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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

DEPOSITION OF: **MARVIN SWANDA**  
DATE: May 22, 2012  
TIME: 8:00 a.m.  
PLACE: 1221 N Street, Lincoln, Nebraska

COPY



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ALSO PRESENT: Scott Ross, Craig Scott, Brian  
Dunnigan, Jim Schneider, Jesse Bradley, Mark  
Goff, Tom Riley, David Kracman

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I-N-D-E-X

<u>WITNESS</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
M. Swanda	6			

<u>EXHIBITS</u>	<u>Marked</u>	<u>Offered</u>
No. 1	6	
No. 2	6	
No. 3	6	
No. 4	6	
No. 5	6	
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4	No. 23	108
5	No. 24	120
6	No. 25	120
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17	No. 36	142
18	No. 37	143
19	No. 38	147
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21	No. 40	148
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MARVIN SWANDA.

Being first duly cautioned and solemnly sworn as hereinafter certified, was examined and testified as follows:

(Exhibit Nos. 1 through 5 marked for identification.)

DIRECT EXAMINATION

BY MR. WILMOTH:

Q. Good morning, Mr. Swanda.

A. Good morning.

Q. Thank you for taking a day out of your retirement to join us.

A. No problem.

Q. Next time, plan retirement in Canada where the fishing is better anyway, I'm guessing.

Mr. Swanda, before we go any further, are you currently on any medication or suffering any ailment that would prevent you from testifying truthfully and accurately today?

A. No.

Q. Thank you very much. We have premarked a series of exhibits. I'd like to go through each one and ask whether you have seen those

1 exhibits. Let's start with Exhibit No. 1,  
2 which is the subpoena.

3 A. Yes, I have seen it.

4 Q. You have seen that document?

5 A. Yes.

6 Q. And have you brought any materials with  
7 you today other than what the United States  
8 government has provided us previously?

9 A. No.

10 Q. Thank you.

11 MR. DUBOIS: Marv, do you want  
12 to speak up a little clearer so that the court  
13 reporter can hear you clearly.

14 THE WITNESS: Okay.

15 Q. (By Mr. Wilmoth) I'd like to you to have  
16 a peek at Exhibit 2, please. This is a May 3,  
17 2012, Touhy request from the Nebraska Attorney  
18 General's office. Have you seen that document,  
19 sir?

20 A. Yes, I believe I have.

21 Q. Have you been the subject of a Touhy  
22 request in the past?

23 A. Yes, I believe I have.

24 Q. Would you tell me the circumstances  
25 under which that occurred?

1 A. That was in regards to the arbitration  
2 effort that went on in 2009, I believe.

3 Q. Okay. And you were subject of a  
4 deposition at that time also, weren't you?

5 A. That's correct.

6 Q. This is Exhibit 3 I'm handing you.  
7 Could you have a look at that and tell me if  
8 you have seen that document before?

9 A. Yes, I have.

10 Q. And does this document contain certain  
11 limitations on the scope of your testimony  
12 today?

13 A. I believe that it does.

14 Q. All right. I'm going to hand you  
15 Exhibit No. 4 and ask if you could take a look  
16 at that, please. Have you seen that document,  
17 sir?

18 A. Yes, I believe I have.

19 Q. And is there any material distinction  
20 between Exhibits 3 and 4 with regard to the  
21 limitations on your testimony that you are  
22 aware of?

23 A. Not that I'm aware of.

24 MR. WILMOTH: Mr. Dubois, do you  
25 need to elaborate on that in any regard or are

1 those essentially the same limitations?

2 MR. DUBOIS: I think they are  
3 essentially the same limitations. I actually  
4 didn't go back and look at the April 6th. But  
5 my -- I believe that they are basically the  
6 same. I am basically running on the  
7 limitations on the May 15th letter.

8 MR. WILMOTH: Okay. Thank you.  
9 That was that was my primary question.

10 MR. DUBOIS: Yes.

11 MR. WILMOTH: But since you are  
12 not the subject of the deposition, I didn't  
13 know quite how to get to it.

14 MR. DUBOIS: That's okay. No,  
15 no, that's okay, because I was going to raise  
16 it, that sort of the -- as a general matter I  
17 expect there may be more objections today  
18 because of the limitations on Mr. Swanda's  
19 authorization by Reclamation. As a former  
20 employee there are fairly tight limits on his  
21 testimony, particularly regarding any expert  
22 testimony or opinions or matters regarding  
23 Reclamation policy. As you know, they are set  
24 forth in the response from Interior.

25 MR. WILMOTH: Very good, thank

1 you. We'll try to respect that. And if I ask  
2 such a question, I'm sure you'll object. And  
3 we'll --

4 MR. DUBOIS: I plan to.

5 MR. WILMOTH: -- not  
6 intentionally pursue those, but we may find  
7 ourselves running afoul of that more often than  
8 you'd like, and we'll address it at the time.

9 MR. DUBOIS: I understand.

10 Q. (By Mr. Wilmoth) Finally, Mr. Swanda,  
11 could you take a look at Exhibit 5, please?  
12 Have you seen that document before, sir?

13 A. Yes, I believe I have.

14 Q. I'd like to turn your attention to the  
15 last paragraph on the first page. Would you  
16 give that a quick read, please?

17 A. Okay.

18 Q. Have you commenced working with the  
19 State of Kansas or Reclamation on your direct  
20 testimony as referenced in that paragraph?

21 A. I would respond that I have -- up and to  
22 this point have really just reviewed documents  
23 that were made available for this deposition.

24 Q. Could you tell me what those documents  
25 were?

1 A. They were the -- all of these documents,  
2 of course, that we --

3 Q. Sure.

4 A. -- looked at. And there was a -- I  
5 think some of the documents that were from the  
6 previous discovery during the 2009 that was  
7 presented by the Bureau. That kind of -- that  
8 kind of information.

9 Q. Have you had occasion to, for example,  
10 review any of the expert reports filed in the  
11 case to date?

12 A. No, I haven't.

13 Q. Have you had any communications with  
14 counsel for the Bureau or the counsel for the  
15 State of Kansas with regard to your direct  
16 testimony?

17 A. Yes. There has been, I think, two or  
18 three with Jim Dubois and I have also talked  
19 with John Draper on several occasions.

20 Q. What have you been told in that regard?

21 A. That they were -- that I would be  
22 probably responding to a deposition and giving  
23 information based on my past experience and  
24 knowledge of my work with the Bureau.

25 Q. What's your understanding of the nature

1 of your direct testimony?

2 A. I'm not sure what you mean.

3 Q. What are the topics you are going to  
4 cover?

5 A. Oh, I think -- I believe there is three  
6 main ones, I think, to do with the history of  
7 the Bureau projects in the basin, the  
8 development of those, and the historical data  
9 and that kind of thing related to those  
10 projects.

11 There was some IMP, integrated  
12 management plan, information that I may have  
13 been involved with during my time working. And  
14 there is a third I'm not recalling anymore  
15 but --

16 Q. Are you recollecting the three topics  
17 that are listed in the Touhy letter?

18 A. That's correct.

19 Q. So for purposes of preparation of your  
20 direct testimony, it's your understanding that  
21 your direct testimony will be limited to those  
22 three areas?

23 A. That's correct.

24 Q. Have you been asked to initiate the  
25 first draft of that testimony or do you

1 understand it will be provided to you?

2 A. I have not at this point been involved  
3 with the preparation of that.

4 Q. When do you expect to see it?

5 A. I understand it will be forthcoming in  
6 the next two, three weeks possibly.

7 Q. Okay. Very good. Do you believe that  
8 Mr. Draper is taking the first crack at that  
9 testimony or Mr. Dubois?

10 A. That I'm not sure that I know the answer  
11 to that yet.

12 Q. Very good. Mr. Swanda, we went through  
13 some these matters in your deposition a few  
14 years ago, but just for a clean record in this  
15 case, could you tell me a little bit about your  
16 personal background?

17 A. Okay. I'll -- I can -- I'll start when  
18 I started with Reclamation. I guess it would  
19 be a good starting point. I began my work with  
20 Reclamation in Huron, South Dakota in a  
21 planning group providing hydrology information  
22 to other planning groups within that office.  
23 And that was in 1980.

24 Q. Let me stop you there. Did you have a  
25 hydrology background from an educational

1           standpoint?

2           A.       Yeah. I have a BS degree in  
3           agricultural engineering from South Dakota  
4           State University with an emphasis in soil and  
5           water. And it included some hydrology type  
6           classes and that.

7           Q.       Okay.

8           A.       And so, yeah, so that was my background  
9           on that. So started with Reclamation in '80 up  
10          in Huron. In '81 I transferred to the McCook  
11          field office in Nebraska as a hydraulic  
12          engineer in the water operations branch is what  
13          it was called at that time.

14                 Basically they -- that office was  
15          working with the -- there was, I believe, 16  
16          dams and reservoirs under the responsibility of  
17          that office and the area office which is in  
18          Grand Island. But most of the operation and  
19          maintenance functions were carried out under  
20          the McCook office. And so at that point in my  
21          job there, I would have been working in the  
22          operations side of that. And that was in '81  
23          working with -- I think there was two other  
24          staff engineers also in the office in that side  
25          of the branch.

1 I did -- in '81 I did become a  
2 registered professional engineer in the State  
3 of South Dakota in '81. Worked in that  
4 capacity up until 1985 where I was assigned the  
5 chief of the facilities maintenance branch in  
6 the same office.

7 Q. Is that separate from the operations  
8 branch?

9 A. Yes. There was an operations side and a  
10 maintenance side. And that office had the  
11 direct responsibility for the operations and  
12 the maintenance of 11 of those dams and  
13 reservoirs and oversight on an additional four  
14 or five at the time.

15 And so in '85, as I became the  
16 supervisor of the maintenance branch, which had  
17 somewhere in the neighborhood of 15 people  
18 probably responsible for maintenance at 11 of  
19 those dams.

20 And worked in that capacity until 1995,  
21 at which time there was a significant contract  
22 renewal effort going on in the Republican River  
23 Basin with all the irrigation districts. I  
24 might mention there is 12 irrigation districts,  
25 I think 14 at the time but now 12, I believe,

1 associated with those dams and reservoirs, so  
2 we worked closely with those.

3 But in '95 there was, I think, six or  
4 seven of those in the Republican were up for  
5 renewal. So the chief of the water operations  
6 branch was assigned to work strictly on that  
7 effort to get that done. So I was at that  
8 point reassigned to the -- as the chief of the  
9 water operations branch, and back into the  
10 branch where I started.

11 And so now I was the supervisor of that  
12 branch responsible for the operations of those  
13 projects. And that did include Harlan County  
14 due to the fact Reclamation is responsible for  
15 the irrigation function in that facility even  
16 though it's a Corps of Engineer facility.

17 And so worked in that capacity until  
18 2001, I believe, and at that time I was  
19 promoted to the McCook -- McCook office  
20 manager, which basically was over all those  
21 functions, operations and maintenance, both of  
22 the jobs I held previously, it was the  
23 individual now over that entire office  
24 structure. And so worked in that capacity  
25 until my retirement in December, the end of

1 December of 2010.

2 Q. And what were your primary  
3 responsibilities as the manager of the McCook  
4 field office?

5 A. It was mainly responsible for the -- for  
6 the overall operations and the maintenance of  
7 those 11 dams and reservoirs and oversight on  
8 the other five that were single purpose  
9 reservoirs in northern Nebraska. And worked --  
10 I mean, it involved everything from safety of  
11 dams at those facilities to the Republican  
12 River Compact activities.

13 But any of the -- working with all of  
14 the irrigation districts. And there is, I  
15 believe, three municipalities and one rural  
16 water district that there were contractual  
17 obligations that Reclamation had. So working  
18 with all those districts and other water users  
19 and coordination with Corps of Engineers on  
20 flood control operations as well as the  
21 activities at Harlan County.

22 Q. You mentioned one of the aspects of your  
23 work was understanding the efforts to comply  
24 with the Republican River Compact, is that  
25 right?

1           A.       That's correct. I was -- since '95 when  
2           I became the chief of water operations through  
3           the rest of my career, I was pretty involved in  
4           the Republican River Compact activities,  
5           providing information at the annual meetings  
6           and attending appropriate meetings or that kind  
7           of thing. And --

8           Q.       What kind of information did you  
9           typically provide at those meetings?

10          A.       Annually there was a section, I believe,  
11          that they always have on the agenda on  
12          federal -- with regard to federal reports. And  
13          typically I would provide the Bureau of  
14          Reclamation report to the RRCA.

15          Q.       And what would that report typically  
16          include?

17          A.       It would involve -- it would involve all  
18          of the operation, operational data, significant  
19          data that occurred at those reservoirs,  
20          especially the Republican River reservoirs and  
21          the Republican River irrigation districts  
22          providing pertinent data and the significant  
23          highlights, that kind of a thing. And  
24          everything from significant events at the  
25          reservoirs and providing delivery data, that

1 kind of thing, to the irrigation districts.

2 Q. Was this technical data or factual  
3 material that --

4 A. It was -- it was data -- for the most  
5 part it was data that typically that office was  
6 responsible for collecting and --

7 Q. Could you give me an example? Are we  
8 talking about, for example, irrigation  
9 deliveries or stuff like that?

10 A. Yeah, it would -- yes, it would involve  
11 the deliveries to the districts, that kind of a  
12 thing, and reservoir data from inflows,  
13 probably releases. You know, there was quite a  
14 bit of actual data that was included. And we  
15 would prepare a report and submit that to the  
16 RRCA for their use. And it included, you know,  
17 just a lot of -- mostly data kind of  
18 information.

19 Q. What was your understanding of how the  
20 RRCA would then utilize that information?

21 A. I think they -- a lot of that I believe  
22 was needed to -- for the engineering committee  
23 to do their work. It was official data that  
24 was required for them. And I know when they  
25 would publish the report in following year,

1 whenever that was, usually that report was  
2 included as an attachment.

3 Q. Did you work closely with the  
4 engineering committee of the RRCA?

5 A. At times we did. There was usually a --  
6 I don't know if it was always that way, but at  
7 one point there was a meeting prior to the  
8 annual meeting, technical meeting I guess they  
9 referred to it as, and typically I would attend  
10 and maybe other members of our staff or area  
11 office personnel would attend, depending what  
12 the topics were.

13 Q. Sure. Did you ever work with the  
14 committee to review its work or to confirm the  
15 accuracy of that work?

16 A. I would say probably not unless it was  
17 something that was related to data that we  
18 provided them, if there was a question on  
19 something. But that was pretty rare that that  
20 happened that we would have to verify something  
21 like that. But that would be probably the only  
22 instance, I think.

23 Q. Sure. Have you ever worked with the  
24 RRCA groundwater model?

25 A. I have reviewed output from it. That

1 would be the extent of it.

2 Q. Is there anyone within Reclamation  
3 during your tenure who was responsible for  
4 actually running the model and determining the  
5 effect of certain inputs into the model?

6 A. I don't think there was. If there was,  
7 it would be somebody in the regional office.  
8 But I don't think there was.

9 Q. And just for the record, the regional  
10 office is the Great Plains regional office, is  
11 that correct?

12 A. That's correct, in Billings.

13 Q. Who might that have been?

14 A. Mark Phillips was the individual at the  
15 time. I think he's since retired also, I  
16 believe. But he was -- and I can't speak to  
17 how much involvement he had.

18 Q. Do you know if he was located in the  
19 hydrology division of the regional office?

20 A. Yes, he was in -- and I can't give you  
21 the name of it, but it was in the same -- same  
22 group, if you will, that people like Gordon  
23 Aycock and those that worked with that kind of  
24 stuff.

25 Q. Did you ever have occasion to work

1 directly with the Washington office on any  
2 matters, the commissioner's office?

3 A. Not directly.

4 Q. If you had a view that you needed to or  
5 felt as though you wanted to express to your  
6 superiors, what would be the typical process  
7 that you would engage in to do that?

8 A. That would be working up through the  
9 chain of command, which my boss was the area  
10 manager in Grand Island.

11 Q. I asked somebody to draw me an  
12 organizational chart of Reclamation. I'd like  
13 you to do the same, to the best of your  
14 ability. And we're not grading on artistic  
15 quality here.

16 MR. DUBOIS: The good news is  
17 it's a curve.

18 Q. (By Mr. Wilmoth) Yeah, and the curve is  
19 pretty low right now. But what I'd like to get  
20 from you is simply your understanding, since  
21 the time you were the McCook field office  
22 manager, of the organization of the Bureau from  
23 the Washington office to the Great Plains  
24 regional office to the Nebraska-Kansas area  
25 office and where you fit into that hierarchy.

1 A. You just want a chart?

2 Q. Yes. Just so you are aware, I'll ask  
3 you to insert some specific names to tell me  
4 where they fit into the organization as we go  
5 forward, so you might want to just leave a  
6 little room for that.

7 So could you just explain that very  
8 briefly to me?

9 A. Okay. The McCook field office at the  
10 time I was there in my last eight, nine years,  
11 I guess it was, I would have been the field  
12 office manager. I don't know if you want me to  
13 write that kind of stuff in there.

14 Q. Yes, I would, please. Thank you.

15 (An off-the-record discussion was held.)

16 Q. (By Mr. Wilmoth) Mr. Swanda, before we  
17 took a break there, I asked you to provide a  
18 quick organizational chart for the Bureau. May  
19 I just take a look at that quickly?

