



STATE OF NEBRASKA
Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

JUSTIN D. LAVENE
CHIEF OF THE AGRICULTURE,
ENVIRONMENT & NATURAL
RESOURCES SECTION

May 3, 2012

VIA U.S. MAIL

James DuBois
U.S. Department of Justice
999 18th Street
South Terrace Suite 370
Denver, CO 80202

Marvin Swanda c/o
John Chaffin
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394



Re: *Touhy* Request and Amended Notice of Deposition of Mr. Marvin Swanda and Subpoena Duces Tecum in *Kansas v. Nebraska*, No. 126, Original

Dear Sirs:

The State of Nebraska is providing the Bureau of Reclamation with a supplemental *Amended Notice of Deposition of Mr. Marvin Swanda and Subpoena Duces Tecum* and *Touhy* Request. As you know, Mr. Swanda was identified by the State of Kansas as a non-expert witness expected to testify in *Kansas v. Nebraska*, No. 126, Original on March 15, 2012. For various reasons, Mr. Swanda was not timely made available to Nebraska for deposition during the discovery period authorized by Case Management Order No. 4. On Motion, Nebraska requested leave to depose Mr. Swanda out of time, and that motion was granted by the Special Master by Order of April 26, 2012.

The justification for this request generally is set forth in Nebraska's March 30, 2012 *Touhy* Request and is incorporated herein by this reference. A copy of that request is attached as Exhibit A. The scope of the requested testimony is the same as that previously requested.

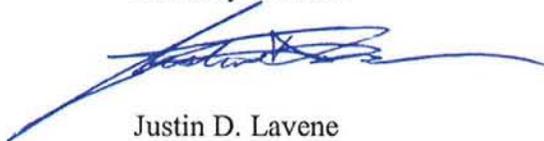
Nebraska has scheduled the deposition for 8:00 AM to 5:00 PM on May 22, 2012 as set out in Nebraska's Supplemental Amended Notice of Deposition of Mr. Marvin Swanda and

Subpoena *Duces Tecum* accompanying this request. I understand the time and place of this deposition is convenient for you both.

Nebraska will submit a check for costs to the Department of Interior in accordance with 43 CFR § 2.85, if this request is granted.

Very truly yours,

JON BRUNING
Attorney General



Justin D. Lavene
Counsel of Record
Assistant Attorney General

Enclosures



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JUSTIN D. LAVENE
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ENVIRONMENT & NATURAL
RESOURCES SECTION

March 30, 2012

VIA U.S. MAIL

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801

Jim Dubois
U.S. Department of Justice
999 18th Street
South Terrace Suite 370
Denver, CO 80202

John Chaffin
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

**Re: *Touhy* Request and Amended Notice of Deposition of Mr. Marvin Swanda
and Subpoena Duces Tecum in *Kansas v. Nebraska*, No. 126, Original**

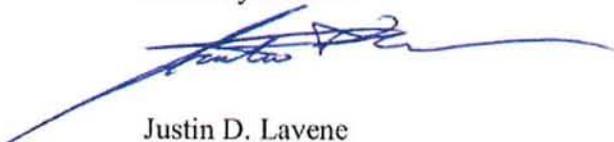
Messrs.:

The State of Nebraska respectfully requests that Mr. Marvin Swanda appear for deposition and provide the testimony, documents and information specified in Kansas' *Touhy* Request dated March 30, 2012, for use in the above-referenced litigation. A copy of the Petition filed by Kansas, along with a copy of Nebraska's Answer and Counterclaims are attached hereto as Exhibit A pursuant to 43 C.F.R. § 2.84(b). A copy of the current Case Management Plan governing this proceeding is attached to the accompanying Amended Notice of Deposition and Subpoena Duces Tecum as Exhibit A. Nebraska will submit a check for costs to the Department of Interior in accordance with 43 CFR S 2.85 if its request is granted. In addition, Nebraska will pay the costs of duplication in accordance with 43 CFR, Part 2, Appendix A, if its request is granted.

