

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
OFFICE OF ADMINISTRATIVE LAW JUDGES

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IN RE: : Docket Nos.:
 : :
 : A0-FV-09-0138
HEARING ON PROPOSED :
PROMULGATION OF A NATIONAL: AMS-FV-09-0029

MARKETING AGREEMENT FOR :
LEAFY GREEN VEGETABLES : FV09-970-1
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Yuma Civic Center
1440 Desert Hills Drive
Yuma Room
Yuma, Arizona

Thursday, October 15, 2009

8:00 a.m.

BEFORE:

MARC R. HILLSON

Chief Administrative Law Judge

APPEARANCES:

On Behalf of the Proponents:

JASON E. RESNICK, ESQ.

Western Growers
17620 Fitch Street
Irvine, California 92614-6022
(949) 863-1000

HANK GICLAS, Vice President
Western Growers

17620 Fitch Street
Irvine, California 92614-6022
(949) 863-1000

SCOTT HORSFALL, CEO
LGMA
1521 "I" Street

Sacramento, California 95814
(916) 441-1240

On Behalf of the USDA:

BRIAN T. HILL, ESQ.
U.S. Department of Agriculture
Office of the General Counsel

1400 Independence Ave., SW
South Building, Room 2325
Washington, DC 20250
(202) 720-9237

ANTOINETTE M. CARTER
Technical Assistant to the Chief

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Programs
Marketing Order Administration Branch
1400 Independence Ave., SW
Stop 0237, Room 1406-S
Washington, DC 20250-0237

(202) 690-3919

APPEARANCES: (Cont'd.)

On Behalf of the USDA:

MELISSA SCHMAEDICK

Senior Marketing Specialist
U.S. Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Programs
Marketing Order Administration Branch
1220 SW 3rd Avenue, Suite 385
Portland, Oregon 97204

(503) 326-2214

ANTHONY J. SOUZA
Federal Program Manager
U.S. Department of Agriculture
Fresh Products Branch
Fresh Fruit & Vegetable Inspection

3355 Myrtle Avenue, Suite 240
North Highlands, California 95632
(916) 332-4758

SUZANNE DASH
Agricultural Economist
U.S. Department of Agriculture
Agricultural Marketing Service

Fruit and Vegetable Programs
Economic Analysis &
Program Planning Branch
1400 Independence Ave., SW
Room 0564B, South Building
Washington, DC 20250-0241
(202) 720-0988

Reporter: Pamela M. Hollinger

I-N-D-E-X

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Tim Dempsey	3529
Alan Luke	3533
Robert Boelts	3536
Ralph Treadway	3546
Torey Ligon	3582
Vicki Scott	3614
Anthony Souza	3632

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

2 (8:06 a.m.)

3 JUDGE HILLSON: Good morning,
4 everybody. This is Marc Hillson. We're in
5 Yuma, Arizona. Today is October 15th, 2009.
6 It's our ninth day of hearing in the Leafy
7 Greens Proposed Marketing Agreement.

8 And are there any preliminary
9 housekeeping matters, or should we just go
10 right on to witness testimony?

11 My understanding is that the
12 Proponents have agreed to let Mr. Warshawer
13 testify first this morning, so, without
14 further ado, why don't you come on up here.

15 I have a written statement from
16 Mr. Warshawer that I've marked as Exhibit 96.

17 (Exhibit 96 was marked
18 for identification.)

19 JUDGE HILLSON: If you'd please
20 raise your right hand.

21 Whereupon,

22 STEVE WARSHAWER

1 having first been duly sworn, was called as a
2 witness and testified as follows; to wit:

3 JUDGE HILLSON: Okay. And could
4 you please state your name and spell it for
5 the record.

6 MR. WARSHAWER: My name is Steve
7 Warshawer, and that's W-a-r-s-h-a-w-e-r.

8 JUDGE HILLSON: Okay. And you
9 want to read a statement; is that correct?

10 MR. WARSHAWER: Yes, I do.

11 JUDGE HILLSON: Please proceed to
12 do so.

13 TESTIMONY

14 MR. WARSHAWER: Hello. My name is
15 Steve Warshawer. I'm a small farmer located
16 near Santa Fe, New Mexico, where I raise mixed
17 vegetables, including fresh cut salad mix,
18 poultry and eggs, and beef, replacement daily
19 heifers and bulls. I operate the oldest CSA
20 (Community Supported Agriculture) program in
21 New Mexico, providing fresh produce directly
22 to about 200 families.

1 I'm also employed by La Montanita
2 Cooperative, a four-store consumer-owned
3 retail grocery chain that focuses on local,
4 organic, and natural food. La Montanita
5 serves the public and is owned by 16,000
6 families and individuals in Albuquerque, Santa
7 Fe, and Gallup, New Mexico. I am the
8 Enterprise Facilitation Manager for the COOP's
9 Distribution Center, which offers a full range
10 of distribution services to our region's
11 farmers and to other wholesale and retail
12 buyers of local food. I provide business
13 services to farmers in our region, designed to
14 help them become and remain viable businesses.
15 My job is to help farmers address internal and
16 external barriers to their success.
17 Regulatory factors and the ability of farmers
18 of all scales to successfully comply with a
19 conflicting web of regulations is looming ever
20 larger as a barrier to success for our U.S.
21 farms of all scales.

22 I am also the Coordinator of the

1 Food Safety Committee of the National Good
2 Food Network organized by the Wallace Center
3 at Winrock International. The NGFN is a
4 voluntary association of regional groups
5 working to scale up the production and
6 distribution of good food, fresh, local, and
7 regional, through a values-based value chain
8 approach linking growers, distributors,
9 buyers, and other members of the value chain.
10 The NGFN is a multi-stakeholder, multi-
11 interest group body.

12 I also work closely with the staff
13 at the National Organic Coalition and the
14 National Sustainable Agriculture Coalition.
15 These groups are coordinating opposition to
16 the NLGMA and will do so until a final
17 distribution of the Proponents' proposal is
18 reached.

19 My assessment of the proposed
20 NLGMA is made in the light of my personal
21 experience as a farmer, an advisor to farmers,
22 and marketer for farmers and retailers locally

1 in New Mexico, Colorado, and Arizona and on
2 the basis of my coordination of food safety-
3 related discussion among groups, including
4 farmers, wholesalers, and NGO agricultural
5 service providers all over the U.S.

6 I believe that proponents and
7 opponents alike, at this and at previous
8 hearings, share the goal of creating food
9 safety solutions that reduce incidents of
10 food-borne illness and protect public health.
11 I look to counter eroding public confidence in
12 the safety of our food and its sources. I'm
13 personally committed to the effectiveness and
14 viability of farms of all scales with an
15 emphasis on economically, environmentally, and
16 socially fair practices throughout the value
17 chain. I do not support solutions that reduce
18 consumer choice or favor any single segment of
19 the farm and food production community at the
20 expense of any other. We are a diverse nation
21 of diverse farms and food sources, and all
22 systems that seek to improve performance in

1 the U.S. food system must respect that fact.
2 I support multi-interest stakeholder-based
3 processes as the mechanism by which to create
4 solutions that are resilient, durable, and
5 enduring.

6 As we work to preserve opportunity
7 for U.S. farms and processors of all scales
8 and types, while restoring public confidence
9 in the safety of the foods we offer, we are
10 challenged to do so in ways that are effective
11 and fair to all.

12 Summary of concerns raised
13 previously by opponents:

14 At the administrative hearings
15 conducted over the last several weeks,
16 USDA/AMS has heard from dozens of witnesses
17 representing thousands of farmers and tens of
18 thousands of members of the general public
19 expressing concerns about the NLGMA. The
20 concerns of these witnesses have covered a
21 consistent range of topics. I have not been
22 able to attend other hearings. I have had the

1 opportunity to read transcripts of several
2 witnesses' testimonies and to view several
3 hours of video. I realize that this
4 represents only a tiny fraction of what you
5 have heard thus far. I will list areas of
6 concern that have been previously raised and
7 which are also concerns to me. I share
8 concerns that the proposal as written is
9 designed to place authority and control over
10 the choices of many farms and many citizens in
11 the hands of a small number of individuals
12 with a definite and narrow interest.

13 I will also offer further
14 observations about the proposed NLGMA that
15 reflect my belief that it is not an agreement
16 that should be administered as a USDA/AMS
17 marketing agreement. I will describe the
18 relationship between the regulatory process
19 and its purpose and private food safety
20 programs (called "schemes" among global food
21 safety players). I will offer my suggestion
22 as to the correct role of an LGMA as a private

1 food safety program, not a public/private
2 partnership. I will also identify an
3 appropriate role for USDA/AMS in relation to
4 a properly positioned NLGMA.

5 Experiences and impacts of
6 metrics, based on California and Arizona Leafy
7 Greens Marketing Agreements:

8 Witnesses speaking in opposition
9 to the proposed NLGMA have cited a broad range
10 of adverse environmental impacts that have
11 been increasingly evident during the tenure of
12 the two existing state marketing agreements.
13 While Proponents have argued that LGMA metrics
14 are not the cause, it is safe to say that
15 current LGMA metrics have not harmonized with
16 environmental improvement mandates or
17 significantly influenced the chaotic situation
18 that farmers must face as they attempt to
19 resolve conflicting imperatives from different
20 regulatory sources or buyer demands. Any
21 proposed marketing agreement must coexist and
22 be effective in multi-regulatory agency,

1 multi-stakeholder, multi-interest group
2 climate in which farmers today operate if it
3 is to be worthy of consideration for expansion
4 to a national scope. It makes no sense to
5 extend further a concept that has not shown
6 effectiveness in this regard.

7 Opposition witnesses have pointed
8 out in particular that the metrics of the
9 existing LGMA's do not harmonize with the rules
10 of the National Organic Program, a set of
11 marketing rules that have been created to
12 assure consistency; that is, processes defined
13 as organic have been followed in the production
14 of food labeled as organic. This is another
15 harmonization failure of the current model.

16 Opposition witnesses have pointed
17 out that the metrics developed under the
18 existing LGMA's reflect a sterilization; for
19 example, bare earth buffer strips, and
20 isolation; for example, general wildlife
21 exclusion, approach to on-farm food safety
22 that is impractical and too costly for small

1 and diverse farm operations to afford. There
2 is significant disagreement over the
3 effectiveness of the sterilization and
4 isolation approach in relation to microbial
5 food-borne illness from leafy greens in
6 general and fresh cut ready-to-eat salads in
7 particular. Burdening an entire range of
8 farms with such metrics is counterproductive
9 and regressive. The fact that such a set of
10 metrics has been developed under the current
11 LGMA, a one size fits all metric based on the
12 practices of larger, mono-crop farms and
13 discourages diversity, cannot be defended and
14 surely cannot be allowed to become a template
15 for an expanded national approach.

16 Proponents have argued that the
17 LGMA is voluntary, allowing small-scale and
18 direct marketing producers to operate outside
19 the agreement. This point is intended to
20 allay the concerns raised above regarding
21 affordability and practicality of the NLGMA in
22 relation to small, medium scale, and diverse

1 producers. This approach would have the
2 unintended consequence of excluding small-
3 scale and diverse farms from access to larger
4 markets. As a small CSA farmer who also packs
5 and sells wholesale fresh cut salad mix, I
6 object to this solution. If a marketing
7 agreement is an appropriate regulatory
8 intervention, then it must be workable for
9 farms of all scales and crop and production
10 methods and crop and livestock mixes. All
11 farms are responsible to produce safe food.

12 Structure of the proposed NLGMA:

13 Witnesses speaking in opposition
14 to the proposed NLGMA have expressed concerns
15 about its zone design, grouping climatically
16 dissimilar locales into zones such as -- I'm
17 sorry -- grouping climatically dissimilar
18 locales within zones such as Alabama with
19 Wisconsin and Vermont with Florida. The
20 apparent goal of this design is to assure that
21 locales dominated by larger handlers are in
22 control of each zone. The fact that large

1 handlers also operate in key production
2 locales in each zone, and that multi-zone
3 handlers will choose which zone to vote in
4 seems designed so that large handlers who
5 initiated the Cal. LGMA will retain
6 operational control under the proposed NLGMA.

7 Opponents point out that there's
8 only token involvement of consumers in the
9 NLGMA power and administrative structure and
10 no representation of environmental groups on
11 its boards. If in fact the goal of the NLGMA
12 is to improve food safety while harmonizing
13 with the existing climate of diverse
14 regulatory imperatives, then it is critical
15 that other stakeholders have equal voice in
16 the discussion. The current design seems
17 intended to deny a meaningful voice to all but
18 the largest handlers. See the analysis of
19 Dave Runsten from CAFF, Community Alliance
20 with Family Farms, presented at Monterey NLGMA
21 hearing September 22 to 24.

22 Opponents have pointed out that

1 the range of produce covered under the
2 proposed agreement is inappropriately broad.
3 The category of "fresh cut ready-to-eat"
4 produce seems to be the locus of greatest risk
5 for food-borne illness, yet the proposed NLGMA
6 reaches beyond that area to whole leafy
7 greens, including produce that generally
8 includes a kill step such as cooking in its
9 preparation process. The unique handling,
10 packing, and presentation processes associated
11 with fresh cut ready-to-eat produce invite a
12 totally different approach to process control
13 for enhanced food safety than do other leafy
14 greens. The proposed NLGMA goes beyond the
15 realm of greatest risk and seeks to impact
16 activities in segments of the produce industry
17 where there is little or no indication that
18 such intervention is needed. If such impact
19 is needed, then why limit impact to leafy
20 greens? Why not a "risky produce marketing
21 agreement"?

22 Opponents have pointed out that,

1 in practice, the agreement is not truly
2 voluntary. If it is successful, as Proponents
3 intend it to be, in attracting a "significant
4 percentage" of support from handlers, it will
5 become a de facto standard that all other
6 handlers must follow. Handler approval of
7 this program places establishment of on-farm
8 production metrics in their hands, forcing
9 growers to follow standards created through a
10 process in which they have no significant
11 voice. This again shows the need for a multi-
12 stakeholder process in the creation of a
13 marketing agreement if it is to be effective
14 and fair. Input through testimony at hearings
15 such as this and through public comment into
16 a process whose outcome will be controlled by
17 a limited portion of a single segment of a
18 multi-stakeholder value chain should not be
19 confused with meaningful participation in such
20 a process. I also bring to your attention the
21 fact that I have personally spoken to -- I'm
22 sorry. I also bring to your attention the

1 fact that I have personally spoken to growers,
2 handlers, shippers, and others who are
3 unwilling to voice their concerns as part of
4 the hearing process. This does not bode well
5 for equitable involvement in the
6 administration process if an agreement does go
7 into effect. The design of the proposed NLGMA
8 does not allow meaningful ongoing
9 participation of the stakeholders that it
10 affects, yet it will have a coercive effect on
11 many of those stakeholders if it is
12 successfully implemented.

13 The role of USDA/AMS marketing
14 agreements:

15 Witnesses speaking in opposition
16 to the proposed NLGMA have raised the question
17 of whether USDA/AMS has the authority to
18 implement a marketing agreement on food safety
19 under the Agricultural Marketing Agreement Act
20 of 1937. At best, this is a remarkable
21 stretch of the authority granted in 1937. It
22 is reasonable to hypothesize that food safety

1 was not an issue that was in the mind of
2 legislators when the Act was passed. Clearly,
3 it is a reinterpretation of the intent of the
4 Act to address food safety within a federal
5 marketing order framework. If the proposal
6 proceeds over the objections of enough
7 interest groups, this authority could be
8 challenged legally and/or attempts made to
9 modernize the AMAA of 1937.

10 Opponents have pointed out that
11 food safety is not a marketing matter.
12 Everyone in the room can agree that the public
13 expects and demands that its food be as safe
14 as possible. AMS is mandated to use marketing
15 agreements to help industry address matters
16 that affect the marketing of its products.
17 Despite the fact that consumer loss of
18 confidence does influence marketing, I believe
19 that confidence has been lost due to
20 ineffective, inadequate, and outdated modes of
21 regulatory oversight, not due to marketing
22 chaos within the industry. It is in no one's

1 best interest to turn food safety into a brand
2 identity issue. I believe that the current
3 LGMA's operating alongside buyer branding of
4 food safety through the imposition of private
5 standards has exacerbated the trend towards
6 marketing of food safety. The entry of a
7 federal marketing agency into the realm of
8 food safety sends the worst possible message.
9 A regulatory science-based agency with
10 expertise in food safety should be leading the
11 governmental intervention, not a marketing
12 agency. The USDA/AMS is not a food safety
13 agency.

14 One of the goals of the AMAA of
15 1937 was to establish and maintain orderly
16 marketing conditions for agricultural
17 commodities in interstate commerce while
18 preserving consumer choice. It is important
19 to consider both of these aspects of AMAA's
20 purpose. On the one hand, order is best
21 maintained by concentration of power and
22 authority, such as in monopolies. Marketing

1 agreements are intended to give some of the
2 price stability and supply chain orderliness
3 of monopolies without subverting consumer
4 choice in the marketplace. The proposed LGMA
5 fails the test of balance between these two
6 objectives by giving near monopolistic control
7 of the market to a limited number of large
8 handlers, while tending towards metrics and
9 practices that exclude popular types and
10 scales of operation from access to the stated
11 benefits of participation. The proposed NLGMA
12 does not meet the criteria of an AMAA
13 marketing agreement.

14 The role of regulation:

15 I believe that opponents and
16 proponents alike agree that public expectation
17 that its food be as safe as possible is pre-
18 competitive and non-competitive. It is a
19 condition that the public reasonably believes
20 should exist among all market players. All
21 food should be as safe as possible.

22 As with universal public

1 expectations, such as with clean air and
2 water, when this expectation is undermined,
3 the public turns to a government to assure
4 through regulation and oversight that its
5 expectations are met. As with other public
6 health issues that we face, there's always a
7 tension between industry self-regulation and
8 government intervention. In general,
9 regulatory intervention ensues or increases
10 when self-regulation in the eyes of a
11 significant body of the public has failed and
12 public well-being is threatened. This is the
13 condition that we face now in regard to food
14 safety. We can debate this point all we
15 want, but the public believes that the food
16 safety system is broken and expects government
17 regulation to repair it.

18 It is in this context that
19 enormous legislative effort is being brought
20 to bear to modernize our food safety
21 regulations and enforcement processes.
22 Efforts are being made to assure that our

1 regulations are science-based and identify and
2 target areas of significant risk, while
3 recognizing diversity of scale, production
4 practice, distribution method, and even
5 climate. Significant attention is being given
6 to assure that modernized regulatory processes
7 do not inadvertently further past trends of
8 consolidation of production into the hands of
9 fewer and fewer business owners and reverse
10 the recent trends in growth of local and
11 regional food production and distribution and
12 the increased choices afforded to the public
13 and to farmers that result from this growth.

14 The role of marketing agreements
15 and private "schemes":

16 I have no doubt that the intention
17 of the Proponents and of USDA/AMS in its
18 willingness to advance the Proponent proposal
19 so far is driven by its belief that such a
20 public/private partnership is both appropriate
21 and useful to this purpose. I believe that it
22 is actually the worst possible course to

1 follow. The AMS marketing agreement process
2 does not follow the duly-established
3 conventions for the creation of regulations,
4 which involve extensive and transparent
5 processes, significant investment in, and peer
6 critique of underlying science, and ultimate
7 accountability to the public through our
8 Legislative Branch. Marketing agreements are
9 not a substitute for regulation.

10 Alongside effective regulation,
11 marketing agreements and other private
12 initiatives can enhance public confidence
13 through the systematic implementation of best
14 practices and continuous improvement of such
15 practices. Based on current experience with
16 super metrics, which are also examples of
17 private food safety schemes, we can see the
18 danger of the proliferation of these
19 standards. Nothing in the experience of the
20 current LGMA, nothing in the current proposal,
21 and nothing in USDA/AMS authority or capacity
22 give anyone more than hope that a successfully

1 implemented NLGMA will end the trend of
2 private standard proliferation and the
3 continued marketing of food as "safer" to the
4 public.

5 What is missing today in U.S.
6 produce, and especially fresh cut ready-to-eat
7 produce, is a fair competitive framework in
8 which private schemes can be assessed and
9 implemented. Such a framework has emerged
10 globally through the development of multi-
11 stakeholder-supported benchmarking capacity
12 for the various schemes. Through
13 benchmarking, standards are set for these
14 schemes and fair competition ensues as private
15 scheme owners sell their programs on the basis
16 of their potential to support continuous
17 improvement and implementation of best
18 practices at different levels of food
19 production. Global benchmarking is carried
20 out by GFSI, the Global Food Safety
21 Initiative, which is a multi-stakeholder
22 collaboration of buyers, producers, and other

1 interested organizations. McDonald's and Wal-
2 Mart and several major U.S. buyers are members
3 of GFSI. GFSI measures the private schemes
4 against globally agreed on standards designed
5 to meet public expectation about pre-
6 competitive conditions. And the competitive
7 marketplace then determines which schemes add
8 value and which do not. The guidance document
9 comprising these standards is reviewed and
10 updated regularly and a wide range of
11 stakeholders work together to maintain a
12 functional current and relevant set of
13 standards. GFSI member buyers agree to accept
14 any private scheme that is GFSI-approved.
15 Super metrics are minimized.

16 See web link www.mygfsi.com.

17 If the U.S. produce industry or
18 any segment within it wants to enhance the
19 process of rebuilding public confidence in the
20 food system and to do so in a way that is not
21 anti-competitive, it would operate within the
22 harmonized private food safety schemes. As

1 Tom Nunes told us yesterday, we cannot make
2 super metrics go away. I especially believe
3 that we will not eliminate them by creation of
4 quasi governmental alternatives.

5 Harmonizing private food safety
6 schemes according to a process such as GFSI,
7 which is currently working to establish itself
8 strongly in the U.S., subjects the standards
9 themselves to critical assessment as to
10 whether they do in fact support continuous
11 improvement across a full range of businesses
12 represented in a given sector. GFS, as a
13 multi-stakeholder body, is an objective third
14 party with credibility beyond that of USDA.
15 The leafy greens industry does not need a
16 government stamp of approval on its voluntary
17 safety regime. It needs buyer approval. The
18 most direct path to buyer approval is through
19 multi-stakeholder collaboration within the
20 GFSI framework. If the NLGMA seeks to reduce
21 super metrics and restore public confidence,
22 it will best accomplish this through a

1 framework such as GFSI.

2 If the proposed LGMA was a private
3 food safety scheme, its owners would get
4 together and develop their program, including
5 metrics and standards. They would proactively
6 engage other important parties in the process
7 because of their interest in creating a
8 successful product, the scheme itself. They
9 would be judged successful if they met GFSI
10 standards and received GFSI approval. This
11 approval would assure acceptance by a
12 substantial and growing number of buyers and,
13 in so doing, would replace those buyers' in-
14 house auditing programs. From my point of
15 view, this is a more accurate reflection of
16 the process of LGMA to date all the way back
17 to its origin, with the exception that it has
18 not been vetted to an entity whose stamp of
19 approval would compel buyers to accept it in
20 lieu of their own programs. So I wonder how
21 good are the current metrics. What would we
22 find if we submitted the California or Arizona

1 LGMA to GFSI for evaluation? Perhaps that
2 would give us an idea where we stand with our
3 current direction in marketing agreements.

4 A role for USDA in harmonization
5 of food safety schemes:

6 It is important that industry
7 respect values and trust its relationship with
8 USDA who can support industry within the GFSI
9 framework. One of the major complaints about
10 implementation of GAPs, public and private, is
11 the lack of consistent auditing. USDA/AMS can
12 and should be actively involved in auditor
13 training and certification. USDA/AMS
14 involvement in this process would enhance
15 confidence on the part of all stakeholders,
16 including the public.

17 There is also an increasing need
18 for training in best practices all along the
19 value chain. USDA is best equipped to deliver
20 this training and should retain a leading
21 role.

22 If USDA/AMS were to recognize that

1 it is not doing the industry or the public any
2 favor by advancing the Proponent proposal, it
3 would remain an important and active player in
4 furthering the goals of building public
5 confidence and reducing the adverse impacts of
6 super metrics. The work we have done over the
7 last few years, especially in the last few
8 weeks, would serve USDA and the industry well.

9 Conclusion:

10 In addition to the concerns of the
11 many opponents of the proposed NLGMA, I add
12 for your consideration the idea that a
13 USDA/AMS NLGMA, even if it is legal, even if
14 it is implemented to the highest standards, is
15 not what the industry or the public needs now
16 in order to effect an increase in public
17 confidence in fresh cut ready-to-eat leafy
18 greens and other high-risk produce. Rather,
19 what is needed is the modernization of our
20 regulatory process according to science and
21 risk-based principles with scaleable
22 implementation, along with privately-developed

1 food safety schemes to support the continuous
2 improvement of best practices on the farm all
3 the way through processing, handling,
4 shipping, and retail delivery. It is
5 imperative that all these private schemes pass
6 muster with GFSI and thus are acceptable to
7 buyers of all scales and sizes. This is the
8 most effective set of interventions that would
9 support industry opportunity and consumer
10 health and satisfaction.

11 If I could believe for a moment
12 that a USDA/AMS LGMA could fit into such a
13 framework, I would consider supporting it.
14 But even after yesterday's testimony, I
15 cannot.

16 I agree that the most important
17 goals of the proposed NLGMA are to increase
18 public confidence in the food supply, decrease
19 buyer reliance on their own audit programs,
20 while improving best practices on all farms.
21 I can anticipate many objections to my
22 suggestions, and some were addressed yesterday

1 in comments made by Proponent witnesses.

2 One, although it was stated that
3 consumers respect USDA auditors more than
4 private, it was acknowledged that out-of-
5 country equivalency works. USDA auditing of
6 a program is not a prerequisite to public
7 acceptance.

8 And, two, it was pointed out that
9 private auditors like Primus are fully
10 respected by buyers and that to be successful,
11 NLGMA would have to achieve status on par with
12 Primus. The GFSI approach puts the strength
13 of private auditing to work on behalf of
14 industry and buyers.

15 If the Proponents want a marketing
16 agreement targeting food safety to add
17 industry weight to the process of restoring
18 public confidence in their products, they need
19 to take the approach of fully developing their
20 program through a transparent process that is
21 accessible to and meaningfully inclusive for
22 all of the stakeholders whose support they

1 seek. The Proponents need to complete their
2 proposal by developing metrics that
3 demonstrate their commitment to harmonizing
4 the competing mandates of conservation, GAPs,
5 local and regional food supplies, diverse
6 farms, and affordable safe food for all
7 consumers reflecting the strong and diverse
8 agriculture that our public demands. They can
9 then submit their proposal -- the program --
10 to be vetted against global food safety
11 standards for such private programs. If the
12 program is going to move forward, it should do
13 so in a different venue -- that of a free
14 competitive marketplace under the guidance of
15 global food safety standards for supporting
16 public confidence and enhancing operations
17 through best practices and continuous
18 improvement. USDA/AMS should not develop a
19 National Leafy Greens Marketing Agreement.

20 JUDGE HILLSON: Thank you, Mr.
21 Warshawer. I'm going to receive your written
22 testimony into evidence as Exhibit 96.

1 (Exhibit 96 was
2 received.)

3 JUDGE HILLSON: And I will ask the
4 USDA panel first for their questions. Ms.
5 Schmaedick.

6 MS. SCHMAEDICK: Melissa
7 Schmaedick, USDA. Good morning, and thank you
8 for your testimony.

9 You mentioned that you operate the
10 oldest CSA in New Mexico?

11 MR. WARSHAWER: Yes.

12 MS. SCHMAEDICK: I'm -- are there
13 other producers that are involved in providing
14 product to that CSA?

15 MR. WARSHAWER: Yes.

16 MS. SCHMAEDICK: How many?

17 MR. WARSHAWER: Varies from -- in
18 a given year from ten to a couple dozen.

19 MS. SCHMAEDICK: And can you tell
20 me if these other producers fall into the
21 small or large business category?

22 MR. WARSHAWER: Nearly all are

1 small. In fact, nearly all would be very
2 small, according to the suggestions of our
3 witness yesterday.

