

2/28/2012

DAVID POPE

1

1 .

2

NO. 126, ORIGINAL

3

IN THE SUPREME COURT OF THE UNITED STATES

4

BEFORE THE OFFICE OF THE SPECIAL MASTER

5 .

6 STATE OF KANSAS,

7 Plaintiff,

8 vs.

9 STATE OF NEBRASKA

10 AND

11 STATE OF COLORADO,

12 Defendants.

13 .

14 .

15

DEPOSITION OF

16

DAVID L. POPE, P.E.,

17 .

18 Taken on behalf of the Defendants, pursuant to

19 Notice to Take Deposition, beginning at 11:00 a.m.

20 on the 28th day of February, 2012, at the Kansas

21 Department of Agriculture, 109 SW 9th Street, in

22 the City of Topeka, County of Shawnee and State of

23 Kansas, before Kenda K. Falley, RPR, CSR.

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

2

1 APPEARANCES

2 .

3 ON BEHALF OF THE PLAINTIFF:

4 .

5 Mr. John B. Draper

6 Montgomery & Andrews

7 325 Paseo de Peralta

8 Santa Fe, New Mexico 87501

9 505-982-3873

10 jdraper@montand.com

11 .

12 Mr. Christopher M. Grunewald

13 Kansas Attorney General's Office

14 120 SW 10th Street

15 Second Floor

16 Topeka, Kansas 66612

17 785-296-2215

18 chris.grunewald@ksag.org

19 .

20 Mr. Burke W. Griggs

21 Kansas Department of Agriculture

22 109 SW 9th Street

23 Topeka, Kansas 66612

24 785-296-4616

25 burke.griggs@kds.ks.gov

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

3

1 ON BEHALF OF THE DEFENDANT STATE OF NEBRASKA:

2 .

3 Don Blankenau

4 Mr. Thomas R. Wilmoth

5 Blankenau Wilmoth, LLP

6 206 South 13th Street

7 Suite 1425

8 Lincoln, Nebraska 68508

9 402-475-7080

10 don@aqualawyers.com

11 tom@aqualawyers.com

12 .

13 Mr. Justin D. Lavene

14 Nebraska Attorney General's Office

15 2115 State Capitol

16 Lincoln, Nebraska 68509

17 402-471-2064

18 justin.lavene@nebraska.gov

19 .

20 .

21 .

22 .

23 .

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

4

1 ON BEHALF OF THE DEFENDANT STATE OF COLORADO:

2 .

3 Mr. Peter J. Ampe

4 Colorado Attorney General's Office

5 1525 Sherman Street

6 7th Floor

7 Denver, Colorado 80203

8 303-866-5032

9 peter.ampe@state.co.us

10 .

11 .

12 .

13 .

14 .

15 .

16 .

17 .

18 .

19 .

20 .

21 .

22 .

23 .

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

5

1 INDEX

2 .

3 .

4 Certificate ----- 169

5 .

6 .

7 WITNESS

8 ON BEHALF OF DEFENDANTS: PAGE

9 DAVID POPE

10 Direct-Examination by Mr. Wilmoth 7

11 Cross-Examination by Mr. Ampe 162

12 .

13 .

14 EXHIBITS

15 POPE DEPO EXHIBIT NO.: MARKED

16 No 1 Revised Notice of Deposition 7

17 No 2 CV 7

18 No 3 1/24/2007 Letter to Dr. Ann Bleed

19 from David Pope 9

20 No 4 Cover page from Fourth Report of

21 Special Master Littleworth 11

22 No 5 Table entitled Annual H-I Model

23 Pumping 12

24 No 6 Supreme Court of the United States

25 number 105, original document 14

(Main Office)
Topeka, KS
785.273.3063



(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

6

1	No 7	Amended Rules and Regulations	
2		Governing the Diversion and Use of	
3		Tributary Ground Water in the Arkansas	
4		River Basin in Colorado	15
5	No 8	Letter dated January 4, 2012 from	
6		the Colorado Department of Natural	
7		Resources Division of Water Resources	
8		from Mr. Steve Witte	16
9	No 9	U.S. Supreme Court Texas V New Mexico,	
10		485 U.S. 388 (1988)	17
11	No 10	Expert report by David L. Pope,	
12		P.E. dated November 18, 2012	37
13	No 11	An Interview with David Pope, former	
14		Chief engineer	60
15	No 12	E-mails regarding model issues	127
16	No 13	E-mail notes of the October 13-14,	
17		2004 EC Meeting	130
18	No 14	Talking points for August 15, 2007,	
19		RRCA annual meeting	141
20	No 15	E-mail about RRC: Deliveries from	
21		Harlan County/HC evap charge	155
22	No 16	Report to the House Environment	
23		committee dated January 16, 2003	161
24	.		
25	.		

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

7

1 DAVID L. POPE, P.E.,
2 called as a witness on behalf of the State of
3 Nebraska, was sworn and testified as follows:

4 DIRECT-EXAMINATION

5 BY MR. WILMOTH:

6 Q. Good morning, Mr. Pope, how are you
7 today?

8 A. Good morning. Just fine.

9 Q. Can you please state and spell your full
10 name for the record?

11 A. David, D-A-V-I-D L, middle initial.
12 Pope, P-O-P-E.

13 Q. And, Mr. Pope, are you currently on any
14 medication or suffering any ailment that would
15 preclude you from testifying truthfully or
16 accurately today?

17 A. No.

18 Q. I'm going to hand you a couple of
19 documents. We'll mark these as Exhibits 1 and 2
20 respectively.

21 (THEREUPON, Pope Deposition Exhibit No 1
22 and No 2 were marked for identification.)

23 BY MR. WILMOTH:

24 Q. Mr. Pope, would you be so kind as to
25 identify what we've marked as Exhibit 1 there in

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

8

1 your hands?

2 A. Yes, this is the revised notice of
3 deposition for myself.

4 Q. And on the second page we had asked
5 whether you could bring any additional materials
6 or supplemental materials along with you. Do you
7 have any such materials today?

8 A. Yes, I do.

9 Q. May I review those, please. So we've
10 been provided seven documents. I would ask you if
11 you would, please, to identify each document in
12 turn and we'll mark each one as an exhibit?

13 A. Okay.

14 MR. WILMOTH: Do you have extra copies,
15 John, for exhibits?

16 MR. DRAPER: Yes, I do. And to the
17 extent we need to make more copies so if you would
18 like to make them as exhibits to the deposition we
19 can do that.

20 A. Did you want me to identify this one?

21 MR. DRAPER: I have a set that he can
22 look at while you look at the ones we've given
23 you. So, David, if you could just give them their
24 set and they've got that and I think I've got one
25 that matches right here. And then as I say, some

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

9

1 set I do have extra copies or if I don't we can
2 make them.

3 A. Are you ready?

4 BY MR. WILMOTH:

5 Q. Yes, thank you.

6 A. First document is a letter dated January
7 24, 2007 to Doctor Ann Bleed from myself.

8 Q. And why did you bring that particular
9 document with you today?

10 A. There was some references in my expert
11 report to requests and communications with
12 Nebraska and this was one such letter that I
13 thought would be an example of that.

14 Q. All right. Let's go ahead and mark that
15 as Exhibit 3.

16 (THEREUPON, Pope Deposition Exhibit No 3
17 was marked for identification.)

18 MR. DRAPER: And, Tom, if it's your
19 preference to go ahead and get into detailed
20 questioning right now. And that's one that I do
21 have extra copies of I can give you right now.

22 MR. WILMOTH: I think it would be best if
23 we just went ahead and identified them all and
24 mark them for the record and we can see whether we
25 need to revisit them or not.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

10

1 MR. DRAPER: Okay.

2 MR. GRIGGS: Do we have an Exhibit 2?

3 MR. WILMOTH: Exhibit - Exhibit 2 -

4 MR. GRIGGS: - is the January 24, 20 -

5 MR. WILMOTH: -- is actually the CV. We
6 haven't gotten there yet. Sorry. So this will be
7 marked as Exhibit 3?

8 MR. DRAPER: Oh.

9 MR. GRIGGS: Oh.

10 THE REPORTER: I did.

11 MR. WILMOTH: Got a copy?

12 THE REPORTER: Yeah.

13 MR. WILMOTH: All right. Very good.

14 BY MR. WILMOTH:

15 Q. And then could you tell me about the next

16 --

17 A. The next document is the cover page from
18 Fourth Report of Special Master Littleworth in the
19 case of Kansas V Colorado and the United States of
20 America. Along with a page 98 from that report as
21 an excerpt.

22 Q. And what is the relevance of that
23 particular page?

24 A. I had made reference in my expert report
25 to the amount of pumping that had been occurring

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

11

1 before the litigation in essence in that case and
2 there is a reference to the amount afterwards.
3 This report on page 98 shows that the historic
4 pumping from 1970 to 1994 after well development
5 had stabilized, averaged about 170,000 per year
6 with peak of about 287,000 acre feet towards the
7 top of the page.

8 Q. All right. So this is pumping that
9 predates the FSS, is that correct?

10 A. This is in the Arkansas River --

11 Q. Okay.

12 A. -- system.

13 Q. Very good, okay.

14 A. And I made some references to comparison
15 of actions between various cases.

16 Q. Very good. So we'll mark that as Exhibit
17 4.

18 (THEREUPON, Pope Deposition Exhibit No 4
19 was marked for identification.)

20 BY MR. WILMOTH:

21 Q. Then if you would identify the next
22 document, please?

23 A. Next document is a table entitled Annual
24 H-I Model Pumping 1995-2008 acre feet.

25 Q. It's relevance?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

12

1 A. This relates to the same topic that I
2 just referred to. And this is a compilation of
3 information from the Arkansas River compact
4 administration accounting that shows the pumping
5 in Colorado along the Arkansas River for the
6 period shown on the table. Again showing the
7 average for 1997 through 2008 along with other
8 periods being 87,316 acre feet. So that's the
9 comparison then to the previous documentation.

10 **Q. Okay, thank you.**

11 THE REPORTER: Do you want that 5?

12 (THEREUPON, Pope Deposition Exhibit No 5
13 was marked for identification.)

14 MR. WILMOTH: Yes, that would be Exhibit
15 5, thank you.

16 BY MR. WILMOTH:

17 **Q. Again if you would describe the next
18 document. Do you have one of these, John?**

19 A. I don't. My page -- mine is missing
20 that. Is that an extra here?

21 MR. DRAPER: You can take that and I'll

22 --

23 A. Okay. I believe the next one you have is
24 a document entitled Supreme Court of the United
25 States number 105, original. This is a page from

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

13

1 the final court decree that was issued by the
2 court March 9, 2009.

3 Q. Could you explain the relevance of this
4 document?

5 A. There is a reference at the bottom of
6 that first paragraph says, accordingly, we
7 overrule Kansas exception and approve the entry of
8 the proposed judgment and decree. And then
9 attached to this document is an excerpt from
10 Volume II of the fifth and final report of Special
11 Master Littleworth, which is the portion printing
12 the proposed judgment and decree. This report is
13 dated January, 2008. And the excerpt includes all
14 the pages showing the contents of the volume and
15 then the judgment and decree recommended by the
16 special master that was ultimately adopted and
17 through page 13 showing the list -- well, the last
18 two or three pages there show the list of
19 appendices to the decree. I did not copy all of
20 those. The report is this thick (indicating).

21 Q. How did you rely on this material in
22 developing your report?

23 A. I again in my expert report made
24 references to actions required and taken by the
25 State of Colorado in regard to the Kansas V

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

14

1 Colorado case regarding the Arkansas River
2 compact. And I had significantly -- significant
3 personal involvement in regard to that case and in
4 the preparation of the draft decree or the draft
5 -- yeah, judgment and decree and the various
6 documents associated with that. And so I've
7 relied upon this document to illustrate some of
8 the knowledge and some of the requirements that
9 came from that case.

10 Q. And we'll mark that as Exhibit 6, please.

11 (THEREUPON, Pope Deposition Exhibit No 6
12 was marked for identification.)

13 BY MR. WILMOTH:

14 Q. Could you please describe the next
15 document?

16 A. Next document is entitled Amended Rules
17 and Regulations Governing the Diversion and Use of
18 Tributary Ground Water in the Arkansas River Basin
19 in Colorado or Arkansas river basin if you prefer
20 in terms of how, Pete, it might be stated out
21 there.

22 MR. AMPE: Thank you, Mr. Pope.

23 A. Just to show that there is interstate
24 comedy in some cases at least. So, and this
25 document is the current rules and regulations

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

15

1 adopted by the Colorado State engineer to help
2 implement the actions that were taken by the State
3 of Colorado in regard to the Arkansas River case
4 and the decree that we spoke of in the previous
5 document.

6 Q. Okay, thank you.

7 MR. WILMOTH: Mark that as Exhibit 7.

8 (THEREUPON, Pope Deposition Exhibit No 7
9 was marked for identification.)

10 BY MR. WILMOTH:

11 Q. And the next document, please?

12 A. The next document is a letter dated
13 January 4, 2012 from the Colorado Department of
14 Natural Resources Division of Water Resources
15 signed by the division engineer Mr. Steve Witte.
16 And the subject is requirements for the 2012-2013
17 Arkansas River replacement plans for pre 1986
18 wells.

19 Q. And the relevance of that material is
20 what?

21 A. This is a document provided to users of
22 ground water in the subject area of the Arkansas
23 River illustrating requirements again to implement
24 the rules and regulations known as the use rules
25 that we referred to in the previous document. I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

16

1 provided this just to show some of the
2 requirements and level of involvement in this
3 matter.

4 (THEREUPON, Pope Deposition Exhibit No 8
5 was marked for identification.)

6 BY MR. WILMOTH:

7 Q. Thank you. And you've got one more
8 document I believe?

9 MR. WILMOTH: Yes, that would be Exhibit
10 8?

11 THE REPORTER: Yes.

12 BY MR. WILMOTH:

13 Q. I believe we have one more document.

14 A. Document is entitled U.S. Supreme Court
15 Texas V New Mexico, 485 U.S. 388 (1988). This
16 document basically IS the amended decree and order
17 entered March 28th, 1988 in that case.

18 Q. How did you rely on this work in
19 formulating your opinions in the report?

20 A. I made reference to the Pecos River
21 compact and the Texas V New Mexico case to again
22 illustrate actions taken by another State to
23 comply with a U.S. Supreme Court decree in showing
24 some of the requirements, particularly in regard
25 to the appointment of a River Master and the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

17

1 duties associated with that official in New
2 Mexico.

3 THE REPORTER: Do you want that marked?

4 MR. WILMOTH: Yes, we'll mark that
5 Exhibit 9, please.

6 (THEREUPON, Pope Deposition Exhibit No 9
7 was marked for identification.)

8 MR. DRAPER: Tom, a lot of these were
9 public documents, but for your convenience we
10 wanted to provide them today.

11 MR. WILMOTH: Thank you.

12 BY MR. WILMOTH:

13 Q. And let's revisit Exhibit 2 for just a
14 moment, Mr. Pope. Would you be so kind as to
15 identify that exhibit.

16 A. This document is entitled David L. Pope,
17 P.E. that lists my address and other information.
18 This is essentially my resume or CV if you will.
19 That was provided I think earlier to Nebraska.

20 Q. And you offered an expert report in this
21 matter, did you not?

22 A. Yes.

23 Q. And before we get into that I wanted to
24 talk to you a little bit about your background;
25 both your educational background and your

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

18

1 professional background. Could you briefly
2 describe your educational background for me?

3 A. Yes, I attended Oklahoma State University
4 and graduated with a BS degree in agricultural
5 engineering now referred to biological and
6 agricultural engineering, I think, at this point.
7 I also entered into a master's program and
8 graduated about a year and a half later with a
9 master's degree also in agricultural engineering
10 with emphasis in water resources engineering
11 management.

12 Q. Could you explain your emphasis in water
13 resources engineering? Was there a specialized
14 course work that lead to that emphasis?

15 A. Yes. The courses selected in my master's
16 program were designed to support that particular
17 emphasis as compared to the broader range of
18 things in that department. So I haven't looked at
19 a transcript for a long time, but basically took
20 the graduate level courses in everything from
21 statistics to additional math to classes in either
22 agricultural or civil engineering related to water
23 resources engineering. Might have been some
24 additional hydrology. Soil mechanics.

25 THE REPORTER: What kind of mechanics?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

19

1 A. Soil mechanics. A range of courses that
2 helped prepare me for that field.

3 BY MR. WILMOTH:

4 **Q. Any course work in water rights**
5 **administration, for example?**

6 A. It was taught in a very general way. Not
7 -- not in any great specificity as I recall.
8 There was a class, for example, in I forget the
9 exact title, but irrigation management or
10 something of the sort. And as a part of that
11 there was some coverage of water law that was
12 applied generally in the west since Oklahoma was a
13 part of the 17 western States and laid out some
14 general principles in terms of how that was done
15 as well as the eastern part of the country I think
16 as I recall. So that was probably my earlier
17 introduction to the topic that ultimately dealt
18 within a little more detail later in my career.

19 **Q. Did your work involve training on the**
20 **policy side also -- water policy?**

21 A. Again, some of the course work included
22 that, the water resources engineering and
23 management, whatever the exact title was, a class.
24 Gaitedly some level of degree about the policy
25 aspects. I suspect that I learned a lot more

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

20

1 later in regard to that particular endeavor.

2 Q. In the real world?

3 A. Yes.

4 Q. Did you prepare a master's thesis?

5 A. I did.

6 Q. Do you recall the topic of the thesis?

7 A. It was in essence reuse of tailwater run
8 off from irrigated land in the Oklahoma Panhandle.
9 I don't remember the exact title, but something of
10 that sort.

11 Q. What was the nature of the reuse that was
12 being made in the area that you studied?

13 A. At that point in time -- well, let me
14 back up. I was -- I actually moved to Guymon,
15 Oklahoma for a period of time. I think it was
16 mostly a summer, but also made a number of other
17 trips out there and installed water measurement
18 devices at the end of irrigated fields. And was
19 essentially collecting data and studying the issue
20 of how much run off was occurring from irrigated
21 fields. These were virtually all flood irrigated
22 or gravity irrigated lands at that time. Center
23 pivot systems were certainly not very common yet
24 particularly in that area. And I was trying to
25 quantify the amount of run off for the purpose of

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

21

1 illustrating that there was some economic value
2 and water conservation value in capturing that run
3 off and collecting it in what was popularly
4 referred to as tailwater pits, and then reusing it
5 on that same field or another field. My thesis
6 then really developed procedures and information
7 that ultimately frankly was used I think quite a
8 bit to design those kinds of facilities. And they
9 became wide spread -- not just because of my work,
10 but in part used on a pretty wide spread basis
11 thereafter and some were in use at that time of
12 course.

13 Q. So do I understand from that work that
14 you drew some conclusions about how much tailwater
15 would result from the application of a certain
16 amount of irrigation water?

17 A. Yes, we -- we installed water meters on
18 each of the wells. So we knew how much water was
19 being pumped to each field that was being studied.
20 I think there was half a dozen or so different
21 fields monitored as well as flumes to measure all
22 of the run off from those same irrigated fields.
23 And then from that data and other information on
24 crops produced and how many acres and, you know,
25 just we essentially tried to monitor everything we

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

22

1 thought relevant to that particular question. And
2 then that data was, you know, was analyzed and
3 reported in the thesis as well as other related
4 conclusions and information.

5 Q. Do you recall what factors were relevant
6 to the amount of run off that could be captured?

7 A. Yes, in general terms at least. I have
8 fields that had -- these were again all what we
9 called furrow irrigation at the time where water
10 was distributed across the upper end of the field,
11 the highest part of the field, typically with
12 gated pipe. At that time it might have been a few
13 open ditch systems, but by then gated pipe was
14 pretty common in that area. And we determined the
15 length of the rows, quarter mile or half mile or
16 some other distance, and then looked at the way in
17 which water was applied. How many rows were
18 irrigated from a certain amount of flow. Whether
19 they were trying to push the water through fast or
20 in a soaking manner at a lower amount for each
21 individual row. And so we looked at those
22 relationships, the slope of the field, whether it
23 had been machine leveled or whether it was a
24 little more crudely applied, if you will, in
25 regard to the natural topography of the irrigated

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

23

1 field. So largely based on physical
2 characteristics of the land being irrigated, the
3 amounts of water applied and that ran off.

