: Right. Okay. Thanks.

JUDGE CLIFTON: Mr. Hedin.

BY MR. HEDIN:

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

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

We don't grow 'em to drop 'em on the ground. We just don't. And those growers are smart enough to see, when there's 300 and some odd million pounds out there, and the sales are whatever they are, that some have got to go on the ground, and they will drop a few on the ground. They're not going to drop their whole crop, heavens no. They might take 5 or 10 percent off, okay, if they can get full value for 'em. That's what I see.
I don't see us ever getting to that 110, anywhere near that. Okay.

Q    And the reform—or the amendment won't change the way the supply formula provides that 110 percent?

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

MR. HEDIN:  Good. Thanks.

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

JUDGE CLIFTON:  Ms. Deskins.

BY MS. DESKINS:

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

A    Yes.

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

A    Right.

Q    Can you just say, for the record,
what that institute is.

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

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

Q   Okay. And did you prepare this yourself?

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

Q   Okay. And that's the handbook
from the Cherry Marketing Institute?

A     Yes; yes.

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

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

MS. DESKINS:  Okay. All right.

Thank you.

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

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

MR. HEDIN:  Your Honor, I forgot
one question.

BY MR. HEDIN:

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

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

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

But they also didn't imagine new markets and new products to go against those restrictions. Because there's a lot of people
out there trying to get new markets and new products. As the old five plus one pack and pie filling, the way the United States consumers and consumers throughout the world consume different cherries, you know, they never imagined that we would be in this sort of a--a place.

Now--and so I don't think they really thought through--and I'm not faulting them because they--through an awful lot. Okay? I never--I don't think that they ever thought through what would happen with top line and bottom line certificates, the way we handle them today.

Now, you know, as we try and find new markets, and new products, and exports, those restriction percentages aren't as devastating as they might have been 15 years ago, or whenever this market order was started, and there was mainly a pie fill business. And so, you know, the industry has changed an awful lot since then.
Q. Does this amendment bring us back closer to—or back to the original conception of how diversion credits would be employed?

A. According to my father, yes. Okay? And like I said, he was there at the inception of this order. I said: Why didn't you put this in at the first? And he says: Well, we never thought about it, but if we would a thought about that, we would have.

So, you know, that's his comment.

MR. HEDIN: Thank you.

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

(No response)

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

THE WITNESS: No.

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

THE WITNESS: If somebody needs one of these, it's all colored up, they can
have it; okay?

JUDGE CLIFTON: Did you end up,

Mr. Hill, with what you need?

MR. HILL: I have what I need, and

I would like to admit No. 18 into evidence.

JUDGE CLIFTON: Is there any

objection?

MS. DESKINS: No objections.

JUDGE CLIFTON: Exhibit 18 is

admitted into evidence.

(Whereupon, Exhibit No. 18,

previously marked for

identification, was received in

evidence)

MR. HILL: You can leave it there

for the next witness.

JUDGE CLIFTON: Good thinking.

That's great. Thank you so much, Mr. Rowley.

(Witness excused)

JUDGE CLIFTON: It's almost 10:30.

Why don't we take a break. Would you like--

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

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

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

(No response)

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

MR. HILL: I call Mark Hawkins.

MR. HAWKINS: B. Bart.

MR. HILL: Oh.

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

JUDGE CLIFTON: Please have a
seat. Thank you.

MR. HAWKINS: Thank you.

JUDGE CLIFTON: Please state and
spell your full name.

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

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

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

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

(Laughter)

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

JUDGE CLIFTON: Would you raise your right hand.

WHEREUPON,

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

JUDGE CLIFTON: Mr. Hedin.

BY MR. HEDIN:
Q: Bart, can you describe for us, a little bit, your positions in the industry and your membership on the various boards?

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

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

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

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

A: Yes. It would be Northwest Tart Cherry, Incorporated.

Q: Do we need that spelled, Your Honor.

JUDGE CLIFTON: Please.
THE WITNESS: N-o-r-t-h-w-e-s-t C-h-e-r-r-y, I-n-c.

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

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

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

THE WITNESS: Yes.

JUDGE CLIFTON: Okay.

BY MR. HEDIN:

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

A Yes. I have.

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

A Yes. It was because the situation was a very large crop. There was concern with how we were going to comply with the amount that we needed to restrict ourselves to, and at that point we decided one of the tools we
were going to use was to divert them right there in the orchard.

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

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

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

And so when all of a sudden, we came to the realization that we didn't get full credit for the pounds that were put on the ground, it was met with, at first, almost disbelief, couldn't imagine that that could ever be possible. Shock. Very disgruntled.
Very upset, not pleased, not a good thing.

It's not fair.

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

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

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

A Yes.

Q Okay.

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

Q Okay. Do you anticipate that you would see different responses, depending on
crop size, and if so, what would those be?

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

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

A Sure. Very limited tart cherry industry in the State of Washington. As Perry mentioned, there are three handlers. Interesting perhaps to note is we used to all work together as, as one company, and then as we grew and it became a little cumbersome, we parted company, friendly, but just decided it
was better for each of us to pursue our own course. It became a little cumbersome, as big as we were.

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

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

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

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

Q And do you concur with Mr. Rowley that grower prices will be advanced by
implementing this change?

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

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

JUDGE CLIFTON: Mr. Hill.

MR. HILL: Just one question.

BY MR. HILL:

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

A Yes.

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

A Yes.

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

A $7 million of--

Q Gross receipts.

A Of gross receipts. That's going
to vary, year by year, but--but most time, we
would not meet that. We would be small, then.

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

JUDGE CLIFTON: Ms. Salehi.

BY MS. SALEHI:

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

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

The industry at large, across the
board, there would be no ill effects that I--
that I can foresee.
MS. SALEHI: Thank you.

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

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

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

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

MR. ROWLEY: That's what I thought.

JUDGE CLIFTON: Mr. Engeler.

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

THE WITNESS: Thank you.

MR. ENGELER: --ask you a lot.

BY MR. ENGELER:

Q But from a handler perspective, I had a couple questions, and it's been
testified earlier today, that the restricted
percentage on the final volume control
percentages would increase, if this proposal
were implemented, and there were a lot of
grower diversions.

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

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

Q     Okay. Thank you. Just one other
from a handler perspective. If this proposal
goes into effect, it was testified in
Michigan, that it would not likely impact the preliminary percentages, because at that point you wouldn't know what the grower diversion activity would be.

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

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

A I don't know that that would--the change is likely to occur, as you mentioned. I don't foresee there being any--I don't see any negative issues that would impact us, as far as how we deal with our compliance plan, etcetera. I really believe that to make it so that these, the cherries that go on the ground have equal value--I really see that as an across-the-board positive change, and I'll state it again.
I really believe that was the original intent. The fact that it's not now was a real surprise, and just something that happened because of our lack of ability to foresee the future. Unintended negative consequence.

MR. ENGELEHR: Thank you. That's all I have.

THE WITNESS: Thank you.

JUDGE CLIFTON: Mr. Johnson.

BY MR. JOHNSON:

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

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

A Let me state that I take advantage of export credits, new market credits, new product credits. The only potential, and
negative impact, that I foresee, could be to
a very limited, very. very small number who,
almost exclusively, export their products.

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

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

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

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

MR. JOHNSON: Okay. Thanks, Bart.

JUDGE CLIFTON: Mr. Johnson, don't
leave. To his question, though, are they
currently advantaged because of so many
cherries coming to them at a discounted price,
or--and they will lose that--or is there some
other reason for the advantage they currently
enjoy?

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

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

MR. JOHNSON: Thanks, Judge.

Thanks, Bart.
JUDGE CLIFTON: Mr. Hedin.

BY MR. HEDIN:

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

A    Generally.

Q    And are you--

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

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

A    Yes.

Q    Okay. Is there a market for those credits?

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

Q    When you were describing the inequity that an exporter might have, is that
because they have more than they need and are able to sell them, or transfer them to other handlers, and would be less able to do so under this? Or there might be a weaker market?

A    I suppose that potential exists; yes.

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

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

Q    Okay.

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

MR. HEDIN: Okay. That's all,
Your Honor. Thank you.

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

(No response)

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

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

JUDGE CLIFTON: Thank you. You may step down.

(Witness excused)

JUDGE CLIFTON: You may call your next witness.

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

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

(Discussion off the record)

JUDGE CLIFTON: All right. We're back on record at 10:48.
Please state and spell your full name.

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

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

WHEREUPON,

CHAD ROWLEY

WAS CALLED AS A WITNESS BY AND ON BEHALF OF

THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,

HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND

TESTIFIED AS FOLLOWS:

JUDGE CLIFTON: Mr. Hill.

BY MR. HILL:

Q Good morning, Mr. Rowley.

A Good morning.

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

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

JUDGE CLIFTON: It is so marked.
(Whereupon, Exhibit No. 19 was marked for identification)

BY MR. HILL:

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

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

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

Handlers and growers have come to understand the inequalities of the current system and have worked together, with USDA, tart cherry handlers and processors, to make this change, proposed change.
As a handler of tart cherries--
there's an error there, sorry--I support the
proposed amendment for the following reasons.