The reasons supporting the Kansas *Touhy* are incorporated herein by this reference. A copy of the Kansas' *Touhy* is attached hereto as Exhibit B.

Very truly yours,

JON BRUNING
Attorney General



Justin D. Lavene
Counsel of Record
Assistant Attorney General

Enclosures

EXHIBIT B



JOHN B. DRAPER
Direct: (505) 986-2525
Email: jdraper@montand.com
Reply To: Santa Fe Office
www.montand.com

March 30, 2012

By U.S. Mail and Email

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801
athompson@gp.usbr.gov

**Re: Touhy Request (Revised) for Testimony of Mr. Marvin Swanda
in *Kansas v. Nebraska & Colorado*,
No. 126, Orig., U.S. Supreme Court**

Dear Mr. Thompson:

The State of Kansas requests that Mr. Marv Swanda appear as a witness in the above-referenced case. The trial in this case will be scheduled for the period August 8-31, 2012 before Special Master William J. Kayatta. Statement of Special Master William J. Kayatta, Status Conference, March 23, 2012. In anticipation of this Touhy Request, the State of Kansas submitted Kansas' Disclosure of Defensive Expert Testimony and Non-Expert Witnesses in this case on March 15, 2012, listing Mr. Swanda, a copy of which is attached hereto. In addition, the State of Nebraska has scheduled a deposition of Mr. Swanda for April 3, 2012 as set out in Nebraska's Notice of Deposition of Mr. Marvin Swanda and Subpoena Duces Tecum, a copy of which is attached hereto (without exhibits). I understand that the time and place of this deposition are convenient for Mr. Swanda.

Kansas will submit a check for costs to the Department of Interior (Department), in accordance with 43 CFR § 2.85, if required.

The requested testimony is expected to be helpful and relevant in resolving the current dispute among the States of Kansas, Nebraska and Colorado (States) regarding Nebraska's compliance with the Supreme Court Decree (Decree) of May 19, 2003,

REPLY TO:

325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
Telephone (505) 884-4200 • Fax (505) 888-8929

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Albuquerque, New Mexico 87176-6210

Exhibit A
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Aaron M. Thompson
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enforcing the Republican River Compact (Compact). The Decree is found at 538 U.S. 720 (2003). The Final Settlement Stipulation (FSS), which is approved by the Decree, is found on the U.S. Supreme Court website at <http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html>.

The U.S. Bureau of Reclamation (Reclamation) has projects in all three States. The United States appeared as an *amicus curiae* (friend of the Court) in the proceeding in the original jurisdiction of the United States Supreme Court, and, with significant input from Reclamation, was a full participant in the negotiations that resulted in the Decree. See Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska & Colorado*, No. 126, Orig., at 24-25 and App. E (2003) (also found at the U.S. Supreme Court website address cited above). Reclamation, including Mr. Swanda, provided testimony on April 14, 2009 in the non-binding arbitration initiated 10/21/08 before Arbitrator Karl J. Dreher, in this matter.

Mr. Swanda's testimony is not reasonably available from any other source. Mr. Swanda, as a former long-time Reclamation employee, possesses knowledge of the historical operations of the Reclamation projects in the Republican River Basin ("RRB") that no other single person possesses. Mr. Swanda will be able to testify to facts of which he has personal knowledge during the period of Mr. Swanda's employment. Specifically, Mr. Swanda's testimony would consist of the following subjects if this Touhy Request is approved, each subject limited to the knowledge he gained during the time of his employment at Reclamation.

1. Documentation of the initiation and operations of the RRB Reclamation projects.
2. Concerns of Reclamation regarding groundwater use above Reclamation projects and how those concerns were documented.
3. Concerns of Reclamation regarding Nebraska's Integrated Management Plans and how these concerns were documented.

