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1 SUPREME COURT OF THE UNITED STATES
2 No. 126, Original
3 STATE OF KANSAS,
4 Plaintiff,
5 vs.
STATE OF NEBRASKA and
6
STATE OF COLORADO
7
Defendants.
8
9 CONTAINS CONFIDENTIAL INFORMATION
10 HEARING before SPECIAL MASTER Vincent L. McKusick,
11 held at Division III Appellate Courtroom, U.S. Court of
12 Appeals for the 10th Circuit at the Byron R. White U.S.
13 Courthouse, 1823 Stout Street, Denver, Colorado, on
14 January 6, 2003, commencing at 1:03 p.m., before Amanda L.
15 Maze, RPR, a notary public in and for the State of Colorado.
16
17 APPEARANCES:
18 For the State of Kansas: John Draper, Esq.
Leland E. Rolfs, Esq.
19 David Pope
20 For the State of Nebraska: David D. Cookson, Esq.
Bartholomew L. McLeay, Esq.
21 Roger Patterson
22 For the State of Colorado: Carol D. Angel, Esq.
Peter J. Ampe, Esq.
23 Hal D. Simpson
24 For the United States: Sarah Himmelhoch, Esq.
Jeffrey Minear, Esq.
25

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1 PROCEEDINGS
2 SPECIAL MASTER MCKUSICK: Good afternoon,
3 everybody. For the record, this is a hearing in
4 U.S. Supreme Court Docket Number 126 original,
5 Kansas against Nebraska and Colorado. It's an
6 informational hearing on the motion filed by the
7 three states, with the support of the United States
8 as amicus curiae, seeking approval by the Court of
9 the final settlement stipulation entered into by the
10 States on the date of December 15, 2002. My job now
11 is to prepare a report for filing with the Supreme
12 Court. This hearing is to help me in that job.
13 Before going further, I want to say, this
14 first Monday of January 2003 is a very special day
15 for all of you and for me. Just exactly three years
16 ago, on the first Monday of January 2000, we met for
17 the first time in the Kansas City United States
18 Courthouse for oral argument on the groundwater
19 motion to dismiss and for our first case conference.
20 Today represents the result of this
21 splendid effort by all of you in bringing this
22 Republican River case to what, by comparison to the
23 other western river cases in the Supreme Court, is a
24 remarkably speedy conclusion. I congratulate all of
25 you.

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1 Today is also just about a year and a half
2 after we all went on that -- went together on that
3 most helpful aerial and ground tour of the
4 Republican River basin in July 2001. Those three
5 days of education by all of you is proving
6 particularly -- proving particularly valuable as I
7 go about the job of producing a report to the
8 Supreme Court. And I suspect the fact that all of
9 you traveled together the length of the basin those
10 three days was not unhelpful in your achieving the
11 final settlement stipulation that is now before me.
12 So this is a very special day, I suggest.
13 Let's get down to work. First, let's take
14 appearances. Steven Scott, my invaluable case
15 management assistant is with me. Court reporter is
16 Amanda Maze. First, the States, could we have
17 appearances from Kansas. And it would be helpful to
18 me as you introduce the people from Kansas, if each
19 would stand so I could put a name to a face.
20 MR. DRAPER: Your Honor, I am John Draper,
21 counsel of record for Kansas. And I have with me
22 the following people: Mr. Lee Rolfs, who is the
23 legal advisor to Mr. Pope, the chief engineer of
24 Kansas. Next to him is Mr. Pope, chief engineer and
25 director of the Department of Water Resources in

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1 Kansas.
2 Just behind me we have Mr. David Barfield,
3 who is on Mr. Pope's staff as an engineer. Next to
4 him is Mr. Dale Book, who is president of the
5 Groundwater Engineers, one of our lead consultants
6 in this case. With Mr. Book are members of his
7 office, Ms. Mary Kay Brengosz, Ms. Melissa Geis, and
8 Mr. Jon Mayberry.
9 Thank you, Your Honor.
10 SPECIAL MASTER MCKUSICK: Thank you,
11 Mr. Draper. For the State of Nebraska?
12 MR. COOKSON: Special Master McKusick,
13 David Cookson. I have joining me at the table the
14 director of the Department of Natural Resources,
15 Roger Patterson; co-counsel, Mr. Bart McLeay from
16 Kutak Rock; Don Blankenau, co-counsel from Fenimore
17 Craig; Ann Bleed, deputy director of the Department
18 of Natural Resources; Chad Kudym from the HGR
19 Engineering, one of our outside consultants who was
20 kind enough to bring us our blowups of the maps
21 today; and Tom Riley from the Flat Water Group, also
22 another one of our outside consultants. And I think
23 that's everybody from Nebraska.
24 Oh, and also I'd like to -- I guess I
25 volunteered to do this. I would also like to

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1 introduce our mediators, although I'm doing this on
2 behalf of all three States and the U.S., Mike Harty
3 and Chris Moore from CDR and Associates.
4 SPECIAL MASTER MCKUSICK: Thank you very
5 much. And for the State of Colorado?
6 MS. ANGEL: Thank you, Your Honor. I'm
7 Carol Angel, counsel of record for the State of
8 Colorado. With me are Hal Simpson, the Colorado
9 state engineer, and Assistant Attorney General Pete
10 Ampe. And we also have First Assistant Attorney
11 General Wendy Weiss; Assistant Attorney General Chad
12 Wallace; and Assistant Attorney General Alexander
13 Davis; and one of our legal assistants, Mr. David
14 Canaday.
15 Then we have chief deputy state engineer
16 Ken Knox, and Megan Sullivan of his staff. I'm
17 sorry. Our introductions will go on for a while.
18 A number of our technical consultants,
19 Mr. Willen Schreuder who worked on the computer
20 model. And then from the firm of Helton and
21 Williamson, Mr. William Helton, Mr. Tom Wilson,
22 Mr. Jim Slattery, who also worked on the model
23 extensively, Mr. Randy Hendricks. And then we have
24 our document -- the technical consultants, Mr. Clark
25 Haiti and Mr. David Klatosky. And I believe that's

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1 everybody.
2 Thank you, Your Honor.
3 SPECIAL MASTER MCKUSICK: Thank you very
4 much. And now, the amicus curiae of the United
5 States?
6 MS. HIMMELHOCH: Thank you, Your Honor.
7 This is Sarah Himmelhoch on behalf of the United
8 States. And I have with me Mr. Jeffrey Minear, who
9 is the assistant solicitor. In the gallery is
10 Mr. James DuBois, my co-counsel. And then from the
11 Bureau of Reclamation, we have Mr. Ore, Mr. Dennis
12 Allacher, Mr. Gordon Aycock, Mr. Marv Swanda. And
13 the Department of the Interior solicitors office, we
14 have John Chaffin. I don't -- oh, I need new
15 glasses. We also have another of my co-counsel, I
16 apologize, Mr. Michael Ghelata. Did I miss anyone
17 else? And Mr. Walsh is here in spirit, though not
18 in body, Your Honor.
19 SPECIAL MASTER MCKUSICK: I think perhaps,
20 Ms. Himmelhoch, you don't need to hide behind that
21 map. The map perhaps could be moved down here
22 farther.
23 MS. HIMMELHOCH: Okay.
24 SPECIAL MASTER MCKUSICK: I could see it
25 perfectly well.

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1 Have I missed anybody?
2 Well, let's get into business. Again,
3 this is an informational hearing. We will not swear
4 witnesses nor will we have presentation of evidence
5 in Q and A form. We will follow the presentation
6 outline that was attached to the joint statement
7 filed by the States with me last Thursday. That
8 goes through, and we'll plan to go through, the
9 final settlement stipulation section by section.
10 I will try to direct my questions to the
11 appropriate section and to the appropriate
12 presenter. But let's not let formality stand in the
13 way of your deciding who can best respond.
14 I do ask that when a person speak, that
15 each time identify themselves. It's important for
16 the court reporter.
17 I'm going to urge that also, particularly,
18 that the United States, as amicus curiae, should not
19 be bashful about speaking up when you have
20 contributions to make.
21 Again, I, of course, leave it entirely up
22 to you to pick the person or persons to answer my
23 questions or to make presentations. And also, if
24 you want at any time to confer before responding,
25 just let me know.

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1 At the conclusion of the presentation, as
2 we walk down through the outline that the States
3 presented, I plan to call upon counsel for each of
4 the States and the amicus, United States, to make a
5 wind-up statement on why the Supreme Court should
6 approve the final settlement stipulation.
7 I do want to say also that I do plan to
8 submit to the States and to the amicus, a draft of
9 my report for your comments. Before we adjourn
10 today, we'll work out a schedule for getting your
11 comments on the draft.
12 I also plan, probably in an hour and a
13 half or so, to call a recess, which might be a
14 convenient time if some questions come up where you
15 want to put your heads together, that'll give you
16 that opportunity.
17 Are there any questions or suggestions as
18 to how we proceed this afternoon? Any at all?
19 Well, let's get under way, then. The
20 presentation outline that was attached to the
21 States' statement goes down through the -- goes down
22 through the final settlement stipulation by
23 sections. And the Sections I and II on the outline
24 said to be self-explanatory, but the state engineers
25 or counsel can answer any questions as needed. So

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1 let me kick off with a question, a question or two.
2 First of all, the Section I is on general,
3 and Section II is on definitions. I do not find in
4 the definitions any definition for "year" or "water
5 year." And I do see on Page 6 a definition of
6 "annual," as defined in the RRCA accounting
7 procedures. Is the assumption that "year" means a
8 calendar year and that "water year" means -- has a
9 generally accepted meaning that doesn't have to be
10 defined? That's my question.
11 MS. ANGEL: Well, Your Honor, we could ask
12 one of the engineers. But I believe we meant to use
13 annual to refer to anything that was yearly. And
14 then we meant to leave the definition --
15 SPECIAL MASTER MCKUSICK: I can't hear you
16 very well. There is a mic there. I hate to ask you
17 to get up every time and come up to that --
18 MS. ANGEL: I'll try and speak up.
19 SPECIAL MASTER MCKUSICK: That's better.
20 MS. ANGEL: We meant the "annual"
21 definition to answer all the questions about what we
22 meant. And I believe throughout the document, we
23 attempted to use "annual" or "annually" when we were
24 referring to some kind of yearly period.
25 SPECIAL MASTER MCKUSICK: And a "water

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1 year" corresponds to a calendar year?
2 MS. ANGEL: That's the current definition
3 in the accounting procedures. It was specifically
4 referred to the accounting procedure in case the
5 engineers later decided unanimously that a different
6 water year would be more efficient.
7 And I'm sorry, I'm Carol Angel.
8 SPECIAL MASTER MCKUSICK: Well, fine.
9 Thank you very much.
10 A very small point in the definitions of
11 federal reservoirs. Why isn't the Milford Reservoir
12 in Kansas a federal reservoir or a -- is it not
13 included for this purpose it isn't so treated? I
14 notice that the Lovewell Reservoir is, which is in
15 Kansas.
16 MS. HIMMELHOCH: Your Honor, I believe --
17 this is Sara Himmelhoch on behalf of the United
18 States. It was felt that that was outside of the
19 area of concern for purposes of the settlement. And
20 since none of the activities involved in the
21 settlement affected that reservoir directly, we
22 opted not to include it in there.
23 SPECIAL MASTER MCKUSICK: The definition
24 of federal reservoirs was used, it didn't make any
25 difference if Milford was excluded?

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1 MS. HIMMELHOCH: Correct, Your Honor.
2 SPECIAL MASTER MCKUSICK: I don't have any
3 other questions on Sections I and II. And why don't
4 we move directly to Section III, which relates to
5 existing development. And Mr. Patterson?
6 MR. PATTERSON: Special Master McKusick,
7 good afternoon. Thank you. My name is Roger
8 Patterson. I am the director of the Nebraska
9 Department of Natural Resources. And I will provide
10 the overview of Section III in the settlement
11 stipulation, which we have titled, Existing
12 Development.
13 The States, after analyzing all of the
14 available water data, came to the mutual conclusion
15 that the water supplies of the Republican River
16 basin were for the most part fully developed. As a
17 result, the States have agreed that a moratorium be
18 placed on the construction of new wells upstream of
19 Guide Rock, Nebraska.
20 Rules and regulations previously adopted
21 by Colorado and Kansas in the Republican basin above
22 Guide Rock have created a de facto moratorium. As a
23 result, only very limited well construction has
24 occurred in these areas in the last several years.
25 In Nebraska, the moratorium applies to all

1 or part of three Republican River Natural Resource
2 Districts. All three affected natural resource
3 districts have now adopted temporary suspension on
4 the construction of new wells upstream of Guide
5 Rock, Nebraska.
6 The Upper Republican Natural Resource
7 District adopted a moratorium in 1997. The Middle
8 Republican NRD adopted a moratorium in June of 2002,
9 the past summer. And the Lower Republican NRD
10 adopted a moratorium in the area upstream of Guide
11 Rock effective on December 9th of 2002.
12 SPECIAL MASTER MCKUSICK: Are all of those
13 upstream from Guide Rock?
14 MR. PATTERSON: The Middle Republican and
15 the Upper Republican are totally situated upstream
16 of Guide Rock. Guide Rock falls within the Lower
17 Republican NRD. And they have adopted rules to
18 preclude the construction of new wells in their
19 district upstream of Guide Rock, not in their
20 district downstream of Guide Rock.
21 SPECIAL MASTER MCKUSICK: Now, do I
22 understand correctly, though, that the moratorium
23 applies only above Guide Rock?
24 MR. PATTERSON: That is correct.
25 SPECIAL MASTER MCKUSICK: And why cut it

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1 off there?
2 MR. PATTERSON: The reason for that, which
3 we will -- which is laid out in Section V of the
4 settlement stipulation -- really ties to those
5 special concerns and special conditions that we have
6 developed for the part of the basin located upstream
7 of Guide Rock, particularly in these dry years. So
8 to make the settlement work, we did not need to put
9 the moratorium in the area downstream of Guide Rock
10 to Hardy. But the water use, the consumptive use of
11 that water, does count towards the consumptive use
12 that Nebraska or Kansas would make.
13 SPECIAL MASTER MCKUSICK: And we're going
14 to be talking more about Guide Rock --
15 MR. PATTERSON: We will.
16 SPECIAL MASTER MCKUSICK: -- later, and
17 you're going to be handling that?
18 MR. PATTERSON: I will do that. I will do
19 my best.
20 The settlement provides that the
21 moratorium may be modified in the future by the
22 Compact Administration if new information would
23 demonstrated that additional ground water
24 development would not cause a State to consume more
25 than its respective allocation. The moratorium

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1 applies only to the Republican River basin and not
2 to any other basin or any groundwater supply located
3 outside of the Republican River basin.
4 There are a number of exceptions to the
5 moratorium provided for in the settlement
6 stipulation. Certain areas of the basin are
7 generally excepted for three reasons.
8 One, they are an area where the United
9 States Geological Survey has measured groundwater
10 levels rising by at least 10 feet from a time prior
11 to well development. This is due to the build up of
12 groundwater mound created by water imported from the
13 Platte River systems canals.
14 Second, the areas excluded are located
15 downstream stream of Guide Rock, Nebraska, as we
16 just discussed, or, three, they're located in
17 natural resource districts that are generally not
18 part of the Republican basin. In this case, we have
19 a Twin Platte Natural Resource District and the
20 Little Blue Natural Resource District.
21 Additionally, specific exceptions are
22 provided for test holes, dewatering wells with an
23 intended use of one year or less, replacement wells,
24 as long as they do not consume more water than
25 the --

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1 SPECIAL MASTER MCKUSICK: Will you explain
2 to me what a dewatering well is?
3 MR. PATTERSON: Dewatering well would
4 generally be associated with construction, perhaps,
5 that you're building in an area that would have a
6 high water table. You may need to go in and put
7 some temporary wells in to pump out, basically dry
8 up that foundation area.
9 Small wells that pump either 50 gallons
10 per minute or less, or 15 acre feet per year or less
11 are excepted; wells for certain emergency purposes
12 and wells for expansion of municipal or industrial
13 uses; transfers of use from an existing well are
14 also allowed, again, as long as the new well does
15 not consume more well than the old well consumed.
16 Such transfers are not allowed if they
17 would cause an increase in depletion upstream of
18 Trenton Dam, with special consideration I would add
19 addressed by the United States and Trenton Dam and
20 Swanson Lake.
21 SPECIAL MASTER MCKUSICK: Clear up for me
22 what an augmentation well meant. Do I understand
23 correctly that that means when a well can pump more
24 water than it will deplete from the stream flow? Is
25 that shorthand?