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

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

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

Number 3. Payson Fruit Growers
will better able to--will be better able to
meet its restriction obligations using the
pound-for-pound Grower Credits, rather than
credits that have been discounted by the restriction percentages.

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

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

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

6. As the crop surplus gets larger, there will be more financial incentive for growers to participate with in-orchard diversion activities. Properly balanced inventories will stabilize price and help the entire tart cherry industry become more stable and sustainable.
7. The current system decreases incentives for growers to participate with in-orchard diversion activities as the crop gets larger. This is a serious problem with the current order.

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

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

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

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

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

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

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

We go to other sources and ask for help, when I think we would have taken care of some of the problem ourselves, if we--if it
would--if the incentive were fair, across the board.

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

JUDGE CLIFTON: Mr. Hedin.

BY MR. HEDIN:

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

A Well, half the cost, or half, nearly half the value of cherries is in processing, pitting, processing them, and then you add storage to it, which adds up, years after year. And so I would say that at least half of your value is in the processing, and then it depends on how many years it stores after that.
It could even exceed half of the value, gets tied up in processing.

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

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

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

A Yes. Direct savings; yes.

MR. HEDIN: No further questions at the moment.

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

Mr. Engeler?

MR. ENGELER: Yes. I have a couple.
BY MR. ENGELER:

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

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

I think other states have not done that, maybe because it appears to be unfair. So then we get large surpluses in storage, which puts pressure in other areas, to find how are we going to sell this. We've put them...
up, we've put storage into them, growers
didn't put any on the ground, so now what are
we going to do with them? A logical option is
go to the Government and ask for help, for a
USDA purchase.

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

A I do not see it as a negative,
because the total doesn't change. The total
pounds does not change in the formula. None
of us like to see restrictions. We don't like
to see it go higher or lower. But we like to
see it go lower. We don't like to see it go higher. But we--but the total pounds doesn't change, and I feel like we will meet our supply--we'll meet our supply in the marketplace.

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

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

A I think the change is difficult to adjust to. That the large change is hard. We sit down in that meeting, in June, and try to come up with the best number we can come up.
Then we go out and estimate our different sources of diversion activity, and part of it is in-orchard, and we are working hard as an industry, as was mentioned earlier, to try to reduce the change, try to become more accurate in our estimating, because at point, we'll ask growers, as part of our plan, to put some on the ground, which, again, is our last option. And so we hope we can get better at predicting the crop. That's a real key to everything we do, not just this amendment, but everything we do. That crop prediction is very important.

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

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

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

14 Q So do you believe you might be
15 able to anticipate that there might be a
16 larger amount of grower diversion, and plan
17 accordingly, in those types of years?
18
19 A Again, we don't like large amounts
20 of grower diversion, but we like planned
21 amounts, something that we plan as part of our
22 plan, and we'll anticipate right after that
23 meeting in June, as we estimate our crop, and
plan what percentage needs to be part of a
grower in-orchard diversion plan for our
company.

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

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

Q     Okay.

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

Q     Yes, I understand that part of it,
but I guess what I was getting at is that the
change between the preliminary percentage,
volume control percentages, and the final
percentages--that might be, if this proposal
goes through, that that change might be
significant. That's the aspect I was getting
at.
A: I don't--I guess maybe I don't understand your question. But I don't see a big problem. We live with that change. We anticipate--we hope it's minimal, but when the final percentages are there, we all adjust our plan and figure out how we're going to make it work. Cause in-orchard's already done. At that point, all we have ahead of us are exports, new markets, and other things that we have to deal with at that point, so I don't see it as being a large negative to this amendment.

MR. ENGELER: Okay. Thanks.

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

Mr. Hill.

BY MR. HILL:

Q Ultimately, regardless of whether there's a change in the amendment, the restriction percentage can go up, depending on whether there's more cherries out in the field anyway; correct?
A That's correct.

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

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

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

JUDGE CLIFTON: Ms. Deskins.

BY MS. DESKINS:

Q Good morning, Mr. Rowley.

A Good morning.

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

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

MS. DESKINS: Thank you.

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

      Mr. McFetridge.

      BY MR. MCFETRIDGE:

      Q     Good morning, Mr. Rowley.

      A     Good morning.

      Q     I just wanted to ask a point of

clarification. Do you remember the Small
Business Administration definition for a
larger handler, that was specified earlier, of
$7 million of annual receipts?

      A     Yes.

      Q     Would you say Payson Fruit Growers

is a large or small handler, based on that
definition?

      A     It'd be a large handler.

      Q     All right.

      JUDGE CLIFTON: Would that be true

if you limited it to just the tart cherry?

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

      JUDGE CLIFTON: Okay. And you

don't have other fruits?
THE WITNESS: No. We'd be a large handler.

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

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

(No response)

JUDGE CLIFTON: What would you like to add?

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

JUDGE CLIFTON: Thank you.

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

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

MS. DESKINS: No objection.

JUDGE CLIFTON: Exhibit 19 is hereby admitted into evidence.
(Whereupon, Exhibit 19, previously marked for identification, was received in evidence)

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

MR. HILL: Yes.

JUDGE CLIFTON: All right. Which do we want?

MS. DESKINS: Ten.

MR. HILL: Ten, please.

JUDGE CLIFTON: Ten. All right.

Please be back and ready to go at 11:15.

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

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

Mr. Hill, you may call your next witness.

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

JUDGE CLIFTON: Good morning.
Please state and spell your full name.

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

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

WHEREUPON,

THAD ROWLEY

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

JUDGE CLIFTON: Thank you. Mr. Hill.

BY MR. HILL:

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

A Okay. I'm a tart cherry grower. Your definition of a large or small grower. We have been on the side of the larger grower. We've been on the side of the small grower.
So maybe we could say we are a medium-size grower.

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

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


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

BY MR. HILL:

Q Okay. So we're here talking about diversions, obviously.
Q So have you had any dealings with the diversion process, in-orchard?

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

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

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

And so--but yes, as we have diverted, you know, and as a member of Payson Fruit Growers--I also sit on the board of Payson Fruit Growers. As a member of Payson Fruit Growers, at the beginning of the season, we make a plan, as our manager, Chad, stated,
on how many--and the percentage of cherries we are going to divert, and we have followed that plan in the past, which would be the reason why we have dropped cherries on the ground and not, you know, put them on the market. We've tried to follow the plan, so--

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

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

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

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

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

A    Yes, I was here.

Q    And you heard his response; correct?

A    Yes. I did.

Q    Would you agree with his sentiment?

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

Q    Now Mr. Ray Rowley was asked about this. Do you also believe that the
regulations, as currently formatted, provides a bit of a "moving target" on how many cherries you need to put into circulation or put on the ground?

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

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

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

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

(Laughter)

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

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

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

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

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

A I'm trying to remember, and maybe you can help me out, Ray, but I can't--I can't remember, I--you know, we have said yes, maybe we need to divert a little more, if you can, or a little bit less, if you can. But I think
we do try to "hit that moving target" as the season goes through.

Q Okay.

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

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

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

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

No further questions, Your Honor.

Thank you.
JUDGE CLIFTON: Who else has questions for Mr. Thad Rowley?

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

BY MR. HILL:

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

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

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

A Exactly.

Q The diverted--

A Yes.
Q  The diverted amount; correct?

A  Yes.

MR. HILL: Thank you.

JUDGE CLIFTON: Mr. Engeler.

BY MR. ENGELER:

Q  I have just one quick question for you.

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

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

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

MR. ENGELER: Okay. Thanks.

BY MR. HILL:

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

A  No. I can't see how they'd be
harmed at all. I think it'd be an advantage.

Q And can you explain why you believe so.

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

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

A Yes. I do.

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

(No response)

JUDGE CLIFTON: Is there anything you'd like to add?
THE WITNESS: No. Just thank you again, the same as the others, for listening to us and hearing our testimonies.

JUDGE CLIFTON: Thank you.

THE WITNESS: Yes.

(Witness excused)

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

JUDGE CLIFTON: Thank you.

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

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

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

WHEREUPON,

PAUL MEREDITH

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

JUDGE CLIFTON: Thank you. Mr.
BY MR. HEDIN:

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

A    I'm nervous.

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

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

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

A    It's Payson High School. The name of the farm is Meredith Orchards. M-e-r-e-d-i-t-h, Orchard, O-r-c-h-a-r-d-s.
And I am--my brother's in Indonesia right now, and he'll be there for another year, and so I am operating the farm.

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

Yes.

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

Yes.

And what has been your reaction to that process?

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

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

I'll say I am.
Q    Good.

A    I might also state, for the

question that you had, we are a tiny farm. We

have 34 acres. And we don't grow cherries to

put 'em on the ground.

Q    And the diversion process in which

you do participate, is that after you've had

discussions with Mr. Chad Rowley at Payson,

before deciding to do that?

A    Yes. I'm a member of the board of
directors at Payson Fruit Growers, and my

brother normally is, but he is not there, so

I am his replacement.

Q    Okay. And is it your

understanding that the grower in-orchard
diversion process at Payson is the last, not

the first choice, that you guys make?