4 MS. SCHMAEDICK: And how many of
5 them produce leafy green products?

6 MR. WARSHAWER: Two or three.

7 MS. SCHMAEDICK: Do you produce
8 leafy green products?

9 MR. WARSHAWER: Yes.

10 MS. SCHMAEDICK: You've made
11 several references to the Agricultural
12 Marketing Agreement Act of 1937. What is your
13 familiarity with that Act?

14 MR. WARSHAWER: Well, I'm not a
15 lawyer or a legislator. I've read portions of
16 it and I've particularly singled out portions
17 that seem to have relevance to the current
18 conversation.

19 MS. SCHMAEDICK: So you've just
20 read portions of it?

21 MR. WARSHAWER: Correct.

22 MS. SCHMAEDICK: But you don't

1 have any experience actually working with that
2 Act?

3 MR. WARSHAWER: No.

4 MS. SCHMAEDICK: Or any experience
5 in interpreting the Act and its application?

6 MR. WARSHAWER: Absolutely not.
7 This is my first attempt to interpret the Act.

8 MS. SCHMAEDICK: Do you have any
9 experience working with marketing orders or
10 agreements other than this proposal?

11 MR. WARSHAWER: No direct
12 experience.

13 MS. SCHMAEDICK: Do you have any
14 understanding of how they work?

15 MR. WARSHAWER: I think I do or I
16 wouldn't have prepared this testimony, but I
17 don't have the understanding or experience
18 that one would have if they were already
19 involved in actively implementing one.

20 MS. SCHMAEDICK: Is it your
21 understanding that this proposed National
22 Marketing Agreement is a USDA proposal?

1 MR. WARSHAWER: No. It's a
2 proposal created by industry and USDA is, as
3 I understand it, currently testing to
4 determine if the proposal should advance
5 further beyond the proposal stage.

6 MS. SCHMAEDICK: Can you define
7 "testing"?

8 MR. WARSHAWER: That's --
9 "testing" I understand to be conducting these
10 administrative hearings to gather information
11 about the usefulness and relevance of the
12 proposed agreement.

13 MS. SCHMAEDICK: How long have you
14 been aware of the development of the proposed
15 agreement?

16 MR. WARSHAWER: I heard about it
17 in mid-February of 2009.

18 MS. SCHMAEDICK: And did you make
19 any attempt to become involved in the process?

20 MR. WARSHAWER: Minor attempt.

21 MS. SCHMAEDICK: You stated that
22 you've reviewed the hearing sessions in

1 Monterey; is that correct?

2 MR. WARSHAWER: Not the whole
3 thing. I have seen pieces of the video and
4 read several of the posted testimonies.

5 MS. SCHMAEDICK: Are you aware
6 that there were attempts to reach out to
7 several interest groups including conservation
8 organizations, small farmer organizations to
9 bring those interests to the table in the
10 development of this draft?

11 MR. WARSHAWER: I'm aware that the
12 -- yes, I've heard that. And I also have
13 heard comments on the effectiveness of that
14 outreach. In the end, my judgment is not
15 about the attempt to outreach. My judgment is
16 on the actual effective inclusion or lack of
17 inclusion.

18 MS. SCHMAEDICK: And based on the
19 current proposal, if I understand you
20 correctly, you do not see adequate opportunity
21 for these interest groups to be involved?

22 MR. WARSHAWER: I don't believe

1 that the proposal as currently presented
2 reflects the active involvement of those
3 constituencies.

4 MS. SCHMAEDICK: Does the current
5 proposal as it is written allow for the
6 opportunity for these interest groups to be
7 involved in the development of proposed
8 metrics?

9 MR. WARSHAWER: Not to the extent
10 I believe necessary. No.

11 MS. SCHMAEDICK: Do you have any
12 suggestions on how to include those parties?

13 MR. WARSHAWER: I need to preface
14 any comment by saying regardless of how such
15 a proposal would go forward -- in other words,
16 whether it's under AMS guidance or under some
17 other venue, I would suggest specific
18 inclusion of environmental groups in the
19 Technical Committee and of consumers in the
20 Marketing Committee. And looking at how to
21 best balance those stakeholders' involvement,
22 I have no opinion. I would prefer to see that

1 balancing come out of a process that was more
2 inclusive. In other words, were those bodies
3 involved in discussing the question of how can
4 we be represented, that discussion might lead
5 to a proposal that was satisfactory to the
6 Proponents and to those groups. I don't have
7 an opinion on how to best do that.

8 MS. SCHMAEDICK: In your opinion,
9 are public hearings a transparent process?

10 MR. WARSHAWER: They're
11 transparent for people who are adept at
12 handling such a modality and who have the time
13 to dedicate to participation.

14 MS. SCHMAEDICK: Are you aware of
15 the other steps in the rule-making process
16 that allow for public comment?

17 MR. WARSHAWER: I'm aware that at
18 some point after USDA/AMS's next stage, there
19 will be an open public comment period that
20 will involve written comments.

21 MS. SCHMAEDICK: So you're not
22 very familiar with the rule-making process?

1 MR. WARSHAWER: I guess I'm not --
2 if there's any additional steps, I'm not aware
3 of them.

4 MS. SCHMAEDICK: You state on page
5 two of your statement that "Any proposed
6 marketing agreement must coexist and be
7 effective in the multi-regulatory agency,
8 multi-stakeholder, multi-interest group
9 climate in which farmers today operate if it
10 is to be worthy of consideration for expansion
11 to a national scope."

12 I'm assuming that you've read the
13 proposed agreement?

14 MR. WARSHAWER: Yes.

15 MS. SCHMAEDICK: What part of the
16 proposed agreement leads you to believe that
17 it does not allow for a multi-regulatory
18 agency, multi-stakeholder, multi-interest
19 group climate?

20 MR. WARSHAWER: The -- well,
21 clarification. That climate is not the
22 responsibility of the Proponents or of the

1 agreement. That's my description of the
2 climate that we all operate in. And so I'm
3 not sure I get the question, at least in
4 relation to this aspect of my testimony.
5 Could you rephrase for me?

6 MS. SCHMAEDICK: If I understand
7 your testimony, one of your concerns is that
8 it does not include opportunity for other
9 regulatory agencies to be involved, for other
10 stakeholders to be involved, or other interest
11 groups to be involved in the development of
12 metrics and the implementation of this program
13 if it were put in place. And I'm -- based on
14 language in the proposed agreement, I'm
15 wondering why you came to that conclusion.

16 MR. WARSHAWER: Well, the way the
17 Technical Committee is set up, I've learned a
18 lot about it from the testimony yesterday, and
19 I can see how it will bring the regulators
20 into the metrics setting process.

21 As to the other stakeholders,
22 which is consumers and particularly buyers,

1 who you heard me yesterday asking over and
2 over about, I don't see any design in the
3 system that brings consumers or buyers into
4 the process. And I think that in the long
5 run, that gap is gonna be really significant
6 in determining whether buyers endorse in the
7 necessary ways this agreement and back away
8 from private programs.

9 So I think I have to sort of parse
10 your question a bit. The multi-regulatory
11 aspect seems to be well-considered and seems
12 to be on the table as in the testimony late
13 yesterday from the two doctors. The people
14 are looking at which regulators and which
15 representative bodies should be included in
16 the technical process. That part I'm now
17 better educated about.

18 I don't see that same attention to
19 the other stakeholder groups that are
20 elsewhere in that value chain and I believe
21 that they're very important to the success of
22 this -- potential success of this program.

1 MS. SCHMAEDICK: Other than
2 buyers, which other stakeholders are you
3 concerned about?

4 MR. WARSHAWER: Consumer groups,
5 environmental groups, and among producer
6 groups an appropriate weighting of larger-
7 scale industrial concerns with diverse
8 regional and locally operating small-scale
9 farming concerns. Those would be the areas
10 where I currently see an inadequate balancing
11 or an absolute lack of representation.

12 MS. SCHMAEDICK: And if those
13 interest groups were to be accurately or
14 adequately represented, where would you
15 include them? On the Technical Review Board,
16 on the Committee?

17 MR. WARSHAWER: No. I think the
18 marketing -- it depends. We'd have to go
19 through them one by one. Consumer groups and
20 buyers need to be in the marketing. In the
21 current design, I can see the reason why the
22 Administrative Committee needs to be only

1 signatories because that's where the final
2 body of decisionmaking rests. And the
3 environmental groups may well have a place in
4 Technical Committee because that's part of the
5 -- that's the location, as I understand it,
6 within the proposal where conservation metrics
7 and good agricultural practices need to be
8 reconciled. So to go through point by point
9 and in detail, you know, we would have to --
10 we would see a -- I think the largest body of
11 the groups that I feel are under-represented
12 would belong in marketing. Some would belong
13 in technical.

14 I think that also small growers
15 and diverse growers would need to have a voice
16 in technical as well because, again, their
17 operational concerns and their methods by
18 which they would achieve good agricultural
19 practices are different than those at larger-
20 scale farms, so they would need to be present
21 in that metric reconciliation process that
22 seems to be designed for the Technical

1 Committee.

2 So I can see a little bit of
3 distribution, but I can see a place for
4 everybody.

5 MS. SCHMAEDICK: Is it your
6 understanding that the Administrative
7 Committee -- those members would only be
8 signatories?

9 MR. WARSHAWER: I may have mis-
10 read it but that's what I thought and that's
11 partly why I was asking the questions
12 yesterday about adding other types of
13 signatories, was to give that signatory status
14 an opportunity for access to the
15 Administrative Committee.

16 MS. SCHMAEDICK: Do you have a
17 copy of the proposed language in front of you?

18 MR. WARSHAWER: I don't. It went
19 away.

20 MS. SCHMAEDICK: So could we have
21 a copy, please?

22 If you could turn to Section

1 970.40, Establishment and membership under the
2 general heading "Leafy Green Vegetable
3 Administrative Committee."

4 MR. WARSHAWER: I'm here.

5 MS. SCHMAEDICK: Okay. So this
6 section proposes the establishment of the
7 Administrative Committee. Under paragraph
8 (a), it describes the Committee consisting of
9 23 members.

10 MR. WARSHAWER: Uh-huh.

11 MS. SCHMAEDICK: If you look down
12 at (a)(1), (2), (3), (4), (5), (6), (7), (8),
13 (9), those outline the memberships.

14 MR. WARSHAWER: Uh-huh.

15 MS. SCHMAEDICK: Can you tell me
16 what type of membership positions are
17 outlined?

18 MR. WARSHAWER: Membership -- what
19 type. Well, you've got producers and
20 handlers, you've got a retail rep from
21 production, a food service rep from
22 production, and a member from production.

1 MS. SCHMAEDICK: A public member?

2 MR. WARSHAWER: And an importer.

3 MS. SCHMAEDICK: And an importer.

4 MR. WARSHAWER: Public member,

5 yeah.

6 MS. SCHMAEDICK: Are producers

7 signatories to this agreement?

8 MR. WARSHAWER: No, they're not.

9 MS. SCHMAEDICK: Are retail

10 representatives signatory to the agreement?

11 MR. WARSHAWER: No, they're not.

12 MS. SCHMAEDICK: Are importers?

13 MR. WARSHAWER: Nope.

14 MS. SCHMAEDICK: So based on this

15 information, is the Administrative Committee

16 limited to signatories?

17 MR. WARSHAWER: No, it's not. My

18 -- thank you for that correction.

19 MS. SCHMAEDICK: I'd also like to

20 direct your attention to paragraph (b).

21 MR. WARSHAWER: On the same item?

22 MS. SCHMAEDICK: Yes.

1 MR. WARSHAWER: Uh-huh.

2 MS. SCHMAEDICK: I'll just read
3 that and then I'll ask you some questions. It
4 states, "A majority of the producer members of
5 the Committee shall not otherwise be engaged
6 in the handling of leafy green vegetables or
7 the manufacturing of fresh cut packaged leafy
8 green products, and two producers must be
9 small producers as defined in the rules and
10 regulations. Furthermore, at least four
11 handler members must be engaged in the
12 manufacturing of fresh cut leafy green
13 products."

14 Based on the language in this
15 proposed paragraph, do you -- what is your
16 opinion on the opportunity for representation
17 of pure growers and small grower entities?

18 MR. WARSHAWER: There's definitely
19 an attempt to represent them. Whether it's
20 sufficiently balanced to get at the -- what
21 would be an optimum representation. Because
22 of my oversight and having failed to correctly

1 analyze this before presenting to you today,
2 I can't comment.

3 MS. SCHMAEDICK: What is your
4 understanding of zones as proposed in the
5 agreement? That's 970.28.

6 MR. WARSHAWER: 970.28. Okay.
7 Can you be more specific, my understanding?
8 What do you mean by that?

9 MS. SCHMAEDICK: In your
10 testimony, you stated that it was your opinion
11 that it was inappropriate to have differing
12 production and handling climates within each
13 zone. So what I would like you to look at is
14 the correlation between the proposed
15 definition of the "zones" and how that
16 proposed definition works with the proposed
17 establishment of the Committee membership.

18 MR. WARSHAWER: I understand the
19 correlation in that Committee membership is
20 linked back to -- is divided by zones. The --
21 part of the purpose of the zones -- beyond
22 that, I don't see the purpose of the zones

1 because they don't strike me as being
2 inherently workable from a production or
3 management or sort of a -- they don't hold
4 together as zones for any reason other than
5 the appointment or voting of membership. And
6 that's why I identified the fact that each
7 zone seems to be anchored by a major producing
8 area and that those major producing areas can
9 be linked back to the major producing area
10 here in California and secondarily in Arizona
11 and the apparent design that allows the groups
12 who've initiated the original LGMA to sustain
13 operational control throughout the
14 implementation of the NLGMA.

15 MS. SCHMAEDICK: So if I
16 understand what you said, is that the zones
17 seem to be linked to the definition of the
18 distribution of the Administrative Committee
19 membership?

20 MR. WARSHAWER: That seems to be
21 their primary purpose, is to link -- create a
22 division through which the Administrative and

1 other Committees can be populated.

2 MS. SCHMAEDICK: Do you understand
3 the voting process that is described in
4 970.48, Procedure?

5 MR. WARSHAWER: I think I do.

6 MS. SCHMAEDICK: Do you understand
7 the proposed changes to this section that were
8 offered yesterday?

9 MR. WARSHAWER: No, I don't -- I
10 can't imagine that I understand them fully.

11 MS. SCHMAEDICK: If it were
12 demonstrated to you that the voting structure
13 as proposed in the agreement was -- is being
14 proposed in such a way that no one particular
15 zone could dominate the voting process, would
16 that make a difference in your understanding
17 of how this Administrative Committee would
18 work?

19 MR. WARSHAWER: That's a difficult
20 one because the question of -- the way our
21 larger handlers and -- are spread out across
22 the zones lie -- underlays the question of how

1 the zones interact and supply membership
2 forward to the committees.

3 I'm not sure -- I mean, the short
4 answer is yes. If there were a way to do
5 that, that would answer my concerns. The long
6 answer is I don't think it's as easy as just
7 zone definition, and I'm not sure I have any
8 suggestions how to accomplish that.

9 MS. SCHMAEDICK: Okay. I'd like
10 to point your attention to Section 970.45.

11 MR. WARSHAWER: Okay.

12 MS. SCHMAEDICK: The last two
13 sentences of that section read, "The Technical
14 Review Board may appoint subcommittees as
15 necessary to facilitate input and review from
16 regions throughout the production area.
17 Subcommittees may consist of producers,
18 handlers, and other interested parties as
19 deemed appropriate by the Technical Review
20 Board."

21 MR. WARSHAWER: That's a good
22 thing.

1 MS. SCHMAEDICK: What is that --
2 what is your opinion of that proposed
3 language?

4 MR. WARSHAWER: It's a good thing.
5 It's good language. And the subcommittees and
6 the openness of the Technical Review Board to
7 include others who are not directly part of
8 that process is also a good thing.

9 MS. SCHMAEDICK: Does that address
10 any of your concerns that you've raised?

11 MR. WARSHAWER: It's definitely a
12 mechanism to include -- well, I really am
13 challenged to see a structural solution to the
14 problem of maintaining diverse participation
15 when we have the distribution of influence
16 that we have just by virtue of the location of
17 our major handlers in a handler -- in a
18 handler agreement. That's a conceptual
19 problem that I don't think can be written
20 around unless the process itself came out of
21 -- I'm sorry -- unless the language itself
22 came out of a process that had the

1 stakeholders that I've described involved. So
2 my concern is that at the present, absent the
3 involvement of these other, you know,
4 consumer, buyer, environmental groups and so
5 on, this language may look good and it may
6 sound appropriate, but it hasn't been tested
7 internally in the dialogue and, you know,
8 discussion process that would have been
9 possible if it had been more inclusive at that
10 stage. And I do recognize your points, that
11 people have been asked to participate, but
12 here we are. We are where we are.

13 So I'm appreciative of the
14 language. I'm appreciative of its intent.
15 I'm not sure that it addresses that other
16 underlying theme and how well that can be
17 done.

18 MS. SCHMAEDICK: On page two of
19 your statement, you state that "Opposition
20 witnesses have pointed out in particular that
21 the metrics of the existing LGMA's do not
22 harmonize with the rules of the National

1 Organic Program."

2 We have had testimony from several
3 growers and handlers who produce and handle
4 organic product and they have essentially
5 stated the contrary. Can you explain why you
6 have this statement in your --

7 MR. WARSHAWER: Yes.

8 MS. SCHMAEDICK: -- testimony?

9 MR. WARSHAWER: The -- listening
10 to the witnesses who spoke about -- what the
11 witnesses specifically said is that their food
12 safety audits did not force them out of
13 compliance with any NOP requirements. These
14 were growers who were from a particular
15 segment; in other words, these are what I'm
16 referring to as more mono-crop and larger-
17 scale and these are also, in both cases that
18 I heard yesterday anyway, they were growers --
19 what we call mixed growers. They had organic
20 component and conventional component. And I
21 believe that the -- in that scenario, the
22 skill and the scale of operation is such that

1 the challenges of conformity to both can be
2 better addressed.

3 I think this harmonization problem
4 points mostly to diverse operations, which the
5 National Organic Program encourages, and it
6 also points more to operations that are
7 less -- more diverse. That's -- yeah, that's
8 really my point.

9 MS. SCHMAEDICK: So in your
10 opinion, is there any possible way for a small
11 diversified farm to be NOP-compliant as well
12 as GAP-compliant?

13 MR. WARSHAWER: Yes.

14 MS. SCHMAEDICK: So in your
15 opinion, they do not conflict?

16 MR. WARSHAWER: It's hard to argue
17 -- it's hard for me to accept that statement
18 when the metrics that we're working with --
19 you know, the metrics in the new proposal
20 aren't defined. The metrics will emerge out
21 of the process. The metrics of the existing
22 LGMA's have proved problematic for diverse and

1 smaller organic growers.

2 MS. SCHMAEDICK: So you just
3 stated that the metrics in the proposed
4 agreement have not been defined yet; is that
5 correct?

6 MR. WARSHAWER: I understand that
7 the metrics will be defined through the
8 continued input of the Technical Committee, so
9 that's part of the purpose here.

10 MS. SCHMAEDICK: Right. And we
11 have just identified language that addresses
12 the ability for regional and interest groups
13 to have input.

14 MR. WARSHAWER: Uh-huh.

15 MS. SCHMAEDICK: So is it possible
16 that the development of metrics under the
17 proposed national agreement could be
18 different?

19 MR. WARSHAWER: Yes, it is.

20 MS. SCHMAEDICK: Would that be a
21 good thing?

22 MR. WARSHAWER: Yes, it would be.

1 I think my testimony here says metrics of the
2 existing LGMAs do not harmonize well.

3 MS. SCHMAEDICK: On page four of
4 your testimony, middle of the first paragraph,
5 you state, "Input through testimony at
6 hearings such as this and through public
7 comment in a process whose outcome will be
8 controlled by a limited portion" -- 'portion'
9 actually, but is it supposed to be 'portion'?

10 MR. WARSHAWER: I'm thinking
11 "portion."

12 MS. SCHMAEDICK: Okay -- "... of a
13 single segment of a multi-stakeholder value
14 chain ..." and then the sentence continues,
15 but my question is: You state "whose outcome
16 will be controlled by a limited portion of a
17 single segment of multi-stakeholder ..."

18 What do you mean by that?

19 MR. WARSHAWER: Okay. I view the
20 production, handling, shipping, distribution
21 sale of leafy greens as a multi-step -- and
22 I'm calling multi-stakeholder process.

1 There's different -- and this has been
2 presented to us in Proponent testimony as
3 well. There's lots of steps in the process
4 from field-to-fork, as it was called
5 yesterday. That's what I mean by a value
6 chain, is all of the links in that chain.

7 The outcome of this -- the
8 testimony that we're giving here and the
9 outcome of the standard-setting process in the
10 end falls to the handlers or those that the
11 handlers have designated. And under the
12 current agreement, as designed, it may fall to
13 a fairly limited number of handlers with the
14 largest investment and the largest locus of
15 operation here in the west. That's not the
16 same to me as -- having that control in such
17 a limited portion of a single segment is not
18 the same as meaningful participation of all
19 stakeholders. That's the conflict that I'm
20 trying to wrestle with.

21 MS. SCHMAEDICK: I'd like to
22 direct your attention to 970.67, Audit

1 Metrics.

2 MR. WARSHAWER: 970.67? Okay. Go
3 ahead.

4 MS. SCHMAEDICK: The first
5 sentence reads, "Audit metrics shall be
6 recommended by the Committee to USDA for
7 approval after consultation with the Technical
8 Review Board."

9 Based on that sentence, who
10 actually ultimately in the end has the
11 authority to implement metrics?

12 MR. WARSHAWER: USDA.

13 MS. SCHMAEDICK: So does USDA fall
14 into your "controlled by a limited portion of
15 a single segment of multi-stakeholder"?

16 MR. WARSHAWER: Well, USDA can
17 only approve recommendations that it receives.
18 Obviously, USDA is not going to write the
19 audit metrics. In this description, the audit
20 metrics -- the proposed metrics will come from
21 the limited body that I'm describing may end
22 up in that position. I think you're -- I

1 don't think that changes my opinion. USDA
2 will approve them or not, but the metrics will
3 be ultimately controlled and put forward
4 potentially by this limited representative
5 body -- limited and non-representative body.

6 MS. SCHMAEDICK: Is there
7 consultation with the Technical Review Board
8 required?

9 MR. WARSHAWER: Yes.

10 MS. SCHMAEDICK: And do you know
11 the process by which USDA would go through
12 implementing any proposed metrics?

13 MR. WARSHAWER: No, I do not. In
14 fact, that's one of the areas that I have
15 mentioned indirectly in my testimony, the
16 comparison between rule-making processes as I
17 understand them and this process which, at
18 least as far as I know, does not have the same
19 degree of transparency and inclusivity that a
20 rule-making process does. And, you know, if
21 I'm wrong about that, do show me. But I
22 believe this becomes an internal process

1 between USDA and the majority interest on the
2 Administrative Committee.

3 MS. SCHMAEDICK: So if I were to
4 submit to you that the process actually
5 involved a publishing of a proposal and a
6 comment period prior to implementation, would
7 that change your --

8 MR. WARSHAWER: Yes, it would.

9 MS. SCHMAEDICK: -- understanding?

10 MR. WARSHAWER: Uh-huh.

11 MS. SCHMAEDICK: Would that make
12 you feel more comfortable?

13 MR. WARSHAWER: Yes, it would.

14 MS. SCHMAEDICK: On page four of
15 your testimony, you state under the -- the
16 first paragraph under the heading "Role of
17 USDA/AMS Marketing Agreements," you state,
18 "Witnesses speaking in opposition to the
19 proposed NLGMA have raised the question of
20 whether USDA/AMS has the authority to
21 implement a marketing agreement on food safety
22 under the Agricultural Marketing Agreement Act

1 of 1937."

2 Based on earlier questions, are
3 you -- again, are you familiar with other AMS
4 programs?

5 MR. WARSHAWER: Yes.

6 MS. SCHMAEDICK: What are you
7 familiar with?

8 MR. WARSHAWER: Well, I mean, I
9 read the list of existing programs and taken
10 a quick look at portions of some of them, but
11 I have not done an exhaustive study of the
12 particular areas covered in those agreements.
13 I've also read a little bit about a couple of
14 proposals that were turned down, so I really
15 don't think I have the -- and certainly I
16 wouldn't be the person that would be actively
17 litigating or in any way attempting to pursue
18 this claim. I'm simply pointing out that this
19 is one of the issues that's been raised that
20 we may have to see addressed further down the
21 line.

22 MS. SCHMAEDICK: So are you

1 familiar at all with the California Pistachio
2 Marketing Order?

3 MR. WARSHAWER: That one I'm not
4 so familiar with. No.

5 MS. SCHMAEDICK: Are you familiar
6 with the California Almond Marketing Order?

7 MR. WARSHAWER: I've heard some
8 things about that one but haven't read it in
9 full. No.

10 MS. SCHMAEDICK: How about the
11 Raisin Marketing Order?

12 MR. WARSHAWER: The same.

13 MS. SCHMAEDICK: In your opinion,
14 you operate a CSA, as you mentioned, and
15 you're also a grower. If you were to deliver
16 product, a head of lettuce that looked
17 beautiful, it met every single quality
18 attribute in terms of physical
19 characteristics, but it were contaminated by
20 some possible way, would you still consider
21 that product to be a quality product?

22 MR. WARSHAWER: Well, by my

1 definitions, that problem -- the cause of the
2 contamination or the risk of contamination
3 would have been addressed prior to the
4 assessment of quality. This is the
5 distinction that I make when I try and speak
6 of pre-competitive conditions. In my -- yeah.
7 I'll stop there for now.

8 MS. SCHMAEDICK: So am I
9 understanding you to say that a -- whether or
10 not a product is contaminated has no bearing
11 on its quality?

12 MR. WARSHAWER: That's a little
13 different than what I said. I'm saying that
14 the fact of it being contaminated is a
15 separate set of issues than what its qualities
16 are from a marketing standpoint. The fact
17 that it's contaminated or may be contaminated
18 is a result of a different set of processes
19 than the one that brings to it marketable
20 qualities.

21 MS. SCHMAEDICK: And based on your
22 experience with your consumers, how would they

1 view -- would they view a contaminated product
2 as being quality?

3 MR. WARSHAWER: I don't believe
4 they would be -- no, they wouldn't view it as
5 quality, but I also don't know that they would
6 look at contamination as a quality or lack
7 thereof as a quality. I'm pretty sure that
8 the consuming public expects all food to be
9 safe and it doesn't look at a head of lettuce
10 and say, This one's pretty and that one's not
11 and think, well, the pretty's one safer than
12 the less pretty one. Those are completely
13 separate processes in the mind and experience
14 of the consumer. And quality attributes that
15 are marketable have visible, measurable, and
16 in some cases I would say emotional
17 attributes, and the whole contamination issue
18 is prior to the exposure of marketing
19 attributes. It's not an issue that we're
20 supposed to be asking consumers to make
21 decisions based on. They're not supposed to
22 pick a piece of food 'cause they think it's

1 safer than another.

2 MS. SCHMAEDICK: Based on your
3 experience and awareness of contamination in
4 leafy green products, do consumers have a
5 reaction to those events in the marketplace?

6 MR. WARSHAWER: Absolutely.

7 MS. SCHMAEDICK: What happens?

8 MR. WARSHAWER: Well, I think that
9 Proponent witnesses described it well -- that
10 particularly in our time, with the rapid
11 movement of information around the country,
12 when something happens in one part of the
13 country, it affects the whole industry coast
14 to coast and that effect is regardless of
15 scale, it's regardless of, you know, isolation
16 or broadness of some incidents. It's pretty
17 damaging.

18 MS. SCHMAEDICK: So are you saying
19 that they stop buying the product?

20 MR. WARSHAWER: That is correct.
21 Consumption goes down.

22 MS. SCHMAEDICK: Why do they stop

1 buying the product?