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1 MR. PATTERSON: In general. Hal Simpson
2 is the expert on this, and he is going to explain
3 augmentation wells when we get him up here. Those
4 are wells that we did exclude.
5 I would point out that prior to any State
6 developing that kind of a plan, it would have to
7 come to the Compact Administration, and we would
8 have to review and approve it. But Hal is going to
9 cover that when he gets into his explanation on
10 compact accounting.
11 We also addressed surface water in that
12 the settlement recognizes that each of the three
13 States has previously taken action that essentially
14 results in a de facto moratorium on new surface
15 water rights or permits. The States have agreed
16 that they will notify the other States and the
17 United States Bureau of Reclamation prior to lifting
18 any surface water moratorium or granting any new
19 surface water rights. The settlement stipulation
20 recognizes the right of each State to grant new
21 rights to surface water if under such rights they
22 could make use of water within the States' compact
23 allocation.
24 We did bring blow-ups of the maps that are
25 in the settlement stipulation that cover the area of

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1 the moratorium. But other than if you have
2 additional questions, I think that is my overview of
3 what we called Existing Development, which, for the
4 most part, is the moratorium on groundwater wells.
5 SPECIAL MASTER MCKUSICK: Would you
6 explain the reasons behind the provision for
7 freezing well development above the Trenton Dam?
8 MR. PATTERSON: The United States, during
9 the settlement discussions, raised a concern about
10 further depletion to inflow to Swanson Lake, which
11 is the lake behind Trenton Dam. And we recognized
12 that that was a fair concern.
13 And the way we addressed it here is
14 essentially to do two things. One, make permanent,
15 if you will, the moratorium on well construction
16 upstream of Trenton Dam. And secondly, we put in a
17 limitation on transfers of existing wells, so you
18 couldn't transfer a well that was depleting the
19 stream below Trenton and replace that with a well
20 that would now deplete upstream of Trenton. So we
21 have those two considerations that were to address
22 the concern about inflow to Swanson Lake.
23 SPECIAL MASTER MCKUSICK: A very small
24 drafting point, there are some places, particularly
25 on Page 12 where it says, the States will not

1 increase the level of development of wells as of
2 July 1, 2002. Obviously that means -- does not
3 mean, does not increase the rate of development of
4 wells, rather it means will not increase the number
5 of wells or the capacity of wells.
6 MR. PATTERSON: That's right. It's not
7 the rate.
8 SPECIAL MASTER MCKUSICK: That provision
9 about freezing well development above Trenton, the
10 Trenton Dam, has a provision on Page 12 that reads,
11 Any of the States may seek to amend this provision
12 or this stipulation by making application to the
13 Court upon any change in conditions making
14 appropriate -- making modification of this
15 Subsection III.A.3 necessary or appropriate.
16 Well, first of all, this does not provide,
17 apparently, for the States, first of all, to -- one
18 of the States who wishes to amend the provision of
19 going to the RRCA under the dispute resolution
20 mechanism. And then secondly, it provides for
21 making application to the Court, the Supreme Court
22 of the United States.
23 As I -- maybe you want to turn to counsel
24 to respond to this question. But the only way a
25 case can be taken to the original jurisdiction of

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1 the Supreme Court is by filing a motion for leave to
2 file a complaint. And is that what is contemplated
3 here?
4 MR. PATTERSON: Let me give you the
5 engineering description and then maybe Sarah can
6 respond legally. The United States is not a party
7 to the compact. And we wanted to address their
8 concern. We made this a high standard, that you
9 could not simply come to the Compact Administration,
10 of which the United States is not a party, and do
11 away with this protection that we included for their
12 benefit. That's the reason, to me, that we did not
13 leave this subject to the Compact Administration to
14 make this decision.
15 We do recognize that we could have a
16 situation in the future where something changes
17 substantially, perhaps a reformulation of the
18 Swanson Lake Project where Nebraska, Colorado,
19 Kansas may want to use water in this area through
20 new development. We would have to, in that case, go
21 back to Congress. But also that's why we set it up
22 to go back to the Court.
23 MR. COOKSON: David Cookson.
24 The thinking was, Your Honor, that as
25 Mr. Patterson stated, was to protect the interests

1 of the United States, who would not be a party to
2 the Compact Administration, and to set a standard
3 that is so high or onerous, if you will, that it was
4 not being done -- an undertaking done lightly,
5 understanding that all of the States -- all the
6 States could do would be to file their motion for
7 leave with the Court seeking to change this
8 particular provision.
9 And as it is with every case, the Court
10 will tell us whether or not they wish to exercise
11 their jurisdiction or not. And so every -- I think
12 the States recognize that there is not only the
13 likelihood that we wouldn't do this, but even if we
14 do agree to do it, the Court may say they don't wish
15 to entertain jurisdiction at which case we're stuck
16 where we are.
17 But the idea was, there could be a process
18 where, for instance, the irrigation districts that
19 are served by the Swanson Project would no longer be
20 in existence and the necessity of having that water
21 or not consuming water above Swanson would change to
22 such an extent that the States would wish to
23 petition the Court.
24 SPECIAL MASTER MCKUSICK: There's another
25 problem is I -- seems to me you don't provide a

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1 legal standard that the Supreme Court can do
2 anything with. Suppose the Supreme Court takes your
3 original jurisdiction case and refers it to a
4 Master. The Master's going to have a hard time
5 saying what is necessary or appropriate. It is
6 almost a legislative matter. It would seem to me
7 the resolution in that matter might be Congress.
8 MR. COOKSON: And I think the reality is
9 the Court may take that as the justification -- or
10 its reasoning for not accepting jurisdiction.
11 However, before we modified something that had been
12 approved by the Court, we felt the appropriate first
13 step would be to go to the Court.
14 And it could simply be a question of
15 modifying whatever the consent judgment that they
16 enter in this case to reflect that change. Does
17 that -- it would almost -- it almost would have to
18 be by unanimous agreement for it to go forward.
19 SPECIAL MASTER MCKUSICK: On Page 15,
20 there's a -- again, Subparagraph G there is a
21 provision that Nebraska shall not change its
22 proposed method of calculating historic consumptive
23 use before providing notice to the RRCA. There's no
24 provision that the RRCA has any part in that, is
25 there?

1 MR. PATTERSON: No. It's advisory.
2 However, we -- we have in the rules and regs for
3 both Kansas and Colorado, they have established
4 their methodology for determining consumptive use
5 and making transfers. The transfer of groundwater
6 has to be done through our natural resource
7 districts, which are have not yet promulgated rules
8 to do that.
9 We have proposed in Appendix F, a
10 methodology that we would suggest the Nebraska
11 natural resource districts adopt to make these
12 transfers. And then we have agreed that if we
13 change in any way from this, that we would advise
14 the RRCA so that they do the methodology that we
15 were going to use.
16 The standard is still there. And that is
17 the standard can't be -- the standard is that the
18 consumptive use of the new well cannot be higher
19 than the consumptive use of the replacement well or
20 the use -- where the water's transferred, can't be
21 higher than the use that was made where it was
22 previously used.
23 SPECIAL MASTER MCKUSICK: But the RRCA
24 doesn't have any part in moving to a different
25 method of computation.

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1 MR. PATTERSON: No. That would be
2 Nebraska's determination. But we have agreed to
3 advise the RRCA if we chose to do something
4 different than what's in Appendix F.
5 SPECIAL MASTER MCKUSICK: Another small
6 point on Page 17 in regard to surface water
7 limitations in the second sentence each state agrees
8 to notify each official member of the RRCA of --
9 before adopting changes in the current restrictions.
10 That just simply means that each member of the RRCA
11 does it?
12 MR. PATTERSON: I think it does. I think
13 that's the only place where we used official member
14 of the RRCA. It means member for that State.
15 SPECIAL MASTER MCKUSICK: You could say
16 notify the RRCA?
17 Also -- that same sentence goes on to say,
18 And provide the RRCA an opportunity for discussion.
19 And, again, this is not a situation where the RRCA
20 is expected to take action. It's a discussion, I
21 take it?
22 MR. PATTERSON: Special Master, that's
23 correct. It's really a heads up and a courtesy to
24 the other members so that if they have concerns,
25 there's an opportunity to express the concern, have

1 the state proposing to make a change hear that, and
2 decide whether they -- at their decision is correct,
3 will go ahead after considering those concerns. So
4 it is advisory.
5 SPECIAL MASTER MCKUSICK: In other words,
6 it relies upon the continued good will among the
7 three cooperating states?
8 MR. PATTERSON: That's correct.
9 MR. COOKSON: Your Honor, I might add that
10 the 60-day provision allows that under our state
11 law, if either of the other States or the Bureau of
12 Reclamation had an objection, that would give them
13 time within our statutory period to make that
14 objection known before the rule or the water right
15 was granted.
16 SPECIAL MASTER MCKUSICK: I'm interested
17 in looking over the State of Nebraska statutes that
18 were -- there was some enacted on July 20, 2002.
19 Was that related to the moratorium?
20 MR. COOKSON: I believe, if you're
21 referring to the Department of Natural Resources
22 rules and regulations.
23 SPECIAL MASTER MCKUSICK: Yes.
24 MR. COOKSON: That was actually the result
25 of -- there was a merger between the Department of

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1 Water Resources and the Natural Resources
2 Commission. And so they had to redo all of their
3 rules. And so they were officially merged and
4 adopted on July of 2002.
5 SPECIAL MASTER MCKUSICK: I see. What
6 kind of legal action has Nebraska had to take in
7 order to implement the moratorium that, as I
8 understand it, is already in place?
9 MR. COOKSON: The -- as part of the
10 agreement with the other States, we had agreed back
11 in the agreement in principal to have these
12 particular suspensions and moratorium in place by
13 the time the final settlement agreement was
14 submitted to you. To do that, each of the NRDs,
15 under the Groundwater Management and Protection Act,
16 had to ask the Department of Natural Resources to
17 resume a study under that Act that had begun prior
18 to the filing of the litigation, but which had been
19 suspended during the pendency of the litigation.
20 They then were entitled, under the
21 statute, to adopt rules and regulations adopting a
22 temporary suspension subject to going through the
23 notice and public hearing. So they had to publish a
24 notice for a period no less than 21 days. There was
25 a public hearing that was necessary. And then they

1 had a board hearing at which time the rules and
2 regulations were discussed.
3 There were two rather contentious public
4 hearings in the Middle Republican and the Lower
5 Republican. And then there was a subsequent meeting
6 of those boards at which time the temporary
7 suspensions were adopted. In the Middle Republican,
8 it was adopted by unanimous vote. In the Lower
9 Republican, it was adopted by a vote of 10 to 1.
10 SPECIAL MASTER MCKUSICK: It's this kind
11 of thing that I think is important to bring to the
12 attention of the Supreme Court. It shows the good
13 faith efforts to bring this settlement about. It
14 shows that the train is already partially leaving
15 the station and so on.
16 MR. COOKSON: I might add, Your Honor,
17 that we had advised the Middle and the Lower that we
18 would not make the request from them until October
19 when we were -- so that they would have sufficient
20 time to do it before the final settlement was
21 submitted. The Middle Republican as a sign -- not
22 only as a sign of good faith to us, but as a sign of
23 good faith to the other States actually acted almost
24 immediately upon -- after the settlement in -- or
25 agreement in principal was reached at the -- in

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1 April. They published their notice in May and
2 adopted their temporary suspension in June.
3 SPECIAL MASTER MCKUSICK: As I understand
4 it, Nebraska had little or no regulation of well
5 pumping previously.
6 MR. COOKSON: Well, that's actually a
7 common misconception. The Upper Republican had
8 limitations beginning as far back as the early '80s
9 on new wells in their particular district due to the
10 only provisions in law at that time that allowed you
11 to adopt a moratorium, which were declining water
12 levels.
13 In the Middle Republican and the Lower
14 Republican, they did not have that sufficient level
15 of decline so as to have a legal justification until
16 the Groundwater Management Act had been revised in
17 1995. And immediately upon doing that, the Middle
18 Republican at least began the process that
19 ultimately led to where we are today.
20 SPECIAL MASTER MCKUSICK: Thank you.
21 Well, I think that exhausts me, any way, on this
22 one, on Section III. So we move to Section IV,
23 Subsections A and D on Compact accounting.
24 Mr. Pope?
25 MR. POPE: Thank you, Your Honor.

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1 Good afternoon. For the record, my name
2 is David Pope from Kansas. I will be describing the
3 portions of the settlement as indicated on the
4 presentation outline in Section IV, at least the
5 first four sections of -- Subunits A through D of
6 Section IV that deal with the overall frame work of
7 Compact accounting under the settlement. And then
8 later on we'll hear from others about the remaining
9 provisions, Mr. Simpson and then again Mr. Patterson
10 on other related items.
11 I think as you know, the Republican River
12 Compact was negotiated prior to significant
13 development of the basin's water resources, thus its
14 provisions were prospective in nature providing a
15 broad, overarching framework for development by the
16 States in cooperation with the United States.
17 The Compact negotiators left many details
18 of administration of the Compact to be developed by
19 the respective successors. This settlement, and
20 particularly this section and Section V of the
21 settlement provide the States' mutual agreement on
22 the details of the administration of the Compact.
23 Another way of saying that is we spent a lot of time
24 and effort working through these accounting
25 procedures to try to come up with a workable

1 settlement.
2 Subsection A of the stipulation states
3 that the States will determine virgin water supply,
4 computed water supply, allocations, imported water
5 supply credit, augmentation credit, and computed
6 beneficial consumptive use based on a methodology
7 set forth in the RRCA accounting procedures, which
8 are attached as Appendix C. And I'll come back to
9 this in a few minutes.
10 Fundamentally, this section obligates the
11 States to conduct an annual accounting of the
12 basin's water supply allocations and use in
13 accordance with the accounting procedures. These
14 computations are used to determine compliance with
15 the Compact and to provisions of the settlement.
16 Historically, the States have administered
17 the Compact to the Republican River Compact
18 Administration. The settlement, of course, provides
19 that the RRCA will continue to administer the
20 Compact.
21 In addition to the data explicitly needed
22 for annual accounting, the States are obligated to
23 annually exchange an extensive amount of supporting
24 data used to develop their estimates of use to allow
25 the other States the ability to understand the basis

1 and if needed independently verify the estimates of
2 use.
3 Further, the States are given the ability
4 to inspect various records and to conduct
5 accompanied or unaccompanied site inspection for
6 purposes of verification. And that is spelled out
7 in the accounting procedures in Pages 32 through 38.
8 SPECIAL MASTER MCKUSICK: I see,
9 obviously, one virtue of this. Everybody is --
10 three States are keeping their books on the same
11 basis. What did you have before this? What did you
12 have in place before settlement?
13 MR. POPE: There were in place, Special
14 Master, a relatively limited set of accounting
15 procedures that had been developed by mutual
16 agreement of the States over the years, going back
17 when accounting first started. But in general, the
18 States had left to each other to develop their own
19 estimates of how much water had been used and
20 provide that data and information -- and there
21 certainly were opportunities for discussions of
22 that.
23 But in general, it was the acclamation of
24 that information and to some extent we continue
25 that. But with a lot more detail and a lot more

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1 opportunity for review of the underlying data and
2 ability to monitor and evaluate that. So I think
3 this is a much more comprehensive settlement.
4 SPECIAL MASTER MCKUSICK: More collection
5 of data?
6 MR. POPE: There will be more collection
7 of data certainly. And the formulas are much more
8 details. The fundamental principles are somewhat
9 similar. But there are some differences as I'll
10 discuss here in a few minutes.
11 But I think there was -- in my view at
12 least and the others can comment, but I believe one
13 of the things that we thought was advantageous to
14 the settlement was to have a much more comprehensive
15 and well-defined set of procedures that would
16 hopefully serve us well in the future and avoid
17 conflict and disagreement.
18 I would note that the accounting
19 procedures lay out the details of how the annual
20 computations will be made, both generally and to
21 each designated drainage basin. I will return to
22 most -- the most significant features of the
23 accounting procedures after Section IV.B, C, and D
24 of the stipulation which addresses the sub-basin
25 flexibility, the determination of groundwater

1 depletions, and averaging.
2 Now, with regard to Subsection B, which
3 deals with sub-basin accounting, this section
4 defines the States' flexibility in the use of their
5 allocation geographically. This section allows the
6 States to use what's been referred to as otherwise
7 unallocated waters at locations of their choosing so
8 long as the following conditions are met.
9 Basically, a State may not impair the
10 ability of a downstream State to use its specific
11 sub-basin allocation within that sub-basin.
12 Secondly, a State, of course, may not use more than
13 its state-wide allocation. And then, thirdly, in
14 water-short years, additional constraints apply as
15 will be discussed in the Guide Rock section by
16 Mr. Patterson in a few minutes.
17 SPECIAL MASTER MCKUSICK: Stopping there
18 before you go to IV. Does this -- first of all,
19 when it says, Water derived from sub-basins in
20 excess of a State's specific sub-basin allocations
21 as available, does that mean any State, even though
22 it's not a State within which any part of the
23 sub-basin is located?
24 And I'm leading up to my next question is,
25 if more than one State could make a demand on this

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1 unallocated water, does it become simply first
2 come/first serve, the first one that gets there?
3 MR. POPE: I think the answer to the first
4 question is that it would be only States within that
5 sub-basin that would be using water from that
6 sub-basin. I believe I've not missed anything when
7 I say that.
8 And secondly, the protection that's really
9 embodied is in part so that the practical aspects in
10 terms of where water's used and how much water's
11 used in the basin under the current status of
12 existing development -- but an example would be in a
13 sub-basin shared by two States, this settlement
14 agreement provides that the upper State would not
15 use any more water than that amount that would still
16 leave available the amount allocated to the
17 downstream State.
18 SPECIAL MASTER MCKUSICK: I can see that.
19 Take Red Willow Creek, which, I believe, is
20 completely in Nebraska.
21 MR. POPE: Correct.
22 SPECIAL MASTER MCKUSICK: And I believe
23 that Kansas is allocated some water from that.
24 Could Kansas, if it called on the water first, ahead
25 of Nebraska, could it take unallocated water out of

1 that sub-basin?
2 MR. POPE: Well, when you have a sub-basin
3 of that nature -- Sarah may have a comment here in a
4 minute -- the unalloc -- so-called unallocated
5 waters are really allocated to the main stay. They
6 are really the waters that are relied upon in the
7 Compact to make up the main stem allocations in
8 part.
9 And Kansas would not have a specific claim
10 to individual tributary, but it would have a claim
11 to all of the water that's allocated to it in its
12 main stem allocation. And whether Nebraska would
13 use part of the unallocated water in that particular
14 sub-basin or whether it would use more or less from
15 the main stem, wouldn't matter as long as it doesn't
16 directly interfere within this case, the Kansas use
17 of water.
18 MS. HIMMELHOCH: If I may, Your Honor?
19 This is the Compact, as I understand it,
20 contemplates use by each state within its own state
21 boundaries. The exception being that Kansas is
22 being given the option to divert its water at Guide
23 Rock. That general provision applies here as well,
24 so Kansas would divert whatever portion of the
25 otherwise unallocated water it wished to use within

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1 Kansas or at Guide Rock. Nebraska within Nebraska
2 and Colorado within Colorado.
3 What would happen on a creek which only
4 appears -- which only flows in one state, like Red
5 Willow, is that Nebraska is obliged to let flow into
6 the main stem that portion which has been allocated
7 to Kansas so that Kansas can divert it either at
8 Guide Rock or in the state of Kansas.
9 MR. POPE: I know this is --
10 SPECIAL MASTER MCKUSICK: I find it rather
11 complicated.
12 MR. POPE: It is somewhat complicated. We
13 spent many days and days working on ways to try to
14 get this accomplished that would protect all
15 interested and be consistent with the Compact.
16 Let me go on for a minute and see if it
17 would help with your questions and we can go further
18 as may be needed.
19 In regard to the test of impairment of a
20 downstream State's specific sub-basin allocation,
21 the accounting procedures require specific
22 calculations to determine Kansas and Colorado
23 compliance with this requirement. And the reason I
24 say Kansas and Colorado is because all of the
25 sub-basins in Nebraska are not shared sub-basins.