A    I'm sure it would be. I'm sure

they'd rather pick cherries and sell 'em than

drop 'em on the ground.

MR. HEDIN: No further questions,

Your Honor.
BY MR. HILL:

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

A       Yes.

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

A       Oh, yes.

Q       Could you--

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

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

A       Melvin.

Q       Melvin Meredith.

A       Yes.

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

A       He's a 100 percent in favor of this amendment. I might add, it only seems fair, in a line of fairness, that if you drop about 10,000 pounds of cherries on the ground,
you get credit for 10,000 pounds. I mean, that's--in my mind, there's no other way to do it, cause there's no fairness in giving credit for something that--you know, giving partial credit for what you do, because it's somewhere along the line, we have to justify to the people that are driving past our orchards, how come we're dumping cherries on the ground, cause a lot of people don't understand that, and it certainly should be fair, that we get full credit for what we put on the ground.

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

JUDGE CLIFTON: Thank you, Mr. Hill.

Who else has questions for Mr. Meredith?

Ms. Salehi.

BY MS. SALEHI:

Q Thank you for coming. I just wanted to ask you, as a small grower, in years that you have diverted cherries, what
percentage of your entire operation would you say you have diverted? An estimate.

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

Q Okay.

A But it was quite a few.

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

A I'm not sure the percentage of that would change, because we work with Payson Fruit Growers, and they kind of ask us to, you know, divert a certain amount. So even as a small grower, we have to divert what they ask us to, although we're never going to flood the market with what we do. It might just be a very small amount that we put into Payson Fruit Growers, but we still have an obligation
to divert our little tiny amount, cause I
think that's the way it should be.

MS. SALEHI: Thank you.

JUDGE CLIFTON: Mr. Engeler.

BY MR. ENGELER:

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

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

Q Okay. Thanks.

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

MR. ENGELER: Okay.

JUDGE CLIFTON: Ms. Deskins.

BY MS. DESKINS:

Q Mr. Meredith, you testified that
as the regulations are now on the diversion credit, it's unfair? Do you recall that?

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

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

A    Yes; it certainly seems confusing.

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

A    The way it is now?

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

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

MS. DESKINS: I have no further questions.
JUDGE CLIFTON: Who else has questions for Mr. Meredith?

(No response)

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

(Laughter)

THE WITNESS: Okay.

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

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

JUDGE CLIFTON: It's very important that we hear from people of all
different sizes. So your testimony is exceptionally valuable because of the size.

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

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

MS. SALEHI: Judge.

JUDGE CLIFTON: Ms. Salehi.

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

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

(Laughter)

THE WITNESS: She's a city girl,
and she doesn't understand how, when there's
poverty in the world and people starving to
death, how we can dump cherries on the ground,
and, you know, I guess it's like the milk
marketing order. You know, you have to
eliminate milk, and people are going hungry,
and it just--I just tell her that that's--you
can't even get 'em to the people that need the
cherries. There's no way you could afford to
take 'em there, and I--that's really a sad
thing in this world, where we have to do that,
and we dump enough cherries on the ground to
feed a heck of a lot of people.

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

MS. SALEHI: Okay. Thank you.

THE WITNESS: You're welcome.

JUDGE CLIFTON: Are there other
questions for Mr. Meredith?

MR. RAY ROWLEY: Just a comment.

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

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

(Laughter)

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

(Laughter)

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

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

THE WITNESS: Yes. They did that.

JUDGE CLIFTON: Mr. Meredith,
thank you for your testimony.
THE WITNESS: You're welcome.

(Witness excused)

JUDGE CLIFTON: Mr. Hill, how

would you like to proceed?

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

WHEREUPON,

RAYMOND ROWLEY

WAS RECALLED AS A WITNESS BY AND ON BEHALF OF

THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,

HAVING PREVIOUSLY BEEN DULY SWORN, WAS FURTHER

EXAMINED AND FURTHER TESTIFIED AS FOLLOWS:

JUDGE CLIFTON: Mr. Rowley, you

remain sworn. Again, please state your name.


JUDGE CLIFTON: Thank you.

BY MR. HEDIN:

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

Do you want to share some thoughts
on that?

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

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

And the reason I believe he was--

and you'd have to get him to clarify it all

the way--but with a certain restriction

percentage, there's only so much value out

there, and if you take value from one place

and give it to another value, it's kind of a

reshuffling of the value. And so he thought

that his export credits that they earn, and

then sell, would be diluted in value a little

bit to in-orchard credits.

And that's the reasons that he

gave us in those diversion meetings.

Q     When you say "diluted in value,"

what do you mean, specifically?

A     Well, in-orchard diversion

credits--and this has been explained before,

I know--but it's kind of an inverse

relationship. The higher the restriction, or

the higher the crop totals go, the less value

they have for "getting cherries outta jail,"

so to speak. Okay? They have less value to
satisfy your restriction--your restriction from the market order.

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

A The in-orchard.

Q The in-orchard.

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

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

A It diminishes in relationship to--as in-orchard credits increase, it diminishes, yes. In his mind. Now there's been other testimony that they don't--you know, Bart Hawkins says, well, that wasn't even fair in the beginning, and all that. But in his mind,
they would diminish in value and they wouldn't be able to sell them for as much. They use it as a money-maker, from what I understand.

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

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

MR. HEDIN: No further questions, Your Honor.

MR. HILL: One clarification. You
used his name, Mike. What was the last name?

THE WITNESS: Schrom.

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

THE WITNESS: Perry will.

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

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

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

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

Ms. Deskins.

BY MS. DESKINS:
Mr. Rowley, I just want to clarify this. When you say that this handler thought that the change would devalue export credits, there's nothing in the proposed amendment that's going to devalue them in terms of the order language; correct?

Correct.

Okay.

From what I understand; yes.

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

Yes; yes.

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

Correct.

--export credits--

Correct.

--and handler diversion certificates?

Yes.

MS. DESKINS: All right. Thank
THE WITNESS: You want me to answer that one.

MS. DESKINS: No.

THE WITNESS: Okay.

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

JUDGE CLIFTON: Oh. Okay.

MS. DESKINS: They look a lot alike.

JUDGE CLIFTON: All right. All right.

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

(Laughter)

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

JUDGE CLIFTON: Very good.

THE WITNESS: Dad's father is a teacher.

JUDGE CLIFTON: Well, wear that
middle name proudly. I know you do.

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

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

THE WITNESS: I think we've covered it.

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

(Witness excused)

JUDGE CLIFTON: Mr. Hill.

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

JUDGE CLIFTON: All right.

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

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

MR. HILL: As of right now, yes.
It's the only one of which I'm aware.

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

MR. HILL: I believe it will.

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

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

(1:11 p.m.)

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

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

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

Now to protect your two week filing period, if you have a short filing, you can fax it to the hearing clerk. If you have a long filing, you really have to use a delivery service such as FedEx, USP, or the like, that can guarantee you next business day
delivery, and that avoids the document being
diverted for irradiation, which is intended to
kill anthrax. We always take care of the last
crisis. We're still doing that. So you don't
want to use ordinary mail.

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

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

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

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

You can also share, among

yourselves, proposed transcript corrections,

so that you don't do unnecessary work, if you

want.

All right. And Mr. Engeler, you

have available for the parties' use some

instructions on filing briefs?

MR. ENGELER: Correct.

JUDGE CLIFTON: And if anyone

would like one of those, I invite you to

approach Mr. Engeler now and get that.

(Instructions shared amongst

attendees)

JUDGE CLIFTON: All right. Mr.

Hill, would you like to call your next

witness.

MR. HILL: We're going to call Mr.

McMullin.

JUDGE CLIFTON: All right. Mr.

McMullin, if you'll come forward. Please be

seated in the witness chair. And let's go off
record while we distribute and mark this
writing that Mr. McMullin has brought.

(Discussion off the record)

JUDGE CLIFTON: All right. We're
back on record. We've marked the document on
McMullin Orchards Inc. letterhead as Exhibit
20, and it is four pages.

(Whereupon, Exhibit 20 was marked
for identification)

JUDGE CLIFTON: Mr. McMullin,
would you please state and spell your complete
name.

THE WITNESS: My name is Robert
McMullin. R-o-b-e-r-t capital M-c, capital
M-u-l-l-i-n.

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

WHEREUPON,

ROBERT McMULLIN

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

JUDGE CLIFTON: Thank you. Mr. Hill.

BY MR. HILL:

Q Good afternoon, Mr. McMullin.

A Good afternoon.

Q It's good to see you here. As has been noted, we have a document that's been marked for evidence, Exhibit No. 20. It appears to be your personal statement. Could you please read that for us.

A Yes.

My name is Robert McMullin. I am a 61-year-old third generation tart cherry grower living at 11052 S. 200 W. Salem, Utah. I have been involved in the growing of tart cherries since I was 12 years old, trying to fun a Friday limb shaker to harvest cherries. I farm with my two brothers, a sister, my son, and several nephews in the south end of Utah County. We have about 500 acres of tart cherries that we grow.
I currently serve on the CIAB board as a grower member from District 7.