4 Q. Did the crop being irrigated have any
5 effect on your conclusions; was that relevant?

6 A. At least to some degree. I think we were
7 looking more at the physical parts in that water
8 applied, but there was kind an indirect
9 relationship to the amount of water applied and
10 the crop produced. That wasn't the main focus.

11 Q. Excuse me. Do you recall drawing any
12 conclusions about how much water generally ran off
13 a field as a percentage of the amount applied?

14 A. Yes, in general terms there was certainly
15 some variability as one would expect, but again in
16 that time period speaking of the early 1970's --
17 in fact, I think I did the actual data collection
18 mostly in 1970, '71. The typical figures seem to
19 be in about 15 to 20 percent range of the amount
20 applied versus what was collected at the end of
21 the field that could be captured for the purposes
22 of tailwater recovery and that did vary from
23 fields but not uncommon.

24 Q. Correct me if I misstate this, but does
25 that mean that essentially you were observing 80

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

24

1 to 85 percent efficiency rate in terms of the
2 application of the irrigation water?

3 A. In terms of a very crude sense
4 application efficiency includes other factors, not
5 just tailwater run off.

6 Q. And once this tailwater was collected in
7 the reuse pits, who made the use of that water and
8 how was the use made?

9 A. In some places there were tailwater --
10 I'm trying to remember. I think there might have
11 been -- I'm not sure whether any of these fields
12 actually had tailwater pits, but -- I don't
13 believe they did as a matter of fact. But the
14 point was that in a proposal to reuse water and to
15 increase the efficiency recognizing that there was
16 a certain amount of loss through the soil, that's
17 lost that way, below the root zone and there is a
18 certain amount that runs off. Those are the two
19 big ways in addition to evaporation and losses
20 when water is applied. The -- whether the same
21 person would reuse the water on -- on the field
22 being irrigated or whether that land owner or even
23 perhaps another land owner would pick that water
24 up downstream or down field and apply it to
25 another field was really just options that we

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

25

1 described in terms of how it could be done. There
2 was no right way or wrong way. If you could pick
3 it up and use it in another field downgradient, of
4 course, there was little or no pumping. Whereas
5 if you were to reuse it on the same field, that
6 implied that you had to pipe the water uphill and
7 pump it from the pit back up to the beginning of
8 the same field. In essence recirculate the water.

9 Q. I see.

10 A. So there were really two -- those are the
11 two major alternatives for how water was captured
12 and reused.

13 Q. And did that ultimately lead to virtually
14 100 percent efficiency of irrigation, I suppose?

15 A. Didn't -- you could never quite get to
16 100 percent, but -- particularly because of some
17 of the evaporative losses, but for individuals
18 that had a reasonable length in terms of their
19 rows and used techniques to try to, you know,
20 formally as possible distribute the water across
21 the land and then recapture the run off, they --
22 they were able to -- I think in those days we
23 were, you know, thinking, you know, the 85 or 90
24 percent range was pretty good. Historically most
25 gravity irrigation of this nature had been more

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

26

1 like 65 percent or certainly a lot worse if you
2 had inefficient delivery mechanisms. And it was
3 trying to minimize the overuse on the upper part
4 of the field, which was depercolation and more
5 uniformly distribute the water across the field.
6 So I -- I was looking at those issues and in fact
7 did some later work in regard to that particular
8 question as well.

9 Q. So to be clear if I understand this, you
10 were analyzing a potential reuse of water not
11 studying an actual reuse on the ground in
12 suggesting that that was a way to increase farm
13 efficiencies?

14 A. We were really -- our initial goal was to
15 try to get some actual facts and data in terms of
16 how irrigators could economically and --
17 economically get better use of the water they had
18 and hopefully do some conservation. I -- I want
19 to I think also note that we became aware that,
20 you know, like anything else there's never a free
21 ride. And that one person's waste is another
22 person's supply. And so if water runs off of a
23 field and is picked up by somebody else either
24 consciously or in some other way, that water still
25 gets used. So you do not necessarily tilt the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

27

1 balance in terms of consumptive use as much as
2 most people first realize or first think.

3 Q. If I understand you correctly you
4 indicated that the practice of developing these
5 reuse pits and redistributing the water was
6 something that was pursued thereafter?

7 A. Well, I -- I believe the -- the period of
8 the 1970's was a period when a number of gravity
9 or flood irrigation users adopted that practice
10 and -- and tailwater pits became more common, you
11 know. Coincidentally at that same time period in
12 the 1980's a lot of irrigators were also starting
13 to use some pivot irrigation systems and many of
14 those were going in as an alternative. As an
15 alternative way to apply water more uniformly in
16 many cases to the land as compared to the -- to
17 the gravity method. And so we weren't really
18 trying to push a particular method as much as to
19 try to assist the users with information in regard
20 to ways to be more efficient and get the most for
21 their water.

22 Q. Are reuse pits common in Kansas today?

23 A. There's a number of those still in place
24 and have been in place for years. Particularly
25 where they've retained flood irrigation methods.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

28

1 A -- a substantial amount of irrigated land in
2 Kansas has been converted to some pivot that used
3 to be flood irrigated. I think largely to save
4 labor and to more uniformly apply the water and to
5 try to do it with less pumping.

6 Q. When you evaluated the use of these reuse
7 pits, did you have occasion to determine the
8 effect of their implementation on return flows to
9 rivers and streams?

10 A. We didn't take it that far in that
11 project.

12 Q. Have you ever looked at that question
13 subsequently to your master thesis?

14 A. To some degree. I've not carried out --
15 I can recall explicit studies myself. I think
16 that broader question is one that water
17 administrators and others look at, deal with in
18 various different ways. I've certainly been aware
19 of that as a part of my overall professional
20 responsibilities. But I can't think of any
21 specific studies that I've lead or that involved
22 in per say.

23 Q. What is the general effect of that
24 practice in your experience on return flows to
25 rivers and streams?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

29

1 A. That practice meaning the tailwater pits?

2 Q. Yes, and reuse of the tailwater?

3 A. Generally speaking when tailwater pits
4 were used that resulted in more of the run off
5 that I earlier spoke of being put back on the land
6 and consumed by crops.

7 Q. On the original fields or adjacent
8 fields?

9 A. Original field or another field. And
10 somewhere down gradient there was less water.

11 Q. Does any portion of that water in the
12 reuse pits evaporate?

13 A. Undoubtedly at least some, yes.

14 Q. Did you ever conduct any studies to
15 determine how much say as a percentage of the
16 overall volume in the pit?

17 A. I can't say that I conducted studies. I
18 -- I don't recall whether we reported any numbers
19 in the thesis project that we spoke of or not.
20 I've certainly been aware of how water evaporates
21 from a free surface and there's techniques that
22 are used to estimate that readily available.

23 Q. Does any portion of the water in the pits
24 typically percolate into the aquifer below the
25 irrigated area?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

30

1 A. Yes, in fact, depending on soil
2 conditions and depth and how the pits are
3 constructed and whether they're lined or unlined,
4 all that. There is a substantial amount of
5 leakage that can occur in some cases.

6 Q. And what typically happens to that water;
7 does it go in the aquifer?

8 A. Depends on the geology and the local
9 conditions, but at least some of it would return
10 to whatever system is -- is below the land. It
11 could be some sort of an aquitard or it could be a
12 shallow aquifer or it could be a long way to an
13 aquifer in some areas. Hundreds of feet deep in
14 some cases. But there's some returns that
15 eventually work their way back into the hydrologic
16 system in some fashion.

17 Q. And I suppose that the extent to which
18 that happens and the timing of all of that depends
19 on the case specific?

20 A. That's right.

21 Q. Geology?

22 A. Yeah.

23 Q. Well, speaking of the movement of water,
24 did you have any formal training in the area of
25 ground water or surface water modeling?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

31

1 A. I wouldn't say I have formal training in
2 ground water or surface water modeling. I have
3 certainly had occasion during my career to review
4 numerous models and they have been used in cases
5 that I have been directly involved in both
6 intrastate and interstate models have been -- were
7 presented to me in administrative cases hearings,
8 for example, and submitted to the Kansas Division
9 of Water Resources when I was working there for
10 consideration for various water right matters, for
11 example. So I had occasion to become familiar
12 with models and learn about the various kinds of
13 models and how they're constructed and how they're
14 used and then together with my staff we got to
15 evaluate those and make decisions.

16 Q. Who on your staff was principally
17 responsible for doing the modeling work that would
18 help you reach your conclusions?

19 A. Various people off and on over the years.
20 We had a technical services section and there were
21 several individuals that reviewed and dealt with
22 models from time to time. That section was headed
23 up by James Bagley. Another prominent member of
24 that group for a number of years was David
25 Barfield and there were other individuals that

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

32

1 reviewed models. There was also another group
2 that was a separate section at the time called the
3 Basin Management Program and there were
4 individuals that worked in that program that dealt
5 with modeling. They were -- they were not dealing
6 with it so much in a water allocation sense, but
7 in a more of a broader management perspective in
8 certain areas of the State working with various
9 other groups.

10 Q. During your tenure with the Department of
11 Water Resources, did you have occasion to work
12 with Steve Larson and Sam Perkins?

13 A. Yes.

14 Q. What was the nature of the work they
15 performed for you?

16 A. In the case of Steve Larson, I became
17 acquainted with him during the course of the
18 litigation with Colorado on the Arkansas River
19 Compact. Mr. Larson was very significantly
20 involved in that case particularly in regard to
21 the -- I think originally review and then
22 ultimately as the model was evolving through the
23 litigation and different versions, Steve was
24 involved in -- in making changes and -- and
25 providing technical advice. He is quite

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

33

1 experienced and well known in regard to modeling.
2 Steve Larson was also retained by Kansas as a
3 technical resource when the RRCA ground water
4 model was being developed in the -- this case that
5 was ultimately developed jointly by the States and
6 eventually approved.

7 Q. How about Mr. Perkins?

8 A. Mr. Perkins was -- came along later in
9 regard to my involvement. I don't remember
10 exactly when he was employed with the department,
11 but I certainly worked with Sam and know Sam. He
12 was an internal technical resource in regard to
13 modeling and towards kind of the later part of my
14 tenure I guess and helped work on various
15 projects.

16 Q. Did you rely on Mr. Larson and Mr.
17 Perkins to formulate your opinions about the
18 functionality or efficacy of the RRCA ground water
19 model?

20 A. You're talking in -- back then when we
21 were working on the model development during the
22 settlement discussions?

23 Q. Yes, sir.

24 A. Yes. Mr. Larson. I don't recall Mr.
25 Perkins being involved at that time. If -- he

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

34

1 might have been some in sort of the background. I
2 -- I don't recall the specific dates there now.
3 But Mr. Larson was very much involved and, yes, I
4 did rely on his judgments in regard to the
5 decision process as we were moving through the
6 settlement discussions.

7 Q. During the course of the settlement
8 discussions were you on any of the so called
9 committees such as the Accounting Procedures
10 Committee or the Modeling Committee or any others?

11 A. I was not actually on either of those
12 committees. I was principally involved in the
13 broader discussions that took place with the --
14 between the three States and the representatives
15 of the federal government. There were some sort
16 of ad hoc sub groups that I was directly involved
17 in during the course of the settlement discussions
18 where, for example, the three State engineers who
19 would have some discussions. Or -- or there might
20 be joint discussions between the State engineers
21 or directors and certain technical staff, for
22 example. And there were times there whenever we
23 would look at a -- focus on a particular area, for
24 example, accounting or water measurement or -- or,
25 you know, that sort of thing. And then we would

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

35

1 also interact with these other committees as well.

2 Q. Who was responsible for representing the
3 Kansas view point on the Modeling Committee, for
4 example?

5 A. Well, we had Mr. Larson and Mr. Dale Book
6 and Mr. David Barfield were the three principles
7 that were members or at least participated
8 actively on the Modeling Committee. I think
9 that's it in regard to the involvement.

10 Q. Did any of these folks participate on the
11 Accounting Procedures Committee?

12 A. Yes, Mr. Barfield was a very lead person
13 in regard to the accounting procedures and I think
14 Mr. Book was also quite involved in those
15 activities.

16 Q. I notice that your curriculum vitae
17 indicates that you have a consulting business, is
18 that correct?

19 A. Yes, it is.

20 Q. Can you list for me your top three
21 clients by revenue?

22 A. At this point in time?

23 Q. Yes.

24 A. Well, since -- since July 1 I have
25 stepped down my practice extensively and so since

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

36

1 that time period it would be probably the Garden
2 City Company followed by the State of Kansas
3 through Mr. Draper's firm and -- those are the
4 only two clients I've actually done any
5 significant billing for since July 1. Prior to
6 that time my biggest client was the Missouri River
7 Association of States and Tribes. So that would
8 have been the top billing client for several years
9 prior to that time.

10 MR. WILMOTH: What do we want to do about
11 lunch, John? You want to break five minutes early
12 and try to get back by one and get rolling?

13 MR. DRAPER: That would be fine.

14 MR. WILMOTH: Would that be wiser than
15 trying to go another 15 minutes? Probably would.

16 MR. DRAPER: Probably good to beat the
17 crowd.

18 MR. WILMOTH: We'll take a break then and
19 come back at one.

20 (THEREUPON, a recess was taken, after
21 which the following was had:)

22 BY MR. WILMOTH:

23 Q. Welcome back, Mr. Pope.

24 A. Thank you.

25 Q. I wanted to provide you a copy of what I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

37

1 believe is your expert report. We'll mark this as
2 Exhibit 10. Just ask if you could identify that
3 as such.

4 (THEREUPON, Pope Deposition Exhibit No 10
5 was marked for identification.)

6 A. Yes, this appears to be my expert report
7 dated November, 2011.

8 BY MR. WILMOTH:

9 Q. And what is the general purpose of this
10 report, Mr. Pope?

11 A. As I understand it it was to summarize
12 areas of potential testimony that I might be
13 called upon to give in the future trial of the
14 case and setting forth various categories being
15 outlined in the report.

16 Q. So with regard to the section that begins
17 on page three, for example, what's the purpose of
18 that section?

19 A. Background information about the various
20 attempts made by Kansas to seek compliance with
21 the Republican River Compact and describing my
22 involvement in that process. And that essentially
23 provides a very brief introduction in terms of
24 what lead to then the negotiation of the
25 settlement and development of the final settlement

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

38

1 stipulation.

2 Q. Okay. So this section is just generally
3 factual background?

4 A. Yes, I think that's right.

5 Q. There's no technical analysis in this
6 section?

7 A. No, I don't think so.

8 Q. How about the next section? What's the
9 purpose of that discussion beginning on page four?

10 A. It's a brief background in terms of the
11 settlement process and that lead up to it being
12 adopted. And noted the fact that the FSS called
13 for a ground water model to be developed by the
14 parties that committed to doing that. And that
15 that ultimately was then adopted as essentially
16 required by the FSS through rules and regulations
17 of the RRCA, Republican River Compact
18 Administration as well as the RR -- RRCA
19 accounting procedures. And then I give a little
20 background to note that those were modified at a
21 special meeting of the RRCA in January of 2005. I
22 also wanted to provide some background about sort
23 of information perhaps helpful to understanding
24 the various provisions of the FSS and found some
25 basis for that in the transcript from the hearing

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

39

1 held January 6th, 2003 by Special Master McKusick
2 noting there that the three, quote, State
3 engineers, end of quote, participated directly
4 along with counsel for the States in the U.S. And
5 largely this section was designed to describe my
6 understanding of the various provisions of the S
7 -- FSS, I'm sorry, because I knew that there had
8 been some different interpretations I guess, if
9 you will, in regard to how some of that is done.
10 Particularly related to use of averaging, for
11 example, made reference to that on page five. And
12 so I go into a fair amount of detail about my
13 understanding in terms of how that process was --
14 is done and my view should be done, both for water
15 short year administration and normally referred to
16 as the normal five year accounting. And
17 references there to -- to my view in regard to how
18 those averages are determined and then what that
19 means in regard to the result when you have a
20 certain number of -- the result of the annual
21 accounting gives you a value in acre feet per
22 year. Either more or less consumptive -- Computed
23 Beneficial Consumptive Use as compared to the
24 allocation. Noting that there's also the
25 adjustment for imported water supply that

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

40

1 essentially gets added to the allocation or
2 subtracted from the Computed Beneficial
3 Consumptive Use, whichever way you want to do it.
4 And so those results for individual years then are
5 totaled for the compliance period in question;
6 whether it's a two year period or five-year period
7 and of course those are computed differently for
8 each of those tests, if you will. And then to get
9 the average you divide that total by the number of
10 years in the period and if you happen to be in a
11 situation where there is more -- if the average
12 use is greater than zero then you can use that
13 same process to determine the amount of overage.
14 Be it totaling up the values for the five year
15 period or two year period or taking the -- each
16 individual years result in acre feet per year
17 times the number of years and get an acre foot per
18 year average that way and multiply by the number
19 of years. And so it's -- it's a -- just a math
20 issue as long as you pay attention to the units
21 and what's being accomplished by that process. So
22 that's one way of describing by example in my text
23 here my understanding of how that is supposed to
24 be done. And this section of my report goes on to
25 refer to reports given at annual meetings of the

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

41

1 RRCA that occurred during the period starting in
2 2003 after the settlement had been reached and
3 continuing on through the years at least when I
4 was the Compact Commissioner for Kansas and I
5 think they did continue beyond that. And in
6 particular included some language expressing
7 increasing concerns as the years went by, I guess
8 I would say, about the fact that individual years
9 were showing more Computed Beneficial Consumptive
10 Use than the allocations allowed. And making
11 reference in particular to those totals and things
12 of that nature. These reports by the various
13 States talk about what was being done and the
14 concerns being expressed particularly by Kansas
15 and I illustrate some of those and make some
16 references to reports and provide some quotes.

17 Q. So this section basically consists of
18 some factual background and your interpretation of
19 the FSS, is that right?

20 A. In a general way I guess that's correct.

21 Q. And then this next section Nebraska
22 compliance efforts, is this more background
23 information?

24 A. Yes, it's more background and it's
25 expressing my views in regard to some of the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

42

1 things that were being done by Nebraska and the
2 Natural Resources Districts that were also
3 involved in regulating ground water in the case of
4 NRD's. And I think that background description,
5 you know, expresses some concern about when things
6 were done as compared to the situation that
7 occurred in regard to the use of water. There's
8 also a paragraph or so in here about the actions
9 by the State of Nebraska and other entities, I
10 guess, involved in some way about arrangements
11 reached, agreements reached with various
12 irrigation districts in Nebraska to forego the use
13 of water or to lease water or whatever terminology
14 you want to use, purchase, water for a year in
15 order to try to provide that to Kansas. And this
16 part of the report speaks to some of the concerns
17 that I observed at that time and note here I guess
18 in general terms that there are limitations in
19 terms of the reliance on surface water. Doesn't
20 mean it can't be done, shouldn't be done. Just
21 means that there are limits in terms of how that
22 would fit into the solution. And note again some
23 of the concerns like timing, lack of agreement on
24 procedures, how it would be accounted for, that
25 sort of thing.

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

43

1 Q. So is all this based on your observations
2 as the chief engineer in Kansas?

3 A. Yes, observations and involvement I guess
4 I would say in various different ways particularly
5 through the compact administration. Certainly we
6 had some contact from time to time with Kansas
7 Bostwick Irrigation District and --

8 THE REPORTER: Foster?

9 A. Bostwick.

10 THE REPORTER: Bostwick.

11 A. B-O-S-T-W-I-C-K. And then I go on in
12 this particular section to sort of try to
13 illustrate some of the difficulties that Kansas
14 was dealing with in regard to shortage of water.
15 There are several references in the report to that
16 and note not only the shortage as to the Kansas
17 Bostwick Irrigation District, but to a lot of
18 other users that divert water between essentially
19 the Kansas Nebraska State line and Milford
20 Reservoir. I treat that as one category. And
21 what then was required by my office at the time to
22 administer water rights because of that shortage
23 of water and curtail substantial amount of use. I
24 also then note just in general terms here that
25 there's also other interests of the State of

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

44

1 Kansas in those waters because of storage
2 contracts that the State of Kansas has with the
3 Corps of Engineers for Milford Reservoir and the
4 water users that depend upon water provided by
5 that reservoir pursuant to those contracts and to
6 subsequent other agreements and sales and
7 arrangements down the Kansas River.