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1 They are all within Nebraska. But there are others
2 that are shared between either two or three of the
3 States.
4 These calculations require that States'
5 use in a specific sub-basin be less than the sum of
6 its allocation from that sub-basin, any remaining
7 allocation from an upstream State in that sub-basin,
8 and the unallocated waters of that sub-basin. So
9 it's a sum of those three components.
10 And, again, as I said, Nebraska's in a
11 little different situation.
12 Fundamentally, each -- for each sub-basin,
13 the test prohibits an upstream State from, again,
14 using a specific allocation from a downstream
15 sub-basin.
16 Similarly, the accounting procedures
17 include calculations to determine whether on a
18 five-year running average basis, each States'
19 statewide use is within its statewide allocation.
20 And, again, the details of the special case in the
21 water-short years will be discussed in a few
22 minutes.
23 Let me pause and see if there's any
24 further questions on that component or maybe this
25 will become --

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1 SPECIAL MASTER MCKUSICK: Do any of the
2 rest of you have comments on that?
3 MS. HIMMELHOCH: Your Honor, I realized I
4 forgot to answer the second half of your question,
5 which was, Is it first come/first serve. And the
6 answer to that with respect to the otherwise
7 unallocated is yes, it is first come/first serve.
8 As a practical matter with the moratorium
9 in place, we are essentially fixing the world as it
10 exists today and there is unlikely to be any
11 question as to who gets to use the otherwise
12 unallocated water because everybody that has their
13 development in place. But the fundamental principle
14 is with respect to otherwise unallocated water,
15 first come/first serve.
16 MR. POPE: There are some unique sort of
17 physical circumstances in some of the shared
18 sub-basins, that I think, help make this work.
19 MR. PATTERSON: Your Honor, if I could,
20 just add one thing, the example of Red Willow where
21 it is a sub-basin entirely within one state, there
22 is a specific allocation to Nebraska. There is no
23 specific allocation to Kansas. But the unallocated
24 is split between the two.
25 SPECIAL MASTER MCKUSICK: I missed that.

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1 MR. PATTERSON: So there would be no
2 obligation on Nebraska in Red Willow Creek. We
3 could use our specific and we could use all of the
4 unallocated. However, that means that we would have
5 to use, less, obviously, somewhere else in the
6 basin.
7 MR. POPE: With respect to Subsection C
8 about the groundwater modeling component. Last
9 April, in the settlement principles, the States
10 agreed that a comprehensive groundwater model was
11 needed to properly account for stream flow
12 depletions due to groundwater pumping from both the
13 alluvial pumping and upland and highplains,
14 sometimes known as Ogallala pumping, as well as to
15 determine credit for imported water. And that was
16 the imported water Mr. Patterson spoke of in terms
17 of the groundwater mound issue.
18 This is consistent with the conclusions of
19 your first report. The settlement principles
20 obligated the States to work aggressively and
21 cooperatively in consultation with the United States
22 to develop the model between then and July 1 of 2003
23 with a number of specific interim requirements
24 during the period between the signing of the
25 settlement principles and November 15th or

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1 essentially, finally, December when we reached the
2 final settlement.
3 The States created a technical modeling
4 committee to carry out this work. The modeling
5 committee is composed of modeling and other experts
6 of each State, the United States Geological Survey
7 and the Bureau of Reclamation.
8 Modeling committee was given the following
9 assignments for the period through November 15th of
10 2002: First, they were to meet with the U.S.
11 Geological Survey personnel to become throughly
12 familiar with the work that they had done thus far
13 on the modeling effort. Secondly, decide whether to
14 adapt the U.S. Geological Survey model or to develop
15 another model acceptable to the States for the
16 purposes set forth in the settlement principles.
17 And thirdly, to identify issues and set
18 deadlines for discussing the issues for adaptation
19 or development of a selected model and adopt
20 milestones to adopt, run, and calibrate the model.
21 And fourthly, work on the necessary steps to
22 accomplish this adopting, running, and calibrating
23 the model, and to agree on fundamental model issues
24 next, including what's known as calibration
25 parameters and targets, and procedures for

1 determining the pumping and recharge. These are
2 sort of key issues that had to be resolved before
3 settlement could take place.
4 SPECIAL MASTER MCKUSICK: And this -- and
5 you had a November 15th deadline for that?
6 MR. POPE: Yes. This was the internal
7 deadline we had agreed upon in the principles for
8 that status of work to be done. So we knew where we
9 were on the groundwater model issue and then could
10 proceed to finalize other remaining issues. That --
11 basically during that time frame, then, the -- we
12 received that progress report on the modeling
13 effort.
14 Basically, I would summarize by saying
15 that the modeling committee began its meetings, met
16 numerous times very intensely. U.S.G.S. did provide
17 a detailed briefing regarding its modeling work, and
18 at this meeting committed to providing the States
19 with its model as of that date and all its
20 supporting data, which did occur, I think as you
21 recall from some of the status reports. And they
22 provided that model and supporting information
23 during June of 2002.
24 After receipt of these data and the model,
25 the committee did decide to develop its own model of

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1 the basin using components of the U.S. Geological
2 Survey model as a starting point.
3 The committee, for example, used the
4 U.S.G.S. model grid, stream flow network, land
5 surface elevations as a starting point. Nebraska
6 did propose and ultimately it was agreed to extend
7 the model boundary to include the full extent of the
8 area of the groundwater mound that we spoke of
9 produced by the Platte River diversions into the
10 Republican River basin and areas just north of the
11 Republican River were then included.
12 And there is a map over here, a blow-up of
13 the model domain. I think there is one in the
14 materials as well. But as you can see, the model
15 domain includes all of the basin plus a little piece
16 to the northeast there that take care of this mound
17 area in Nebraska. And then some areas that are a
18 part of the physical boundaries of the basin that
19 extend south and east of the basin into Kansas
20 there.
21 SPECIAL MASTER MCKUSICK: Would you
22 explain to me the mound?
23 MR. POPE: Yes. I can do that. And
24 Mr. Patterson may want to point out sort of where
25 that occurs with another map there. But

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1 fundamentally, as I understand it, and, again,
2 Roger's more familiar with this than I, but some of
3 the projects that divert water through canals and
4 onto irrigated land from the Platte River, that
5 application of land, or water onto land, has return
6 flows that add to the water table.
7 And because these return flows and these
8 lands are located geographically right near the
9 boundary of the Platte River basin and the
10 Republican River basin, that increase in water level
11 has occurred historically for a number of years.
12 And that's what's referred to as the mound.
13 Roger, would you like to supplement that?
14 MR. PATTERSON: I think that's good. The
15 U.S.G.S. has monitored these groundwater levels for
16 many, many years in this area. And when we refer to
17 the mound, we adopted their -- basically their
18 working definition of a 10-foot rise in the water
19 tables since predevelopment. And these -- this
20 cross-hatched blue area on the map here is what we
21 refer to as the mounds that are also multiple areas.
22 But they are relatively concentrated in these two
23 large ones here.
24 MR. POPE: So essentially what we have,
25 is, then, unlike some other areas of the basin where

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1 water levels tend to go down rather than up with use
2 over years or stay stable, in the mound area, it's
3 higher. And then that results in certain areas, at
4 least, increased discharge from the groundwater
5 system to streams, to tributary streams, that add
6 water into streams in the Republican River basin
7 that otherwise would not have been there were it not
8 for this additional water diverted into the basin.
9 Does that --
10 SPECIAL MASTER MCKUSICK: Yes, that's
11 fine. When I interrupted you, you were in the
12 process of describing the work that had to be done
13 leading up to November 15th. Here we are a month
14 and a half beyond that. Where is the modeling
15 committee in its work now?
16 MR. POPE: The modeling committee worked
17 very intensely up through the time period of the
18 settlement. I think there's been a work -- mainly
19 working individually on review of a large amount of
20 data that has been exchanged and was used as a part
21 of the process that they have thus far gone through.
22 They have made a lot of progress in regard
23 to putting the model together thus far. However, I
24 think there has been a little bit of a hiatus over
25 the holidays here. And they're reviewing this data

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1 and they will be getting together the week after
2 next --
3 UNKNOWN: That's correct.
4 MR. POPE: Week after next. And they will
5 now be sharing their results of the review of this
6 data and moving into the next steps of finalizing
7 some of the matter.
8 SPECIAL MASTER MCKUSICK: You described
9 what happened up to November 15th. Now describe
10 what has to be completed to complete the job.
11 MR. POPE: Okay. Well, I think -- let me
12 see. I think the key thing would be to finalize the
13 analysis and estimates that have been made on a
14 number of matters that include pumping estimates and
15 mostly some of the things in the model that will be
16 used as calibration parameters.
17 The model has not yet been calibrated,
18 even though it is operational. It has --
19 preliminary runs have been made. But now there
20 are -- you have got all this data and all this
21 structure of the model. And the calibration process
22 refining those things that are unknowns that will be
23 used as variables is the big task.
24 SPECIAL MASTER MCKUSICK: Is that data
25 collection?

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1 MR. POPE: Most of the data has already
2 been collected. There may be a few places where
3 they would collect some more or analyze data in
4 terms of how it would be used in the modeling
5 process. But it's largely sort of finishing up the
6 model.
7 SPECIAL MASTER MCKUSICK: Is that
8 engineers sitting in their office? Will they do
9 this calibration? I don't grasp really what's
10 happening.
11 MR. POPE: That part really does get
12 technical for all of us from this standpoint. But
13 the modeling committee meets and reviews output from
14 runs of the model that have been made to see what is
15 replicating the actual known historic stream flow as
16 compared to what the model predicts.
17 They work individually in their offices
18 based on assignments by the committee to refine
19 certain elements that need more work. And then they
20 get together and discuss and talk about those
21 things. There's a lot of shared data sets and model
22 runs that are reviewed and evaluated by each of the
23 members of the committee.
24 SPECIAL MASTER MCKUSICK: Ms. Angel, you
25 have something to add?

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1 MS. ANGEL: Thank you, Your Honor. If you
2 want a great deal of detail about exactly where the
3 model is and what they are planning to do in the
4 next few months, we could offer Mr. Knox, who has
5 been the head of the modeling committee, to give you
6 a more detailed report. It's a matter of how much
7 detail you want. And I think Mr. Pope is doing
8 fine. I just didn't know if you wanted --
9 SPECIAL MASTER MCKUSICK: I think that
10 would be valuable. Basically what my question is
11 leading up to is, how much remains to be done? What
12 is the certainty that it'll be done on a time
13 schedule as suggested here, well prior to June 30th
14 and that sort of thing? That would be fine. I
15 would be happy to hear him.
16 MR. POPE: I would be happy to have
17 Mr. Knox up here. Mr. Knox and his people, they
18 have spent a great deal more time on this than the
19 State engineers. Why don't you come forward, Ken,
20 and give a little summary.
21 MR. KNOX: Good afternoon. For the
22 record, my name is Ken Knox for the State of
23 Colorado.
24 For your second question, as to the
25 certainly, with every fiber in our bodies, we will

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1 hope and pray, and we do -- we do, sir, anticipate
2 completing this on time.
3 Sir, I believe there are two main
4 components that we have to work on. First, is in
5 regards to the model itself. As Mr. Pope accurately
6 described, the model is not fully calibrated. It
7 does not fully represent all the physical conditions
8 throughout the basin. However, I do hasten to add,
9 it is calibrated for a large -- most of the area,
10 predominantly, especially in the western part of the
11 basin, we have achieved calibration. There are
12 certain refined areas that Mr. Pope and
13 Mr. Patterson referred to in the mound area that we
14 have a bit of technical work to do.
15 During the hiatus, we are reviewing those
16 data sets and our methodologies. The intent is to
17 make sure we are all on the same page, that we have
18 a consistent, scientifically proven, adopted and
19 recognized method that we could proceed from.
20 The second component, sir, is
21 documentation of the model. That is something we --
22 throughout this process, folks were working in a
23 very collegial, as well as collaborative manner.
24 And we need to document that for understanding and
25 presentation to the Court, but candidly, also for

1 successive generations so that they could see where
2 we got to, how we did, and they can build upon it in
3 the future as well. I hope that helps.
4 SPECIAL MASTER MCKUSICK: Yeah. Thank you
5 very much, Mr. Knox.
6 I have another --
7 MS. ANGEL: Your Honor, one more thing. I
8 just asked Mr. Knox, and the next modeling committee
9 meeting is January 20th through 22nd. So they are
10 continuing on a fairly tight schedule.
11 SPECIAL MASTER MCKUSICK: Pushing. Okay.
12 MR. POPE: Your Honor, one thing that I
13 would note is I believe most of us have observed
14 this process, even though many of us have focused on
15 many of the other matters related to this but have
16 been very, very interested and we all understand
17 that this modeling effort is very critical.
18 We think there's, perhaps, almost an
19 unprecedented level of cooperation between the
20 experts of three states that have been involved in
21 major litigation. We're very pleased that they have
22 come as far as they have. But that doesn't mean
23 that there aren't issues and matters that have to --
24 SPECIAL MASTER MCKUSICK: Still a lot to
25 do.

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1 That leads me to another question. On
2 Page 19, in regard to the groundwater model project,
3 it says, the States agree to devote the necessary
4 time and resources to complete the model subject to
5 legislative appropriations. That makes one kind of
6 shudder in this time of tight budgets. But we are
7 now less than six months away from when the thing
8 was supposed to be completed. Do you have any
9 slightest qualms about having that appropriation?
10 MR. POPE: Well, I think --
11 SPECIAL MASTER MCKUSICK: And I would turn
12 to each of the three states on that score.
13 MR. POPE: Well, you know, clearly I have
14 to say --
15 SPECIAL MASTER MCKUSICK: For the model
16 program?
17 MR. POPE: Clearly we have --
18 SPECIAL MASTER MCKUSICK: How about
19 Kansas?
20 MR. POPE: We have to clearly recognize
21 that we are all going through very difficult budget
22 situations. But I think the level of commitment is
23 very much there, and hopefully there will be
24 sufficient dollars to do it. Some of that will
25 depend on whether there are unresolved disputes that

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1 we have to continue to pursue with. But as far as
2 we know, we're committed. And we think we're okay
3 to get that accomplished.
4 SPECIAL MASTER MCKUSICK: And you're
5 giving it your priority?
6 MR. POPE: Absolutely giving it the
7 priority.
8 SPECIAL MASTER MCKUSICK: How about
9 Nebraska?
10 MR. PATTERSON: Special Master, money for
11 Nebraska to continue through the end has been
12 appropriated by our legislature. And we're
13 suffering some economic hardships like the other
14 states. But we have the money appropriated. And I
15 don't anticipate any problem being able to hang on
16 to that to complete the job.
17 SPECIAL MASTER MCKUSICK: And Colorado?
18 MR. SIMPSON: For the record, Hal Simpson.
19 Our appropriation year ends June 30th.
20 And we have sufficient funds to complete the
21 modeling of the target date of July 1st. So we're
22 in fine shape at the current time.
23 SPECIAL MASTER MCKUSICK: I appreciate
24 that.
25 MR. POPE: I think the few additional

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1 comments I would make about this, I think it's
2 important to note that the modeling committee has
3 come to agreement on many of the major components
4 about the structure and calibration targets. I'm
5 not going to dwell on that further. I think
6 Mr. Knox has pretty well covered things and has -- I
7 would note, of course, as I think you know, there's
8 a fairly detailed summary in the settlement package
9 itself in Appendix J about the status of the
10 modeling effort.
11 SPECIAL MASTER MCKUSICK: Yes.
12 MR. POPE: Would note, for example, that
13 there were 57 stream gauges throughout the basin
14 that were selected by the model committee as base
15 flow targets. Ultimately, the committee agreed on
16 the estimated monthly flows for each gauge. These
17 are included in the settlement documents. There
18 could be minor modifications to the base flow
19 targets in the coming months based on unanimous
20 action of the committee.
21 But the thing, the point here is that we
22 had set forth in the principles that we had to have
23 a good, clear understanding of the model structure
24 and the methodologies and key data sets and targets
25 to get where we are now. That's the hard part.

