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In re: Non-Binding Arbitration Pursuant to the Final
Settlement Stipulation, Kansas v. Nebraska and
Colorado

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No. 126 Original, U.S. Supreme Court

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TRANSCRIPT OF PROCEEDINGS

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BE IT REMEMBERED that the above-entitled matter came
on for hearing before the HONORABLE KARL J. DREHER,
Arbitrator, held at University of Denver, Sturm
College of Law, Denver, Colorado on the 10th day of
December, 2008.

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1	I N D E X	
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22 P R O C E E D I N G S
23 ARBITRATOR DREHER: At this time we are
24 ready to begin oral arguments on legal issues in the
25 nonbinding arbitration being conducted pursuant to
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1 the Final Settlement Stipulation approved and adopted
2 by the U.S. Supreme Court on May 19, 2003 in Kansas
3 versus Nebraska and Colorado, Original No. 126.
4 It's a couple of minutes after 2:00 on
5 December 10, and I'm Karl Dreher, the Arbitrator.
6 If counsel would now please identify
7 yourselves for the record.
8 MR. DRAPER: I will start.
9 Mr. Arbitrator, my name is John Draper,
10 and I'm special counsel for the State of Kansas here.
11 I think the others should identify themselves that
12 came from Kansas, if you would.
13 MR. BOOK: Dale Book, consultant to the
14 State of Kansas.

15 MR. GRIGGS: Counsel to the Division of
16 Water Resources, State of Kansas.

17 MR. GRUNEWALD: Chris Grunewald,
18 Assistant Attorney General with the State of Kansas.

19 Not sitting next to me, but soon to be
20 sitting next to me would be Sam Speed, also Assistant
21 Attorney General for Kansas.

22 MR. DRAPER: I should mention also that
23 my assistant, Donna Ormerod, is present.

24 MR. AMPE: I'm Peter Ampe, First
25 Assistant Attorney General for the State of Colorado.

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1 MS. BERNHARDT: Autumn Bernhardt,
2 Assistant Attorney General for Colorado.

3 MR. POWERS: Marcus Powers, Assistant
4 Attorney General for Nebraska.

5 MR. LAVENE: Justin Lavene, special
6 counsel to the Attorney General of Nebraska.

7 MR. WILMOTH: I'm Tom Wilmoth with the
8 law firm of Husch Blackwell Sanders, on behalf of
9 Nebraska.

10 MR. BLANKENAU: Don Blankenau, with the
11 same law firm and same affiliation.

12 ARBITRATOR DREHER: There are seven
13 issues that have been identified and briefed by the
14 States, and I have -- because the issues have been
15 presented somewhat differently by the States, I
16 restated those issues in the form of the following
17 seven questions.

18 And as part of the presentation from
19 each State, I would ask that you state whether you
20 agree or disagree with my framing of the issues by
21 these questions; if you disagree, your reasons why.

22 If I need to back up and repeat them,
23 that's fine, because they will sound somewhat, a
24 little different to you than how you presented them
25 in your briefs.

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1 Question 1: Are Nebraska's proposed
2 changes to the Republican River Compact
3 Administration accounting procedures proper subjects
4 of dispute resolution and for this arbitration?

5 Question 2: Is the evaporation from
6 nonfederal reservoir below Harlan County Lake
7 required to be included in the Compact accounting?

8 Question 3: Does the Final Settlement
9 Stipulation allocate evaporative losses from Harlan
10 County Lake entirely to Kansas when the Kansas
11 Bostwick Irrigation District is the only entity

12 actually diverting stored water from Harlan County
13 Lake for irrigation?

14 Question 4: If Nebraska has violated
15 the Republican River Compact or the Consent Decree of
16 May 19, 2003 causing damage to Kansas, is Nebraska
17 subject to remedies for civil contempt of Court,
18 including disgorgement of Nebraska's gains, or should
19 any damages awarded to Kansas be limited to actual
20 damages suffered by Kansas?

21 Question 5: Is Kansas's proposed remedy
22 for future compliance with the Republican River
23 Compact a proper subject for this arbitration and can
24 the Supreme Court formulate and mandate a remedy for
25 future compliance?

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1 Question 6: If Nebraska's alleged
2 violations during both 2005 and 2006 are
3 substantiated, is Kansas entitled to damages for both
4 2005 and 2006, or for 2006 only?

5 Question 7: Is Nebraska's issue of how
6 should damages paid for violations during one year or
7 years be considered in determination of compliance in
8 future years a proper subject for this arbitration?