I, as a Utah grower, support the Federal Tart Cherry Marketing Order and the Cherry Industry Administrative Board.

I'm here to speak in favor of the proposed amendment to allow bottom line diversion credits.

In years past, and especially in 2009, we have chosen to divert major portions of our crop by putting them on the ground. In 2009, for example, our total crop was 8,494,438 pounds, and of that total crop, 3,468,055 pounds were diverted on the ground. This represents almost 41 percent of our crop that went on the ground.

We felt that rather than putting it on the market and depressing prices, it was better to do our part by just not harvesting them.

During periods of high restriction, this practice has not allowed us
to fully utilize our diverted fruit. We have been penalized a high percentage because the credits were added to the production of our processor and not allowed as a bottom line number.

As a result, in 2009, when we had a 68 restriction, our credits that we did in orchard diversion were only worth 32 percent of what was diverted. This really came home to us after the crop was harvested because of the huge crop all over the country.

We had only planned on a restriction after the market growth factor of something in the high 40's for restriction.

This, in essence, penalized us for allowing our fruit to go on the ground. This fruit was not put on the market. It was not processed or put into storage. It was just abandoned. Why should the fruit that we abandoned not be allowed the same credit as fruit that was exported or put up for new product development?
I am including an addendum, for the record, that outlines some of the talking points I have mentioned above. I will not take the time to read those at this time, but I do agree with all of the points mentioned.

I believe by passing this amendment, that I, as a grower, will receive a higher return for my cherries that are in-orchard diverted, as well as a higher return on those cherries that are put on to the regular market.

This is another tool that again will increase my returns. I am also including written testimony from other members of my family since they were not able to appear in person today.

I will add to this testimony, I have a brother by the name of David McMullin, who I've been farming with all of my life, and in his written statement here, he states: We support the amendment to the marketing order to allow full credit of orchard diversions and
not to be added to our production of our processor.

I also have a written statement from another brother. His name is William McMullin, and he states also: As a grower, I support the federal Tart Cherry Marketing Order and also support the amendment for in-orchard diversions.

I have a sister that we farm with. Her name is Ann Dockstader.

Q Can you spell that, please.

A D-o-c-k-s-t-a-d-e-r. And in her letter, she states: Not to harvest your crop is a tough decision for any farm, but looking at all the costs associated with harvesting, diverting in orchard comes with a much lower price tag. One of the most difficult aspects has been that the fruit diverted in the orchards is added to the top of your overall production, increasing the restricted pounds by your unharvested fruit.

Because of this aspect of the
marketing order, I ask you to support the amendment for in-orchard diversions.

And that's signed Ann Dockstader.

JUDGE CLIFTON: How is Ann spelled?

THE WITNESS: A-n-n. And with that, I'd like to thank you for this opportunity to testify, and that concludes my testimony.

JUDGE CLIFTON: Thank you, Mr. McMullin. Would you like to begin the questioning, Mr. Hill?

MR. HILL: Yes.

BY MR. HILL:

Q Just quickly, what was the first brother's name? I heard--

A David.

Q David.

A David McMullin.

Q Now obviously since you brought these in, and they're your brothers and your sister, you've spoken to them about these
proposed changes?

    A  Absolutely, I have. I've spoken
to all three of them. We've had several
occasions to do that. So I have talked to
them.

    Q  And in your specific instance, has
this--how has this affected you? Could you
just give us a run-down on how the current
regulation has affected you.

    A  What it has--basically, where
we're not allowed to a full diversion credit
for our in-orchard diversion, it reduces the
value of those credits. So as I stated in my
testimony, for instance, in 2009--let's take
an example, let's say diversion credits were
worth 10 cents a pound. Okay.

    Well, in 2009, my diversion
credits, by the time I left that fruit in the
field, were only worth four cents a pound. So
economically, it doesn't make sense to do the
diversion, to be honest with you.

    Q  And this would be in comparison to
maybe a post-harvest credit, which would be
worth still ten cents?

A Would still be worth the ten
cents; yes.

Q Now in talking to your brothers
and your sister, can you give us a little bit
more on what, on the conversation that you had
with them.

A Well, as we talk about it, my--to
give you an example, in 2009, as we talk about
this diversion, and what was going on, I'm the
one that advocated putting the crop on the
ground. I said hey, we need to, we need to
put this--we need to do our share. We need
to--we've got a huge national crop. We need
to, we need to put some of our crop on the
ground.

As things progressed, and the crop
was getting larger, then the wisdom of that
was--was good. My brothers and sister felt
good about that.

Okay. Well, when the dust
settled, and they found out, gee, we've got this 68 percent restriction, then they figured out okay, well, hey, my--our diversion credits are only worth 32 percent of what they should have been.

They were upset at me because I did--because I suggested that they put this on the ground. They said, hey, we would have better off, rather than putting all of that on the ground, we should have backed away and not put as much fruit on the ground, and we should a put it in juice, we should have processed more. So we had an occasion to talk about that several times.

And then when I told them about this particular amendment, they were excited about it and said, hey, that really makes sense to us, to be able to control our production, and we're not in the business to store fruit, we're in the business to sell fruit. And so that's--gives you a little bit of background. I hope that's what you were
after.

Q  Sure. Now looking at the next

page, which you have titled Talking Points--

A  Right.

Q  --did this basically go to the

point towards the bottom, as the crop size

increases, the worth of in-orchard diversion

credits decrease--

A  Absolutely.

Q  --and therefore the bullet point--

this is a disincentive--

A  Sure--for growers to divert.

Q  --for growers to divert.

A  Absolutely. That is correct.

BY MR. HEDIN:

Q  Is it safe to say, Robert, that if

it doesn't change, you and your brothers and

sister won't do the orchard diversion like you

did last time?

A  Absolutely. We've learned our

lesson.

Q  When you guys decided to do the
in-orchard diversion, was it a first choice, a second choice? Would you have done other diversions, had you been able to?

A   We would have--it probably--since we've had experience with it before, and we knew that this was not a bottom line diversion at the time, so it would have--it really was a second or third choice. But barring the availability of other credits, and having the prospect of having to store that product in a reserved form, this is what we chose to do. We just chose to divert it on the ground.

Q   What's the approximate cost of storing products per month, then for a year?

A   Well, we figure with storage and interest, it's about a penny a pound.

Q   Per month, or per year, or--

A   Per month.

Q   Per month.

A   Yes. Depending on--and part of that, Perry, depends on the cost of interest.

Now currently, with interest as low as it is,
it might be three-quarters of a cent a pound.

Q  Sure.

A  But we basically figure a penny a pound.

Q  But it becomes an ongoing cost--

A  Oh, yes, absolutely; no matter what.

Q  There was a discussion before you were here, but it was asking about what you do--what growers do with their fruit, and why--how they explain that. You're aware, Robert, are you not, that you could do charitable contributions with your products?

A  Yes; we're aware of that.

Q  Can you explain, a little bit, why you don't do more of that, and what's the cost associated with that process.

A  Well, the first thing they ask us to do, when we do a charitable contribution, is, Will you store it for us? and we want to--we want to get rid of it, if we're going to do that. So there's an added cost that we have
to store--cause we have to store it for them.

We have tried, we have given fruit away, and
one of the problems with charitable
contributions, too, is the form that it's in.

Where the fruit that we store is
commonly in a five plus one form, in a four
pound bucket, and when we try to--if we try to
give it away to somebody, they say, well, hey,
we can't use that because it's in a five plus
one form. And so it's not really something
that can be given away in the form that we, as
growers, have it, and it's just--we just can't
do it.

Q    So contributing fresh tart
cherries isn't a practical--

A    Well, no--well, especially fresh
is not practical. It doesn't--it's a
perishable commodity. It is--you just can't
handle it. If it's over 24 hours old, it's
gone.

Q    So you would incur both the
packing costs and the carrying costs, if you
were making a charitable contribution?

A Right. You would. Far better to

in-orchard divert it than to try to do

something like that.

Q Also there was some discussion

about this--the inclusion of in-orchard
diversions as part of your handle, and a

slight, apparently misunderstanding, about how

that would be incorporated.

You were around when they were

formulating this marketing order, were you

not?

A Yes.

Q Participated in that?

A Yes.

Q Did you ever think that in-orchard
diversions would be treated as they currently

are?

A No; no. I did not. I didn't--I

just didn't anticipate that--that idea; no.

MR. HEDIN: Okay. Those are my

only questions at the moment. Thank you.
JUDGE CLIFTON: I'm sure there are other questions. Would you explain what the five plus one form is. A number of people have testified about it, but I really don't know what it is.

THE WITNESS: Five plus one is when we pick cherries, they're pitted--well, they're graded, pitted, sorted. Then they put them in a four pound--or a four gallon pail. It's a, it's a--just a four gallon plastic pail.

And in that pail we put 25 pounds of fresh cherries, the pitted cherries. Then we put five pounds of cherries on top. So the ratio is five plus--five pounds of cherries plus one pound of sugar. So that's why we call it five plus one.

JUDGE CLIFTON: Okay. So what's in the pail?

THE WITNESS: Okay. We've got 25 pounds of cherries and we have five pounds of sugar.
JUDGE CLIFTON: Okay. So the sugar goes on top--

THE WITNESS: On top.