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1 That really was the hard part in my view.
2 I guess the remaining work, and we may
3 have covered this now that I have listed here was in
4 addition to making reference to the Appendix J is a
5 description of the status, but would be to
6 finalization of the data sets and methods to be used
7 in the model, refining previous estimates of
8 groundwater pumpage, pumping recharge, surface water
9 recharge, and precipitation recharge.
10 Each State will review the final estimates
11 developed by the others. A lot of work has been
12 done in this area. It will be finalizing things
13 like phreatophyte coverage and methods for
14 estimating evapotranspiration. And complete the
15 model testing, as Mr. Knox indicated.
16 I would note at this point that the
17 settlement does include a provision to resolve any
18 model disputes. And I would just note briefly that
19 it is expected that the modeling committee will
20 continue to work cooperatively to complete the model
21 by July 1.
22 If at any time members of the committee
23 cannot reach an agreement, the committee shall
24 report the nature of the dispute to the States, and
25 the States will resolve the disputes as soon as

1 possible. If the States cannot reach agreement
2 regarding the dispute issue, the stipulation
3 provides for binding arbitration, including a
4 cooperative process to select an arbitrator. If the
5 States cannot agree on an arbitrator, the
6 stipulation provides that Special Master would
7 select the arbitrator.
8 Then I would also note that the settlement
9 provides that the modeling committee shall submit
10 the final groundwater model to the three States with
11 sufficient time for the three States to agree to the
12 model by July 1.
13 SPECIAL MASTER MCKUSICK: How much lead
14 time is that?
15 MR. POPE: That's not a specifically
16 defined, but I think we would probably need
17 something like 30 days or something of that sort to
18 review it. But we have really not explicitly
19 defined that. I think the Republican River Compact
20 Administration is prepared to meet as necessary,
21 because ultimately it will be adopting the model as
22 part of its accounting processes. I see some
23 shaking heads, so apparently that's right.
24 That's all I had on the model. I would
25 like to move to another area unless you have any

1 questions.
2 SPECIAL MASTER MCKUSICK: Yeah.
3 MR. POPE: On Subsection D deals with
4 accounting and the -- what is referred to as
5 averaging. Subsection D provides that all
6 compliance tests under Section IV, which we're now
7 discussing, are to be done on a five-year running
8 average basis. And Mr. Patterson again will discuss
9 some of the Section V provisions during water-short
10 years when additional tests shorter than that period
11 will be used.
12 Averaging has long been discussed in
13 connection with the Compact. Within the Compact
14 itself, the original allocations were based upon
15 the, quote, computed average annual water supply,
16 end of quote, determined by the negotiators using
17 the available gage records. In addition, the RRCA's
18 annual assignments to its engineering committee has
19 included the computation of 5- and 10-year average
20 water supplies and allocations, at least for
21 informational purposes.
22 I will note that this provision was one of
23 the more difficult ones to negotiate. Averaging
24 provides greater predictability and flexibility in
25 the use of water. Recognizing that groundwater

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1 pumping may cause stream depletions a year or more
2 after the pumping occurs, the use of averaging in
3 the accounting allows the States to manage
4 groundwater and surface water together. However,
5 these advantages must be balanced by the need to
6 protect downstream demands for the same water.
7 Ultimately, the balance we framed in the
8 settlement concerning multi-year averaging was
9 three-fold. Number 1, a compromise average length,
10 five years for overall accounting. Number 2, a
11 shorter averaging period and more strict use
12 criteria above Guide Rock in water-short years.
13 And, Number 3, the removal of a portion of large
14 flood events from the computed water supply and
15 allocations.
16 With regard to --
17 SPECIAL MASTER MCKUSICK: Pardon. Counsel
18 may want to respond to this too, but Article 4 in
19 allocating, the beneficial consumptive -- for
20 beneficial consumptive use in each of the states, it
21 says, It is hereby allocated for beneficial
22 consumptive use in Colorado, it starts, annually, a
23 total of 54,100 acre feet of water. I guess my
24 question is, how can that be changed into over a
25 period of five years if you use an average only a

1 total of 54,100 acre feet of water.
2 MR. POPE: Well, again, counsel may want
3 to comment on this. The numbers are computed
4 annually. But it's a matter of what type of
5 methodology is used in the accounting.
6 Mr. Cookson?
7 MR. COOKSON: I think that is the first
8 major point is we'd still do an annual accounting.
9 But the original Compact allocations were from an
10 averaged supply from the period of 1929 to 1940 was
11 the basis of the water supply in Article 3. So
12 while not express, implicitly the Compact allocated
13 an average amount, because in 1943, the actual
14 virgin water supply was not the virgin water supply
15 that existed in Article 3.
16 And, in fact, in order to make the books
17 balance, so to speak, it makes a practical and we
18 think consistent with the Compact to do averaging
19 for both aspects, because otherwise you have a
20 supply that is average and an allocation that's not.
21 And the physical reality is they may not match.
22 But we still do it annually in terms of
23 measuring compliance, we use a five-year averaging,
24 which is consistent both with -- we believe, with
25 the terms of the Compact and with the historical

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1 basis that the Compact worked off of since the very
2 beginning.
3 And it allows us to address the practical
4 concerns of not only using groundwater, which has
5 delayed effects over time, but it also allows us to
6 account for the changes to the flow that are caused
7 by the storage in the reservoirs which did not exist
8 at the time the original allocations were averaged
9 in Article 3.
10 SPECIAL MASTER MCKUSICK: Ms. Angel?
11 MS. ANGEL: If I could just add, the
12 specific words at the beginning of Article 3, which
13 is, The basis for the water supply that is
14 allocated, state that the allocations are derived
15 from the computed average annual virgin water
16 supply. So that's a -- you read Article 3 and
17 Article 4 together in our view. So we think that's
18 consistent. It's also consistent with the practice
19 of the RRCA, which has looked at annual figures,
20 5-year averages, and 10-year averages.
21 SPECIAL MASTER MCKUSICK: In other words,
22 in Article 4, you're reading as if the word
23 "averages" was put in, does hereby allocated for
24 unofficial consumptive use in Colorado annually on
25 the average?

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1 MS. ANGEL: Because of Article 3, yes.
2 MS. HIMMELHOCH: And I would also note,
3 Your Honor, that there was anticipation that supply
4 would fluctuate and that there would have to be
5 accommodation made for that fluctuation. There is
6 an explicit provision for variations greater than
7 10 percent. And so it is clear the language of the
8 Compact was intended to give the RRCA the ability to
9 account in a way that reflected the realities of the
10 system, which probably would change from the time
11 the Compact was drafted through the operation of the
12 Compact.
13 SPECIAL MASTER MCKUSICK: Okay.
14 MR. POPE: I might just note back to the
15 issue of flood flows that there are certain flows
16 that will be removed from the determinations of
17 computed water supply and allocations as specified
18 in the accounting procedures. These are flood
19 waters that are greatly in excess of the basin's
20 storage capacity and current needs for beneficial
21 consumptive use.
22 And, again, I would note that this
23 practice of removing flood flows has some parallel
24 in the original negotiation of the Compact where the
25 1935 flood flows were not included in the

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1 determination of the average water supplies of the
2 article -- of Article 3 of the Compact. And, again,
3 to try to make the system of averaging fair and
4 workable, we had to deal with the large floods.
5 The State will be considered in compliance
6 with Section IV as long as the five-year running
7 average, statewide computed beneficial consumptive
8 use does not exceed that State's five-year running
9 statewide allocation, and as long as any upstream
10 State's sub-basin use does not impair the ability of
11 a downstream State to use its allocation from the
12 same sub-basin. Imported water will be allowed to
13 be used as a credit to offset Nebraska's computed
14 beneficial consumptive use when determining Compact
15 compliance. And that's built into the formulas.
16 So far, I have focused on provisions of
17 the stipulation related to Compact accounting. Much
18 of the details of how accounting will be done is in
19 Appendix C of the stipulation of the RRCA accounting
20 procedures. I will seek to explain each of the
21 formulas briefly starting on Page 10 of the
22 accounting procedures, if you would like. And I
23 will make this fairly brief.
24 Essentially the first -- starting there on
25 Page 10, the first basic formula is the computation

1 of virgin water supply. Its definition is derived
2 from the Compact itself. And with the exemption of
3 removal of the imported water supply credits and the
4 inclusion of all groundwater depletions to stream
5 flow and the inclusion of evaporation from
6 nonfederal residence varies storing more than
7 15 acre feet, this computation of virgin water
8 supply in the accounting procedure is unchanged from
9 the historic methods of the RRCA.
10 So those are really the differences -- and
11 they are important differences. It is calculated
12 for each, designated drainage basin by summing the
13 downstream gauge plus the sums of all beneficial
14 consumptive uses by the States plus the changes in
15 federal reservoir storage in that sub-basin plus any
16 imported water supply credits. The imported water
17 supply credits will be discussed by Mr. Simpson when
18 discussing Section IV.F. And these imported water
19 supply credits are excluded as they are not part of
20 the water supply of the basin.
21 The second basic formula is the
22 computation of computed water supply. It is defined
23 in the accounting procedures to be the virgin water
24 supply less the change in federal reservoir storage
25 in any designated drainage basin less the flood

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1 flows. The computed water supply is the basis of
2 future allocations under the settlement.
3 The definition provides for two
4 adjustments to virgin water supply to calculate the
5 computed water supply. The second of these flood
6 flows we have already talked about.
7 And then the next is, the other one is the
8 change in federal reservoir storage. And I would
9 indicate that the historic methods used in this term
10 in the computation of virgin water supply and,
11 therefore, the determinations of allocations, was
12 done. However, change in federal reservoir storage
13 is not used in the computation of beneficial
14 consumptive use.
15 Of particular concern is that under the
16 historic method, the water is released from storage
17 typically in years of high use. The inclusion of
18 change in storage term reduces the allocations by
19 the amount of water released for use and, yet,
20 consumptive use from the storage release increases
21 the computed consumptive use for that year.
22 So it was somewhat of a problem
23 practically speaking. The adopted formulas remove
24 change in federal reservoir storage from the
25 determination of allocations.

1 To implement this decision and to not
2 conflict with the definition of "virgin water
3 supply," a new term was created called "computed
4 water supply." In effect, the States are allocating
5 the water supply as regulated by the federal
6 reservoirs.
7 The practical effect of this decision is
8 to increase allocation in years of release from
9 storage and decrease allocations in years of
10 decrease in storage, at least as compared to the
11 historic method. This allows for a better match
12 between allocations and use. The long-term average
13 water supply and allocations are unchanged by this.
14 The third basic formula is the computation
15 of the allocations. Table 2 of the accounting
16 procedures on Page 40, each State's sub-basin
17 allocations have been expressed as a percent of the
18 virgin water supply of the sub-basin. State
19 allocations in a particular sub-basin are found by
20 multiplying the computed virgin supply -- excuse me,
21 multiplying the computed water supply for the
22 sub-basin by the percentage allocated to the State
23 in the sub-basin.
24 So then the final basic formula is the
25 computation of computed beneficial consumptive use.

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1 Settlement provides that computed beneficial
2 consumptive use is depletions to stream flow in the
3 basin resulting from irrigation of lands in excess
4 of 2 acres, nonirrigation uses diverting more than
5 50 acre feet, net evaporation from federal
6 reservoirs, and evaporation from nonfederal
7 reservoirs with a storage capacity greater than 15
8 acre feet.
9 And as we have already discussed, the
10 joint groundwater model currently being developed by
11 the States will be used to determine the depletions
12 to stream flow resulting from groundwater use.
13 The accounting procedures provide
14 significant details on the computations of
15 consumptive uses, both surface water and
16 groundwater. These procedures provide both general
17 guidance on methods as well as specific formulas for
18 the application of these methods to each designated
19 drainage basin.
20 An additional difference that I would note
21 in the methods of accounting procedures as compared
22 to the historic methods is that the virgin water
23 supply and allocations are adjusted every year for
24 every designated drainage basin, whether or not the
25 values within 10 percent of the Compact value. Of

1 course, I think as you recall, the Compact provides
2 for this adjustment when the departure's greater
3 than 10 percent. We have simply agreed that that
4 should be done each year so that the accounting
5 matches up, so that we can balance the books, so to
6 speak. So that is sort of a practical
7 administration that we think is consistent with the
8 provisions of the Compact.
9 Finally, in connection with the accounting
10 procedures, I would note that they can be modified
11 by action of the RRCA, and that's found in the
12 stipulation section -- I.F, Page 5. While the
13 settlement teams have worked hard to make the
14 document comprehensive and significant changes are
15 not expected, it is expected that there will be some
16 modifications with the completion of the model to
17 fully conform with its output and other changes may
18 occur from time to time, as well as the possibility
19 that advances in technology, for example, could
20 allow for improved methods.
21 SPECIAL MASTER MCKUSICK: Those
22 adjustments you see as within the normal powers of
23 administration of the RRCA, I take it?
24 MR. POPE: Again --
25 SPECIAL MASTER MCKUSICK: To be consistent

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1 with the Compact having that little looseness in the
2 joints?
3 MR. POPE: That's right. We have worked
4 long and hard and these are very comprehensive, but
5 we can't anticipate everything that might occur.
6 SPECIAL MASTER MCKUSICK: But you still
7 can't arrive at those changes except for unanimity
8 among of the States.
9 MR. POPE: That's right. Those would
10 require an action which would require unanimity from
11 the States.
12 With that, Your Honor, hat concludes my
13 portion of the Section IV unless you have further
14 questions.
15 SPECIAL MASTER MCKUSICK: I have none
16 other. Does anybody have anything to add to
17 Mr. Pope's presentation? Let's proceed to
18 Mr. Simpson, then, for the balance of Section IV.
19 Subsections E through H.
20 MS. ANGEL: Your Honor, did you say we
21 would be taking a break? Would it be possible to
22 not break up Mr. Simpson's presentation?
23 SPECIAL MASTER MCKUSICK: I appreciate
24 your raising that. And it is time that we have a
25 break.