8 BY MR. WILMOTH:

9 Q. So up until this point on page ten, is
10 there any technical analysis at all in this
11 document that you performed?

12 A. I don't recall independent technical
13 analysis. I think it's more a matter of assessing
14 and evaluating documents and things that occur
15 historically in my experiences dealing with the
16 administration of water in Kansas and my role as
17 commissioner to the Republican River Compact
18 administration.

19 Q. And as far as the documents you're
20 referring to, those would be documents such as
21 Exhibits 3 through 9 that you provided this
22 morning?

23 A. Yes, I also note several places in the
24 report to other documents that I think you already
25 have and have been provided to -- I think in this

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

45

1 proceeding. For example, the RRCA annual reports
2 and documents of that nature that are well known
3 to both States or all the States.

4 Q. And with regard to the last two sections
5 regarding the Arkansas and Pecos Rivers and then
6 also the River Master that you have suggested be
7 appointed, what is the basis of these views?

8 A. These views are based upon my experience
9 and knowledge gained over the years when I was
10 chief engineer. In the case of the Arkansas River
11 I was extensively involved in that litigation by
12 virtue of my role as member of the Arkansas River
13 Compact Administration. Member of the Litigation
14 Team for Kansas. Prepared information and reports
15 and testified several times during the lengthy
16 trial that occurred during the course of that
17 case. I became quite familiar with the issues and
18 with the dispute that went on between the two
19 States. In particular for this purpose here I
20 relied upon my knowledge of the actions required
21 by the Supreme Court and the activities undertaken
22 by the State of Colorado to then ultimately comply
23 with the terms of the court decree that was
24 rendered in the case. That case included not only
25 the -- it was like four or so phases as I recall.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

46

1 One of which was determinations of the amount of
2 violations. And another was quantifying those and
3 economic damages or other damages and finally
4 future compliance. And so the issue of what would
5 be required in the future probably is most on
6 point here to this particular segment of the
7 report. That's the reason that I then provided
8 documents which were identified this morning
9 related to that case. Particularly the documents
10 in Exhibit No. 6, Exhibit No. 7 and Exhibit No. 8.
11 And then also some of the background information
12 to this also was Exhibit Nos. 4 and 5 talked about
13 the pumping issue and comparisons before and
14 after. And so my primary point there based on
15 these -- these documents as well as my personal
16 experience was the nature of what was required to
17 be done and what was done that affected the amount
18 of water that could be pumped by some 50 percent.
19 Plus the fact that in the particular case of that
20 compact, which is very different than the
21 Republican, but that particular compact there is a
22 big analogy to -- to satisfy the requirements of
23 the compact. Colorado also developed processes to
24 allow wells to pump if they replaced the useable
25 depletions to the State line of Kansas so that

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

47

1 Article 4D of the Arkansas River Compact was not
2 violated. And so it's a fairly complex process,
3 as a matter of fact, but by comparison it shows
4 the amount of effort and the nature of what was
5 required to be done and what was done. Not to say
6 that there weren't disputes along the way and the
7 litigation, but in the end I think for this
8 accounting period since the case has been resolved
9 Colorado has been found to be in compliance. In
10 the case of the Pecos River that was involved in
11 the Texas V New Mexico case there is a very
12 analogous process. And while I was not as
13 personally involved or was not personally involved
14 in the case itself, I -- because of my role as
15 chief engineer, I was personally acquainted with
16 each of the State engineers that served during the
17 period while I was Chief Engineer of Kansas. And
18 we talked a lot. And so I tried to learn and gain
19 as much information as possible. Obviously the
20 Texas V New Mexico case was very important as a
21 precedent in the Arkansas River litigation. And I
22 also heard pretty detailed reports almost every
23 year from typically the State engineer or the
24 director of the Interstate Stream Commission at
25 various meetings of groups like the Association of

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

48

1 Western State Engineers or Western States Water
2 Council or other venues. And so I tried to pay
3 attention and learn from that and to see what was
4 done. And there were other officials that I got
5 acquainted with from New Mexico. I was able to
6 visit New Mexico several times and on at least one
7 occasion took a fairly extensive tour of water
8 facilities in the State. And so it was through
9 that involvement and that knowledge that I gained
10 that I felt comfortable in making a comparison in
11 regard to what was -- what resulted from that case
12 and the actions then that have been since taken by
13 New Mexico and the various other officials and
14 entities in that State to -- to comply with the
15 decree. And, in fact, they have complied with the
16 decree, as I understand it each and every year,
17 since the decree was entered. And so that's the
18 nature of the paragraph and why I refer to it and
19 provided the documents as I did.

20 Q. So is it your intent to suggest that
21 Nebraska should employ as measures that were
22 employed in the other basins?

23 A. It's not my suggestion that Nebraska
24 apply the exact same measures, because the
25 physical conditions are different, the nature of

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

49

1 the compacts and decrees are different. But by
2 analogy it was intended to illustrate the level of
3 activity. The significant amount of activity that
4 was required to employ the measures. Whether they
5 be augmentation or whether they be replacing
6 surface water or ground water depletions with
7 surface water, use of storage. Various different
8 techniques and mechanisms were used in each of
9 those two cases. So the essence -- that's the
10 essence of my -- of what was -- what was being
11 provided here was to look at those two cases by
12 example and what they might mean in regard to what
13 may be appropriate for Nebraska to comply with
14 this decree.

15 Q. If those efforts represent a yard stick
16 against which to measure the propriety of the
17 States efforts to comply with the compact, how do
18 you view Nebraska's efforts of measuring up?

19 A. Excuse me. Initially I viewed Nebraska's
20 efforts as something that was getting underway.

21 Q. When is that just for clarity?

22 A. What?

23 Q. For clarity sake when was that?

24 A. For the most part -- just started for the
25 most part just subsequent to the settlement being

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

50

1 entered in December of 2002. That's not to say
2 that there weren't some activities that had taken
3 place in the normal course of business or perhaps
4 may have been leading up to that, particular
5 recent months. For example, in the moratoriums in
6 the two lower -- the Lower Republican Natural
7 Resources District and the Middle Republican
8 Natural Resources Districts. I think those were
9 being developed just prior to the settlement so
10 that, in fact, those could be effective in -- in
11 regard to the drilling of new wells. You know, I
12 viewed that as a -- as a needed step, but a very
13 incomplete one in regard to really solving the
14 total problem. Sort of a foregone conclusion on
15 my part that new ground water development really
16 was going to aggravate the problem and that's why
17 we took the actions we did many years before that
18 as I did -- as did the State of Colorado.

19 Q. So when the FSS was signed, as I
20 understand it, all the tools weren't really in
21 place yet, is that what you're saying, on the
22 Nebraska side?

23 A. No, I don't think they were in place on
24 the Nebraska side.

25 Q. What did you expect to happen to get them

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

51

1 in place?

2 A. I expected a fairly quick implementation
3 of restrictions on pumping in the two districts
4 that did not have permit systems and allocations
5 as of that date.

6 Q. Are we talking about ground water pumping
7 in the districts?

8 A. Yes, ground water pumping and perhaps a
9 review of what was going on in the Upper
10 Republican NRD. But quite frankly, you know, more
11 than that, you know, I think they, you know,
12 lagged substantially behind what I had expected
13 and hoped in regard to allowing additional land to
14 be put under irrigation.

15 Q. Now, that's different than ground water
16 pumping?

17 A. It's the land that could be irrigated
18 with the ground water pumping. So the --

19 Q. But the amount of acreage and the amount
20 of ground water pumped are two different things,
21 is that what you're saying?

22 A. Well they're very closely related. But
23 my expectation was that the moratorium would
24 essentially close off new development of irrigated
25 land almost simultaneously. That did not occur.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

52

1 Q. Does the FSS require that?

2 A. Not explicitly.

3 Q. Why did you expect that to occur then?

4 A. Well, because it would -- it seemed
5 logical to me that if you have a problem, which
6 was very apparent by then, in regard to the amount
7 of use compared to the allegations that you would
8 try to prevent that from getting worse. And, you
9 know, beyond that I was relying on a lot of
10 discussions and everything that occurred during
11 the course of the settlement. You know, that gets
12 into confidential matters. But my expectation was
13 that fairly swift action would be taken and it
14 took a year or two depending on the district to
15 get that accomplished. You -- in your earlier
16 question you had asked about other activities and
17 expectations and, you know, clearly there is a
18 range of things that, and options that can be done
19 and some of which are laid out in the FSS itself.

20 Q. What would that include? What would that
21 range include?

22 A. Well, the FSS probably lays that out
23 pretty well, but it -- were things like -- given
24 the fact that the two year compliance period for
25 water short year administration was probably the -

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

53

1 - the most restrictive requirements. There were a
2 number of options referred to in the FSS that
3 would reduce the amount of depletions to the river
4 or Computed Beneficial Consumptive Use above Guide
5 Rock and whichever way that occurred --

6 Q. Through augmentation, for example?

7 A. Augmentation is one of the possibilities.
8 It's mentioned there. Substitute supply for --
9 particularly water use in the Superior Canal area
10 was explicitly mentioned as a part of the FSS. So
11 that while their diversion is at Guide Rock, a lot
12 of the irrigated land is below Guide Rock
13 geographically. And so the thought there was
14 figure out a way to reduce the use at or above
15 Guide Rock and do some sort of substitution below
16 while pumping or whatever it might be. And
17 augmentation possibilities, wherever it might be.
18 So there's a series of things like storage use
19 that would be possibilities. And the FSS did not
20 dictate which of those would have to be used per
21 se, but it does set forth the requirements that
22 have to be achieved.

23 Q. So could Nebraska, for example, purchase
24 and transfer surface water?

25 A. One of the options I think that is

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

54

1 available within certain terms.

2 Q. And could they regulate surface water
3 users to restrict their consumption?

4 A. I think there are -- are several
5 possibilities there that -- that have a number of
6 different constraints that I guess I would hate to
7 generalize about or be too specific about,
8 recognizing that there are reclamation projects in
9 Nebraska. There are contracts between districts
10 and the federal government. There are authorized
11 projects under congressional authority involved.
12 There's water rights held by reclamation for
13 projects. There's State law. There's the
14 compact. There's a whole variety of constraints
15 that would have to be considered in terms of what
16 would be done there and how that would be done.

17 Q. In your experience as the chief engineer
18 were the reclamation projects in your State
19 subject to State law?

20 A. Yes, they are.

21 Q. What are the constraints that you see in
22 Nebraska as they relate to the reclamation
23 projects?

24 A. Well, while they're subject to State law
25 in terms of the water administration component, I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

55

1 think we were always cognizant that one has to, I
2 think, be aware that you also have federal
3 projects that have been authorized and constructed
4 and implemented. And that there are some
5 constraints at least in regard to that. And then
6 there are contractual obligations between the
7 irrigation districts and their member land owners,
8 water users, and reclamation. And I always wanted
9 to be cautious in regard to actions that would be
10 taken so as to look at the whole picture. There
11 -- you know, for example where does the water
12 right fit in, what are the effect on those users
13 versus others. I mean you have all these issues
14 in the broader sense that I think need to be at
15 least considered. Are there compacts involved and
16 are there other factors.

17 Q. Are these socioeconomic issues that
18 you're referring to?

19 A. Well, I guess the term I would probably
20 use in the context of Kansas where you ask the
21 question was public interest. It's an equal --
22 not equal, but it's another substantial
23 consideration in regard to the obligations of the
24 chief engineer in Kansas under the Water
25 Appropriation Act to administer water both to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

56

1 prevent impairment and to not prejudicially or
2 unreasonably affect the public interest. And
3 public interest considers a lot of different
4 factors.

5 Q. Such as what?

6 A. The effect on the broader community of
7 the water users. I think the issue of federal
8 projects is of public interest issue.

9 Q. How so? Is that because they have a
10 return to the treasury?

11 A. Well, I suppose that's one. I don't know
12 that I had put that at the top of my list in
13 regard to a State concern, but certainly there is
14 an issue. But more to the point in State issue is
15 you've got a political subdivision of State
16 government that has been created by authorization
17 of the legislature and, in fact, the chief
18 engineer in Kansas has to approve the creation of
19 those districts and the petitions as I recall the
20 language. And so there is a consideration of the
21 various laws in the State that have been --
22 actions have been taken, administration occurs so
23 as to consider that along with all the other
24 factors.

25 Q. As far as those political subdivisions to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

57

1 which you refer, you're referring to irrigation
2 districts?

3 A. Yes, I was.

4 Q. And those irrigation districts are
5 subject to State law, are they not?

6 A. Yes, they are.

7 Q. And their water users are subject to
8 State water laws, right?

9 A. Yes.

10 Q. I'm still not sure I understood what you
11 view as a constraint on federal projects. I think
12 you identified the contracts between the users and
13 the districts, for example.

14 A. Uh-huh.

15 Q. What is the constraint that arises from
16 the nature of a federal project in your view?

17 A. Well, it's a pretty complex area and I'm
18 certainly not professing to be an attorney or
19 providing all of the different aspects whether it
20 be legally or administratively. But in the body
21 of State law you have water law, but you also have
22 laws related to the creation of these political
23 subdivisions and the obligations they have both to
24 the State and to their users.

25 Q. So we're still talking about the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

58

1 irrigation districts and not the Bureau of
2 Reclamation right now, is that right?

3 A. Well, they're intertwined, because the
4 use -- the irrigation districts have a contractual
5 obligation to Bureau of Reclamation and Bureau of
6 Reclamation has an obligation to try to carry out
7 their projects. And for the purposes of -- of the
8 -- the State you have State law, but you also have
9 then in this particular case the Republican River
10 Compact and you have the settlement reached, which
11 lead to a court decree. And a part of what
12 occurred during that settlement process was the
13 involvement of the federal government through
14 Justice and Department of Interior and Corps of
15 Engineers. And the interaction of their interests
16 in the projects together with the States interest.
17 And we tried to bring all of that together so as
18 to end up with a settlement that would properly
19 allow the administration and the enforcement of
20 the compact, but at the same time protection of
21 the federal projects, because we really needed the
22 United States to sign off. They're not a formal
23 signatory, but their views in regard to whether
24 the settlement accomplished and protected their
25 projects was an important factor in getting the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

59

1 settlement approved. And so this relates -- this
2 stuff all relates, in my mind, in regard to what
3 was expected from the settlement.

4 Q. Let me ask you this as simply as I can.
5 Is there something that you can point to either in
6 the compact or the FSS or the Nebraska State law
7 or Kansas State law that precludes the regulation
8 of Bureau of Reclamation projects?

9 A. I haven't suggested that they shouldn't
10 be subject to regulation.

11 Q. Okay. So is this really a policy
12 constraint that you're talking about when you talk
13 about constraints associated with the project?

14 A. I think it's a matter of choices that are
15 made that would satisfy the provisions of the FSS,
16 which is really the key goal here, in my view.
17 And I would simply somehow based on an answer to
18 the question you gave or propounded --

19 Q. Sure.

20 A. -- you know, what are the considerations.

21 Q. Okay. Considerations, not constraints
22 though, is what we're talking about?

23 A. I probably did use the word constraints,
24 but I think consideration is -- is okay.

25 Q. Okay.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

60

1 A. I didn't suggest that I'm backing away
2 from constraints, but -- but they're both
3 involved.

4 Q. I want to give you a copy of an article
5 that was written upon your departure and just ask
6 you if you have any recollection of participating
7 in this interview. We'll mark that as Exhibit 11?

8 THE REPORTER: Yes.

9 (THEREUPON, an off the record discussion
10 was had, after which the following:)

11 (THEREUPON, Pope Deposition Exhibit No 11
12 was marked for identification.)

13 A. Yes, I recall being interviewed. I'm
14 just trying to picture -- fully understanding the
15 particular interview involved and --

16 BY MR. WILMOTH:

17 Q. Feel free to take your time and give it a
18 read if you need to.

19 A. I recall the interview and I kind of
20 scanned the article. Obviously it's 20 pages long
21 or something.

22 Q. When did this interview take place?

23 A. I can't give you a specific date. It was
24 probably within a year of my retirement as chief
25 engineer I would guess. I don't remember exactly.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

61

1 Q. Is there any reason that any of the
2 answers you gave in this article would not reflect
3 your opinion at the time?

4 MR. DRAPER: You mean as to each
5 particular statement on these 20 pages? And he
6 confirmed that he -- they are -- they were taken
7 down and expressed accurately?

8 MR. WILMOTH: Uh-huh.

9 MR. DRAPER: That's going to take a while
10 if you want to be that detailed.

11 MR. WILMOTH: I'll point to a couple.

12 BY MR. WILMOTH:

13 Q. Let's go to page eight.

14 A. Where is the heading?

15 Q. In the top right hand corner there is the
16 page numbers.

17 A. Oh, I see it. I got it, right. Okay.

18 Q. Bottom of the page left hand column and
19 carrying over to the right hand column do you see
20 that paragraph that believes - or that begins we
21 didn't do an absolute first in time?

22 A. Yes.

23 Q. Could you just read that paragraph for
24 me?

25 A. We didn't do an absolute first in time

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

62

1 (favoring senior rights) but there was preference
2 given to the senior right holders in terms of how
3 much they were allocated. The key was
4 establishing the IGUCA within the framework of the
5 Kansas Water Appropriations Act, but adapting the
6 controls to the physical situation so as to
7 minimize the economic harm to the broader
8 community by limiting regulation as much as
9 possible.