2 MR. WARSHAWER: They're afraid.

3 MS. SCHMAEDICK: They're afraid

4 that it's not --

5 MR. WARSHAWER: They don't want to
6 get sick.

7 MS. SCHMAEDICK: They don't want
8 to get sick.

9 MR. WARSHAWER: But to describe --
10 I won't -- I choose my food based on whether
11 it will make me sick or not is not a decision
12 that people make going forward to make their
13 daily or weekly buying decisions. That's a
14 potentially disruptive more than -- than
15 calming influence in the food system when that
16 kind of chaos exists. That's why the
17 Proponents see loss of market when good
18 agricultural practices or related metrics have
19 not been well-regulated and well-assured.

20 MS. SCHMAEDICK: Is it your belief
21 that the proposed mark will be used on
22 consumer packaging?

1 MR. WARSHAWER: I completely
2 believe the Proponents' position that they
3 have no such intention. It's -- this isn't
4 designed as a consumer mark. I am not so sure
5 that future events might not change that. I
6 personally would prefer to see language in the
7 agreement that explicitly proscribes this mark
8 from being used in any consumer capacity.

9 MS. SCHMAEDICK: Okay. On page
10 five of your statement, under the "Role of
11 marketing agreements in private schemes," I
12 believe it's the third sentence in the first
13 paragraph: "The AMS marketing agreement
14 process does not follow the duly-established
15 conventions for creation of regulations, which
16 involve extensive and transparent processes,
17 significant investment in, and peer critique
18 of underlying science, and ultimate
19 accountability of the public through our
20 Legislative Branch."

21 Based on some of the information
22 that you have currently or just recently

1 received, do you still believe this statement
2 to be true?

3 MR. WARSHAWER: I would need to do
4 a comparison of how rule-making process occurs
5 following legislative approval or legislative
6 initiative versus rule-making process within
7 AMS marketing agreements. I'm not qualified
8 to integrate the information you've given me
9 with that statement just yet.

10 MS. SCHMAEDICK: Are you aware
11 that the rule-making process that AMS follows
12 is governed by a proscribed set of rules and
13 regulations?

14 MR. WARSHAWER: Yes. I --

15 MS. SCHMAEDICK: Have you read
16 those?

17 MR. WARSHAWER: No, I have not.

18 MS. SCHMAEDICK: You have not.

19 MR. WARSHAWER: Huh-uh.

20 MS. SCHMAEDICK: Also on page
21 five, under the section "Role of regulation,"
22 first paragraph, it's the third sentence from

1 the bottom, it starts with, "In general."

2 MR. WARSHAWER: Uh-huh.

3 MS. SCHMAEDICK: "In general,
4 regulatory intervention ensues or increases
5 when self-regulation in the eyes of a
6 significant body of the public has failed and
7 public well-being is threatened."

8 Are you familiar with the National
9 Organic Program and the history behind it?

10 MR. WARSHAWER: Fairly familiar, I
11 hope.

12 MS. SCHMAEDICK: Would you
13 describe the evolution of the National Organic
14 Program as coming out at a process or a
15 situation that you described in this sentence?

16 MR. WARSHAWER: I think that's a
17 reasonable description. Yes.

18 MS. SCHMAEDICK: Is it possible
19 that the leafy green industry, the national
20 leafy green industry, is grappling with the
21 same types of concerns that the organic
22 industry was dealing with?

1 MR. WARSHAWER: Yes, it is.
2 Not -- not -- I mean, I want to agree with
3 that question. I'd like to agree without
4 equivocation. I have to equivocate just a
5 bit. It's a different set of problems because
6 organic is a process -- organic production is
7 a process and food safety is an absence of
8 dangerous conditions. There's some important
9 similarities, but I don't think they're one in
10 the same. I don't think they're analogous
11 enough that we can say that the two processes
12 are directly comparable. There's some
13 important similarities.

14 MS. SCHMAEDICK: In your opinion,
15 the -- have you read the FDA GAP, GHP, and GMP
16 guidelines?

17 MR. WARSHAWER: Not GHP and GMP
18 but I read GAP.

19 MS. SCHMAEDICK: Do they describe
20 a process-based system?

21 MR. WARSHAWER: It's a process-
22 based system that's intended to prevent

1 certain outcomes or minimize certain outcomes.

2 Yes.

3 MS. SCHMAEDICK: On page seven of
4 your testimony, third paragraph under "A role
5 for USDA and harmonization of food safety
6 schemes," the first sentence of that third
7 paragraph, "If USDA/AMS were to recognize that
8 it is not doing industry or public any favor
9 by advancing the Proponent proposal," and the
10 sentence continues -- can you explain why you
11 believe USDA/AMS is advancing the Proponent
12 proposal?

13 MR. WARSHAWER: Physically
14 advancing. That's -- as I understand it,
15 that's what this process is about. The
16 proposal moves from step to step to step
17 through AMS process. I don't -- I'm not -- I
18 apologize if that language makes me -- if you
19 interpret that language to be me including you
20 as a Proponent. That's not my intent. It is
21 USDA's job to advance the proposal from step
22 to step through its process.

1 MS. SCHMAEDICK: So you just
2 stated that that is our job; is that correct?

3 MR. WARSHAWER: Yes, until you
4 reach such point where you either -- you
5 continue advancing it and it comes into effect
6 or you decide that, based on the criteria that
7 you manage, it's not appropriate for it to
8 proceed further.

9 MS. SCHMAEDICK: Then how are we
10 not doing industry or the public a favor?

11 MR. WARSHAWER: That is a poorly-
12 worded sentence. Does not get at my intent
13 and I appreciate you bringing it to my
14 attention.

15 I think what I'm trying to say
16 there is that if the -- if the proposal were
17 not to reach completion and go into full
18 implementation, AMS would remain an important
19 and active player in furthering the goals, and
20 I apologize for that wording. I can see why
21 you interpret it that way.

22 MS. SCHMAEDICK: Those are my

1 questions for the moment. Thank you.

2 JUDGE HILLSON: Other questions
3 from the USDA panel? Mr. Souza.

4 MR. SOUZA: Thank you. Anthony
5 Souza, USDA. Good morning, Mr. Warshawer.
6 Got just a few questions for you this morning.
7 On the first page of your statement, you state
8 that you're a small grower. You raise mixed
9 vegetables.

10 MR. WARSHAWER: Uh-huh.

11 MR. SOUZA: Do you or have you
12 gotten audits on your ranch or farm?

13 MR. WARSHAWER: Not yet.

14 MR. SOUZA: You state that you're
15 an employee for a consumer-owned cooperative?

16 MR. WARSHAWER: Yes, sir.

17 MR. SOUZA: Is there a requirement
18 for people who supply produce to the
19 cooperative to undergo audits or abide by --

20 MR. WARSHAWER: No.

21 MR. SOUZA: Could you answer that
22 with a "yes" or "no"?

1 MR. WARSHAWER: I'm sorry. Your
2 question is whether the COOP requires that its
3 produce suppliers have been GAP-audited, and
4 the answer is no.

5 MR. SOUZA: Okay. Thank you.
6 Further down on the first page, you talk about
7 the National Good Food Network and your work
8 as a coordinator with them. Could you give a
9 little synopsis of what you do for that
10 organization?

11 MR. WARSHAWER: I -- I recently
12 was retained to help facilitate conversation
13 about food safety issues among the various
14 regional team leads in the Good Food Network,
15 and that involves organizing the agenda and
16 carrying out conference calls and facilitating
17 communications about food safety issues that
18 are of interest to these different regional
19 team leads.

20 MR. SOUZA: Do you act as a -- as
21 -- in doing outreach in that capacity?

22 MR. WARSHAWER: Not so far.

1 Unless my interpretation of "outreach" and
2 yours might be different, but otherwise not so
3 far.

4 MR. SOUZA: Do you do any type of
5 training or promoting --

6 MR. WARSHAWER: No, sir.

7 MR. SOUZA: Thank you. In your
8 statement on page six, you go through and you
9 talk a little bit about global -- the Global
10 Food Safety Initiative.

11 MR. WARSHAWER: Yes.

12 MR. SOUZA: What experience do you
13 have with that program?

14 MR. WARSHAWER: I'm learning how
15 it operates and I'm not a member and not a
16 participant in it. I'm learning its function
17 and form through its available media
18 information.

19 MR. SOUZA: Do you know in limited
20 research that you've done who makes up that
21 organization?

22 MR. WARSHAWER: From what I've

1 read so far, the composition is buyers, there
2 are auditing groups in it, there are producer
3 groups in it. It's a combination of most of
4 the stakeholders that I have identified with
5 the possible exception of regulatory and
6 government bodies who are involved in the
7 movement of food through the supply chain.

8 MR. SOUZA: Are there aspects
9 within that audit that are outside the realm
10 of food safety, so to say?

11 MR. WARSHAWER: Yes. There are.

12 MR. SOUZA: Do you know what those
13 are?

14 MR. WARSHAWER: They -- the GFSI
15 and other global initiatives also address
16 other aspects like worker rights and social
17 issues and that sort of thing.

18 MR. SOUZA: Are many of those
19 issues covered by regulations as well?

20 MR. WARSHAWER: I believe so.
21 Yes.

22 MR. SOUZA: Have you ever

1 undergone a USDA audit?

2 MR. WARSHAWER: You mean, a GAPs
3 audit?

4 MR. SOUZA: Yes, sir.

5 MR. WARSHAWER: No.

6 MR. SOUZA: Are you familiar with
7 a USDA good agricultural, good handling
8 practice audit program?

9 MR. WARSHAWER: Yes, somewhat
10 familiar, yeah. Uh-huh.

11 MR. SOUZA: In what way?

12 MR. WARSHAWER: Well, in New
13 Mexico, we have state Department of Ag. folks
14 who do the GAP auditing and GAP training under
15 the guidance of a USDA staff person, and that
16 whole process is -- the -- as we've had buyers
17 -- particularly I think what we had was --
18 well, I'm going off on a tangent for you.

19 Can you redirect with that
20 specific question again?

21 MR. SOUZA: Sure. In what way are
22 you familiar with the USDA GAP/GHP audit --

1 MR. WARSHAWER: I work with
2 several GAP-approved or GAP-audited growers in
3 New Mexico and have seen the changes that
4 they've made in their operations in order to
5 meet those requirements and, through doing so,
6 to gain access to certain buyers who required
7 those audits.

8 MR. SOUZA: In what capacity do
9 you work with those growers?

10 MR. WARSHAWER: I'm not a GAP
11 trainer or auditor. I am helping with -- I
12 work with those producers mostly in a
13 marketing and distribution capacity.

14 MR. SOUZA: You make mention in
15 your written testimony here that the Good --
16 "Global Food Safety Initiative as a multi-
17 stakeholder body is an objective third party
18 with credibility beyond that of USDA."

19 Could you elaborate upon that a
20 little bit?

21 MR. WARSHAWER: Well, I'm making
22 that statement based on the fact that the --

1 the inclusion of buyers and the inclusion of
2 some of these other interest groups brings
3 together -- it may be -- the way that
4 statement is worded may just not get exactly
5 what I was trying to communicate, so I
6 appreciate you bringing that to my attention,
7 but the main point is that by the inclusion of
8 these other stakeholder groups in GFSI, it
9 allows them the GFSI standard to reach further
10 and reach further with some -- I don't know if
11 I'd call it enforcement capacity, but it
12 reaches further and is more impactful than
13 what the USDA seal would be in a situation
14 like this. It reaches further because of its
15 impact on buyers and buyer groups.

16 MR. SOUZA: On page seven in your
17 testimony, you have a section there, "Role for
18 USDA in harmonization of food safety scheme."
19 You make mention in there "One of the major
20 complaints about implementation of a GAP,
21 public and private, is a lack of consistency
22 in auditing."

1 Would you say it's easier to --
2 easier for consistency to be maintained with
3 one body conducting the audits or with several
4 accredited bodies conducting audits?

5 MR. WARSHAWER: Oh, easier if it's
6 one. However, easier is not necessarily
7 better in this case.

8 MR. SOUZA: So consistency is not
9 always better?

10 MR. WARSHAWER: No. Easier is not
11 always better. Consistency can be pursued in
12 a different -- if there are other criteria at
13 work in the selection of a -- in the
14 evaluation of the choices between a
15 centralized and single authority or multiple
16 authorities, there are different values at
17 work in that decision.

18 MR. SOUZA: Could you explain what
19 those values are?

20 MR. WARSHAWER: Well, for example,
21 in -- this -- by analogy, this is the same --
22 this is the exact same issue as to whether it

1 would be better to have a wholly-owned
2 monopoly type control from top to bottom of
3 the production, distribution, and sale of a
4 product versus having a diverse and more
5 complex system. Either system can pursue the
6 same goal of effectiveness. They look very
7 different.

8 MR. SOUZA: In those two analogies
9 that you mentioned, talking about monopoly,
10 you're talking about the private sector;
11 correct?

12 MR. WARSHAWER: Yes.

13 MR. SOUZA: So could there not be
14 a role for government in this?

15 MR. WARSHAWER: Again, which
16 "this"?

17 MR. SOUZA: If a national organic
18 program goes forward, for a government body to
19 be the auditing organization. Are you against
20 that?

21 MR. WARSHAWER: I think I get your
22 question. Whether only private -- whether in

1 the suggestions I'm making I am assuming that
2 the USDA auditors could not be a part of it?

3 MR. SOUZA: No. Under the current
4 proposal, it talks about the Inspection
5 Service. If you go to 970.14, it states,
6 "Inspection Service means Fruit and Vegetable
7 Program, Agricultural Marketing Service, USDA,
8 its designees, or other entities approved by
9 USDA to inspect/audit on its behalf."

10 MR. WARSHAWER: Uh-huh.

11 MR. SOUZA: In your written
12 statement, is it correct that you would prefer
13 this to be done by the private sector?

14 MR. WARSHAWER: It's really not a
15 preference. I think this is one of the
16 interesting areas where we're caught in a --
17 I mean, what I want is that the audits be
18 consistent and that the private sector not be
19 excluded from carrying a role in auditing
20 process, and I think USDA is the best place to
21 look for the -- in the creation of
22 accreditation and certification process that

1 would lend that consistency.

2 I think one of the problems that
3 I've heard described a lot with regard to
4 private-initiated GAPs is that private
5 auditors, who knows how they're trained, who
6 knows what standards they've been trained to?
7 And having that inconsistency is a problem.
8 I can see more than one role for USDA in that
9 process. USDA can obviously audit
10 consistently and it can assure consistency of
11 other auditors.

12 But the idea that only USDA can
13 audit, which has been put forward several
14 times by Proponents, is not so helpful and, in
15 fact, here you point out that USDA can
16 designate others in this 970.14 and, in fact,
17 we've seen that in the foreign example, where
18 USDA can actively audit but others do on its
19 behalf or under its guidance.

20 MR. SOUZA: No further questions.
21 Thank you.

22 JUDGE HILLSON: Ms. Dash, do you

1 have some questions?

2 MS. DASH: Suzanne Dash. Would
3 you be willing to identify yourself as a small
4 or large farmer based on Small Business
5 Administration's definition as \$750,000 per
6 year gross sales?

7 MR. WARSHAWER: Small.

8 MS. DASH: Thank you. Based on
9 your food safety talks with farmers and just
10 with the farmers in your area, are there any
11 practices or regulations that small farmers in
12 particular might have difficulty complying
13 with, food safety practices?

14 MR. WARSHAWER: The smaller the
15 farm, the harder it is to deal with the buffer
16 requirements and the separation requirements
17 between livestock and vegetable operations.
18 Those are two of the big ones.

19 MS. DASH: Okay. Thank you. I've
20 heard of GFSI, but I didn't know anything
21 about it until a couple of questions that you
22 guys were talking about. So my first question

1 is: Since it exists, why would you say that
2 what is missing today in the U.S. produce
3 industry is a fair competitive framework when
4 your first sentence in that paragraph is that
5 GFSI exists. Does that --

6 MR. WARSHAWER: Hasn't been
7 particularly visible or noted in U.S. as best
8 I can tell.

9 MS. DASH: Okay. I guess that was
10 my question. It exists. Do you know why it's
11 not big in the U.S.?

12 MR. WARSHAWER: That's a great
13 question and I think it -- I think it is a
14 buyer-driven program originally and the buyers
15 have not rallied around it and are now
16 beginning to look at it. I actually think,
17 from what I'm observing, the buyers are having
18 some of the same qualms finally about super
19 metrics and the costs to them as what we're
20 having, you know, on the producer and handler
21 and distribution side.

22 MS. DASH: Now, the members are

1 buyers. And who are the private schemes? Is
2 that auditing firms or is that handlers?

3 MR. WARSHAWER: The private
4 schemes are owned -- are essentially operated
5 by other organizations. For example, Western
6 Growers could own and operate a food safety
7 scheme and seek benchmarking from GFSI and
8 then have a range of auditing options that
9 would be accepted by GFSI and also accepted by
10 the buyers.

11 What I'm looking for in this whole
12 pursuit, which may be at times somewhat
13 inadequate or incomplete, is a way to get the
14 buyers involved and a way to assure that
15 compliance with this program achieves the
16 objectives of buyer acceptance and the
17 reduction of redundant audits and redundant
18 costs and particularly the reduction of
19 extreme demands on anyone throughout the
20 supply chain.

21 MS. DASH: So you support
22 something like GFSI, not necessarily GFSI?

1 MR. WARSHAWER: I think if there
2 were -- I don't -- I certainly am not here to
3 sell their program. I'm citing that as an
4 example of a working initiative that addresses
5 this gap between buyer commitment, buyer
6 involvement, and other stakeholders who are
7 not as well represented in the current
8 proposal as drafted, and so I'm simply
9 pointing this up as a -- I don't want -- I
10 mean, it is a working example. It may not be
11 the one -- the best one, but it is a working
12 example of the kind of approach that I prefer.

13 MS. DASH: Okay. Thank you. On
14 page two, you say that, "We have heard from
15 tens of thousands of members of the general
16 public expressing concerns about the NLGMA."
17 And can you talk about who those tens of
18 thousands --

19 MR. WARSHAWER: You have to back
20 up one word -- "All you have heard from is
21 witnesses representing thousands of farmers
22 and tens of thousands of members." You

1 haven't heard, to my knowledge, from the
2 thousands of farmers who or the tens of
3 thousands of consumers.

4 MS. DASH: Okay. So, for example,
5 there was a witness from Consumers Union and
6 she is representing --

7 MR. WARSHAWER: Correct.

8 MS. DASH: -- concerns --

9 MR. WARSHAWER: Correct.

10 MS. DASH: -- of -- so since I
11 have a subscription to Consumers Reports, does
12 that mean that she was expressing my concerns
13 about the NLGMA?

14 MR. WARSHAWER: I'm sure she
15 thinks so.

16 MS. DASH: Okay. But you're
17 comfortable with that sentence, that --

18 MR. WARSHAWER: Yes. I think, you
19 know, from what knowledge I have -- and,
20 again, I opened with the admission that I
21 haven't gone through every witness list and
22 observed and read their testimony or observed

1 all the videos -- but from what I -- from the
2 information I'm following, the sort of
3 funneling process down to the relatively small
4 number of people who have stepped forward
5 represents a substantial body of farmers and
6 a substantial body of consumers.

7 They don't represent them in a
8 legally-designated representative capacity,
9 but they're speaking on behalf of their
10 concerns.

11 MS. DASH: Thank you. That's all
12 the questions I had.

13 JUDGE HILLSON: Who else on the
14 panel has questions?

15 MR. HILL: Brian Hill. I just
16 want to point you to page four. You said
17 something curious here. I want just to get
18 your take on it. You said -- you wrote here,
19 "I also bring to your attention the fact that
20 I have personally spoken to growers, handlers,
21 shippers, and others that are unwilling to
22 voice their concerns as part of the hearing

1 process."

2 Could you please explain to me
3 what you've heard in talking to these people?

4 MR. WARSHAWER: Sure.

5 MR. HILL: Why they were unwilling
6 to make their voices heard.

7 MR. WARSHAWER: The -- this --
8 ultimately, this is a trust issue and it gets
9 at the transparency that I've been talking
10 about. For -- for an industry that's got a
11 fairly small number of individuals and
12 companies in the -- in such a key role who sit
13 in the middle of that supply chain and can
14 influence backwards towards growers and even
15 laterally towards other handlers in quite
16 significant ways, there is not automatically
17 a trust that concerns raised or objections
18 raised will be heard well and will not have
19 some unintended consequences. So people are
20 afraid to speak when they feel that the --
21 what they say may in some way, you know,
22 discredit or affect their ability to do

1 business in the future. And that's what I've
2 heard.

3 I've heard that there's not a
4 climate of trust in all directions around the
5 process to date.

6 MR. HILL: Okay. I guess what I'm
7 getting at here is your next sentence says,
8 "This does not bode well for equitable
9 involvement in the administration process if
10 an agreement does go into effect."

11 Now, whose responsibility would
12 you say it is to make themselves heard?

13 MR. WARSHAWER: Well, it's --

14 MR. HILL: I mean, I guess what
15 I'm getting at here is it's like a person who
16 doesn't vote and then blames voters or who
17 ends up getting in office at some stage. So
18 where would you say the onus is here?

19 MR. WARSHAWER: Well, business is
20 a little bit different because this process is
21 not really a one-person, one-vote process. If
22 you went back and said, We're gonna poll every

1 person in the country who grows leafy greens
2 and say, How do you feel about this program
3 and you were able to do so anonymously and you
4 were able to do so in the privacy of some kind
5 of, you know, protected environment, you might
6 get a different answer than if you filled a
7 room full of people and said, How do you vote?
8 And I think this is just a dynamic of the
9 complex nature of business relationships and
10 the challenges that are present in trying to
11 advance an opposition or unpopular position in
12 the face of authority or power.

13 So I'm avoiding your question -- I
14 admit it -- 'cause I don't really know who's
15 responsible. But we are here together in a
16 process that's attempting to get at some of
17 these vulnerabilities in order to achieve a
18 better-intended outcome.

19 MR. HILL: And you mentioned
20 earlier -- you said something to the effect
21 that you've heard other witnesses state that
22 only the USDA can do the audits. Would it be

1 more correct to say that other witnesses have
2 stated that their customers are more
3 comfortable with USDA audits?

4 MR. WARSHAWER: Well, different
5 statements were made. One was that the -- a
6 reference was made by Mr. Vessey yesterday --
7 I think that's correct -- to the -- a study in
8 which the -- the public was surveyed as to
9 whose audit it would trust and the answer was
10 a government audit would be trusted. But that
11 led me to the problem of since we're not
12 marketing NLGMA to the public, is that
13 relevant? And so I don't think it is.

14 MR. HILL: And why would you
15 consider it not relevant? I mean, you have --
16 you have said on several occasions that the
17 consumer needs to be a part of this. And if
18 the consumer is being questioned and says that
19 USDA audits are more -- government audits are
20 more reliable, for the sake of argument, is
21 that not something that should be looked into?

22 MR. WARSHAWER: Well, if we're

1 gonna go that route, we've got to look at a
2 consumer seal, and I think that would be a
3 dangerous approach to have a consumer seal on
4 food safety.

5 So this is part of the quandary
6 that we're in. On the one hand, you know, the
7 public votes with its dollar and adverse
8 information affects us in all of our business
9 pursuits, but whether to carry food safety
10 through to the court of public opinion as a
11 brand identity is really a challenging
12 question. I think it has more downside than
13 upside.

14 MR. HILL: I have no further
15 questions.

16 JUDGE HILLSON: Anything else from
17 the USDA panel? Ms. Schmaedick.

18 MS. SCHMAEDICK: Melissa
19 Schmaedick, USDA. Mr. Warshawer, on your name
20 tent, it says Beneficial Farm. Is that
21 correct?

22 MR. WARSHAWER: Uh-huh.

1 MS. SCHMAEDICK: Are you --

2 MR. WARSHAWER: That's the wrong
3 one. I'm sorry.

4 MS. SCHMAEDICK: The one that's in
5 front of you.

6 MR. WARSHAWER: Yes. There it is.

7 MS. SCHMAEDICK: Are you speaking
8 on behalf of Beneficial Farm today or some
9 other entity?

10 MR. WARSHAWER: Just Beneficial
11 Farm. That -- in the legally-constituted
12 representative capacity. I'm not speaking for
13 any of the groups that are named in my bio.

14 MS. SCHMAEDICK: Okay. I just
15 wanted to point your attention to a couple of
16 other sections of the proposed language.

17 MR. WARSHAWER: Okay.

18 MS. SCHMAEDICK: Under 970.35,
19 Purpose, towards the end of that paragraph --
20 it's the second-to-last semicolon, it states,
21 "to foster greater collaboration with local,
22 state, and federal regulators."

1 In your -- what is your
2 understanding of that language?

3 MR. WARSHAWER: My
4 understanding -- it's pretty straightforward
5 and evident to me. What -- you'd have to
6 direct me a little more somewhere.

7 MS. SCHMAEDICK: I believe that in
8 your statement, you alluded to the potential
9 for this proposed program to directly be in
10 conflict with other existing regulations.

11 MR. WARSHAWER: Uh-huh.

12 MS. SCHMAEDICK: So I'm trying to
13 understand why you would come to that
14 conclusion if this language is proposed in the
15 agreement.

16 MR. WARSHAWER: Do you have a
17 specific reference in my testimony that I can
18 look at to see if I just inadequately worded
19 something and didn't catch my intent, or if it
20 is really a different problem?

21 (Pause.)

22 MS. SCHMAEDICK: Well, I'm not

1 finding it quickly, but --

2 MR. WARSHAWER: I'm sorry. Do you
3 want to ask me again in a general way and see
4 if I can --

5 MS. SCHMAEDICK: Sure.

6 MR. WARSHAWER: -- give you the
7 information you're looking for?

8 MS. SCHMAEDICK: If I understood
9 your statement correctly, and I will also draw
10 on statements that have been made in the past,
11 that if this were -- if this proposed
12 agreement were implemented, that it would
13 potentially cause specifically growers to be
14 in direct conflict with existing conservation
15 regulations, for example, is that -- is that
16 a concern that you have?

17 MR. WARSHAWER: I think that's the
18 sort of thing that I'm getting at, and I can
19 see the intent and the purpose would be to --
20 by saying "to foster collaboration," there is
21 an intent to avoid that kind of harm. That
22 doesn't change my concern that, you know --

1 one of the problems with a process like that
2 is how is it initiated, who's involved in the
3 draft and development stages, what kind of
4 buy-in is created through that process and
5 then, as a result, how effective will it be?

6 MS. SCHMAEDICK: Are you aware of
7 any guidelines that exist in the realm or in
8 the process of federal regulation development
9 that requires an assessment of whether or not
10 existing regulation would be conflicted?

11 MR. WARSHAWER: I'm not aware of
12 that. No.

13 MS. SCHMAEDICK: Okay.

14 MR. WARSHAWER: And, you know, I
15 am also, as you observed, I'm not well enough
16 versed in the parallel rule-making -- in the
17 rule-making process within an AMS marketing
18 agreement, how that -- and how that compares
19 and harmonizes with rule-making process that
20 comes out of legislative initiative. That's
21 the kind of thing I'm concerned about, though,
22 and I don't believe I'm sufficiently educated

1 to really pinpoint the concern or to sort of
2 prioritize a rank how high -- how great of a
3 concern it is. It's simply a concern.

4 MS. SCHMAEDICK: The last section
5 of proposed language I would like to point out
6 to you is 970.46, Market Review Board. I
7 believe in your statement you indicated that
8 you believe that consumers should have a
9 representation on the Market Review Board.
10 I'd like to give you a moment to read that
11 paragraph.

12 (Pause.)

13 MR. WARSHAWER: Okay.

14 MS. SCHMAEDICK: So if I'm
15 understanding the proposed language correct
16 correctly, there are -- it's proposed that
17 there are nine members on the Market Review
18 Board; is that correct?

19 MR. WARSHAWER: Yes. Nine non-
20 voting members is what it says.

21 MS. SCHMAEDICK: Okay. And how
22 many seats is it being proposed that consumers

1 would be given out of that nine?

2 MR. WARSHAWER: Three.

3 MS. SCHMAEDICK: So does that
4 equate to roughly one third?

5 MR. WARSHAWER: Uh-huh.

6 MR. RESNICK: Is that a "yes"?

7 MR. WARSHAWER: Yes.

8 MS. SCHMAEDICK: And the last
9 sentence in that proposed paragraph, could
10 you --

11 MR. WARSHAWER: "The Committee may
12 additionally appoint representatives from
13 consumer, retail, or food service
14 organizations."