9 Now, I read those at normal speaking
10 speeds, so if I need to go back over them again, I
11 will do that.

12 Would that be helpful to restate them
13 again or not? Is it necessary?

14 MR. DRAPER: Well, as we get to each
15 one, it might be helpful for you to restate it so we
16 can hear it again as we -- if you would like to go
17 through those in order with argument and each State
18 can state whether it needs to have the question
19 reread before stating whether it -- it's agreeable to
20 that formulation.

21 MR. BLANKENAU: I think that is fine.

22 ARBITRATOR DREHER: Now, in email
23 correspondence with counsel on Monday of this week, I
24 proposed that each State take 30 minutes for an
25 opening statement in the order of Kansas, Nebraska

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1 and Colorado and that each State take 20 minutes for
2 rebuttal in the same order, allowing me 30 minutes to
3 one hour, depending upon when we have to vacate the
4 room, for questions and responses.

5 Kansas proposed that the times be split
6 evenly between Kansas, on the one hand, and Nebraska
7 and Colorado on the other, given that Nebraska and
8 Colorado were aligned on those issues briefed by

9 Colorado.

10 Given that Nebraska has briefed issues
11 that were not briefed by Colorado and given that all
12 three States have actual interests as sovereigns, I'm
13 not inclined to adopt Kansas's suggestion and will
14 allow each State equal time for opening statements
15 and rebuttal. However, Kansas has asked to have its
16 rebuttal heard last, which I will allow, as no State
17 shall be disadvantaged by change in the order of
18 rebuttal.

19 So, with that, are we ready?

20 MR. DRAPER: Kansas is ready.

21 ARBITRATOR DREHER: Well, Kansas is the
22 plaintiff and they go first, so be my guest.

23 MR. DRAPER: Thank you. And would you
24 like to, then, have us address all seven questions in
25 this opening statement and then the other States
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1 address those in their turn?

2 ARBITRATOR DREHER: That would be my
3 preference, but you may choose not to address all
4 seven. That's entirely up to you.

5 MR. DRAPER: All right. Well, as we get
6 to each question, I may ask you to repeat your
7 formulation so that we can be clear about any
8 difference we may have.

9 ARBITRATOR DREHER: Sure, good.

10 MR. DRAPER: Very good.

11 Well, I will begin our part of the
12 opening statements then.

13 I would like to begin with a little bit
14 of background. I think the Arbitrator is becoming
15 more and more familiar with the background here, but
16 I would like to pick out a few points that I believe
17 are relevant to our discussion and argument today.

18 In the early 1980s, Colorado and Kansas
19 cut off further well development, for all practical
20 purposes, in the Republican River Basin. However,
21 Nebraska did not do that and continued until much
22 later in the mid-1980s. In the forum of the
23 Republican River Compact Administration, Kansas
24 complained, and has complained, in more or less
25 continuous fashion since then, to Nebraska that its
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1 pumping was violating the Compact.

2 We had no meaningful response from
3 Nebraska. It was indicated that the Department of
4 Natural Resource did not have authority to regulate
5 groundwater, and that that was a matter that was not

6 under their control, but under the control of the
7 Natural Resource Districts in the area.

8 It was also asserted that the Compact
9 was unworkable because the accounting was after the
10 fact.

11 The discussions continued in the forum
12 of the Republican River Compact Administration for
13 many years, culminating in the latter part of the
14 1990s in mediated negotiations. Professional
15 mediator was hired and for a period of about 14
16 months, the parties tried come to an agreement that
17 would be acceptable to both States.

18 This included the question of whether
19 groundwater was required to be accounted for in the
20 Compact.

21 That process did not yield satisfactory
22 results, so Kansas filed suit in May of 1998 in the
23 Supreme Court. That was objected to by Nebraska.
24 And after a series of briefs being filed, the Court
25 granted the motion for leave to file in January of
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1 1999.

2 At the same time, however, the Court
3 invited a motion to dismiss to test the question that
4 had been asserted by Nebraska that groundwater was
5 not to be accounted for under the Compact. That
6 was -- that was also briefed and this was before the
7 Court and before -- and just in time before the Court
8 was expected to rule, it assigned the case to Special
9 Master McKusick, who then took over the consideration
10 of, in the first instance, the motion to dismiss.

11 And he ruled in January 2000 that the --
12 that the motion to dismiss should be denied on the
13 basis that groundwater pumping, both alluvial near
14 the water and Ogallala pumping, for the most part at
15 greater distances from the river, should be included
16 in Compact accounting; that is, to the extent that
17 that pumping affects the surface flows of the river.