10 Q. Can you explain the meaning of that
11 paragraph and what you were trying to address in
12 that discussion?

13 A. Yes, the -- the Walnut Creek IGUCA is how
14 we pronounce the I-G-U-C-A was a quite complex
15 surface water, ground water system out in central
16 Kansas. And given the fact that most of the
17 actual irrigation use -- not all, but most was as
18 a result of pumping from a hydraulically connected
19 aquifer, but yet the shortage was the surface
20 water system. Ultimately the evidence showed that
21 that was as a result of the depletions to stream
22 flow as a result of the ground water pumping. And
23 there was a very senior quite large surface right
24 down at the lower end of the river system. The
25 holder of the surface right had not insisted upon

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

63

1 a formal administration of water in order to
2 protect their surface right. They did however
3 want their shortage of supply addressed. And
4 given the nature of their concern then I invoked
5 the initiated proceedings for the creation of an
6 IGUCA. During the course of the hearing which
7 went on some 20 or 23 days of actual hearing, not
8 consecutively, but total time, a lot of testimony
9 was provided by the very wide range of intervening
10 parties, a dozen or so, and of course a lot of
11 evidence was provided. This is a formal quasi
12 judicial proceeding. And it became very clear
13 that the choices that could be provided using the
14 statutory authority set forth in the IGUCA statute
15 allowed as chief engineer to try to solve that
16 problem but to do it in such a way to minimize the
17 economic damage and to protect the public interest
18 and hopefully the rights of the water right
19 holders. Because of the effect of the ground
20 water pumping on the stream flow and the timing of
21 that effect and the variability it's -- it was a
22 little more complex than just simply administering
23 all surface rights. It doesn't explicitly say it
24 in this -- in this article, but the most senior of
25 the water rights, both surface water and ground

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

64

1 water are called vested rights in Kansas or the
2 pre 1945 rights or pre June 28th, 1945 rights.
3 And those were fully protected. So they were
4 continued to allowed to be divert all of the water
5 that they were entitled. We then had a group of
6 500 or so appropriation rights and there was much
7 more than latitude in regard to which of those and
8 under what circumstances some curtailment would
9 occur or some reductions in how much they could
10 pump and what ultimate order should be issued.
11 And what I was really trying to say here was we
12 looked at a series of alternatives and one
13 alternative was to just go down the priority list
14 on that group of appropriation rights until the
15 amount of water authorized by the rights equaled
16 the amount of water that we had determined based
17 on the evidence that could be drawn from that
18 aquifer and quantified the amount based on
19 modeling and evidence. That would have resulted
20 in about one half round numbers of the
21 appropriation rights being completely curtailed.
22 So that was one alternative. The other
23 alternative is what I ultimately chose and that
24 was to look at what was referred to as the
25 reasonable needs of the appropriation rights based

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

65

1 on how much water it took to produce crops and put
2 that water to beneficial use. I determined
3 basically that the amount that had been
4 appropriated back in the 1950's and 60's and years
5 of that nature was really more than they needed if
6 you looked at a yet undetermined interpretation of
7 the term reasonable use yet at that time in
8 Kansas. And so based upon more current technology
9 we set some allocations for what was a, quote,
10 reasonable amount of water. And by limiting the
11 senior group of the appropriation rights all of
12 which were junior to the vested rights to the
13 allocated amounts that that then freed up some
14 water that could then be diverted by the junior
15 category of the appropriation rights. And so that
16 was then allocated to the juniors. So the result
17 of that is that more efficient use was required
18 and more conservation was required. There was --
19 it wasn't necessary to completely shut off the
20 junior rights. And we met the goals of getting
21 the aquifer stream system back into a sustainable
22 basis. And by getting it back to a sustainable
23 basis, once the aquifer got replenished because it
24 was pumped way down and we were having wells that
25 couldn't pump their capacities and we had people

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

66

1 that couldn't divert from the stream from their
2 individual pumps and we had this shortage to this
3 big downstream surface right, and once that system
4 got back a few years down the road it did in fact
5 stabilize and the downstream senior surface water
6 right did get its water. Now, what I was trying
7 to say here was that that was my goal at the time
8 and we achieved it. We protected the water rights
9 both downstream and up and down along the system.
10 We imposed a regime that resulted in a more
11 efficient use and in my view it lessened the
12 amount of economic damage not that there wasn't
13 some and protected the public interest. And I
14 believe it was completely consistent with Kansas
15 water law. Both the Kansas Water Appropriation
16 Act and the IGUCA statutes. And the court's
17 agreed with me. Well, I better clarify that. The
18 litigation was ultimately settled by all the other
19 parties and I was able to accept the settlement.
20 But in essence it never went to trial. But the
21 court did approve the settlement.

22 Q. So by analogy assuming that Nebraska
23 complies with the compact in the FSS, is there
24 anything in either of those documents that
25 precludes the State of Nebraska from attempting to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

67

1 minimize the economic harm to the broader
2 community by limiting regulation as much as
3 possible?

4 A. Can you repeat that, please?

5 Q. Why don't you read it back.

6 (THEREUPON, the court reporter read back
7 the following testimony:

8 "Q. So by analogy assuming that Nebraska
9 complies with the compact in the FSS, is
10 there anything in either of those documents
11 that precludes the State of Nebraska from
12 attempting to minimize the economic harm to
13 the broader community by limiting regulation
14 as much as possible?"

15 A. So long as it's fully understood that
16 Nebraska would comply with the compact as
17 implemented through the FSS and the court decree.
18 That infers providing the water that Kansas is
19 entitled to, which by the way, almost has to
20 involve a federal project. As long as it's done
21 on a timely basis and results in those goals, why
22 I have not really said that could or shouldn't
23 occur.

24 BY MR. WILMOTH:

25 Q. On the preceding page, page seven, middle

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

68

1 of the left hand column, there is further
2 discussion of whether or not a preference system
3 is a good idea; do you see that? Begins
4 preference system may.

5 A. Yes.

6 MR. DRAPER: I haven't kept up with you.

7 MR. WILMOTH: Left hand column, page
8 seven, middle of the page.

9 MR. DRAPER: Okay, thank you.

10 BY MR. WILMOTH:

11 Q. Do you see where it starts we just need
12 to use it, fourth sentence in?

13 A. Yeah, I see it.

14 Q. Could you just read the rest of that
15 paragraph for me?

16 A. We just need to use it. If there's a
17 shortage of water, water rights need to be cut
18 back in order priority or based upon a reasonable
19 allocation system, consistent with the
20 Appropriations Act and IGUCA statutes, if desired,
21 that will still satisfy as many beneficial uses as
22 possible. There are ways to do it, but it is not
23 easy or painless in the short run.

24 Q. Is that an accurate representation of
25 your belief at the time?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

69

1 A. It is although the portions of this
2 section of the article make more clear than just
3 that couple of sentences that when I said we just
4 need to do it, that I was referring to the body of
5 law, the Appropriation Doctrine, not a preference
6 system. The question was posed about, you know,
7 should we give preference to certain users based
8 on the type of use. One category ahead of the
9 other as compared to the first in time, first in
10 right Appropriation Doctrine system and the IGUCA
11 process like I previously described.

12 Q. Okay.

13 A. So as long as you put it in that context
14 I think the article does say that earlier then I
15 guess my view is still the same overall.

16 Q. Does that same view apply as to
17 preferences between ground water users and surface
18 water users?

19 A. Does that same view apply as between
20 ground water and surface water users?

21 Q. Should any preference be afforded one or
22 the other?

23 A. This -- in Kansas surface water and
24 ground water rights are allocated and administered
25 in a single priority system. So both have

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

70

1 appropriation rights or vested rights irrespective
2 of whether it's a surface right or ground water
3 right. And we on occasion have had to take action
4 to administer those together. The preference that
5 I was referring to there had nothing to do with
6 surface water and ground water. It was referring
7 to the types of uses.

8 Q. Sure. I'm asking if you feel the same
9 way about surface water rights versus ground water
10 rights; should any preference be accorded either
11 one?

12 A. Well --

13 Q. Or is this all subject to the same kind
14 of overriding public interest considerations and
15 --

16 A. Well, I -- I don't have -- my view is as
17 I stated a minute ago. I believe you need to
18 administer them as a system and it would be more
19 based on the water rights. I realize you're in
20 somewhat of a different situation under the
21 Nebraska law, but I think that's harder to do. So
22 I'm not sure I can answer the question related to
23 preference where you have on one hand in Nebraska
24 as I understand it a system of surface rights
25 under appropriation law being administered by DNR

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

71

1 and on the other hand ground water in a different
2 system of law with some integration between the
3 two. And given that system it may be necessary to
4 -- to look at your system physically and logically
5 within the framework of your law in order -- to
6 get to the, quote, right result. You know, there
7 may have to be some considerations that aren't
8 quite as pure as we would have in Kansas.

9 Q. Uh-huh.

10 A. I'm not prepared to really say one way or
11 the other in such a hypothetical, general sense.

12 Q. But at least with regard to Walnut Creek
13 you didn't elect to shut down all surface water
14 users and no ground water users, did you?

15 A. Well, it was really the opposite.
16 Because the extensive use was the ground water
17 system.

18 Q. Uh-huh.

19 A. Much more limited surface water use up
20 and down the river system, but then a large
21 surface right at the bottom. So the problem we
22 really were solving was how to protect that
23 surface right.

24 Q. Uh-huh.

25 A. Which frankly just put Kansas there.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

72

1 Q. Uh-huh. So then tell me did you shut
2 down all the ground water users in that basin or
3 did you allow some ground water users to continue
4 to exercise their right?

5 A. Well, the end result from the proceeding
6 was that the order cut ground water use in about
7 half if you aggregated all of it. Remember we had
8 vested rights, the more senior of the
9 appropriation rights and the more junior of those.
10 So I think the face amount was even more than
11 that. But the actual net effect of the
12 implementation of the Walnut Creek IGUCA resulted
13 in ground water pumping going down about 50
14 percent round numbers.

15 Q. And so the idea was to move water down to
16 the senior user, correct, and satisfy that senior
17 right?

18 A. Yes, overall that was the senior right
19 and happened to be downstream. But remember there
20 were also vested rights scattered up and down
21 throughout the system from one end to the other,
22 both for surface water and some wells -- older
23 wells. And to protect all of those rights since I
24 wasn't dealing with a -- just protect one water
25 right. I wasn't dealing with a formal

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

73

1 administration of water rights complaint per se.
2 I was dealing with a broader complaint. And so I
3 viewed my responsibility to look at that whole
4 system. And so in order to do that, you know, we
5 came up with a solution that has -- was done there
6 that I described, but that brought the aquifer
7 level up on average, so it fluctuated some, so
8 that the vested ground water rights two counties
9 upstream were able to exercise their well and get
10 the pumping rate that they were originally
11 entitled to most -- for the most part. And
12 surface pumps were able to have some flow. Again
13 we've got the system back in the balance. That's
14 the message.

15 Q. Did you allow all those intervening users
16 to exercise the full amount of their rights?

17 A. There was an allocation provided to each
18 and every water right -- each and every ground
19 water right -- every water right had an
20 allocation, but the ground water rights explicitly
21 had the -- the restricted pumping amounts. And so
22 every one of them was required to be metered and
23 every one of them had a new allocation that
24 restricted it more than what they would have had
25 under their original right. Now, they could still

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

74

1 pump a larger amount in some years, but there were
2 some multi year restrictions involved.

3 Q. Uh-huh. Would it have made any sense to
4 allow those people on the surface side -- surface
5 use side to just continue to divert all the water
6 they were seeking or would that have just simply
7 --

8 A. The surface rights were not restricted
9 beyond what they were originally vested or
10 appropriated?

11 Q. Okay. So essentially the intervening
12 surface rights were allowed to use all the water
13 that they wanted to use subject to the maximum
14 extent of their appropriation? They were
15 unregulated, in other words?

16 A. No, not unregulated. They had to be
17 metered and they were restricted to the amount
18 that they were appropriated. And they were also
19 limited to the acres they could irrigate or this
20 order also is subjected to the towns and the
21 industries and all the users, feed lots. And they
22 were all required to have water conservation plans
23 that met State guidelines so as to insure that
24 they were not wasting water, they were using water
25 efficiently and they were also subject to day to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

75

1 day administration to satisfy more senior
2 downstream surface rights. So there were times
3 that if the junior -- if there -- most of -- most
4 of the surface rights were quite senior. But to
5 the extent that there were any junior surface
6 rights, they from time to time would get curtailed
7 when the wells were subject just to the IGUCA
8 restrictions.

9 Q. Uh-huh.

10 A. So there was some sort of a melting of
11 the two systems, but yet we had to preserve some
12 level of administration as well. But for the most
13 part the surface rights largely because of
14 seniority were actually less regulated, if you
15 will, than the ground water users were in this
16 case. That was subject more of a physical facts
17 than the legal regime, you know, the nature of
18 their water rights than it was anything else.

19 Q. So you think that provides a good analogy
20 for the current litigation, this Walnut Creek
21 scenario?

22 A. Well

23 Q. I thought I heard you say put Kansas down
24 at the end and?

25 A. Well, I meant that because of the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

76

1 downstream senior in the context of the compact is
2 what I was kind of trying to say by analogy there.
3 But there is some analogy there, but I would
4 hasten to add that not everything would fit
5 perfectly because of water law and because of --
6 we didn't have any reclamation projects. The
7 Republican basin is bigger and probably more
8 complex because of tributaries and all of the
9 things that would be different in a basin that
10 spans parts of three States. But federal
11 reservoirs and stuff that we didn't have, you
12 know, all that kind of stuff. Now, whether
13 they're federal or not, you know, we didn't really
14 have much of that. There was some small water
15 shed type dams and stuff to deal with. But, I
16 mean, the point was there was a problem to be
17 solved and this was one way to solve it with the
18 particular set of facts and circumstances and law
19 that we had.

20 Q. Let me take you back to your days when
21 you were developing the ground water management
22 districts and I believe you maybe ran District 3,
23 is that right, for a period?

24 A. I was the manager for District 3 for a
25 few years.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

77

1 Q. Why were those districts developed?

2 A. By the 1960's, as I understand the
3 history, I wasn't in Kansas then yet, it became
4 very apparent that the level of development in the
5 high plains aquifer, the IGUCA portion in
6 particular, was -- had become fairly significant.
7 Water levels were declining. There were other
8 water related concerns I suppose in some cases
9 with stream flow effects and stuff. But the real
10 effect -- real issue, impetus, was ground water
11 decline. So based on some planning studies and
12 based upon those data, local and State leaders
13 started discussing how to deal with it. I came on
14 the scene in 1971 and became involved in that
15 activity originally in my role as extension
16 irrigation engineer for Kansas State University.
17 And it was very apparent to most people there, at
18 least they anticipated that some form of control
19 of ground water pumping beyond just the -- the
20 administration of the existing rights -- ground
21 water rights had been established needed to occur.
22 In fact, State law even changed quite a bit about
23 that time period a few years later. But to
24 tighten it up. More regulatory authority. But --
25 so the debate was whether State control versus

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

78

1 local control and as you can probably imagine
2 there was a lot of interest by the locals in
3 having more involvement in that process. That
4 then evolved into support for allowing the
5 creation of ground water management districts.
6 And in fact I think it was in '72, if I recall,
7 essentially current Ground Water Management
8 District Act was -- was enacted and of course it's
9 been amended several times since then, but that
10 then allowed the five existing ground water
11 management districts to be organized.

12 Q. Why was that local control important in
13 your view?

14 A. Well, I think the views of, you know,
15 varied a little bit off and on over the years by
16 many of us. But at the time it was viewed by many
17 of us as a way to have more local involvement and
18 to get more buy in from local water users and to
19 most importantly recognize the differences from
20 area to area in the State.

21 Q. Physical differences?

22 A. Physical differences and to some extent
23 be also some interest in people having more say so
24 in tailoring programs not only to the differences
25 that existed but their desires. Their goals. And

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

79

1 so that was I think the original impetus even
2 though that in large part has maybe not worked
3 quite as well as we had hoped at the time, but
4 there has been things done over the years.

5 Q. What hasn't worked well in your view?

6 A. Well, I shouldn't have opened up that
7 door with that last comment, but.

8 Q. Welcome to the deposition, Mr. Pope.

9 A. I should learn don't volunteer things.
10 Well, we have a problem. The thing is -- the
11 short answer to it is that the -- the system of
12 developing ground water management districts in
13 western Kansas has not solved the problem that was
14 identified in the original envision.

15 Q. Is the problem of ground water declines?

16 A. Yeah. It's helped, but it hadn't solved
17 the problem.

18 Q. I note on page four of Exhibit 11, is it?

19 A. Is that this Hydrogram?

20 Q. Yes.

21 A. Four, did you say?

22 Q. Page four. Middle of the page left hand
23 column, paragraph starts in 1978.

24 A. Yeah.

25 Q. And then the last sentence reads the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

80

1 general view was that to effectively deal with
2 regional declines in the water level, additional
3 statutory authority would be needed or at least
4 helpful and the IGUCA statute was passed.

5 A. Uh-huh.

6 Q. Was that authority sufficient at the time
7 to address the problem you mentioned?

8 A. That authority meaning the IGUCA statute?

9 Q. I -- I infer that from your sentence, but
10 if there's something else material please feel
11 free to elaborate.

12 A. Restate the question, please?

13 Q. Was the authority referenced in that
14 sentence sufficient to accomplish the objectives
15 for which the IGUCA -- excuse me, for which the
16 GMD was established?

17 A. I think the authority was largely
18 sufficient.

19 Q. Was it ever amended or supplemented?

20 A. The IGUCA statutes?

21 Q. Whatever statutes you're referring to in
22 this paragraph?

23 A. The -- there's some general -- well, the
24 references to the Ground Water Management District
25 Act that's -- that's referred to there and of

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

81

1 course there have been a few changes from time to
2 time there, but I think the large reference here
3 as I recall and as I kind of glean it now was to
4 the IGUCA statutes. They had been tweaked a
5 little, but there's essentially as I recall been
6 very little change, if any, to the actual '78
7 IGUCA statute. There's -- there's undoubtedly at
8 least some change, but -- so I think in the
9 context of what -- if I recall now your question
10 was, I think the statutory authority is there.
11 It's a question of how it's used between the GMD
12 and the State.

13 Q. So if the ground water decline has not
14 been arrested sufficiently and the statute hasn't
15 been amended, what's the problem with achieving
16 the goal? Is the authority not being implemented?

17 A. It's not being implemented. I guess I
18 would define the problem as the statute was framed
19 in the context of local initiative. So that to --
20 in order to implement their overall management
21 program and to deal with those issues, the ground
22 water management districts would initiate
23 proceedings to establish an IGUCA and within a GMD
24 that they can do that. Then it's up to the chief
25 engineer to hold a hearing, dah, dah, dah, make

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

82

1 all the decisions as to what should be done. In
2 the broader Ogallala regions in western Kansas,
3 none of the districts have initiated that process
4 except for the Arkansas River corridor from the
5 close out to the Colorado line down through GMD
6 three to deal with the different set of problems.
7 But the -- other than that in order to deal with
8 regional declines in the Ogallala aquifer, that
9 process has not been used. And your question was
10 why?

11 Q. Why?

12 A. You know, it's hard to put myself in the
13 -- in the minds of a board member in those
14 districts, but obviously I talk with them a lot
15 over the years and my conclusion from that has
16 been that the motivation of board members, most of
17 which are irrigators in those districts, a few
18 other users has changed over the years. The --
19 the founders saw the problem, were concerned about
20 it and were very interested in solving it and that
21 lead to the original GMD Act and it lead to young
22 bucks like me being aggressive out there for a few
23 years and we were. And then as economic
24 conditions changed, farms got bigger and value of
25 water -- the difficulty of restricting yourself

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

83

1 when you have a current farm to operate that
2 depends on water for the hope of things being
3 better in the future, knowing there is a long
4 term, short term tends to win out. And so lots of
5 talk, lots of discussion, lots of data collected.
6 But the problem just kind of got kicked down the
7 road. And that's not to say that a lot of things
8 have not occurred. I'm not probably being as
9 critical as it sounds like but, yes, I am to some
10 extent. The -- you know, there needs to be good
11 facts and good information and good data. And
12 there was a lot of education and a lot of really
13 good job in terms of encouraging conservation and
14 installed metering programs throughout all of
15 those districts. Lots more enforcement between
16 the local and the State as far as pumping
17 restrictions. So I'm not saying there has not
18 been actions taken. That in fact has lessened the
19 amount of the decline, but in regard to really
20 asking for a strong regulatory program as implied
21 by this statute I think there has been fear of
22 doing that by the districts and -- and so it
23 didn't occur. Now, some of the districts now one
24 in particular and Mr. Barfield and as I understand
25 it had discussions that has lead to now a sort of

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

84

1 a parallel statute being considered by the current
2 legislature that would change the process a little
3 and give the districts more comfort, but if they
4 wanted to request more control that they would
5 have a better feel for what to expect. And I
6 think some were just afraid if they asked for an
7 IGUCA that they're going to get a lot more
8 regulation than they want. That was -- that was
9 kind of the fear that I always kind of detected
10 from people.

11 Q. So if the goals and objectives aren't
12 being achieved and the locals aren't willing to do
13 it why doesn't the State step in and do it?

14 A. Well, the -- the State has mostly through
15 the tenure when I was there established I think
16 eight intensive ground water control areas at
17 various areas of the State at State request except
18 for one or two of those in the central part of the
19 State. But the model that had been established in
20 the Ground Water Management District Act really
21 put the burden on them to do that and if there was
22 a need to do it to prevent impairment of senior
23 rights, then the chief engineer could step in.
24 But in the Ogallala there were not impairment
25 requests filed except for a few examples between

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

85

1 individual wells, but not the regional -- so much
2 the regional thing. And -- and so right or wrong
3 I limited my energies to solving the problems that
4 had to be solved and needed to be solved in regard
5 to administration of water law and in those
6 instances where there was stream flow to be
7 protected I stepped in to do that.