JUDGE CLIFTON: --of the pitted cherries?

THE WITNESS: Of the pitted cherries.

JUDGE CLIFTON: And does it just gradually make its way down through all the cherries?

THE WITNESS: Yes, gradually makes its way down through. It's--part of it is a--the sugar cap on top keeps the fruit from oxidizing. It keeps the oxygen away from it, and so in the freezing process, it just makes it so that fruit on top isn't brown. So that's part of the reason to do, put the sugar cap on it, rather than mix it in with the cherries.

JUDGE CLIFTON: So does this happen at a packing shed?

THE WITNESS: Yes, happens at the
packing--at the processors. That's where it happens.

JUDGE CLIFTON: And then what is its next stage?

THE WITNESS: The next stage is it's--after it comes off the line, it's frozen. Then it's marketed, and either it will go to a--into pie fill or something to do with some kind of a dessert, some form like that--and there are other uses for it too--but most of it goes to pie fill.

Then the other processes, it goes to a dried processor who takes it, and he--they'll take it and then they dry it.

JUDGE CLIFTON: So the penny a pound per month of cost of storing and paying the interest is in a frozen state?

THE WITNESS: That's in the frozen state. Yes, ma'am.

JUDGE CLIFTON: And most of that product is in the five plus one form?

THE WITNESS: That's correct.
JUDGE CLIFTON: Thank you.

THE WITNESS: There are--I might add, there are, you know, there are other ways to do it. There are some processors that do--and there's none in Utah--but there are some that do an IQF, individually quick frozen, and so they'll freeze them that way, without sugar, and so that's another form that the cherries--that you can get it in.

JUDGE CLIFTON: You say there are none in Utah.

THE WITNESS: No.

JUDGE CLIFTON: Where do you know of such processors?

THE WITNESS: In Michigan, there are individual quick frozen. I don't remember--I don't know if they do it in Washington or not. It seems like I'd heard that there was a, an IQFer.

MR. HEDIN: Yes; they do.

THE WITNESS: Yes. So in Washington, there are some. We've done it in
the past in Utah, but we haven't done it for
the last ten years, haven't done the
individual quick frozen.

JUDGE CLIFTON: Thank you.

Who has other questions for Mr.

Robert McMullin?

Ms. Salehi.

BY MR. SALEHI:

Q Hi, Mr. McMullin.

A Hi.

Q I just wanted to ask you a

question. On page two of your testimony, at
the very bottom, there's a statement that says
"Handlers should have more capital available
with which to pay grower. See discussion
below."

Would you please walk me through

that discussion on the next page.

JUDGE CLIFTON: Where are you,

please.

MS. SALEHI: Page two of the--I'm

sorry--not the actual--
MR. HEDIN: It says page two at the bottom.

JUDGE CLIFTON: All right.

MS. SALEHI: Right.

THE WITNESS: Okay. So let's look at this, then. On grower costs, my cost as a grower will be reduced, and just as we go through that, and please interrupt me if you have a question.

Okay. So what it does, if a grower uses in-orchard diversions--I'm the grower--okay, I'm going to save about six cents a pound to harvest it. So that it costs me to take my shaker out, my mechanical, the harvester, harvest it, and in here it's also--there's also broken out transportation. So it costs me, you know, just, say, a half a cent a pound to haul it, to haul it in to the processor.

And then, in addition to that, since, if I do the in-orchard diversions, then I don't have to pay, I don't have to pay my
Cherry Marketing Institute costs, and I don't have to pay my Cherry Industry Administrative Board promotion.

So on that, that's--those are--that comes out to about a penny a pound.

So overall, it saves me about 7.5 cents a pound not to--not just--just to leave it in the field, just not to harvest it.

And so as we kind a go through the--in our minds, you know, as we're thinking about what we're going to do with this crop, we think, well, hey, there's 7.5 cents a pound right there, and if I can get 10 cents diversion--or excuse me--if I can get a credit for 10 cents a pound with that, I mean, that's 17.5 cents, and I don't have to do anything.

And so that makes it to me--I think, gee, you know, I've--that's money in my pocket, in hand. So that's the reason that we look at that in-orchard diversion. So that saves me as a grower then. The handlers, they'll save--you know, there's variable costs
for cherries left in the orchard. Now I, you
know, from a handler point of view, the--I
would guess, I would assume that that means
that, okay, me, as a handler, I don't have to
mess with those cherries. They're over and
they're done with.

I don't--I won't have any costs
associated with those. Then the storage. I
won't have any storage for those cherries.
And I would say part of that variable is, as
Perry mentioned, is the carrying costs, that
a handler would have to bear, if he put that
fruit up.

And then that ties into the bottom
point there. He'll have less capital tied up
in the inventory.

BY MS. SALEHI:

Q Just as a point of clarification,
this is all if this amendment passes; correct?

A That's correct.

MS. SALEHI: Thank you.

JUDGE CLIFTON: Mr. McMullin, are
you the author of the Talking Points?

THE WITNESS: No. I'm not.

JUDGE CLIFTON: Where did they come from?

THE WITNESS: They came from Perry.

JUDGE CLIFTON: From Mr. Hedin.

THE WITNESS: Mr. Hedin. Yes, ma'am.

JUDGE CLIFTON: Okay. And were they presented in a group meeting of some kind, or distributed--

THE WITNESS: No. These were--they were sent out as part of a newsletter.

JUDGE CLIFTON: All right. And are there any portions of them--you said you didn't want to take the time today to go into them. But this is precisely a good time to go into them.

Are there any other portions that you'd like to highlight for us because they're especially important?
THE WITNESS: Not that I can really pick out right now, Judge. Other than I--on page two, this one, where it says "Handlers are discouraged from encouraging or utilizing in-orchard diversion credits by the way the order is structured," that, to me, is a very important section. And if you'd like, I'll--would you like me to read through that, or do you want to just point it out? Or what do you think?

JUDGE CLIFTON: I'd like you to walk me through it.

THE WITNESS: Okay.

JUDGE CLIFTON: You read it and tell me what I need to understand from it.

THE WITNESS: Okay. A lot of the handlers, since at least they're discouraged from encouraging or utilizing in-orchard diversion credits by the way the order is structured, because if they take that fruit in, then their bottom line is increased. So the top line credits--okay, there's the top
and the bottom credits. Okay.

As I understand it, if I'm a handler, and I say, hey, okay, I'm going to handle--Mr. McMullin, I'm going to handle your fruit. Okay.

And I come to them, and I say okay. Hey, I've put a million pounds of cherries on the ground. I brought you a total of--I brought you 5 million that I brought into the plant, and then I put a million on the ground. Okay.

Well, he says, hey, I really don't want that million that's on the ground, because that really means that on my top line I've got to have 6 million pounds of--or I have to have 6 million pounds up there on top. So that means that me, as a handler, I have to go out, and I have to get that many more credits to cover that million pounds.

If I have a 50 percent restriction, okay, I've got to cover another half a million pounds of credits because of
your--because you're bringing in me those
diversion credits. So I really don't want
those. And so that's that. That's that
particular point. I hope I haven't confused
you, totally.

And then it follows through and
explains that in-orchard diversion credits are
discounted by the amount of the restriction
percentage.

So if I bring in a 1000 pounds,
time 25 percent of the restriction, is 25,000
pounds--2500 pounds, total, of restriction,
that 7500 pounds of credit are available for
the other restriction.

Okay. If the crop increases and
the restriction increases, the worth of in-
orchard diversion credits decreases.

So if I bring in a 1000 pounds,
time the 50 percent restriction, there's 5000
pounds of restricted fruit.

MR. HEDIN: If I may--

THE WITNESS: Yes; excuse me.
That should be 10,000.

MR. HEDIN: 10,000.

THE WITNESS: Yes. Excuse me.

That's right. It should be 10,000. I'm sorry. That didn't figure out either in my mind. But that should be 10,000 pounds, time the 25 percent restriction, is 2500 pounds that I've got restricted.

So that 7500 pounds of credit are available for other restrictions.

So if a crop increases, and I have a bigger restriction, you can work it right down through, then I've got to have 5000 pounds of credit, are available for other restrictions.

Okay. At the higher restriction levels, handlers can reach a point of diminishing return for in-orchard credits as a compliance option. So that's exactly what my processor tells me. He says, hey, I don't want any more in-orchard diversion. I don't want you to do that because that's going to
increase my top line, and I have to—in order—
-if I accept those, I have to have more
cherries to cover my restriction.

So the changing of the compliance
worth of in-orchard diversion credits, it
presents a risk to the processor. And 2009
really showed that, because the restriction
went from—Perry, remind me, an early 51, 52
percent.

MR. HEDIN: And all the way up to
sixty-eight.

THE WITNESS: And went to sixty-
eight because of the huge crop that happened,
and our inability to predict how many pounds
we were going to have. So that really makes
the processor wary, and especially coming up
into the future years. It's actually making
those in-orchard diversions less valuable and
less desirable, because that processor is
really going to discourage that.