20 A. Sure.

21 Q. Thank you. Thank you very much. Could  
22 you tell me, starting at the bottom of that  
23 chart, with whom you worked directly in the  
24 McCook field office on Republican River  
25 matters?

1 A. At the time I would have worked with and  
2 under my -- and they worked under my direction,  
3 I guess, but Craig Scott.

4 Q. Would you mind just listing those names  
5 for me?

6 A. Craig Scott. He was a -- or is a  
7 hydraulic engineer. And I think he has a  
8 different title now. But he was working there.  
9 Bill Peck, he would have been the chief of the  
10 water operations group it's called now instead  
11 of branch. Mark Rouse.

12 MR. BLANKENAU: Autumn, have you  
13 joined us?

14 MS. BERNHARDT: I have, thank  
15 you.

16 A. Mark works in the water operations group  
17 under Bill Peck. And then other than that, it  
18 would have been secretarial type help or  
19 clerical type help to put reports together or  
20 something like that.

21 Q. (By Mr. Wilmoth) How about in the area  
22 office, were there other folks with whom you  
23 worked directly on Republican River matters?

24 A. There would have been in the Grand  
25 Island office, of course, and there was

1 different people in those jobs during that  
2 tenure, I guess. I'm not sure if we're talking  
3 about the time I was the manager.

4 Q. For the record, that is the period that  
5 I'm concerned about, basically from 2001, I  
6 understand, forward until your retirement.

7 A. Okay. There was in the area manager  
8 positions there -- I believe Ellis Johns was  
9 one. Of course Aaron Thompson. I think Fred  
10 Orr would have been the original one in that  
11 period. The sequence would have been Fred Orr,  
12 Ellis Johns, and Aaron, I believe.

13 There was -- there was a deputy area  
14 manager that worked for the area manager. For  
15 the most part that was Steve Ronshaugen, I  
16 believe, and Brent Esplin after -- after Steve  
17 retired. And that was -- there would have been  
18 on occasion working with someone like Jack  
19 Wergin, possibly. He was in the water  
20 conservation side of things. And so there  
21 would have been occasional working with him on  
22 some of that. But the majority of it was  
23 through the area manager and the deputy area  
24 manager kind of thing.

25 Q. So with respect to communications

1           between the field office and the area office on  
2           Republican River matters, can you tell me who  
3           was primarily responsible for various topics?  
4           For example, did you have a specific person who  
5           provided you with hydrologic analysis or  
6           hydraulic analyses, and did you have a specific  
7           person who informed you about the impact on  
8           various things on contracting activities?

9           A.       In regards to reservoir operations and  
10          numbers and that kind of data related to that,  
11          we would have -- we would have typically got  
12          that from Bill Peck. He was the chief water  
13          operations and responsible for that activity.

14                 Craig Scott, I would have relied on him  
15          quite a bit for preparing reports, that kind of  
16          thing. He was at one time working in the water  
17          operations group also, so very knowledgeable of  
18          that kind of data and information that we would  
19          have relied on that kind of thing for reviews  
20          and whatever. Mark Rouse also would have  
21          provided some data, depending on what we were  
22          looking for. But that's where we went on that.

23                 Anything contractual, contractual  
24          obligations, that kind of thing, probably  
25          worked with Steve Ronshaugen. He was pretty

1 knowledgeable in that area. So between him and  
2 myself -- and of course I worked with the  
3 contracts for the most part of my career there,  
4 with the irrigation districts, that is, I'm  
5 talking about. And so it was kind of a mix of  
6 his knowledge and mine when those kind of  
7 topics were up.

8 And of course ultimately, if there were  
9 questions, we would go to the contracts people  
10 in the regional office and confer with them  
11 whenever we needed.

12 Q. Who are those individuals?

13 A. Recently it's Lynette Smith is the head  
14 of that, and there would have been somebody  
15 prior to that. I can't give you that name  
16 right -- anymore.

17 Q. That's the beauty of retirement, you  
18 don't really have to.

19 So you were involved obviously in the  
20 development of views or opinions about  
21 Nebraska's various integrated management plans  
22 over the course of your tenure at the field  
23 office, weren't you?

24 A. I would have been involved as far as the  
25 knowledge I had and the ability to direct

1 people to look into the various issues and  
2 prepare reports or that kind of thing. With  
3 the -- my history and that kind of thing,  
4 typically we would draft the reports to begin  
5 with and provide them up the line.

6 Q. How would you characterize your  
7 principal responsibility in that regard?

8 A. I would say we would use the knowledge  
9 and experience we had with our surface federal  
10 projects, you know, the long history that was  
11 related to that and the data that we collected  
12 over the many years and the operational  
13 experience that came with that was relied on  
14 quite a bit.

15 Q. And in developing that information or  
16 compiling that information, do I understand  
17 that you would have relied on those individuals  
18 in the way that you earlier described to me?

19 A. That's correct.

20 Q. If I understand correctly, you would  
21 kind of assemble this opinion and you would  
22 give it to the next level at the area office,  
23 is that correct?

24 A. That's -- that's typically how it would  
25 have worked. We would have prepared a draft

1 and then provided it up the -- up the line.

2 Q. How common was it for you to receive  
3 feedback the other direction?

4 A. It was -- it was pretty common, I would  
5 say. I mean, there would be -- there would be  
6 certain amount of back and forth. And we  
7 worked -- one other individual we did work with  
8 quite a bit would have been Gordon Aycock in  
9 the regional office as far as -- and if we were  
10 preparing a document of some sort.

11 Q. What role did Mr. Aycock serve in that  
12 capacity?

13 A. He would -- he would be probably from a  
14 technical -- significant technical in that he  
15 had -- he had 30-plus years of experience in  
16 not only our -- knowing our projects but also  
17 others, and he was involved in the compact  
18 settlement activities back in the late '90s.  
19 So he brought to the table kind of the same  
20 knowledge base that I would have had.

21 Q. Okay. So then if I understand it, you  
22 would provide some analyses, they would go up  
23 to the area office and at that point I guess  
24 would they be shared with Mr. Aycock and then  
25 brought back to you? Or did you just work

1 directly with Mr. Aycock and then generate a  
2 recommendation to the area office?

3 A. Probably we would have put -- typically  
4 we would have worked -- put a document  
5 together, let's just say a document of some  
6 sort, and we would have maybe, depending on  
7 what -- what the topics were, we probably would  
8 have conferred with him if we felt he could add  
9 to that at the time prior to moving it up the  
10 line.

11 Once we had something we felt was  
12 pretty -- pretty good, then it was -- it was  
13 shared up the line and waiting for direction on  
14 where to go with it.

15 Q. So let's take this document then. For  
16 sake of these questions we can assume that it's  
17 a draft view or comment on an integrated  
18 management plan, any particular plan. Again,  
19 I'm less interested in the substance than the  
20 process.

21 The document moves from your shop to the  
22 area office. Who in the area office then  
23 typically would have a contribution at that  
24 point?

25 A. I think at that point it would have been

1 the area manager and/or the deputy area manager  
2 for the most part.

3 Q. And how would you describe the nature of  
4 those contributions? Were those technical  
5 reviews or editorial reviews, policy reviews?

6 A. I would say it could have been a  
7 combination of all, of all, possibly, just  
8 depending what the nature of the --

9 Q. Sure.

10 A. But certainly from -- certainly the  
11 policy and the editorial type thing, and that  
12 would have been the strongest part of it, I  
13 would guess.

14 Q. So the document originates at the McCook  
15 field office, it moves its way through the  
16 Nebraska-Kansas area office, and then I assume  
17 it's transmitted from there to the Great Plains  
18 regional office, is that right?

19 A. That's typically how it would have been,  
20 yes.

21 Q. And who from the regional office would  
22 have been involved in contributing to that type  
23 of document?

24 A. Typically it would have -- you know,  
25 assuming the Gordon Aycocks of the world

1           probably were involved, depending what the  
2           document would have been, but typically they  
3           would have had some involvement prior to that.  
4           But certainly once it was sent up to there, it  
5           would have been the regional director and his  
6           assistants or whoever he felt needed to then  
7           see it.

8           Q.           And earlier I asked how common it would  
9           be to receive direction or comments from the  
10          area office. How common would it have been to  
11          receive similar contributions from the regional  
12          office?

13          A.           I think fairly common. It would have  
14          been any significant -- if it's testimony or  
15          anything like that that was going to go out, we  
16          would get feedback from them.

17          Q.           What was the general nature of that  
18          feedback? The same question, was it technical  
19          or policy or otherwise?

20          A.           Well, I think it could have been all of  
21          the above, too, because the regional director  
22          is an engineer from the technical and having  
23          been at other projects and fairly knowledgeable  
24          in that area, but certainly policy and where it  
25          went from there, he would --

1 Q. Was it typical for the regional director  
2 to review your technical work?

3 A. He would certainly look at it, be aware  
4 of it. Typically he wouldn't be knee deep in  
5 it, that's for sure, but he certainly would  
6 have a take on the conclusions that we possibly  
7 were drawing or presenting.

8 Q. Do you ever recall having a disagreement  
9 about the conclusions being presented?

10 A. No, I don't.

11 Q. And then the document that we're talking  
12 about, the type of document we're talking  
13 about, would that ever ascend to the Washington  
14 office?

15 A. I believe, and I can't speak for sure on  
16 that, but I believe that would have been -- the  
17 regional director would have shared especially  
18 anything that was going to be put out at a  
19 hearing or a testimony kind of a thing, it  
20 certainly would have been shared, I think.

21 Q. But just so I understand, your office  
22 did not typically communicate directly with the  
23 commissioner, is that correct?

24 A. No, that would not be a good thing.

25 Q. You didn't want to do that?

1 A. No.

2 Q. If you did, it was a bad deal?

3 A. Yeah.

4 Q. Yeah. I get it.

5 A. Didn't mean we weren't occasionally on a  
6 conference call or something with the  
7 commissioner, but it's one of those you spoke  
8 when you were spoken to.

9 Q. Sure. We're all familiar with those  
10 conversations. Okay. Thank you very much.

11 A. Yeah.

12 Q. Could we go ahead and mark this as  
13 Exhibit 6 and then I'd like to make some copies  
14 for counsel.

15 (Exhibit No. 6 marked for  
16 identification.)

17 (Recess taken at 8:44 a.m. to 8:51 a.m.)

18 Q. (By Mr. Wilmoth) Mr. Swanda, I'd asked  
19 you earlier a little bit about your personal  
20 background and we kind of jumped right into  
21 the -- into your professional work background.  
22 Where are you from originally?

23 A. I'm a native of South Dakota.

24 Q. And did I understand you went to South  
25 Dakota State?

1 A. That's correct.

2 Q. And you obtained a bachelor's of  
3 science?

4 A. Yes, in agricultural engineering.

5 Q. Do you have any additional educational  
6 training?

7 A. That would pretty much sum it up, I  
8 think. Other than, you know, there would have  
9 been training courses, that kind of thing, off  
10 and on throughout my career that covered  
11 various things that I may have attended.

12 Q. That might have been sponsored by the  
13 Bureau?

14 A. Yeah, could have, or other agencies or  
15 whatever.

16 Q. And what did you do prior to joining the  
17 Bureau?

18 A. I worked -- started out after college  
19 with the South Dakota Department of Natural  
20 Resources.

21 Q. In what capacity did you serve there?

22 A. I was an engineer with them in the -- I  
23 think it was the wastewater end of things, if  
24 you will, dealing with all the municipalities  
25 and that kind of thing and wastewater treatment

1 and those kind of issues.

2 Q. On a regulatory side?

3 A. Yes, to some extent. And it also  
4 involved -- at the time there was quite a bit  
5 of money put into construction of new  
6 facilities, and so it was a combination of  
7 those -- those things. I worked in the  
8 permitting program to start with when I was  
9 with them.

10 Q. And then did you have any positions that  
11 you occupied before you went to Reclamation  
12 from there?

13 A. No. It was from there to Reclamation,  
14 yes.

15 Q. I'd like you to turn to Exhibit 4, if  
16 you could, please. Exhibit No. 4. It's this  
17 one. Could you turn to the second page,  
18 please. And at the top there you'll see a  
19 series of what I characterize as limitations or  
20 perhaps topics, but these are what I understand  
21 to be the areas in which you will be  
22 testifying. Do you see those?

23 A. Yes.

24 Q. And the first one speaks about documents  
25 of the initiation and operations of the RRB

1 Reclamation projects, is that right?

2 A. Yes.

3 Q. Could you just explain for me your  
4 understanding of this topic or limitation?

5 A. I think what this probably deals with is  
6 there are numerous definite plan reports, they  
7 are called, that were put into place or maybe a  
8 better word were developed back prior to the  
9 construction of the federal project. It was  
10 after -- these plans were developed after the  
11 compact was signed and put into place.

12 And it was documents that looked at the  
13 various reaches of the Republican River and  
14 laid out the federal projects and how they  
15 would fit into the compact allocations and how  
16 these projects would work and how they were  
17 planned. And so there are numerous documents.  
18 Really there is one -- there should be one for,  
19 and is, I believe, for each federal project.  
20 And they are pretty substantial in nature.  
21 They involve everything from economics to the  
22 hydrology, water supply side of things.

23 But basically the general philosophy  
24 that Reclamation looked at at the time on how  
25 the projects would work and fit in and work

1 from the upstream to the downstream areas.

2 And so there is those documents. And  
3 then I think -- which would have been planning  
4 type documents for the projects. And then  
5 the -- I'm not sure if this is referring to,  
6 but certainly there would have been significant  
7 operations type documents, annual operating  
8 plans that came into being once the projects  
9 were in place that documented the actual  
10 operation of the project on an annual basis.  
11 Each year there was a document put together,  
12 prepared by the Bureau.

13 Q. And bear with me here. Some of these  
14 questions may seem inane, but I'm trying to  
15 understand the nature of the limitations that  
16 you are under. So if I ask you whether a  
17 document like that exists, can you tell me the  
18 answer to that question?

19 A. I believe I can.

20 Q. Okay. And if I ask you to interpret the  
21 document or tell me what it means, can you  
22 answer that question?

23 MR. DUBOIS: I think that would  
24 probably be -- if you are asking about  
25 policies, I think that's what's prohibited

1 under number six. When you get into meaning,  
2 it seems to me that that's interpretation of --  
3 I guess it depends on the question. To the  
4 extent you are asking policy questions, that's  
5 one thing. I'm trying to -- yeah, I'm trying  
6 to --

7 MR. WILMOTH: I know.

8 MR. DUBOIS: -- puzzle through  
9 this to some degree as well. But, you know, I  
10 guess it's going to depend on the nature of the  
11 question as far as what -- you know, what  
12 something means as far as data and input and  
13 things like that versus what policy does that  
14 reflect.

15 MR. WILMOTH: Sure.

16 MR. DUBOIS: If you are into the  
17 policy questions, it seems like that is  
18 prohibited by number six.

19 Q. (By Mr. Wilmoth) So for example, if we  
20 were to take a definite plan report, have a  
21 look at that, you certainly could tell me that  
22 that report exists and you could tell me that  
23 it says what is printed on the page, I assume.

24 But if I asked you to tell me whether or  
25 not that report meant that Reclamation believed

1           it would always have a full supply of water,  
2           you could not do that?

3                         MR. DUBOIS: I think that's  
4           correct. Because that would -- that would  
5           require -- seems to me that that would require  
6           more technical professional interpretation and  
7           be more in the line of expert opinion at that  
8           point.

9           Q.           (By Mr. Wilmoth) Okay. Okay. So aside  
10          from the definite plan reports, Mr. Swanda, and  
11          the annual operating plans, are there any other  
12          specific what I will categorize as historical  
13          reports with which you are familiar that you  
14          think you would rely on to facilitate your  
15          testimony in the case?

16          A.           And you are asking not just Reclamation  
17          reports, correct?

18          Q.           Yes. Any -- again, what I will  
19          characterize as a historical report concerning  
20          the initiation and operations of the project.

21          A.           Yeah, I would -- in addition to those  
22          what I referred to already, there would have  
23          been -- a good example would be USGS stream  
24          flow data that existed, for example. There  
25          would have been not just USGS but also I

1 believe the Nebraska Department of Natural  
2 Resources, and Kansas as well, I think, in the  
3 Republican that have stream gauging  
4 responsibilities. We would utilize that kind  
5 of data to the extent it was available.

6 There was -- you know, we prepared  
7 reports that really documented all of the  
8 discharges into canals and farm use type  
9 records of water and anything that's especially  
10 required. And a lot of it's required by the  
11 states to prepare, responsibility to do so.

12 There would have been precip data from  
13 the National Weather Service, that kind of  
14 thing, and Reclamation provided that to them as  
15 well. But anything that would have been  
16 germane to the federal projects, we probably  
17 would have utilized if we felt it was  
18 necessary.

19 Q. Can you characterize your understanding  
20 or views of the initiation and operations of  
21 the projects just in a very general sense?

22 A. I guess I would rely on what was  
23 documented in the definite plan reports and,  
24 you know, there is numerous times we use those  
25 as a reference as to what was envisioned from

1 the federal projects.

2 And I believe throughout those various  
3 documents they envisioned that the federal  
4 projects would fit within the compact  
5 allocations and not cause any violations. They  
6 were planned as such.