8 Q. By initiating this IGUCA process --

9 A. Several IGUCA's because of that and other
10 measures as well. Including up in the lower
11 Republican below the State line, for example. Not
12 an IGUCA, but we did a lot of regulation there.
13 Special rules and a variety of things. And spent
14 a fair amount of time encouraging and working with
15 the districts to try to come up with solutions
16 but, you know, you can talk for a number of years.
17 Earlier in the deposition I mentioned something
18 called a basin management program and we had a
19 group of staff dedicated to analyzing issues
20 around the State and to go out and we decided
21 rather than the rural in the closet pure
22 regulatory from the top down to go out and try to
23 work with people and stakeholders and ground water
24 management districts and other kinds of other, you
25 know, user groups, the whole spectrum to look at

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

86

1 these areas and do modeling, collect information
2 and come up with a series of alternatives, and say
3 here is what it's going to take to deal with the
4 long term problems that we have in these areas.
5 Not just the Ogallala but some other areas. And
6 so we probably spent about the last ten or so
7 years that I was chief engineer working our way
8 through that process. And we had started
9 implementing some of those about the time I
10 retired. But again we were starting to get quite
11 a bit of push back even with that system, because
12 again just the resistance to regulation by the
13 ground water irrigator. And it's just there;
14 right or wrong and, you know, it's understandable.
15 I'm not trying to say, you know, that people
16 aren't concerned about that. But -- and so it was
17 a question with duties and, you know,
18 responsibilities and the resources and everything,
19 you know, you can do what you can do. And, again,
20 if there had been instances of actual real time
21 shortages and impairment and things like that we
22 took action. It's this broad long term regional
23 decline that's a little harder to deal with in
24 that context unless it's done by the local system.

25 Q. Sure. Let me direct you to page six of

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

87

1 this document. Top left hand column. Just give
2 those first few sentence a read. Is this the kind
3 of thing you're describing right now?

4 A. Tell me which one again?

5 Q. Top left hand column of page six?

6 A. Which --

7 Q. The idea was to collect needed data and
8 work with the local people, et cetera?

9 A. Yeah, that's -- that's in essence
10 referring to the -- of this management process I
11 just described where we were trying to work with
12 stakeholders and collect data and come up with
13 hopefully shared ideas in regard to how to solve
14 problems.

15 Q. Okay.

16 A. And -- and again made reference to this
17 Rattle Snake Creek program. We worked for years
18 and years with those folks and ultimately they
19 basically said we're not going to do it. And so
20 then we were sort of on the verge about the time
21 my career was ending in that role as to move out
22 independently as a State. I did that in one such
23 area, kind of a parallel basin to the Rattle Snake
24 that's referred to there, but we actually did move
25 out to initiate proceedings for an IGUCA and to --

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

88

1 to take testimony and decide whether or not to
2 implement certain management suggestions that had
3 been developed by the stakeholder group.

4 Q. Do you know what happened to that process
5 after you left?

6 A. Yes, I -- the day I retired I issued the
7 order declaring it a IGUCA. It was actually an
8 expansion of an existing IGUCA on the one end of
9 it. As a going away present for Dave Garfield and
10 it was time and the order needed to be issued. So
11 I worked hard to try to get it done before I left.
12 We had the hearing and everything. And then phase
13 two of that process was to determine the specific
14 controls and we didn't get that done before I
15 retired. And -- and that whole process became
16 kind of controversial. There was some push back
17 and by that I mean strong intervention by some
18 interest groups that were trying to oppose change
19 to status quo. And so, you know, I looked at
20 their concerns and basically said the problem is
21 still there. And the facts show that the problem
22 is still there in terms of reductions and stream
23 flow and declines in water levels and so I issued
24 the order. And, you know, let's see what happens
25 in the future.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

89

1 Q. So do you know if the rules and
2 regulations were ever implemented?

3 A. They had not been yet is my understanding
4 but, you know, I'm sure that's still on the
5 docket.

6 Q. Continuing on page six here there is a
7 discussion about beneficial use and waste, do you
8 see that discussion?

9 A. Okay, page six.

10 Q. Starts at the bottom of the left hand
11 column and continues --

12 A. Yes.

13 Q. I'm curious about your experience with
14 beneficial use given increasing efficiencies?

15 MR. DRAPER: You're referring to the
16 bottom paragraph left hand column on page six?

17 MR. WILMOTH: Continuing to the rest of
18 the page down to the next heading.

19 A. And what's your question then?

20 BY MR. WILMOTH:

21 Q. My question relates to increasing
22 efficiencies and the concept of waste and
23 beneficial use.

24 A. Yes.

25 Q. Do you see the second paragraph in the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

90

1 right hand column, closely related?

2 A. Yes.

3 Q. Was this reasonable needs concept the
4 basis of the allocations that you developed in the
5 Walnut Creek scenario?

6 A. In part.

7 Q. Could you explain that concept to me?

8 A. Well, I referred to it earlier and that
9 part of it, and again we had water right
10 priorities and --

11 Q. Sure.

12 A. -- you know, sustainable yield and all
13 that. But the reasonable needs portion emanates
14 from a part of the Kansas Water Appropriation Act
15 that said all appropriation right -- this is a
16 paraphrase. All appropriation rights shall be
17 limited to the reasonable needs of the
18 appropriator and so the issue there is what is
19 that. And a determination of sorts was made at
20 the time those rights were originally granted in
21 terms of the permits. And then in Kansas those
22 appropriation rights are perfected by the actual
23 beneficial use of water within the terms and
24 conditions and limitations of the permit. And
25 that right is -- a certificate of appropriation is

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

91

1 issued based on the perfection of the water right.
2 But many of those were perfected and certified
3 years and years ago. And so the issue at hand
4 that was I think being talked about in this
5 article and, in fact, that we dealt with in Walnut
6 Creek IGUCA was should we in essence redetermine
7 what is reasonable under current day standards.
8 And so as I testified earlier in that particular
9 IGUCA, I -- I did determine a new reasonable use
10 for ground water rights -- one of the categories
11 of ground water rights. It was a moot question
12 for the juniors, because they ended up with five
13 or six inches of water. But the senior category
14 of the appropriation rights, their allegations
15 were based on what we determined as the reasonable
16 needs then based on the evidence at the hearing
17 and the scientific data. And -- and so those
18 numbers were less on an average annual basis than
19 their rights would have allowed earlier. And so
20 together with multi year allocation they were
21 limited to, you know, twelve or 13 inches of water
22 depending on those specific locations compared to
23 18 to 24 --

24 Q. So --

25 A. -- under the original water rights

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

92

1 typically.

2 Q. So these are conducted in some kind of
3 quasi judicial hearing process?

4 A. It was.

5 Q. And people come and offer testimony about
6 what they use I imagine and people look at various
7 data to make a determination as to what's
8 reasonable?

9 A. Yeah. There were formal parties and they
10 put on experts and everything from modeling to,
11 you know, circumstances. It wasn't a lot of
12 individual water users that came up and talked
13 about that particular issue. But there was a lot
14 of testimony about -- there was some testimony at
15 least from certain witnesses about what the
16 current net irrigation requirements are based on
17 NRCS requirements and, you know, efficiencies and
18 things of that nature. And what I talked about
19 here as well was a consideration is limiting use,
20 but we also recognize that consumptive use of
21 water is a different thing than gross diversion
22 and increasing deficiency. So as a caution here
23 in this paragraph I think is you have to look at
24 that whole picture. Because are you really saving
25 water in the whole river basin or are you -- or

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

93

1 are you just improving the efficiency. So we
2 tried to look at those factors.

3 Q. How are those proceedings to set the
4 reasonable allocations -- or excuse me, the
5 reasonable need allocations initiated?

6 A. How were they what?

7 Q. How were they initiated?

8 A. The proceedings?

9 Q. Yes.

10 A. To get started on that? Under the
11 intensive ground water use control area statutes
12 the law allows proceedings to be initiated in one
13 of two ways. First way is that a request is
14 received from a ground water management district
15 if the area is within the district. The second
16 way is that the chief engineer on his or her own
17 initiative can initiate the proceedings if and
18 there is a series of criteria set forth in the
19 statute. For example, water levels have or have
20 decline -- have or are declining excessively.

21 Q. So this is just something that applies
22 within IGUCA's --

23 A. Yes.

24 Q. -- this concept?

25 A. Just in -- just in an area for

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

94

1 consideration of an IGUCA. And then once you get
2 in an IGUCA and you held a hearing and had all the
3 administrative processes, then the chief engineer
4 can determine whether or not an IGUCA should be
5 established and if so what the corrective control
6 provision should be. And in this particular
7 example we've been talking about I developed a
8 corrective control provision that involved this
9 reasonable use process.

10 Q. But you're not obligated to conduct any
11 such analyses outside of IGUCA's?

12 A. Not required to. I think it's an
13 outstanding question as to whether or not the
14 chief engineer could promulgate rules and
15 regulations that would define that or otherwise
16 deal with that issue. And I believe the general
17 conclusion has been based on legal advice and what
18 not is if you're going to do that you really need
19 to go through the IGUCA process because of the
20 statutory authorities involved even though it's
21 not explicit. But that's kind of the general sort
22 of -- kind of gets maybe beyond what could be done
23 strictly under the water appropriation act rules.

24 Q. So when you developed these allocations
25 in the -- in Walnut Creek, for example, could you

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

95

1 have done that without the kinds of technological
2 improvements that you mentioned in here, the
3 efficiency improvements, or is it just based
4 entirely on those kinds of things?

5 A. Well, you know, the old addage for a
6 State engineer is you can do anything that a judge
7 will uphold. But to get more serious the -- Brian
8 is taking notes. The -- I'm sorry, I lost my
9 train of thought with the joke. The --

10 Q. There were technological improvements and
11 those allowed you to develop these --

12 A. Yeah, I think if -- I think had the
13 technological improvements not been there, for
14 example, admin of sprinkler systems and more
15 efficient flood irrigation systems and what not,
16 then I think it would be harder to make the case
17 that the person need not ask for their reasonable
18 use of water in the current day standard. That's
19 why some of those rights were larger, you know,
20 years and years ago because that was the standard
21 -- that was the technology at the time. And, you
22 know, you can -- so you've got, you know, the
23 issue -- the tough issue here. You know, I kind
24 of stuck my neck out on this particular case was,
25 you know, is that an appropriate principal to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

96

1 apply when you're talking about property rights
2 that have been established under State law. And,
3 you know, Kansas law gives a lot of authority to
4 the chief engineer to make those kinds of
5 decisions and so that's the job. And, you know,
6 some of these issues have not been explicitly
7 litigated enough to know for sure how that will
8 play out in the final analysis in Kansas, but this
9 particular order stands.

10 Q. Given all that how do you feel about the
11 15 inch allocation in KBID; is that consistent
12 with their reasonable need?

13 A. I think, you know, I haven't explicitly
14 looked at that particular question in certainly
15 any kind of administrative judicial way. But my
16 impression historically over the years is that
17 under a normal set of circumstances climatically
18 and water supply that that's a -- that's not a bad
19 allocation. You know, we're talking about again a
20 irrigation district. A system that has a lot of
21 delivery mechanisms in terms of canals and
22 laterals even though we're talking now sort of the
23 unfarmed part of that, but there's still it's --
24 it's a -- it's harder to go down very far on that
25 kind of a system because of the delivery

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

97

1 mechanisms as compared to the guy that has a well
2 and can pump water into a center pivot with almost
3 no losses until you get to whatever loss exists
4 when the water is applied to the land. And so,
5 you know, one has to be kind of careful in terms
6 of taking into consideration all of the -- the
7 circumstances in a system of that nature. And you
8 don't know when you set that allocation each year
9 in the surface water system totaling what that
10 year is going to be like. It may get wet or it
11 may be really dry during that year. So they're
12 setting an allocation before the season starts.
13 Where as the guy with the individual well can turn
14 the well on or not and he has to live within his
15 allocation. And of course in my example here in
16 Walnut Creek for those wells explicitly I did
17 provide multi year flexibility so that the
18 allocations they got were an average for that --
19 for that five-year period and they could still go
20 up to their full appropriate amount any individual
21 year as long as they didn't impair anybody.

22 Q. So do you know when that 15 inch
23 allocation was initially established.

24 A. Not explicitly.

25 Q. On page six towards the bottom you

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

98

1 indicate the water use reports and the meter
2 information now collected by the ground water
3 management districts and the Division of Water
4 Resources indicate that the average farmers useage
5 is two thirds to three quarters of their water
6 right amount. Is that true in KBID?

7 A. No, I don't know for sure. It wasn't
8 meant to be referring to KBID, but we're talking
9 about ground water management district areas
10 meaning mostly the -- the Ogallala and High Plains
11 aquifer areas. I suspect if you look at KBID you
12 would find a pattern of water use that's very much
13 dependent upon water supply limitations and in
14 part then what happens in terms of climatic
15 conditions in any given year. So there sometimes
16 if you have a real wet year you might have less
17 use, but a lot of their real low uses have been
18 because they didn't have the water. The water
19 just wasn't physically available based on what
20 happened in the stream and hydrologic conditions.
21 So here we're talking about two thirds or three
22 fourths. That's areas in say -- say the Garden
23 City area where their typical water right is 24
24 inches and so they -- they are using less than the
25 24 inches on an average year at least.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

99

1 Q. So there's something that makes KBID user
2 something other than average and it's the fact
3 that they have a variable water supply, is that
4 it?

5 A. Variable water supply and they're a
6 surface water system with the nature of the
7 delivery imposed or provided by a system of canals
8 and laterals.

9 Q. Uh-huh. Speaking of KBID what was your
10 general role as chief engineer in coordinating
11 with KBID?

12 A. Well, depended on the time periods and
13 the issues that would come up they were certainly
14 a substantial water user in the lower Republican
15 area as we refer to it. Had a certain amount of
16 involvement with all of the irrigation districts
17 in the State in terms of their surface water
18 systems and, you know, involvement in some of the
19 irrigation association type activities and four
20 States irrigation council. And so there was some
21 level of communication with each of the districts.
22 In the case of Kansas Bostwick the involvement
23 became more because of the shortages of water that
24 started occurring, particularly those in the late
25 80's, early 90's. There was obviously some

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

100

1 involvement before that because there were issues
2 before that. And then during that particular
3 period was the first period of time that I was
4 chief engineer that I recall where we had very
5 limited water supplies to the district and to
6 other users. And so I was up in the valley quite
7 a bit during that late 80's, early 90's time
8 period interacting with various users including
9 KBID. We were administering junior ground water
10 and surface water rights in the lower Republican
11 during a three year period or so there and that
12 had been the first time that had been necessary
13 other than just a few isolated -- I shouldn't say
14 a few isolated but, you know, some traditional
15 surface water administration in the valley. But
16 we -- when things got really short and we
17 curtailed I think it was about 150 ground water
18 rights and I don't know how many surface rights in
19 the lower Republican valley why I got to know
20 people up close and personal up there. And so
21 Kansas Bostwick encounter part way was short and
22 we were also interacting with Nebraska in
23 particular in the three States in general about
24 Republican River Compact. And so we wanted to
25 understand the needs of KBID and how they operated

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

101

1 and so I got more deeply involved in that. Of
2 course they were concerned about shortages of
3 water. And so the coordination was really just to
4 learn more about their system. I had already
5 known quite a bit about it over the years and
6 that's about it.

7 Q. Did you ever investigate any ways to help
8 KBID cope with water shortages?

9 A. Well, yes, investigate may be too strong
10 a term, but going back into many years even before
11 the period I just described there was interest in
12 Kansas, and I was involved in that, in trying to
13 find ways to lessen some of the losses within the
14 traditional irrigation district. And this started
15 all the way back in the Cedar Bluff Irrigation
16 District and Ferwin (spelled phonetically) and
17 Webster and some of the other districts that had
18 experienced some shortages. So the idea of
19 replacing open laterals with buried pipe came
20 about and Kansas was really in the forefront in
21 that. I was very involved in that in the earlier
22 parts of my career. And so then KBID as their
23 shortages became more acute really took it upon
24 themselves to develop an active program that they
25 had been implementing for a number of years now to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

102

1 replace laterals with pipe and we -- I don't know
2 that we lead the charge for that, but certainly
3 was aware of it and supported it. I think from
4 time to time I wrote letters supporting
5 applications that KBID made to the Bureau of
6 Reclamation for assistance under their various
7 programs over the years. You know there was
8 different ones. You know, I forget all the exact
9 names of them, but the 2020 at one point and/or
10 2025 program and before that it was irrigation
11 conservation program or something, I don't know,
12 but -- so there were some of those that occurred
13 up to frankly the current time I think. So in
14 that regard we were trying to -- trying to work
15 together.

16 Q. Did you ever look at any alternatives to
17 expanding supply like enlarging local reservoir,
18 for example?

19 A. Yes, we did have interest in that and by
20 the time we got into the settlement discussions
21 for the FSS I think the public knowledge part of
22 that would make it pretty clear in terms of
23 documents that -- that we work with the Bureau of
24 Reclamation on a reconnaissance level study to
25 look at that very possibility of trying to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

103

1 increase storage available at Lovewell. And
2 included within the FSS as you know is a provision
3 where the cities would cooperate in regard --

4 THE REPORTER: Would what?

5 A. Cooperate in regard to support for a
6 feasibility study. I forget what words were used
7 in there for sure, but the next step is a
8 feasibility study in getting authorized by
9 Congress project to potentially implement that
10 concept. And so that was certainly something that
11 I was involved in.

12 BY MR. WILMOTH:

13 Q. Do you view that as a good idea?

14 A. Well for the most part, yes. I think if
15 we were able to capture more surface water in the
16 off season, both from the run off down white --
17 Rock Creek and potentially from the Republican
18 River that that would then help the supply for
19 both Kansas Bostwick and indirectly for Nebraska
20 Bostwick. And that's embodied to some extent
21 within the FSS. We always, you know, I think a
22 person always has to withhold judgment in terms of
23 what the specific project would be and how it
24 would operate and -- and whether it would -- you
25 know, whether the -- the benefits would outweigh

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

104

1 any impacts but, that might occur. So, yes,
2 overall.

3 Q. Do you have an opinion as to why that
4 hasn't been done yet?

5 A. I sort of lost track of that for -- for a
6 number of years. For several years when I was
7 still in office here, the snag we ran into was
8 getting congressional action to appropriate the
9 money. I think we ultimately got the act passed
10 to allow the bureau to -- to do its work, but I
11 can't remember exactly where that stood at that
12 time or certainly not now. But it -- it's the --
13 the limited amount of work that the Bureau of
14 Reclamation can do with its overall budget in
15 getting the specific items included. And, of
16 course, for several years now the ban on ear marks
17 is essentially taken off the table any project
18 that does not find its way into the
19 administration's budget. So the last several
20 years have certainly been -- I think that could
21 very well have been an issue. But it's just the
22 time it takes to get a project looked at,
23 developed, authorized, funded and implemented.

24 Q. Sounds like it's a money issue primarily
25 though?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

105

1 A. I don't know. I wouldn't be surprised.

2 THE REPORTER: Whenever it's convenient
3 can we take a break?

4 MR. WILMOTH: Yeah, let's take five or
5 ten.

6 (THEREUPON, a recess was taken, after
7 which the following was had:)

8 BY MR. WILMOTH:

9 Q. Mr. Pope, could I turn your attention to
10 Exhibit 10 in your expert report, please?

11 A. Yes.

12 Q. On page two in the qualifications section
13 you list various qualifications that I infer in
14 part some expertise on you to evaluate Nebraska's
15 compliance efforts, is that right?

16 A. Yes, I think my experience in dealing
17 with interstate water issues and compact
18 administration provides a certain degree of
19 expertise to any of that.

20 Q. And what are the unique insights you have
21 to Nebraska's compliance processes?

22 MR. DRAPER: You asked what, unique?

23 MR. WILMOTH: What unique insights he
24 believes he has with regards to Nebraska's
25 compliance efforts other than as an observer of

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

106

1 course.