So I think that's a very important
part of this, is not only from a grower
perspective but from that handler perspective.
I hope I haven't completely confused you.

JUDGE CLIFTON: No; it's important

that you have testified about this, because I
had not yet gotten the impression of how
tricky the result could be to the handler.

THE WITNESS: Yes.

JUDGE CLIFTON: I had gotten the
impression of how tricky it could be to the
grower. But now I see that it can also be
tricky for the handler because of the
uncertainty of what the percentage of
restriction will be.

THE WITNESS: Okay.

JUDGE CLIFTON: All right. I'd
like to have Ms. Salehi approach you with the
record copy of this exhibit, so that you could
make the change--

THE WITNESS: Yes.

JUDGE CLIFTON: --to make those
two 1000 pounds figures be 10,000 pound
figures.
THE WITNESS: Yes. Okay.

JUDGE CLIFTON: And so if you'll
very legibly correct that and put your
initials.

THE WITNESS: Cross that out and
do it. Okay. I will do it. Thank you.

JUDGE CLIFTON: And I encourage
the rest of you to do likewise on your own
copies.

THE WITNESS: Okay. Thank you.

MR. HEDIN: Could we read into the
record what changes he made on that.

JUDGE CLIFTON: Yes. Ms. Salehi,
would you do that.

MS. SALEHI: Sure. On page two of
the Talking Points, mine, line seven, starting
with E.g., the number has changed from 1,000
to 10,000 pounds. And then from there, one,
two, three, four lines down, another, it
starts with Example, or e.g., the same number,
1,000, has changed to 10,000 pounds.

JUDGE CLIFTON: Mr. McMullin, I'd
like you to tell me a little more about the business relationship you have with your brothers and your sister.

You said that you had farmed for years with your brother, David.

THE WITNESS: Yes.

JUDGE CLIFTON: Who is in McMullin Orchards Inc.?

THE WITNESS: Those are the three principals. My brother, David McMullin, my brother, William McMullin, and my sister, Ann Dockstader. And myself. We're the four owners of McMullin Orchards Inc.

JUDGE CLIFTON: Okay. Are you equal owners?

THE WITNESS: No; we're not.

JUDGE CLIFTON: All right. Who are the primary owners?

THE WITNESS: The primary owners would be David, William, and myself, Robert.

JUDGE CLIFTON: Okay. And you see each other during the active times of cherry
production, every week?

THE WITNESS: Well, we have a weekly meeting, 52 weeks out of the year. Well, we take off Christmas and Thanksgiving. But we have a weekly meeting. We have a weekly farm meeting. Then we have interaction all the time, back and forth. We work together.

JUDGE CLIFTON: All right. And you're located in Payson, Utah?

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: How far is that from where we are, here, in Provo?

THE WITNESS: That's about twenty, a little over 20 miles south of here, is where we're at.

JUDGE CLIFTON: All right.

What other questions are there for Mr. Robert McMullin?

MR. HEDIN: I don't know if they finished over there yet.

JUDGE CLIFTON: Mr. Engeler.
MR. ENGELER: I have one.

BY MR. ENGELER:

Q Getting back to the Talking Points, on page three, under the Grower Costs, you have listed there a cost of one-half cent per pound for CIAB promotion.

It's my understanding that those costs are actually paid out of handler assessments under the marketing order. So I'm wondering if you listed this as a grower cost because those costs are passed on to handlers. Is that--

A That's--well, they're passed on to me as a grower. They're passed on to me.

That's correct.

Q Okay. I just wanted to clarify that.

A Yes. When we get out grower printout, it has those costs listed, right there.

Q Okay. Thank you for the clarification there. And then I was
wondering, right at the beginning of your testimony, you talked about running a Friday limb shaker. For those of us that don't know much about the cherry industry, could you explain to us what that is.

A Well, I--we don't have those any more. That's kind of an antique. That was in--actually, that was about in 1962. That's a--it's a machine--the particular one that we have, it was a machine that hooked on to the front of a tractor, and there was a boom that came out, and on the end of that boom was a device that you would go in and you could attach it to a limb in a tree, and as you're sitting there holding on to it, you'd hit the button or hit the lever, and it would actually--it would shake, and it would shake the cherries off the tree into a catching frame which was manually packed from three to three, and then those catching frames were set up and they would go--it'd roll off those frames into boxes, into individual boxes that
were set up in a row by the tree.

I had no problem. My job was to
go in and actually run the shaking machine.
The trouble I had was the hired help that I
had, where my--I had some cousins, and some
other help that would help me, and they hated
to move the catching frames. That was the
hardest part of the job.

So we lasted about a half a day,
and then they says, hey, we're done with this--
--for 3 cents a pound, we can go do something
else. So that's the way it worked.

MR. ENGELER: Thank you.

JUDGE CLIFTON: Ms. Salehi.

BY MS. SALEHI:

Q You may have already mentioned
this. If so, I apologize for missing it. But
I know that you have mentioned you have 500
acres of tart cherries.

A Yes, ma'am.

Q I don't know if you were here when
we were discussing the SBA definition of small
growers, or--which I think was--

A    I wasn't.

Q    --750,000 in gross receipts.

According to that definition, do you consider your operation as a small grower or a large grower?

A    We would be--well, it depends on the year. It really does. But I would say on average, with the 750,000, we would probably be considered a large grower.

Q    A large grower?

A    Yes.

MS. SALEHI: Okay. Thank you.

JUDGE CLIFTON: What other questions are there?

Ms. Deskins.

BY MS. DESKINS:

Q    Mr. McMullin, I just want to clarify a couple of things. And the Talking Points, you said they came from Perry Hedin?

A    Yes.

Q    Were they published in a
newslette?
A Yes.
Q Okay. And what was the name of the newsletter?
A I don't--I'm sorry. I don't have that information.
Q Was it a newsletter for the CIAB?
A Yes, and it came out to us as growers.
Q And do you happen--if you recall what month the newsletter would have been?
A I think that would have been-- when, Perry? January?
MR. HEDIN: Oh, no.
THE WITNESS: December.
MR. HEDIN: No; this was after the March meeting.
THE WITNESS: Oh, after the March meeting. So in--okay. Yes. It would have been after the March meeting.
BY MS. DESKINS:
Q Okay. After the March meeting of
what year?

A Of 2011.

Q Okay. And also on page two of the Talking Points, there's a term there, C-M-I. Does that stand for Cherry Marketing Institute?

A Yes, ma'am.

Q And you had a chance to look over the Talking Points; correct?

A Pardon me?

Q You had a chance to look over the Talking Points?

A Yes.

Q And there had been one correction made to the pounds?

A Yes. The pounds--that was incorrect. Yes, ma'am.

Q And other than that, the information is correct to the best of your knowledge?

A Yes, ma'am.

MS. DESKINS: I have no further
questions.

JUDGE CLIFTON: Who else has questions? Mr. Hedin.

MR. HEDIN: If I may.

BY MR. HEDIN:

Q Robert, a little earlier, you spoke about the savings and variable costs from a processor standpoint. Can you delineate a little bit for us what the cost of a bucket is, the cost of the sugar that you put on it, and roughly the cost of pitting, that you would save by not harvesting the fruit.

A From what I understand, the bucket, the processing, and everything, altogether, it's somewhere, 26, 27 cents a pound, depending on the cost of sugar, and from what they tell us, the cost of sugar's up again this year.

Q Right.

A So in that, I would say--and it depends on the processor. Some processors may
be more than that. But as I understand, somewhere in the 25 to 30 cents range.

Q       Okay. So that's money that would not be expended--

A       Expended; right.

Q       --conceivably would be paid back,

then, to you and your brothers and your sister?

A       That's correct.

MR. HEDIN: That's all, Your Honor. Thank you.

JUDGE CLIFTON: Mr. McMullin, you haven't specifically talked about meeting the cost of production. Do you have any comments about it?

THE WITNESS: As far as meeting the cost of production, on our farm, we--as we look this over, as we've, you know, as we went through this--on page three of the Talking Points--as we go through this per pound basis here that would be saved, and by the time I get, say I'm hoping for a little bit more than
10 cents on a diversion credit. But, you
know, we're looking at 18 to 20 cents a pound,
that it costs us to produce that and--a pound
of cherries, and that is a variable cost
because we're blessed, because I'm third
generation, and most of our ground is paid
for, and if you have to borrow money and pay
the annual mortgage payment, that's in
addition to that.

So it's a--and again, that depends
on the year and where we're at. But that's a
ball park figure.

JUDGE CLIFTON: Thank you.

THE WITNESS: Thank you, ma'am.

JUDGE CLIFTON: What other
questions does anyone have of Mr. McMullin?

Mr. Johnson.

BY MR. JOHNSON:

Q   Following up, Judge, on your
question. Robert, I just wanted--so it's safe
to say that given the figures you just cited,
and in the testimony, in the exhibit, that the
savings that you would incur, or receive, that
the amendment, if accepted, would help you—or
would return the cost of production?

A Yes. It would. That would—you
know, that's a fair trade-off. Yes.

MR. JOHNSON: Okay. Thank you.

JUDGE CLIFTON: What other
questions does anyone have for Mr. McMullin?