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1 MS. ANGEL: Thank you.
2 SPECIAL MASTER MCKUSICK: Thank you,
3 Ms. Angel, for reminding me.
4 Before we do recess, I have a general
5 question for counsel that I would like possibly for
6 you to have an opportunity to consider during recess
7 and confer about. And it relates to Section X, the
8 Retention of Jurisdiction by the Special Master.
9 That provision is to provide -- it says,
10 The Special Master shall retain jurisdiction for two
11 things, to resolve discovery disputes that come up
12 during the course of making the groundwater model,
13 and, secondly, to -- if there is a complete
14 breakdown among the States, that -- even on choosing
15 a groundwater arbitrator, to pick the arbitrator.
16 I do not have any problem with performing those
17 responsibilities.
18 The United States' statement addressed
19 what I would call the Virginia against New York
20 problem. That is, the Supreme Court in that
21 original jurisdiction case said that a Special
22 Master should not be given impermissible arbitral
23 functions, rather as the United States' statement
24 suggested, the function that you see here for the
25 Special Master is similar to what a trial judge in

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1 the course of an ongoing case before the trial judge
2 would do to help the parties get together to settle
3 the case.
4 My problem is a different problem. And
5 that is how I have jurisdiction or can keep the
6 jurisdiction once I file a final report. At that
7 point, normally, the Special Master will have been
8 discharged. Mind you that my jurisdiction comes
9 from the Court. It doesn't come from the litigants.
10 Now, the Courts' order in the first
11 paragraph of the proposed consent judgment would
12 approve and adopt the following final settlement and
13 stipulation executed by the parties. But that
14 doesn't incorporate into the decree of the Court the
15 terms of the final settlement stipulation.
16 I'm not sure that I can retain
17 jurisdiction after I file the final report. And
18 also, suppose I do likely go ahead, what do I --
19 what do I do -- this revision contemplates the
20 proposed consent judgment of the Court anticipates
21 that the end of the case will be brought by the
22 parties filing a notice with the Clerk. What does
23 the Special Master do to get discharged, to wind up
24 his function?
25 Now, I have a proposal. And do please --

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1 obviously, I'm going to do everything that I can
2 to -- my recommendation to the Court is obviously
3 going to be to recommend this settlement. And I'm
4 going to -- I'm prepared to do everything that I can
5 to be in a position to perform this function. But I
6 have a proposal that perhaps might get around the
7 difficulty that I have been pointing out here.
8 And Steve -- we have made up a proposal
9 for a substitute second paragraph of the decree, the
10 proposed decree to be entered with the Court and by
11 the Court. And I would modify only the second
12 paragraph, only to the extent of the Court
13 specifically recognizing my continuing jurisdiction.
14 And let me read it.
15 It says, This action is recommitted --
16 this is the Supreme Court speaking after they have
17 approved the final settlement stipulation -- this
18 action is recommitted to the Special Master for the
19 sole purpose of monitoring the completion, by the
20 State parties of the RRCA groundwater model pursuant
21 to the binding procedures of the final settlement
22 stipulation.
23 And then the next sentence is basically
24 what you have in the second sentence -- second
25 paragraph now, All claims, counterclaims, and

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1 cross-claims for which leave to file was or could
2 have been sought in this case arising prior to
3 December 15, 2002, are hereby dismissed with
4 prejudice effective upon the filing by the Special
5 Master of a final report certifying adoption by the
6 RRCA ground -- of the RRCA groundwater model by the
7 State parties.
8 Anyway, during the recess, would you folks
9 want to take a look at that? Are there any
10 questions?
11 MR. COOKSON: Yes, can I ask a
12 clarification?
13 SPECIAL MASTER MCKUSICK: Yes.
14 MR. COOKSON: As I read this, and I want
15 to make sure I'm reading this correctly, you're
16 anticipating you would actually file two final
17 reports?
18 SPECIAL MASTER MCKUSICK: No. That's a
19 very good question. I would file what -- what I'm
20 going to file recommending approval of the -- would
21 be my second report, recommending approval of the --
22 but to be perfectly -- but this would be in the
23 appendix to my report, same as this first report.
24 In the appendix of the report, the only
25 thing left to be done was for me to monitor the --

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1 so it's a penultimate report, if you will. But it
2 wouldn't be the final report. If I filed a final
3 report, I think I'm all done.
4 MR. COOKSON: Understanding that dilemma,
5 let me share with you -- I'll come up.
6 The reason -- one of the primary driving
7 reasons behind this sort of unusual approach coming
8 to you now asking the Court to approve the
9 settlement and not having the model finished is in
10 order for the States, and particularly Nebraska, to
11 implement many of the parts of the settlement, we
12 need to have the litigation resolved.
13 And so from our perspective, whether you
14 call it your second report or the penultimate
15 report, or however you deem the report recommending
16 approval, as long as that process goes forward, and
17 hopefully with a quick acquiescence by the Court,
18 then that is the reason that we're striving to get
19 that done now, is so that we can begin further
20 implementation of the settlement agreement. But we
21 have to have the Court's approval on 90 -- the bulk
22 of it.
23 SPECIAL MASTER MCKUSICK: I understand
24 that very well. And I want to cooperate in every
25 way I can to make this just as fine as possible.

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1 And that's often part of the presentation to the
2 Court. The Court doesn't want to have it come to
3 them piecemeal. They don't want any loose ends, as
4 we have called it in our discussions earlier.
5 So this -- I have tried to put in the --
6 all it is is just monitoring the completion pursuant
7 to the binding procedures. They have got to -- it
8 has only one place to end up. But the Court has to
9 have some way of being informed that it's happened,
10 that -- anyway, talk about it and we'll talk about
11 when we come back.
12 Why don't we take a recess for -- until
13 five minutes of 3.
14 (Recess taken.)
15 SPECIAL MASTER MCKUSICK: So far as that
16 proposal in regard to decree, why don't we defer
17 until the end discussion of that and what I will put
18 in my draft report.
19 Mr. Simpson?
20 MR. SIMPSON: Thank you, Your Honor. For
21 the record, I'm Hal Simpson, Colorado state
22 engineer.
23 I'm going to continue discussion on
24 Compact accounting, Section IV, beginning with
25 Subsection E that deals with system improvements and

1 operations study. I'll try to help you understand
2 that brief section.
3 Basically during negotiations, the States
4 and the United States discussed the possibility of
5 improving the water supply to the Kansas Bostwick
6 Irrigation District and to a lesser degree, to the
7 Nebraska Bostwick Irrigation District, as well as
8 improving the water supply below Hardy during the
9 summer months for the benefit of Kansas.
10 The Bureau of Reclamation, with some
11 technical assistance from the States, evaluated it
12 on a limited basis, 13 alternatives that would
13 improve the water supply in this lower part of the
14 river below, basically, Harlan County Reservoir.
15 They looked at the cost and benefits in an
16 approximate way, and based on those
17 13 possibilities, which was provided to us in what
18 was referred to as a value study presentation
19 report, the States then identified three -- at least
20 three options that they thought were very promising
21 that, in fact, did merit additional study.
22 And the Bureau of Reclamation is
23 initiating what we referred to as an appraisal study
24 focusing on those three alternatives as a minimum
25 that we hope would provide a way to better use the

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1 supplies of water originating below Harlan County
2 Reservoir.
3 SPECIAL MASTER MCKUSICK: This is -- this
4 is relating to the use of water rather than
5 increasing the supply of water.
6 MR. SIMPSON: In a way, it's increasing
7 the supply. And let me give you the flavor of what
8 we're talking about. The first option would be to
9 automate the headgate of the Courtland Canal -- you
10 were there on our field trip -- so that it would
11 track the rise and fall of the river so that water
12 would not spill over the diversion dam and not be
13 usable to the Bostwick districts.
14 Another option is to increase the canal
15 capacity of the Courtland Canal from 400 cubic feet
16 per second to 600 cubic feet per second. So that
17 can divert more water, especially in leaner years.
18 And the third option or way they wanted to
19 improve the Courtland Canal is to allow it to be
20 operated in the winter months to capture return
21 flows originating below Harlan County reservoir and
22 putting that water into storage in the Lovewell
23 reservoir.
24 The second option we looked at was
25 actually increasing the capacity of Lovewell

1 Reservoir by raising the dam or raising the spillway
2 at the dam to capture additional water so either
3 coming down the drainage, but primarily from
4 Courtland Canal, by being more efficient and
5 operating in the winter months. That increased
6 capacity would be looked at at two options, 16,000
7 acre feet or, under the ultimate maximum storage,
8 35,000 acre feet.
9 And, finally, to improve the water supply
10 to Hardy, under a tributary in Kansas and as part of
11 the Cortland water canal, there is a little
12 tributary called Beaver Creek that has the capacity
13 of about 8,500 acre feet where water from Courtland
14 Canal would be diverted into it. That water then
15 could be released for the benefit of the water users
16 in the Courtland Canal or down to the Republican
17 River for the benefit of water users below Hardy.
18 So those are the options that are going to
19 be looked at in this appraisal level study. And if
20 the States can gain federal support, obviously, it
21 would be desirable to move ahead with construction
22 of one or more of these alternatives.
23 Related to these alternatives, as
24 referenced in Subsection E is an operations study.
25 And what we would do there would be look at the

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1 potential benefits of these increased and improved
2 water supply options, in a number of ways,
3 increasing supply to the Bostwick Districts,
4 reducing the demand on Harlan County Reservoir,
5 therefore making water available to be carried over
6 into future years, and making water available below
7 Hardy.
8 This operations study would take a long
9 period of historical records where we have stream
10 flow, storage, and diversions and superimpose on
11 that these new facilities and reoperate the system
12 in an accounting way to look at the benefits to
13 either increased carry-over storage in Harlan County
14 Reservoir or increased water supply below Harlan
15 County Reservoir. And this operations study would
16 be completed after the appraisal study has been
17 finished, so that we would have a way to look at the
18 benefits of the appraisal study.
19 As an option, the States have agreed that,
20 based on the operations study, we would revisit the
21 five-year running average and determine if it could
22 be adjusted. We aren't saying which way. We're
23 just saying that it might be that the five-year
24 running average could be adjusted.
25 Well, that concludes my discussion on

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1 Subsection E. And I can move on unless you have
2 questions.
3 SPECIAL MASTER MCKUSICK: Well, I applaud
4 the interest of the chief engineer of Colorado in
5 Kansas problems. And I think that's wonderfully
6 illustrative of the kind of collaboration that's
7 going on here. I applaud you.
8 MR. SIMPSON: If we can satisfy their
9 needs, we should try to do so.
10 SPECIAL MASTER MCKUSICK: They will
11 reciprocate some time.
12 MR. SIMPSON: Subsection F deals with how
13 we account for the consumptive use and accounting of
14 imported water supply. We have had some discussion
15 this morning about that imported water supply.
16 Currently, that exists as return flows from
17 diversion just north of the Republican River basin
18 from the Platte River and very large canals that
19 were constructed after the Compact was negotiated,
20 creating these groundwater mounds that we have been
21 talking about, which part of those mounds are
22 migrating southward into the Republican River basin.
23 This mound of imported water provides a
24 source of supply for groundwater wells and also
25 discharges into some surface streams in Nebraska. I

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1 believe Mr. Pope and Mr. Patterson both discussed
2 these mounds cause increased stream flow.
3 The States agree that this water should
4 not count as virgin water supply or as a computed
5 beneficial consumptive use. Additionally any mound
6 should be recognized as a credit against depletions
7 to virgin water supply. And then in Section V, or
8 Roman numeral V, Subsection B.2.b, this credit is
9 further limited during water-short year
10 administration. And I believe Mr. Patterson will
11 talk about that in his discussions at that time.
12 Well, how do we determine this credit?
13 Well, basically we have to use, again, the
14 Republican River Compact Administration's
15 groundwater model to evaluate the benefit of this
16 credit. And we do it with two runs of the model so
17 that we can evaluate an historical condition. And
18 in the second run, the recharge from these
19 diversions from the Platte are, in a sense, turned
20 off, and a second run is made and then the two
21 models subtract the results from them. And then you
22 see the net benefit of the credit from this imported
23 water supply.
24 And this accounting is set forth in
25 Section III of the accounting procedures in

1 Subsection A, and that's set forth on Page 11 of the
2 accounting procedures manual. I would be glad to
3 answer any questions with respect to the accounting
4 of imported water supply.
5 SPECIAL MASTER MCKUSICK: On Page 24, the
6 second line from the bottom, there's a phrase,
7 whether determined expressly or by implication,
8 which stopped me short. It says, Determinations of
9 beneficial consumptive use from imported water
10 supply whether determined expressly or by
11 implication.
12 MR. SIMPSON: I would turn to legal
13 counsel for explanation of that term.
14 MR. COOKSON: Your Honor, you've hit on
15 something that was the subject of much discussion.
16 Our agreement is that if you are consuming
17 imported water and not virgin water supply, it
18 shouldn't count, and that if after that consumption
19 occurs, there's still imported water supply getting
20 into the streams, we should get a credit.
21 The practical reality is the way the
22 model's constructed, you don't make two separate
23 determinations. You make a net determination, which
24 is how much extra water is getting in. So we
25 expressly determined the latter. By implication, we

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1 have eliminated the former, the consumption by the
2 well.
3 So in order to reflect that, we reached a
4 compromise language, which was, Whether it was
5 determined expressly or by implication. So it's
6 determined, but not expressly determined. It comes
7 out in the wash.
8 SPECIAL MASTER MCKUSICK: Fine. Thank you
9 very much. I guess I understand.
10 MR. COOKSON: That's the same response I
11 got from everyone else in the group.
12 SPECIAL MASTER MCKUSICK: That's all that
13 I had on your --
14 MR. SIMPSON: Okay. Moving on quickly to
15 Subsection G on Page 25.
16 We agree that the measurement techniques
17 need to be clearly identified, as well as data
18 collection and reporting. And we feel, through the
19 use of the procedures set forth in the stipulation
20 as well as in the accounting procedures, we have
21 very specific and detailed procedures for core
22 measurement for data collection and for reporting.
23 The purpose of this, of course, is to
24 prevent any future disagreements on reporting and
25 verification. And this is been discussed in quite a

1 bit of detail in Section Roman numeral V on Page 32
2 of the accounting procedures manual.
3 And, again, Mr. Pope has discussed that
4 when he provided his explanation of the accounting
5 procedures. We thought it was important to very
6 clearly lay out what we would report, when we would
7 report it, and all the details so that there would
8 not be future disagreement.
9 Finally, moving to Subsection H, also on
10 Page 25, we talk about augmentation credit. And in
11 particular, the States have agreed that a State
12 could acquire existing wells, eliminate the
13 consumptive use of water by these wells, and pump
14 groundwater from these wells or even a new well to a
15 stream to be used as an offset to depletions caused
16 by other consumptive uses or wells in the basin.
17 The purpose of this is to bring about compliance
18 with the Compact.
19 We have agreed that the use of these
20 augmentation wells shall not cause any new net
21 depletions to the stream system either annually or
22 long term. And the basis, again, for determining
23 the net effect of this pumping is the Republican
24 River Compact Administration's groundwater model.
25 And you asked how these wells would work.

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1 Let's say you had a series of wells 3 miles from the
2 north fork of the Republican River in Colorado.
3 Part of the water that is pumped by these wells and
4 has been used, say, to irrigate crops comes from
5 storage and a part comes from the impact upon the
6 north fork of the Republican River. Let's say that
7 ratio is 80 percent from storage, 20 percent from
8 stream flow. I'm just picking numbers.
9 We stop that irrigation, no longer
10 irrigate, turn those pump wells on, and pump that
11 water in a pipe to the stream. We get all the water
12 that is pumped into the stream above a gauge and,
13 therefore, we view that we are offsetting the
14 long-term effect of 20 percent depletion as well as
15 an additional amount of water that's being pumped
16 from storage, the 80 percent, that will help offset
17 depletions.
18 It's something we would not want to do
19 unless a last resort to come into compliance under
20 the Compact based on the five-year average.
21 Colorado brought this idea up. We thought it was
22 something that should be considered. We do it in
23 other parts of the state as a way to offset the
24 effect of other well depletions. It's usually a
25 short-term, interim pumping, not a permanent

1 long-term pumping, but we felt we should be able to
2 do that. And we did get concurrence from the United
3 States and the other States. But I want to make it
4 clear, we just can't do it without first having the
5 Compact Administration's approval in advance of the
6 plan and how it would operate.
7 That concludes my comments on this.
8 SPECIAL MASTER MCKUSICK: I have one
9 question on accounting.
10 MR. SIMPSON: Sure.
11 SPECIAL MASTER MCKUSICK: On Page 36 in
12 the accounting procedures. There's a word,
13 "kriging."
14 MR. SIMPSON: Kriging.
15 SPECIAL MASTER MCKUSICK: K-r-i-g-i-n-g.
16 It says, Potentially evapotranspiration rate is set
17 at a uniform rate for all classes and so on. The
18 amount is X at Y claimant stations and is
19 interpolated specially using kriging.
20 MR. SIMPSON: You're pronouncing it
21 kriging. But it could be kriging.
22 SPECIAL MASTER MCKUSICK: I didn't know
23 how to pronounce it.
24 MR. SIMPSON: It's a statistical technique
25 to interpolate data from different points where you

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1 have evaporation, data and one location needs
2 counting. You can interpolate that data from
3 kriging. We have people in the room that can give
4 you a great more detail about how it operates,
5 rather than myself, but it is a statistical way of
6 interpreting data.
7 SPECIAL MASTER MCKUSICK: In other words,
8 the specialist knows what that means?
9 MR. SIMPSON: Mr. Knox can define it or
10 explain it if you would like.
11 SPECIAL MASTER MCKUSICK: And it is
12 specifically defined?
13 MR. SIMPSON: But it is a standard
14 procedure.
15 SPECIAL MASTER MCKUSICK: Fine. Well,
16 let's go to Guide Rock. Mr. Patterson?
17 MR. PATTERSON: Your Honor, I think we
18 call it making the data fit.
19 I will summarize Section V of the final
20 settlement stipulation, which we have referred to as
21 Guide Rock. This section was developed in response
22 to concerns with less-than-full water supply years.
23 Article 4 of the Compact provides that
24 Kansas may take all or a portion of her allocation
25 from the main stem and any unallocated sub-basin

1 supply at or near Guide Rock, Nebraska. The States
2 disagreed in the lawsuit whether and how this would
3 occur. We believe the settlement agreement resolves
4 this issue by providing for water administration in
5 Nebraska above Guide Rock at times when it will
6 provide a needed benefit to Kansas.
7 In general, Nebraska has agreed to provide
8 for regulation of natural flow between Harlan County
9 Lake and the Superior Diversion Dam near Guide Rock.
10 Nebraska will also recognize a priority date of
11 February 26, 1948 --
12 SPECIAL MASTER MCKUSICK: Explain what
13 the significance of that is to me.
14 MR. PATTERSON: Part Kansas Bostwick
15 irrigation at a time date -- this is pat -- this is
16 the same priority date that is held by the Nebraska
17 Bostwick Irrigation on the Courtland Canal. And the
18 priority date is generally the date that is assigned
19 to a water right which determines where you fall in
20 the priority system. And the way water
21 administration works in our state, as well as in
22 Colorado and Kansas, is the more senior date gets
23 the water first.
24 SPECIAL MASTER MCKUSICK: And who would
25 be -- who would typically be the persons with lower

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1 priority?
2 MR. PATTERSON: The last person in the
3 basin that came in and made application for a water
4 right and put the water right to use. So it really
5 is a priority system. For the most part, in this
6 section of the river, the canals have older priority
7 dates. So the Franklin Canal, the Superior Canal,
8 the Courtland Canal, most of the individual water
9 users in this section of the river are actually
10 later or what we call junior priority dates, that
11 would be junior to this 1948 date.
12 And that's significant here because what
13 we have agreed to do is when times are short on
14 water supply, Nebraska will shut off these junior
15 users to allow the water to be available to the more
16 senior canals.
17 Nebraska's also agreed to protect any
18 storage water that is released out of Harlan County
19 Lake from diversion by a user that does not have a
20 contract for that water.
21 Additionally, the States and the United
22 States have agreed to take action to minimize bypass
23 flows at the Superior/Courtland Diversion Dam. The
24 process that we have worked out for how that will
25 occur is laid out in Appendix L.