2 A. Well, serving as a member of the
3 Republican River Compact administration for --
4 commission for many years.

5 BY MR. WILMOTH:

6 Q. And did that involve working with
7 Nebraska to develop compliance plans?

8 A. Well, it involved interactions with the
9 director of Nebraska DNR, two different -- three
10 different directors of Nebraska DNR leading up to
11 and particularly I guess after the settlement.
12 And of course hearing reports in various places,
13 compact administration reports provided to various
14 other groups.

15 Q. Hearing reports you say, I'm sorry?

16 A. Me hearing reports.

17 Q. You hearing reports?

18 A. Me hearing reports and then because of
19 that interest in our -- interest in the compact
20 and in compliance tried to observe the process,
21 pay attention to legislation, pay attention to the
22 IMP process once that got started. Just generally
23 evaluate that. And then again I guess with the
24 back drop of things I testified about earlier in
25 terms of other experience in dealing with compact

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

107

1 compliance and decrees -- and with the decrees.

2 Q. In Kansas?

3 A. Well, and Colorado and New Mexico.

4 Q. Okay. But you never worked with anyone
5 within Nebraska to develop a compliance plan, did
6 you?

7 A. No, I wouldn't say I've worked -- if you
8 mean in terms of actually developing --

9 Q. Uh-huh.

10 A. Then, no, just the process in terms of
11 the interaction between myself and our office and
12 counterparts in Nebraska.

13 Q. So your expertise would be equivalent to
14 that of Mr. Wolf's, for example, in Colorado?

15 A. I'm sorry?

16 Q. Your expertise, for example, in this
17 regard would be equivalent to that of Mr. Wolf's
18 in Colorado?

19 A. I can't speak for his expertise or
20 involvement. Clearly there is a substantial
21 difference in my mind in terms of the position on
22 the river for Kansas as compared to Colorado being
23 down stream at least for the lower part of the
24 river versus Colorado. And our involvement with
25 the irrigation projects is quite a bit different.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

108

1 And our involvement with the Guide Rock
2 requirements associated with the FSS and the other
3 measures included within that are substantially
4 different than it would be for Colorado and Mr.
5 Wolf. That's not by any means to take away from
6 that expertise and experience and all the range of
7 issues and things that Dick and Hal and others
8 have dealt with over the years. But simply just
9 those issues between Kansas and Nebraska were
10 pretty -- pretty intertwined over the years.

11 Q. Okay. And your service as the RRCA
12 commissioner for Kansas has provided you some
13 insights into Nebraska's past efforts to comply,
14 right?

15 A. My involvement in add -- RRCA some
16 involvement --

17 Q. Has given you some insights as to
18 Nebraska's past efforts to comply?

19 A. Yes.

20 Q. Okay. And those are based on your
21 observations and your communications with people
22 from Nebraska?

23 A. And my own observation.

24 Q. Uh-huh. Did you ever communicate with
25 anyone from the governor's office in Nebraska

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

109

1 directly about compliance efforts -- the Nebraska
2 governor's office to be clear?

3 A. Yeah. That's what I took your question
4 to be. Not that I recall directly, no.

5 Q. Did you ever work with anyone directly
6 involved with the natural resource districts, any
7 of the directors to develop plans to facilitate
8 compliance?

9 A. I didn't have any what I would consider
10 direct involvement with NRD officials. There were
11 reports from time to time at RRCA meetings. I saw
12 some of the folks and probably visited with them
13 some at various other events and conferences, that
14 sort of thing, but it was pretty much not a direct
15 thing with them. I had staff that did attend many
16 NRD meetings over the years even after the FSS
17 just to sort of keep Kansas informed. So I did
18 receive reports about discussions that took place
19 and activities that were ongoing through that
20 mechanism.

21 Q. Okay. So you served as the chief
22 engineer from 1983 to 2007, correct?

23 A. Yes.

24 Q. And you were the Kansas representative of
25 the RRCA Commission?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

110

1 A. Yes.

2 Q. Until 2007, is that right?

3 A. Yes, about June of 2007.

4 Q. And your service terminated in '07?

5 A. With the department, yes.

6 Q. Okay.

7 A. And the RRCA.

8 Q. Now, how do you believe that that past
9 service bears on Nebraska's present compliance
10 efforts? How does your past service afford you an
11 expertise or a unique insight into Nebraska's
12 present compliance plans?

13 A. Well, the -- the issues are still there
14 and compliance --

15 Q. Can you tell me which issues you're
16 referring to?

17 A. Well, the compliance issues related to
18 the period 2003 through 2007 happened on my watch
19 as chief engineer. And I think the principal
20 issues I understand it relate to the lack of
21 compliance in 2006 -- 2005 and 2006 and so --

22 Q. Is that what your expert report is
23 limited to?

24 A. Not explicitly.

25 Q. Is that the intent of the report?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

111

1 A. Not necessarily. The issue of compliance
2 efforts had evolved over time. I have continued
3 to monitor activities. Served as a consultant to
4 the State of Kansas throughout the period since I
5 left in 2007. So I've had some involvement with
6 this case in a different way. Certainly not in a
7 role as Chief Engineer Barfield does. But -- but
8 so I feel like not in the depth, but to some
9 extent. Some of the bigger picture issues that I
10 -- well, I'm not sure about bigger picture, but
11 some of the issues that I touched on specifically
12 here are ones that I think are within my
13 experience level and knowledge.

14 Q. So as far as the issues that are
15 currently at bar, there is this '03 to '07
16 noncompliance and then what are the other issues
17 that cause you concern here for future compliance?
18 I'm trying to understand how your past service
19 provides you expertise on what Nebraska is
20 presently doing? Is it because you've been
21 monitoring it since you left?

22 A. Well, part of it is I have been
23 monitoring it since I left but the -- the, for
24 example, the water short year administration
25 requirements of the FSS are very important, in my

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

112

1 view, to Kansas. My experience in developing
2 those and in how they operate in particular are in
3 my view still an issue. And when you have
4 relatively recent shortfalls like the 2005-2006
5 period, then the question is what are the
6 appropriate actions within this overall system.
7 And frankly I think I have a pretty good
8 understanding of the hydrology of the Republican
9 River basin developed over the years in terms of
10 surface water and ground water and reservoir
11 projects and where everything is situated to
12 pretty well know how that system operates in part
13 relying upon the technical information by others.
14 But the overall understanding of that system I
15 think is still there.

16 Q. Have you read the present integrated
17 management plans adopted by Nebraska?

18 A. Not in-depth. I have not studied those.
19 I understand some of the provisions and I've seen
20 them and looked at certain parts of that.

21 Q. It's your opinion they won't insure
22 compact compliance?

23 A. I don't think I've offered that opinion.

24 Q. I'm asking it now; is that your opinion?

25 A. Yes, that's my opinion that they will not

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

113

1 offer compliance during water short periods
2 depending on individual circumstances --

3 Q. And what do you base that upon?

4 A. -- and long term situation. Well, the --
5 my knowledge of the fact of ground water
6 depletions and the lag effect of those completions
7 that occur and continue to occur and frankly grow
8 over time. And that's based on historic knowledge
9 as well as the opinions of experts for the State
10 of Kansas. And I think that's there, which will
11 then cause a further reduction of surface
12 supplies. I think that will then mean that
13 circumstances say similar, for example, to the
14 2002 through about six period, something like that
15 repeats again I'm not convinced that the -- that
16 there won't be problems again.

17 Q. But if you don't have a good familiarity
18 with the IMP's, how can you make that decision?

19 A. Well, we've had, what, three sets of
20 IMP's now. And I'm looking at this in a broader
21 perspective. And short term IMP's that do not
22 provide specific measures that may or may not
23 happen are hard to rely upon and be very confident
24 that they will really work. The actions will
25 really be taken. I'm aware enough of what's in

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

114

1 the IMP's to -- to -- to I think make that
2 assessment.

3 Q. So if the critical issue is water short
4 year compliance, what are the water short year
5 provisions in the IMP's today?

6 A. Well, there is a number of things that
7 are listed as possibilities, as I understand it.
8 There's consideration of potential augmentation
9 plans. There's the possibility of arrangements
10 for requiring surface water on a short term basis,
11 leases, purchases, those sorts of things and
12 trying to allow that water be made available for
13 compact compliance. I understand that there is
14 included a compact call concept embodied within
15 the IMP's that would require the passing of
16 natural flow downstream through projects rather
17 than allowing it to be stored. And there is also
18 -- I know there's been efforts under way, I'm not
19 sure to what extent they're spelled out, I'm
20 trying to remember in the IMP's about the
21 vegetation removal and channel improvements and
22 things. And that's over -- in addition to the --
23 the requirements for each NRD limiting their
24 depletions to or certain proportion of the ground
25 water depletions that can occur as determined

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

115

1 through the methodology laid out in the overall
2 package. And of course I'm certainly aware of the
3 fact that there have been changes in allocations
4 for wells in the NRD's, each increment of IMP's to
5 some extent at least. So I probably left some
6 things out, but off the top of my head there --
7 they are -- you know, they continue to evolve.

8 Q. So getting back to our earlier
9 conversation about methods of compact compliance
10 we talked about augmentation, surface water
11 purchases, ground water reductions, surface water
12 regulation; all those things are in the IMP's,
13 right?

14 A. Basically I think.

15 Q. So is it your concern that they won't be
16 enforced or is it that they won't be effective and
17 what do you base either one of those conclusions?

18 A. Well, I'm not aware that an augmentation
19 plan has been developed and presented to the RRCA
20 as required by the FSS. So I think it's hard for
21 me sitting here today or I think anyone to know
22 for sure what is going to be proposed and how that
23 will work. How will it -- where and how will it
24 work and how will the -- the water be accounted
25 for. How will it be quantified or how it will be

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

116

1 delivered. Will it comply with the -- the
2 provisions of the compact and the FSS, for
3 example. Likewise, surface water purchases like
4 you mentioned we had some experiences in 2006 and
5 2007 with those and certainly aware in my view of
6 some issues and concerns that emanated from that.
7 Even though there was some benefit, there was also
8 some concerns. And I'm not aware of again any
9 long term plans that have really been put into
10 place to show how that would really be done in
11 such a way that it would really work. And satisfy
12 the provisions of the compact and the FSS and do
13 it in a way to achieve compact compliance within
14 these other goals.

15 Q. But surely you're not suggesting that
16 Nebraska has to come up with a plan today that
17 tells you exactly how every contingency will be
18 addressed under any circumstance in the future,
19 are you?

20 A. I haven't said that. What I've said is
21 it's pretty conceptual. It's pretty conceptual
22 that we may do these things if necessary. That's
23 a very different conceptual framework as compared
24 to here is an actual plan. We've got these
25 supplies acquired and we've developed this

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

117

1 particular infrastructure or whatever it is and
2 here is proposed accounting.

3 Q. Isn't the future pretty conceptual
4 though?

5 A. Well, though --

6 Q. Can you tell me today when Nebraska's
7 going to be under threat of non compliance. They
8 haven't been out of compliance in the last six
9 years, have they?

10 A. The -- in my view the circumstances have
11 been very different in the last, whatever it's
12 been, four or five years since the end of the last
13 five year compliance period in 2007. And with the
14 climatic conditions and circumstances that have
15 occurred there I'm not sure -- I'm not saying they
16 haven't had some benefit and some effect. I'm
17 just saying that I think you can't measure the
18 long term effect of the current IMP's and the
19 current -- current compliance program, if you
20 will, until you look at those against much more
21 severe conditions.

22 Q. But you can't tell me today that those
23 IMP's are going to result in noncompliance in any
24 particular year, can you?

25 A. I can't certainly tell any particular

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

118

1 year and I don't have any crystal ball to say
2 absolutely. I just express concerns since you
3 asked me the question. Concerns about what the
4 future will hold under those -- those current
5 plans. You know, I don't -- I'm not questioning
6 the commitment of Brian or anybody else. I'm just
7 saying that it's a very different model, in my
8 view, as compared to the other two that I spoke of
9 in terms of what has occurred in Colorado and the
10 Arkansas River and Arkansas system or even the
11 Pecos River system.

12 Q. But the thing that intrigues me is you
13 haven't mentioned in your report a definitive
14 assessment that Nebraska's IMP's will not work?

15 A. Well, that wasn't really the purpose of
16 my report. I have not provided here an analysis.
17 This was more of the concepts and concerns. I
18 haven't tried to quantify. That's done by other
19 witnesses for Kansas. And so you asked me
20 questions about my opinion that I have not given.

21 Q. Right. I'm asking those opinions now?

22 A. Well, I'm trying to answer that question.
23 And so, you know, I'm trying to -- I'm pretty
24 confident in the analysis of compliance and
25 concerns and modeling and those things that have

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

119

1 been laid out by other Kansas witnesses. I have
2 not studied that in great depth either. But I've
3 been involved for a number of years in this
4 process and I think I understand the concepts.

5 Q. Do you think that any of the Kansas
6 witnesses have definitively stated that the IMP's
7 would not work?

8 A. I can't answer that question for sure. I
9 don't know that I've studied those reports in that
10 depth.

11 Q. You're not relying on any of them to draw
12 that conclusion?

13 A. Not that explicit conclusion, no.

14 Q. Thank you. You also note that you
15 participated in the development of the FSS. This
16 is the second paragraph -- excuse me, the
17 paragraph spanning pages two and three of your
18 report. This would also be KS 789 and 790. Is
19 that correct, did you participate in developing
20 the FSS?

21 A. Yes.

22 Q. And do you consider yourself an expert on
23 its contents?

24 A. Of the FSS?

25 Q. Yes.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

120

1 A. I guess I would say yes.

2 Q. From what perspective? From a legal
3 perspective or technical perspective or some other
4 perspective?

5 A. It's an interesting terminology so I
6 guess I have to be -- recognize that in terms of
7 that kind of a document, but the depth of
8 involvement in its development is why I answered
9 the way I did. I was involved in essentially all
10 aspects of the discussions of the settlement teams
11 between the three States and the U.S. that lead to
12 the development of the FSS. As we've said
13 earlier, I'm not saying that I was at every
14 technical committee meeting as far as modeling and
15 things like that, but the -- but the principal
16 effort that went into crafting the FSS was a very
17 extensive process, you know, for that whole time
18 period between 2001 through 2002 and then beyond
19 in terms of implementation into 2003 and frankly
20 beyond in terms of implementation. But -- so
21 there were a lot of discussions, a lot of
22 involvement between representatives of Nebraska
23 and Kansas and Colorado and the federal compact
24 and looking at interest of the States and looking
25 at the concerns and needs and desires to try to

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

121

1 craft a settlement process that would hopefully be
2 specific enough and detailed enough and
3 comprehensive enough to lead to compact
4 compliance.

5 Q. And all this involvement afforded you
6 some additional insight into the meaning of the
7 terms of the FSS? Certainly more, for example,
8 than I would have as a third party reading the FSS
9 could?

10 A. Well, I would assume that would be
11 correct. You know, certainly there were a number
12 of parties involved in the discussions, but I at
13 least at the time felt like I was as knowledgeable
14 as anybody about it. And that's leaving aside
15 that there may be certain legal principals or some
16 other things that are there. But the lead people
17 in really coming to agreement were largely the
18 three State engineer directors with a lot of help
19 by other people. But there was -- there was a lot
20 of involvement in those three officials.

21 Q. So is the purpose of the section starting
22 on page four and continuing through page eight of
23 your report designed to provide these specialized
24 views of the meaning of the FSS; the nuances, if
25 you will?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

122

1 A. Well, I guess to some extent. It was a
2 description that I provided aimed at trying to
3 deal with some of the questions that I understood
4 were outstanding.

5 Q. Uh-huh, and certainly there is some
6 dispute about those questions and maybe Roger
7 Patterson has a different perspective or someone
8 else might have a different perspective, but this
9 is your view of what those terms mean?

10 A. Well, within the limits of the scope of
11 this section. I did not cover every provision of
12 the FSS or every issue out there.

13 Q. Sure.

14 A. I tried to focus on some of the overall
15 ones and particularly some of the, you know,
16 allocation issues and things that would affect the
17 accounting and matters of that nature.

18 Q. One of the provisions of the FSS included
19 a waiver of damage claims. Are you familiar with
20 that provision?

21 A. Yes.

22 Q. Did you counsel the State of Kansas to
23 agree to that provision?

24 A. I'm not sure that's a term I would use,
25 but I was certainly involved in the discussions

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

123

1 that took place during the settlement negotiations
2 and I certainly was in a role to interact with the
3 other officials in Kansas, the other members of
4 the team of course and the governor's -- the
5 governor personally and the attorney general in
6 regard to this process. And I think I was looked
7 to by those officials for guidance in terms of
8 weighing all of the provisions of the settlement.
9 I certainly was not one to say, hey guys, this
10 would be a good thing to do. It would not have
11 been my personal preference or the preference I
12 think of the State of Kansas. But in the give and
13 take of the settlement it was something that we
14 ultimately after substantial process agreed to.

15 Q. Do you ever regret that decision?

16 A. The decision about that? I have a number
17 of regrets about the settlement process and how
18 this has evolved and that's one of them.

19 Q. Can you tell me about some others?

20 A. Well, the one I was just referring to was
21 in the context of the others and not independently
22 by itself. But I guess I regret that we ended up
23 in a situation where we are today where the --
24 where neither Colorado nor Nebraska has complied
25 with the FSS and the decree for substantial

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

124

1 periods of time. And I had really hoped and
2 expected that that would not occur. Had
3 substantial confidence based on the whole process
4 that lead up to this that things would be
5 different. And that we wouldn't end up here. And
6 so I guess I -- I'm disappointed may be a better
7 term, but had I known then what I know now maybe I
8 would have looked at things a little differently.

9 Q. So you waived the damages and you didn't
10 get compliance. Did you feel hoodwinked basically
11 by Roger and the crowd?

12 A. I don't think I would use that term. You
13 know, I think people developed good relationships
14 and worked hard and well together to develop trust
15 and understanding. I think it's a very different
16 question in terms of why things evolved the way
17 they did. I don't pretend to know all the in's
18 and out's of that. I, you know, can't say for
19 sure what's in everybody's mind. But -- but I
20 guess I would still stick with my term
21 disappointed and frustrated.

22 Q. Do you have any reason to believe there
23 was any nefarious action on can -- on Nebraska's
24 part?

25 A. Nefarious?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

125

1 Q. Attempting to evade compliance
2 intentionally? Any bad faith? Do you think there
3 was an element of bad faith here?

4 MR. DRAPER: Are you asking as a legal --

5 MR. WILMOTH: I'm just asking his
6 opinion. He interacted with these guys. He cut a
7 deal.

8 A. I think what was -- I'm trying to be
9 careful in terms of how I portray any discussions
10 that occurred in confidence, but --

11 MR. DRAPER: Let me just clarify, too.
12 Are you asking him about the State of Nebraska in
13 general or a particular individual?

14 MR. WILMOTH: I'm asking him if he feels
15 as though either Roger Patterson as the director
16 and working with you to negotiate the FSS or the
17 State of Nebraska subsequently ever engaged in any
18 actions that you feel constitute bad faith on your
19 part or were they attempting to do what they could
20 do within reason.

21 A. My -- I think those officials -- I would
22 not accuse them of nefarious actions. I think
23 subsequent to the settlement process I think they
24 found themselves in great difficulty trying to
25 achieve the things that they thought were

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

126

1 necessary. And whether or not they could have
2 done more or differently I think is a different
3 question. But my view I think they underestimated
4 what it was going to take to get compliance in
5 working with the NRD's and others in -- in
6 Nebraska. So I think that took longer and was
7 more difficult than perhaps they anticipated.
8 Even though at the time I think -- it's my view
9 that they were pretty confident that they were
10 interacting in understanding that interplay within
11 Nebraska. But in my view it didn't turn out quite
12 the way that probably was anticipated by either
13 them or us and, you know. I guess I'm going to be
14 a little careful about trying to think, you know,
15 express my opinion in terms of what they were
16 thinking --

17 Q. Okay.

18 A. -- or doing.

19 Q. I think I understood you to say earlier
20 that you didn't participate directly on the
21 Modeling Committee but that you often heard
22 reports back from your representatives on the
23 committee, is that correct?