18 On the basis of the Special Master's
19 recommendation, the Supreme Court denied the motion
20 to dismiss the case and proceedings continued before
21 Special Master McKusick.

22 However, in October 2001, negotiations
23 began between the States on the possibility of
24 settling the dispute and a settlement was reached
25 that was submitted to Special Master McKusick -- the
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1 Final Settlement Stipulation. The five volumes that
2 that make up that -- that settlement, most of the

3 substantive provisions are in that one volume that
4 the Arbitrator has received. And that was submitted
5 to the Special Master about December 15, 2002. The
6 next six months until the end of June 2003, were
7 devoted to working out the details of the RRCA
8 groundwater model.

9 Now, all of the important features of
10 that model had already been worked out among the
11 States and were included as an appendix to the FSS.
12 There were further details that needed to be worked
13 out and the States asked for six months to do that.

14 They were allowed to do that by Special
15 Master McKusick; and at the end of the six-month
16 period, they were able to agree on the model
17 documentation and the model itself, of course.

18 So that's just a little review of the
19 background. Most of those things, I think the
20 Arbitrator is already familiar with, to a certain
21 extent.

22 I would point out that the adoption of
23 the Final Settlement Stipulation is something that
24 was signed off on by the attorneys general themselves
25 for each of the three states and also the governors

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1 of each of the three states; and that the Final
2 Settlement Stipulation itself, as well as the signing
3 statement of the governors and the attorneys general,
4 both had nonseverability provisions, basically that
5 this was a complete agreement and that they were --
6 they were recommending its adoption, but only in its
7 entirety. And if it couldn't be done in its
8 entirety, then the agreement would not survive that.

9 So that brings us to the first question,
10 I think. And if the Arbitrator would repeat for me
11 again your formulation --

12 ARBITRATOR DREHER: Sure.

13 MR. DRAPER: -- I would be glad to
14 respond specifically.

15 ARBITRATOR DREHER: First question is:

16 Are Nebraska's proposed changes to the
17 Republican River Compact Administration accounting
18 procedures proper subjects of dispute resolution and
19 for this arbitration?

20 MR. DRAPER: We agree with that
21 formulation of the question, yes.

22 And I would like to address that now.

23 As we just mentioned, the Final
24 Settlement Stipulation was an agreement of the States
25 that was reached at the highest level. The Final

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1 Settlement Stipulation, incidentally, explicitly
2 includes all of the appendices, so that is -- really,
3 all of the five volumes are necessary to have a full
4 Final Settlement Stipulation.

5 This is made clear by the definition of
6 the word "stipulation" at the beginning of the FSS.
7 And I think -- I have been using these acronyms, FSS,
8 but that stands for Final Settlement Stipulation.

9 In that document, at page 8 of the text
10 of it is defined the word "stipulation." Says:
11 "Stipulation: This Final Settlement Stipulation to
12 be filed in Kansas v Colorado" and -- I'm sorry, "to
13 be filed in Kansas versus Nebraska and Colorado, No.
14 126, Original, including all appendices attached
15 hereto."

16 In addition -- I will wait a minute if
17 you would like to go to that provision.

18 ARBITRATOR DREHER: No, go ahead.

19 MR. DRAPER: But I would point out,
20 then, that the Final Settlement Stipulation was an
21 agreement between the States as to how to settle the
22 litigation that was brought by Kansas initially
23 against Nebraska; but ultimately, there were
24 cross-claims and counterclaims that brought Colorado
25 fully into the case.

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1 This Final Settlement Stipulation is
2 approved and incorporated in the Supreme Court Decree
3 of May 19, 2003. So it's now an order of the Court.
4 And as -- as such, it can't be changed, except by
5 virtue of its terms if it provides for some kind of
6 change, or, of course, by further order of the United
7 States Supreme Court. There are provisions in the
8 FSS that do give the States some flexibility to agree
9 to certain changes.

10 In addition, there are certain issues
11 that didn't get quite settled and the States
12 contended themselves with setting out the principles
13 and allowing that to be the subject of further action
14 at a later time.

15 And I'm thinking there of the one issue
16 that we have pointed out among Nebraska's that is the
17 subject of a footnote in the Appendix C, I think it
18 was Footnote 2. This is an example of where the
19 States agreed that it should be handled in a certain
20 way and, like every other part of the agreement, the
21 agreement of the States, as incorporated in the
22 court's decree, is enforceable. And we believe that

23 there was a question of fact that hadn't been
24 determined and the parties agreed, yes, there is this
25 question of fact and whatever it should turn out to
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1 be in that regard, it should be -- the accounting
2 principles should be changed accordingly.