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1 There are two levels of projected water
2 supply that trigger these actions by the States.
3 The first -- and this is based on Bureau of
4 Reclamation forecasting. So when the Bureau of
5 Reclamation is forecasting an irrigation supply from
6 Harlan County Lake that is less than 130,000 acre
7 feet, that's the number that is available to the
8 Nebraska District and the Kansas Bostwick District
9 under their new contracts when Harlan County Lake is
10 full.
11 So when the Bureau's forecasting less than
12 that amount and water is needed for direct
13 irrigation at Guide Rock, then Nebraska will go out
14 and we will close or shut off any of these water
15 rights that are junior to the February 26th, 1948,
16 date.
17 SPECIAL MASTER MCKUSICK: Now, where does
18 130,000 acre foot figure come from?
19 MR. PATTERSON: It is included in the
20 consensus plan that was worked out between the
21 Bureau of Reclamation and Corps of Engineers. It is
22 generally the amount of water that would be
23 available to the two districts together when Harlan
24 County Lake is full. So we picked that up. We
25 tried as best we could in this settlement to stay

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1 consistent with the consensus plan between those two
2 federal agencies, as well as the contracts the
3 Bureau of Reclamation has entered into with the two
4 irrigation districts.
5 SPECIAL MASTER MCKUSICK: And then where
6 does the 119,000 for triggering the water-short year
7 administration?
8 MR. PATTERSON: That number is also
9 included in the consensus plan between the Corps and
10 the Bureau and was collaborated on, I believe, if
11 you will, by the two irrigation districts. So we,
12 again, picked up that number as indicative of a
13 water-short year, sometimes when under this
14 agreement we've agreed to take additional actions.
15 So we picked it up.
16 I'm sure we could get somebody up here and
17 tell you a little bit more of the history of where
18 that came from. But, again, we tried to work with
19 that number since it had previously been worked out.
20 When the Bureau is -- so when we hit the
21 130 or less forecast from the Bureau, Nebraska will
22 notify our junior users to this 1948 date that they
23 should expect to be shut off that summer if
24 conditions don't improve. And then we will follow
25 through and do that. The time frame we worked out

1 as part of the settlement is we will begin this
2 particular action starting in 2003, so this year.
3 When the Bureau is projecting an actual --
4 a projected or actual supply from Harlan of less
5 than 119,000 acre feet, which we have called
6 water-short administration, then Nebraska has agreed
7 to take further action to limit our beneficial
8 consumptive use above Guide Rock to no more than the
9 amount of our allocation, Nebraska's allocation,
10 that is derived above Guide Rock.
11 Where in normal years, if you will, we
12 will be able to use our allocation on a statewide
13 basis. In these water-short years, we will then
14 have to limit our consumptive use above Guide Rock
15 to the part of our allocation that is derived above
16 Guide Rock.
17 We have agreed that we will do this on a
18 two-year average as opposed to the five-year average
19 that David Pope talked about.
20 SPECIAL MASTER MCKUSICK: Now, would you
21 explain why the shift from five year?
22 MR. PATTERSON: The shift from the five
23 year -- again, we're talking about times when we're
24 in water-short years. So there is basically not
25 enough water --

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1 SPECIAL MASTER MCKUSICK: You hope it
2 won't last too long.
3 MR. PATTERSON: Not enough to go around.
4 And the concern there, particularly from Kansas's
5 standpoint was if you are still in a five-year
6 average, you may have two of these water-short
7 years -- if Nebraska used heavily in these two short
8 years, get a lot of rain in year three or in year
9 four, all of a sudden we're in compliance on a
10 five-year basis, but there were two very short years
11 that Nebraska was using more and Kansas was
12 receiving less.
13 And we understood that dynamic. So what
14 we have agreed to here in these conditions is to use
15 this two-year averaging. And we do have an
16 alternative to that that I will get to in just a
17 second.
18 We have also agreed in these water-short
19 years that we will limit the consumptive use in the
20 sub-basins above Harlan County Lake to the two-year
21 running average of the sum of the specific sub-basin
22 allocations plus 48.9 percent of the sum of the
23 unallocated supply from these sub-basins.
24 In these years, Kansas will also limit its
25 consumptive beneficial use in the sub-basins in

1 northwest Kansas to no more than the two-year
2 running average of the sum of its specific
3 allocations, and 51.1 percent of the sum of the
4 unallocated supply from those same sub-basins; 51.1
5 percent of any unused Colorado allocation from any
6 of those same sub-basins that may be available.
7 In water-short years, Colorado will limit
8 its five-year running average sub-basin use above
9 Swanson Lake, which is Trenton Dam, to the sum of
10 the five-year running average specific allocations
11 from those sub-basins. In other words, Colorado
12 cannot use its allocation from Beaver Creek, which
13 flows into the Republican River below Swanson Lake
14 to offset any computed beneficial consumptive use in
15 the other three Colorado sub-basins.
16 So each State during water-short years has
17 different and tighter criteria that we have agreed
18 to all live with.
19 During water-short years, Nebraska has the
20 discretion to determine how we will comply. And we
21 have agreed to advise the other States and the
22 United States each year by April 30th of any
23 measures that Nebraska plans to take to limit our
24 consumptive use, and by June 30th of that year of
25 the final decision that we have made.

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1 In water-short administration years, only
2 imported water derived from sources above Harlan
3 County Lake or imported water from below Harlan
4 County Lake that can be diverted at Guide Rock for
5 irrigation or to fill Lovewell Reservoir may be used
6 to offset Nebraska depletions above Guide Rock.
7 Appendix M describes an alternative that
8 Nebraska may choose to use. The alternative
9 provides that in lieu of the two-year running
10 average compliance schedule in water-short year
11 administration, Nebraska may elect to implement a
12 plan for reduction of computed beneficial
13 consumptive use above Guide Rock when the projected
14 or actual water supply in Harlan is less than
15 130,000 acre feet. These plans must be previously
16 approved by the Compact Administration.
17 If Nebraska chooses to implement such a
18 plan, compliance above Guide Rock will then be based
19 on a three-year running average as opposed to the
20 two. For any year in which Nebraska implements an
21 approved plan, the plan shall be in effect for the
22 remainder of the year unless the projected supply
23 rises above 130,000 acre feet.
24 I acknowledge that this section is rather
25 complicated. And I would be happy to answer

1 questions.
2 SPECIAL MASTER MCKUSICK: Here we are
3 talking about calendar years?
4 MR. PATTERSON: Again, we are talking
5 about calendar year. That is correct.
6 SPECIAL MASTER MCKUSICK: On Page 28 in
7 the Paragraph B, the provision that states
8 situations when Nebraska may offset any computed
9 beneficial consumptive use in excess of its
10 allocation that is derived from sources above Guide
11 Rock with imported water supply credit. Now -- and
12 then it says, Nebraska will receive credit only for
13 imported water supply that -- and it lists three
14 things.
15 And Number 4 seems to be an unrelated
16 item. It requires -- it receives credit only if it
17 produces water above Harlan County Lake, produces --
18 two, produces water below Harlan County Lake and
19 above Guide Rock that can be diverted during the
20 Bostwick irrigation season, three, produces water
21 that can be stored or as needed to fill Lovewell
22 Reservoir. And four says, Kansas and Nebraska will
23 explore crediting water that is otherwise usable by
24 Kansas.
25 Is this just an expression of good will?

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1 Or will there be other situations where that credit
2 will be allowed.
3 MR. PATTERSON: I think, Special Master,
4 one through three really remit to water that would
5 be available to the Bostwick Irrigation District in
6 Kansas. And four, it really is a place holder that
7 if Kansas could otherwise make use of some water
8 that we would import, either for Bostwick or some
9 other use that they may have, then we would talk
10 about getting credit for that. So really four is in
11 there pretty much as a place holder.
12 SPECIAL MASTER MCKUSICK: I guess the
13 overall question in regard to the -- is a
14 water-short year administration the same as it is on
15 the five-year averaging? And how is this consistent
16 with the Compact?
17 Perhaps may I ask whether the position of
18 the States seems to be that it's not inconsistent
19 with the Compact. You have situations where you use
20 five-year and then you can shift to two-year or you
21 may shift to three-year.
22 MR. PATTERSON: I think it's the same
23 answer we gave before.
24 MR. COOKSON: Obviously, one of the areas
25 of dispute, as you will recall from the issues that

1 you had identified for resolution, was what does the
2 provision about Guide Rock mean? In terms of an
3 annual or even an averaged annual Compact allocation
4 for Kansas's perspective, they're really interested
5 in water being available when they needed it.
6 What we tried to address here was a
7 practical solution within the general principles of
8 the Compact, without being inconsistent with its
9 terms, such that we could address their practical
10 concerns in a way that didn't, in the others State's
11 view, unduly burden us with non-Compact allocations.
12 So it was a compromise that we tried, in
13 the spirit of Article 9 which allows the Compact
14 Administration to adopt rules and regulations that
15 are not -- that are consistent with the terms of the
16 Compact.
17 So we tried to address the dispute over
18 Guide Rock and what that meant in a way that
19 addressed the needs of Kansas in a practical way and
20 addressed the concerns of the upstream States so,
21 such that we aren't burdened with what we would
22 consider to be non-Compact obligations.
23 And you're right, and when it all comes
24 down to it, we tried to find something that wasn't
25 inconsistent with the terms of the Compact because

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1 the Compact doesn't expressly address this issue.
2 It's one of the areas where it's silent.
3 SPECIAL MASTER MCKUSICK: Thank you,
4 Mr. Peterson.
5 We should move to Section VI on soil and
6 water conservation. Mr. Simpson?
7 MR. SIMPSON: For the record, I'm Hal
8 Simpson, Colorado state engineer. I'm going to
9 discuss Section VI, which begins on Page 30 and
10 carries over onto Page 31 and 32.
11 First, in Subsection A, the States spell
12 out or set forth how they're going to account for
13 evaporation from federal reservoirs. And these are
14 residence varies that are greater than 1,500 feet
15 in. The States have not included in previous
16 Compact accounting of consumptive use.
17 Beginning in 2003, the States will, in
18 fact, determine the evaporation from these
19 reservoirs greater than 15 acre feet in accordance
20 with procedures set forth in Section Roman numeral
21 IV.A.2.f on Page 23 of the accounting procedures.
22 SPECIAL MASTER MCKUSICK: Maybe we have
23 talked about this before, but why do you restrict
24 this to nonfederal reservoirs above Harlan County
25 Lake? Are there nonfederal reservoirs downstream

1 that are inconsequential?
2 MR. SIMPSON: I believe that is the case.
3 I would have to ask Mr. Pope. But I think the
4 concern was the impact on the inflow to Harlan
5 County Reservoir and the storage for the Bostwick
6 Irrigation District.
7 Moving on to Subsection B, dealing with
8 soil and water conservation measures. During the
9 negotiations, it became clear that the apparent
10 reduction of surface runoff from some of the
11 sub-basins could not be fully explained by changes
12 in precipitation or from depletions resulting from
13 groundwater pumping and use. Therefore, the States
14 and the United States have agreed to study the
15 impacts of nonfederal reservoirs and the land
16 terracing on the virgin water supply of the basin.
17 The States and the United States will form
18 a committee by January 31st of 2003 to be known as
19 the Conservation Committee. By April 30th, 2004,
20 the conservation committee will submit to the
21 Republican River Compact Administration a proposed
22 study to quantify the effects of evaporation and
23 land terracing practices on water supplies.
24 If the Republican River Compact
25 Administration accepts the proposed study plan, the

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1 States and the United States will undertake the
2 study at a cost not to exceed $1 million, with
3 United States responsible for 75 percent of the cost
4 and the States responsible for one-third -- each
5 State responsible for one-third of the remaining
6 25 percent.
7 The States portion may be provided by
8 in-kind contributions, in other words, salaries of
9 staff who assist in that study. Study must be
10 completed within five years of the date the study is
11 accepted by the Compact Administration. The
12 participation in the study does not commit any State
13 or the RRCA to take any action or include the impact
14 of soil and water conservation measures in Compact
15 accounting.
16 Participation in the joint study by the
17 States or the United States is contingent upon the
18 appropriation of funds by the respective State
19 legislatures and Congress.
20 Any questions?
21 SPECIAL MASTER MCKUSICK: I don't want to
22 minimize the importance of this, but isn't it true
23 that these measures that are -- that the parties and
24 the United States have committed themselves to,
25 really don't have very much to do with the -- with

1 settling the controversies in this action, but are
2 valuable add-ons, so to speak?
3 MR. SIMPSON: That is correct.
4 SPECIAL MASTER MCKUSICK: Thank you very
5 much, Mr. Simpson.
6 Now go on to Section VII on dispute
7 resolution. Mr. Pope?
8 MR. POPE: Thank you, Your Honor. For the
9 record, again, my name is David Pope, chief engineer
10 for Kansas.
11 Section VII deals with the issue of
12 dispute resolution. It's set out in some detail,
13 and I'm simply going to summarize, I think, what
14 some of the key elements of this are.
15 All disputes must first be submitted to
16 the Compact Administration for its consideration and
17 action. The State raising the issue must define the
18 dispute, provide supporting materials related to the
19 dispute, and propose a schedule for resolution.
20 If a State raising the issue believes the
21 issue requires immediate attention, they may
22 designate it as a fast-track issue, in quotes, which
23 must be addressed by the Compact Administration
24 within 30 days, unless, I think, by agreement to
25 extend that vote.

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1 As in the past, each State has one vote in
2 each decision, and the decisions by the Compact
3 Administration must be unanimous.
4 Any issue which cannot be resolved by the
5 Compact Administration shall be submitted to
6 nonbinding arbitration unless otherwise agreed to by
7 the States with an actual interest in the dispute.
8 The States involved in the dispute may agree to
9 another method of dispute resolution or that
10 arbitration shall be binding, but no State shall be
11 subject to binding arbitration without its express
12 written consent.
13 For issues submitted to arbitration, the
14 settlement outlines a process to define and amend
15 the scope of the dispute, the process to identify
16 the skills needed of an arbitrator, and for his or
17 her selection and the contents of the decision by
18 the arbitrator. Each State is required to indicate
19 its acceptance or rejection of the arbitrator's
20 decision within 30 days.
21 And, finally, after a State has
22 participated in dispute resolution, the settlement
23 provides that it has exhausted all administrative
24 remedies and can then seek relief from the United
25 States Supreme Court for resolution of the dispute.

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1 The arbitrator's decision can be admitted to the
2 Court, but shall not be deemed as conclusive.
3 There is a lot of detail, of course, in
4 these provisions that I'm sure you can read through.
5 But those are kind of the key elements. And I think
6 this was an attempt by the parties to try to resolve
7 disputes, if possible, through the Compact
8 Administration, and then through other alternative
9 dispute resolution methods, if possible.
10 SPECIAL MASTER MCKUSICK: This provision,
11 again, is something which is not directly related to
12 this dispute, but perhaps awfully good if this had
13 been in place before the dispute came along. And it
14 is a very valuable add-on in this final settlement
15 stipulation.
16 MR. POPE: Yes. I think that was the view
17 of the parties to try to develop a mechanism that
18 will help deal with issues and help avoid future
19 cases of this nature, if possible.
20 SPECIAL MASTER MCKUSICK: Back in the
21 definitions section, there's a definition of
22 "submitted to the RRCA" and a definition of
23 "reasonable opportunity."
24 What do you understand -- if a matter is
25 submitted to the RRCA, according to this definition,

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1 and if the RRCA has a reasonable opportunity to
2 investigate and act upon that matter and -- but the
3 RRCA does nothing, is the implication that the
4 request has been denied?
5 MR. POPE: In general, and there may be
6 some comments that counsel who worked on this may
7 want to make, but I think the attempt was to make
8 the language mandatory in the sense that the RRCA
9 will do something with it.
10 SPECIAL MASTER MCKUSICK: Will act on it?
11 MR. POPE: Will act on it. I think that's
12 pretty clear in the provisions. If they do not act
13 within the time frames that are set out, I suppose
14 it would be by default denied. That seems to be the
15 counsel's position.
16 SPECIAL MASTER MCKUSICK: I see counsel
17 shaking their heads affirmatively.
18 MR. POPE: It's framed in a substantial
19 amount of detail to try to provide a process that
20 leads to some decision during the course of the
21 process.
22 And, again, there's really two types of
23 disputes. There are those things that are probably
24 not necessarily a short-term quick problem that
25 needs immediate resolution versus those that are

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1 more complex that are going to require some fairly
2 extensive consideration. I guess I have nothing
3 further unless there's questions or further
4 supplementation.
5 SPECIAL MASTER MCKUSICK: Fine. Thank
6 you, Mr. Pope.
7 Now, the remaining sections, we turn to
8 counsel to comment on. Section VIII is
9 nonseverabilty of the agreement; IX is the entirety
10 of the agreement; and X is the retention of
11 jurisdiction by the Special Master.
12 And leaving X for the moment, going back
13 to VIII, nonseverabilty of the agreement and, IX,
14 entirety of the agreement, do counsel have any
15 comments?
16 MR. COOKSON: Unless you have specific
17 questions.
18 SPECIAL MASTER MCKUSICK: This is a
19 standard provision. Do they have any particular
20 significance here?
21 MS. ANGEL: Your Honor, Carol Angel.
22 The nonseverabilty provision, I would say,
23 is very particularly significant in that this was a
24 very complex settlement put together piece by piece
25 with different pieces of great importance to each of

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1 the parties. And so nonseverabilty is just such a
2 vital part of this entire agreement. I would just
3 like to underline that. I hope the language pretty
4 well speaks for itself.
5 SPECIAL MASTER MCKUSICK: Any further
6 comment on that?
7 And the entirety of the agreement, there
8 aren't any oral site agreements, so that's
9 understandable.
10 Let's go finally to the retention of
11 jurisdiction by the Special Master. And this
12 relates specifically to the form of the proposed
13 consent judgment and the modification that I passed
14 out to you by way of suggestion.
15 Your comments now do not need to be final,
16 by any means, at least as of now. Unless I hear
17 something strongly to the contrary, I would propose
18 to send this out in my draft second report.
19 Could I hear from each counsel, first
20 starting with Kansas, what your view is on it?
21 MR. DRAPER: Yes, Your Honor. I'm John
22 Draper, counsel for Kansas.
23 Our first reaction to your proposed change
24 to the language of the proposed consent order is
25 favorable. I think that would be an improvement.