7 And the projects would operate pretty  
8 much on the natural flows and supplement those  
9 with storage water from the reservoirs. That  
10 was the basis for building the reservoirs. And  
11 the subsequent return flows would then be  
12 utilized downstream as a supported stream flow  
13 and inflows to the downstream reservoirs. So  
14 that generally was the philosophy in those.

15 Q. Now, let me ask you about the second  
16 limitation in the letter. The syntax is a  
17 little odd, but can you just explain your  
18 understanding of that limitation?

19 MR. DUBOIS: Are you looking at  
20 number two or number three? The first one is  
21 not really a limitation.

22 MR. WILMOTH: Number two. Okay.  
23 The one I'm interested in is document  
24 concerns -- I'm not sure if that's a verb or a  
25 noun, but document concerns of Reclamation

1 regarding groundwater use above Reclamation  
2 projects based on his own personal experience.

3 MR. DUBOIS: I'm sorry.

4 A. So 1 B you are referring to, right?

5 Q. (By Mr. Wilmoth) Yes. Could you just  
6 understand your -- excuse me -- explain your  
7 understanding of that limitation?

8 A. Well, I think what it's saying to me is  
9 based on my own personal experience during the  
10 time I was associated with federal projects, I  
11 would be willing to -- or I would be able to  
12 document those concerns as they related to  
13 groundwater use.

14 Q. Does that mean you can -- sorry.

15 MR. DUBOIS: I'm guessing that  
16 should have been maybe documented concerns, you  
17 know.

18 MR. WILMOTH: Well, that was my  
19 next question.

20 MR. DUBOIS: I'm not sure  
21 because I didn't write this. But it just seems  
22 like it's sort of structurally in that sentence  
23 it would then make sense.

24 MR. WILMOTH: That was my next  
25 question was whether --

1 MR. DUBOIS: Documented  
2 concerns.

3 MR. WILMOTH: -- whether the  
4 concern had to be written down somewhere, too?

5 MR. DUBOIS: I think so.

6 MR. WILMOTH: Okay. Okay. So  
7 if the -- just for the clarity of our  
8 conversation, we would only be interested in  
9 discussing and allowed to discuss concerns that  
10 were reduced to writing, is that your  
11 understanding? Either Mr. Swanda or  
12 Mr. Dubois?

13 MR. DUBOIS: I think that's -- I  
14 mean, just -- Tom, I think that's correct  
15 because if it was not documented stuff then it  
16 would be asking for his expert opinion --

17 MR. WILMOTH: Okay.

18 MR. DUBOIS: -- on undocumented  
19 stuff --

20 MR. WILMOTH: Gotcha.

21 MR. DUBOIS: -- and therefore we  
22 follow that. So that's why documented seems to  
23 make sense in the context of all the rest of  
24 the limitations.

25 MR. WILMOTH: All right. And so

1 I assume that we really have the same  
2 limitation then as the first limitation, we  
3 could inquire about whether a document exists  
4 and whether it says something, but insofar as  
5 there is an interpretive element to what it  
6 means and that interpretation involved some  
7 expert view, that would be out of bounds?

8 MR. DUBOIS: I believe so, yes.

9 MR. WILMOTH: All right.

10 MR. DUBOIS: You could ask, you  
11 know, just -- I think that it would be  
12 legitimate to ask what went into that document.

13 MR. WILMOTH: Sure.

14 MR. DUBOIS: But the  
15 interpretation of the technical aspects is both  
16 beyond what, I think, that Mr. Draper endorsed  
17 Mr. Swanda for as far as a witness and  
18 correspondingly beyond the limitations of  
19 Touhy.

20 MR. WILMOTH: Thank you.

21 MR. DUBOIS: And Touhy, by the  
22 way, is T-O-U-H-Y.

23 MR. WILMOTH: So just to bring  
24 this to a head and kind of conclude it, the  
25 third limitation talks about document concerns

1 of Reclamation regarding Nebraska's integrated  
2 management plans up to the time of his  
3 retirement. I assume we have the same answer  
4 to the same set of questions?

5 MR. DUBOIS: And I suspect that  
6 that probably should also be documented, or  
7 they were at least shooting at documents  
8 related to those things.

9 MR. WILMOTH: Okay, thank you  
10 very much.

11 Q. (By Mr. Wilmoth) So taking a specific  
12 example, Mr. Swanda, were you involved in  
13 developing Reclamation's testimony on the  
14 integrated management plan that was submitted  
15 in June of 2010?

16 A. I believe I would have been, yes.

17 Q. And so you can tell me what went into  
18 the development of those comments, direct?

19 A. I believe that's correct.

20 Q. But if I were to ask you about some  
21 technical aspect of those comments, you could  
22 not testify to that, correct?

23 A. I believe that's correct.

24 Q. Mr. Swanda, I have a series of documents  
25 here that I'd like to work through with you.

1           The majority of these, if not all of them, were  
2           provided to us as a document -- part of a  
3           document request under the Touhy letters that  
4           we sent.

5           A.       Okay.

6           Q.       And they all or nearly all of them come  
7           from an electronic mail file that appears to  
8           have you listed as the sender. So that's the  
9           context in which these arise.

10                               (Exhibit No. 7 marked for  
11                               identification.)

12          Q.       (By Mr. Wilmoth) I realize that it's  
13          been some years, and at least a few months of  
14          retirement which probably counts as another ten  
15          years, since you last maybe laid eyes on these,  
16          so I want you to take plenty of time and have a  
17          look at them and get familiar with them.

18                       Once you've had a moment to review this,  
19          could you just tell me what this document  
20          represents?

21          A.       Okay. Could you repeat the question?

22          Q.       Could you just tell me what this  
23          document is? What does this kind of document  
24          represent? Is this a standard form document?

25          A.       Yeah, it is -- it's a briefing draft,

1 redline strikeout type draft briefing paper,  
2 apparently for the commissioner. And it's on  
3 the Republican River compact lawsuit settlement  
4 at the time.

5 Q. If you look at the first page it appears  
6 that Mr. Aycock prepared the redline strike.  
7 Would that have been a fairly common  
8 occurrence?

9 A. How I would interpret this is I'm not  
10 sure who would have prepared the initial  
11 version of this. And I think from what I would  
12 recall is that Gordon would have probably been  
13 sending it. If this is showing up on my email,  
14 I probably received his comments back on this  
15 briefing paper, and so I'm not sure there is  
16 some changes in here. But that would have been  
17 transmitted by me after probably our review in  
18 the McCook office, transmitted from me to Steve  
19 Ronshaugen who was either the deputy area  
20 manager or acting area manager. He was in both  
21 roles at some point in time and I don't recall  
22 the time period there.

23 Q. So is this a kind of typical  
24 communication along the lines of one we  
25 discussed earlier today where you all kind of

1 on the technical side would provide some work  
2 and then move it up the chain to the area  
3 office?

4 A. That's correct. And depending on  
5 what -- what was going on at the time related  
6 to this activity, someone maybe felt that this  
7 was a typical briefing paper to keep the  
8 commissioner up to date on what was going on.  
9 So occasionally we'd probably take the same one  
10 that we had before and update it with the  
11 current activities.

12 Q. Okay.

13 A. And then work it up the chain.

14 Q. We have got a number of these that I'd  
15 like to work through with you, Mr. Swanda.  
16 This will be Exhibit 8.

17 (Exhibit No. 8 marked for  
18 identification.)

19 Q. (By Mr. Wilmoth) And again, I realize  
20 that it's been some time since you looked at  
21 these, so feel free take the time you need to  
22 familiarize yourself with these.

23 A. Okay.

24 Q. Mr. Swanda, the -- there is a  
25 description there in the purpose of the paper

1 at the top of the briefing paper itself. Do  
2 you see that?

3 A. Yes.

4 Q. And the purpose as stated is the  
5 protection of surface water interests in the  
6 Republican River Basin, Nebraska and Colorado.

7 What was the purpose of this particular  
8 briefing paper, do you recall?

9 A. I think the purpose, from just looking  
10 at it, it was -- it was for Mike Ryan, who is  
11 regional director, to provide information in a  
12 briefing to Karl Wirkus, who was, as indicated,  
13 deputy commissioner of operations in the  
14 Washington office.

15 Q. So was the typical objective of these  
16 papers just informational or did they seek some  
17 action?

18 A. I think it -- from what I recall it  
19 would -- the intent is to keep the Washington  
20 office up to date on the current status of  
21 whatever was contained in the paper, briefing  
22 paper.

23 Q. And do you know what the Washington  
24 office would then do to utilize that  
25 information? How would that information be

1 utilized is a better question?

2 A. I don't know that I can speak to it. To  
3 me, as far as I know, it would be for an  
4 informational thing for them to be on top of  
5 the issue.

6 Q. A number of these papers, as I'm sure  
7 you know, have recommendations in them. Do you  
8 recall whether those recommendations were ever  
9 accepted, as a general matter, I'm not asking  
10 about any particular recommendation, but --

11 A. I think this paper is -- the reason we  
12 would have had it, it was a final -- it was a  
13 final briefing paper, so then that was -- I  
14 assume it was -- it was accepted to the extent  
15 they used it for whatever purpose once they had  
16 it. It's a final version of it.

17 Q. And is this paper a document that  
18 characterizes or documents concerns of  
19 Reclamation regarding groundwater use?

20 A. I would say it does to the extent that  
21 it was an internal document to the  
22 commissioner.

23 Q. And could you --

24 A. Or is one of his --

25 Q. I'm sorry.

1 A. Or to the individual that works for the  
2 commissioner.

3 Q. And could you take a look at the graphic  
4 on the last page?

5 A. Yeah.

6 Q. Do you recall having input on that  
7 document, on that graphic, excuse me?

8 A. I wouldn't have personally generated  
9 this, but it would have been generated at  
10 probably my direction is what I would recall  
11 about it. Someone else would have put it  
12 together.

13 Q. Can you tell me what this graphic is  
14 intended to articulate?

15 A. I believe what it captures --

16 Q. Take a breath.

17 MR. DUBOIS: I'm trying to  
18 figure out -- I'm trying to figure out the  
19 question and how far it's going. You know, I  
20 apologize, this is the -- this is -- you  
21 carefully crafted the question to be on a fine  
22 edge there of what does it say versus -- I  
23 guess the question, are you asking what on the  
24 face of the document the information is, or are  
25 you asking him for an interpretation of the

1 information? I'm trying to figure out -- I'm  
2 trying to let this go as far as it can go --

3 MR. WILMOTH: Sure, I  
4 understand.

5 MR. DUBOIS: -- without hitting  
6 into it. So, you know, I'll let you go ahead  
7 and start down the path, but I'm trying to keep  
8 you out of trouble, too, Marv, stay within the  
9 limitations.

10 MR. WILMOTH: Why don't you let  
11 me see if I can ask a couple different  
12 questions here.

13 MR. DUBOIS: Thank you.

14 Q. (By Mr. Wilmoth) Can you tell me on the  
15 face of the document what it depicts?

16 A. I think it depicts the moving average,  
17 which is a trendline for the total inflows into  
18 the federal projects. Can't tell you -- it  
19 says all reservoirs, not which ones  
20 necessarily, but the inflows into those  
21 projects and the trendline over time for both  
22 of the construction of wells in the basin.

23 Q. Can you tell me what went into the  
24 development of this particular graphic?

25 A. I believe on the inflow, that would have

1 included the computed inflows by Reclamation  
2 into all of those reservoirs. And the number  
3 of wells, I believe that would have been  
4 obtained from -- from NRD data, I believe.

5 Q. Can you tell me when the last  
6 Reclamation reservoir was constructed?

7 A. I think it was in '64, somewhere in  
8 there, Norton. Red Willow was in the early  
9 '60s also. Those would have been the two most  
10 recent.

11 (An off-the-record discussion was held.)

12 A. Norton Dam, Keith Sebelius Lake. And  
13 Red Willow Dam, Hugh Butler Lake.

14 Q. (By Mr. Wilmoth) And is this what is  
15 colloquially referred to as the X graph? Have  
16 you heard that term before?

17 A. Yeah. Who created that term, I'm not  
18 sure, but it's similar to that. It's -- it's  
19 the same data but typically the -- what you  
20 refer to as the X graph is usually related to  
21 specific projects and the same kind of data.

22 Q. And you mention that this would have  
23 been taken from inflow calculations by the  
24 Bureau. Can you explain to me how those  
25 calculations are made?

1           A.       Yeah, they -- of course there is  
2           typically -- there is stream gauges above the  
3           reservoirs. But what Reclamation does is  
4           computes an inflow and that's using the change  
5           of reservoir content, say month to month, and  
6           factoring in the evaporation that occurred in  
7           that given month, accounting for that and the  
8           rainfall that may have fell over the reservoir.  
9           And so using -- using average of the surface  
10          area of the reservoir to get a -- to work the  
11          evaporation into that as to the effect that had  
12          on it.

13                 So anyway, typically Reclamation would  
14          have done computed inflow every month on all  
15          the reservoirs we were responsible for going  
16          back in time probably from when the dam was  
17          constructed.

18          Q.       This is likely to draw an objection, but  
19          is it the Bureau's position that wells in  
20          Nebraska are adversely impacting Reclamation  
21          projects?

22                   MR. DUBOIS: You are right, it  
23          will draw an objection. I think that that goes  
24          beyond the -- it bumps into limitation number  
25          six. He's not authorized to testify as to

1 official policies for Reclamation.

2 Q. (By Mr. Wilmoth) And this may draw a  
3 similar objection, but from a technical  
4 perspective does this graphic indicate to you  
5 that groundwater pumping in Nebraska is  
6 adversely affecting Reclamation projects?

7 MR. DUBOIS: Yes, that draws an  
8 objection. I will object in that I think that  
9 that is asking actually for expert testimony,  
10 opinion testimony.

11 MR. WILMOTH: Okay, thank you.  
12 This will be Exhibit No. 9.

13 (Exhibit No. 9 marked for  
14 identification.)

15 Q. (By Mr. Wilmoth) Mr. Swanda, could you  
16 just have a look at that document? Go ahead  
17 and read through it and let me know when you  
18 have done so.

19 A. Okay.

20 Q. We earlier spoke about feedback received  
21 from offices higher up the org chart, if you  
22 will. Is this the kind of feedback that would  
23 be typically received like that?

24 A. Yes. I think what's starting at the  
25 bottom and moving to the top is how it would

1           have happened. But it would have been a  
2           request from the top down through the regional  
3           office to the area manager and to my --

4           Q.       That's Mr. Thompson in this case?

5           A.       That's correct.

6           Q.       Okay. And Mr. Thompson is forwarding  
7           that feedback to you, is that right?

8           A.       That's correct, to answer the questions,  
9           is how I read this.

10          Q.       Do you recall this general conversation  
11          or this general topic?

12          A.       Just -- just very generally. I mean, I  
13          do recall this -- this thing. But that would  
14          be -- there was a lot of -- a lot of traffic  
15          that come and went regarding all kinds of  
16          things that I'm past generally remembering.

17          Q.       So if you look toward the bottom there,  
18          two lines up, you'll see what I interpret to be  
19          Mr. Ryan's direction to include in the briefing  
20          paper a statement that Nebraska and Colorado  
21          are not in compliance with the compact. Do you  
22          see that?

23          A.       Yes.

24          Q.       Is my inference correct?

25          A.       That is what he appears to be pointing

1 out.

2 Q. And are you familiar with the RRCA  
3 accounting procedures?

4 A. Yes, generally speaking.

5 Q. Do you know whether or not Nebraska and  
6 Colorado were in compliance with the compact in  
7 2009?

8 A. I do not remember. Or do not know.

9 Q. Do you think that at one time you knew  
10 and you just don't remember today? Or would  
11 you not have been familiar with that fact?

12 A. Well, I think what I remember is that a  
13 lot of the accounting was not completed after a  
14 point in time and there may not have been  
15 numbers to judge that. And I don't recall if  
16 2009 was one of those years, but --

17 (Exhibit No. 10 marked for  
18 identification.)

19 Q. (By Mr. Wilmoth) This is Exhibit 10.  
20 Would you please have a look at this document,  
21 Mr. Swanda, and familiarize yourself with it?

22 A. Okay.

23 Q. Do you recall working on this paper?

24 A. I recall the paper now, but I'm not sure  
25 my role in it at the time.

1 Q. Could you remind me of where in the  
2 organizational chart Mr. Esplin sat at this  
3 time?

4 A. He would have been the deputy area  
5 manager under the area manager.

6 Q. In the Nebraska-Kansas area office?

7 A. That's correct.

8 Q. Do you have any idea who would have  
9 asked him to, quote, unquote, strengthen the  
10 recommendation in the latest briefing paper?

11 A. There is two possibilities. It would be  
12 conjecture on my part, but it would either be  
13 the regional director or the commissioner's  
14 office.

15 Q. And if you look at the last sentence of  
16 the recommendation, it talks about initiating  
17 legal action. Do you see that sentence?

18 A. Yes.

19 Q. Do you know whether that was ever  
20 pursued?

21 A. Not to my knowledge.

22 Q. Do you know whether the Bureau at the  
23 time of your work on this memo asked the  
24 justice department to initiate litigation on  
25 behalf of the Bureau projects?