BY MR. HILL:

Q Yes. You've already mentioned the
high restriction percentage in 2009. Much of
that is due to the high crop, the large crop
that you had that year; correct?

A That's true, and well, then, also
the carryover that's come in.

Q And the carryover. Now you
haven't been here for much of this hearing.
So there has been a lot of talk about the
potential size of the crop this year. Do you
have any statement on what you expect the
national crop to be this year?

A As we have looked, and the folks
that I've talked to, and the folks in Michigan had a relatively light crop last year, the bud set that's in Michigan, I understand is exceptional, and could be a very large crop this year. And then also we had a light crop last year, our buds are doubles and triples, and it's very likely that we'll have a big crop this year. It looks very good.

Q So would you say like in a year, like if that were to come to fruition, would you say that a year, like what you expect this year would be a perfect time to have this amendment, as it is currently--well, as it's proposed, to be--

A Absolutely. This would be an ideal year to have it.

Q So whether or not that happens, it would be your position to get this done as quickly as possible, in case this happens maybe next year as well?

A Yes. We would like to see it done, well, ASAP, right away. We really
would.

Q Just a couple quick questions. OR
maybe just one.

A Maybe just--I didn't want to
interrupt you but--

Q Oh, go ahead.

A Excuse me. One of the things
that, too, though, is going to influence us as
growers this year, is that hey, after this
learning curve that we've had, unless--well,
it's going to happen--my processor's going to
tell me--hey, you bring all that fruit that
you can this year because we're going to put
it in the corner, and it's going to cost you,
or whatever. But we don't want those, or
you're going to have to abandon it in the
field.

And so we're--it's going to be a
tough year for us this year, I think, without
having this amendment.

Q And just quickly. Under the
proposed amendment, is it safe to assume that-
-safe to believe that you expect fuller returns to increase?

A Yes. I do.

Q One last question. Would you then say that the certainty of the--that the certainty with the one-for-one credit year, is that good for the industry, having--

A Yes. I think it is. I really do. I think it's good for the industry.

JUDGE CLIFTON: Are there other questions for Mr. McMullin?

(No response)

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

THE WITNESS: No, ma'am.

JUDGE CLIFTON: Thank you very much for your testimony. You may step down.

(Witness excused)

MR. HILL: I would like to admit what's marked as No. 20 into evidence, please.

JUDGE CLIFTON: Is there any objection?
MS. DESKINS: No objection.

JUDGE CLIFTON: Exhibit 20 is hereby admitted into evidence.

(Whereupon Exhibit No. 20, previously marked for identification, was received in evidence)

MR. HILL: We do want to recall Mr. Ray Rowley again, please.

MR. HEDIN: We just can't get rid of you, Ray.

JUDGE CLIFTON: Mr. Rowley, you remain sworn. Please again state your full name.


JUDGE CLIFTON: Well, I know that it's Raymond Claude Rowley. But since you're the only Ray, that will be good enough.

RAYMOND C. ROWLEY

WAS RECALLED AS A WITNESS BY AND ON BEHALF OF
THE CHERRY INDUSTRY ADMINISTRATIVE BOARD AND,
HAVING PREVIOUSLY BEEN DULY SWORN, WAS FURTHER
EXAMINED AND FURTHER TESTIFIED AS FOLLOWS:

BY MR. HILL:

Q How are you going again?
A Again.

Q Okay. You heard what I just asked Mr. McMullin. So I kind a want the same
information from you. You've already mentioned
that you expect a large crop this year, or I
guess in the industry, it is expected to be a
large crop.

There's been questions about how
quickly this can be enacted, this proposed
amendment. Could you give us a little bit of
dialogue about how important this is, to get
in the timetable you'd like to see, and why.

A Let's talk about Utah's crop real
quick. I think Robert "hit it right on the
head." I've been in this business just under
30 years, and I have never seen the number of
buds on tart cherry trees in this area; okay.
And the inside of each of those numbers,
instead of one, there's either two or three
blossoms. So we're setting ourselves up for
a huge crop in Utah, barring any frost; okay.
The trees are healthy. They had a short crop
on them last year. They were able to build
reserves, and I expect the trees to come out
very healthy this year.

Michigan had a short crop last
year also. I've talked to several growers in
Northern Michigan, a couple in Central
Michigan, and they're all expecting large
crops, barring any freeze.

As I've talked to them, they've
all said the same thing--the spring is still
cool. They haven't progressed to where
damaging frosts are likely at this point.

Usually, if we can get through
Mother's Day in May, our risk of frost is
basically gone. Now every once in a while,
there's some that comes along. But usually,
if we can get through Mother's Day, we're
okay.

And so, you know, we're almost to
the end of April. It looks like there's going
to be a huge crop across the country. That's
what we project today. I would suspect that
crop would be in the neighborhood, barring any
frost, 350 million pounds--that's my guess--
but that is just a wild-eyed guess. But I'll
bet it's way above three hundred.

If that happens, there really
ought to be some cherries put on the ground.
But with the 350 million pound crop, the
restriction will be well over 50 percent. the
value of in-orchard diversions this year,
under the current system, will be minimal, and
so the incentive for growers like me, or
Robert, or any of the others that you've heard
today, will not be there to put them on the
ground.

So they'll be picked, that expense
will go into them, they'll be processed, that
time will go into them, and every month
thereafter, according to, you know, and I
don't know these numbers, Robert does, that
somewhere around a penny a pound will be
charged them.

And I don't think that's best for
industry; okay. As far as how soon we can get
this in to place, speaking for myself and our
farm, and I believe I can speak for the tart
cherry growers of Utah, if there would be any
way to get this thing in place for the 2011
crop year--that's this year--whether it be
informal rulemaking, whether it be expedited,
whether it be going to Mr. Shipman and getting
on our knees and begging. I don't know. It
would be a great help for us this year, and it
would be--well, it would help every one of us
growers. Okay? It really would.

The incentive would be there to
put a few more on the ground. It would return
more money to us growers. So that's where I
see it. Am I outta line, Robert?

MR. McMULLIN: No; not at all.

You're "right on."

BY MR. HILL:

Q   Now I'm not sure if I have the
right person, but I think it was you who said
that with the large crop this year, under the
current system, it'd be a bit of a disaster.
Is that the disaster--

A   That's just what I explained.
That's the disaster scenario.

Q   And part of that disaster is lower
grower returns, I would--

A   Lower grower returns, plus that
never-ending storage bill.

BY MR. HEDIN:

Q   One thing. If that's all
processed, and then is all carried as
inventory, what do you think will happen in
the longer term, as well as the short term, on
pricing?

A   Well, the carry-over will continue
to go on. It will be carried as inventory. It will be in either a primary reserve pool, or a secondary reserve pool, but I really don't believe that those buyers, in their mind, separate those. I believe they look at the total crop and the total reserves, and say, okay, here's what's really out there, and so there's a downward pressure on price because of the total carry-over.

Q So you would see the kind of--or you would expect the kind of prices we saw in 2009--

A Yes.

Q --to be repeated?

A It would be very similar, probably.

MR. HEDIN: Thank you.

BY MR. HILL:

Q And ultimately, does that carry-over--could that effectively depress prices in subsequent years, beyond this year?

A Yes, yes, because, you know, it's
not like an apple or a peach, that they go away after you either sell 'em or you throw 'em away. In storage, cherries last and last, and keep giving you that monthly storage bill; okay. And so--

Q The "gift that keeps on giving."

Correct?

A It is. And so if it's put in storage, it'll still be there until somebody uses it, so, yes it will carry over, and carry over, and carry over.

BY MR. HEDIN:

Q Now you're requesting of the USDA that they look at any and all alternatives that they might have to speed the process?

A I'll make that formal request. How's that? As a cherry grower in Utah, and as the chairman of the Red Tart Cherry Market Board here, in Utah, and as head of the Diversion Committee on the CIAB board, and anything else you want to attach to it--okay?-

-I formally request you do anything and
everything you can do to get this amendment, 
or this process in place for us by the 2011 crop year, which is in three months. And I don't know what it would take, on your part. I don't know all the processes. But I do plead with you to do what you can.

And if that means we have to go talk to Mr. Shipman again, then I'm more than willing to go do it. And I know everybody in the industry would, too, if that's what it's going to take. But I--you know, I look at this room, and, you know, we're on this side, you're on this side, and I think of USDA, and I think, okay, the United States Department of Agriculture, and agriculture's my life. I think we're in this together. I think we're a team; okay?

I don't see it as "us" and "you guys," and I know we can't talk to you about some things, and other things, and all that stuff, in the middle of this. But I see it as one team trying to get this through.
I appreciate the cooperation we've had in the past, and whatever it takes, if we can cooperate and make it work, I think we would all be better off.

MR. HEDIN: Thank you.

MS. DESKINS: I have some questions for you, Mr. Rowley.

THE WITNESS: All right. Go ahead.

BY MS. DESKINS:

Q Okay. The last time there was a--okay. You have a prediction of how big the crop could be this year. The last time--do you happen to recall when there was--the last time there was a crop as big as what you think it might be this year?