15 MS. SCHMAEDICK: In your opinion,
16 does that allow for potentially additional
17 representation of consumers or consumer
18 groups?

19 MR. WARSHAWER: That's what it
20 says. How that would be implemented, you
21 know, time will tell.

22 MS. SCHMAEDICK: So in your

1 opinion, is there representation given to
2 consumers on the Market Review Board?

3 MR. WARSHAWER: Yes.

4 MS. SCHMAEDICK: Thank you. No
5 further questions.

6 JUDGE HILLSON: Anything else from
7 the USDA panel? Any questions from interested
8 parties that are in the audience? Okay. You
9 have to come up, go to the -- come to the
10 microphone, and identify yourself, please.

11 MS. SCOTT: Good morning. My name
12 is Vicki Scott. I'm with the Yuma Safe
13 Produce Council.

14 JUDGE HILLSON: Could you spell
15 your last name, please.

16 MS. SCOTT: S-c-o-t-t. Mr.
17 Warshawer, is it your perception that there
18 was a lack of diverse -- is it your perception
19 that there was a lack of diverse participation
20 and therefore diverse ideas in the drafting of
21 the proposed rule, or is it your perception
22 that if the rule goes forward as proposed,

1 provisions in the rule do not provide for
2 diverse inclusion?

3 MR. WARSHAWER: That's my -- my
4 sense through this point is that the diverse
5 opinions have not been present in the
6 discussion itself and that's why I've been
7 concerned and not seen -- that's one of the
8 concerns that's reflected to me in the current
9 document.

10 Then to the second half of your
11 question, could you give me that one again?

12 MS. SCOTT: Or is it your
13 perception that if the rule goes forward as
14 proposed, that provisions in the rule do not
15 provide for diverse inclusion?

16 MR. WARSHAWER: The provisions
17 present don't provide enough diverse
18 inclusion.

19 MS. SCOTT: I'm going to have one
20 more question for you. Are you advocating
21 that the GFSI or the Global Food Safety
22 Initiative process be examined by the proposed

1 Technical Review Board as a reference for
2 auditable metrics and ultimate recommendation
3 to the Committee and USDA?

4 MR. WARSHAWER: Yes. I think it
5 would be very useful if -- if this agreement
6 went forward and went into place, I think that
7 the GFSI metrics would be useful to examine.

8 MS. SCOTT: Thank you very much.

9 JUDGE HILLSON: Thank you.

10 Anything else from other interested parties?

11 Let me pass it over to the Proponents then.

12 Mr. Resnick, do you have
13 questions?

14 MR. RESNICK: Yes, Your Honor.
15 Jason Resnick, Western Growers. Good morning,
16 Mr. Warshawer. Thank you for your testimony
17 this morning.

18 I'm just interested in your
19 farming operations. You represent Beneficial
20 Farms?

21 MR. WARSHAWER: Yes, sir.

22 MR. RESNICK: You're the owner of

1 that farm?

2 MR. WARSHAWER: Yes, sir.

3 MR. RESNICK: How many acres is
4 that?

5 MR. WARSHAWER: Altogether about
6 one acre mixed vegetable and about 800 acre
7 pasture and rangeland.

8 MR. RESNICK: And of that, how
9 many acres are leafy greens?

10 MR. WARSHAWER: Oh, gosh. If we
11 charted it out, it would be under a quarter
12 acre.

13 MR. RESNICK: And which leafy
14 greens do you grow?

15 MR. WARSHAWER: Mixed salads --
16 mixed salad greens, mixed lettuce, and
17 arugula, some spinach, cabbage, chard, kale,
18 collards.

19 MR. RESNICK: Do you have any farm
20 workers that work with you or do you work the
21 land yourself?

22 MR. WARSHAWER: I'm -- there's

1 other people doing the work so I can be here.

2 MR. RESNICK: How many?

3 MR. WARSHAWER: Ranging from two
4 to four.

5 MR. RESNICK: What food safety
6 practices do you currently employ on your
7 farm?

8 MR. WARSHAWER: Well, with all of
9 the concern and interest in food safety, I've
10 become known around the farm as "Food Safety
11 Steve." After taking the personal guided tour
12 through the Cornell GAPs Guide, I took
13 training on the Internet, the -- the online
14 version of Farmer GAPs Training, and for this
15 season all I've managed to implement so far is
16 regular worker training on sanitation and on
17 limited best practices associated with
18 handling processes related -- primarily
19 focusing on water, re-use of water,
20 cleanliness of water, and worker hygiene. My
21 goal is to put a food safety plan together
22 this winter and manuals to support training

1 both for farmers, farm help, and for visitors
2 by next spring.

3 MR. RESNICK: Prior to this
4 season, did you not employ those agricultural
5 practices that you just described?

6 MR. WARSHAWER: If I did, they
7 were simply a function of common sense and --
8 rather than as a part of some systematic
9 approach.

10 MR. RESNICK: Where do you sell
11 your produce?

12 MR. WARSHAWER: Community-
13 supported agriculture is the primary means of
14 distribution of our food and, in that
15 approach, people receive direct to consumer.
16 They receive a consistent delivery of a
17 certain composition of produce. And then,
18 besides that, we distribute through -- or we
19 wholesale to a distributor a very small amount
20 of salad mix every week during our growing
21 season.

22 MR. RESNICK: What's your

1 understanding of the reason that consumers
2 purchase from CSAs as opposed to the general
3 supermarket?

4 MR. WARSHAWER: Well, there's a
5 lot of reasons. There are many different
6 reasons and they are of relative importance to
7 different people. Freshness is one of the key
8 points. The ability -- as our consumer
9 witness yesterday described, the ability to
10 maintain a direct relationship with the farmer
11 is another one of those key points. There's
12 also a kind of -- it's almost a kind of pride
13 of localism where people want to invest their
14 dollars in an entity that creates and delivers
15 as much of the value as possible within their
16 immediate community.

17 Those are, say, the key drivers
18 for consumer preference I think.

19 MR. RESNICK: What do you tell
20 your consumers who are concerned about food
21 safety, especially in leafy greens? How do
22 you ensure to them that your leafy greens are

1 safe and that other leafy greens sold through
2 the CSA are safe to consume?

3 MR. WARSHAWER: At the present,
4 that question doesn't come up. I believe that
5 there is an assumption on behalf of the buyer
6 that when they buy locally and buy direct,
7 that automatically the food is safer, fresher,
8 better. And so that question hasn't really
9 been raised. I don't view that as a
10 sufficient answer, though, from my point of
11 view. It's a responsibility, whether they ask
12 or not.

13 MR. RESNICK: Do you believe that
14 it's true that the locally grown produce that
15 you're referring to is safer than --

16 MR. WARSHAWER: No.

17 MR. RESNICK: -- large-scale
18 farming?

19 MR. WARSHAWER: It's -- you know,
20 this is exactly where we don't want to go.
21 When -- you know, we in this room can debate
22 whether one farm's production practices are

1 safer than another's. But when the decision-
2 making criteria goes out based on safety, it's
3 damaging to the whole food system.

4 I don't -- you know, if there's an
5 assumption that it's true, it's untested and
6 I don't personally try and leverage that
7 assumption one direction or another.

8 MR. RESNICK: I'm assuming you
9 agree with the notion that consumers should
10 have the choice to shop at a CSA if they
11 choose to purchase their produce that way or
12 at a supermarket?

13 MR. WARSHAWER: That is the choice
14 I'm trying to preserve through comments such
15 as those I've made today.

16 MR. RESNICK: Is there anything
17 about the National LGMA proposal that you
18 believe will change the way you do business
19 and the CSA does business?

20 MR. WARSHAWER: Not at that level
21 -- well, yes and no. The different -- my --
22 if you had a direct CSA approach where only

1 one farm -- the products of only one farm were
2 distributed to only one group of members, then
3 I don't see any problem here. I go awful
4 close to the handler line when I start
5 bringing product from other farms into the
6 mix. And as tiny as we are, the effect of an
7 LGMA process on the -- were I to become a
8 handler would probably cause me to not be able
9 to include the product from these other farms
10 'cause I don't believe I could reach out and
11 assure that they would reach -- that they
12 would develop and follow the same good
13 agricultural practices.

14 So I'm concerned that in the true
15 CSA model, this process doesn't affect it.
16 But when you get to that point where you're
17 handling and redistributing, I would have to
18 take a more careful look.

19 MR. RESNICK: You handle and
20 redistribute other growers' products?

21 MR. WARSHAWER: In very small
22 amounts. Yeah.

1 MR. RESNICK: In that capacity,
2 and assuming that the National LGMA were to
3 come to fruition, do you see yourself becoming
4 a signatory to the LGMA?

5 MR. WARSHAWER: It's way too early
6 to tell.

7 MR. RESNICK: As it's currently
8 constructed and as your -- your understanding
9 of the fact that there will be agricultural
10 metrics, handling metrics, processor metrics
11 of some sort, if -- as you sit here today, do
12 you anticipate that you would be a signatory
13 as a handler, or do you think you would opt
14 not to be a signatory?

15 MR. WARSHAWER: I really don't
16 think I know enough yet about how my limited
17 handling activity would be served or not by
18 the proposed agreement. I don't -- I really
19 don't think I know.

20 MR. RESNICK: You understand that
21 it's voluntary and you would have that choice?

22 MR. WARSHAWER: Yes.

1 MR. RESNICK: You understand that
2 you would have the opportunity to continue to
3 purchase and handle other growers' products
4 and sell them through the CSA?

5 MR. WARSHAWER: Yes.

6 MR. RESNICK: Okay.

7 MR. WARSHAWER: The handler
8 agreement is voluntary and I'm not obligated
9 to become a signatory to continue handling.
10 That's the point you're making; right?

11 MR. RESNICK: Correct.

12 MR. WARSHAWER: Uh-huh.

13 MR. RESNICK: And that's correct?
14 That's your --

15 MR. WARSHAWER: Yes. I understand
16 that.

17 MR. RESNICK: Okay. And we were
18 talking about consumer choice. Do you also
19 agree with the notion that consumers should
20 also have the choice to purchase leafy greens
21 that have been handled according to good
22 agricultural, good handling, and good

1 processing metrics as proposed by the LGMA if
2 consumer choose to do so?

3 MR. WARSHAWER: Yes.

4 MR. RESNICK: Okay. And you agree
5 that the National LGMA would give consumers
6 that choice as well as the choice to continue
7 to purchase through CSAs that may not have
8 product that's been procured through
9 signatories through the LGMA?

10 MR. WARSHAWER: I'm not so sure
11 that the actual implementation of the LGMA as
12 written wouldn't create a de facto situation
13 where there would be no option for non-
14 signatories and growers who are not part --
15 who are not connected to signatories to get
16 their product into the supply chain and into
17 the delivery -- the distribution chain.

18 MR. RESNICK: As you sit here
19 today, do you believe that CSAs and farmers'
20 markets will gravitate toward the National
21 LGMA standards should they become -- should
22 they come to fruition?

1 MR. WARSHAWER: Will gravitate
2 toward them?

3 MR. RESNICK: Well, actually
4 become signatories and adopt them?

5 MR. WARSHAWER: Well, I think my
6 experience is too limited to answer that on
7 behalf of the whole range of players. In some
8 parts of the countries, these direct marketing
9 CSA operations are significantly large, you
10 know, compared to what I do. I would say
11 smaller ones won't. I really -- but I don't
12 have direct personal experience to answer you
13 with certainty that as a CSA scales up, it
14 might not see or want to be included in
15 something like this from a quality assurance
16 standpoint.

17 MR. RESNICK: And do you feel that
18 farmers, handlers, should have that
19 opportunity to sign on if they choose to?

20 MR. WARSHAWER: Well, my ideal
21 picture is that the LGMA or a program like it
22 is more scale-neutral, that it does contribute

1 to customer -- consumer confidence and
2 effective implementation of GAPs, regardless
3 of the scale of operator. That would be my
4 preference. My concern is that, otherwise, we
5 may end up with big farm GAPs and big farm
6 NLGMA and medium farm GAPs and medium farm
7 NLGMA, and that's the kind of
8 fractionalization that confuses the public
9 and, in the end, harms the whole food system
10 at all scales.

11 MR. RESNICK: So you agree with
12 the notion that good agricultural practices
13 are not -- are important, regardless of the
14 size of the farm?

15 MR. WARSHAWER: Absolutely.

16 MR. RESNICK: Do you grow
17 organically?

18 MR. WARSHAWER: I am not a
19 certified organic producer. No.

20 MR. RESNICK: Do you -- does the
21 CSA which you sell to sell leafy greens that
22 are organically produced?

1 MR. WARSHAWER: In our CSA
2 process, we do not have a requirement of
3 organic certification. I believe we have a
4 handful of participating producers who are
5 certified.

6 MR. RESNICK: You mentioned that
7 organically grown is a process to obtain that
8 certification.

9 MR. WARSHAWER: Uh-huh.

10 MR. RESNICK: Is that correct?

11 MR. WARSHAWER: Yes.

12 MR. RESNICK: And in your -- from
13 your understanding, why do consumers choose to
14 select organically-grown product over
15 conventionally-grown product, if they do make
16 that choice?

17 MR. WARSHAWER: Well, the market
18 indications are that they make that choice in
19 increasing numbers. I believe that for most
20 consumers, the organic process, organic
21 program, represents a kind of harmonization of
22 these several different objectives, like

1 environmental and social. So I think there's
2 -- and there's also a clear recognition that
3 certain undesirable attributes like pesticide
4 and chemical residue and genetically-modified
5 organisms are not present in organic food. So
6 there's some negative drivers and then there's
7 some positive drivers behind the consumer
8 choice.

9 And I have to also say I'm not
10 significantly educated on those market
11 nuances, but that's sort of anecdotally what
12 I hear.

13 MR. RESNICK: So for consumers who
14 choose organic produce because it does not
15 contain pesticides, for example, is it your
16 understanding that they believe that product
17 is safer to consume?

18 MR. WARSHAWER: Safer? They are
19 making a choice to purchase chemical --
20 purchase food where chemicals have not been
21 added or used in the production process. As
22 to whether that choice -- whether the safety

1 aspect is being leveraged to make that choice,
2 I really -- I know I don't do it. I don't
3 know who does. I don't think it's the right
4 way to go. It's more that the -- the
5 conscious and purposeful creation of a process
6 that does not include those chemicals is
7 what's being supported in the buy decision.

8 MR. RESNICK: And you understand
9 that the National Organic Program is
10 administered through USDA?

11 MR. WARSHAWER: Yes.

12 MR. RESNICK: Do you believe that
13 the USDA organic seal is a marketing -- serves
14 a marketing function?

15 MR. WARSHAWER: Absolutely.

16 MR. RESNICK: And do you believe
17 that that helps consumers to make the choice
18 if they choose to buy organic produce to make
19 that choice easier for them?

20 MR. WARSHAWER: Well, in general,
21 yes, and then we have the example of our
22 consumer witness yesterday who said that the

1 stamp does not give her the warm fuzzy
2 feeling. So I would say that the response to
3 the USDA organic seal is largely that it
4 brings that confidence which it's designed to
5 bring and, in some cases, it does not.

6 MR. RESNICK: Do you grow spinach?

7 MR. WARSHAWER: I plant it. It
8 doesn't always grow.

9 MR. RESNICK: Did you sell spinach
10 prior to 2006?

11 MR. WARSHAWER: Yes.

12 MR. RESNICK: Okay. Was your --
13 were your sales impacted by the spinach -- so-
14 called spinach crisis --

15 MR. WARSHAWER: No.

16 MR. RESNICK: -- of 2006?

17 MR. WARSHAWER: No.

18 MR. RESNICK: Do you know farmers
19 that were impacted?

20 MR. WARSHAWER: No.

21 MR. RESNICK: Is that because you
22 don't know farmers that sell spinach or you

1 know spinach farmers who were not impacted?

2 MR. WARSHAWER: I don't directly
3 work with or get information from any
4 substantial spinach producers.

5 MR. RESNICK: Has your
6 operation -- I think this question was asked
7 but I'll just -- for this line of questions --
8 your farm has not been audited --

9 MR. WARSHAWER: For GAPs, no.

10 MR. RESNICK: -- for GAPs?

11 MR. WARSHAWER: Huh-uh.

12 MR. RESNICK: Either by a private
13 entity or public entity?

14 MR. WARSHAWER: No, it has not.

15 MR. RESNICK: And do you know what
16 percentage of the producers who sell directly
17 to the CSA are subject to GAP audit?

18 MR. WARSHAWER: Zero.

19 MR. RESNICK: Okay. Would you be
20 willing to participate in the process of
21 developing metrics should the LGMA come to
22 fruition?

1 MR. WARSHAWER: Under the -- under
2 -- again, I hate to -- see, I'd love to give
3 you an unequivocal yes and I will equivocate
4 slightly. Depending on the conditions and
5 circumstances and how it moves forward, I
6 would be interested in participating. Yes.

7 MR. RESNICK: Okay. Thank you. I
8 have no further questions at this time.

9 JUDGE HILLSON: Anything else from
10 Proponents' table? Mr. Horsfall.

11 MR. HORSFALL: Scott Horsfall with
12 the Leafy Greens Marketing Agreement. Thank
13 you for your testimony, Mr. Warshawer.

14 Part of your opposition or one of
15 your statements, anyway, about the proposed
16 national organization would be that small
17 farmers could conceivably be shut out of sales
18 opportunities to handlers who were members
19 because they hadn't implemented the practices
20 and hadn't been audited. Is that correct? Is
21 that accurate?

22 MR. WARSHAWER: I think it will

1 lead to a -- could lead to a reduction of
2 opportunities for growers because of the
3 handler preference and handler requirement to
4 only buy from growers who are GAP-audited.

5 MR. HORSFALL: Okay. In your --
6 I'll call it your preferred scenario of a GFSI
7 environment for food safety, do you see that
8 situation being any different?

9 MR. WARSHAWER: Again, I'm
10 gonna -- yes, I think it will be somewhat
11 different. From the experience that I have,
12 which admittedly is limited, the emphasis in
13 the global harmonized schemes does make
14 attempts to bring small producers into the
15 process. It makes -- it has sort of a
16 systematic approach to bringing people online
17 at the -- what we could call the bottom rung
18 of the ladder and create continuous
19 improvement.

20 So I do think that there is the
21 potential to create a method that would not
22 separate or isolate producers based strictly

1 on scale.

2 MR. HORSFALL: Okay. But you do
3 understand that the GFSI program, or Global
4 GAP program, also requires GAP auditing --

5 MR. WARSHAWER: Absolutely.

6 MR. HORSFALL: -- and verification
7 certification of practices?

8 MR. WARSHAWER: Yes, I do.

9 MR. HORSFALL: And that buyers
10 then, to become GFSI certified, they're -- you
11 understand they're under kind of the same
12 obligation that an LGMA buyer is or handler is
13 to only market product that's been grown
14 accordingly?

15 MR. WARSHAWER: Yes.

16 MR. HORSFALL: Okay. Thank you.
17 That's all I have right now.

18 JUDGE HILLSON: Mr. Giclas.

19 MR. GICLAS: Hank Giclas, Western
20 Growers. Good morning, Mr. Warshawer. Thank
21 you for your testimony. I won't plow old
22 ground. I just have a couple of other

1 questions about GFSI. And I think, you know,
2 if I understand the point of your testimony,
3 you're setting that up as an example of
4 something that engages the broad cross-section
5 or the broad diversity of the supply chain
6 that you're interested in seeing engaged in
7 some kind of solution in this regard.

8 Is that correct?

9 MR. WARSHAWER: Yes, sir.

10 MR. GICLAS: Are you aware of any
11 resistance to GFSI on the part of the producer
12 community across the country?

13 MR. WARSHAWER: I've heard some
14 comments that some of the social aspects and
15 some of the -- as GFSI has come in, it's
16 brought -- I don't know if I want to call it
17 a Euro-centric, but it's brought a preference
18 towards some of the kinds of initiatives and
19 some of the kinds of social values that are
20 already accepted in Europe and are not so well
21 accepted here. So there -- you know, for GFSI
22 to work well in the U.S., there would be some

1 adaptation.

2 MR. GICLAS: So does that -- would
3 you characterize that as resistance or
4 resistance only to those aspects or -- I mean,
5 I guess my question is, you know, from the
6 producer community, the producer-handler
7 community, you know, are you aware of any
8 controversy associated with them or relative
9 hesitancy on the acceptance of GFSI in the
10 United States?

11 MR. WARSHAWER: I don't think I
12 have enough direct experience to really answer
13 that.

14 MR. GICLAS: Okay. Do you know
15 what level of actually, you know, producer-
16 grower involvement there has been in the
17 development of any of the standards that are
18 benchmarked to GFSI, either on the part of
19 small or large growers?

20 MR. WARSHAWER: Well, I have not
21 had the chance to study GFSI anywhere near as
22 closely as I've been able to study the NLGMA

1 proposal, so I really can't compare. You
2 know, I don't have the kind of detail on that
3 that you all have provided me, so I can't
4 really tell you how involved producers have
5 been as opposed to how involved buyers have
6 been.

7 MR. GICLAS: Okay. Well, let me
8 just ask you -- I mean, relative to the NLGMA
9 then, would you agree or recognize that there
10 is an opportunity and an intent and some
11 specific language that does directly involve
12 producers at different levels?

13 MR. WARSHAWER: Yes.

14 MR. GICLAS: Okay. Do you know
15 how many standards are actually benchmarked to
16 GFSI that are available at the producer level?

17 MR. WARSHAWER: I think there's
18 four that they've approved. Is that right?

19 MR. GICLAS: And do you know how
20 many of those are available in the United
21 States?

22 MR. WARSHAWER: I don't know if

1 any are yet.

2 MR. GICLAS: Okay. Do you -- are
3 you aware of any differences in the benchmark
4 standards? Have you looked at the
5 standards -- maybe that's a better question to
6 ask. Have you looked at the standards that
7 have been benchmarked?

8 MR. WARSHAWER: No.

9 MR. GICLAS: Okay. So -- so you
10 haven't compared, for example, the California
11 or Arizona metrics to the GFSI benchmark
12 standards or GFSI benchmark standards to each
13 other --

14 MR. WARSHAWER: No.

15 MR. GICLAS: -- for harmonization
16 or not?

17 MR. WARSHAWER: No. That's why
18 I'm suggesting -- I mean, I would like to see
19 that comparison done, and I don't know that
20 I'm the most qualified person to do it. I
21 thought the best way to approach it was to
22 submit LGMA state program metrics to GFSI for

1 consideration and see what we got back.

2 MR. GICLAS: Do you know why the
3 California or Arizona LGMA standards have not
4 been submitted --

5 MR. WARSHAWER: I do not.

6 MR. GICLAS: -- to GFSI? If I was
7 to represent to you that one of the
8 requirements for benchmarking is an actual
9 ownership of standards and the California and
10 Arizona metrics are collectively owned by
11 industry and that's a -- you know, what has
12 prevented them, would you have an issue with
13 that or --

14 MR. WARSHAWER: I would think that
15 the industry through its representative
16 bodies, such as Western Growers and United
17 Fresh, could opt to own the standards and
18 could opt to submit them.

19 And as I see it, this is kind of
20 like the fork in the road, that you all must
21 hit somewhere. And instead of taking that
22 approach, the approach has been taken to bring

1 it through the government and quasi-government
2 process rather than through that we'll call a
3 more globally engaged process.

4 MR. GICLAS: Do you think there's
5 anything in the proposal that would prevent
6 the Technical Review Board from considering
7 benchmarking to GFSI or evaluating benchmark
8 standards for their applicability in the
9 production industry?

10 MR. WARSHAWER: No. There's no
11 proscription against such considerations.

12 MR. GICLAS: Okay. Thank you. I
13 don't have any other questions.

14 JUDGE HILLSON: Okay. Anything
15 else? Anything else from anyone? Okay.
16 Well, thank you. You may step down.

17 My understanding, it's almost --
18 we've been going for over two and a quarter
19 hours without a break. Before I call a break,
20 I just want to make sure I understand what the
21 rest of the day is. You have a three-person
22 panel; is that correct, Mr. Resnick?

1 MR. RESNICK: That's correct.

2 Four-person panel.

3 JUDGE HILLSON: A four-person
4 panel. Wow. Okay. And you have -- you only
5 have one more witness rather than two? Okay.
6 So we'll hear the panel after we come back
7 from our --

8 MS. SCHMAEDICK: Judge Hillson, --

9 JUDGE HILLSON: Yes, ma'am -- oh,
10 an additional person wants to testify that
11 hasn't signed up; is that what you're saying?

12 UNIDENTIFIED SPEAKER: She wants
13 to leave by one o'clock.

14 JUDGE HILLSON: Oh, well, let's
15 take a break and the person who wants to
16 testify that is not on -- wasn't sponsored by
17 anyone can come talk to me and we'll see when
18 we can squeeze her in. Thanks.

19 Let's just take a -- let's make it
20 a 15-minute break.

21 (Recess from 10:23 a.m., until
22 10:38 a.m.)

1 JUDGE HILLSON: Back on the
2 record. Mr. Resnick wants to call a four-
3 person panel. Why don't you call them on up.

4 MR. RESNICK: Thank you, Your
5 Honor. The Proponent group calls a panel of
6 four witnesses -- Tim Dempsey, Alan Luke, Bob
7 Boelts, and Ralph Treadway.

8 JUDGE HILLSON: Is that the order
9 they're going to testify, the order that you
10 gave me their names?

11 MR. RESNICK: Yes.

12 JUDGE HILLSON: So we're going to
13 have -- so it's going to be Tim Dempsey, Alan
14 Luke, Robert Boelts, and Ralph Treadway, in
15 that order; is that correct?

16 MR. RESNICK: Yes, Your Honor.

17 JUDGE HILLSON: All right. So,
18 Mr. Dempsey, I guess you're going first.
19 Would you please raise your right hand.
20 Whereupon,

21 TIM DEMPSEY
22 having first been duly sworn, was called as a

1 witness and testified as follows; to wit:

2 JUDGE HILLSON: Okay. Can you
3 please state your name and spell it for the
4 record.

5 MR. DEMPSEY: My name is Tim
6 Dempsey. Last name spelling is D-e-m-p-s-e-y.

7 MR. WARSHAWER: My name is Steve

8 JUDGE HILLSON: Okay. I'm going
9 to mark your written statement as Exhibit 97.

10 (Exhibit 97 was marked
11 for identification.)

12 JUDGE HILLSON: And you may read
13 your statement.

14 MR. DEMPSEY: Okay. Thank you.

15 TESTIMONY

16 MR. DEMPSEY: Thank you for
17 allowing me to testify as a proponent of the
18 National Leafy Greens Marketing Agreement.

19 My name is Tim Dempsey and I'm
20 General Manager and Secretary of Metz Farms of
21 Yuma, Arizona. I have worked in the industry
22 for 20 years and have held my current position

1 since March of 2006. We specialize in the
2 production of spinach and baby greens for a
3 variety of markets and several countries.

4 Our company was only a few months
5 old when the E. coli outbreak occurred in
6 September of 2006. We were confronted with a
7 situation in which we did not have any control
8 or involvement and our entire industry
9 essentially shut down for weeks. It was
10 during this time when the industry recognized
11 food safety needed to be something all
12 companies would need to be committed to in
13 order to succeed. It has become obvious when
14 any food contamination event occurs, the
15 entire industry's reputation suffers and
16 financial ramifications are severe.

17 Our company began implementing the
18 new food safety standards prior to the
19 creation of the Arizona Leafy Greens Marketing
20 Agreement. We do not anticipate any
21 additional costs if the National Leafy Greens
22 Marketing Agreement is implemented, as these

1 costs have already been incurred. Costs
2 associated with food safety compliance have
3 been treated as a normal operating expense and
4 are incorporated into the bottom line cost
5 when negotiating price with our various
6 handlers. If a handler has food safety
7 requirements beyond the Arizona Leafy Greens
8 standards, those costs are paid for by the
9 handler.