1 A. Not to my knowledge.

2 Q. I notice at the top of the paper,  
3 Mr. Swanda, the briefing is for the deputy  
4 commissioner. Do you see that?

5 A. Yes.

6 Q. And it was prepared by, at the bottom,  
7 Mr. Ryan?

8 A. Yes.

9 Q. Can we infer from that then that the  
10 commissioner's office probably did not ask for  
11 the recommendation to be strengthened, since it  
12 was to them? Or did they often ask for those  
13 types of documents to be revised?

14 A. I don't think I can answer that.

15 (Exhibit No. 11 marked for  
16 identification.)

17 Q. (By Mr. Wilmoth) This is Exhibit 11.  
18 Could you take a moment and see if you can  
19 recall working on this paper? And I should  
20 say, Mr. Swanda, if at any point you'd like to  
21 take a few minutes and use the facilities or  
22 otherwise, just let me know.

23 A. Okay.

24 MR. DRAPER: What's the exhibit  
25 number on this?

1 MR. WILMOTH: 11.

2 A. Okay.

3 Q. (By Mr. Wilmoth) Mr. Swanda, if you look  
4 at the background section in the paper itself,  
5 the first sentence reads, Nebraska remains out  
6 of compliance with the compact, et cetera,  
7 et cetera.

8 Do you know whether that was true in  
9 March of 2010?

10 MR. DUBOIS: Calls for a legal  
11 conclusion --

12 Q. (By Mr. Wilmoth) Do you know --

13 MR. DUBOIS: -- that's not  
14 authorized by his testimony.

15 Q. (By Mr. Wilmoth) Do you know who would  
16 have supplied the information needed to draw  
17 that conclusion?

18 MR. DUBOIS: Actually, just -- I  
19 guess I'll start by objecting that he hasn't --  
20 you haven't asked him whether or not he's  
21 familiar, what his role is with regard to the  
22 briefing paper or his input to establish that  
23 he would know any of that. So you can make it  
24 easier and maybe we can back up and start with  
25 that and run from there.

1 Q. (By Mr. Wilmoth) Are you familiar with  
2 this particular paper, Mr. Swanda?

3 A. I believe generally I am, yes.

4 Q. Did you have input into this paper? It  
5 might help you to look at the first page of the  
6 transmission.

7 A. The reason I'm hesitating is because how  
8 this is laid out, this is -- this is coming  
9 back down the line, so I -- this does not  
10 necessarily indicate to me that I would have  
11 initiated this going up the line.

12 Q. Okay.

13 A. What I did here was I shared this with  
14 Craig Scott on my staff after receiving it. In  
15 my mind it's a final briefing paper, so how it  
16 came -- came into being I'm a little hesitant  
17 to speak.

18 Q. So you don't recall working on it  
19 directly? You do recall receiving it but not  
20 working on its content?

21 A. That's correct. And there was numerous,  
22 numerous briefing papers, that's -- to remember  
23 every one is kind of difficult.

24 Q. So would it have been typical for  
25 someone either in the area office or the

1 regional office or I suppose the commissioner's  
2 office to send you briefing papers?

3 A. It would have been typical to receive  
4 the final version of a briefing paper on ones  
5 that we would have had some input on or maybe  
6 drafted the original ones.

7 Q. So it's possible that you might have  
8 drafted this?

9 A. That's correct. Me or my staff or all  
10 of the above, I guess.

11 Q. Do you have an opinion based on that as  
12 to whether or not you participated in  
13 developing that first statement in the  
14 background section?

15 A. Could you say state the question again,  
16 please?

17 Q. Do you see the first statement in the  
18 background section --

19 A. Yes.

20 Q. -- which states Nebraska remains out of  
21 compliance with the compact? Did you  
22 participate in facilitating the arrival at that  
23 conclusion, did you help to draw that  
24 conclusion?

25 A. I don't know that I can answer that due

1 to the fact that I'm not 100 percent sure I  
2 would have worked on this particular briefing  
3 paper.

4 Q. Can you tell me as a general matter who  
5 within your office or the offices up the chain  
6 of command would have the knowledge base that  
7 would allow them to draw that conclusion?

8 A. That would have been myself, Craig  
9 Scott, Gordon Aycock in the regional office.

10 Q. How about Mr. Ryan?

11 A. I don't know if I can speak to if he  
12 could or could not have drawn that conclusion.

13 Q. What is your basic familiarity with the  
14 RRCA accounting procedures?

15 A. My familiarity would be -- would have  
16 been looking at the outputs from the accounting  
17 and the inputs as well, you know, the data that  
18 goes in and the results that come out to the  
19 extent they were available to Reclamation.

20 Q. So you don't necessarily crunch the  
21 numbers through the accounting procedures or  
22 you did not in your capacity?

23 A. That's correct.

24 Q. Did anyone within your shop do that?

25 A. On occasion if we were reviewing that

1 information, someone like Craig Scott would  
2 have looked through that data.

3 Q. Okay.

4 A. And I as well, but typically he would  
5 have done the heavy lifting on that.

6 (Exhibit No. 12 marked for  
7 identification.)

8 Q. (By Mr. Wilmoth) This will be  
9 Exhibit 12. Could you please take a look at  
10 that document, Mr. Swanda, tell me if you have  
11 any recollection of working on that document?  
12 This is about two months before your  
13 retirement, I think.

14 MR. DUBOIS: When you say that  
15 document, do you mean the email or the  
16 attachment?

17 MR. WILMOTH: I'm talking about  
18 the attachment. But I think the email speaks  
19 for itself.

20 A. Okay.

21 Q. (By Mr. Wilmoth) Did you work on this  
22 paper?

23 A. I believe that I would have, yes.

24 Q. And were you responsible for drafting  
25 the initial recommendation that Reclamation

1 support Kansas's petition in this case?

2 A. I would have been involved in the  
3 original drafting. As to -- I believe this is  
4 likely a final version of it. As to if that  
5 would have been my contribution to this or not,  
6 that I couldn't -- I don't recall that.

7 Q. Do you remember what contributions you  
8 made specifically?

9 A. Not really. I would have -- like I  
10 mentioned earlier, myself or staff would have  
11 been involved, likely draft something to begin  
12 with.

13 (Exhibit No. 13 marked for  
14 identification.)

15 Q. (By Mr. Wilmoth) Let me give you what  
16 we'll mark as Exhibit 13. Please have a look  
17 at this document and tell me if you recognize  
18 it.

19 A. Okay.

20 Q. Do you recognize this document?

21 A. I believe I'm generally familiar with  
22 it, yes.

23 Q. Did you participate in drafting the  
24 document?

25 A. I would have been -- yes, I would have

1 participated in some aspect of it.

2 Q. And when did you retire?

3 A. December 31st, 2010.

4 Q. So this is about six weeks prior to  
5 that, is that right?

6 A. That's correct.

7 Q. And if you look at the background  
8 section again it states that Nebraska remains  
9 out of compliance with the Republican River  
10 Compact. Do you see that?

11 A. Yes.

12 Q. Do you know who was responsible for  
13 providing the analysis to support that  
14 statement?

15 A. I do not right off.

16 Q. Do you know whether it would have been  
17 someone in your office or someone in another  
18 office?

19 A. It could have been someone in my office  
20 or the regional office, either or both. There  
21 would have been a review by most parties  
22 involved.

23 Q. As you sit here today do you have an  
24 opinion as to whether that statement was true?

25 MR. DUBOIS: Calls for an expert

1 opinion. I'll object.

2 Q. (By Mr. Wilmoth) Do you recall any  
3 discussion at the time of this briefing  
4 surrounding that statement?

5 A. No, I do not.

6 Q. Very early in your testimony you  
7 explained that sometimes these documents are  
8 initiated using an older version and then added  
9 to, is that right?

10 A. That's correct. Or updated to the  
11 current.

12 Q. Is it possible that that statement was a  
13 residual statement from an earlier version?

14 A. It's possible.

15 Q. Do you recall reviewing any data or  
16 information during the development of this  
17 particular document that would support that  
18 statement? Or do you recall directing anyone  
19 else to do so?

20 MR. DUBOIS: Compound question  
21 on that one.

22 Q. (By Mr. Wilmoth) Do you recall doing it?

23 A. Not offhand, I don't.

24 Q. Do you recall directing anyone to do so?

25 A. No, I don't.

1 Q. Did you participate in discussions with  
2 the Department of Justice concerning the United  
3 States' position in this case, about this same  
4 time, late November, late December, 2010?

5 A. I don't recall anything specific right  
6 off the bat.

7 Q. Is this the typical type of briefing  
8 that would be shared with the justice  
9 department as it evaluated its options with  
10 regard to the litigation?

11 A. I don't know that I can speak to that.  
12 That would have been handled by our solicitor.

13 (Exhibit No. 14 marked for  
14 identification.)

15 Q. (By Mr. Wilmoth) We'll mark this as  
16 Exhibit 14. Please give that a read,  
17 Mr. Swanda, and familiarize yourself with that  
18 document.

19 A. Okay.

20 Q. Would you take a look at number three in  
21 the Q and A document? In the second sentence  
22 there is a statement that Reclamation believes  
23 there is a strong correlation to the  
24 groundwater use by the states, especially  
25 Nebraska and Colorado.

1           I understand that you cannot explain to  
2 me the nature of that correlation from a  
3 technical standpoint. Can you tell me what  
4 analysis went into the development of that  
5 correlation?

6           MR. DUBOIS: You can do that.

7           THE WITNESS: Okay.

8           MR. DUBOIS: He is only  
9 asking -- he's not asking for the analysis,  
10 he's asking what analysis went into it, and  
11 that's fine.

12          A.       I think we would have reviewed the  
13 output from the engineering committee's work  
14 with the compact accounting information and  
15 there may have been other information as well  
16 that I don't recall right offhand. But that  
17 would have been a -- certainly something we  
18 would have -- we would have looked at, I think,  
19 as to what that information was showing.

20          Q.       (By Mr. Wilmoth) I notice the term used  
21 there is correlation. Is there a difference  
22 between correlation and causation? Or do you  
23 view those as equivalent to one another?

24          A.       I would -- in my mind that's the same,  
25 kind of the same use.

1 Q. Do you recall whether Reclamation  
2 conducted any analysis of the impact of other  
3 conditions on the decline of inflow to its  
4 projects?

5 A. In conjunction with looking at stream  
6 flow data and that historic inflow information  
7 available from our projects, we would have also  
8 looked at precip data during those same periods  
9 to see if there was an indicator that the  
10 precip trends had changed.

11 Q. I'm going to give you what we'll mark as  
12 Exhibit 15, ask you to take a look at that.

13 (Exhibit No. 15 marked for  
14 identification.)

15 A. Okay.

16 Q. (By Mr. Wilmoth) What is the topic being  
17 addressed in that communication?

18 A. I think it was an update. Scott again  
19 through his -- he's an employee of the regional  
20 office, and he was involved with the  
21 coordination of the conservation study that  
22 came out of the settlement stipulations.

23 And I think what this is doing is  
24 providing an update to me. It was a five-year  
25 study and I think apparently this was in the

1 fourth year of that study and he was providing  
2 an update to some extent to me as to where they  
3 were, the states were at at that point in time.

4 Q. Is this the kind of information that you  
5 would -- or the people in your office would  
6 rely on to determine the effect of various  
7 factors on inflows to the project?

8 A. I don't think we would have relied on  
9 this at this point in time due to the fact that  
10 the study was still in progress. It was not  
11 final at that point in time. Certainly had  
12 probably some interesting information at that  
13 point, but I don't think we would have relied  
14 on it until the final product was supplied.

15 Q. Do you know whether that work has ever  
16 been finalized?

17 A. I think it was still ongoing when I was  
18 working and I do not know. I did think about  
19 that the other day, actually.

20 Q. Give you what we'll mark as Exhibit 16.  
21 (Exhibit No. 16 marked for  
22 identification.)

23 Q. (By Mr. Wilmoth) Could you please have a  
24 look at that document tell me if you are  
25 familiar with it?

1 A. Okay.

2 Q. Is this a dialogue among yourself and  
3 those listed on the email?

4 A. Yes, it is. I think it was a probably  
5 just a thought process going on during that  
6 time.

7 Q. Is this dialogue occurring about the  
8 time that you were developing the IMP testimony  
9 in 2010?

10 A. It would appear that it is, yes.

11 Q. Do you see the note from Mr. Scott  
12 there, the second sentence about one other  
13 point?

14 A. Yes.

15 Q. Is that a pervasive view within the  
16 McCook field office?

17 A. No.

18 MR. DUBOIS: Objection.

19 Q. (By Mr. Wilmoth) Did you hold that view?

20 A. No.

21 Q. Do you know whether Mr. Scott held that  
22 view?

23 A. I do not believe he did.

24 Q. Do you know whether that view was ever  
25 communicated up the chain, so to speak?

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

2 MR. WILMOTH: Why don't we take  
3 15 minutes.

4 (Recess taken at 10:04 a.m. to 10:22 a.m.)

5 Q. (By Mr. Wilmoth) Mr. Swanda, I'd asked  
6 you earlier about the Bureau's efforts to study  
7 the effects of conservation measures on inflows  
8 to the reservoirs.

9 Did the Bureau ever complete any such  
10 study? And I don't mean the one that was being  
11 conducted specifically for the RRCA, but were  
12 there ever any other such studies?

13 A. Yeah. There was a study in '85, I  
14 believe, a Republican River study that not just  
15 looked at conservation but it looked at, I  
16 think, the various aspects of the basin as far  
17 as water use and that kind of thing, and did  
18 speak to some extent about conservation and  
19 effects the best they could at the time.

20 Q. That was a 1980 vintage document, did  
21 you say?

22 A. Yeah, '85, I believe.

23 Q. Are there any other studies that you  
24 recall as we sit here today?

25 A. There would have been -- you are talking

1 about conservation?

2 Q. Yes, sir.

3 A. Or any study?

4 Q. The effects of conservation measures on  
5 inflows to the facilities.

6 A. I don't think there were that I recall  
7 any specific to that use.

8 Q. When the Bureau analyzes the effect of  
9 groundwater pumping, for example, on inflows,  
10 how does it account for the effect of  
11 conservation measures?

12 A. What I recall, it was -- it was -- my  
13 time there was strictly a look at the  
14 groundwater use. The accounting from the  
15 compact, you know, mainly was the data that was  
16 looked at there.

17 Q. So the conservation measures and their  
18 effects on inflows are not part of that  
19 analysis?

20 A. That's correct, because there was  
21 really, I don't believe, a good source of  
22 information or whatever to account for that.

23 Q. Okay. And we went through a number of  
24 the briefing papers earlier. I just want to  
25 revisit and get a better understanding of the

1           general purpose of those papers as you  
2           understood them.

3                       Are the papers informational only or do  
4           you produce those regularly on some schedule  
5           pursuant to some requirement?

6           A.        What I recall, typically they were a  
7           result -- as a result of a request from  
8           somewhere higher up, usually, typically the  
9           regional office or, you know, there would be a  
10          meeting or there would be some event coming up.  
11          Just to keep the appropriate individuals  
12          briefed and up to date on the current status  
13          was the typical use of that, of preparing a  
14          briefing paper.

15          Q.        So there wasn't any regulatory  
16          requirement or statute that you are familiar  
17          with that --

18          A.        No.

19          Q.        -- necessitated those?

20          A.        No, I don't believe so. It was usually  
21          as directed from above.

22          Q.        So some of the examples that we looked  
23          at today, for instance, maybe there was a  
24          congressional briefing coming up or a meeting  
25          with a particular constituent that would

1           necessitate those papers?

2           A.           That's correct. There was usually some  
3           triggering event coming up in the future.

4           Q.           Okay. Mr. Swanda, could you generally  
5           describe for me your role in analyzing  
6           Nebraska's integrated management plans over the  
7           course of, say, the last ten years of your  
8           employment with Reclamation? We touched on  
9           this earlier, but perhaps we could revisit  
10          that.

11          A.           My role would have been as the manager  
12          of the office which included the operations  
13          function, as discussed earlier. It would have  
14          been to oversee the operations of those  
15          projects and then to incorporate the knowledge  
16          and experience related to those. Could you ask  
17          the question again?

18          Q.           Sure. With regard to the IMPs  
19          themselves and your role in developing  
20          Reclamation's testimony on those --

21          A.           Okay.

22          Q.           -- what was that role?

23          A.           Okay. My role would have been myself  
24          and including the appropriate staff to  
25          probably -- or to draft the original testimony,

1 to put a draft together of what we felt would  
2 be appropriate testimony to provide for  
3 whichever hearing that was out there.

4 And so we would usually take the first  
5 shot at the draft and then provide that up the  
6 line eventually for their purview, that kind of  
7 thing.

8 Q. Was there anything about the development  
9 of the IMP testimony that deviated from that  
10 normal course as we've discussed it repeatedly  
11 where you run things up the line and you may  
12 get some feedback, make some modifications, I  
13 suppose?

14 A. Right, no, that was -- that was the  
15 typical process. If we drafted something, it  
16 was, like I say, as I referred to earlier, we  
17 may -- during the drafting process we probably  
18 would have conferred with someone like Gordon  
19 Aycock in the regional office due to his  
20 experience and rolled that into the preparation  
21 of that document.

22 One other individual, depending on the  
23 time frame we are talking about, was we had --  
24 I don't think I mentioned his name yet, but was  
25 Dennis Allacher, he was retired but we had him

1 on contract, and he would have assisted up and  
2 to the point where he was no longer a contract  
3 employee with us. But certainly early on in  
4 the 2000s he would have been helping with  
5 preparation of some of those documents.