Mr. Swanda's direct testimony will be pre-filed written testimony. He will be subject to cross-examination and redirect examination during the trial.

There is no record or set of records that can be provided and used in lieu of Mr. Swanda's testimony. While certain public Reclamation documents will be relevant, his testimony is necessary in order to provide the foregoing facts in an efficient way to the Supreme Court Special Master.

I believe this request for Mr. Swanda's testimony complies with 43 CFR § 2.88 because: (a) the testimony is not available from another source as explained above; (b) the testimony, to our knowledge, would not be inconsistent with any other federal

Aaron M. Thompson
March 30, 2012
Page 3

statute or regulation; and (c) the testimony would be consistent with the Department's ability to

- (1) Conduct its official business unimpeded: Every effort will be made to schedule your testimony at a time to minimize as much as possible any interference with your schedule and official obligations;
- (2) Maintain impartiality in conducting the Department's business: The testimony would be consistent with Reclamation's policies applicable to its projects in the Basin for the benefit of water users in both Nebraska and Kansas;
- (3) Minimize the possibility that the Department will become involved in issues that are not related to its mission or programs: This proceeding raises issues that are central to Reclamation's mission and programs in the Nebraska-Kansas Area of Reclamation's Great Plains Region and is likely to affect the future viability of Reclamation's projects there;
- (4) Avoid spending public employee's time for private purposes: Your testimony will contribute to two important public purposes, namely, achieving compliance with a U.S. Supreme Court Decree enforcing an interstate compact and enhancing the viability of Reclamation projects in the Basin;
- (5) Avoid the negative cumulative effect of granting similar requests: Given the unique character of the present interstate proceeding, it is not expected that there will be any similar requests that would have a negative cumulative effect on the Department;
- (6) Ensure that privileged or protected matters remain confidential: No privileged or protected matters will be inquired into by Kansas in the course of your testimony; the Case Management Plan entered by the Special Master in this proceeding protects privileged matters; and
- (7) Avoid undue burden on the Department: Kansas will make every effort, and we expect the other States to cooperate fully, to minimize any impact on your other responsibilities.

Aaron M. Thompson
March 30, 2012
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Thank you very much for your consideration. I would be glad to provide any additional information that would be helpful.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John B. Draper", with a long horizontal flourish extending to the right.

John B. Draper

JBD:dlo

cc: (by email) (w/attachments)
Donald B. Verrilli, Jr., US Sol. Gen.
James J. DuBois, Esq., USDOJ
John Chaffin, Esq., USDOJ
Patrick Erger, USDOJ
Justin Lavene, Esq., State of Nebraska
Autumn Bernhardt, Esq., State of Colorado

No. 126, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

Before The Honorable William J. Kayatta, Jr.
Special Master

**KANSAS DISCLOSURE OF
DEFENSE'S EXPERT TESTIMONY
AND NON-EXPERT WITNESSES**

The State of Kansas, pursuant to Paragraph 7 of Case Management Plan No. 2, provides herewith the following defensive expert disclosures:

1. Expert Witness: Dale E. Book
 Expert Report: Response to Expert Report of James C. Schneider, Ph.D., on
 Nebraska's Proposed Changes to the RRCA Accounting
 Procedures

2. Expert Witness: Steven P. Larson
 Expert Reports: Response to Expert Report of James C. Schneider, Ph.D., on
 Nebraska's Proposed Changes to the RRCA Accounting
 Procedures

As part of this Disclosure of Defensive Expert Testimony, Kansas gives notice that it may offer the following documents as exhibits to summarize or support the opinions to be expressed by the foregoing experts:

1. The expert report listed above.
2. Resumes for each of the expert witnesses, already provided.
3. Any part of the expert report listed above.
4. All documents listed as references in the expert report listed above.
5. All exhibits identified in Kansas' Initial Disclosure of Expert Testimony.

The expert report listed above is being provided herewith.