A 2009, the crop was--what was it? It was big. I can't--I could get my paper. It's on my paper.

MR. HEDIN: Look at Exhibit 7.

THE WITNESS: It's on mine too but
it's back there a little bit.

JUDGE CLIFTON: Let's see. Yours is eighteen, Mr. Rowley.

THE WITNESS: Yes. But it--

there's Tom's.

(Pause)

MR. HEDIN: You're on Exhibit 7.

THE WITNESS: Okay. We have 350 million pounds, or just a hair under it, in 2009. We had just over 350 million pounds in 2001. We had 400 million pounds, or just barely under it, in 1995.

And from everything that I've seen, the potential is there for another 350 million pound crop this year, because of the way the trees are set up. You know, my life's in those orchards, and I just haven't ever seen the bud set that we have this year. I have not seen it before. We have pruned twice as much as we usually prune, hoping to take off some a that crop so we can size the crop that we expect to be on those trees.
BY MS. DESKINS:

Q      Okay. And when a crop is as big as what you predict it could be this year, what kind of restrictions does the industry typically see?

A      Well, the last, in 2009, it was a 68 percent restriction for the 350 million pound crop. That was almost—you know, what's that? Two-thirds of our crop was restricted. You know, you heard it from Bart Hawkins, from Washington. Unless this changes, he's not going to drop a cherry on the ground. You heard him say that. You know. I expect some of the Utah growers are going to do the same thing.

You know, until we can change this, there's no value for us to put any on the ground. There's not an incentive.

If we can change the incentive, right up front, then we come an awful long ways to putting supply and demand back into balance.
Q And to the extent this regulation isn't changed, it doesn't help to put the supply and demand back in balance?

A The price will. Price will. But the price will drop so far, that it--I don't know. You know, I look at what we got for our 2009 crop, and it hurt. It really hurt.

Q Okay. But say for the record, when you talk about what you got, you got a very low--

A A lower price.

Q A lower price.

A Yes; yes.

Q Enough, that would affect your ability to stay in business?

A Well, to an extent, yes, okay, because, you know, your operation--we've got to be planting trees every two or three years. We know how much we've got to plant to keep our farm rotation going. I'm sure Robert's the same way; you know? Cherry trees last between 25 and 30 years. So you've got
to keep rotating them around.

Well, you run into a 2009 year,
and the price is way down, you have to order
trees three years out, two and a half to three
years out, and you say, okay, well, I haven't
got enough money this year to even pay for the
trees I ordered three years ago. That means
I'm not ordering out here, and so it throws
your whole rotation thing off.

I mean, it's not just as simple as
saying you're going to stay in business.
Well, yes, you got trees, you're going to stay
in business, but it hinders the whole plan,
and where you plant, and how fast you replace
the old broken-down trees.

And then you're seven or eight
years to the first crop, once you plant. So
from the time of planning to put an orchard
in, or replace an orchard, you're ten years
before you get a dime off of it.

And so it hinders that whole plan,
and it throws it all into a--anyway. It just
messes it up.

Q Okay. And just for the record, the purpose of the restriction is to try to keep tart cherries off the market?

A Right.

Q Okay.

A The purpose of the restriction is it tries to keep them off the market, in a pool, where they're available when we need to put 'em back on the market. Does that make sense?

Q Yes.

A What are you laughing at?

Q No; it makes sense, Mr. Rowley.

That makes sense. And to the extent this regulation can be changed as soon as possible, it is going to help deal with these huge restrictions--

A Right.

Q --that the tart cherry industry is looking for; is that correct?

A Right. Right. You heard in my
first testimony—you asked, you know, how come
some people didn't put more on the ground, and
I says "like sheep," and everybody laughed at
me there. But it's--more truth to that than
you know. I got a few sheep at home and they
follow each other, and as soon as there's one
processor that says, well, I don't think I'm
going to put any on the ground, the processor
five miles down the road, he can't do anything
different or he's going to lose his growers.

And the other processor next to
him says, well, if he's doing it, I gotta do
it. And pretty soon, nobody puts any on the
ground cause there's no incentive to put it on
the ground.

I heard one grower, back in
Michigan, and I don't know if it came out in
the testimony back there or not. He says we
would have been better off, in 2009, to pick
our cherries, concentrate 'em, then dump the
concentrate out in a landfill, cause we would
a got full value for that destruction of
product, rather than put 'em on the ground in
the orchard because we're only getting a third
of the value out of it. Now something is
broke. Something is broke.

We're trying to fix that. And
back to my plea to you folks. If we can get
this in place for this year, because it looks
so--like such a huge crop, we're all going to
be better off, and I believe, as a CIAB in the
cherry industry, we're committed to doing what
we can. But I don't know what that is yet,
and I don't know how we can go about it, to
get it.

I mean, if it's asking somebody
different, if it's going back and having
another meeting and inviting somebody else.

I don't know what it is. But
whatever we can do. If we can get it for this
year's crop, it would be a great benefit for
this industry.

MS. DESKINS: Thank you.

MR. HEDIN: Might I follow up,
Your Honor?

JUDGE CLIFTON: You may, Mr. Hedin.

BY MR. HEDIN:

Q In following up Ms. Deskins' question, Ray, you're a fairly sophisticated and large grower, here, in the state. What would you speculate would be the impact to the smaller, or the medium-size grower, if they got the kind of pricing structure that you were talking about?

A Well, our co-op has eight growers, and we handle cherries for five others that are not members. The eight growers in the co-op all have the exact same pricing structure from that guy that called him the tiniest grower in the industry--Mr. Meredith--to us, which is the largest, here, in our co-op. So I don't think it's different.

All I know is that the little guy will benefit from this every much as the big guy. Okay?
Q But would his cost of operations be higher than yours--
A Oh, for sure; for sure.
Q --and thus, the consequence would be more severe to them, would it not?
A Yes; it would. Yes. His cost of operation would be much more per acre than ours.

JUDGE CLIFTON: Are there any other questions for Mr. Ray Rowley?
THE WITNESS: If you'll end this hearing, I won't have to come back up anymore.

JUDGE CLIFTON: Mr. Rowley, I think it's a very good thing that you came back up.

THE WITNESS: Okay.

JUDGE CLIFTON: Thank you. Is there anything else you'd like to add?

THE WITNESS: Thank you for coming. Thank you for being part of the team, and I hope we can work as a team.
(Witness excused)

JUDGE CLIFTON: Thank you.

Mr. Hill, do you have any other evidence?

MR. HILL: It would appear I do not, Your Honor.

JUDGE CLIFTON: Ms. Deskins, do you have any more evidence?

MS. DESKINS: I don't, but could we go off the record for a moment.

JUDGE CLIFTON: We certainly can.

Let's go off the record. It's now 2:23.

(Discussion off the record)

JUDGE CLIFTON: All right. We're back on record. We have just confirmed the admission into evidence, and I'm just going to do it again, just to make sure we did not fail to admit anything. The exhibits that are admitted into evidence are 1 through 20, and Exhibit 7, page 10A, Exhibit 7, page 9A, Exhibit 7, page 13A.

All of those are admitted into
evidence.

(Whereupon, Exhibits No. 1 through No. 20, previously marked for identification, were received in evidence)

JUDGE CLIFTON: All right.

Is there anything further before we conclude this hearing?

Mr. Hill?

MR. HILL: I would believe--I believe that's all from our side, Your Honor, in our proposal one. That's correct.

JUDGE CLIFTON: Thank you.

Ms. Deskins?

MS. DESKINS: Judge Clifton, the only thing we'd like to add to the record, in case someone reads the transcript, is if they want to submit anything electronically let me just read the address where they can submit it to. It's Parisa Salehi@ams.usda.gov, and I'm going to spell Parisa. It's spelled P-a-r-i-s-a, dot, Salehi, S-a-l-e-h-i, at
American.usda.gov.

And that's the address, if you want to submit anything electronically. But you should also file things with the Office of the Hearing Clerk, and their address is 1400 Independence Avenue, S.W., Room 1031 South Building, and it's Mail Stop 9203, Washington, D.C. 20250-9203.

JUDGE CLIFTON: Excellent. Thank you.

MR. HEDIN: Can I just ask a point of clarification.

JUDGE CLIFTON: You may.

MR. HEDIN: Is it that it must be filed with her, or it should be, as a courtesy?

MS. DESKINS: There's new electronic submission rules, and to the extent practicable, you should try to e-mail it to her. But it definitely has to be filed with the Hearing Clerk's Office, in order to be part of the record.
JUDGE CLIFTON: And Ms. Salehi, as I understand it, there will be posted on an Agricultural Marketing Service Web site, the transcript and the exhibits; is that correct?

MS. SALEHI: That's correct.

JUDGE CLIFTON: All right. And we have to get the transcript, of course, from Neal Gross, before that can be done.

All right. Is there anything further?

(No response)

JUDGE CLIFTON: There is not.

This concludes our hearing at 2:27.

(Whereupon, at 2:27 p.m., the hearing was concluded.)
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CERTIFICATE

This is to certify that the foregoing transcript

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

Before: USDA

Date: 04-26-11

Place: Provo, UT

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

______________________________
Court Reporter