1 And I think it does address something that we had
2 overlooked in putting the documents together. It
3 would be helpful.
4 There's one item I would mention just so
5 that we're all aware of it. We're currently under
6 an order to make some final production by
7 January 15th. And we have made substantial --
8 SPECIAL MASTER MCKUSICK: Kansas is?
9 MR. DRAPER: Kansas. Just Kansas. And
10 Kansas has made substantial progress. We are
11 prepared to produce over 12,000 pages of scanned
12 documents with coding and indexes. There is,
13 however, a part of the production that has proved
14 impossible to complete by that date. And I checked
15 with the other states this morning and obtained
16 their agreement to my request to you today to allow
17 us two extra months to finish this.
18 SPECIAL MASTER MCKUSICK: You say two?
19 MR. DRAPER: Two extra months, yes, Your
20 Honor. This is primarily large format maps that
21 have been used in county assessor offices and other
22 information that they are actively using it. It has
23 not been possible for us to get sufficient access to
24 those documents.
25 And so I would be requesting, and I do

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1 request, that we be allowed to make the production
2 that I have mentioned by the due date of
3 January 15th, but be allowed to complete that
4 production not later than two months from that date.
5 This ties somewhat to the language that
6 we're looking at here. This would -- the language
7 talks of recommitting it to the Special Master, the
8 case, for purposes of monitoring the finalization of
9 the groundwater model.
10 SPECIAL MASTER MCKUSICK: Are these
11 documents due to be produced relevant to what the
12 groundwater modeling committee is doing?
13 MR. DRAPER: I don't believe so, Your
14 Honor. To my knowledge, they are not relevant to
15 that.
16 SPECIAL MASTER MCKUSICK: Of course, I
17 want to hear from the other states. Let's --
18 perhaps let's put aside -- well, you suggested that
19 this was in some way related to the form of the
20 consent judgment or the proposed -- the proposed
21 decree that I would put in my report, recommend to
22 the Supreme Court in my report?
23 MR. DRAPER: Yes, I think in some way it's
24 related. But upon consideration, I don't believe
25 that it would require any amendment of the language

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1 you have proposed.
2 But I wanted to raise the fact that we
3 would be asking for an extension on part of that
4 production for two months. And presumably, if Your
5 Honor is agreeable to that, that would be an order
6 that would be entered soon, but effective -- it
7 might be effective after you have submitted this
8 report to the Court, depending on with what speed
9 you proceed.
10 SPECIAL MASTER MCKUSICK: Let's, if I may,
11 put aside the question of your extension and just
12 talk about the form of the decree. And I understand
13 your reaction is generally favorable.
14 MR. DRAPER: Yes. Thank you.
15 SPECIAL MASTER MCKUSICK: Nebraska?
16 MR. COOKSON: Your Honor, in reviewing
17 this, and with the clarification that you gave me
18 before the break, I think this satisfies our needs.
19 The first paragraph approves and adopts the terms of
20 the final settlement stipulation. Your paragraph
21 refers to them as binding procedures of that
22 stipulation, which are the things that we need to
23 get out of this consent judgment as quickly as we
24 can so we can move forward.
25 I don't think -- we also were momentarily

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1 concerned that this might have a conflict with the
2 severability provision; however, all we are doing in
3 terms of the States is providing a proposal, which
4 you are free to disregard, regard, or do whatever
5 you like, as is the Court. And so we don't believe
6 that it is in violation.
7 SPECIAL MASTER MCKUSICK: I worried about
8 the nonseverabilty clause. And it seems to me that
9 what I'll call my proposal implements Section X and
10 saying the Special Master will retain jurisdiction
11 and do two things and doesn't this proposed decree
12 be issued by the Supreme Court do just that?
13 MR. COOKSON: I would agree 100 percent,
14 Your Honor. And, in fact, what the States -- our
15 view is in terms of the severability agreement that
16 we are making a proposed consent judgment. You will
17 make your proposed consent judgment. And on behalf
18 of the State of Nebraska, if this is the language, I
19 can indicate that we will consent to your proposal
20 as opposed to the one the States came up with. So
21 from our perspective, that works.
22 SPECIAL MASTER MCKUSICK: Thank you,
23 Mr. Cookson. Ms. Angel for Colorado?
24 MS. ANGEL: I agree with Mr. Cookson that
25 this doesn't present a severability problem. And in

1 general, we think it's a good idea to make it clear
2 that you have retained jurisdiction for this.
3 The only clarification that perhaps we
4 might ask is you refer to a final report certifying
5 adoption of the groundwater model. And that to me
6 implies essentially an administerial act and not a
7 full-blown report that we have had on groundwater or
8 will have on this settlement. Is that a proper
9 understanding?
10 SPECIAL MASTER MCKUSICK: Absolutely.
11 What I visualize the final report being, literally
12 that, the parties have adopted the RRCA groundwater
13 model in accordance with the binding procedures of
14 the binding settlement and please discharge me.
15 MS. ANGEL: And presumably please pay you.
16 Yes, sir. This looks fine. Thank you.
17 SPECIAL MASTER MCKUSICK: The United
18 States?
19 MS. HIMMELHOCH: Your Honor, Sarah
20 Himmelhoch. We have no objection to the proposal.
21 In fact, we think it's a good solution to a problem
22 we hadn't spotted.
23 SPECIAL MASTER MCKUSICK: Thank you very
24 much.
25 I do think that -- and clearly Mr. Knox

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1 and his colleagues on the groundwater modeling
2 committee are very, very conscious of it. It does
3 it seems to me there's great pressure put on
4 completing the groundwater model as quickly as
5 possible or identifying problems along the way to
6 success there, as early as possible. So getting
7 about resolving them by the mechanism that the --
8 that is set up in the final settlement stipulation.
9 I guess we're really at the point now to
10 consider your request, Mr. Draper. Again, what
11 relationship does this have to the proposed decree?
12 Suppose -- what relationship does this have to the
13 proposed Supreme Court decree that I expect I will
14 be putting into my report to the Supreme Court?
15 Suppose I am -- in the very happy event am
16 able to file my report on the 15th of February,
17 which was within your two month extension? How
18 would the -- whether or not there was an extension
19 or not be affected?
20 MR. DRAPER: I don't think there would,
21 Your Honor. I think --
22 SPECIAL MASTER MCKUSICK: You think it
23 would be?
24 MR. DRAPER: I think that would be an
25 acceptable situation. In other words, if you were

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1 to agree to our request for a two-month extension
2 with the support of the States, but enter your -- or
3 submit your report to the Court before the two
4 months is up, I think it's still a standing order,
5 which, of course, we would be complying with. But I
6 just wanted to raise it in this context since it did
7 cross that potential boundary.
8 SPECIAL MASTER MCKUSICK: I guess I -- and
9 obviously I have got to hear from the people who are
10 anxious to have the production of this stuff. I
11 supervised discovery all the way through while
12 settlement discussions were going on. And there
13 were two purposes of that.
14 Number 1, you had to know the facts in
15 order to know what you're settling. And, in other
16 words, at least, I'm sure at least in some respects
17 the data was relevant to the settlement discussion.
18 The other thing was to get ready for trial in the
19 case the settlement fell on its face. Now we have a
20 settlement.
21 And I guess -- and both of those uses are
22 out the window, except for the construction of the
23 groundwater model. And I guess you aren't really
24 the one to ask, but I guess I -- why don't we hear
25 from what the position of the other people may be.

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1 And let me --
2 MR. DRAPER: Your Honor?
3 SPECIAL MASTER MCKUSICK: Yes.
4 MR. DRAPER: I might say that the reason
5 that we are complying with it is because you have
6 ordered us to.
7 SPECIAL MASTER MCKUSICK: Excuse me, I
8 didn't hear you.
9 MR. DRAPER: The reason we are complying
10 with your order and asking for an extension --
11 SPECIAL MASTER MCKUSICK: Because it's
12 outstanding?
13 MR. DRAPER: Because it is a standing
14 order and we intend to do it. I don't understand it
15 to have any relevance to the completion of the
16 groundwater analysis.
17 SPECIAL MASTER MCKUSICK: Mr. Cookson?
18 MR. COOKSON: We -- again, we have agreed
19 to the extension. That is fine. With the
20 understanding that on the 15th, we are going to get
21 everything that they have now that is encoded and
22 scanned and ready to go, which Mr. Draper has
23 indicated is approximately 12,000 pages.
24 That information is much like the
25 information that Kansas requested from us in the

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1 formal discovery process that we were obligated to
2 provide last November in that while it may not be
3 directly related to the groundwater model, it is
4 data and information that can be used to verify the
5 data and inputs that are going into the model. It
6 is underlying records, while not the actual data
7 itself, it does go to our ability as one of the
8 tasks that Mr. Pope identified that remains to be
9 done, which is to verify the other States' data.
10 And so to the extent we get what they have
11 told us is coming on the 15th and understanding the
12 practical problems that they have getting the rest
13 of it, we felt it was reasonable to agree to the
14 extension. But I want to make it clear, we do view
15 this as potential verification information for what
16 they have provided as their data and input to the
17 model.
18 SPECIAL MASTER MCKUSICK: In other words,
19 it is -- you do view it as essential that you get
20 it, but you're willing to have the two-month
21 extension.
22 MR. COOKSON: With the understanding that
23 they are giving us a substantial portion of it --
24 SPECIAL MASTER MCKUSICK: -- on the 15th.
25 MR. COOKSON: On the 15th.

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1 SPECIAL MASTER MCKUSICK: And then get the
2 rest of it by the 15th of March?
3 MR. COOKSON: Right. That is reasonable.
4 We understand their practical problems, the
5 logistical problems they have to deal with and want
6 to be reasonable in trying to work that out. But we
7 don't want it to appear that this information is not
8 necessary. We requested it for a particular reason,
9 one of which was to understand some of the
10 information that would ultimately go into the model.
11 SPECIAL MASTER MCKUSICK: Do you consider
12 that the delay on at least part of the produced
13 materials will in any way delay the groundwater
14 model?
15 MR. COOKSON: No. There is sufficient
16 work for all of the people that we have working on
17 the modeling for them to accomplish other things
18 while we wait for that to come on the 15th.
19 SPECIAL MASTER MCKUSICK: Could we hear
20 from Colorado?
21 MS. ANGEL: I agree with everything
22 Mr. Cookson has said. I have nothing to add. It is
23 important for verification. I think we can agree to
24 the extension. I don't think it should delay the
25 groundwater modeling work.

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1 SPECIAL MASTER MCKUSICK: The United
2 States have anything to add?
3 MS. HIMMELHOCH: No view, Your Honor.
4 SPECIAL MASTER MCKUSICK: Is that
5 satisfactory, Mr. Draper, that we'll amend the order
6 to provide that whatever is available by the 15th
7 will be produced and the balance will be produced by
8 March 15th?
9 MR. DRAPER: Yes. That would be very
10 satisfactory, Your Honor.
11 SPECIAL MASTER MCKUSICK: Fine. Thank you
12 very much.
13 I think we're ready now, if we may, to
14 hear from counsel on a wind-up. Today has been very
15 useful to me, and I think I would appreciate hearing
16 from each of counsel to -- on the question, what do
17 you have to say -- what do you have to suggest to me
18 to go into the report to do a selling job for the
19 settlement that you have arrived at? That's the --
20 the Court wants to know how this jives with the
21 Compact, how it serves public interest, et cetera,
22 et cetera. Anyway, that's what I ask you.
23 Do you want to start, Mr. Draper?
24 MR. DRAPER: Very good, Your Honor.
25 SPECIAL MASTER MCKUSICK: You have been in

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1 this position before of having draft reports from
2 original jurisdiction going that you have had to
3 comment on. Now we look to you for anything you
4 have to say to us.
5 MR. DRAPER: Well, it is a great pleasure
6 to be able to comment on this anticipated report.
7 We support this settlement. As you can see from the
8 documents that have been filed, it has been the
9 result of a great deal of work by all three States
10 and the United States in a very cooperative fashion.
11 It seems to me that it serves the public
12 purpose whenever a controversy among States can be
13 appropriately laid to rest without expending a great
14 deal of the time and energy of the United States
15 Supreme Court, which has many important duties. And
16 I think that's what we have achieved here.
17 This settlement, in our view allows, the
18 perceived ambiguities in the application of the 1943
19 Compact to present and future conditions to be
20 resolved in a manner that is not inconsistent with
21 the Compact and that satisfies the prime concerns of
22 the three States and the United States in this basin
23 that are related to the Compact.
24 Most important among these, from our point
25 of view, is the embrace of the ruling of the Special

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1 Master in his first report that groundwater use in
2 the basin must -- and affecting the waters of the
3 Republican River must be accounted for to the extent
4 of any affect it has.
5 We think we made a tremendous leap forward
6 when you made that decision. That has been adopted
7 for purposes of this settlement as the core of the
8 settlement. And in our view, is the central pillar
9 on which this stands. And we heartly recommend it
10 to you and to the Court.
11 SPECIAL MASTER MCKUSICK: Thank you very
12 much. Nebraska?
13 MR. COOKSON: I agree with Mr. Draper that
14 your ruling on the first fundamental issue that was
15 placed before you put us in a position where things
16 started to fall into place. But when I sat down to
17 ultimately evaluate this settlement for both the --
18 and provide an analysis for both the governor and
19 the attorney general of Nebraska, I looked back at
20 the issues that you had identified for pretrial
21 resolution after you addressed those initial set of
22 issues.
23 And I'll paraphrase them, but there were
24 six basic issues. First, what do the '49 to '94
25 Republican River Compact Administration numbers mean

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1 in practical terms? And maybe more importantly,
2 what do we do about past actions? Your ruling on
3 the '49 to '94 numbers being binding was sort of the
4 second leg of our stool.
5 To make the stool stand, the parties got
6 together to make the third leg. So the other
7 questions we needed to address were, may a
8 complaining State recover damages for water overuse
9 in a year in which a complaining State would not
10 have been able to put it to use.
11 The third was whether a State was free to
12 consume its total allocation without regard to
13 specific sub-basin allocations. The fourth issue
14 was whether Nebraska was required to deliver Kansas'
15 entire main stem allocation at Guide Rock, Nebraska.
16 The fifth was, what is the criteria to determine
17 whether well pumping water is subject to Compact
18 accounting. And the sixth was how do we attribute
19 contributions to stream flow from the groundwater
20 mound.
21 I think as you listened to those questions
22 and you juxtaposed those with the sections of the
23 settlement agreement, you see where we've come from
24 and how we got to where we were. And so we have, in
25 effect, addressed those issues in terms of how does

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1 the Compact apply to those issues, how should it be
2 interpreted.
3 SPECIAL MASTER MCKUSICK: And it is so
4 much better for you to have resolved them with a
5 little give and take along the way than to have them
6 resolved by square-cornered decisions from the
7 Special Master who might well have gone wrong in the
8 process. You have got it right now.
9 MR. COOKSON: And I think the added
10 benefit, as you have pointed out several times is,
11 we have added on significant parts to this
12 settlement that weren't part of our initial
13 controversy but will allow this process to work in
14 the manner that was envisioned in 1943, but frankly
15 was not put into detail at that time.
16 SPECIAL MASTER MCKUSICK: And also you
17 could give and take on those other issues to resolve
18 the heartland of the case.
19 MR. COOKSON: Right. And what we've done
20 is we have created an interwoven product that we
21 believe -- I think all of the States agree not only
22 is consistent with the terms of the Compact but
23 provides a meaningful way for us to get along in the
24 future and administer the Compact in a way that's
25 beneficial to all three States.