10 In our view, the most significant
11 benefits of a national agreement would be the
12 reduction and potential for events to occur,
13 as all leafy green producers comply with these
14 standards and, as the agreement would be
15 nationwide, compliance should become easier
16 for companies which supply product to multiple
17 shippers.

18 We have already observed events
19 occurring outside of our control can have
20 major impacts on all companies. We look at
21 the National Leafy Greens Marketing Agreement
22 as the best option to help ensure all people

1 and entities involved in the production of
2 leafy greens comply with the same standards
3 and consumers can be assured the leafy greens
4 are produced using the best and safest
5 practices possible.

6 JUDGE HILLSON: Okay. Thank you,
7 Mr. Dempsey. I'm going to receive your
8 testimony into evidence as Exhibit 97.

9 (Exhibit 97 was
10 received.)

11 JUDGE HILLSON: I guess, Mr. Luke,
12 you're going to testify next.

13 Whereupon,

14 ALAN LUKE
15 having first been duly sworn, was called as a
16 witness and testified as follows; to wit:

17 JUDGE HILLSON: Please state your
18 name and spell it for the record.

19 MR. LUKE: Alan Luke, L-u-k-e.

20 JUDGE HILLSON: And you have a
21 statement you'd like to read?

22 MR. LUKE: Yes, sir.

1 JUDGE HILLSON: Please go ahead
2 and do so.

3 TESTIMONY

4 MR. LUKE: My name is Alan Luke.
5 My position in the leafy green industry
6 currently is Vice President of Southern --
7 let's try this again -- currently is Vice
8 President of Southern District for D'Arrigo
9 Brothers Company of California. I have been
10 in this position for 15 years and in the
11 produce industry for 19-plus years and in
12 agriculture for 32 -- approximately 32 years.

13 D'Arrigo Brothers grows and
14 handles the following types of leafy greens:
15 head lettuce, romaine, green leaf, red leaf,
16 and butter lettuces. As a grower of leafy
17 greens, we would be classified as large. As
18 a handler of leafy greens, we would be
19 classified as large. We grow these leafy
20 greens using conventional practices.

21 My testimony is in support of the
22 National Leafy Greens Marketing Agreement.

1 D'Arrigo Brothers implemented the
2 California Leafy Greens Marketing Agreement
3 program in Yuma and the Imperial Valley of
4 California in February of 2007 on all of
5 D'Arrigo's produce crops. In October of 2007,
6 we switched the Arizona-grown crops over to
7 the Arizona Leafy Greens Marketing Agreement
8 program. We have found that the LGMA matrix
9 is based upon science and common sense. You
10 can follow and understand the scientific
11 process behind the matrix, it makes common
12 sense and, more importantly, it's doable.

13 As we have followed the LGMA
14 matrix in the production and handling of leafy
15 greens, it is our belief that we are
16 delivering a safer product into the
17 marketplace. With written guidelines and
18 procedures for implementing the matrix,
19 documentation, and audits, both self and third
20 party, we are effectively increasing the
21 safety of our leafy greens.

22 Our experience with the LGMA has

1 been positive and we believe that a national
2 program would bring increased food safety as
3 well as standardization in growing and
4 handling to our industry. As a result of our
5 experience and beliefs, we would like to go on
6 record in support of the National Leafy Greens
7 Marketing Agreement.

8 JUDGE HILLSON: Thank you, Mr.
9 Luke. I'm going to receive your written
10 testimony into evidence as Exhibit Number 98.

11 (Exhibit 98 was marked
12 for identification and
13 received.)

14 JUDGE HILLSON: And, Mr. Boelts,
15 please raise your right hand.
16 Whereupon,

17 ROBERT BOELTS
18 having first been duly sworn, was called as a
19 witness and testified as follows; to wit:

20 JUDGE HILLSON: If you could just
21 please state your name and spell it for the
22 record.

1 MR. BOELTS: My name is Robert
2 Boelts, last name B-o-e-l-t-s.

3 JUDGE HILLSON: And you have a
4 statement you'd like to read?

5 MR. BOELTS: Yes, I do, sir.

6 JUDGE HILLSON: Please go ahead.

7 TESTIMONY

8 MR. BOELTS: My name is Robert
9 Boelts. I've been involved in the production
10 of leafy greens in the Yuma area for over 18
11 years. I'm a fourth generation farmer with
12 hopes of seeing my sons and daughter -- and/or
13 daughter continue in the industry. I am a
14 managing member of Nature Fresh Farms LLC with
15 operations in Imperial County and Yuma County.
16 Our operation produces various types of leafy
17 greens and small grain crops. This season, we
18 are growing in excess of 7500 acres of
19 conventional product and 1250 acres of
20 certified organically-grown product. Nature
21 Fresh Farms LLC is classified as a large
22 grower based on SBA definitions. We are

1 strictly a grower of leafy greens and do not
2 harvest or market any product ourselves. All
3 of the shippers and handlers for whom we grow
4 product are signatories on either the
5 California Leafy Greens Marketing Agreement or
6 the Arizona Leafy Greens Marketing Agreement.
7 Our company employs a full time food safety
8 manager and, in addition, we have at all times
9 three additional employees performing food
10 safety duties during the growing season.

11 I personally am a board member on
12 the Yuma Fresh Vegetable Association and a
13 member of the Yuma Safe Produce Council. I've
14 been involved in several California Leafy
15 Greens Marketing Agreement and Arizona Leafy
16 Greens Marketing Agreement audits and find
17 them to be very thorough and positive. These
18 are the types of audits and controls that are
19 needed on any leafy green product grown
20 anywhere. I am confident that a company
21 having to adhere to any national marketing
22 agreement would feel the same way.

1 These marketing agreements have
2 gone a long way to renew consumer confidence
3 in our products on an area level as well as on
4 a national sales level. I also believe there
5 to be an even greater need for a marketing
6 agreement governing imported leafy greens into
7 our country. Although nearly all of us in the
8 produce industry have had excellent food
9 safety programs for many years, the
10 unfortunate events of September 2006 brought
11 awareness that more could be done. The
12 actions that have been taken over the past
13 three years have been a great step, but I
14 believe it needs to be on a national level to
15 make a safer and even playing field. Ensuring
16 the quality and safety of our product as well
17 as the public's well-being, health, and
18 confidence in our product is of the utmost
19 importance to our industry.

20 In conclusion, I personally go on
21 record supporting the National Leafy Green
22 Marketing Agreement which I believe will be an

1 excellent tool to support and ensure food
2 safety protocols on a national level. This
3 agreement, in my opinion, would greatly ensure
4 consumer safety and confidence in the nation's
5 leafy greens products.

6 Thank you.

7 JUDGE HILLSON: Thank you, Mr.
8 Boelts. I'll receive your written statement
9 into evidence as Exhibit 99.

10 (Exhibit 99 was marked
11 for identification and
12 received.)

13 JUDGE HILLSON: And, Mr. Treadway,
14 please raise your right hand.

15 Whereupon,

16 RALPH TREADWAY
17 having first been duly sworn, was called as a
18 witness and testified as follows; to wit:

19 JUDGE HILLSON: Okay. Could you
20 please state your name and spell it for the
21 record.

22 MR. TREADWAY: My name is Ralph

1 Treadway, R-a-l-p-h, T-r-e-a-d-w-a-y.

2 JUDGE HILLSON: And you have a
3 statement you'd like to read?

4 MR. TREADWAY: Yes, I do.

5 JUDGE HILLSON: Please proceed.

6 TESTIMONY

7 MR. TREADWAY: My name is Ralph
8 Treadway. I am a food safety professional in
9 the produce industry in California and
10 Arizona. I work for a large handler handling
11 leafy green products in California and
12 Arizona. I maintain the GAP and HACCP
13 programs for our company. I compile records,
14 perform field operations, and am the point of
15 contact for USDA/LGMA and independent
16 auditors. I work directly with growers,
17 handlers, harvesters, and auditors. I am not
18 involved in the costing and expenses related
19 to the agreements. I'm here in support of a
20 National Leafy Greens Marketing Agreement.

21 I have seen an improvement in the
22 general awareness among both handlers and

1 growers in the importance of good agricultural
2 practices and food safety. This awareness has
3 been in part due to the adoption of the
4 metrics in both California and Arizona.

5 Ranchers are more likely to implement changes
6 to the ranch to improve food safety.

7 Improvement of the awareness of food safety
8 issues have been translated directly to
9 actions at the ranch level. Overall ranch
10 food safety conditions are much improved.

11 Auditors from the USDA are using a
12 planned program that makes audits complete and
13 repeatable. We still perform both independent
14 third party audits and LGMA audits and they
15 are both thorough and complete but there are
16 differences. In the case of the third party
17 audits, there are so many different companies
18 performing audits and their audit requirements
19 can be different. These differences make it
20 difficult to comply fully with their audit
21 requirements. Buyers also have different
22 requirements that are both confusing and

1 ambiguous. Auditing companies use auditors
2 that in some cases use their requirements as
3 a standard to be followed. The audits
4 performed under the California and Arizona
5 LGMA for each state are all the same and, as
6 a result, there is standardization with less
7 ambiguity in results.

8 In closing, I believe that a
9 National LGMA is in the best interests of the
10 industry and the consumer and I fully support
11 its implementation.

12 JUDGE HILLSON: Thanks, Mr.
13 Treadway. I'm going to receive your written
14 statement into evidence as Exhibit 100.

15 (Exhibit 100 was marked
16 for identification and
17 received.)

18 JUDGE HILLSON: I'll ask you, Mr.
19 Resnick, do you have any further direct of any
20 of these four witnesses before I turn them
21 over to the panel?

22 MR. RESNICK: Not at this time,

1 Your Honor.

2 JUDGE HILLSON: Okay. Then I will
3 ask the USDA panel if they have any questions
4 of these four witnesses and to try to address
5 them to each witness so that they don't have
6 to keep reidentifying themselves, if that's
7 possible.

8 Ms. Schmaedick.

9 MS. SCHMAEDICK: Melissa
10 Schmaedick, USDA, and good morning. Thank you
11 to all four of you for your testimony. And
12 I'll just ask questions in the order in which
13 the testimony was presented, if that's okay.

14 So let's begin with Mr. Dempsey.
15 In your statement, you indicate that you
16 produce spinach and baby green lettuces for a
17 variety of markets and several countries. Can
18 you describe your operations in a bit more
19 detail?

20 MR. DEMPSEY: Yeah. What we do is
21 we specialize in basically a service pack,
22 growing for shippers, various shippers. In

1 doing so, we're already dealing with a variety
2 of different rules and regulations. A lot of
3 what we do ends up in Canada, the U.S., and in
4 Britain. So we're pretty aware of all the
5 different rules and regulations we have to
6 follow. And in doing so, it makes it kind of
7 difficult with all the different rules and
8 regulations and governing bodies, so, again,
9 that's why in my statement I was -- seeing a
10 National Leafy Greens at least is something
11 that would begin to consolidate that.

12 MS. SCHMAEDICK: Does your product
13 go to the fresh market in all cases or
14 processed?

15 MR. DEMPSEY: It ends up in bags.

16 MS. SCHMAEDICK: In bags.

17 MR. DEMPSEY: Yes.

18 MS. SCHMAEDICK: Okay. On the
19 second page of your statement, you -- the
20 first paragraph, you say, "Costs associated
21 with food safety compliance have been treated
22 as a normal operating expense and are

1 incorporated into the bottom line cost when
2 negotiating price with our various handlers."

3 Can you expand a bit on that?

4 MR. DEMPSEY: Well, basically the
5 statement was meant as -- we treat it as
6 anything else. It's an expense just like
7 buying diesel fuel or tractors or anything
8 like that. It's something else that is just
9 a normal part of our operating procedure now.
10 We don't really -- it's an expense that we
11 have to incur in order to make sure that we're
12 providing a product that our customers are
13 looking for. I know a lot of things have been
14 said talking about expense and whether or not
15 people could afford it, but you can afford it
16 because you incorporate it into what you would
17 charge a customer in order to provide the
18 product that they're looking for. And what
19 they're looking for is a safe product that is
20 -- that -- I think you have at least minimized
21 the potential for any kind of event to occur.

22 So when we're -- when I'm figuring

1 out what kind of price we should be charging,
2 it's just another line that we look at.

3 MS. SCHMAEDICK: So do you produce
4 on a contract basis then?

5 MR. DEMPSEY: Yes. Yes, we do.

6 MS. SCHMAEDICK: And you're able
7 to negotiate under that contract a price that
8 allows you to recapture some of these
9 expenses?

10 MR. DEMPSEY: Yes.

11 MS. SCHMAEDICK: Does your
12 operation only produce in Arizona?

13 MR. DEMPSEY: Yes. We're only in
14 Arizona.

15 MS. SCHMAEDICK: You're only in
16 Arizona. Okay. Were there any start-up costs
17 when you implemented your food safety program
18 under the Arizona state program?

19 MR. DEMPSEY: We began to comply
20 with the program when it was in California
21 because all of us were aware, given the
22 circumstance, that this was something that we

1 were going to need to do irregardless. When
2 that occurred is when we did have start-up
3 costs. It ranged -- to my mind, they were
4 fairly minimal, putting up fences here, there,
5 putting -- putting buffer zones in, things
6 like that. They were not a huge burden to us.

7 MS. SCHMAEDICK: And we've heard
8 quite a bit of testimony -- have you been
9 aware of the other hearings and statements
10 that have been given over the process?

11 MR. DEMPSEY: I'm aware of the
12 other hearings. I was here all day yesterday,
13 but --

14 MS. SCHMAEDICK: Okay.

15 MR. DEMPSEY: -- as far as other
16 locations, I'm not aware of the specifics.

17 MS. SCHMAEDICK: Okay. So I guess
18 I should start my questioning by asking
19 whether or not Metz Farms qualifies as a large
20 or a small growing operation?

21 MR. DEMPSEY: We would be
22 considered large.

1 MS. SCHMAEDICK: Large. So if
2 you've been present over the course of the
3 past two days, have you heard statements,
4 concerns indicating that there may not be an
5 adequate mechanism for allowing smaller
6 business growers and handler businesses to be
7 brought to the table?

8 MR. DEMPSEY: Well, I heard that
9 and we began operation just -- obviously just
10 prior to the outbreak, and yet in that time
11 frame we've also been able to expand our
12 business quite a bit and it was with an
13 emphasis on making sure that we were following
14 these rules, and that actually drew people to
15 us. So I'm aware that that's -- statements
16 that were made and a fear that that may occur,
17 but we have not found that to be an obstacle
18 to us growing our business.

19 MS. SCHMAEDICK: And if this
20 program were implemented, would you be opposed
21 to having representatives of the small grower,
22 handler, or conservation, or consumer interest

1 groups as part of the development process for
2 metrics?

3 MR. DEMPSEY: No. I would not.

4 MS. SCHMAEDICK: Would you
5 consider their involvement potentially helpful
6 in the development?

7 MR. DEMPSEY: Yes. Potentially
8 helpful. You bet.

9 MS. SCHMAEDICK: Thank you.
10 That's all the questions I have. Thanks.

11 Mr. Luke, --

12 MR. LUKE: Yes, ma'am.

13 MS. SCHMAEDICK: -- in your
14 statement, you indicate that D'Arrigo Brothers
15 is located in Yuma, Arizona; is that correct?

16 MR. LUKE: D'Arrigo Brothers is in
17 both Salinas, California and Yuma, Arizona.

18 MS. SCHMAEDICK: But the part of
19 the company that you work with is in Yuma?

20 MR. LUKE: The part that I manage,
21 yes, ma'am.

22 MS. SCHMAEDICK: And you began --

1 you first implemented the California state
2 program; is that correct?

3 MR. LUKE: We had a ongoing safety
4 program, but when California came out with
5 their program, the LGMA, we liked what we saw.
6 It was a good program. And so we elected to
7 incorporate it into all our products at that
8 time. Even though my operation is mostly in
9 Arizona, it was a smart move.

10 MS. SCHMAEDICK: And then you
11 indicate that once the Arizona program was
12 established, you switched over to the Arizona
13 program.

14 MR. LUKE: Yes, ma'am.

15 MS. SCHMAEDICK: Can you explain
16 why you did that?

17 MR. LUKE: Because my products are
18 shipped out of Arizona and we became -- we're
19 both a California signatory and a Arizona
20 signatory. But because my products that I
21 grow here, most of them are shipped out of
22 Arizona, we -- we follow the Arizona --

1 they're very similar.

2 MS. SCHMAEDICK: Are there -- as
3 far as -- are the production areas that your
4 company is involved with in California, are
5 they different in terms of a environmental --
6 or production environment from Arizona?

7 MR. LUKE: Yes, ma'am.

8 MS. SCHMAEDICK: Can you describe
9 some of those differences?

10 MR. LUKE: Our California
11 operation has more animals of concern,
12 intrusions. They have different water
13 sources. They have mainly pumps. Arizona, we
14 tend to have less animal intrusions of animals
15 of concern, and we have -- our irrigation
16 water is from the Colorado River. And so
17 there are minor differences in the way we
18 manage the LGMA as far as water sampling, as
19 far as having -- we have less problems with
20 animal intrusion.

21 MS. SCHMAEDICK: And you stated
22 that the California state program and the

1 Arizona state program are quite similar.

2 MR. LUKE: Yes, ma'am.

3 MS. SCHMAEDICK: So in spite of
4 the differences in the production
5 environments, you've been able to apply fairly
6 similar set of standards to both locations?

7 MR. LUKE: Yes. One of the things
8 that we like about the LGMA, both the
9 California and Arizona, is that we feel that
10 the Technical Committee did a very good job of
11 basing the metrics on science and on common
12 sense. There has been some comment about
13 bringing buyers into the program, and that's
14 important to a point. But if I had a dollar
15 for every idea that a buyer wanted D'Arrigo to
16 incorporate, I'd be a very wealthy man.

17 There is a process and, in our
18 opinion, the process of -- that -- with the
19 Technical Committee and the Executive
20 Committee works and it's developed a program
21 that is good and workable.

22 MS. SCHMAEDICK: And are you

1 familiar with the process that is described
2 under the proposed agreement?

3 MR. LUKE: I've read it. I'm not
4 an expert on it. But it sounds like it's set
5 up to give us a scientific-based program which
6 is what we asked for. There's a lot of pie in
7 the sky out there that people will ask for
8 based upon emotion and not science, and, you
9 know, we -- we want to deliver a safe product,
10 but we want to do it based upon science, not
11 upon emotion.

12 MS. SCHMAEDICK: And would you be
13 opposed to bringing the interests of small
14 production and handler representatives or
15 communities, as well as the conservation and
16 consumer interest groups to the table in the
17 development process?

18 MR. LUKE: No, ma'am.

19 MS. SCHMAEDICK: In your opinion,
20 would that contribute in a positive way in the
21 development of metrics?

22 MR. LUKE: Yes. I believe it

1 would.

2 MS. SCHMAEDICK: Thank you.

3 That's all my questions. Thank you.

4 Mr. -- is it Mr. Boelts?

5 MR. BOELTS: Uh-huh.

6 MS. SCHMAEDICK: Boelts?

7 MR. BOELTS: Yes, ma'am.

8 MS. SCHMAEDICK: So you indicate
9 that you also produce in California as well as
10 in Arizona; is that correct?

11 MR. BOELTS: Robert Boelts. Yes,
12 ma'am. That's correct.

13 MS. SCHMAEDICK: And you state
14 that you're strictly a grower. So in terms of
15 harvesting, that's something that you contract
16 out?

17 MR. BOELTS: Basically, our
18 operation just does the growing. We contract,
19 grow, and that's the duty of whoever it's
20 contract grown for is to employ the contract
21 harvester or themselves harvest it.

22 MS. SCHMAEDICK: Do you currently

1 employ any good agricultural practices on your
2 farms?

3 MR. BOELTS: Yes, ma'am.

4 MS. SCHMAEDICK: Are those good
5 agricultural practices different for the -- I
6 believe you stated that you have some organic
7 production? -- yes, organic production. Is
8 there a difference in the way that you
9 approach good agricultural practices in your
10 conventional farming versus your organic
11 farming?

12 MR. BOELTS: They're the same on
13 99 percent of all levels. There has to be
14 certain differences in allowances of
15 organically-produced fertilizers and then as
16 well as compost. There's a few minor
17 differences. But other than that, as far as
18 food safety and training and whatnot, they're
19 the same.

20 MS. SCHMAEDICK: So is there
21 anything under the good agricultural practices
22 that directly conflicts with the organic

1 certification process?

2 MR. BOELTS: No. None of it
3 conflicts with it. It just takes it a step
4 further in clarification on, for instance,
5 days to harvest on when compost can be applied
6 and what have you.

7 MS. SCHMAEDICK: You also state
8 that you're a member of the Yuma Safe Produce
9 Council. Can you tell us a little bit about
10 that organization?

11 MR. BOELTS: Well, it's -- I
12 believe there's going to be testimony about it
13 later from someone we've designated to talk
14 about it, but basically it's a group of Yuma
15 growers that are -- that meet as often as
16 monthly to address issues that are specific to
17 our area.

18 MS. SCHMAEDICK: When you say
19 issues that are specific to your area, can you
20 give me some examples?

21 MR. BOELTS: Well, if it was loose
22 animals or water testing or any issues that

1 can be maybe not specific to our area but
2 concern us here because this is where we're
3 growing and it's the Yuma Produce Council but
4 probably would be experienced by other areas,
5 but we're just concerned about solving them in
6 our area here; for instance, loose animals.
7 We've had meetings with Humane Society, Animal
8 Control, and whatnot.

9 MS. SCHMAEDICK: So in your
10 opinion, if this proposed agreement were to be
11 implemented, would the concerns that you just
12 spoke of be important to include those
13 concerns and considerations in the development
14 of metrics and how they might be met here in
15 the Yuma area?

16 MR. BOELTS: Yes, it would, and I
17 believe most of them are addressed and
18 probably the reason for some of our meetings
19 and the formation of groups such as that are
20 to carry out some of the requirements in the
21 metrics.

22 MS. SCHMAEDICK: Do you believe

1 the same opportunities should be afforded to
2 other areas across the country that may have
3 very specific regional issues that they're
4 dealing with? For example, if there's a
5 location in Ohio that has a specific set of
6 challenges that it's dealing with, should that
7 group be allowed to meet, voice its opinions,
8 concerns, and have those incorporated in the
9 process?

10 MR. BOELTS: I think their opinion
11 and their specific problems need to be
12 allowed, but I guess our meeting, as any of
13 these associations, they aren't meant to
14 change the way anything is done. They are
15 meant to address how we can conform and how we
16 can help each other conform to these rules.
17 So I think that it would be great if they have
18 their concerns and they have opportunity to
19 voice their opinions on it, but I don't think
20 you can have a different set of rules for
21 different areas. I think that would be the
22 point for a national program, that we all have

1 to follow the same guidelines.

2 MS. SCHMAEDICK: Further in your
3 testimony you state, "I also believe there to
4 be an even greater need for a marketing
5 agreement governing imported leafy greens into
6 our country."

7 Can you expand on that a little
8 bit?

9 MR. BOELTS: Well, I think all of
10 us experienced, whether it was the 2006
11 spinach outbreak or previously onion outbreaks
12 or anything, any outbreak that's happened
13 since 2006, they always bring up the spinach
14 outbreak, which is near and dear to many of
15 our hearts, and I guess my point is that a
16 problem, whether it's in the United States on
17 a national level, or whether it was in Mexico,
18 it halts all of our productions here. And I
19 think that any product that's imported or
20 going to be blended in a product mix or
21 whatnot that may be imported in from
22 Canada or Mexico or any other country, should

1 be under the same requirements and guidelines
2 because it has potential to affect, whether
3 it's blended with our products or whether it's
4 just a recall, specifically they don't get
5 right to the bottom of where it came from.
6 The spinach industry, it was a very small area
7 that had an issue and it halted production for
8 -- it affected production for years now in all
9 other areas across the whole nation.

10 MS. SCHMAEDICK: And would you be
11 opposed to bringing small grower, handler
12 business interests, conservation interests, or
13 consumer interest groups to the table in the
14 discussion and drafting process of the
15 metrics?

16 MR. BOELTS: No, ma'am.

17 MS. SCHMAEDICK: Do you believe
18 that that could potentially be beneficial to
19 the process?

20 MR. BOELTS: I absolutely think it
21 would be beneficial to have as many opinions
22 that are based on experiences and science into

1 it that we could.

2 MS. SCHMAEDICK: Thank you. And
3 my next questions are for Mr. Treadway. Mr.
4 Treadway, you state that you are a food safety
5 professional. Could you explain in more
6 detail what that means?

7 MR. TREADWAY: Ralph Treadway. I
8 am the food safety coordinator person for our
9 handler. I perform all of the functions. I
10 implement all of the requirements that are
11 done through the metrics, both in Arizona and
12 in California.

13 MS. SCHMAEDICK: And does the
14 handler that you work for, do they only handle
15 product that is -- do they handle any
16 processed product?

17 MR. TREADWAY: No.

18 MS. SCHMAEDICK: "Processed"
19 meaning fresh cut.

20 MR. TREADWAY: To me, "processed"
21 means stuff that goes in a bag. Are you
22 talking about --

1 MS. SCHMAEDICK: Yes. Yes.

2 MR. TREADWAY: Yeah. We don't do
3 any bagged product.

4 MS. SCHMAEDICK: Okay. Thank you.
5 You also make mention of the HACCP program.
6 I believe that that acronym has been
7 identified and explained on the record. My
8 question is: Do you know which government
9 agency oversees the HACCP program? Let me ask
10 you this? Is the HACCP program a USDA
11 program?

12 MR. TREADWAY: To be honest, I
13 don't know. I mean, it's -- HACCP is a
14 program, but I don't believe that it's
15 overseen by any governmental agency.

16 MS. SCHMAEDICK: Okay. Thank you.
17 Those are all the questions I have. Thank
18 you.

19 JUDGE HILLSON: Ms. Carter.

20 MS. CARTER: Good morning.
21 Antoinette Carter with the USDA. Just a few
22 follow-up questions.

1 For Mr. Dempsey, and I -- forgive
2 me if you've already answered this or
3 explained it, but are you specifically a
4 grower or a grower-handler?

5 MR. DEMPSEY: Tim Dempsey. We
6 only grow.

7 MS. CARTER: Okay. And you
8 mentioned that the spinach and baby green
9 lettuce that you grow ends up in a variety of
10 markets. You mentioned Canada, U.S. and
11 Britain.

12 MR. DEMPSEY: Yes.

13 MS. CARTER: So just to clarify,
14 are you stating that the handlers that you
15 supply to have distribution in those areas?

16 MR. DEMPSEY: That's correct.

17 MS. CARTER: And with regards to
18 the U.S. market, is that -- is it regional
19 distribution or is it national?

20 MR. DEMPSEY: It's a national
21 distribution.

22 MS. CARTER: Okay. And on page

1 two of your prepared statement, you state
2 that, "We look at the National Leafy Greens
3 Marketing Agreement as the best option to help
4 ensure all people and entities involved in the
5 production of leafy greens comply with the
6 same standards."

7 Could you explain how you think
8 the proposal will accomplish this?

9 MR. DEMPSEY: Well, if -- if we
10 can get as much inclusion into a set of
11 standards for the leafy greens agreement, at
12 least then we would all be working on a level
13 playing field. With the standards that we're
14 talking about being based on science, at least
15 that's something that we could all grab hold
16 of. It's not a subjective thing. It's a
17 science-based -- science-based agreement that
18 would allow the people who ultimately consume
19 the product to rest assured that it is -- it
20 is being held to a high standard.

21 MS. CARTER: Thank you. That's
22 all the questions I have.

1 My next questions are directed to
2 Mr. Luke.

3 MR. LUKE: Yes, ma'am.

4 MS. CARTER: Could you -- do you
5 source product from other producers? You
6 mentioned that you're a grower as well as a
7 handler.

8 MR. LUKE: Yes, ma'am.

9 MS. CARTER: With regards to the
10 product that you handle, do you only handle
11 the product that you grow specifically, or do
12 you source from other growers?