24 A. Both from our representatives on the
25 committee and we certainly had a substantial

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

127

1 amount of interaction there. And then
2 occasionally reports from the Modeling Committee
3 itself to the full body in terms of the settlement
4 teams.

5 Q. I would like to hand you a document that
6 we had provided to us during the arbitration
7 proceedings.

8 A. What number is it?

9 THE REPORTER: Twelve.

10 (THEREUPON, Pope Deposition Exhibit No 12
11 was marked for identification.)

12 BY MR. WILMOTH:

13 Q. Exhibit 12. Could you just take a moment
14 and have a look at this document and see if it
15 refreshes your recollection of the topic of that
16 day?

17 A. Okay, do I need to look at these
18 attachments or just the first one?

19 Q. Let's see what you've got there.

20 A. You got the first e-mail there and then
21 there's other -- do you want to ask me about the
22 whole thing or just the first one?

23 Q. Just the first page there. Can you tell
24 me what the date of that e-mail is?

25 A. January 5, 2004.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

128

1 Q. And when was the model finished?

2 A. When was the model finished?

3 Q. Yes.

4 A. Officially June 30, 2003 adopted by the
5 RRCA at the summer annual meeting whenever that
6 occurred; July or August of that year.

7 Q. There is a reference in that document to
8 model fix and some issues that are being
9 addressed. Could you describe the nature of the
10 fix and the problem it was attempting to address?

11 A. No, not explicitly. I -- I have pretty
12 vague recollections of that issue in terms of some
13 of the -- I think there were some way in which
14 Medicine Creek had been treated as far as -- I
15 can't remember for sure whether it was compliance
16 points or -- or some other aspects of it. This
17 may have been an early indication of some later
18 changes that were made by agreement of the parties
19 was after this, but maybe even several years after
20 this where there were some issues that had been
21 raised. And I don't know whether this is one of
22 those or not per se, but there were, you know,
23 there were certain points and certain things in
24 terms of how the model had been represented at the
25 time.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

129

1 Q. So were there provisions of the model
2 that were still being modified after it had been
3 adopted?

4 A. I would not say that, but certainly the
5 parties had to do -- there were two categories of
6 things that I recall at least. One is of course
7 that each year the -- each year the engineering
8 committee collected all the inputs and all the
9 data that would be needed for that year's model
10 run. And ultimately that information was supplied
11 to -- I forget the exact name, Prin -- Willem
12 Schreuder's group. Principia Mathematica or
13 something like that. He actually made the runs
14 for the -- for the Engineering Committee and for
15 the administration. But -- so there were updates
16 of data and the committee tried to deal with any
17 of the things that came up. But those were not
18 structural changes or actual model changes. But
19 there -- there was then I think during the 2003-4
20 period or thereabouts there were some issues --
21 let's see, somewhere along the line in there there
22 were some issues whereby agreement the States did
23 agree to change that were a little bit more than
24 just the annual runs. I don't know if this was
25 one of those or not. But again it's just been

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

130

1 that level of detail and this time I don't have
2 the details on that.

3 Q. So was it your understanding that at the
4 time the model was officially adopted in 2003 it
5 was still subject to modification?

6 A. Well, there was a provision in the FSS
7 that allows the States to agree to changes to the
8 model by amending the rules and regulations of the
9 RRCA that originally adopted the model. So that
10 process was provided for, recognizing that there
11 could be things that would be found to be a
12 problem or that could be improved.

13 Q. Okay. Let me hand you the next document
14 here.

15 MR. WILMOTH: This will be Exhibit 13.

16 (THEREUPON, Pope Deposition Exhibit No 13
17 was marked for identification.)

18 BY MR. WILMOTH:

19 Q. I would like you to take a look at this
20 document and familiarize yourself with its
21 subject.

22 A. Okay.

23 Q. Do you see midway through the first page
24 there is a heading called review of accounting
25 procedure formulas?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

131

1 A. Yes.

2 Q. And this document is dated October 26th,
3 2004, correct?

4 A. Yes.

5 Q. So that's about 16 months after the FSS
6 was approved by the court and sounds like 14
7 months or so after the model was adopted, is that
8 right?

9 A. Summer of 2003 was the RRCA accounting
10 procedures and the RRCA ground water model were
11 adopted.

12 Q. And this first bullet point under this
13 heading indicates that Mr. Barfield had proposed
14 some corrections to the virgin water supply
15 formulas, is that right?

16 A. Yes. Again, there were assignments made
17 to the Engineering Committee and then within the
18 Engineering Committee certain people will do
19 certain tasks, and so I presume that that's one of
20 those.

21 Q. Do you recall the nature of the
22 correction or why it was necessitated?

23 A. Well, in general terms. I -- certainly
24 not in the detail that Mr. Barfield would, but --

25 Q. I forgot to ask him about that.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

132

1 A. He would be a better source. There --
2 there were as the -- after the settlement and the
3 procedures were adopted, again as they started
4 implementing the accounting for the years after
5 the settlement. The first compact year would have
6 been the 2003. Ultimately I think the committee
7 -- there was a process to go back and do some for
8 prior years for certain purposes. But -- but the
9 -- but as they started going through those, I
10 think they noticed that there was some inadvertent
11 omissions on some of the formulas when you go
12 through and you -- there is a concept -- a known
13 concept of how you determine the computed virgin
14 water supply. You have starting gauge data and
15 look at all the things upstream of that particular
16 gauge and that particular sub basin to determine
17 what -- since the -- since the gauge gives you
18 current data to get the virgin water supply you
19 need to add back in the depletions and consumptive
20 uses and reservoir storage changes and all the
21 different things that have to take place from
22 various kinds of uses and projects to get that
23 virgin water supply. And so the formulas are
24 quite consistent throughout, but they have to be
25 adapted to each subbasin and, you know, there are

(Main Office)
Topeka, KS
785.273.3063


Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

133

1 -- there are -- there are some complexities there.
2 And so my recollection, at least, is that looking
3 at where all of those things like surface water
4 CU, for example, is mentioned here, where it is
5 with respect to the gauge and how you deal with
6 that to get the right number for that subbasin.

7 Q. And so the purpose of this correction was
8 to ensure the virgin water supply calculation was
9 accurate?

10 A. I think it was more narrow than that. I
11 think the purpose was to ensure that the formulas
12 were correct to implement the accounting
13 procedures that had been adopted during the FSS.

14 Q. But what was the goal of -- of that?

15 A. So that the accounting procedures in
16 their formulas were reflective of what was
17 actually agreed to. In other words, if you found
18 some busts -- if you found an error in a formula,
19 that was not what the parties intended. There was
20 a desire to -- to be -- check those over carefully
21 since all of this stuff was done during a very
22 intense period of time. But -- and they also had
23 to develop a spread sheet system to implement the
24 accounting procedures. So there was the
25 development of the spread sheet when you start

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

134

1 putting it all to the mat in the actual formulas
2 using that kind of technology, well, then
3 everything has to make sense.

4 Q. Did the parties agree that the imported
5 water supply credit would be consumed by Nebraska
6 or was the imported water supply credit designed
7 to be a debit, if you will, to the Nebraska
8 account?

9 A. The -- my recollection is that the
10 imported water supply credit was, as the term
11 says, was a way to credit to Nebraska the modeled,
12 computed effect of imports from the Platte River
13 system and its projects to -- to the Republican
14 River basin across the hill, so to speak. And it
15 essentially acts as in addition to the allocation
16 for Nebraska.

17 Q. I mean if the accounting procedure showed
18 it to actually be a reduction, would that be the
19 kind of thing subject to correction as this was
20 corrected?

21 A. Well, it would -- it would be a reduction
22 to the beneficial consumptive use. You can look
23 at it that way and you can look at a formula as
24 allocation minus CBCU for Computed Beneficial
25 Consumptive Use, plus imported water supply. Or,

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

135

1 you know, you can move the equation around and
2 change the sign. You know, so it's a concept
3 that's important and I see it expressed different
4 ways sometimes in how that's being used. The --
5 let's see, was there a specific bullet here that
6 you were specifically referring to?

7 Q. On, no, I'm asking you to tell me the
8 difference between what we just talked about here
9 with the correction that Mr. Barfield proposed
10 because we were trying to represent what the
11 parties agreed to with regard to the virgin water
12 supply. I would like you to tell me the
13 difference between that in a situation where the
14 parties agreed that the imported water supply
15 credit will be a benefit to Nebraska, but the
16 accounting procedures show it as a detriment to
17 Nebraska. If that were the case -- for the sake
18 of my next question, if that were the case would
19 that be the type of thing that would warrant a
20 correction as is discussed in this document?

21 A. Well, I think you're mixing up a couple
22 things here. First of all, I'm not aware that
23 there is a formula that -- that shows the imported
24 water supply credit as a -- as a negative or as a
25 reduction.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

136

1 Q. No, my question assumes that's the case.

2 A. Well, give me a break.

3 Q. Well, my question assumes that's the
4 case.

5 A. That's not what the formulas provide for.

6 MR. WILMOTH: Well, counsel, will your
7 witness not answer my question?

8 A. I think a better way to answer the
9 question is that the -- there are certain
10 provisions in the FSS. Then the accounting
11 procedures are a way to implement that and
12 imported water supply credit is a part of that and
13 as the -- and the model by agreement of the
14 parties and in the both the modeling documentation
15 and the formulas in the accounting procedures as a
16 method to compute the amount of the imported water
17 supply credit. And so it's a question of taking
18 the approved RRCA ground water model and then
19 applying the approved RRCA accounting procedures
20 to get that result in terms of what credit and
21 benefit that Nebraska is entitled to for imported
22 water supply.

23 Q. Let me ask you this way; let's assume you
24 did exactly what you said. You take the ground
25 water model and you apply it to the accounting

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

137

1 procedures and the result of that is that the
2 imported water supply credit is essentially being
3 consumed in Nebraska and is not benefiting
4 Nebraska. Is that consistent with your
5 understanding at the time of signing the FSS?

6 A. It's consistent if the facts based on
7 what Nebraska really does would result in that
8 situation. It's possible, for example, that
9 speaking now in this hypothetical answer to a
10 hypothetical question, in trying to be an accurate
11 answer. The mound sort of straddled on the border
12 between the Platte and the Republican River basins
13 is affected by pumping in Nebraska. It's affected
14 by recharge, if you will, from the Platte River
15 projects. Bringing water over to that location.
16 So the factual variables that can occur now or
17 into the future is the amount of imported water
18 supply credit is dependent upon how much water
19 comes in from that Platte River system and how
20 much water is pumped and over what time period
21 from the mound area and what the consequential
22 effect of that is as determined by the agreed upon
23 model and then as applied to the accounting
24 procedures. That's what was agreed to.

25 Q. Are you suggesting that Kansas and

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

138

1 Nebraska and Colorado agreed that in some cases
2 the imported water supply credit would count
3 against Nebraska's CBCU?

4 A. I don't think there was an explicit
5 agreement that that would occur.

6 Q. Did you think that could happen?

7 A. I don't think that came up and I -- so I
8 didn't think about it. I think, you know, what we
9 did agree to and we did recognize is that we have
10 a model and like all models it does, you know,
11 depending on the model they -- they try to
12 represent the physical circumstances and this
13 model does that, you know. People can look at any
14 individual little piece of that and say, well, I
15 don't like that particular piece. And then the
16 other party can say, well, I don't like this
17 particular piece, you know, and you can probably
18 always particularly after the fact say, well, I
19 would have done this a little bit differently.
20 But the reality is the model did what it intended
21 to do in my view. It was constructed by experts
22 with a lot of -- a lot of expertise. It seemed to
23 do a very good job of representing the calibration
24 targets in terms of stream flow and ground water
25 levels and all of the other parameters related to

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

139

1 the model. And, you know, I -- this settlement --
2 this FSS, in my view, was predicated on the
3 certainty of knowing that we had an agreed upon
4 model. It could be changed in the future, but we
5 had an agreed upon model. And unless and until it
6 was changed that's part of the deal.

7 Q. What about the accounting procedures?

8 A. Same thing.

9 Q. So the accounting procedures would remain
10 static?

11 A. Unless changed by the parties.

12 Q. Unless changed by the parties and that
13 would be true regardless of whether they reflected
14 the intent of the parties at the time they
15 negotiated the FSS?

16 A. Well, you know --

17 Q. In other words, do the accounting
18 procedures override the content of the FSS if they
19 fail to effectuate its objectives?

20 MR. DRAPER: Are you asking a legal
21 question --

22 MR. WILMOTH: I'm asking him what he
23 meant when he negotiated it.

24 MR. DRAPER: Tom, when it's convenient I
25 think it would be good to take a short break. I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

140

1 don't want to interrupt you right now.

2 MR. WILMOTH: That's fine. Let's just
3 finish this question.

4 A. Well, you know, the -- I think the
5 accounting procedures were a good faith effort on
6 the part of the settlement teams including the
7 county committee and the other participants to
8 implement the provisions of the FSS and to
9 properly account for the -- all of the, if you
10 will, the nuts and bolts of that that's necessary
11 to determine whether you have a compact compliance
12 or not. Now, I would simply say that as has been
13 demonstrated at least once with the action taken
14 in, what was it, January of 2005, if I recall, the
15 parties by agreement modified the accounting
16 procedures to address issues that they agreed
17 needed to be changed in terms of what they
18 determined to be errors or omissions or whatever
19 it was. And so that's a process that is there and
20 as far as I know can work on things that are, you
21 know, that have determined -- are -- need fixing.

22 Q. When was the first time the model was
23 used for official compact accounting, do you
24 recall?

25 A. For official compact accounting it would

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

141

1 -- you know, the model is run over a period of
2 time. But I think the year from which the ground
3 water depletions were determined and plugged into
4 the accounting procedures, I -- I'm pretty sure
5 that would have been for the 2003 compact year.
6 The first year in the -- in the process after it
7 was signed.

8 Q. Okay.

9 MR. WILMOTH: Let's take a break.

10 MR. DRAPER: Okay.

11 MR. WILMOTH: Take ten.

12 (THEREUPON, a recess was taken, after
13 which the following was had:)

14 BY MR. WILMOTH:

15 Q. Okay, Mr. Pope, let me hand you another
16 document that we obtained from the State of
17 Kansas. We'll mark this as Exhibit 14.

18 (THEREUPON, Pope Deposition Exhibit No 14
19 was marked for identification.)

20 MR. DRAPER: Was this obtained from us in
21 production?

22 MR. WILMOTH: This was actually in the
23 arbitration.

24 MR. DRAPER: Okay.

25 BY MR. WILMOTH:

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

142

1 Q. Mr. Pope, this is a document that is
2 entitled Talking Points for August 15th, 2007 RRCA
3 Annual Meeting. Did you participate in developing
4 this document?

5 A. Let me look at it a little further. I --

6 Q. Take your time.

7 A. I think the answer to your question is,
8 yes, I -- I recall having some participation in
9 review of it even though it was after I was -- had
10 left my role as chief engineer.

11 Q. About halfway down there is a discussion
12 about various calculations of compact compliance
13 and you note that Nebraska and Colorado were both
14 out of compliance; do you see that discussion?

15 A. Halfway down?

16 Q. About halfway down on page one.

17 A. Starts with although some limited
18 progress has been made, is that what you're
19 referring to?

20 Q. Yes, that's a fine example.

21 A. Yes, I see it.

22 Q. And if you turn the page to page two
23 about right here you'll see a discussion of
24 overuse in Nebraska and Colorado, do you see that?

25 MR. DRAPER: Which bullet is that on the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

143

1 page?

2 MR. WILMOTH: Third.

3 A. Towards third -- third one down towards
4 the lower part of that paragraph?

5 BY MR. WILMOTH:

6 Q. Uh-huh, thus due to overuse?

7 A. Yeah, I see that.

8 Q. Based on those two statements does Kansas
9 attribute any of the harm it suffered in '05 and
10 '06 to overuse by Colorado?

11 MR. DRAPER: For my benefit could you say
12 that once more?

13 MR. WILMOTH: Could you read it.

14 (THEREUPON, the court reporter read back
15 the following testimony:

16 "Q. Based on those two statements does
17 Kansas attribute any of the harm it suffered
18 in '05 and '06 to overuse by Colorado?")

19 A. I have not done any independent analysis
20 of that, but my general view I guess would be that
21 all of the water in the basin is allocated. So if
22 any -- any State with an upstream part of the
23 basin over uses its allocation, it can potentially
24 have some effect downstream. Now, the amount of
25 that and where that would occur is more of a

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

144

1 technical question and, you know, I have not -- I
2 don't have an independent view at this point of
3 how much that would be. But certainly there is
4 overuse that has occurred for I think each of the
5 years during the '03 through '06 would be the last
6 year I dealt with in the '07 annual meeting. So
7 how that would play out I'm not sure I could state
8 a view at this point.

9 Q. Do you know whether during your tenure as
10 the chief engineer or in your role as a current
11 consultant anyone on the Kansas team has ever
12 attempted to make that determination; specifically
13 the determination as to how much of the harm might
14 have been inflicted by the State of Colorado
15 versus the State of Kansas -- excuse me, Nebraska?

16 A. I'm not sure.

17 Q. In your report you have a section that
18 discusses the appointment of a River Master?

19 A. Yes.

20 Q. Could you explain why you recommend
21 appointment of a River Master.

22 A. Yes. Well, briefly stated there are
23 several things that occurred in this case.
24 Clearly there were several years of noncompliance
25 and the overuse during the water short year

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

145

1 periods '06 and '07 -- of course 05-06, 06-07 as
2 well as my understanding for the first five-year
3 period, 2003 through 2007 even though there were
4 some change starting to occur in conditions in
5 2007, and as I had indicated earlier thus far the
6 actions taken as of then and I think it's a little
7 hard to tell now with these more recent years, but
8 the -- it's questionable in my mind in terms of
9 whether sufficient actions have been taken and
10 will be taken in the future to ensure compliance.
11 And then thirdly that since this has evolved now
12 subsequent to the settlement and even before the
13 settlement of course there is some history, you
14 know, one of the factors is there's a long history
15 of disagreement between the States particularly in
16 the case of the Republican River Compact, the
17 Kansas Nebraska stuff we've been talking about
18 today. The -- and so it's my view that under
19 those circumstances that a River Master could be
20 very helpful at least from a Kansas perspective in
21 reviewing the plans and actions of Nebraska when a
22 period of overuse would occur to then ensure that
23 those plans are -- looks like, for example, when
24 it looks like there's a problem so that -- so that
25 those plans could be reviewed and evaluated to see

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

146

1 if they were going to then result in compliance.

2 And --

3 Q. Would that be done on an annual basis?

4 A. Well, I think some of the detail would
5 have to be worked out in regard to -- to how it
6 would be set up and what the court would order.
7 But -- so I don't know for sure, but I would say
8 most likely on an annual basis some years there
9 might not be an issue. But on an annual basis
10 would make sense so you keep a running tally of
11 what was going on and let the process work as
12 provided for under the FSS. But, again, when
13 circumstances -- and it depends on what Nebraska
14 does. Because if the plans are indefinite and
15 it's going to be hard to determine for a given
16 period whether it's going to happen, that probably
17 argues for more involvement of a River Master.

18 Q. For the third generation IMP's, for
19 example, Kansas says these are inadequate. The
20 River Master comes in and says Kansas is right,
21 Nebraska is wrong, do X, Y, Z; is that the vision?

22 A. Yeah, I'm not suggesting that the River
23 Master would be limited by the IMP process. But
24 certainly the plan is laid out as represented in
25 the IMP would I presume be something that would be

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

147

1 seriously looked at and --

2 Q. But they could be discarded or revised or
3 modified in any way necessary to ensure
4 compliance?

5 A. Well, I think that again if there was a
6 set of circumstances when -- when they weren't
7 getting the job done, the River Master -- if
8 Nebraska said this is our plan and this is what
9 we're proposing to do, remember there are some
10 conceptual things in the IMP's that I don't know
11 at least at this point in time how that will be
12 implemented. But -- so part of what I think the
13 River Master could do would be for a given year
14 look at that and say what are you really going to
15 do this year if it looks again like it's one of
16 those years where there's a problem. And again
17 you have to start looking long term here, too, to
18 some extent because of these are multi year
19 things. But -- and then, yes, I think potentially
20 the River Master could -- could get the input from
21 the -- from the parties and make a decision in
22 terms of whether they were deemed to be adequate.