The State of Kansas, pursuant to Case Management Order No. 4, ¶ 1, discloses the following witnesses who may be called to offer non-expert testimony:

1. All persons identified as expert witnesses by the State of Kansas.
2. Scott E. Ross
3. Sam Perkins
4. Kenneth Nelson
5. L. Michael Brzon
6. Marv Swanda
7. Brad Edgerton
8. Mike Delka
9. Roger Patterson
10. Ann Bleed
11. Brian Dunnigan
12. Paul Koester

13. Mike Clements
14. Dan Smith
15. John Thorburn
16. Jasper Fanning
17. Any witness listed by Nebraska or Colorado.

Respectfully submitted,

Derek Schmidt
Attorney General
John W. Campbell
Chief Deputy Attorney General
Jeffrey A. Chanay
Deputy Attorney General
Christopher M. Grunewald
Assistant Attorney General
Burke W. Griggs
Special Assistant Attorney General



John B. Draper
Special Assistant Attorney General
Counsel of Record
Montgomery & Andrews, P.A.
P. O. Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873

No. 126, Original

◆

IN THE
SUPREME COURT OF THE UNITED STATES
◆

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

◆

Before The Honorable William J. Kayatta, Jr.
Special Master
◆

KANSAS' CERTIFICATE OF SERVICE

I hereby certify that Kansas' Disclosure of Defensive Expert Testimony and Non-Expert Witnesses, together with a copy of the defensive expert report identified therein, was sent by U.S. Mail and email, this 15th day of March, 2012, as shown below. I further certify that all parties required to be served have been served.

William J. Kayatta, Jr.
Special Master
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04141
eumland@PierceAtwood.com
(4 copies by U.S. Mail)

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John B. Draper
Counsel of Record
State of Kansas

No. 126, Original



In The
Supreme Court of the United States



STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.



BEFORE THE OFFICE OF THE SPECIAL MASTER



**NOTICE OF DEPOSITION OF MR. MARVIN SWANDA
AND SUBPOENA DUCES TECUM**

TO: Mr. Marvin Swanda
c/o John B. Draper
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, New Mexico 87504

Pursuant to Case Management Plan No. 2 ("CMP") in the above-captioned matter, attached hereto as Exhibit A, and Fed. R. Civ. P. 45, as incorporated by the CMP, you are hereby ORDERED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action and recorded by a certified court reporter by stenographic and electronic means.

Time: 1:00 p.m. to 5:00 p.m.
Date: April 3, 2012
Location: Nebraska Attorney General's Office
1221 N Street, Suite 601
Lincoln, Nebraska 68508

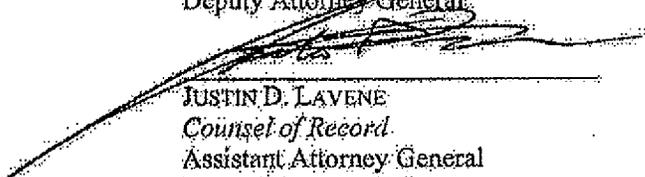
The State of Nebraska hereby requests that you bring to this deposition any supplemental materials, information, data, model runs, studies, reports, electronic and other communications, maps, GIS information and data, or any other tangible things used for testimony in this action.

The Case Management Plan for this action is attached hereto as Exhibit A. The provisions of Rule 45(c) and (d) of the Federal Rules of Civil Procedure are attached hereto as Exhibit B, as required by Rule 45(a)(1)(A)(iv) of the Federal Rules of Civil Procedure. This Subpoena is issued pursuant to Fed. R. Civ. P. 45(a)(3)(B) by Justin D. Lavene, Counsel of Record for the State of Nebraska, Nebraska Attorney General's Office, 2115 State Capitol, Lincoln, Nebraska, 68509.

Respectfully submitted this 22nd day of March, 2012.

STATE OF NEBRASKA,

JON C. BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General



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