6 And then we would have -- as indicated,  
7 we would have -- when we felt comfortable with  
8 that, we would have provided it up the chain  
9 and then it may have come back down with  
10 comments back and forth until the final version  
11 was arrived at.

12 Q. Were you involved in developing the  
13 testimony on the most recent IMPs that were  
14 produced and went to hearing in June of 2010?

15 A. I would have been.

16 Q. I'd like to hand you what we'll mark as  
17 Exhibit 17 and ask you to have a look at it.  
18 It includes a timeline of events which I infer  
19 was generated by Mr. Scott.

20 (Exhibit No. 17 marked for  
21 identification.)

22 A. Okay.

23 Q. (By Mr. Wilmoth) Does that timeline as  
24 stated there by Mr. Scott look generally  
25 accurate to you? And I should tell you there

1 is a couple pages there.

2 A. To my knowledge it's correct.

3 Q. And on the second page there you'll see  
4 a list of specific issues and responses. Why  
5 don't you take a minute to familiarize yourself  
6 with those.

7 A. Okay.

8 Q. Turning back to the timeline, the second  
9 bullet point there it says, beginning in late  
10 2009 Nebraska began developing revisions to the  
11 IMPs. Do you see that?

12 A. Yes.

13 Q. And then on May 26, 2010, Reclamation  
14 sent a letter to Nebraska asking for  
15 clarification of those.

16 A. Yes.

17 Q. Is that consistent with your  
18 recollection?

19 A. As far as I know, yes.

20 Q. Do you know why Reclamation would have  
21 waited so long to seek clarification about the  
22 IMPs?

23 A. As I recall, May 26, 2010 was probably  
24 after reviewing the proposed IMPs that were  
25 coming up in I think it was June. As to why

1           there is -- I think it's two different things,  
2           I believe.

3           Q.           So at the time that the June 2010  
4           testimony was prepared, am I correct in  
5           understanding that you had not received any  
6           response to the clarification you sought?

7           A.           I would have to assume an answer. I'm  
8           not sure.

9           Q.           If you could flip to the second page  
10          here, the specific issues and responses.  
11          Three, four bullets down you'll see a statement  
12          that reads, if the IMPs mean what the DNR  
13          explained. Do you see that?

14          A.           Okay.

15          Q.           Did you participate in that meeting  
16          referenced there?

17          A.           I believe that I did.

18          Q.           Can you tell me what DNR explained at  
19          that meeting?

20          A.           The only thing that stands out for me  
21          from that meeting was the understanding that  
22          surface water wouldn't be curtailed at the same  
23          time as the groundwater users would be.

24          Q.           Did you say it would not be?

25          A.           Would not be, yes.

1 Q. Would not be. Was that a new  
2 understanding?

3 A. I believe that's correct.

4 Q. How did that affect the Bureau's view of  
5 the IMPs at that time?

6 A. I don't think that in our view -- I  
7 believe at the time I don't think that -- that  
8 understanding was captured in the IMPs. From  
9 what I recall, that was a different view on it  
10 than what we were reading it.

11 Q. Did you participate in any of the other  
12 meetings that were designed to afford  
13 Reclamation greater clarification of the IMPs?

14 A. I believe that I did. I don't know what  
15 dates those would have been, but I think that I  
16 would have been involved in the other ones as  
17 well.

18 Q. How would you characterize the  
19 development of your understanding of those IMPs  
20 over the course of those, say, six months  
21 subsequent to June 2010? Did it evolve in any  
22 way?

23 A. I think the -- I think the -- what we  
24 were hearing from the meetings were somewhat  
25 different than what we were reading, but that

1 was where we were attempting to get additional  
2 clarification on that. But there still was, I  
3 think, a number of issues that probably were  
4 outstanding that we were unclear on.

5 Q. I'm going to give you what we'll mark as  
6 Exhibit 18.

7 (Exhibit No. 18 marked for  
8 identification.)

9 Q. (By Mr. Wilmoth) Look at this  
10 communication and tell me if you recall  
11 anything about it.

12 MR. BLANKENAU: Just to make  
13 sure that you got the right one. No, it's not.

14 MR. WILMOTH: That's all right,  
15 we'll get to that one in a minute. But --  
16 we'll go ahead and mark this 19 and then we'll  
17 revert back to 18 in a moment.

18 (Exhibit No. 19 marked for  
19 identification.)

20 MR. DRAPER: So which is which?

21 MR. WILMOTH: This is the one I  
22 just handed you, John, is 19.

23 MR. DRAPER: That's the one that  
24 has a date at the top of August 4, 2010?

25 MR. WILMOTH: Yes.

1 MR. DRAPER: And that's  
2 Exhibit --

3 MR. DUBOIS: 19.

4 MR. DRAPER: -- 19.

5 A. Okay.

6 Q. (By Mr. Wilmoth) Do you see the  
7 statement about halfway down, I infer made by  
8 Mr. Aycock, that the draft IMPs rely primarily  
9 on curtailing groundwater use?

10 A. Where is it?

11 Q. About halfway down, the first sentence  
12 of the second paragraph.

13 A. Okay.

14 Q. Did you share that view at the time? Or  
15 was that consistent with your understanding?

16 A. I'm not sure I could answer that I did  
17 or didn't. I really don't recall. I would --

18 Q. I'm sorry, go ahead.

19 A. That would have been Gordon's, Gordon  
20 Aycock's, his wording.

21 Q. Sure. Would you have looked to  
22 Mr. Aycock to make that determination?

23 A. Not necessarily.

24 Q. On whom would you rely to determine  
25 whether or not you agreed with that statement?

1 A. I'm not sure I can answer that question.

2 Q. Do you recall affirmatively disagreeing  
3 with that statement?

4 A. What I recall is that things were  
5 still -- in my mind I believe at the time we  
6 were still having questions as to exactly what  
7 was and wasn't in the proposed IMPs.

8 Q. Let's go back to Exhibit 18. Have you  
9 had a chance to look this over yet?

10 MR. DRAPER: Tom, is that the  
11 one dated August 31, 2010?

12 MR. WILMOTH: Yes.

13 A. Okay.

14 Q. (By Mr. Wilmoth) Again, you see a  
15 discussion there beginning few lines down from  
16 the top, which I infer to be Mr. Aycock's  
17 statement concerning the forecasting. And he  
18 says, it actually looks quite reasonable and in  
19 most cases works to our benefit. Do you see  
20 that statement?

21 A. Yes.

22 Q. Do you recall evaluating that statement?

23 A. I don't think I personally did. It  
24 would have been Craig Scott and Gordon Aycock.

25 Q. Was that statement consistent with your

1 view at the time?

2 A. It would be consistent in that I relied  
3 on their input regarding that.

4 Q. Okay. We'll mark this Exhibit 20.  
5 (Exhibit No. 20 marked for  
6 identification.)

7 Q. (By Mr. Wilmoth) Please have a look at  
8 that and familiarize yourself with its  
9 contents.

10 A. Okay.

11 Q. Do you see the first paragraph, there  
12 again Mr. Aycock is expressing -- well, let me  
13 check that. I infer that Mr. Aycock is  
14 expressing the view concerning the necessity of  
15 curtailing surface water. Do you see that?

16 A. Yes.

17 Q. Is that consistent with your view at the  
18 time?

19 MR. DUBOIS: Objection, it's  
20 asking for an opinion or views based on his  
21 specialized expertise and knowledge.

22 Q. (By Mr. Wilmoth) Would you have  
23 typically relied on Mr. Aycock to advise you as  
24 to that issue?

25 A. He would have provided input on this

1 kind of thing.

2 Q. This will be 21.

3 (Exhibit No. 21 marked for  
4 identification.)

5 Q. (By Mr. Wilmoth) This is a fairly  
6 lengthy document, Mr. Swanda, and you are  
7 certainly welcome to read it, but I will direct  
8 your attention to my specific question. It  
9 relates to a statement made on the second page  
10 in paragraph one. First and foremost, does  
11 this document look familiar to you?

12 A. I believe it does.

13 Q. Could you just generally describe what  
14 this document is intended to do?

15 A. I believe it was to provide some  
16 background for the petition that was filed.

17 Q. The petition filed by Kansas --

18 A. Yes.

19 Q. -- to initiate this litigation? I would  
20 like to direct your attention to the middle of  
21 what is marked as paragraph one. There is a  
22 statement there beginning, however, if  
23 Nebraska's revised 2010 IMPs are enforced. Do  
24 you see that?

25 A. Yes.

1 Q. Could you read that statement for me?

2 A. However, if Nebraska's revised 2010 IMPs  
3 are enforced as the Nebraska DNR has recently  
4 explained, these revised IMPs should limit  
5 future groundwater pumping to a level that  
6 ensures Nebraska stays within its compact  
7 allocation.

8 Q. Now, again, you are welcome to take your  
9 time and read the remainder of the document.  
10 My question very simply is what happened in the  
11 course of the briefing papers that were  
12 presented to the commissioner to that  
13 assessment? Do you ever recall that position  
14 being sent up the food chain, so to speak?

15 A. Now, this was shared with Aaron Thompson  
16 and so if he moved it up the line I can't speak  
17 to that. He could have, I guess.

18 Q. Do you recall ever receiving any  
19 feedback with regard to this document from the  
20 folks in the area office or the regional  
21 office?

22 A. Not right off the top of my head, I  
23 don't.

24 Q. Do you recall sending this to  
25 Mr. Thompson?

1 A. That's -- yes, that's where this would  
2 have been.

3 Q. And you don't know what happened to it  
4 after that point?

5 A. Not that I recall.

6 Q. So just reflecting back on the last four  
7 exhibits, these communications generally from  
8 Mr. Aycock --

9 A. Uh-huh.

10 Q. -- do you recall working with he and/or  
11 Mr. Scott to synthesize those comments and move  
12 them up to Mr. Thompson as he went about  
13 evaluating the IMPs?

14 A. That would have been the typical process  
15 that would have happened.

16 Q. Let me ask you about a couple of  
17 specific points which are likely to draw some  
18 objections, but I'll try to avoid that.  
19 Exhibit 22.

20 (Exhibit No. 22 marked for  
21 identification.)

22 Q. (By Mr. Wilmoth) I'm primarily  
23 interested in the first statement there.

24 A. Okay.

25 Q. Did you make that statement?

1 A. Yes, I did, it would appear.

2 Q. And was that your understanding at the  
3 time that you submitted this communication to  
4 Mr. Henry?

5 A. Yes.

6 Q. And who is Mr. Henry?

7 A. He is -- Steve Henry is one of the board  
8 of directors of the Frenchman Cambridge  
9 Irrigation District.

10 Q. Was it typical in your employment to  
11 work with the Frenchman Cambridge Irrigation  
12 District to answer questions they might have  
13 about Bureau operations?

14 A. Questions of this nature, yeah, it was  
15 not out of the ordinary. We typically worked  
16 with the board of directors on any given  
17 irrigation district questions or whatever they  
18 may have.

19 Q. You identify a problem there in that  
20 paragraph. Can you describe the problem that  
21 you were referring to?

22 A. I think what I was referring to here is  
23 if a curtailment of surface water occurred, I  
24 think my understanding was at the time that the  
25 existing storage, water that was in storage in

1 a given reservoir --

2 MR. DUBOIS: I'll stop you. You  
3 are wandering into giving technical evidence  
4 based on your expertise. And so I'd caution  
5 you to stick to facts you know from your  
6 personal knowledge.

7 Q. (By Mr. Wilmoth) Let me ask --

8 MR. DUBOIS: I'll let him finish  
9 answering to the extent he can. I'm just  
10 giving him the Miranda warning.

11 MR. WILMOTH: I can try to ask  
12 it a different way on a different document.  
13 This may be more specific or it may be more  
14 objectionable, frankly. But now that he's been  
15 Mirandized, he is aware of his rights.

16 Q. (By Mr. Wilmoth) Let's return to --

17 MR. DUBOIS: I mean, he can  
18 finish answering that question to the extent he  
19 can. I'm just trying to --

20 MR. WILMOTH: Sure.

21 THE WITNESS: I can safely  
22 answer this?

23 MR. DUBOIS: If you can answer  
24 it from personal knowledge, you know, not as a  
25 technical expertise, yeah.

1 A. What this is saying is that as you use  
2 the storage up and the natural flows are not  
3 allowed to be stored, there will be no storage  
4 available in the future after that occurs.

5 Q. (By Mr. Wilmoth) Because the facilities  
6 would not refill?

7 A. Correct.

8 Q. Is that the idea?

9 A. Correct.

10 Q. Let me return to Exhibit 17, which is a  
11 communication dated October 27, 2010. If you  
12 look at the second page there, about halfway  
13 down there is a discussion of bypassing water  
14 through Harlan County Lake.

15 A. Okay.

16 Q. I assume that this will draw an  
17 objection, but can you explain to me why the  
18 passage of water through Harlan County Lake  
19 would render the consensus plan meaningless and  
20 alter the intent of the final settlement  
21 stipulation?

22 MR. DUBOIS: Objection, that  
23 will call for technical information and  
24 expertise and essentially expert testimony. If  
25 you can answer that without need for technical

1 expertise, that's fine. But, again, it's a  
2 matter of sticking within your lay opinions and  
3 your personal knowledge.

4 A. I think I can do that. By doing this  
5 action changes the basis of the parameters that  
6 the consensus plan was put together and based  
7 on.

8 Q. (By Mr. Wilmoth) Okay. Can you tell me  
9 how the consensus plan was put together and  
10 what it was based on?

11 A. Okay. The consensus plan is a plan  
12 coauthored, codeveloped between the Bureau of  
13 Reclamation and the Corps of Engineers with the  
14 intent to provide in any given year an  
15 estimated irrigation supply starting in January  
16 of any given year and with a finalizing that  
17 irrigation supply at the end of May in that  
18 given year.

19 The data used to come up with that, it  
20 was a plan that was outlined, put together and  
21 agreed upon by both agencies, but what it does  
22 it takes --

23 Q. Excuse me, Mr. Swanda, let me stop you.  
24 Which agencies were you referring to?

25 A. The Corps of Engineers.

1 Q. And the Bureau?

2 A. And the Bureau of Reclamation.

3 Q. Thank you.

4 A. And what it was to provide for the  
5 operation of Harlan County Lake in regards to  
6 the irrigation function of that lake and to  
7 discern the irrigation supply in any given  
8 year.

9 The information needed to come up with  
10 that estimate is the end of -- is December 31st  
11 content in Harlan County. There was an  
12 estimated inflow amount that would be added on,  
13 estimated evap amount that would be subtracted  
14 off in the time period from January through  
15 May. So using those values, you could come up  
16 with an anticipated content at the end of May.

17 This information was then provided to  
18 the irrigation districts so that they had some  
19 idea of what the irrigation supply was, could  
20 possibly be coming up that year, whichever year  
21 you are looking at. It was somewhat of a  
22 conservative approach for that reason.

23 And then end of May, the actual  
24 reservoir content was noted. And if it was  
25 above what was originally envisioned, then that

1 was just -- that was a good thing and that  
2 was -- the actual supply was the difference  
3 between those two contents, May until January.

4 If that content was less than what was  
5 anticipated, then there is provisions in there  
6 to provide for lowering the shutoff elevation  
7 in Harlan County to try to be able to provide  
8 that estimate that was originally envisioned in  
9 January to the districts.

10 Q. And just for the record, could you  
11 explain to me what the shutoff elevation is?

12 A. An example would be if we had projected,  
13 let's say, 100,000 acre feet was available and  
14 in May -- when May rolled around it was --  
15 turned out to be 90,000 acre feet. There was a  
16 provision that we had worked out with the Corps  
17 that we could proceed below the bottom of the  
18 irrigation pool down into the sediment pool to  
19 potentially pick up that additional 10,000 acre  
20 feet so that we -- our estimate would be good.

21 Q. And could you just briefly describe  
22 again for the record the difference between  
23 irrigation pool and sediment pool in Harlan  
24 County Lake?

25 A. Yeah. The irrigation pool is a pool of

1           150,000, I believe it is, acre feet that would  
2           be there from the top of the -- top of  
3           conservation, which is a full pool, down to the  
4           bottom where content takes you down in  
5           elevation to get that 150,000. And then  
6           immediately below that pool there is a sediment  
7           pool in there and for the purpose of sediment  
8           accumulation, that kind of thing. And then  
9           there is additional space below that.

10                        But the -- what this procedure allowed  
11           us -- allowed to do was to proceed down into  
12           the sediment pool should the need be there due  
13           to the estimate coming up short.

14           Q.           And how is that sediment pool divided  
15           presently?

16           A.           Divided? Do you mean --

17           Q.           Does the Corps of Engineers and the  
18           Bureau share space in the sediment pool, so to  
19           speak?

20           A.           The -- I'll answer that in just from the  
21           water right perspective, I guess. Reclamation  
22           holds the storage right in Harlan County. I  
23           think it's in the neighborhood of 350,000 acre  
24           feet, which was original contents. But that  
25           would include all of the storage space from the

1 full to the empty point. And so the --  
2 typically you would operate in the irrigation  
3 pool and not drop down into that sediment  
4 space.

5 But with this plan that was agreed upon  
6 by both agencies, there were provisions to  
7 allow that to happen with 19 -- elevation 1927  
8 was a hard shutoff, you could not go below  
9 that, which was, I believe, the bottom of the  
10 sediment pool.