13 MR. LUKE: We will -- Alan Luke.
14 We will purchase from other handlers or
15 growers or other handlers if we happen to be
16 short of a product for some reason, but we do
17 most of our own growing.

18 MS. CARTER: And where are those
19 handlers and/or growers located that you may
20 source from?

21 MR. LUKE: For example, we have
22 bought from Pasquinelli Produce in the past,

1 which is a grower for Dole who is a signatory.
2 You know, we may buy ten acres, 15 acres. In
3 that process, there is a -- there is paperwork
4 to fill out to make sure that the field that
5 we're buying from them has followed the LGMA
6 requirements and we do follow those
7 procedures.

8 MS. CARTER: So are those
9 operations specifically located in -- I guess
10 in this case Arizona or California or --

11 MR. LUKE: Arizona.

12 MS. CARTER: Arizona. And you
13 also mentioned in your statement written
14 guidelines and procedures for implementing the
15 matrix documentation and audits. And you
16 mentioned specifically self and third party
17 audits.

18 Can you explain to us like how
19 many audits do you currently undergo?

20 MR. LUKE: Well, we -- Alan Luke.
21 We have -- as part of our Food Safety
22 Department, we have a person that -- that

1 handles say harvest crews, and she is auditing
2 harvest crews on a daily basis, making sure
3 that they follow through on the requirements
4 of the LGMA for food -- sanitation of
5 equipment, sanitation of knives, sanitation by
6 the people. So it is a daily process.

7 I myself and those that work with
8 me, we do ranch audits before the season
9 starts. Our harvest -- our harvest management
10 does field inspections on a daily basis before
11 they go into a field. This is all documented.
12 If there is a problem, I am called in or the
13 food safety person is called in with the
14 problem. The mediation is determined. Let's
15 say that -- for example, we had a 4-H animal
16 get loose in the edge of one of our fields.
17 We got notified by the Harvest Department that
18 they weren't in the field yet but they had
19 checked the field out. We went and looked at
20 it. We flagged off the area contaminated,
21 destroyed the area contaminated, and then
22 allowed our harvest crew to harvest the rest

1 of the field.

2 MS. CARTER: So those are some
3 specific things your operation is doing in
4 terms of self-auditing?

5 MR. LUKE: Self-auditing. Yes,
6 ma'am.

7 MS. CARTER: So with regards to
8 third party audits, things that your buyers
9 are requiring, I guess my specific question is
10 with the implementation of the state programs,
11 California and Arizona, which you are
12 currently a signatory under, did you see any
13 type of declines? We've heard other persons
14 testify with regards to that.

15 MR. LUKE: We have -- D'Arrigo
16 Brothers has had a policy of when asked for
17 other audits, to deny them. We have been
18 successful in every case except one -- two.
19 One company does their own self-audit. A
20 large restaurant chain has their own auditing
21 firm -- auditing people that are part of their
22 company come in. And another retailer

1 requests that Primus comes in. We have been
2 able to so far limit to those two other
3 outside -- our standard reply is we're part of
4 the LGMA and that's what we use and that's
5 what we provide you.

6 MS. CARTER: So for most of your
7 buyers, they've accepted --

8 MR. LUKE: They accept that. Yes,
9 ma'am.

10 MS. CARTER: Thank you. Those are
11 the only questions I have.

12 And just had some questions for
13 Mr. Boelts, is it? With regards to -- you
14 state that you produce various types of leafy
15 greens. Could you explain specifically what
16 vegetables you're referring to?

17 MR. BOELTS: Yes, ma'am. Robert
18 Boelts. Basically, we grow many leafy green
19 items, including cilantro, dill, spring mix,
20 spinach, iceberg lettuce, romaine, red leaf,
21 green leaf lettuce.

22 MS. CARTER: Okay. And you also

1 mentioned that you have 7500 acres of
2 conventional -- you grow conventional
3 production and 1250 acres certified as
4 organic.

5 Do you produce -- do you grow any
6 of the leafy green vegetables you just
7 noted -- are those both grown conventional
8 and/or organically?

9 MR. BOELTS: All the items I just
10 mentioned are grown conventionally.
11 Organically, we grow a few less. The organic
12 items we grow would be dill, cilantro,
13 romaine, and spinach, and spring mix.

14 MS. CARTER: Okay. And the
15 shippers and handlers you supply to, with
16 regards to their distribution, can you
17 share -- do you know what their distribution
18 level is or the scope?

19 MR. BOELTS: They would all be
20 national and international.

21 MS. CARTER: Okay. That's all I
22 have. Thank you.

1 JUDGE HILLSON: Any other
2 questions from the panel? Ms. Dash.

3 MS. DASH: Suzanne Dash. I have a
4 question for Mr. Dempsey, Mr. Luke, and Mr.
5 Boelts. Have you seen the business case
6 document prepared by Intertox for the
7 Proponent group?

8 MR. DEMPSEY: Tim Dempsey. No, I
9 have not actually.

10 MR. LUKE: Alan Luke. Yes, I
11 have.

12 MR. BOELTS: Robert Boelts. No, I
13 have not.

14 MS. DASH: Mr. Luke, did you look
15 at the costs for a large grower and did you
16 feel that your costs for food safety were in
17 line with the costs that were in that
18 document?

19 MR. LUKE: I just glanced at a
20 spreadsheet. We did -- I did the survey for
21 her. Our costs come out about \$25 an acre.

22 MS. DASH: Okay. Thank you. And

1 I had one more question for Mr. Dempsey. Did
2 you have spinach production in the fall of
3 '06?

4 MR. DEMPSEY: Tim Dempsey. We
5 were -- we had done the initial preparation
6 for it and were about to put it into the
7 ground for the first time. So when it
8 occurred, we were just about to put it into
9 the ground and then subsequently we just would
10 take our best guess at what demand would be
11 and hope for the best.

12 MS. DASH: Okay. Thank you.
13 That's all the questions I have.

14 JUDGE HILLSON: Anything else from
15 the panel? Mr. Souza.

16 MR. SOUZA: Anthony Souza, USDA.
17 Good morning, gentlemen.

18 ALL: Good morning.

19 JUDGE HILLSON: Couple questions
20 for each of you. By reading your testimony,
21 it appears that each one of you have something
22 to do with both California and Arizona; is

1 that correct? Can I get a verbal?

2 MR. DEMPSEY: Tim Dempsey. No.

3 All of our production's in Arizona.

4 MR. LUKE: Alan Luke. All my
5 leafy greens is in Arizona. I do have
6 operations in the Imperial Valley of
7 California with some other crops, but the
8 company is in both California and Arizona.

9 MR. SOUZA: Thank you.

10 MR. BOELTS: Robert Boelts. I
11 have operations in both Arizona and
12 California.

13 MR. TREADWAY: Ralph Treadway. We
14 grow both in California and Arizona.

15 MR. SOUZA: Okay. So I'll limit
16 the questions to Mr. Boelts and Mr. Treadway
17 on this. Mr. Boelts, currently you're being
18 audited under a California Leafy Green and an
19 Arizona Leafy Green; is that correct?

20 MR. BOELTS: Yes. That's correct.
21 Robert Boelts again. That's correct. It
22 would be the Arizona acres are audited under

1 Arizona audit and the California acres, of
2 course, are California.

3 MR. SOUZA: In your opinion, would
4 a National Leafy Green program streamline this
5 process?

6 MR. BOELTS: Yes. My opinion, it
7 would.

8 MR. SOUZA: In what way?

9 MR. BOELTS: Well, they're
10 similar. There are a few differences but
11 they're similar, but I think it would
12 streamline it for us, you know, as well as
13 putting everything else on a level playing
14 field for any other producers.

15 MR. SOUZA: Would this relieve
16 some of the audit fatigue from your company?

17 MR. BOELTS: That would be on the
18 buyers' side of it. I would hope so, that it
19 would give them more confidence in a national
20 program and relieve some of the third party
21 audits that we experience because I would
22 estimate on our acreage we go through between

1 leafy green audits and third party audits four
2 shipper audits. We probably go through 25 of
3 those audits a year. I would think that it
4 would -- a national program that there was
5 buyers' confidence in would lessen that, yes,
6 and then we would still do our self-audits
7 that we do on a daily basis, as Mr. Luke spoke
8 of -- a pre-plant audit and then a pre-harvest
9 audit on all acres.

10 MR. SOUZA: Thank you. Mr.
11 Treadway, you oversee food safety programs in
12 both California and Arizona?

13 MR. TREADWAY: Yes. Ralph
14 Treadway.

15 MR. SOUZA: Would a national
16 program reduce the number of audits for the
17 companies in which you oversee their programs?

18 MR. TREADWAY: Yes. It would.

19 MR. SOUZA: It would -- would it
20 consolidate the two or how do you see that it
21 would reduce the audits?

22 MR. TREADWAY: Well, 'cause we do

1 both, the LGMA audits for California and
 2 Arizona and then we also have buyer and
 3 specific third party audits. If a National
 4 LGMA was adopted and was accepted by the
 5 buying community, then you would phase out
 6 more of the third party audits that we have to
 7 do essentially on the same ranches that --
 8 that the LGMA is already auditing.

9 MR. SOUZA: Have you had audits
 10 occur in the facilities that you -- the
 11 ranches that you oversee, California audit on
 12 one week and an Arizona audit on another week?

13 MR. TREADWAY: I don't --

14 MR. SOUZA: Have you had to
 15 accompany a California leafy green auditor one
 16 week in California and then follow up the
 17 second week -- another week in Arizona --

18 MR. TREADWAY: Yes.

19 MR. SOUZA: -- in a short period
 20 of time?

21 MR. TREADWAY: Yes.

22 MR. SOUZA: Do you feel that a

1 national agreement would reduce or eliminate
2 that?

3 MR. TREADWAY: No. Because the
4 audits are performed by the ranches and the
5 growers as opposed -- what it would eliminate
6 is having an auditor from a third party audit
7 come in the next day to audit the same ranch
8 that we've already audited with an LGMA
9 auditor.

10 MR. SOUZA: Do you have some
11 growers that grow in both Arizona and
12 California?

13 MR. TREADWAY: Yes.

14 MR. SOUZA: Would there be a
15 reduction in audits in that instance where the
16 grower would be audited?

17 MR. TREADWAY: Yes. In that case,
18 yes.

19 MR. SOUZA: Thank you. A question
20 for Mr. Dempsey. You have in your written
21 statement that you specialize in the
22 production of spinach and baby greens lettuce.

1 Could you define what baby green lettuces are?

2 MR. DEMPSEY: Sure. Tim Dempsey.

3 The baby greens are essentially grown -- it's
4 a lettuce with minor amounts of other things,
5 mustards and chards and so forth. But
6 essentially it's a lettuce crop, and it's
7 grown to a height of three to four inches,
8 machine-harvested, and ends up in a package of
9 some size.

10 MR. SOUZA: Are you familiar with
11 the definition in the proposed rule for leafy
12 greens?

13 MR. DEMPSEY: Not off the top of
14 my head. No.

15 MR. SOUZA: Is there a proposed
16 rule up? Could I have you look at Section
17 970.15, Leafy Green Vegetables.

18 MR. DEMPSEY: Okay.

19 MR. SOUZA: Could I have you
20 review the definitions there and ask you --
21 follow up with a question.

22 (Witness reviewing document.)

1 MR. DEMPSEY: Okay.

2 MR. SOUZA: Are there any products
3 that you grow that are not listed in there
4 that you feel should be listed?

5 MR. DEMPSEY: Everything we grow
6 is listed on here.

7 MR. SOUZA: So that meets your
8 definition?

9 MR. DEMPSEY: Yes.

10 MR. SOUZA: Thank you. Mr.
11 Boelts, the same question. Do you grow spring
12 mix?

13 MR. BOELTS: Robert Boelts. Yes,
14 I do.

15 MR. SOUZA: Could I have you refer
16 to 970.15, Leafy Green definition in the
17 proposed rule. Could you take a brief minute
18 and --

19 MR. BOELTS: Yes, sir.

20 MR. SOUZA: -- review that?

21 MR. BOELTS: I just reviewed it.
22 The only one I could see is I don't believe

1 dill is in it, in which I'm not -- I would
2 think it should be.

3 MR. SOUZA: Okay. Everything else
4 fits in there?

5 MR. BOELTS: Yes, sir.

6 MR. SOUZA: So it is your opinion
7 that you do grow dill but you feel that dill
8 should not be defined under the leafy green
9 definition?

10 MR. BOELTS: No. I feel that it
11 should be and I don't see it there.

12 MR. SOUZA: Okay. Thank you very
13 much. No further questions.

14 JUDGE HILLSON: Panel all done?
15 Let me ask anyone -- any interested parties in
16 the audience have any questions? Mr. Resnick,
17 how about redirect for these witnesses?

18 MR. RESNICK: I have no questions.

19 JUDGE HILLSON: Mr. Giclas, you
20 have questions?

21 MR. GICLAS: Thank you, Your
22 Honor. Hank Giclas, Western Growers. I have

1 a question for Mr. Dempsey. Do you have --
2 you referenced in your testimony that Metz
3 Farms incorporates the food safety expenses
4 into the normal operating expense and then
5 negotiates that in the contract.

6 Do you have a feel for how common
7 that is in the industry?

8 MR. DEMPSEY: Tim Dempsey. My
9 feel for at least locally, it's a very common
10 practice.

11 MR. GICLAS: Okay. Thank you.
12 That's the only question I had.

13 JUDGE HILLSON: Okay. Well, thank
14 you, gentlemen. Thank you for your testimony.
15 You may all step down.

16 And I think, Mr. Warshawer, you
17 were going to call a witness at this point?

18 (Pause.)

19 Okay. Please raise your right
20 hand.

21 Whereupon,

22 TOREY LIGON

1 having first been duly sworn, was called as a
2 witness and testified as follows; to wit:

3 JUDGE HILLSON: Okay. And can you
4 please state your name and spell it for the
5 record.

6 MS. LIGON: Yes. My name is Torey
7 Ligon, T-o-r-e-y, L-i-g-o-n.

8 JUDGE HILLSON: Okay. Ms. Ligon,
9 you have a statement you want to read; is that
10 correct?

11 MS. LIGON: Yes.

12 JUDGE HILLSON: Please go ahead.

13 MS. LIGON: Okay.

14 TESTIMONY

15 MS. LIGON: Can you hear me okay?

16 Okay. Good morning. My name is Torey Ligon
17 and I work at the Food Conspiracy Co-op in
18 Tucson, Arizona. Since 1971, Food Conspiracy
19 Co-op has been a member-owned cooperative food
20 store specializing in organic and natural
21 groceries. Our co-op is jointly owned by
22 almost 1500 Tucson families and we are open to

1 the public. Our signature department is our
2 produce section, and we feature organic fruits
3 and vegetables and many locally-grown products
4 from small farmers in Southern Arizona. Over
5 the past two years, we have experienced
6 double-digit sales growth as more people in
7 our community seek out the fresh, healthy,
8 sustainable products that we offer.

9 In my job as the Marketing and
10 Membership Manager, I interact on a regular
11 basis with our members and customers. My
12 interactions with shoppers happen informally
13 in the aisles of the store and more formally
14 through customer satisfaction surveys, member
15 elections, and board committee work.

16 In addition, it is my job to stay
17 on top of trends in the natural food
18 marketplace so that we can best meet the
19 future needs of our members and shoppers. It
20 is with these future food trends in mind that
21 our store pioneered a retail level labeling
22 program for foods at risk of containing

1 genetically-modified organisms in the 1990s.
2 It was also in anticipation of consumer demand
3 that we began a comprehensive labeling program
4 for locally-grown and produced items in our
5 store. In our produce department, all fruits
6 and vegetables are labeled with their country
7 or state of origin. For any item grown in
8 Southern Arizona, items are labeled with the
9 name of the farm, the name of the farmer, and
10 the distance from the farm to our store. For
11 all products that we purchase from wholesale
12 distributors, we prioritize foods grown
13 domestically in neighboring states and items
14 grown on small and mid-sized farms. Our
15 customers tell us in annual surveys that they
16 support organic farming, sustainable growing
17 methods, fair treatment of workers, and humane
18 conditions for farm animals. Our sales
19 reflect our customers' willingness to pay more
20 for sustainably grown foods and their
21 preference for labeled locally-grown items
22 whenever there is a choice.

1 As a representative of the 1500
2 member owners of Food Conspiracy Co-op, I have
3 come here today to express our opposition to
4 the proposed Leafy Greens Marketing Agreement.
5 I believe that this agreement is not in the
6 best interests of our customers or our
7 business.

8 After reading the proposed Leafy
9 Greens Marketing Agreement, it appears that
10 this agreement may require testing and
11 sanitation procedures that are unrealistic and
12 unnecessary for small and mid-sized farms. In
13 addition, the agreement does not appear to
14 offer enough safeguards to protect the unique
15 growing methods of organic farmers. By
16 encouraging farmers to adopt new food safety
17 metrics under this agreement, I worry that
18 some farmers may be pushed away from
19 established sustainable farming practices,
20 such as the promotion of biodiversity, crop
21 rotation, and organic pest control. The bulk
22 of our produce comes from small to mid-size

1 organic farms and our business is based on our
2 ability to continue to offer consumers an
3 alternative to the industrial sale
4 conventional and organic food items found in
5 most grocery stores.

6 It appears that by adopting this
7 agreement, the USDA would be approaching a
8 complex problem with a "one size fits all"
9 solution designed primarily to address the
10 risks posed by the largest producers. Small
11 and mid-sized organic farmers do not need
12 additional obstacles to further disadvantage
13 them in their attempts to compete with large
14 industrial farming operations.

15 This marketing proposal reminds me
16 of another marketing agreement that has
17 negatively impacted our customers and our
18 business. Two years ago, the California
19 Almond Board implemented a set of food safety
20 standards that now requires all domestic
21 almonds to undergo a fumigation procedure or,
22 in the case of organic almonds, a steam

1 treatment. This new standard was implemented
2 after a salmonella outbreak was linked to
3 almonds from one of the largest conventional
4 almond growers in the nation. All almond
5 growers, including organic growers and small
6 and mid-sized farms were forced to comply with
7 these new standards.

8 For a portion of our customers who
9 follow a raw food diet, raw almonds are a
10 critical ingredient in daily meals and a
11 significant source of protein. With the
12 implementation of this food safety standards,
13 some of our customers began driving to
14 California to get farm stand raw almonds
15 because direct consumer sales were exempted
16 from this agreement. This resulted in a loss
17 of sales for our store and frustration on the
18 part of many customers who didn't have the
19 time or the means to drive to California to
20 buy almonds. A month after this new standard
21 was implemented, our store began importing raw
22 almonds from Italy to satisfy demand. Small

1 and mid-sized organic farmers in California
2 are now losing business to almond growers in
3 Europe because of a hastily implemented food
4 safety standard designed to control risk in
5 large-scale conventional almond facilities.

6 While the proposed Leafy Greens
7 Marketing Agreement is voluntary, I have
8 reservations about how voluntary it really
9 will be. What happens when Veritable
10 Vegetable, our primary produce handler,
11 decides to sign on to this marketing
12 agreement? According to this proposal,
13 "signatory handlers could only handle leafy
14 green vegetables from (1) producers within the
15 production area who meet the requirements of
16 the program, or (2) producers and handlers
17 outside of the production area who meet the
18 requirements of the program." We work with
19 Veritable Vegetable in part because of their
20 commitment to small and mid-sized farms. Our
21 customers regularly tell us that they shop
22 with us because of our commitment to small and

1 mid-sized farms. While you may be thinking
2 that Veritable can choose to not participate
3 in this agreement, what happens if one of
4 their larger retail accounts, say a regional
5 chain that they supply, demands that they
6 comply? Will we lose our ability to purchase
7 organic leafy greens from small and mid-sized
8 California farms?

9 Food safety is a concern for all
10 retail stores, and yet this agreement does not
11 inspire confidence in me that my customers
12 would benefit from implementation of this
13 proposal. At Food Conspiracy Co-op, we want
14 to see food safety standards that explicitly
15 differentiate between the food safety risks
16 posed by farms of different sizes. We are
17 also committed to organic agriculture and
18 cannot support any metrics that do not
19 encourage farmers to move toward more
20 sustainable organic growing methods.

21 On behalf of the members of Food
22 Conspiracy Co-op, I urge the USDA to reject

1 the Leafy Greens Marketing Proposal. Thank
2 you.

3 JUDGE HILLSON: Thank you. I've
4 marked your statement as Exhibit 101 and I
5 will receive it in evidence.

6 (Exhibit 101 was marked
7 for identification and
8 received.)

9 JUDGE HILLSON: And I will ask the
10 USDA panel if they have questions of Ms.
11 Ligon. Ms. Schmaedick.

12 MS. SCHMAEDICK: Melissa
13 Schmaedick, USDA, and thank you, Ms. -- is it
14 Ligon?

15 MS. LIGON: Ligon, yeah.

16 MS. SCHMAEDICK: Ligon.

17 MS. LIGON: Uh-huh.

18 MS. SCHMAEDICK: Thank you for
19 your testimony. Couple questions for you. On
20 page one of your statement, you mention that
21 you -- your store actively labels foods that
22 contain genetically-modified organisms. Why

1 do you do that?

2 MS. LIGON: We have a significant
3 customer base that would prefer not to eat
4 foods that contain genetically-modified
5 organisms. And currently in the U.S., there
6 is no mandatory labeling program on products
7 that may contain genetically-modified
8 organisms, and so we have attempted to the
9 best of our ability at the retail level to let
10 consumers know which products may be at risk
11 of containing genetically-modified organisms,
12 which primarily means products that are not --
13 that contain non-organic ingredients of
14 particular crops that are often genetically-
15 modified seeds.

16 MS. SCHMAEDICK: And why are your
17 consumers concerned about GMOs?

18 MS. LIGON: Well, I think that
19 there are different reasons, depending on the
20 consumer, but I think that for most consumers,
21 it's a lack of scientific evidence that
22 suggests that GMOs are safe. So for some

1 consumers, rather than asking for proof that
2 GMOs are unsafe, they would -- they would like
3 evidence that GMO foods are in fact safe, and
4 they feel that foods have not been tested for
5 a long enough time to be able to conclusively
6 demonstrate that safety.

7 MS. SCHMAEDICK: So would it then
8 be accurate to say that this labeling of
9 products that contain GMO is something that
10 you do for your consumers for a food safety
11 concern?

12 MS. LIGON: Yes. I think that
13 would be accurate.

14 MS. SCHMAEDICK: Okay. On page
15 one of your testimony, you -- the last full
16 paragraph, you say, "After reading the
17 proposed Leafy Greens Marketing Agreement, it
18 appears that this agreement may require
19 testing and sanitation procedures that are
20 unrealistic and unnecessary for small and mid-
21 sized farms."

22 Can you point to me in the

1 proposed language of the agreement where it
2 outlines testing and sanitation procedures
3 that are unrealistic and unnecessary for small
4 and mid-sized farms?

5 MS. LIGON: I can't because I
6 think the proposal does not explicitly explain
7 any of the metrics that may be used in the
8 proposed agreement. However, I think given
9 that there is no specific recommendations put
10 forth in the proposal, the only thing that I
11 had to go by was my understanding of the
12 existing agreement that's used in California
13 at this time.

14 MS. SCHMAEDICK: So you would
15 agree that the current proposal does not
16 contain any metrics?

17 MS. LIGON: I do agree.

18 MS. SCHMAEDICK: Do you understand
19 the proposed mechanism that is outlined in the
20 agreement that would -- if implemented, would
21 be followed to develop the metrics?

22 MS. LIGON: I understand that

1 primarily -- the proposal appears to me to
2 primarily outline the basis for creating a
3 committee that would then determine the
4 metrics used in creating a set of food safety
5 standards that would then be adopted.

6 MS. SCHMAEDICK: And have you been
7 present this entire morning?

8 MS. LIGON: No. I heard the
9 previous panel's testimony, and I came midway
10 through the first testimony this morning.

11 MS. SCHMAEDICK: Have you heard
12 any statements made today that would indicate
13 a willingness of the proponents of the
14 proposed agreement to include and incorporate
15 and be mindful of small business practices,
16 challenges, as well as conservation and
17 consumer interests?

18 MS. LIGON: I -- I heard in the
19 previous panel that all of the witnesses
20 expressed an interest in working with small
21 farms, small businesses, and consumer and
22 conservation interests. And I did read in the

1 proposal that there will -- that the interests
2 of small farmers will be taken into account.
3 I think my concern is that from talking with
4 our distributors currently who work in
5 California, the California Marketing Agreement
6 is not something that all of the small farms
7 that we work with are able to comply with, and
8 I don't know that the national agreement will
9 be the same as the California agreement, but
10 I can -- I can expect that probably similar
11 metrics will be decided upon. I'm assuming
12 that the California metrics were decided upon
13 by committee and perhaps a committee with many
14 different interests represented. But I think
15 it's hard to apply the same metrics to large-
16 scale producers and very small producers.

17 MS. SCHMAEDICK: Have you spent
18 time reading any of the testimony that has been
19 submitted at the other hearing locations
20 previous to this location?

21 MS. LIGON: I have read a few
22 statements, two or three statements at the

1 hearing in Monterey.

2 MS. SCHMAEDICK: So you are not
3 aware of statements that were given in
4 Jacksonville by representatives of food safety
5 coordinators that work with very small farms
6 in Georgia?

7 MS. LIGON: No.

8 MS. SCHMAEDICK: In the proposed
9 language, I believe it's under the section
10 referred to as "Purpose," are you familiar
11 with that section? It's Section 970.35.

12 MS. LIGON: 970 point --

13 MS. SCHMAEDICK: -- 35.

14 MS. LIGON: Purpose. Okay. Yes.

15 MS. SCHMAEDICK: Towards the end
16 of that paragraph, there is a phrase that says
17 "to foster greater collaboration with local,
18 state, and federal regulators."

19 My question is: If it is the
20 stated purpose in this proposed agreement to
21 cooperate with other regulatory programs at
22 various levels of government, do you believe

1 that there is a potential for coordination to
2 happen between other programs, such as the
3 National Organic Program or perhaps different
4 conservation regulatory programs that are
5 currently in effect?

6 MS. LIGON: I believe there is the
7 potential for collaboration. I'm not sure
8 that this proposal offers -- guarantees that
9 that collaboration will happen.

10 MS. SCHMAEDICK: Do you have any
11 suggestions that would improve the current
12 proposal that would go further to give you
13 that confidence?

14 MS. LIGON: I don't.

15 MS. SCHMAEDICK: Are you familiar
16 with the proposed membership of the Technical
17 Review Board? It's under Section 970.45.

18 MS. LIGON: Yes.

19 MS. SCHMAEDICK: Are you aware
20 that there are some modifications to that
21 language that have been recommended?

22 MS. LIGON: No.

1 MS. SCHMAEDICK: Have you had a
2 chance to read this section?

3 MS. LIGON: Yes.

4 MS. SCHMAEDICK: In your opinion,
5 is there an attempt to have representation
6 from the environmental interest groups?

7 MS. LIGON: I think it appears
8 there is representation from environmental
9 agencies.

10 MS. SCHMAEDICK: And at the bottom
11 of that section where it discusses the
12 authority for subcommittees, would that create
13 the opportunity for other interest groups to
14 become involved?

15 MS. LIGON: It could.

16 MS. SCHMAEDICK: So given the
17 information that we have just covered, your
18 statement that -- at the bottom of page two,
19 "It appears that by adopting this agreement,
20 the USDA would be approaching a complex
21 problem with a 'one size fits all' solution
22 designed primarily to address the risks posed

1 by the largest producers," does -- do you
2 still think that that's an accurate statement?

3 MS. LIGON: Well, I think that my
4 intention behind that statement was to say
5 that while I think that this proposal leaves
6 plenty of room for input and accommodation for
7 small farmers and organic farmers, I don't --
8 I don't know that anything in it still, even
9 having read through these sections you pointed
10 out, guarantees that the interests of those
11 farmers will not be -- guarantees that their
12 interests will be considered fully because I
13 think in past agreements, small farmers have
14 suffered more significantly than large
15 producers and I think that some of the same
16 precautions may have been included in those
17 proposals. Specifically, I'm thinking again
18 about the recent decision by the California
19 Almond Board, which significantly handicapped
20 many of the small organic almond farmers that
21 we worked with and has forced us to now work
22 with European almond growers. And I think

1 that during the discussions about that
2 agreement, there was consideration given to
3 small farmers, but I don't feel that it
4 adequately protected them, given what's
5 transpired. And I have the same reservations
6 about this proposal.