23 Q. And the master could trump State law by
24 issuing a modification order, for example?

25 A. I -- I haven't explicitly said that. I -

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

148

1 - I think we need to keep in mind that the compact
2 really trumps State law in many respects. And
3 what we're talking about here is really
4 enforcement of the compact. And so to the extent
5 necessary to achieve compliance the individual
6 uses and my understanding are, you know, as found
7 by the Supreme Court in the Hinderliter case --

8 THE REPORTER: Hinder?

9 BY MR. WILMOTH:

10 Q. Hinderliter case. You know, people that
11 have rights under State law are not guaranteed
12 that they can always exercise those fully if any
13 compact does not provide a share of water
14 sufficient to satisfy all those rights.

15 Q. Are there other compliance efforts that
16 the River Master would have authority to deal with
17 such as Colorado's augmentation pipeline?

18 A. Well, I think to the extent that depends
19 on how things are set up. But to the extent that
20 a River Master had jurisdiction over both States
21 if there is a compliance problem at the time then
22 you could again look at plans that were being
23 proposed and operations and -- and make a
24 determination. I am not suggesting that the River
25 Master would jump in and supplant the processes

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

149

1 that are provided for in the FSS.

2 Q. So if the master said we like -- I like
3 the Colorado pipeline concept, it's going to
4 ensure compliance, it's a good thing, I'm going to
5 overrule your objection, Kansas; that's not
6 something that you're envisioning?

7 A. I guess what I am envisioning is I know
8 for a substantial period of time Colorado has been
9 -- has proposed and there's issues that have been
10 submitted to the RRCA and there's been some
11 disputes there and there was an arbitration and,
12 you know, that sort of thing and so that process,
13 you know, takes place. And I'm not suggesting the
14 River Master jump in the middle of that and say
15 okay, I'm going to resolve this dispute instead of
16 the process laid out in the FSS.

17 Q. It's only a compliance level?

18 A. It's a bigger picture compliance result
19 based process I think to really ensure that
20 compliance actually occurs.

21 Q. What about Nebraska's accounting issue,
22 for example? Would he have the authority to
23 approve the accounting procedure change if that
24 was relevant to compact compliance?

25 A. Well, again I think that is an issue, you

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

150

1 know, again depending on how it was set up and the
2 authorities of the River Master, but the process
3 is laid out explicitly in the FSS to -- to adopt
4 as they have and modify and again as they have at
5 least once accounting procedures and there is a
6 dispute resolution process and that's the process
7 that it would follow.

8 Q. Isn't that the same process that we're
9 following now though for the noncompliance by
10 Nebraska? Why is it good for the goose but not
11 for the gander?

12 A. No, I think there is really two different
13 things here. One is what the States agreed to and
14 the FSS is explicit in regard to the role of the
15 RRCA in regard to adopting rules and regulations
16 and approving the model and the accounting
17 procedures.

18 Q. The States didn't agree to appoint a
19 River Master though, did they?

20 A. No, but the States had hoped that all of
21 the parties would be in compliance and so all of
22 that was left to be dealt with in the event that
23 there was a noncompliance.

24 Q. Some would argue the States assume that
25 the accounting procedures would be changed if

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

151

1 there was an identified error, correct?

2 A. Well, I think the States have identified
3 some bus and formal things that need to be changed
4 and in good faith they changed those. I think
5 it's different whenever you change the whole
6 methodology. It's a whole new set of accounting
7 procedures in essence for us involuntarily on at
8 least one of the States, but that's a totally
9 different matter.

10 Q. But appointing a master to dictate the
11 water use in an upstream State is reasonable?

12 A. Tom, that's because you're not in
13 compliance and have not been in compliance. It's
14 an enforcement issue.

15 Q. Hasn't Nebraska been in compliance since
16 '07?

17 A. Well, I don't know that we've had an
18 official accounting approved for a number of
19 years. So just looking at the numbers I'm
20 assuming that there would be compliance for the
21 periods, you know, probably since then. But,
22 again, as an official matter I guess I can't say.
23 The issue is really going to be compliance during
24 these periods of low flow and short water supply
25 and, you know, drought and things like that.

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

152

1 Drought versus things caused by upstream use in
2 issue. So it's a role related to compliance.
3 It's a different role than actually administering
4 the compact and the agreed upon terms.

5 Q. And you indicated that the master's
6 required because DNR and the NRD's can't work
7 together, right?

8 A. Well, I think there's, you know, there's
9 certainly been some result that didn't pan out in
10 my view. I don't think it's the fact -- not
11 trying to infer that the DNR and the NRD's are not
12 working together. And I'm sure that's varied from
13 time to time in terms of the -- you know, how much
14 -- what type of relationship existed perhaps. But
15 it's more the result of what is needed and I think
16 there can be at least at times I think difficulty
17 in terms of having one set of local entities
18 responsible for ground water and the State
19 responsible for surface water and trying to bring
20 that together in such a way that you get an
21 effective joint plan to achieve compact
22 compliance. And so --

23 Q. And they have adopted three IMP's
24 collectively in the last eight years, right?

25 A. They -- they have and as of I think about

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

153

1 the time of the adoption of the second round there
2 was still not compliance. So now we've had this
3 wet period and I think the jury is still out in
4 regard to all aspects of the third IMP and, you
5 know, there is still this whole ongoing issue of
6 growing ground water depletions.

7 Q. So you conclude your report by explaining
8 it's necessary for Kansas to propose a remedy that
9 will ensure future compliance every year, is that
10 your view?

11 A. Let's see, the conclusion section?

12 Q. Yes.

13 A. Well, I thought I said that each
14 compliance period and it's my view that Nebraska
15 has an obligation to comply with the decree each
16 compliance period by period. I don't mean
17 grammatical period, but each accounting period.

18 Q. Have you evaluated the Kansas proposed
19 remedy?

20 A. Well, in general not as much detail
21 lately as I did for awhile, but I know essentially
22 what is contained in there.

23 Q. Do you have any idea that -- how much
24 water under its allocations Nebraska would have to
25 use over the next 50 years if that remedy were

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

154

1 imposed today?

2 A. I don't know any specific numbers, but I
3 think the key point is that with the variability
4 that occurs hydrologically in the Republican River
5 basin there are clearly going to be years when
6 none of the States can use their full allocation.
7 And in this particular set of circumstances where
8 a lot of the development for beneficial
9 consumptive use in Nebraska is through ground
10 water sources, the mechanism for how water is used
11 just because of the physical circumstances will
12 make it difficult, I think, to fully use a
13 variable water supply with large amounts of ground
14 water pumping and then being able to turn on a
15 dime and deal with a period whenever the virgin
16 water supply and the allocations are a lot lower.
17 So it's quite a challenge, I think, to turn that
18 boat real quick. By boat I mean the effect of
19 ground water completion, because it lacks effect
20 and those things. Certainly there are some --
21 some of the alternatives that we, you know, that
22 are contained therein and I've reacted to some of
23 those. But I'm more concerned about those trends
24 long term, which will mean diminishing surface
25 supply, which limits that option and then how that

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

155

1 would be implemented. The augmentation thing I'm
2 not -- I haven't looked at that in very much
3 detail but, you know, that may have some merits if
4 it's done right.

5 Q. I just have a few minutes left. Let me
6 ask you two -- about two documents very quickly.

7 (THEREUPON, Pope Deposition Exhibit No 15
8 was marked for identification.)

9 BY MR. WILMOTH:

10 Q. Mr. Pope, can you take a look at this
11 electronic mail and tell me if you can recall its
12 subject.

13 A. Okay.

14 Q. Could you tell me what the subject of
15 that is?

16 A. Well, in the period in question here
17 2004. That was a year when no deliveries were
18 scheduled to be made from Harlan County Reservoir
19 for either the Kansas or the Nebraska Bostwick
20 irrigation districts. The water supply was so low
21 that they were I think below shut off elevation.
22 So the Bureau of Reclamation had advised the
23 districts --

24 THE REPORTER: What kind of reclamation?

25 A. Bureau of Reclamation had advised the

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

156

1 districts that it appeared that there would be no
2 releases, you know, subject to any huge, big
3 changes in water supply, you know, late. And this
4 is as of June. And Dave Barfield was pointing out
5 here that the -- the accounting procedures then in
6 effect had said that the evaporation in the Harlan
7 County reservoir would be charged to Kansas and
8 Nebraska proportioned to the actual diversions.
9 Well, if there are no diversions in this
10 particular case then how do you do it.

11 BY MR. WILMOTH:

12 Q. Sure.

13 A. So this -- this e-mail was simply posing
14 that question so that we could talk about it and
15 think about it and know how to recommend to deal
16 with it at the RRCA meeting that would be -- be
17 coming up. And the Engineering Committee was, you
18 know, doing its work.

19 Q. And what about the second to the last
20 paragraph on that page, what was the import of
21 that discussion?

22 A. Well, I think his fear at that time was
23 that that would be the claim by Nebraska. As it
24 turned out that was the case later. Not this
25 year, but I don't think that's -- I don't read

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

157

1 this as saying that's an absolute in terms of
2 that's the way it should be or is.

3 Q. Uh-huh. Was that your understanding?

4 A. No.

5 Q. That wasn't your understanding of how
6 that provision would operate?

7 A. It's not my belief that that was the
8 intent. We hadn't dealt with that. I don't think
9 it was -- there was nothing explicit in the
10 accounting procedures at that point in time. And
11 then that situation did -- did come about because
12 in 2006 the State of Nebraska entered into an
13 agreement as I recall it with Nebraska Bostwick
14 and some other districts. But in this particular
15 case Nebraska Bostwick to -- to purchase or lease
16 their water supply and that occurred. So it
17 turned out then that Nebraska Bostwick was still
18 -- the agreement was such that it was still
19 treated as if it was Nebraska Bostwick water, but
20 yet was made available to Kansas. And so Kansas
21 was doing the diversion, but Nebraska was getting
22 the benefit from the water for purposes of compact
23 compliance to the extent that it was properly
24 counted and you have all these other complexities
25 like the substitute water supply issue. So, you

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

158

1 know --

2 Q. But just to be clear. You did not
3 interpret Mr. Barfield's discussion at the bottom
4 of this page to represent his opinion of the
5 matter?

6 A. I -- I see this as a -- as an e-mail that
7 was provided for discussion purposes and, you
8 know, I can't tell you whether that was his
9 opinion or I don't think it was or whether he said
10 this will -- this will be an issue for us in
11 essence.

12 Q. What was your understanding of the
13 language regarding substitute supplies?

14 A. Well, I think without looking at the FFS
15 and quoting the explicit language there is a
16 series of options that Nebraska can take during
17 water short years to -- and given the estimates by
18 the Bureau of Reclamation about whether the water
19 supply will be such that there will be a water
20 short year. To look at early in the year and
21 determine those options and notify the other
22 States and the Bureau of Reclamation. And then as
23 they really get to after the actual determination
24 is made June 30th of those years, then they would
25 decide what actions to actually take and notify

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

159

1 the other States. And a whole series of those
2 relate to ways to reduce the use of water above
3 Guide Rock. There is at least one in there where
4 there is an explicit reference to substitute
5 supply where the -- if for the Superior Canal I
6 think it is be reduction in their surface water
7 supply was undertaken for the benefit of compact
8 compliance. In essence then they could use a
9 substitute supply to make up that difference.

10 Q. What would be the substitute supply?

11 A. Well, ground water has been the one used.
12 There are some ground water used already, but when
13 you take away the surface supply that otherwise
14 would have been there, well, then substitute to
15 make up that additional.

16 Q. Do you know whether that occurred in '06?

17 A. My understanding is that it did.

18 Q. Do you know to what extent? How much
19 water was used as a substitute supply?

20 A. What was the last part of the question?

21 Q. How much water was used as a substitute
22 supply?

23 A. Well, you know, I have not done any
24 independent analysis of that in terms of the
25 specific amounts of water, but I think it's pretty

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

160

1 clear from the correspondence that we had
2 received. And from the way the system is set up
3 that to the extent that the farmers with wells
4 would operate they were -- my understanding and I
5 think this is based on information provided to us
6 that there were no special restrictions on the
7 amount of ground water that could be pumped. They
8 had their overall limits by then. I think it was
9 the NRD allocations by then, but there were no
10 special restrictions to say if you don't take
11 your, you know, a few inches of water that would
12 have always been available from Harlan County
13 through the Superior Canal you can't make up the
14 difference. And there was no such restriction.
15 And so human nature tells me and the conditions
16 tell me that they would have made up that
17 shortfall by pumping extra water from the wells.
18 I think conceptually that's almost got to be true.

19 Q. So it's an assumption on your part? I
20 mean you haven't looked at any data or any well
21 pumping information or anything?

22 A. In the context of doing some sort of a --
23 you know, I think that would be a tough analysis
24 to do but, no, I've not done that analysis.

25 Q. I don't have any questions about this. I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

161

1 just want to ask you if you can authenticate this
2 document for me.

3 (THEREUPON, Pope Deposition Exhibit No 16
4 was marked for identification.)

5 BY MR. WILMOTH:

6 Q. Did you prepare that document, Mr. Pope?

7 A. Well, I -- I am confident that I made
8 such a presentation to this legislative committee.
9 I can't verify that this is the final version or
10 that sort of thing. But it's on our letterhead
11 and, you know, I did brief such committees on the
12 terms of the settlement that we had reached.

13 Q. Okay, thank you. And then just finally
14 does the compact embody the concept of
15 sustainability or require that the system be
16 managed for sustainability, in your view?

17 A. I don't recall the terms explicitly being
18 mentioned, but again the compact as a whole series
19 of provisions have to be looked at in total
20 including determinations of virgin water supply
21 and allocations and concept of applying water for
22 beneficial use and certainly protecting the
23 interest of each of the signatory parties. It --
24 it embodies it indirectly to the extent that
25 compliance as needed is necessary. And so -- so I

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

162

1 think that's sort of the indirect relationship --

2 Q. You mean to the extent that
3 sustainability equals compliance, is that what
4 you're saying?

5 A. Well, sustainability is -- is -- you
6 know, there is a lot of different definitions of
7 that as applied to any particular physical set of
8 circumstances. But sustainable to the extent of
9 sustaining compact compliance.

10 Q. I see. Gotch ya.

11 A. In this case that almost has to involve
12 activity sufficient to protect the water supply at
13 Harlan County reservoir. Sufficient to make the
14 delivery at Guide Rock and satisfy the terms of
15 the FSS and get Kansas its water.

16 MR. WILMOTH: We don't have any further.
17 Pete, do you have any questions?

18 MR. AMPE: A couple of quick questions.

19 CROSS-EXAMINATION

20 BY MR. AMPE:

21 Q. Do you know over say the past 2005-2006
22 had Colorado delivered more water across its
23 boundary, do you know if Nebraska would have
24 passed that water through its State to Kansas or
25 simply consumed it within Nebraska?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

163

1 A. I don't know for sure, but that's why I
2 was -- tried to answer the question the way I did,
3 Mr. Ampe. I think there's a question from a
4 Kansas perspective in terms of what would happen
5 to that water passing through the long reach with
6 the circumstances as they are in Nebraska.

7 Q. All right. And as a Kansas water
8 administrator, what does the term principal
9 spillway mean to you?

10 A. Well, in a typical reservoir I usually
11 think of reservoir when I think of principal
12 spillway and a typical reservoir -- and there are
13 various different designs, will have a spillway
14 where the normal releases of water are made for
15 delivery of water, for example, to water users if
16 that's a part of that project or to make releases
17 for -- for other purposes. And then there is
18 often a -- an emergency spillway to handle the
19 flood flows. The big releases that are necessary
20 sometimes in this neck of the woods. And so
21 that's -- that's what it means to me.

22 Q. Okay. So the emergency spillway to me
23 would be the one near the top of the dam to keep
24 the flood flows from over topping and ruining the
25 dam?

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

164

1 A. That's correct.

2 Q. And the principal would be the other
3 release point?

4 A. That's correct.

5 Q. Okay.

6 MR. AMPE: Thanks, that's all I have.

7 MR. DRAPER: Okay. Let's take a quick
8 break and we'll be right back.

9 (THEREUPON, a recess was taken, after
10 which the following was had:)

11 MR. DRAPER: Okay. We have no further
12 questions.

13 MR. WILMOTH: Thanks, David.

14 (THEREUPON, the deposition was concluded
15 at 5:15 p.m.)

16 .

17 .

18 .

19 .

20 .

21 .

22 .

23 .

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

165

1 SIGNATURE

2 .

3 The deposition of DAVID L. POPE, P.E. was
4 taken in the matter, on the date, and at the time
5 and place set out on the title page hereof.

6 .

7 It was requested that the deposition be
8 taken by the reporter and that same be reduced to
9 typewritten form.

10 .

11 It was agreed by and between counsel and
12 the parties that the deponent will read and sign
13 the transcript of said deposition.

14 .

15 .

16 .

17 .

18 .

19 .

20 .

21 .

22 .

23 .

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063


Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

166

1 AFFIDAVIT

2 .

3 STATE OF _____:

4 COUNTY/CITY OF _____:

5 .

6 Before me, this day, personally appeared,
7 DAVID L. POPE, P.E., who, being duly sworn, states
8 that the foregoing transcript of his/her Deposition,
9 taken in the matter, on the date, and at the time and
10 place set out on the title page hereof, constitutes a
11 true and accurate transcript of said deposition, along
12 with the attached Errata Sheet, if changes or
13 corrections were made.

14 .

15 _____

16 DAVID L. POPE, P.E.

17 .

18 SUBSCRIBED and SWORN to before me this _____
19 day of _____, 2012 in the
20 jurisdiction aforesaid.

21 .

22 _____

23 My Commission Expires

Notary Public

24 .

25 .

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

167

1 DEPOSITION ERRATA SHEET

2 RE: APPINO & BIGGS

3 REPORTING SERVICE, INC.

4 FILE NO.: 20014

5 CASE: STATE OF KANSAS vs.

6 STATE OF NEBRASKA AND STATE OF COLORADO

7 DEPONENT: DAVID L. POPE, P.E.

8 DEPOSITION DATE: February 28, 2012

9 To the Reporter:

10 I have read the entire transcript of my Deposition taken in the
11 captioned matter or the same has been read to me. I request that
12 the following changes be entered upon the record for the reasons
13 indicated. I have signed my name to the Errata Sheet and the
14 appropriate Certificate and authorize you to attach both to the
15 original transcript.

16	PAGE	LINE	FROM	TO	REASON
17					
18					
19					
20					
21					
22					
23					
24					
25					

(Main Office)
Topeka, KS
785.273.3063



(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

168

1	PAGE	LINE	FROM	TO	REASON
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					

24 SIGNATURE: _____ DATE: _____

25 DAVID L. POPE, P.E.

(Main Office)
Topeka, KS
785.273.3063



(Metro Kansas City)
Overland Park, KS
913.383.1131

2/28/2012

DAVID POPE

169

1 CERTIFICATE

2 STATE OF KANSAS

3 ss:

4 COUNTY OF SHAWNEE

5 I, Kenda K. Falley, a Certified
6 Shorthand Reporter, commissioned as such by
7 the Supreme Court of the State of Kansas,
8 and authorized to take depositions and
9 administer oaths within said State pursuant
10 to K.S.A. 60-228, certify that the foregoing
11 was reported by stenographic means, which
12 matter was held on the date, and the time
13 and place set out on the title page hereof
14 and that the foregoing constitutes a true
15 and accurate transcript of the same.

16 I further certify that I am not related
17 to any of the parties, nor am I an employee
18 of or related to any of the attorneys
19 representing the parties, and I have no
20 financial interest in the outcome of this
21 matter.

22 Given under my hand and seal this
23 day of _____, 2012.

24 _____
25 Kenda K. Falley, C.S.R. No. 1003

(Main Office)
Topeka, KS
785.273.3063

Appino & Biggs
Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131