11 Q. Understanding the limitations on your  
12 testimony, can you explain to me your  
13 recollection of Mr. Scott's concern about the  
14 effect of bypassing water on the consensus  
15 plan?

16 A. I think the concern he would have had is  
17 that that would have not -- that would have --  
18 that would have been an operational release  
19 that would not have been made and historically  
20 would not have been made and was -- and was  
21 taken into account when preparing the consensus  
22 plan.

23 So to actually bypass water that  
24 historically Reclamation would not have done  
25 changes the basis and the intent of the plan

1 originally.

2 Q. Uh-huh. And just to be clear, if I  
3 understood what you said earlier, the plan was  
4 designed to help you essentially figure out how  
5 much water was available for irrigation?

6 A. That's correct.

7 Q. In a nutshell?

8 A. Right. In a January time frame to get  
9 the irrigation district some idea going into  
10 that year, this was what we're looking at.

11 Q. And if flows were bypassed, it would  
12 affect the amount of irrigation water  
13 available?

14 A. That's correct.

15 Q. And is there any reason that the  
16 consensus plan's provisions can't be  
17 implemented as stated just because there is  
18 less water in the system?

19 A. I think you would be changing the intent  
20 of the plan to begin with if you start changing  
21 the parameters. There is a -- I mean, it looks  
22 at -- there is an estimated inflow number that  
23 is looked at.

24 Q. So let's say -- let's take these step by  
25 step. The estimated inflow number is, using

1           your example, 100,000 acre feet. And that  
2           would be in January, is that right?

3           A.       No. I think you are mixing that.

4           Q.       Okay.

5           A.       Starting in January, we know the  
6           starting content that's in the reservoir. And  
7           then when the plan was put in place, there was  
8           an estimated inflow amount that was  
9           anticipated, a reasonable inflow amount.

10          Q.       And what was the basis of that?

11                               MR. DUBOIS: I'm -- you can go  
12          ahead and answer this.

13          A.       It was based on historic numbers, inflow  
14          numbers. And I would add to that that should  
15          the five-year average inflows drop below that  
16          number, then you use the five-year lower  
17          numbers, average numbers.

18                        So if it's -- I think it's -- I don't  
19          know the number exactly, but let's say it's  
20          50-some thousand was the estimate. Now, if you  
21          had some low inflow years and the five-year  
22          average 40,000, then that is the number you  
23          would use until you get back up to that number.

24          Q.       (By Mr. Wilmoth) So then you use that  
25          number and then you compare it to actual

1 inflows?

2 A. That's correct.

3 MR. DUBOIS: I'm going to  
4 object. We're wandering further and further  
5 into relying on his technical expertise that  
6 was developed as part of his job as Reclamation  
7 and into expert testimony because we're  
8 breaking it down further and further and I'm to  
9 the point where we're -- I have let it go as  
10 far as -- I'm trying to give you enough room to  
11 get some information.

12 MR. WILMOTH: Sure.

13 MR. DUBOIS: But trying to avoid  
14 going over the line. So I think we're getting  
15 there.

16 Q. (By Mr. Wilmoth) Let me ask one more  
17 question just very generally. I was trying to  
18 get enough foundation to ask it, but I think  
19 you will -- let me put it this way, I'm fairly  
20 confident that you have enough foundation to  
21 get the point across to me.

22 The consensus plan is applied regardless  
23 of what the inflows are in a given year, is it  
24 not?

25 A. That's correct.

1 Q. And if those inflows are reduced due to  
2 upstream consumption or lack of rainfall or  
3 impacts of conservation measures or some  
4 combination thereof, the consensus plan is  
5 applied to whatever inflows are actually  
6 observed, right?

7 A. That's correct.

8 Q. So why is it that the consensus plan  
9 could not be applied to a reduction of storage  
10 that results from a compact call?

11 MR. DUBOIS: Objection, calling  
12 for technical analysis.

13 (An off-the-record discussion was held.)

14 (Recess taken at 11:12 a.m. to 12:35 p.m.)

15 MR. DUBOIS: What I started to  
16 say is that over lunch Mr. Swanda and I were  
17 discussing sort of whether or not we can  
18 revisit your last couple of questions regarding  
19 the consensus plan and whether he can respond  
20 to that without sort of running into the  
21 opinions based on scientific and technical  
22 versus his personal knowledge and sort of  
23 process.

24 And I think that we can probably go back  
25 and revisit that and expand the answers and

1 provide some additional information that is  
2 consistent with answering your question and  
3 staying within the limits that the Interior has  
4 provided.

5 So if you'd like to come back and  
6 revisit the last couple of questions that you  
7 had about the consensus plan, we will try to go  
8 as far as I think that we can within the  
9 limitations we've got.

10 MR. WILMOTH: Okay. Could you  
11 read back the last question, please?

12 (Reporter read the pending question.)

13 Q. (By Mr. Wilmoth) Can you answer that  
14 question, Mr. Swanda?

15 A. I think that is because the bypass of  
16 those flows were not in the original intent of  
17 the consensus plan as one of the parameters.  
18 So when you bypass some flows through there  
19 that would otherwise have been stored, the  
20 end -- ending result or answer from following  
21 the consensus plan procedure would be a lesser  
22 number which means a smaller content in the May  
23 number.

24 And what that would mean potentially  
25 that there would be a greater draft on the

1 reservoir than there would have otherwise been.  
2 And in some cases you could end up in -- down  
3 in sediment pool further. In fact, you would  
4 end up with a lower content elevation.

5 Q. So that I'm clear in what you are  
6 saying, the result of applying the consensus  
7 plan would be different?

8 A. That's correct.

9 Q. But you are not suggesting that the  
10 consensus plan could not be applied to those  
11 circumstances, are you?

12 A. It --

13 Q. I mean, mechanically it could be applied  
14 to those circumstances, is that right?

15 A. You could apply it to get a number. But  
16 it would not be the number that you would have  
17 gotten with the original intent that the  
18 consensus plan was put together for.

19 Q. And can you explain to me the basis of  
20 your understanding of the intent behind the  
21 consensus plan?

22 A. The intent was to provide an irrigation  
23 supply number that both the Corps and the  
24 Bureau would agree upon, and then that number  
25 was -- would be presented to the two irrigation

1 districts that share that supply.

2 And consequently what you are doing is  
3 potentially you are lowering that irrigation --  
4 irrigation supply which by contract the Bureau  
5 has with the two districts.

6 Q. Sure. So is this somehow different than  
7 the overall concern that the Bureau has about  
8 the amount of water in storage in its project?  
9 Is this unique or is this just an extension of  
10 that general concern?

11 A. I think it's -- I think it's probably  
12 two separate -- I mean, there is that concern  
13 but there is also the concern of what -- the  
14 intent of why the consensus plan is in place.

15 Q. And did you work on developing the  
16 consensus plan?

17 A. Yes.

18 Q. When was that developed?

19 A. It would have been probably the late  
20 '90s. It was done when we knew there was  
21 contract renewal on the horizon. And so it was  
22 so that we could ensure an irrigation supply  
23 number that could be contracted with the  
24 districts. Prior to that it was an unknown  
25 from year to year.

1 Q. And was it your understanding that the  
2 consensus plan would forever govern the  
3 operation of that district or those districts?

4 A. It's -- it is -- I believe it's  
5 referenced in the contracts with the districts  
6 and it's also, I believe, referenced -- there  
7 is an O and M agreement between the two  
8 Bostwick districts and with the Bureau and I  
9 believe it's referenced in that. It's kind of  
10 the starting spot to divide up, decide how much  
11 water there is and then to divide, split that  
12 water between the two districts.

13 So it's captured in the contracts. It's  
14 captured in the O and M agreement, I believe,  
15 between the two districts and it's also  
16 captured in the field working agreement between  
17 the Bureau and the Corps of Engineers.

18 Q. Earlier you testified that your  
19 understanding of the so-called historical  
20 documents was that the projects would be  
21 designed and operated within the states'  
22 allocations under the compact. Do you remember  
23 that?

24 A. That's -- yes, I do.

25 Q. And if the consensus plan operated to

1           somehow allow consumption that was in excess of  
2           a state's allocation, that wouldn't comport  
3           with the original design, would it?

4                       MR. DUBOIS: Calls for a legal  
5           conclusion. I'll strike that.

6           Q.        (By Mr. Wilmoth) I think you can answer.

7                       MR. DUBOIS: Yeah.

8           A.        Could you restate the question?

9           Q.        (By Mr. Wilmoth) We agree that earlier  
10          you discussed your understanding that the  
11          projects were designed to be operated and  
12          performed within a state's allocation, right?

13          A.        Yes.

14          Q.        You are not suggesting that the  
15          consensus plan somehow overrides the  
16          allocations, are you?

17          A.        No. I -- no.

18          Q.        So is the consensus plan intended also  
19          to operate within the allocations of the  
20          states?

21          A.        I would say yes.

22          Q.        Okay. Thank you. And we talked earlier  
23          about the fact that if a reduced supply --  
24          excuse me, if a reduction in precipitation, for  
25          example, or an overuse of groundwater resulted

1 in a reduced inflow into the system, that  
2 reduction of inflows would not be inconsistent  
3 with the intent of the consensus plan, would  
4 it? I mean, wasn't it intended to operate  
5 under those circumstances?

6 A. I believe that's a correct statement.

7 Q. But you or Reclamation draw a  
8 distinction between reduced inflows that are  
9 result -- that are a result of those things  
10 but -- strike that.

11 You draw a distinction between inflows  
12 that are reduced due to those activities and  
13 inflows that are reduced due to a compact call?

14 A. Are we talking about the consensus plan?

15 Q. Yes.

16 A. The consensus plan is -- it's strictly a  
17 document that allowed the Bureau in  
18 collaboration with the Corps to establish the  
19 irrigation supply in a given year.

20 Q. Sure. And if that supply is limited  
21 through overuse of groundwater, in your terms,  
22 or a compact call, isn't the effect on the  
23 system the same? Isn't the effect on the  
24 reservoir, the effect on the consensus plan  
25 physically the same thing? It's just a matter

1 of whether you have a regulatory restriction or  
2 not.

3 A. Yeah, and we -- I mean, it does not look  
4 at the reason for the inflows being what they  
5 are, it looks at them as they are what they are  
6 and water stored is what it is.

7 Q. Okay. Let me ask you about what we'll  
8 mark Exhibit 23.

9 (Exhibit No. 23 marked for  
10 identification.)

11 Q. (By Mr. Wilmoth) Could you have a look  
12 at this document and tell me if you are  
13 familiar with it?

14 A. Okay. I think I -- okay. I'm familiar  
15 with it.

16 Q. Could you describe the nature of this  
17 topic that's being addressed in the email?

18 A. From what I recall, this came about,  
19 there was a tour, I believe it was in Kansas,  
20 and I'm not sure the McCook office per se were  
21 involved in it, but I think they were  
22 anticipating a question coming up regarding  
23 increasing storage in Lovewell.

24 Q. And there is a statement made here,  
25 okay, here is my take on this. Do you see

1           that?

2           A.       Yes.

3           Q.       Is that your take --

4           A.       That would be mine.

5           Q.       -- so to speak?

6           A.       Yes.

7           Q.       Can you describe to me just generally  
8           the procedure by which Harlan County Lake water  
9           is divided between the Nebraska and Kansas  
10          Bostwick irrigation districts?

11          A.       Okay. On an annual basis what we do is  
12          start with the consensus plan we have been  
13          talking about.

14          Q.       Sure.

15          A.       And that gives us -- that would give us  
16          the content irrigation supply that's available  
17          in Harlan County. In the Bostwick division the  
18          sources of water for both Bostwick districts  
19          include the inflow, the outflow, the inflow to  
20          Harlan County, the stream natural flows below  
21          Harlan County down to Superior-Courtland, the  
22          inflows into Lovewell from White Rock Creek,  
23          which is what it's located on. I think that's  
24          essentially it from the sources of water  
25          supply, I believe, if I missed something in

1           there.

2                         And then we would look at there is acres  
3           located in Nebraska directly below Harlan  
4           County, several canals that supply those acres,  
5           there is Superior-Courtland diversion dam which  
6           supplies some acres to Nebraska Bostwick, and  
7           then water can be taken down the Courtland  
8           Canal to the Lovewell area.

9                         There is storage in Lovewell, I failed  
10          to mention that. Storage in Lovewell Reservoir  
11          that supplies the acres below Lovewell  
12          Reservoir. So there is various sources of  
13          water that are available to both districts.

14                        Obviously you cannot get water from some  
15          places physically to other places. And so  
16          the -- in the O and M agreement between the two  
17          districts and the Bureau, the process is laid  
18          out on how we split that water supply, be it  
19          Harlan County, Lovewell or whatever, and  
20          including all the natural flows.

21                        And the basic premise is that you would  
22          supply an equal amount of water to all acres,  
23          regardless where they are located, to the  
24          extent possible. And so then we would go  
25          through a fairly complicated process of

1 basically looking at the available water  
2 supplies in those sources and trying to get it  
3 to the acres that were served by those various  
4 canals or whatever, and try to equalize the  
5 totality of all that to the extent possible so  
6 everybody had the same amount of water  
7 available to any given acre.

8 And obviously there were years that  
9 that's not entirely possible in the dry years.  
10 Because you may have a full supply in Lovewell  
11 that you can supply acres below but maybe there  
12 is not a supply available to the acres above  
13 Lovewell. So there is an inequity there.

14 But to the extent we could equalize the  
15 water supply, that was -- that was attempted.  
16 And it's -- it's -- I believe that process is  
17 in the O and M agreement between the two  
18 districts, described in there.

19 Q. And in the second paragraph here about  
20 halfway through, I believe this is you  
21 explaining that with more storage in Lovewell  
22 likely results in more shifting to Nebraska  
23 from HCL supply. Do you see that?

24 A. Yes.

25 Q. What did you mean by that statement?

1           A.       Okay.  What that means is you cannot  
2           supply all of the full supply from just the  
3           storage in Lovewell.  In other words, with the  
4           Lovewell supply to the acreage below Lovewell,  
5           you may be able to supply six inches of water.  
6           So in a year they are using -- everybody has  
7           got nine inches available to them, for example,  
8           you would bring some water from Harlan County  
9           or from natural flows below Harlan County  
10          through the Courtland Canal through Lovewell to  
11          equalize that supply below.

12                        So in theory, if you had additional  
13          storage in Lovewell, that would mean there  
14          would be a need for less water to come -- come  
15          from Harlan County or natural flows up there.  
16          So there would be -- there would be a smaller  
17          amount, you would adjust accordingly.

18          Q.        And was this all in the context of  
19          discussing possible expansion of Lovewell, was  
20          that the idea, or was this an operational  
21          question?

22          A.        I think -- yeah, my response was so they  
23          had an understanding if they got into  
24          discussing things that are in the earlier parts  
25          of this, that it's -- it's not a simple thing

1 to just -- I mean, you kind of got to  
2 understand how it's all actually done on the  
3 ground, the split procedures of the water  
4 supply and all that.

5 So it's kind of one of those things,  
6 trying to keep them from getting too far into  
7 the weeds of -- and it was -- in my  
8 understanding, I think at this time there would  
9 have not been anybody at this meeting that had  
10 the knowledge to explain this.

11 Q. Tell me how Harlan County and Lovewell  
12 are operated together for purposes of refilling  
13 Lovewell in the off season.

14 A. Okay. In the off -- in the off season  
15 historically -- and I don't personally think  
16 that it was ever done where any storage was  
17 moved from -- intentionally moved from Harlan  
18 County to Lovewell.

19 But in the off season, natural flows are  
20 diverted from the Republican River if it's  
21 needed to fill -- refill Lovewell during the  
22 off season. And that's what you would normally  
23 do. Natural flows would be diverted, either  
24 some part in the fall and then back on in the  
25 early spring. But if it was completely drawn

1 down and it appeared that you needed to divert  
2 all winter, then that's what you would do of  
3 natural flows out of the Republican.

4 Q. To put into Lovewell?

5 A. Yes. And you would do that, and you  
6 would also -- whatever there was to gain from  
7 the White Rock Creek would add to that. But so  
8 that was -- that's really how it should be  
9 operated, how it historically was operated.  
10 You would -- you would not move storage to fill  
11 Lovewell storage, you keep it upstream as far  
12 as you can as long as you can.

13 Q. You would not move storage from Harlan  
14 County Lake --

15 A. To fill.

16 Q. -- to fill Lovewell?

17 A. Yes. If you moved storage, it was to  
18 pass on through Lovewell to, as I mentioned  
19 earlier, to equalize the water supply to those  
20 acres below.

21 Q. Does Lovewell fill in that manner every  
22 year?

23 A. I think -- I believe it did. There may  
24 have been one year that it fell just short of  
25 filling. But I believe in the early 2000s when

1 it was the natural flows and that kind of thing  
2 and the supply in Harlan was very short, we did  
3 divert flows all through the winter.

4 Typically that would not be the case  
5 either. You usually would try to avoid those  
6 winter months of moving water through the  
7 canal. But we did do that on occasion when we  
8 felt we had to to get the reservoir full again  
9 by irrigation season of the following year.

10 Q. So if Harlan County Lake is not full in  
11 a given year but Lovewell is full, is the  
12 Lovewell water then utilized on the lands below  
13 Lovewell within KBID?