7 While I think that there's
8 certainly language that could protect small
9 farmers and could give small farmers a seat at
10 the table, I'm not sure how you guarantee that
11 those small farmers maintain that seat at the
12 table and don't find themselves in a position
13 where they can no longer compete.

14 MS. SCHMAEDICK: So you've
15 referred to the California Almond Program as
16 an agreement. Is it your understanding that
17 it is a marketing agreement?

18 MS. LIGON: To be honest, I'm not
19 sure.

20 MS. SCHMAEDICK: If I were to
21 indicate to you that that program is a
22 marketing order, would that be meaningful to

1 you?

2 MS. LIGON: Are you distinguishing
3 between the fact that in this case it was
4 mandatory for growers to comply and in the
5 present situation it's voluntary? Is that the
6 distinction that --

7 MS. SCHMAEDICK: I'm asking
8 whether or not you know if the almond program
9 is a marketing order or an agreement and if
10 you know the difference between the two?

11 MS. LIGON: No, I don't.

12 MS. SCHMAEDICK: Okay. In your
13 testimony, you go to -- you go through quite
14 an extensive explanation of your company's
15 mission to promote locally-grown produce. But
16 then on page two of your statement, you talk
17 about the Veritable Vegetable. First of all,
18 can you explain who is the Veritable Vegetable
19 and then, secondly, what role do they play in
20 your business?

21 MS. LIGON: Yes. We have a strong
22 commitment to local farmers and prioritize --

1 we choose to purchase from local farmers
2 whenever we can. However, in Southern
3 Arizona, particularly in Tucson, Arizona,
4 there are limited number of small farmers that
5 we can work with and they do not supply us
6 with enough produce to meet the demands of our
7 customers. So we have to work with wholesale
8 distributors in addition to direct -- ordering
9 directly from small farmers. Veritable
10 Vegetable is our primary distributor but not
11 our only distributor. And they are a organic
12 produce distributor that works in California
13 primarily with small to mid-sized family
14 farms.

15 MS. SCHMAEDICK: Okay. So your
16 concern is that the Veritable Vegetable would
17 become -- if this program were implemented,
18 that they could potentially become a signatory
19 and that that would impact your --

20 MS. LIGON: Yes.

21 MS. SCHMAEDICK: -- supply?

22 MS. LIGON: Yes. I think that if

1 they were pressured by some of their other
2 retail accounts -- we are a pretty small
3 account. So if they had a larger say regional
4 grocery chain that wanted them to become a
5 signatory, it might become -- they might have
6 to sign on to this agreement in order to
7 maintain those accounts or that account and,
8 if they did, my concern is that some of the
9 small farms that they currently work with
10 would no longer be able to sell to them
11 because they would not be able to comply with
12 the metrics and the auditing procedures laid
13 out in the agreement, yet-to-be-determined
14 metrics, but my concern is that they might not
15 be able to comply. And if that were the case,
16 we would lose our connection to those small
17 farmers because where we live in Southern
18 Arizona, we don't have enough farmers to
19 supply our need and we are dependent on
20 California agriculture, but we prefer to work
21 with those small family farms and we need a
22 distributor like Veritable Vegetable to bridge

1 that -- to make that connection for us. And
2 Veritable Vegetable has already -- I mentioned
3 this earlier, but they have told us that some
4 of their small farms have expressed concern
5 that they're not able to meet the California
6 Leafy Greens Marketing Agreement. At this
7 time, Veritable Vegetable is not a signatory
8 on the California agreement, but my concern is
9 that in the future, if this agreement were
10 more widely promoted, they might need to sign
11 on.

12 MS. SCHMAEDICK: That's all the
13 questions I have for the moment. Thank you.

14 JUDGE HILLSON: Any other USDA
15 panelists have questions? I'm not seeing
16 anything. Anyone in the -- any concerned
17 participants in the audience? How about the
18 Proponents; do you have any questions?

19 MR. RESNICK: Jason Resnick,
20 Western Growers. Good morning, Ms. Ligon. We
21 appreciate your testimony today.

22 MS. LIGON: Thank you.

1 MR. RESNICK: You work for Food
2 Conspiracy Co-op. What is your title?

3 MS. LIGON: I am the Marketing and
4 Membership Manager.

5 MR. RESNICK: How long have you
6 worked with Food Conspiracy Co-op?

7 MS. LIGON: Three and a half
8 years.

9 MR. RESNICK: What percentage of
10 the fresh leafy greens that you sell to your
11 members is direct from the farmer?

12 MS. LIGON: It depends on the
13 season. But in the winter, which is our prime
14 greens season, I would say between 20 and 25
15 percent.

16 MR. RESNICK: And the rest of the
17 time, you purchase from Veritable Vegetable?

18 MS. LIGON: Primarily from
19 Veritable Vegetable. We do also have
20 secondary distributors, but primarily
21 Veritable Vegetable.

22 MR. RESNICK: How many other

1 distributors do you work with?

2 MS. LIGON: Regularly, two other
3 distributors.

4 MR. RESNICK: You expressed in
5 your testimony a commitment to small and mid-
6 sized farms and you said that you work with
7 Veritable Vegetable because of their
8 commitment to small and mid-sized farms. Do
9 you anticipate that Veritable Vegetable would
10 sign on to the National Leafy Greens Marketing
11 Agreement should it come to fruition?

12 MS. LIGON: I don't know. I -- I
13 believe that at some point in the future, if
14 it was in their best interest to, they
15 certainly would.

16 MR. RESNICK: And do you think
17 that would be consistent or inconsistent with
18 their commitment to small and mid-sized farms?

19 MS. LIGON: Well, I think that
20 depends on the exact metrics that are put into
21 place. But if -- if there are testing
22 procedures or other obstacles that small

1 farmers are unable to meet, then I think it
2 would probably shift Veritable Vegetable's
3 purchasing toward mid- to large-sized farms
4 who are more able to meet those requirements.

5 MR. RESNICK: And have you spoken
6 with anyone at Veritable Vegetable about the
7 proposed marketing agreement?

8 MS. LIGON: I have not personally
9 spoken with them, but our produce manager
10 speaks with them very regularly and talked to
11 them in preparation for this hearing about
12 their position on the Leafy Greens Marketing
13 Agreement and how they anticipate it impacting
14 them.

15 MR. RESNICK: And did you have an
16 opportunity to read Bu Nygrens' testimony from
17 Monterey?

18 MS. LIGON: I did.

19 MR. RESNICK: Do you agree with
20 her testimony?

21 MS. LIGON: I do.

22 MR. RESNICK: You understand that

1 the Leafy Green Marketing Agreement is
2 voluntary. You just have concerns about
3 whether there will be pressures in the
4 marketplace to -- that will make firms like
5 Veritable Vegetable feel compelled to sign on?

6 MS. LIGON: I do. We are a fairly
7 small -- we are a very small retail business.
8 We work in collaboration with cooperatives all
9 over the country but, even as a group, we are
10 a very small percentage of the market compared
11 to say major national conventional grocery
12 chains.

13 MR. RESNICK: Thank you. I have
14 no further questions.

15 MS. LIGON: Thank you.

16 JUDGE HILLSON: Ms. Schmaedick,
17 you have another question?

18 MS. SCHMAEDICK: Uh-huh. Melissa
19 Schmaedick, USDA. Ms. Ligon, you stated that
20 you read Bu Nygrens' statement; is that
21 correct?

22 MS. LIGON: I did.

1 MS. SCHMAEDICK: Did you watch the
2 recording of the Monterey hearing for that day
3 in which she gave her testimony?

4 MS. LIGON: No, I did not.

5 MS. SCHMAEDICK: So you are not
6 aware of the cross-examination of her
7 testimony?

8 MS. LIGON: No.

9 MS. SCHMAEDICK: Okay. I would
10 also like to direct your attention to page --
11 of the regulatory text --

12 MS. LIGON: Okay.

13 MS. SCHMAEDICK: -- that was
14 published in the Federal Register. If you'd
15 turn to the second page, third -- second -- is
16 it the second page -- page 45566.

17 MS. LIGON: Uh-huh.

18 MS. SCHMAEDICK: Okay. Third
19 column.

20 MS. LIGON: Okay.

21 MS. SCHMAEDICK: About two thirds
22 of the way down, there's a paragraph that

1 starts with, "If the proposed National
2 Marketing Agreement were implemented ..."

3 JUDGE HILLSON: You said third
4 column but I think you might have meant second
5 column on my copy.

6 MS. LIGON: Yes, second column.

7 JUDGE HILLSON: Second column.

8 MS. SCHMAEDICK: Second column.

9 MS. LIGON: Yes.

10 MS. SCHMAEDICK: Excuse me.

11 MS. LIGON: I see that.

12 MS. SCHMAEDICK: Thank you for the
13 correction. Could you take a moment and read
14 the very last sentence of that paragraph.

15 (Witness reviewing document.)

16 MS. LIGON: Yes.

17 MS. SCHMAEDICK: In fact, I'll
18 just read it out loud so that its on the
19 record. It states, "These metrics would be
20 science-based, scaleable, and regionally
21 applicable in order to accommodate compliance
22 of varying size and types of operations."

1 Does that statement give you any
2 different understanding or further your
3 confidence in the intent of this proposal to
4 work with small businesses?

5 MS. LIGON: I underlined that
6 statement when I read through this proposal,
7 and I don't question the intent to work with
8 small businesses and small farmers. I think
9 if this statement -- if this marketing
10 agreement holds true to this statement, then
11 I think it will be beneficial most likely for
12 all consumers and all retailers selling leafy
13 greens. My concern, again, is just how the
14 national agreement will differ from the
15 California agreement which, in my
16 understanding, is not adequately addressing
17 scaleable and regionally applicable compliance
18 orders for small farms.

19 MS. SCHMAEDICK: That's your
20 belief of the California state program?

21 MS. LIGON: Yes.

22 MS. SCHMAEDICK: Those are all the

1 questions I have.

2 JUDGE HILLSON: Okay. Thank you
3 for testifying, Ms. Ligon. I will -- and you
4 may step down.

5 MS. LIGON: Thank you.

6 JUDGE HILLSON: According to what
7 I've been told, there's just one witness left.
8 Ms. Scott is the only other witness? There's
9 no one else to testify? Even though it's
10 12:10, I'd just as soon take a five-minute
11 break and then just come back and hear Ms.
12 Scott so we don't have to go out and come
13 back, if that makes more sense.

14 Let's take a five-minute break and
15 then Ms. Scott will testify.

16 (Lunch recess from 12:14 p.m.,
17 until 1:20 p.m.)

18

19

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21

22

1 AFTERNOON SESSION

2 (1:20 p.m.)

3 JUDGE HILLSON: Okay. We're back
4 on the record. It's 1:20 in the afternoon,
5 and the next witness we have is Ms. Scott. If
6 you'd please raise your right hand.
7 Whereupon,

8 VICKI SCOTT

9 having first been duly sworn, was called as a
10 witness and testified as follows; to wit:

11 JUDGE HILLSON: Could you please
12 state your name and then spell it for the
13 record.

14 MS. SCOTT: My name is Vicki
15 Scott, V-i-c-k-i, S-c-o-t-t.

16 JUDGE HILLSON: Okay. And I have
17 a written statement here that I have marked
18 Exhibit 102, and I presume you want to read
19 that statement?

20 MS. SCOTT: Yes, please.

21 JUDGE HILLSON: Go right ahead.

22 (Exhibit 102 was marked

1 for identification.)

2 TESTIMONY

3 MS. SCOTT: My name is Vicki Scott

4 and I am a participant in the Yuma Safe

5 Produce Council and the Council's designated

6 spokesperson for this National Leafy Greens

7 Marketing Agreement hearing. The Yuma Safe

8 Produce Council is a group of food safety

9 coordinators and managers employed by local

10 and regional producers and handlers of leafy

11 greens. We organized in November of 2007 in

12 response to the then recently formed Arizona

13 Leafy Green Marketing Agreement. The mission

14 of the Yuma Safe Produce Council is to enhance

15 food safety education in our community and

16 among our members by networking, increasing

17 public awareness through media outlets, and

18 maintaining a high understanding of current

19 and ongoing research.

20 The Yuma Safe Produce Council is

21 neutral on the establishment of a National

22 Leafy Green Marketing Agreement. As the

1 designated food safety representatives for our
2 employers, our primary job functions are to
3 develop and execute food safety programs that
4 are specific for our companies, implement food
5 safety directives from our customers, and
6 adhere to prescribed guidance such as the
7 "Commodity Specific Food Safety Guidelines for
8 the Production and Harvest of Lettuce and
9 Leafy Greens," more commonly referred to as
10 the California and Arizona Leafy Green
11 Metrics. We applaud the recently announced
12 cooperative initiative between USDA and FDA
13 designed to improve outreach efforts with key
14 agriculture and safe food stakeholders to
15 better share and exchange produce best
16 practices and ideas. Protecting the public's
17 health by providing safe quality produce is
18 our greatest concern.

19 We appreciate the opportunity to
20 comment today on the subject of research as it
21 appears in the proposed rules, Section 970.75,
22 Research and Promotion. The Yuma Safe Produce

1 Council recommends that the Research and
2 Promotion section be expanded to include
3 production research as allowed under the
4 Agricultural Marketing Agreement Act of 1937,
5 Section 1, part 8c(6)I. The term "food safety
6 research" may provide a clearer intent. Audit
7 metrics under Section 970.67 should be
8 developed with the benefit of science-based
9 research. A national-based marketing
10 agreement should recognize the great diversity
11 of growing regions and support any metrics
12 development with research that represents the
13 differences in water, environmental factors,
14 and local farming and work practices that
15 exist across the country. We recommend, at
16 a minimum, the following highlighted and
17 underlined language be inserted in Section
18 970.75.

19 970.75, Research and Promotion.

20 "The Committee, with the approval of the
21 Secretary, may establish or provide for the
22 establishment of" -- this is where the

1 highlighted and underlined language says "food
2 safety research" -- and it goes on to explain
3 the rest of the paragraph -- "marketing
4 research and development projects and/or
5 promotional activities, including paid
6 advertising, designed to assist, improve, or
7 promote the efficient adoption,
8 implementation, and marketplace acceptance of
9 the agreement and of leafy green vegetables or
10 products handled by signatory members. The
11 expenses of such projects shall be budgeted
12 and paid from funds collected pursuant to
13 Section 970.56."

14 The Yuma Safe Produce Council
15 would also like to comment in general on the
16 function of the zones and more specifically on
17 the eligibility for zone representation as
18 proposed in Section 970.41. The Yuma Safe
19 Produce Council has seen firsthand the value
20 of local collaboration and advocacy for food
21 safety. We have increased our knowledge of
22 food safety best practices through our monthly

1 interactions as a group and have outreached to
2 the public with food safety information
3 through local events and the media. The
4 Arizona LGMA has fostered a collaborative
5 atmosphere by holding meetings in the public
6 arena and the AZ LGMA Technical Subcommittee
7 has regularly held sessions designed to keep
8 producers and handlers well informed.

9 It is our opinion that the zones
10 as currently delineated do not favor
11 collaborative efforts due to geographic
12 separation and divergent climate and crop
13 production cycles. Although the proposed
14 agreement allows for subcommittee and advisory
15 board creation, it is silent with regards to
16 zone duties and responsibilities and any
17 potential administrative needs. We believe
18 there would be a great advantage in providing
19 for the elected zone committee members to meet
20 and outreach regularly with the membership of
21 the zones they represent. As currently
22 written, this is not a requirement and no

1 funding provisions have been made for this
2 type of interaction. The Yuma Safe Produce
3 Council would be most interested in hearing
4 the intentions of the National LGMA drafters
5 on this topic or discussing a solution with
6 the Proponent group, the USDA, and other
7 interested parties.

8 Furthermore, in order to foster
9 great cooperation and provide for better
10 representation, we offer the following
11 recommendation with regard to Section 970.41,
12 Eligibility. In addition to the language in
13 paragraph (a), we suggest that each producer
14 or handler member of the Committee and their
15 alternate member shall be a legal resident of
16 the zone for which they are selected. With
17 the inserted language paragraph (a) of the
18 section might read:

19 970.41, Eligibility. "Each
20 producer or handler member of the Committee
21 and their alternate member shall be at the
22 time of his or her selection and throughout

1 his or her term of office a producer or
2 handler or an officer or employee of a
3 producer or handler" -- and here is the
4 highlighted and underlined text -- "and a
5 legal resident in the zone for which
6 selected."

7 This concludes my remarks. The
8 Yuma Safe Produce Council would like to
9 express our thanks for your time and kind
10 attention to this testimony.

11 Respectfully, Yours Truly.

12 JUDGE HILLSON: Thank you, Ms.
13 Scott. I'll receive your written testimony
14 into evidence as Exhibit 102.

15 (Exhibit 102 was
16 received.)

17 JUDGE HILLSON: And I will -- I'll
18 ask the USDA panel if they have any questions
19 of you. Ms. Schmaedick.

20 MS. SCHMAEDICK: Melissa
21 Schmaedick, USDA. Good afternoon and thank
22 you, Ms. Scott, for your testimony.

1 MS. SCOTT: Good afternoon. Just
2 a couple of questions. On the first page,
3 you're recommending the insertion of "food
4 safety research" specifically into the
5 proposed 970.75?

6 MS. SCOTT: Yes.

7 MS. SCHMAEDICK: Can you give some
8 examples of what type of food safety research
9 you might -- what type of projects might you
10 consider?

11 MS. SCOTT: Well, I don't think
12 that our group really considered a list of
13 projects. I know that Shelly Tunis from Yuma
14 Fresh Vegetable Association testified
15 yesterday, and in their suggested language it
16 had a list of what those activities might be.
17 And I believe that it was much better written
18 than mine. And I did have an opportunity to
19 read her list -- I don't recall it now -- and
20 I didn't actually hear her testimony, but I do
21 believe that was a more complete list, and we
22 would concur with her testimony yesterday.

1 MS. SCHMAEDICK: Would any
2 research, in particular food safety research,
3 conducted under the proposed program, if it
4 were implemented, would the results of that
5 research be beneficial for large and small
6 business entities?

7 MS. SCOTT: I would hope so. As
8 Dr. Fonseca and as it Ms. Russell testified
9 yesterday, I think they described some of the
10 potential issues with research regarding
11 ownership and how sometimes that isn't often
12 able to share that in an arena that we would
13 need to establish metrics. So research that
14 we would contribute to or help fund would
15 certainly assure that we would obtain those
16 results and we could also direct it into the
17 areas where it was most needed.

18 MS. SCHMAEDICK: Would it allow
19 for research to be conducted in situations
20 where otherwise funding may not be available
21 for that research?

22 MS. SCOTT: I would think that

1 would be exactly an example of where it might
2 be used.

3 MS. SCHMAEDICK: The other
4 question I had for you is on your proposed
5 insertion of the term "legal resident" into
6 the eligibility requirement, can you explain
7 why you are recommending that change in more
8 detail?

9 MS. SCOTT: It's my understanding
10 that some of the opposition has some concerns
11 about the zonal representation in that it
12 might favor California corporations all the
13 way across the United States because of their
14 presence in areas that produce and ship large
15 amounts of leafy greens. So we are suggesting
16 this as an alternative to make sure that the
17 elected members of those zones are more
18 closely tied to the zone that they are elected
19 to represent by actually residing there rather
20 than just being assigned as the corporate
21 representative of a certain zone, even though
22 their permanent residence may be in California

1 or Arizona or any of the other -- or -- those
2 are the main two large handling areas.

3 MS. SCHMAEDICK: Okay. And based
4 on your understanding of the term "zones," do
5 zones describe regions for representation on
6 the Administrative Committee, or would the
7 term "zones" define how metrics are developed?

8 MS. SCOTT: As I understand it in
9 the document, the zones are representative of
10 how people would be elected to the Committee.

11 MS. SCHMAEDICK: Thank you. Those
12 are all the questions I have.

13 JUDGE HILLSON: Any other
14 questions from the USDA panel? I'm not seeing
15 -- oh, now I am.

16 MS. CARTER: I do.

17 JUDGE HILLSON: Ms. Carter.

18 MS. CARTER: Good afternoon.

19 Antoinette Carter with USDA. Just wanted to
20 follow up on the question regarding the
21 proposed modification to Section 41,
22 Eligibility. Could you explain how you

1 envision that modification working,
2 particularly when you have say a handler or a
3 grower that's operating in several different
4 states, might have employees that are, you
5 know, located within the various states. How
6 do you envision that working?

7 MS. SCOTT: Well, I think the one
8 example that I know of firsthand is with
9 regards to the California members of the
10 Arizona Leafy Greens Marketing Agreement. The
11 members of the Arizona LGMA Committee, four of
12 the five actually are residents of the state,
13 even though they may be employed with a
14 California handler. So there are ways that,
15 you know, those employees may reside in that
16 community or they may live there year-round in
17 support of what their company does in that
18 area.

19 And from a Safe Produce Council
20 aspect, we've seen that your ability to react
21 locally and interreact locally is strongly
22 tied to how much you trust the people and

1 whether or not they're accessible to you to
2 share your concerns and work through problems.

3 So I think it's just a suggestion
4 of an alternative.

5 MS. CARTER: Okay. All right.
6 Thank you.

7 JUDGE HILLSON: Anything else from
8 the USDA panel? Any questions from the
9 Proponents? Go ahead, Mr. Resnick.

10 MR. RESNICK: Thank you, Your
11 Honor. Jason Resnick, Western Growers. Good
12 afternoon. Thank you for your --

13 MS. SCOTT: Good afternoon.

14 MR. RESNICK: -- testimony, Ms.
15 Scott. Just a couple of quick questions. How
16 many members are there of the Yuma Safe
17 Produce Council?

18 MS. SCOTT: We don't have paid
19 membership dues. We have about 15 to 20
20 people that participate on a regular basis.

21 MR. RESNICK: Is there any formal
22 organization of the Council?

1 MS. SCOTT: No, there's not and we
2 like it that way.

3 MR. RESNICK: Is it an ad hoc
4 group of people?

5 MS. SCOTT: It is.

6 MR. RESNICK: And the individuals
7 that make up the Yuma Safe Produce Council are
8 employees of growers and handlers?

9 MS. SCOTT: Yes, they are.

10 MR. RESNICK: And what percentage
11 of those are represented by the Arizona LGMA?

12 MS. SCOTT: How do you mean?

13 MR. RESNICK: Are they signatories
14 or otherwise produce for signatories to the
15 Arizona LGMA?

16 MS. SCOTT: Just without having my
17 list here, I would say that probably about
18 seven or eight are actually employed by
19 handlers and I think the rest are probably
20 grower employees.

21 MR. RESNICK: And of those firms
22 that are represented by those employees, are

1 the majority of those firms either signatories
2 of the Arizona LGMA or grow for signatories of
3 the Arizona LGMA?

4 MS. SCOTT: I would say that
5 everybody that participates either grows for
6 a signatory or is an employee of a handler.

7 MR. RESNICK: And do you have any
8 official capacity within the Arizona LGMA?

9 MS. SCOTT: Yes, I do.

10 MR. RESNICK: What is that?

11 MS. SCOTT: I'm one of the five
12 members of the Marketing Committee and also
13 the Technical Subcommittee chair.

14 MR. RESNICK: Okay. And as you
15 testify today, you are not speaking on behalf
16 of the Arizona LGMA?

17 MS. SCOTT: I am not and that's
18 why I didn't talk about that in my creds.

19 MR. RESNICK: Okay. And you're
20 not testifying on behalf of your employer?

21 MS. SCOTT: No, I'm not.

22 MR. RESNICK: Okay. Did the

1 Council poll their employers to see if the
2 employers -- the executive management teams
3 agree with the position taken by the Yuma Safe
4 Produce Council?

5 MS. SCOTT: We had a meeting and
6 we discussed what we were going to consider
7 for testimony. They -- the group itself has
8 seen two drafts. I cannot say whether or not
9 they gained approval or a signoff from their
10 supervisors.

11 MR. RESNICK: And the -- strike
12 that. Did your Council take a vote on whether
13 to support or have a neutral position or
14 oppose the National LGMA?

15 MS. SCOTT: Yes, we did.

16 MR. RESNICK: Okay. And obviously
17 the vote was to take a neutral position?

18 MS. SCOTT: Yes, it was.

19 MR. RESNICK: Thank you.

20 MS. SCOTT: The people that were
21 present, that was our choice.

22 MR. RESNICK: And if the drafters

1 in the Proponent group for the National LGMA
2 were to consider the recommendations you've
3 made, vote on them, and take a position, would
4 the Yuma Safe Produce Council respect that
5 position?

6 MS. SCOTT: Without asking them, I
7 don't know. I would think that they would be
8 honored that you would consider our
9 suggestions.

10 MR. RESNICK: Okay. Thank you. I
11 have no further questions.

12 JUDGE HILLSON: Any further
13 questions for Ms. Scott? Okay. Thank you,
14 Ms. Scott.

15 MS. SCOTT: Thank you.

16 JUDGE HILLSON: You may step down.
17 I've heard a rumor that the USDA has a witness
18 to call.

19 MR. HILL: That is true. We'd
20 like to call Anthony Souza to testify.

21 JUDGE HILLSON: I've marked Mr.
22 Souza's written statement as Exhibit 103, and

1 I think I have four attachments. I marked one
2 that was with a cover sheet that says "AMS
3 Auditor Criteria" as Exhibit 104. I mark a
4 Memorandum of Understanding between the
5 Agricultural Marketing Service and the Food
6 and Drug Administration as Exhibit 105. A
7 document that says "Food and Drug
8 Administration Compliance Policy Guides" on
9 the MOU between Department of Agriculture and
10 HEW Food and Drug Administration that's marked
11 as Exhibit 106. And, finally, as Exhibit 107
12 I have an MOU between AMS and the Food and
13 Drug Administration. It looks like it's
14 August 1973. So those have all been marked.

15 (Exhibits 103, 104, 105,
16 106, and 107 were marked
17 for identification.)

18 JUDGE HILLSON: And, Mr. Souza, if
19 you'd please raise your right hand.
20 Whereupon,

21 ANTHONY SOUZA
22 having first been duly sworn, was called as a

1 witness and testified as follows; to wit:

2 JUDGE HILLSON: Could you state
3 your name and spell it for the record.

4 MR. SOUZA: Anthony Souza,
5 A-n-t-h-o-n-y, S-o-u-z-a.

6 JUDGE HILLSON: Okay. And you
7 want to read the statement that I've marked as
8 Exhibit 103?

9 MR. SOUZA: Yes, I do.

10 JUDGE HILLSON: Go right ahead.

11 MR. HILL: Before you start, can I
12 ask a couple of questions?

13 JUDGE HILLSON: Oh, you want
14 preliminary questions?

15 MR. HILL: Yes.

16 JUDGE HILLSON: Sure. Go ahead.

17 MR. HILL: First, did you prepare
18 this document?

19 MR. SOUZA: Yes.

20 MR. HILL: And this document, is
21 it true to the best of your knowledge?

22 MR. SOUZA: Yes, it is.

1 MR. HILL: Okay. And are you
2 neutral in this current Leafy Greens Agreement
3 Proposal?

4 MR. SOUZA: Yes. USDA's position
5 is neutral.

6 MR. HILL: Right. And so the
7 information that you're about to provide, it's
8 for the use of all parties involved; correct?

9 MR. SOUZA: Yes, sir.

10 MR. HILL: And you're not
11 taking -- you're not intending to take any
12 side, proponent or opponent, in this proposal?

13 MR. SOUZA: As stated, USDA's
14 position is neutral in this.

15 MR. HILL: You can continue.

16 TESTIMONY

17 MR. SOUZA: Good day, ladies and
18 gentlemen of the leafy green industry,
19 interested individuals, and government
20 officials.