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1 I think I happen to catch a little bit of
2 Mr. Pope's statement on a local television
3 statement, and I think he was right. This is one of
4 those unique situations where this settlement is a
5 win-win-win for all three States, and hopefully also
6 for the U.S. in that we have addressed their
7 concerns.
8 SPECIAL MASTER MCKUSICK: You mentioned
9 groundwater model, Number 1, that the past damages
10 for past years, '94 and before. One thing that
11 interests me is here we now have eight years
12 subsequent to 1994.
13 And when -- and all the issues of water
14 quantities, of consumptive use, and all the
15 difficult -- even if we determine violations, the
16 cry out, what are the damages and so on. I
17 understand in another case that is being tried out
18 at great length, for those eight years, that's
19 another reason why this nonseverable settlement is
20 of significance here.
21 You have -- you have settled out any
22 possible claims that would have been exceedingly
23 difficult and lengthy to try relating to possible
24 violations in these eight years.
25 MR. COOKSON: Yes. I think all three

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1 States recognize that very point that while --
2 before '94 we had a framework within which we were
3 going to be working, there really wasn't anything
4 from '94 to the present.
5 We were fortunate in that that period
6 happened to be a period in the basin that was
7 relatively wet, so to speak. But I think the
8 urgency of the drought that we are now under and
9 have been for the past year or so, sort of made it
10 clear to us that we needed to get together and get
11 this resolved for the benefit of all three States,
12 as we went into what is a very dry period.
13 SPECIAL MASTER MCKUSICK: Thank you very
14 much, Mr. Cookson. Colorado?
15 MS. ANGEL: Your order asked us to address
16 why the settlement is consistent with the Compact
17 and an effective and beneficial resolution of the
18 dispute. And from Colorado's perspective, this is
19 indeed consistent with the Compact and a very
20 effective and beneficial resolution.
21 Our perspective is a little different. We
22 are the driest part of the basin. We have
23 11 percent of the water supply and our agricultural
24 economy is based almost entirely upon wells that
25 were put in between 65 -- 1965 and 1980, 30 to 15

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1 years before this whole controversy erupted. So
2 what we needed to work towards was a settlement that
3 allowed Colorado to bring those wells into the
4 Compact accounting and consistent with your order,
5 and still protect the interests -- the important
6 interests of the other States.
7 And I think through compromise, that's
8 exactly what we've been allowed to do. As you said
9 yourself, Special Master, just a few minutes ago, it
10 works so much better when you can do these things
11 through compromise, through administrative and
12 engineering considerations rather than
13 square-cornered legal decisions.
14 At the same time, it is very consistent
15 with the Compact. As Mr. Pope said earlier, the
16 Compact was a prospective and overarching broad
17 document. It was entered into almost 60 years ago
18 and the engineers that entered into it --
19 SPECIAL MASTER MCKUSICK: It was 60 years
20 ago. It's only a few months short of 60 years.
21 MS. ANGEL: That's correct. And the
22 engineers who negotiated it expressly acknowledged
23 that there were details of administration that would
24 need to be, needed to be worked out, and I think
25 that's what this settlement does. It sets out very

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1 specifically agreements on administration and
2 accounting that are consistent with the Compact that
3 fit within the spaces in the Compact where things
4 are not clearly defined or are ambiguous or simply
5 not addressed.
6 And I think it fits within Article 9,
7 which says that it's the duty of the three States to
8 administer the Compact through the state engineers.
9 And it gives the officials the ability to adopt
10 rules and regulations consistent with the Compact.
11 And, in fact, that's what the accounting procedures,
12 which are not part of this settlement do.
13 We have taken great pains to take your
14 ruling on the inclusion of depletions from Ogallala
15 groundwater and make it work in Compact accounting,
16 which is not a simple procedure. If you look at the
17 accounting procedures, there's a lot of thought that
18 has gone into taking the groundwater model runs and
19 describing exactly what model runs will be done,
20 what will be compared and then how that will be put
21 into Compact accounting.
22 And then as Mr. Cookson mentioned, we've
23 taken those other issues where we did not agree on
24 the precise way the Compact should be administered,
25 and we've come to a compromise, an agreement on how

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1 that will work. One of the more important things
2 for Colorado is the agreement on use of specific
3 sub-basin allocations.
4 Because Ogallala groundwater depletions
5 are now included, we are faced with including
6 depletions from wells that don't confine themselves
7 to any particular sub-basin, necessarily. They
8 don't obey those sub-basin boundaries. They don't
9 confine themselves to any particular water year.
10 And so to make that work, we have the agreements on
11 sub-basin allocation use, we have the agreements on
12 averaging.
13 We have also agreed, of course, on the
14 Guide Rock administration, which was a great
15 controversy, which we thankfully were not terribly
16 involved with, but that, of course, is a major part
17 of it.
18 As to why this is a beneficial and
19 effective settlement, it's given us the opportunity
20 to create solutions just not possible in litigation.
21 I mean, the best example is the groundwater model.
22 This was a model put together in record time,
23 specifically because the very high-powered experts
24 hired by each State, instead of fighting each other
25 and testifying --

1 SPECIAL MASTER MCKUSICK: The battle of
2 experts. One shudders to think of that being tried
3 out in a court of law.
4 MS. ANGEL: Exactly. With your
5 background, perhaps you could make sense of it.
6 SPECIAL MASTER MCKUSICK: From Maine,
7 because I know all about it.
8 MS. ANGEL: But Mr. Knox who has advanced
9 engineering degrees and chaired the groundwater
10 modeling committee told me that when they got going,
11 it was like they were speaking in a different
12 language. They were able to communicate directly
13 with each other, speaking in partial differential
14 equation-ese as opposed to English and we didn't
15 have to filter it through a lawyer asking questions
16 to you weighing it and then weighing it against
17 someone else. And so I think we have made an
18 amazing progress.
19 And the cooperation and the level of
20 effort they put into it gives me great confidence
21 that we will have a model that is far superior
22 because it's a cooperative model to anything that
23 could come out of litigation. And it will certainly
24 be at least cost and far less time. You only need
25 to compare it to the Arkansas case or even the

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1 discovery that went into Nebraska v Wyoming before
2 the settlement.
3 We have also, I think, Mr. Cookson noted
4 this and you've noted this, we've gone beyond the
5 issues that were directly at -- in dispute and we've
6 looked at other things that could be a problem. And
7 we have tried to cooperatively built a framework for
8 the future. We have the dispute resolution
9 provision.
10 We have the accounting procedures, which
11 were largely the product of a committee that
12 consisted of the three engineering advisors from
13 each State, the people who will be doing this in the
14 future. But they also took care to make it very,
15 very detailed, including tables and formulas, so
16 that their successors will be able to hopefully
17 administer this Compact without leading into the
18 kinds of disagreements that brought us before you.
19 This, of course, dismisses all the claims.
20 It releases us from the threat of damages. And when
21 you are dealing with public entities and the kind of
22 budget crisis that has struck all three states,
23 that's a very significant achievement. It saves us,
24 of course, the litigation costs.
25 It's overall, I just think, a very

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1 beneficial achievement. It's -- I think it really
2 parallels the achievement that led to the Compact,
3 the three -- essentially the three engineers from
4 each state sitting down and working it out. And I
5 think the fact that we are here is a testament to
6 the characters of the three state engineers we have
7 now.
8 And I also really want to give our thanks
9 and give credit to our mediators who have made
10 substantial contributions throughout the entire
11 process.
12 And also, I'd like to thank you for --
13 even though it wasn't always pleasant, keeping our
14 feet to the fire because we wouldn't be here
15 otherwise.
16 SPECIAL MASTER MCKUSICK: It was very
17 pleasant.
18 MS. ANGEL: So in case you have any doubt,
19 we really -- we heartly support this settlement and
20 would ask that you would recommend that the Supreme
21 Court approve it.
22 SPECIAL MASTER MCKUSICK: Thank you,
23 Ms. Angel. The United States?
24 MS. HIMMELHOCH: Sarah Himmelhoch again,
25 Your Honor.

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1 I would echo what each of the States'
2 representatives have said here today. If you look
3 at the two questions that you posed to us, is this
4 consistent with the Compact, and why is this a good
5 idea, why is this in the public interest, I think
6 the resounding answer to both is positive.
7 With respect to the Compact, the Compact
8 states that its overriding purpose is the efficient
9 use of water in the Republican River basin. And by
10 addressing not only the current disputes but by
11 building a framework by which future disputes could
12 be resolve and additional information could be
13 gathered as necessary, the States have implemented
14 that fundamental purpose of the Compact. And they
15 have done so while recognizing the plain language of
16 the Compact and addressing the ambiguities in the
17 Compact in the manner that's consistent with the
18 plain language and the intent.
19 And I would like to say on behalf of the
20 United States, they have also recognized one of the
21 basic purposes of this Compact, which was to make
22 federal development within this basin possible. And
23 they have achieved a method of ensuring the
24 sustainability of that federal development, by
25 addressing, sometimes at great cost, the interests

1 of the United States in protecting those projects
2 that are already there.
3 They have promised to ensure the continued
4 viability of federal projects that were at the heart
5 of what the States were trying to accomplish when
6 they implemented this Compact. And we appreciate,
7 and I believe they did it in the public interest,
8 that they did it in a manner consistent with
9 existing promises made in consensus plans made
10 between federal agencies and in contracts with
11 irrigation users throughout the district.
12 So we think it is consistent with the
13 Compact, consistent with the purposes. And it's in
14 the public interest because it achieves that
15 efficient use of the water so that everybody is
16 served to the maximum extent possible.
17 The other reason that it's consistent with
18 the public interest is one that every State has
19 echoed, and I would just like to reiterate, which is
20 these cases can be enormous, as everybody knows.
21 And this case was resolved in record time and with
22 as little expense as possible. And where the money
23 was spent was often spent in leveraging knowledge to
24 achieve a goal rather than to fight each other.
25 The amount of effort that went into

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1 developing the groundwater model and the expertise
2 that was shared in developing the accounting
3 principles is money that perhaps we would have had
4 to spend in litigation. But instead of coming up
5 with a result, we would have been giving you a
6 problem to resolve. And so in addition to achieving
7 good things on the ground, they have achieved it in
8 a way that serves the public interest by minimizing
9 the amount of money we spent on litigation.
10 And I think, to echo everybody else here,
11 the -- sometimes difficult deadlines that you
12 imposed on us in the case management and the early
13 resolution of core issues were a key part of why we
14 got here. And we took that head start you gave us
15 and I think we got to a point that has achieved the
16 purposes of the Compact and serves the public
17 interest both fiscally and through the water
18 services.
19 SPECIAL MASTER MCKUSICK: Thank you very
20 much. I want to take this opportunity to thank the
21 United States in its role as amicus curiae in this
22 case. Obviously, you have a very big function in
23 the management of water in the Republican River
24 basin and you stepped up to bat and done -- sorry to
25 mix a metaphor, but you have been a great help in

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1 this case, just tremendous. We appreciate it.
2 Are we ready to talk about a schedule on
3 the draft second report? The -- Amanda, the court
4 reporter, tells me that she can have this out by
5 e-mail before the end of the day Friday, this
6 Friday, the 10th, the transcript of today.
7 I think, and we'll have to do some heavy
8 work, but I think we could have a draft report out
9 to you, again, by e-mail, before the end of the day
10 on the following Thursday, which is the 16th. And
11 then the question comes, when could you have the --
12 your comments back to us? And I would suggest one
13 day short of two weeks, which would be the 29th of
14 January.
15 Now, I don't want to push you on that. I
16 think to the extent that you could, it would be
17 valuable if you could coordinate your comments. The
18 only -- that would be much better than to have to
19 have a second round of comments on comments. And
20 e-mail is a wonderful speedy thing of immediate
21 access. And anyway, could we talk about whether
22 that kind of a schedule would be practical.
23 MR. COOKSON: Your Honor, in keeping with
24 our negotiation practices, could we ask Kansas what
25 their trial schedule is?

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1 SPECIAL MASTER MCKUSICK: Excuse me?
2 MR. COOKSON: In keeping with our
3 negotiation practice, most scheduling, the first
4 question we ask is what is Kansas's trial schedule
5 because that will dictate Mr. Draper's availability.
6 SPECIAL MASTER MCKUSICK: Right. Yes.
7 MR. DRAPER: Thank you, Your Honor. That
8 case is going to be in trial next week, all week.
9 SPECIAL MASTER MCKUSICK: All week. And
10 so that you wouldn't be around when the end of the
11 day on Thursday you got our draft report.
12 MR. DRAPER: Yes. We will not be
13 available at that time.
14 SPECIAL MASTER MCKUSICK: Suppose we let
15 it out the end of the day on Friday?
16 MR. DRAPER: I'll be on an airplane
17 somewhere, but I suppose there is technical
18 availability at that point.
19 SPECIAL MASTER MCKUSICK: It's more
20 important the date of -- suppose we move it back one
21 day to the 30th of January, Thursday the 30th of
22 January, for the response? What is your situation
23 between the 17th of January and the 30th of January?
24 MR. DRAPER: Your Honor, we'll be working
25 on -- I presume, on post-trial briefs at that point.

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1 But I don't see any reason that that should greatly
2 affect our schedule here. I would suggest you might
3 give us one more day to the 31st of January. It is
4 kind of a neat ending.
5 SPECIAL MASTER MCKUSICK: All right.
6 Friday the 31st.
7 MR. COOKSON: Your Honor, that would be
8 fine. What I would like to do is while we are here,
9 a lot of the final drafting of this document was
10 done by conference call. So if we're going to put
11 together a collective set of comments, we should
12 schedule the conference call so that we can do that.
13 And I'll volunteer to stay in the script role.
14 SPECIAL MASTER MCKUSICK: Are you
15 suggesting to try to coordinate now?
16 MS. ANGEL: Off the record? Or do you
17 want to schedule it now?
18 MR. COOKSON: We can do it after the
19 hearing. But before we leave today, I would like to
20 coordinate that so we do that. The 31st is fine
21 with that caveat that the parties agree to a
22 conference call to put our collective thoughts
23 together.
24 MR. DRAPER: And I think Mr. Cookson's
25 premise that we aim to submit one response is the

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1 right way to go.
2 SPECIAL MASTER MCKUSICK: Fine. That
3 would be much appreciated. And obviously would save
4 a week or so on the other end to us.
5 Is there -- so you don't want to try to
6 settle the conference time now, but...
7 MR. COOKSON: We'll do it before we leave
8 or perhaps over coffee.
9 SPECIAL MASTER MCKUSICK: I'll just leave
10 that to you.
11 Well, I think one thing that I should do
12 before I adjourn is to thank the mediators. One
13 thing that obviously I was shut off from was the
14 inner workings of the settlement negotiations. But
15 I see the end product of your work, the work of the
16 mediators. And I am sure they were very beneficial.
17 And I want to thank you.
18 With this, I think we had a good days'
19 work. And we are finishing up before 4:30. And I
20 thank you all very much indeed. And I don't know
21 how to say to say thank you firmly enough.
22 This has really been a fun case for me to
23 be involved in in every way. I've learned a lot
24 about western water law, at least at the moment I
25 think I know something about it. How long it'll

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1 last, I don't know. And I do thank you all very
2 much indeed. We'll stand adjourned.
3 (The hearing concluded at 4:27 p.m.)
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1 STATE OF COLORADO)
)ss. REPORTER'S CERTIFICATE
2 COUNTY OF DENVER)
3 I, Amanda L. Maze, Registered Professional
4 Reporter and Notary Public within the State of
5 Colorado, do hereby certify that this hearing was
6 taken in shorthand by me at the time and place
7 herein set forth and thereafter reduced to
8 typewritten form, and that the foregoing 136 pages
9 constitutes a true and correct transcript.
10 I further certify that I am not related
11 to, employed by, nor of counsel for any of the
12 parties or attorneys herein, nor otherwise
13 interested in the result of the within action.
14 In witness whereof, I have hereunto
15 affixed my hand this 10th day of January, 2003. My
16 commission expires: May 7, 2003.
17
18 _____
Amanda L. Maze
19 Registered Professional Reporter
and Notary Public
20
21
22
23
24
25

1 MACKERETH LOMBRITTO & ASSOCIATES, INC.
2501 15th Street, Suite 1C
2 Denver, Colorado 80211-3986
3 January 10, 2003
Honorable Vincent L. McKusick
4 Pierce Atwood
One Monument Square, 8th Floor
5 Portland, Maine 04101-1110
6 Re: State of Kansas v. States of Nebraska and Colorado
7 Enclosed is the January 6, 2003, hearing in the above entitled case.
8
____ Previously filed. Forwarding signature page and
9 amendment sheets.
10 ____ Signed, no changes.
11 ____ Signed, with changes, copy of which is enclosed.
12 ____ Unsigned, notice duly given _____ pursuant to the Rules of Civil Procedure.
13
____ Not signed, notice duly given _____ since trial
14 is set for _____.
15 _XX_ No signature required.
16 ____ Signature waived.
17 ____ To be signed in court.
18 ____ Signature pages/amendments to be returned to court on date of trial.
19
____ Mailed by certified mail No._____.
20
____ Hand-delivered _____.
21
22 AMANDA L. MAZE, RPR
Enclosures (As above noted)
23
24
25

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