14 A. That's correct, that's the only place --

15 Q. The stored water?

16 A. Yes. That's the only place you can take  
17 those waters.

18 Q. And is the stored water utilized to such  
19 a degree that Lovewell typically drains down?

20 A. If it was -- if -- if Lovewell was  
21 operated -- other than a high runoff year, we  
22 had flows, more water than we knew what to do  
23 with. But typically you would use -- you  
24 should almost use all of the irrigation storage  
25 supply out of Lovewell in that -- what that

1 does is leaves as much water upstream in Harlan  
2 or to be used upstream because you know you can  
3 refill that storage in the following winter  
4 months or spring, whatever.

5 Q. So generally from an operational  
6 standpoint, it's a good practice to retain  
7 stored water when you can?

8 A. Yeah, upstream as far as you can.

9 Q. So were you in your current position or  
10 the position we discussed as the McCook field  
11 office supervisor in 2005 and 2006? Did you  
12 occupy that position?

13 A. Oh, yes, yes. That was a question, I'm  
14 sorry.

15 Q. The operations that we just discussed,  
16 were those supplied in those two years?

17 A. I don't recall. I would have to look  
18 back to recall exact. Every year was different  
19 from the other year.

20 Q. Sure. With respect to the concerns  
21 about bypassing flows through Harlan County  
22 Lake, if those flows are bypassed and Lovewell  
23 Reservoir -- strike that -- Lovewell Reservoir  
24 is full, can't those bypass flows be utilized,  
25 physically speaking, below KBID instead of

1 stored water in Lovewell?

2 I'm not trying to ask you this from a  
3 policy standpoint, I'm asking from a physical  
4 standpoint if that's possible.

5 A. What time of year are you asking?

6 Q. During the irrigation season.

7 A. Yes, if you pass them -- if you pass  
8 them through Lovewell.

9 Q. So those flows --

10 MR. DUBOIS: Pass them through  
11 Lovewell? I'm sorry, did I misunderstand? I  
12 thought you had been talking about passing  
13 through HCL, Harlan County.

14 MR. WILMOTH: I am, but I think  
15 that's the same answer.

16 MR. DUBOIS: All right.

17 Q. (By Mr. Wilmoth) Did you understand my  
18 question?

19 A. Yeah, I think I did. You asked if you  
20 could do that.

21 Q. Yeah, if that could be done. The basic  
22 question is could those natural flows be  
23 utilized below Lovewell in lieu of the water  
24 stored in Lovewell during the irrigation  
25 season?

1 A. It's -- depends what color water you  
2 want to -- yeah.

3 Q. Okay. Do you need to or does the Bureau  
4 attempt to equalize the volume of water stored  
5 in Harlan County and Lovewell? In other words,  
6 do you try to keep them basically in balance?

7 A. I would say you try to fill both of them  
8 if you can.

9 Q. But if you cannot do that, do you try to  
10 draw them down equally or do you draw Harlan  
11 County first and keep Lovewell raised?

12 A. Well, you would go back to the split  
13 procedure.

14 Q. Okay.

15 A. And it -- I didn't speak to that. But  
16 the split procedure, it's probably -- it would  
17 be revisited daily, if needed, to assess the --  
18 where the water was and where it was needed.

19 Q. I see. Okay.

20 A. So it's -- it's an ongoing process  
21 through the summer revisiting where the supply  
22 is and where it needs to go.

23 Q. And were you responsible for that task  
24 in your capacity as the McCook field office  
25 manager?

1 A. It would have been under our -- my  
2 direction, yes.

3 Q. Let's change topics. Can you tell me a  
4 little bit, Mr. Swanda, about the Bureau's  
5 interaction, particularly your office's  
6 interaction with the Frenchman Cambridge  
7 Irrigation District?

8 A. We would have interacted with them at  
9 times at their board meeting, depending on the  
10 topics. Could be anything from water supply to  
11 maintenance activities. Anything that was  
12 germane to the districts.

13 Q. Did you ever assist them with technical  
14 analysis of any kind?

15 A. Could you be more specific?

16 Q. Sure. Did the Bureau assist the  
17 Frenchman-Cambridge Irrigation District in  
18 preparing a petition to the Department of  
19 Natural Resources to have the Republican River  
20 Basin declared over-appropriated?

21 A. I don't think we would have assisted  
22 other than providing data or something like  
23 that, if they requested it.

24 Q. Let's mark this, as Exhibit 24.

25

1 (Exhibit No. 24 marked for  
2 identification.)

3 Q. (By Mr. Wilmoth) Can you have a look at  
4 this communication, tell me if it refreshes  
5 your recollection about this matter?

6 A. Okay.

7 Q. Do you see the discussion there talking  
8 about providing technical support for the  
9 petition?

10 A. Yes, I do.

11 Q. Do you recall whether that was done or  
12 not?

13 A. That I do not recall.

14 Q. Did you have any role in developing any  
15 such testimony or technical support?

16 A. I'm not aware of any specifics in regard  
17 to that. Really only thing I recall is we may  
18 have reviewed something that they had put  
19 together.

20 Q. Okay. Let me give you Exhibit 25.

21 (Exhibit No. 25 marked for  
22 identification.)

23 A. Okay.

24 Q. (By Mr. Wilmoth) Does this  
25 correspondence ring any bells with you?

1 A. I remember it.

2 Q. And as I understand this, it appears to  
3 me that the Frenchman Cambridge Irrigation  
4 District was making noises about maybe suing  
5 the Bureau, is that right? If you look at the  
6 last paragraph in particular.

7 A. Yeah, I would let that speak for itself,  
8 I guess.

9 Q. Do you remember having any discussions  
10 about the district possibly initiating  
11 litigation against the Bureau?

12 A. About all I remember is there was some  
13 general discussion. Nothing in particular  
14 really.

15 Q. Did that play any role in the way in  
16 which you managed your relationship with the  
17 district?

18 A. Not personally it didn't.

19 Q. Do you know whether that affected anyone  
20 else's views of how the district was to act in  
21 relation to the Bureau?

22 A. Not that I'm aware of.

23 Q. Do you know whether that threat of  
24 litigation played any role in your development  
25 of the comments on the IMPs?

1 A. No, I'm pretty sure they did not.

2 Q. Did you assist the district in  
3 developing its comments on the IMPs?

4 A. I don't think we did.

5 Q. Do you know whether the district  
6 assisted you in developing such comments?

7 A. On the Bureau's comments or --

8 Q. Yes.

9 A. Not that I'm aware of.

10 Q. Give you Exhibit 26, ask you to take a  
11 look at this. And if you could note the name  
12 of the attachment and then have a look at the  
13 attachment.

14 (Exhibit No. 26 marked for  
15 identification.)

16 Q. (By Mr. Wilmoth) I'd ask you again if  
17 that refreshes your recollection as to whether  
18 the district ever aided your comments on the  
19 IMPs.

20 (Exhibit No. 27 marked for  
21 identification.)

22 Q. (By Mr. Wilmoth) Let me go ahead and  
23 give you also Exhibit 27, this might assist.

24 A. And the question again, please?

25 Q. Did you solicit comments from the

1 district on -- to help you formulate your  
2 opinions about the IMPs?

3 A. Probably we did.

4 Q. And what role did the district play in  
5 helping you formulate your thoughts on the IMPs  
6 specifically? Did they prepare any analyses or  
7 provide you with any input of particular note?

8 A. No, I would -- not -- no. It would have  
9 been just providing comments to the attachment,  
10 if they had any. As to if we used them or not,  
11 I'm not sure I recall that. But --

12 Q. Let me give you Exhibit 28.

13 (Exhibit No. 28 marked for  
14 identification.)

15 Q. (By Mr. Wilmoth) Please have a look at  
16 this and note the date and take a look at the  
17 bottom of that email, if you would.

18 A. Okay.

19 Q. Is this email from Mr. Scott essentially  
20 seeking the district's comments on your draft  
21 IMP testimony?

22 A. I don't know if it was an attempt to  
23 receive comments from them or if it was just a  
24 sharing of where we were at at the time.

25 Q. Do you recall receiving anything in

1 response to your request for comments?

2 A. I don't -- I don't recall anything at  
3 the moment.

4 Q. We'll mark this as 29.

5 (Exhibit No. 29 marked for  
6 identification.)

7 Q. (By Mr. Wilmoth) This appears to be a  
8 communication from Mr. Edgerton to you  
9 indicating that he made a few changes. Do you  
10 see that?

11 A. Yes, at the top.

12 Q. Do you recall that discussion with  
13 Mr. Edgerton?

14 A. Oh, I can't say that I recall that. But  
15 I kind of recall the document here.

16 Q. And I've been asking you about the  
17 district's efforts to comment on your views of  
18 the IMPs and also to facilitate your  
19 understanding of the IMPs.

20 Do you recall providing the district  
21 with assistance in that regard? In particular  
22 do you recall the discussions in this document  
23 which we'll mark Exhibit 30?

24 (Exhibit No. 30 marked for  
25 identification.)

1 A. Could you restate the question?

2 Q. (By Mr. Wilmoth) Do you recall working  
3 with the district to assist them in preparing  
4 their comments on the IMPs?

5 A. I would phrase it as I believe we  
6 received a draft of this and he was -- I  
7 believe he was looking for us to verify the  
8 numbers he was using that they are correct.  
9 For example, those Harlan County numbers and  
10 things like that.

11 Q. Do you recall --

12 A. I wouldn't describe it as preparing.

13 Q. Okay. Do you recall endorsing that  
14 description in any way, if you look at the  
15 first page of the email transmission?

16 MR. DUBOIS: Which transmission?

17 MR. WILMOTH: From Mr. Edgerton.

18 MR. DUBOIS: Are we on 30 still?

19 MR. WILMOTH: Yes.

20 Q. (By Mr. Wilmoth) The email transmission  
21 from Mr. Edgerton to Mr. Dunnigan indicates, I  
22 worked with Reclamation on the water short year  
23 scenario and I believe it is very close to  
24 reality.

25 Do you recall endorsing that description

1 of the so-called water short year scenario?

2 A. Well --

3 MR. DUBOIS: I'll object. There  
4 is no foundation that he endorsed anything from  
5 this email.

6 MR. WILMOTH: That's why I'm  
7 asking.

8 Q. (By Mr. Wilmoth) Did you endorse this at  
9 all? Do you have any recollection of doing  
10 that?

11 A. No. We would just -- I think all we did  
12 was verified the numbers he was using.

13 Q. Okay.

14 A. That he was using correct assumptions.

15 Q. So you worked with him on it in some  
16 measure? In other words --

17 MR. DUBOIS: Asked and answered.  
18 I mean, what he said is that they verified the  
19 numbers. And now you are -- you keep saying  
20 you worked on it with him. He's given you the  
21 answer. I'm wondering what you are trying to  
22 put into his mouth.

23 MR. WILMOTH: Well, what I'm  
24 trying to determine is whether Mr. Edgerton is  
25 making an accurate characterization in his

1 email. It certainly implies that he worked  
2 with Reclamation to develop the water short  
3 year analysis.

4 If that statement by Mr. Edgerton is  
5 false, I'd like to hear it from Mr. Swanda.

6 A. I think I answered that. What I recall  
7 is we verified his assumptions that he made in  
8 this.

9 Q. (By Mr. Wilmoth) Could you show me which  
10 ones?

11 A. I think we're -- I believe we're talking  
12 about the last page, correct?

13 Q. Yes, this document called the reality of  
14 the water short year. In fact, why don't we do  
15 this. Why don't we just have you, to the  
16 extent you can, underline on the exhibit for me  
17 those things that you recall verifying.

18 MR. DUBOIS: Trying to get on my  
19 copy what he's underlying so I'm --

20 MR. WILMOTH: We can make copies  
21 if you want.

22 MR. DUBOIS: That would be  
23 probably actually more helpful.

24 MR. DRAPER: Please.

25 MR. WILMOTH: Can we make a copy

1 of this? Let's just take a couple minutes.

2 (Recess taken at 1:19 p.m. to 1:23 p.m.)

3 Q. (By Mr. Wilmoth) Mr. Swanda, you  
4 mentioned that you verified these figures. Can  
5 you explain to me what you meant by the term  
6 verification? This is a theoretical or a  
7 hypothetical scenario, isn't it?

8 A. Yes. As far as I can tell, it was a  
9 what-if situation. So there was -- I would  
10 think what we verified was anything related to  
11 probably the consensus plan and those kinds of  
12 numbers related to that that would have been in  
13 this scenario.

14 Q. Just to see if they jibe with your  
15 understanding of those --

16 A. Yeah.

17 Q. -- plans?

18 A. That he had correct numbers.

19 Q. And I didn't ask you this yet. But did  
20 you participate in any respect preparing the  
21 testimony itself to which that document is  
22 attached?

23 A. Not to my knowledge.

24 (Exhibit No. 31 marked for  
25 identification.)

1 Q. (By Mr. Wilmoth) Could you please have a  
2 look at this Exhibit 31 and tell me if you are  
3 familiar with it.

4 A. Okay.

5 Q. Are you familiar with this document?

6 A. Vaguely.

7 Q. Can you tell me how you became  
8 acquainted with this document originally?

9 A. I would -- I think it was just forwarded  
10 to me, probably from Edward Parker, and I just  
11 forwarded it on to Steve Ronshaugen.

12 Q. Who is Edward Parker, for the record?

13 A. He works in the Corps of Engineers in  
14 Kansas City.

15 Q. Okay. And if you will turn to the  
16 second page of this document, about two-thirds  
17 of the way down you'll see a reference to  
18 enforcement of the compact. Begins, as a  
19 result Kansas was planning to take action  
20 seeking enforcement of the FSS and the  
21 underlying compact. Do you see that?

22 A. I'm not sure I'm seeing it.

23 Q. About halfway, about two-thirds of the  
24 way down, begins as a result.

25 A. Oh, okay. Okay.

1 Q. The following sentence reads, the Kansas  
2 reps apparently wanted to run their plan by US  
3 representatives in order to sound out the US  
4 and to pick up ideas on how they could improve  
5 their plan.

6 Do you recall participating in a  
7 dialogue about that topic?

8 A. No.

9 Q. Do you know whether the Bureau  
10 participated in that process?

11 A. I do not.

12 Q. Could you turn to the agenda, couple of  
13 pages back? Do you see that date November 8,  
14 2007, at the top?

15 A. Yes.

16 Q. Are you aware of this meeting in any  
17 regard? I mean, obviously it was sent to you  
18 by somebody, you forwarded it on, but --

19 A. Yeah, that was the only knowledge I had  
20 of it.

21 Q. After the fact?

22 A. Yeah.

23 Q. Okay. Do you know anything that came of  
24 this meeting?

25 A. I -- no, I do not, nothing that I can

1 recall right off.

2 Q. Did the meeting generate any work for  
3 you in particular to conduct?

4 A. Not that I recall.

5 Q. Did you or anyone at the Bureau, to your  
6 knowledge, assist the State of Kansas in  
7 developing the remedy it's been seeking in this  
8 litigation?

9 A. Not to my knowledge.

10 Q. Has the Bureau analyzed the impact of  
11 the remedy that Nebraska -- excuse me, that  
12 Kansas has been seeking? And by impact I mean  
13 on your projects and surrounding lands.

14 A. No, not that I'm aware of.

15 Q. We'll mark this as Exhibit 32.

16 Mr. Swanda, can you just take a look at this  
17 and tell me what this communication and the  
18 supporting attachments is all about?

19 (Exhibit No. 32 marked for  
20 identification.)

21 Q. (By Mr. Wilmoth) What were you all  
22 trying to determine here is the question.

23 A. From what I recall, I think we were  
24 trying to get an idea of how many acres that we  
25 supplied water to were within the buffers that

1 are indicated, where they laid out in regards  
2 to the river or the tributary, whatever.

3 Q. And what was the purpose in doing that?

4 A. I think just to get an impact if those  
5 waters or if those acres were not -- what I  
6 recall, were not supplied water from surface  
7 water, give us an idea how many acres would be  
8 impacted.

9 Q. If they -- if these acres were not  
10 supplied with surface water, how many acres  
11 would be impacted, is that what you said?

12 A. That's correct. That's what I recall is  
13 the effort here.

14 Q. Did you spend any time examining the  
15 specific relief that Kansas has requested in  
16 this case?

17 A. No, I did not.

18 Q. Just for clarity's sake, with regard to  
19 the two graphics for the Frenchman Cambridge  
20 Irrigation District -- I should say the  
21 Frenchman Cambridge Division, does this first  
22 one here depict the area that's one mile out  
23 from the river and its tributaries?

24 MR. DUBOIS: Can I clarify your  
25 question for you?

1 MR. WILMOTH: Sure, yes.

2 MR. DUBOIS: Are you trying to  
3 say the area marked in blue?

4 MR. WILMOTH: Yes.

5 MR. DUBOIS: Because obviously  
6 there is stuff outside the blue as well.

7 MR. WILMOTH: Yes, just the area  
8 within the blue.

9 MR. DUBOIS: Thank you.

10 A. Would you say that question, ask it  
11 again, please?

12 Q. (By Mr. Wilmoth) Does the blue area  
13 depict an area that is essentially one mile  
14 from the river and its tributaries?