21 As stated, my name is Anthony
22 Souza. My address is 3355 Myrtle Avenue,

1 Suite 240, North Highlands, California. I
2 serve as one of eight Federal Program Managers
3 within the USDA, Agricultural Marketing
4 Service, Fruit and Vegetable Program. I have
5 21 years of experience as a fruit and
6 vegetable inspector with a Bachelor's degree
7 in ag. education. The primary responsibility
8 of a Federal Program Manager is to ensure
9 uniformity and integrity in the inspection and
10 auditing service performed by state personnel.
11 I am in the western region, which includes
12 Arizona, California, Hawaii, Nevada, and Utah.
13 I have counterparts in other territories of
14 the United States that have similar
15 responsibilities.

16 The purpose of this testimony is
17 to describe USDA's experience and expertise in
18 providing impartial inspection and audit
19 services that verify Food and Drug
20 Administration guidelines and regulations for
21 good agricultural practices, good handling
22 practices, and current good manufacturing

1 practices.

2 AMS Services. The mission of the
3 Agricultural Marketing Service, referred to as
4 AMS, is to facilitate the strategic marketing
5 of agricultural product in the domestic and
6 international marketplace throughout the use
7 or market news information, marketing orders
8 and agreements, research and promotion
9 activities, commodity purchases for school
10 lunches, and other government feeding
11 programs, and standardization, training,
12 auditing, and inspection activities.

13 AMS Fruit and Vegetable Program
14 has over 90 years of experience providing
15 certification and verification services for
16 fruits, vegetables, and other specialty
17 products. Inspection services include product
18 sampling and analysis according to federal or
19 state grades or specification, marketing order
20 requirements, import requirements, industry
21 grades, or contract specifications. Auditing
22 services include verification programs for

1 quality assurance to marketing order
2 requirements, the preservation of value-added
3 commodities, and good agricultural and
4 handling practices, and Hazardous Analysis
5 Critical Control Point, referred to as HACCP,
6 plans based on industry specifications or
7 marketing order requirements.

8 Inspection and audit services are
9 performed by a combination of federal and
10 state personnel. Through the use of
11 cooperative agreements, AMS trains and
12 authorize state Department of Agriculture
13 employees to perform inspection and auditing
14 services. This partnership with the state
15 Department of Agriculture allows AMS to
16 provide inspection and auditing services at or
17 near specialty crop production areas and major
18 terminal market/wholesale distribution centers
19 across the country. Fruit and Vegetable
20 Programs have 2,650 federal and state
21 personnel who provide inspection and audit
22 services. Currently, there are approximately

1 250 auditors and 150 auditors-in-training.

2 In the course of providing
3 inspection and audit services, we are on the
4 farms and in packinghouses and processing
5 facilities. The Food and Drug Administration,
6 referred to as FDA, recognizes that our
7 presence at these operations help to ensure
8 adherence with food safety guidelines and
9 regulations, contributes to the protection of
10 consumers, and aids FDA in enforcement of
11 pertinent regulations. A memorandum of
12 understanding between the FDA and AMS defines
13 each agency's responsibility related to
14 inspections and standardization activities for
15 products. I submitted a few of those as
16 examples with my testimony. We have
17 inspection personnel in fruit and vegetable
18 processing plants across the country who help
19 assure that these processing facilities adhere
20 to GMPs. All processed products must meet the
21 requirements of the Food, Drug and Cosmetic
22 Act before a USDA grade can be assigned.

1 Inspectors perform tests to assure that the
2 products do not exceed FDA defect action
3 levels. AMS personnel will report to FDA if
4 product or practices is observed which have a
5 reasonable probability of causing serious
6 adverse health consequences or death to humans
7 or animals. AMS personnel, specifically in
8 the Processed Products Branch, are authorized
9 to tag product to be held for FDA to take
10 action.

11 From this point forward, I'm going
12 to speak specifically about AMS's audit based
13 service for good agricultural practices (GAP),
14 good handling practices (GHP), current good
15 manufacturing practices (CGMP), and related
16 commodity specific programs.

17 An important component of third
18 party auditing is the retail and food service,
19 which is increasingly demanding that its
20 suppliers provide verification that they are
21 conforming to recognized good agricultural
22 practices, good handling practices, or good

1 manufacturing practices.

2 At industry's request, AMS has
3 incorporated food safety elements into several
4 of our programs and has established programs
5 such as Quality Through Verification and the
6 GAP/GHP Audit Verification Program to provide
7 independent verification that growers and
8 handlers are following FDA guidelines and
9 commodity specific based practices.

10 AMS actively communicates with
11 retailers and food service companies to
12 provide information on AMS audit-based
13 programs. The results of these contacts are
14 increasingly favorable, as many buyer groups
15 have recognized that AMS audit programs offer
16 a viable solution in verifying their suppliers
17 have implemented GAPs, GHPs, and GMPs.
18 Retailers have requested our assistance when
19 they implement GAP requirements for their buy
20 local programs which are made up primarily of
21 small to medium-size growers. We work with
22 retailers and local cooperative extension

1 agents and provide training to these growers
2 on an overview of the role that auditing plays
3 in a food safety program.

4 The audit programs were developed
5 with the cooperation and assistance of USDA
6 Agricultural Research Service, State
7 Department of Agriculture, and the National
8 Good Agricultural Practice Program, which is
9 a group of academic and scientific faculty
10 from across the United States. These groups,
11 in addition to others, continue to provide
12 scientific expertise as the GAP, GHP, and GMP
13 programs evolve when newer science formulates
14 specific best practices. Additionally, AMS
15 works closely with FDA in incorporating any
16 final FDA commodity specific guidelines into
17 our audit program, such as when the draft
18 guidance recently released for leafy greens,
19 melons, and tomatoes is issued in "final."

20 Since the beginning of the GAP and
21 GHP Audit Verification Program, over 4,000 GAP
22 and GHP audits of 100 different commodities

1 have been completed in 45 states, Puerto Rico,
2 Washington, D.C., and Canada. As the demands
3 for verification of GAP, GHP, and GMP have
4 increased, commodity groups have approached
5 AMS for assistance with the development of
6 commodity specification audit programs. In
7 2008, a commodity specific program for
8 tomatoes was implemented for the California
9 Tomato Farmers Cooperative, as well as a
10 commodity specific program for mushrooms.
11 These programs are used by producers of both
12 commodities. We are actively assisting the
13 citrus, potato, and apple commodity groups as
14 they develop commodity specific best practices
15 and request our assistance to verify
16 conformance with commodity specific best
17 practices.

18 AMS is involved with the
19 California and Arizona Leafy Green Marketing
20 Agreement. Through our cooperative agreement
21 with these two states, AMS provides training
22 and oversight of the state personnel

1 conducting the audits. Both state Department
2 of Agriculture and state marketing agreement
3 boards requested that AMS provide oversight
4 and technical assistance to their programs.
5 As a Federal Program Manager for these two
6 states, I work very closely with the
7 California Department of Food and Agriculture
8 staff on the auditing aspect of this program
9 and attend the board meetings and technical
10 review meetings to share AMS policy on matters
11 under our oversight.

12 Audits. AMS Industry Service
13 Audit and Accreditation Program (ISAAP) is an
14 internal quality management system that
15 defines how AMS develops, manages, and
16 provides audit and accreditation programs.
17 AMS audit programs follow general recognized
18 International Organization for
19 Standardization, referred to as ISO, audit
20 principles and activities.

21 The audit process begins with a
22 farm or facility representative requesting a

1 voluntary GAP, GHP, or GMP audit. AMS
2 requires that they sign an agreement for
3 participation in the audit program. This
4 agreement grants permission for the auditor to
5 have access to the farm and/or facility for
6 the purpose of conducting the initial audit,
7 any unannounced audit, and follow-up audits.
8 Audits are scheduled for a time when the farm
9 or facility are in production. For
10 clarification, the initial audit, which the
11 firm knows the date and time of the audit, is
12 the first audit that is intended to verify
13 adherence to the program's requirement. The
14 unannounced audit may be one of -- one or
15 more. This audit is scheduled but not
16 announced to the company ahead of time. It's
17 intended to verify continued ongoing adherence
18 to the program requirements. And the follow-
19 up audits, also unannounced, are to verify
20 that any corrective actions have been
21 implemented. The participation agreement also
22 requires that an applicant agrees to maintain

1 all records required by the audit program,
2 including but not limited to a food safety
3 manual, all records are required by the firm's
4 food safety manual, water test results, and
5 employee training records. These records are
6 required to be available to AMS auditors for
7 review.

8 The audit begins with an opening
9 meeting. The auditor explains the audit
10 activities to the farm or facility
11 representative. The audit consists of a
12 physical visit to the farm and/or facility
13 which involves a review of records and
14 documents, interviews of employees,
15 observations of practices, and a closing
16 meeting. An audit checklist is used by the
17 auditor to verify that the farm or facility is
18 adhering to GAPs, GHPs, and GMPs.

19 During the closing meeting, the
20 auditor provides the company representative
21 with a copy of the audit report and discusses
22 the results of the audit and any non-

1 conformities found. We have established
2 procedures for the resolution of complaints,
3 appeals, and disputes received from the
4 grower, handler, or other parties about the
5 verification audit.

6 If at any time during an audit the
7 auditor observes an immediate food safety
8 risk, it is our obligation as a federal agency
9 to subject to the public trust to report an
10 immediate food safety risk to the appropriate
11 public health authorities and/or FDA. The
12 audit results are valid for one year from the
13 date of the initial audit provided that at
14 least a passing score is achieved on both the
15 initial and any unannounced audits. A
16 company's information will be posted on the
17 USDA website if any and all unannounced audits
18 show satisfactory adherence to the program.
19 If the medium passing score is not achieved,
20 the company's information will be removed from
21 the website until a follow-up audit is
22 conducted by AMS verifying the effective

1 corrective actions have been taken and the
2 company attains the minimum score on all
3 appropriate scopes of the audit. AMS retains
4 audit reports for a period of three years.

5 Auditor training and oversight.
6 AMS auditor qualifications are modeled after
7 internationally-recognized auditor competence
8 and auditing principles. To be qualified as
9 an AMS auditor, federal and state inspectors
10 must successfully meet the auditor
11 qualifications and complete auditor training
12 requirements. AMS requirements for auditor
13 independence, integrity, objectivity, and the
14 auditor qualifications and training
15 requirements assure the reliability of the
16 auditing staff. AMS auditors are held to the
17 highest ethical standards and the strict
18 conflict of interest policy of government
19 employees.

20 The auditor qualification
21 criterias are reviewed on a regular basis, and
22 if it is determined that additional training

1 requirements are needed, the auditor criteria
2 is revised. Consistency between the auditor
3 is a critical component of a third party
4 audit. AMS auditor criteria establish auditor
5 qualifications to ensure that the audit
6 programs are provided professionally and
7 uniformly.

8 AMS qualifications and
9 requirements must be met to become an AMS
10 qualified auditor. I have attached a copy of
11 AMS ISAAP Auditor Criteria for the record and
12 everybody should have a copy of that as well.

13 First, a potential auditor
14 candidate must meet the educational and
15 agricultural work experience requirements to
16 be recommended by a supervisor as a viable
17 candidate for auditor-in-training. The
18 candidate must be open-minded, diplomatic,
19 observant, perceptive, tenacious, and
20 decisive, and demonstrate strong writing and
21 oral communication skills.

22 The second step is for the

auditor-in-training to successfully complete the AMS approved fundamental training courses which are: ISO 9011 Guidelines for quality and/or environmental management systems, Section 4, Principles of Auditing, and Section 6, Audit Activities, a Process-Based Audit course, and a Specific Audit Program training course, GAP, GHP, GMP, HACCP or Better Process Control School. Training is provided by a combination of AMS trained specialists, state food safety regulatory officials, food safety experts from academia, and FDA Office of Regulatory Affairs University online courses.

The next step is for the auditor-in-training to participate in a minimum of three audits, acting as the team leader on two of them, under the supervision of an evaluator. The evaluator is a Federal Program Manager, Audit Program Manager, supervisor, or senior auditor who is an AMS qualified auditor and has completed ISO 9011 Lead Auditor training.

1 An auditor-in-training is not
2 permitted to perform audits independently
3 without supervision until they can demonstrate
4 the ability to manage and coordinate audits,
5 has received a satisfying rating on an
6 evaluation, and has been determined to be
7 qualified by a supervisor.

8 To maintain the status of an AMS
9 qualified auditor, they must maintain a
10 satisfactory rating on their annual Auditor
11 Performance Evaluation, complete annual ethics
12 and program specific refresher training, and
13 participate in a minimum of two complete
14 audits each year as a team leader. Qualified
15 auditors must also complete 80 hours of
16 continual professional development every three
17 years. The requirement ensures that the
18 auditor maintains their auditing knowledge and
19 skills. The professional development training
20 may include online college courses, FDA
21 training courses, extension presentations, and
22 attendance at workshops, conferences, and

1 seminars related to auditing services.

2 AMS audit criteria recommends,
3 although does not require, that auditors
4 become certified as an America Society for
5 Quality in the appropriate auditing field. A
6 number of our auditors are American Society
7 for Quality certified quality auditors and/or
8 certified HACCP auditors.

9 AMS auditors are located in
10 approximately 75 field offices around the
11 country, primarily in specialty crop
12 production regions. We have reviewed which of
13 the areas have the highest leafy green
14 production in the United States and have
15 determined that we have adequate staffing in
16 those areas to handle the potential increased
17 demand for auditors if the proposed National
18 Leafy Green Marketing Agreement is
19 implemented. California and Arizona, which
20 account for approximately 80 percent of the
21 U.S. leafy green production, uses six to ten
22 state auditors for verification audits. AMS

1 has the capability to train additional federal
2 and state personnel as the requests for audits
3 increase.

4 The proposed National Leafy Green
5 Marketing Agreement states that "no signatory
6 handlers subject to the provision of this
7 agreement shall receive leafy green vegetables
8 produced in foreign countries that have not
9 been subjected to GAP verification by a USDA
10 licensed inspector." According to data from
11 USDA National Agricultural Statistics Service,
12 the majority of the leafy greens imported into
13 the United States come from Mexico, primarily
14 from states along the U.S. border, and two
15 provinces in Canada, Quebec and Ontario. AMS
16 does not foresee any difficulty in providing
17 services in these two areas as we have offices
18 located in close proximity.

19 Audit fees. The Agricultural
20 Marketing Act of 1946, which is one authority
21 under the Agricultural Marketing Service
22 operates, requires that services are provided

1 on a cost recovery basis. The fees for all
2 inspections and audit activities are
3 established to cover the costs in operating
4 the program. The current fees for audit based
5 services is \$92 per hour per auditor.

6 Domestically, this rate includes all travel
7 expenses. Internationally, the fee is set at
8 \$92 per auditor -- \$92 per hour per auditor
9 plus all travel expenses. In accordance with
10 the cooperative agreements, our state
11 cooperators can set their fees to recover the
12 cost of providing services, so fees for some
13 audit services can vary slightly from state to
14 state.

15 In conclusion, AMS has over a 90-
16 year history of providing impartial,
17 efficient, uniform certification and
18 verification services to the produce industry.
19 Our personnel have experience in fruit and
20 vegetable and specialty crop production and
21 handling and understand the complexity of the
22 agricultural production and processing

1 practices. We are committed to ensure that
2 AMS auditors are qualified and well trained to
3 ensure the consistency of auditors. Our
4 nationwide availability of qualified
5 independent auditors ensure that we can
6 provide service across the United States as
7 well as internationally. AMS is prepared to
8 provide impartial, consistent audit
9 verification services so that the industry can
10 demonstrate adherence to the best practices
11 that FDA, industry, and the scientific
12 community has developed.

13 Thank you.

14 JUDGE HILLSON: Mr. Hill, do you
15 have any further direct questions of Mr.
16 Souza?

17 MR. HILL: No questions.

18 JUDGE HILLSON: Okay. I'm going
19 to receive into evidence Mr. Souza's statement
20 as Exhibit 103 and as attachments as Exhibit
21 104 through 107.

22 (Exhibits 103, 104, 105,

1 106, and 107 were
2 received.)

3 JUDGE HILLSON: And I will ask --
4 actually, I will ask the Proponents' panel
5 first if they have any questions of Mr. Souza?
6 Mr. Giclas.

7 MR. GICLAS: Thank you, Your
8 Honor. Hank Giclas, Western Growers. Mr.
9 Souza, thank you for your testimony this
10 afternoon. I don't have a lot of questions.
11 There's a lot to absorb here. But I do have
12 a couple.

13 On the second page of your
14 testimony, I think the last paragraph, you
15 talked about AMS actively communicating with
16 retailers and food service companies to
17 provide information on audit-based programs,
18 and the result of those contacts are
19 increasingly favorable, and that buyer groups
20 are recognizing AMS audit programs.

21 Can I ask you to -- I mean, that's
22 been one of the kind of points of discussion

1 here. Can I ask you to expand on that a
2 little bit? I mean, what kind of contact do
3 you have? Is it -- is it formal, is it
4 informal? You know, what kind of acceptance
5 are you seeing? What's the trend? You know,
6 those kind of -- can I just get you to expand
7 on that a little bit?

8 MR. SOUZA: Sure. Both formal and
9 informal. We've asked to set up meetings with
10 some major retailers, go in, explain what our
11 audit program is all about, get feedback from
12 them, ask what difficulties or what issues did
13 they have in accepting our program, explaining
14 our program, and -- so we do it both on a
15 formal and informal way.

16 We have set up meetings with both
17 smaller retailers and larger retailers to
18 explain our program and to ask for acceptance
19 of our program.

20 MR. GICLAS: And what -- you say
21 the trend is increasing. I mean, what's the,
22 you know, evidence or examples of that? Are

1 you seeing, you know, more and more retailers
2 or more food service or is it a combination?
3 I mean, are people coming to USDA/AMS to
4 provide GAP audits, you know, on behalf of
5 their operations, or are they -- you know, if
6 a GAP audit is done by a supplier, are they
7 just willing to accept it?

8 MR. SOUZA: I believe the latter.
9 If GAP audits are done by a supplier, they
10 will accept it. We are working on putting up
11 -- on our website which companies accept or
12 will accept a USDA audit as meeting good
13 agricultural practices, so we are working as
14 we find more acceptance from different groups
15 on putting together a list so that customers
16 would know whether or not different box stores
17 are different, small retailers would accept
18 those audits.

19 MR. GICLAS: Do you have a feel
20 for how many retailers or box stores or food
21 service suppliers accept GAP audits?

22 MR. SOUZA: No. I don't have that

1 information.

2 MR. GICLAS: Okay. On -- on the
3 fourth page of your testimony, in the middle
4 of the first section, you talk about, "During
5 the closing meeting of an audit, an auditor
6 provides the company representative with a
7 copy of the audit report and the results of
8 the audit and any non-conformities."

9 I'm interested in the next line.

10 "There are established procedures for
11 resolution of complaints, appeals, and
12 disputes received from the grower, handler, or
13 other parties about the verification audits."

14 Can you describe those procedures?

15 MR. SOUZA: Yes. We've got a --
16 we have a directive out which outlines that
17 and which I could submit. It basically -- if
18 an auditee is in disagreement with that, they
19 can base a formal complaint through the
20 National Office and then it works down.
21 There's a review board which would be set up
22 within the branch that would review the

1 process, the complaint process established by
2 the branch, and work that at the national
3 level.

4 MR. GICLAS: Is there any
5 opportunity if, for example, they're not
6 satisfied with the appeal process at or within
7 USDA that they appeal further?

8 MR. SOUZA: No. There would be no
9 process for that.

10 MR. GICLAS: Okay. Your position
11 and I know your experience gives you
12 familiarity with third party audit
13 requirements. I was impressed by the AMS, you
14 know, auditor qualifications. I'm curious if,
15 you know, you would be willing to compare an
16 AMS auditor to a third party auditor in terms
17 of, you know, qualifications, continuing
18 education, those types of --

19 MR. SOUZA: I would not have the
20 expertise to do that.

21 MR. GICLAS: Okay. I guess my
22 last question is on the last page of your

1 testimony, you talk about doing audits in
2 foreign countries and you have the capacity to
3 do that. Have you -- does AMS have experience
4 in auditing in foreign countries and, you
5 know, what's the relative -- you know, the
6 relative acceptance, if you will, on the part
7 of a foreign government for a USDA auditor to
8 come into a country and perform an audit on
9 it? I mean, how does that work?

10 MR. SOUZA: I would not be able to
11 answer that question. That would have to
12 be -- I know that the Fresh Products Branch
13 has not done any audits outside the United
14 States, but I am aware of our sister branch,
15 the Processed Products Branch, has conducted
16 audits outside the United States.

17 MR. GICLAS: And those are the
18 audits in Canada that you referred to?

19 MR. SOUZA: Yes.

20 MR. GICLAS: And do you know if
21 Processed Products has done any audits in
22 Mexico?

1 MR. SOUZA: I'm not aware of that.

2 MR. GICLAS: Okay. All right.

3 That's all the questions I had.

4 JUDGE HILLSON: Mr. Horsfall.

5 MR. HORSFALL: Thank you, Your
6 Honor. Scott Horsfall with the LGMA,
7 California LGMA. Mr. Souza, thank you for
8 your testimony. You talked about the cost
9 structure of the AMS audits. Would you expect
10 those costs to remain consistent under a
11 National LGMA program which may have a
12 somewhat different audit structure and
13 checklist?

14 MR. SOUZA: That's really hard to
15 speculate on that, the reason being we do have
16 cooperative agreements with different states.
17 And within the cooperative agreements, it
18 allows for a cost recovery from those states.
19 USDA, we -- our minimum -- USDA would be
20 charging the \$92 per hour on that all-
21 inclusive portal. If the states felt that
22 they had to have a higher rate and could

1 justify it, then we would review that.

2 MR. HORSFALL: But the USDA
3 portion would be consistent?

4 MR. SOUZA: Yes.

5 MR. HORSFALL: Thank you.

6 JUDGE HILLSON: Mr. Resnick.

7 MR. RESNICK: Thank you. Jason
8 Resnick. Just a request. Mr. Souza mentioned
9 the appeal process document that could be
10 incorporated into the record and we would just
11 request that that document be incorporated
12 into the record at a future hearing.

13 MR. SOUZA: I have that now. I
14 could go ahead and --

15 MR. RESNICK: Or here.

16 MR. SOUZA: May I?

17 JUDGE HILLSON: You may.

18 MR. RESNICK: Thank you.

19 JUDGE HILLSON: So you have a copy
20 to give me that I can mark then?

21 MR. SOUZA: Yes.

22 JUDGE HILLSON: Okay. Might as

1 well go off the record for a minute.

2 (Off the record briefly.)

3 JUDGE HILLSON: Back on the
4 record. Why don't you say that again, Mr.
5 Souza.

6 MR. SOUZA: I do just have one
7 copy of it and it is Fresh Products Branch
8 Directive 703 from August 4th, 2008.

9 JUDGE HILLSON: Well, do you want
10 me to mark it and put it in the record as
11 evidence now?

12 MR. SOUZA: Sure.

13 JUDGE HILLSON: Because,
14 otherwise, it could wait till next week or
15 whatever. I'm going to mark it as -- document
16 just described by Mr. Souza I'm going to mark
17 it as Exhibit 108 and I will receive it into
18 evidence.

19 (Exhibit 108 was marked
20 for identification and
21 received.)

22 JUDGE HILLSON: Did you have any

1 other questions? Mr. Giclas again.

2 MR. GICLAS: Yeah. Hank Giclas.

3 I guess I do have another question or maybe
4 another couple. Has AMS contemplated the
5 recognition, the accreditation -- I don't know
6 what the right term of art to use would be --
7 of third party auditors in carrying out any of
8 these, you know, verification or inspections?

9 MR. SOUZA: That would be a
10 question for -- at the administrative level.
11 I would not be able to answer that question.

12 MR. GICLAS: The other question I
13 was thinking about also was there's a
14 memorandum of understanding between FDA and
15 AMS here. This memorandum of understanding is
16 currently in force; is that correct?

17 MR. SOUZA: I provided those as
18 examples, but there are memorandum -- the one
19 on defect action levels, yes, it's currently
20 in effect and I believe the others are, too.

21 MR. RESNICK: Are you referring to
22 Exhibit --

1 JUDGE HILLSON: Just to note,
2 there's more than one MOU in the package you
3 gave me.

4 MR. SOUZA: Correct.

5 MR. RESNICK: Okay. For the
6 record, it's Exhibit 105.

7 MR. GICLAS: I don't have any
8 other questions.

9 JUDGE HILLSON: Anyone else have
10 any other questions? Do we have any redirect
11 from the USDA panel?

12 MR. HILL: No, Your Honor.

13 JUDGE HILLSON: Okay. Thank you,
14 Mr. Souza. You may step down. Oh, I'm sorry.
15 Well, you may not step down.

16 MS. SCOTT: Sorry.

17 JUDGE HILLSON: Please say who you
18 are again, please.

19 MS. SCOTT: Vicki Scott with the
20 Yuma Safe Produce Council. Mr. Souza, with
21 regard to Section 970.67, paragraph (d) --
22 it's off again? I thought she just turned it

1 on. Okay.

2 We'll start all over again. With
3 regards to Section 970.67 in the proposed
4 document, paragraph (d) where it talks about
5 "Audit metrics may be developed and
6 recommended to accommodate differences in
7 production and handling environments of
8 different regions and different leafy green
9 vegetable products," do you have any examples
10 of that that you could share with us where you
11 have different audit metrics in the current
12 AMS GAP program?

13 MR. SOUZA: We do have an audit
14 checklist that we do use under the current
15 audit program. Yes.

16 MS. SCOTT: Is it the same for all
17 inspections?

18 MR. SOUZA: Yes. It's a general --
19 it's not a commodity specific. It's a general
20 that reaches across the board from --

21 MS. SCOTT: How would you -- how
22 would you relate that to this particular

1 paragraph where it is attempting to
2 accommodate differences in growing regions?

3 MR. SOUZA: Under the audit
4 program in which I gave my testimony on, I
5 described we use the guide as a basis for that
6 So we would use -- we use for interpretation
7 in there the guide in order to conduct the
8 audit off of the checklist.

9 MS. SCOTT: If this would go
10 forward, a National Leafy Greens Marketing
11 Agreement, and a set of metrics is developed
12 by the Technical Review Board and subsequently
13 approved by the Committee and USDA, could you
14 foresee different audit checklists being used
15 by your organization?

16 MR. SOUZA: That's really hard to
17 answer at this point with no metrics being
18 developed yet.

19 MS. SCOTT: Thank you. One other
20 question about the zones. The zones as they
21 are delineated or called out in the proposed
22 document, do they allow for ease of

1 memorandums of understanding with your current
2 workforce that you have in place?

3 MR. SOUZA: Yes. We've got
4 auditors throughout the country. I don't
5 think that would be an issue.

6 MS. SCOTT: They're not
7 disproportionately located, in your opinion?

8 MR. SOUZA: I'm real familiar with
9 the auditors I have under my jurisdiction.
10 We've got different -- we've got three
11 other -- four other territories in here, so I
12 can't speak on their behalf. But the western
13 region, we're -- definitely would not have any
14 issues. In the audit -- I don't foresee that
15 we would but, if there was a difficulty with
16 that, we would be able to train and get them
17 up and move people around.

18 MS. SCOTT: Would you see the
19 memorandums of understanding being developed
20 between your committee and your organization
21 being by the state or by the zone?

22 MR. SOUZA: We'd really have to

1 take a look and see what the Proponent group
2 proposes.

3 MS. SCOTT: Thank you.

4 JUDGE HILLSON: Thank you, Ms.
5 Scott. Are there any other questions from
6 anybody? Okay. Thank you, Mr. Souza. You
7 may step down.

8 My understanding is that we don't
9 have any more witnesses, so at this point
10 we'll continue the hearing on Tuesday, October
11 20th, in Syracuse, New York where the high
12 temperature today is 43 degrees, by the way,
13 and we'll close the hearing here in Yuma.
14 Thank you very much.

15 MR. RESNICK: Thank you, Your
16 Honor.

17 JUDGE HILLSON: Off the record.

18 (Proceedings recessed at 2:23
19 p.m., to reconvene on October 20, 2009.)
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