15 A. That's what this would indicate to me.

16 Q. And the green lands are irrigated with  
17 surface water from the Bureau, is that right?

18 A. That's what it implies to me, yes.

19 Q. Did you work on this graphic at all?

20 A. I didn't personally.

21 Q. Okay. Did you gain an understanding of  
22 its contents from someone else? Or is this the  
23 first time you have seen this document?

24 A. No, I -- I vaguely recall seeing it  
25 before. But I don't think it's too difficult

1 to understand.

2 Q. So the red lands, if I understand this,  
3 are irrigated with Bureau project water but are  
4 outside the one mile buffer, is that correct?

5 A. I think that would be a correct  
6 interpretation.

7 Q. And if you flip the page to the next  
8 graphic, I assume that all those things are  
9 true that we just talked about but it's a two  
10 mile buffer here instead of a one mile buffer,  
11 is that correct?

12 A. I believe that to be the case.

13 Q. Do you recall ever evaluating the impact  
14 of the Kansas proposed remedy on the Bureau  
15 projects?

16 A. I do not.

17 Q. Do you know whether anyone in the Bureau  
18 did?

19 A. Not that I can recall.

20 Q. Give you what we'll mark as Exhibit 33.

21 (Exhibit No. 33 marked for  
22 identification.)

23 Q. (By Mr. Wilmoth) Mr. Swanda, do you  
24 recall participating in this conversation  
25 that's reflected in this email?

1 A. I vaguely recall the call that it's  
2 referring to, I believe.

3 Q. Did the Bureau coordinate its comments  
4 on the IMP with the State of Kansas?

5 A. I don't believe so.

6 Q. Did you assist the State of Kansas in  
7 any material respect with regard to its  
8 interpretation of the IMPs?

9 A. Not -- not that I recall.

10 Q. Do you recall what did occur on this  
11 phone conversation?

12 A. The only thing I recall is just some  
13 general discussion on our understandings of  
14 what the IMPs were at the process -- or at that  
15 point in time.

16 Q. Do you remember how they compared? In  
17 other words, did you have similar  
18 understandings or are they materially different  
19 in any regard?

20 A. I don't recall that, I guess, or would  
21 at this point.

22 Q. We'll mark this as Exhibit 34.

23 (Exhibit No. 34 marked for  
24 identification.)

25 Q. (By Mr. Wilmoth) Could you take a look

1 at that communication and tell me if you  
2 remember participating in the conversation  
3 that's referenced there?

4 A. Okay.

5 Q. Do you recall that conversation?

6 A. Vaguely I do. Do recall it, but not  
7 much as far as the detail in it.

8 Q. Can you tell me who participated in that  
9 meeting or the conversation? Was it a meeting  
10 or a telephone conversation, I guess I should  
11 ask first.

12 A. I think it was a combination of both, I  
13 believe. There was probably individuals at the  
14 meeting and I think Gordon Aycock would have  
15 called in, possibly.

16 Q. Can you tell me the subject matter of  
17 the meeting?

18 A. Not in detail, I couldn't.

19 Q. I note the last sentence indicates that  
20 some notes from a DNR meetings and the comments  
21 on the IMPs would be a good background. Does  
22 that refresh your recollection in any regard?

23 A. Not -- it doesn't help a lot. There was  
24 numerous meetings and --

25 Q. During the summer of 2010?

1 A. Yep.

2 Q. When you say numerous meetings, are you  
3 talking about meetings with --

4 A. Well, there were several meetings with  
5 DNR and we had various comments going on, IMPs.  
6 So to know exactly what --

7 Q. Do you remember how many times you met  
8 in Topeka?

9 A. To my knowledge, it would have been  
10 probably the only time that I'm aware of.

11 Q. So the summer of 2010 was also the same  
12 time that the Bureau was seeking clarification  
13 from Nebraska DNR on the IMPs, isn't that  
14 right?

15 A. I believe that's correct.

16 Q. And if that clarification were sought it  
17 would have been shared with the State of  
18 Kansas, perhaps?

19 A. That I'm not sure. It -- I couldn't  
20 answer one way or the other.

21 (Exhibit No. 35 marked for  
22 identification.)

23 Q. (By Mr. Wilmoth) I'll give you what  
24 we'll mark as Exhibit 35, Mr. Swanda. This is  
25 a going a ways back, but I'd like you to have a

1 look at it, just see if it looks familiar to  
2 you.

3 MR. DUBOIS: Is this 35?

4 MR. WILMOTH: Yes.

5 MR. DUBOIS: Thank you.

6 Q. (By Mr. Wilmoth) I'm sorry, Mr. Swanda,  
7 can you take a look at that, just make sure  
8 that it's not miscopied? Yeah, it is. For  
9 sake of clarity, this page got inverted, so --

10 A. Oh, I kind of wondered where it was  
11 starting.

12 Q. I apologize for that. It's a copying  
13 error on our part. The document is complete,  
14 it's just in -- the second and third pages are  
15 reversed by mistake.

16 MR. DRAPER: Tom, for  
17 clarification, this Exhibit 35 is attachments  
18 to an email dated December 9th, 2012, is that  
19 right?

20 MR. WILMOTH: Well, that's --  
21 the email would indicate that, John. But I  
22 think this is actually from a file that  
23 contained multiple things that were generated  
24 on that date. Maybe Mr. Dubois has a better  
25 explanation. But if you look at the date of

1 the document itself, it indicates that it's  
2 dated 5-22-2006. I think this is some kind of  
3 an archival residual from how they put these  
4 documents together.

5 MR. DUBOIS: Well, the  
6 attachment is simply an attached file to the  
7 email, so --

8 MR. WILMOTH: Well, yeah, but on  
9 your disk there were about 3,000 documents  
10 dated the same date and time, so I assumed it  
11 was just a -- you know, the way that the file  
12 was organized.

13 MR. DRAPER: Looks like there is  
14 some discrepancy because the date December 9th,  
15 2012 on the cover email includes Alice Johns  
16 who was not there at that time.

17 MR. WILMOTH: Right. I can't  
18 explain it. That's just the way the documents  
19 were produced.

20 A. All three of us were not there at that  
21 time.

22 Q. (By Mr. Wilmoth) Right. But I'm less  
23 interested in the cover email and more in the  
24 document itself, which I think you might have  
25 had a hand in working on.

1 MR. DUBOIS: And that document  
2 is apparently dated 5-22-06?

3 MR. WILMOTH: Yes.

4 MR. DRAPER: Perhaps this is a  
5 deal where the email gets redated when it's  
6 printed out.

7 MR. DUBOIS: Could be.

8 A. Yes.

9 Q. (By Mr. Wilmoth) Do you recognize this  
10 document?

11 A. Yes.

12 Q. Can you confirm for me that it was  
13 generated roughly in 2006?

14 A. I have no reason to believe that it  
15 was -- that's not -- that is the correct date.  
16 I don't see anything other than that.

17 Q. I notice the purpose of the paper is to  
18 provide a strategic plan concerning the  
19 implementation of the Republican River Compact  
20 settlement, is that right?

21 A. That's what it says, yes.

22 Q. Did the strategic plan pursued by  
23 Reclamation between 2006 and 2010, the time of  
24 your departure, change in any material respect?

25 A. I would say my answer would have to come

1 from someone higher up. We -- my office would  
2 have done as directed by our higher-ups.

3 Q. Okay. Do you recall off the top of your  
4 head whose edits are reflected in this  
5 particular documents?

6 A. If the email is correct, it says I made  
7 some of the changes. That would be myself. I  
8 don't know if that would be all of them or not  
9 or which ones would have been mine.

10 Q. If you turn the page to the section  
11 entitled Reclamation's position and role.

12 A. Okay.

13 Q. Toward the end of that first paragraph  
14 it indicates that Reclamation shall remain  
15 neutral in discussions with the state but  
16 should work closely with the natural resource  
17 districts. Do you see that?

18 A. Yes.

19 Q. Do you think that that position changed  
20 in any material respect since 2006? Or is that  
21 something for the higher-ups to answer?

22 A. To my knowledge, it did not change. I  
23 can only speak to my perspective on it.

24 Q. We'll mark this as Exhibit 36.  
25

1 (Exhibit No. 36 marked for  
2 identification.)

3 Q. (By Mr. Wilmoth) Could you please have a  
4 look at this and tell me if this document looks  
5 familiar to you?

6 A. Okay.

7 Q. Is this system operations study that's  
8 referred to here?

9 A. I think there is -- what I recall, there  
10 is some reference to that in the final  
11 settlement stipulation.

12 Q. Do you know what its purpose is?

13 A. Not exactly.

14 Q. Did you ever participate in evaluating  
15 the system operations from the standpoint of  
16 facilitating compact compliance?

17 A. No, not that I recall.

18 Q. Do you know whether the Bureau has ever  
19 undertaken a study like that?

20 A. The closest thing would have been the  
21 study in the Lower Republican, which I think  
22 was done during the same time frame as the  
23 settlement efforts were going on between the  
24 states, late 1900 -- '90s, in there.

25 Q. You note here in the second line that

1 the conservation study, the Lower Republican  
2 River study, which you might have just been  
3 referring to --

4 A. Yes.

5 Q. -- Frenchman Valley study, we're all  
6 struggling. Why was that?

7 A. I think it was probably just from a --  
8 probably different reasons for trying to  
9 complete those different studies, probably  
10 staff, staff time. And conservation study  
11 is -- the states, I think, were struggling in  
12 getting that study done in the United States.

13 Q. And so there was no system operation  
14 study ongoing at the time of your departure,  
15 was there?

16 A. No.

17 Q. Do you know whether the Bureau has ever  
18 evaluated any alternatives that would -- from  
19 an operations standpoint that would facilitate  
20 compact compliance by any of the three states?

21 A. Not that I recall.

22 Q. Document number -- Exhibit No. 37.

23 (Exhibit No. 37 marked for  
24 identification.)

25 Q. (By Mr. Wilmoth) Could you give this a

1 read, please, and let me know if you recognize  
2 it.

3 A. Yes, I'm familiar with it somewhat.

4 Q. What does the email reflect?

5 A. I think it captures some of the main  
6 items related to the purchase of natural flows  
7 and storage water that occurred in the 2006,  
8 2007, 2008 time frame in the Republican River  
9 Basin.

10 Q. How did the Bureau view those purchases?  
11 Were they of any concern to the Bureau?

12 A. Yes, there were concerns.

13 Q. Could you tell me what those concerns  
14 were?

15 A. One of the -- several -- there were  
16 several concerns and they generally centered  
17 around the authority, if Reclamation had the  
18 authority to do these kinds of things, first.  
19 Second would be did it get crosswise with  
20 contractual obligations with irrigation  
21 districts, did it comply with the water rights  
22 that Reclamation held on these projects.

23 I think there was a big concern on the  
24 use of project water supplies and where  
25 those -- should those supplies be purchased or

1 moved from one project facility where they were  
2 going to be used. And the big concern is that  
3 it was project water and that it had to remain  
4 project water.

5 Q. Do I --

6 A. So those were -- and there were probably  
7 lesser amount of the monies, who benefited from  
8 receiving those.

9 Q. Am I correct in inferring then that all  
10 of those problems got worked out since these  
11 all went through?

12 A. I would -- generally that's correct.

13 Q. To your knowledge, at the time of your  
14 departure were there any policies or positions  
15 of the department that would preclude the entry  
16 of similar arrangements in the future?

17 A. I think from my knowledge when I was  
18 there and the concerns were, as I mentioned,  
19 really to do with the authorities of the  
20 projects, the contractual obligations, the use  
21 of project water, where that use occurred.

22 There were also -- this precipitated, I  
23 think, in almost all the cases some type of  
24 environmental review because it was outside of  
25 the NEPA documents that were put in or used

1 when the contracts were done, that kind of  
2 thing.

3 Q. How did those get resolved?

4 A. There was -- there was a NEPA document  
5 generated to cover each one of those actions.

6 Q. Do you have any reason to believe that  
7 these arrangements couldn't be arranged in the  
8 future?

9 A. The first --

10 MR. DUBOIS: I'll object to  
11 that. You are now going to Reclamation policy  
12 in the future and he has no authorization to  
13 testify to that.

14 MR. WILMOTH: Why don't we take  
15 ten and come on back.

16 (Recess taken at 1:55 p.m. to 2:28 p.m.)

17 Q. (By Mr. Wilmoth) Mr. Swanda, I'm going  
18 to hand you what we'll mark as Exhibit 38 and  
19 just ask you to turn to page three of this  
20 document, which is actually page seven of the  
21 transcript.

22 A. Page which?

23 Q. Page three of the document but it's  
24 actually page seven of the transcript. Does  
25 your name appear there?

1 (Exhibit No. 38 marked for  
2 identification.)

3 A. Yes.

4 Q. (By Mr. Wilmoth) Does that mean that you  
5 attended this particular meeting of the  
6 Republican River Compact Administration?

7 A. That's correct.

8 MR. DUBOIS: Are we going to  
9 mark this as 38?

10 MR. WILMOTH: 38.

11 Q. (By Mr. Wilmoth) I'm going to hand you  
12 what we'll mark as 39.

13 (Exhibit No. 39 marked for  
14 identification.)

15 Q. (By Mr. Wilmoth) During the time at  
16 which you attended that meeting, do you recall  
17 hearing the Nebraska report which I've handed  
18 you and marked as Exhibit 39?

19 A. I think I remember that. Not in much  
20 detail, probably, but --

21 Q. Earlier we looked at some briefing  
22 papers that indicated Nebraska was not in  
23 compliance with the compact in 2010 or 2009.  
24 And I'm wondering, if you were aware of this  
25 information would you have conveyed this up the

1 chain?

2 A. This document per se?

3 Q. The information contained in the first  
4 paragraph in particular is what I'm interested  
5 in.

6 A. I would think this document probably was  
7 sent up. I'm not a hundred percent sure on  
8 that, but if we had possession of it we would  
9 have shared it.

10 Q. Okay. Thank you. Now I'd like to hand  
11 you what we'll mark as Exhibit 40 and ask if  
12 you have -- if you have seen a copy of this  
13 document.

14 (Exhibit No. 40 marked for  
15 identification.)

16 A. Okay.

17 Q. (By Mr. Wilmoth) Do you recognize that  
18 document?

19 A. Yes, I do.

20 Q. And just for the record can you identify  
21 it for me, please?

22 A. It's a statement by Aaron Thompson, area  
23 manager, regarding the proposed integrated  
24 management plan for the Middle Republican  
25 Natural Resource District dated June 8th, 2010.

1 Q. And obviously it's entitled a statement  
2 by Mr. Thompson, but he's not the only one that  
3 had input into this, is he?

4 A. That's probably correct.

5 Q. Did you have input into this document?

6 A. I would have had some involvement in the  
7 drafting of some of the material that's in  
8 here.

9 Q. Who else would have been involved?

10 A. I believe Craig Scott on my staff,  
11 certainly there would have been review by  
12 others in the regional office, I believe.

13 Q. Such as Mr. Aycock?

14 A. Yes.

15 Q. Or --

16 A. Gordon Aycock, yes.

17 Q. What I'd like you to do is take this pen  
18 and either circle or underline those portions  
19 of the testimony for which you and your people  
20 in the McCook field office were primarily  
21 responsible.

22 A. You are talking titles or --

23 Q. Anything you'd like.

24 A. Would it be easier to conclude that we  
25 would have had some involvement in not

1 necessarily everything that's in here but  
2 certainly the drafting of this document instead  
3 of going through it?

4 Q. What I'd like to do is at least by --  
5 let's go by paragraph. If you could just put a  
6 checkmark next to the paragraphs in which  
7 you --

8 A. Okay.

9 Q. -- had some primary drafting  
10 responsibility. Yeah, let's have you mark this  
11 one that's actually an exhibit. I realize it's  
12 a lengthy document, so take the time that you  
13 need to review it.

14 MR. WILMOTH: You can make a  
15 copy of that when we're done if you like.  
16 That's easier.

17 MR. DRAPER: That would be  
18 appreciated.

19 (An off-the-record discussion was held.)

20 MR. WILMOTH: Thank you. We  
21 don't have anything further. We'll get a copy  
22 of that made.

23 MR. DRAPER: No questions from  
24 Kansas.

25 MR. WILMOTH: Autumn, do you

1 have anything?

2 MR. DUBOIS: Take us off mute,  
3 Autumn.

4 MS. BERNHARDT: Thanks for  
5 reminding me. I was asking questions left and  
6 right.

7 MR. GRUNEWALD: Very  
8 nonresponsive witness.

9 MR. WILMOTH: Do you have any  
10 questions, Autumn?

11 MS. BERNHARDT: I don't, thank  
12 you.

13 MR. DUBOIS: No redirect.

14 MR. WILMOTH: Thank you very  
15 much, Mr. Swanda.

16 (Concluded at 2:41 p.m.)

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STATE OF NEBRASKA            )  
  :    ss.  
COUNTY OF LANCASTER        )

I, Sheryl Teslow, General Notary Public in and for the State of Nebraska, do hereby certify that MARVIN SWANDA was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him as above set forth was reduced to writing by me.

That the within and foregoing deposition was taken by me at the time and place herein specified and in accordance with the within stipulations; the reading and signing of the witness to his deposition having not been waived.

That I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

IN TESTIMONY WHEREOF, I have placed my hand and notarial seal the            day of May, 2012.

\_\_\_\_\_  
Sheryl Teslow, RDR, CRR