3 And so that is an agreement of the
4 States. And if the States -- I don't think this has
5 been really fully discussed among the States, but
6 ultimately, they can't decide on an agreeable
7 characterization of the facts and how that should be
8 handled with respect to where the diversions or
9 returns come from, with respect to the Arikaree and
10 the North Fork that is based on objective criteria
11 and the States have said should be resolved by those
12 criteria.

13 This is in strong contrast to all of the
14 other changes that the State of Nebraska would like
15 to ask the Arbitrator, and ultimately the Supreme
16 Court, to force on the other States.

17 In most areas of the FSS, there is
18 simply an agreement as to how that -- how the
19 particular subject is to be handled.

20 One of the main ones that Nebraska has
21 raised has to do with how you account for the mound
22 credit.

23 As I think the Arbitrator is aware,
24 there is what is called a groundwater mound in the
25 northern part of the basin that results from return
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1 flows from irrigation water that returns not to the
2 Platte where it's diverted from, but returns to the
3 Republican River Basin. And the experts for the
4 States analyzed that and have included, in the FSS
5 accounting and in the RRCA groundwater model,
6 accounting that takes -- takes that credit and
7 applies it as the States agreed.

8 Now, in that particular instance, this
9 could -- this is perhaps the largest change they want
10 to make and this would change the allocation between
11 the States.

12 The basic approach is -- I think they
13 explained in the footnote, is whether to do this on
14 and off with the imported waters, with the pumping on
15 or with the pumping off. Now the pumping is always
16 on. Every year there is pumping. And that's how the
17 States agreed to do it; in other words, they used the
18 real situation to do that.

19 Now, Nebraska would like to turn the

20 pumping off and create a hypothetical or artificial
21 situation where the groundwater levels are going to
22 rise in the model and Nebraska gets more credit.

23 Now, the more credit Nebraska gets, the
24 less Kansas gets out of the virgin water supply.
25 This is a zero-sum game and if they get an extra
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1 acre-foot, that extra acre-foot has to come out of
2 somebody's hide.

3 When you are down in the area below
4 Colorado, that is going to either be -- well, if it
5 is going to come out of anybody's hide, it will be
6 Kansas' hide.

7 So this is the question today as a legal
8 matter, this is open to discussion, whether it's a
9 reasonable change or not. And we believe that the
10 States set out very clearly in the FSS how that was
11 to be done, with the pumping on.

12 And that is one of the features that is
13 affected by this nonseverability requirement that
14 went into adopting the FSS. There are many, many,
15 many compromises and adjustments; States didn't get
16 exactly what they wanted in one area, but they were
17 okay with it because they got something that they
18 felt was enough of a compensation in other areas.
19 Just like a regular compromise situation.

20 And so now the question is whether,
21 against the will of, at least Kansas, that that
22 agreement can be changed in a way that benefits one
23 State against another.

24 It seems to us that this is not the kind
25 of thing that the Supreme Court has said it would
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1 decide.

2 When you look at interstate compact
3 interpretation cases, we have -- all of the States
4 have discussed in their briefs, we find that the
5 Supreme Court, when it has been asked to change an
6 interstate compact, has said, No, we are not a
7 political institution; we will enforce the law, we
8 will interpret it and give a remedy, but we will
9 not -- we will not change that.

10 And what we have in the FSS is an
11 implementation; there is a lot of detail in the FSS
12 that is not in the Compact, and this is the way the
13 parties to the Compact agreed that those terms should
14 be applied when you get down to how do you apply a
15 model that didn't exist at the time of the Compact?
16 Things like that.

17 And so the Supreme Court has backed away
18 from changing an agreement. If it can discern an
19 agreement, it will not change that agreement.

20 And you saw the example in the Pecos
21 River situation where the agreement was to have a
22 Pecos River Commission with each state with one vote,
23 and a federal nonvoting member that could break a
24 deadlock; that was the agreement.

25 The Special Master, in that case,

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1 recommended that they have a voting member to break
2 deadlocks and the Court said we can't do that.

3 Another good example is the Ellis Island
4 case. I think we cited that case, I don't think we
5 got too deeply into the facts, but that was one where
6 the Special Master in that case had found that the
7 division between the boundary -- this is a boundary
8 case between New York and New Jersey on Ellis
9 Island -- and they had found that the boundary was at
10 the high watermark as originally existed at that
11 island, but there had been a lot of fill from the
12 Corps of Engineers to expand the island from 23 acres
13 to 30 acres, in round numbers. They found that the
14 big immigration reception building there actually had
15 the line going right through it. So part of that
16 main reception building was in New York and part was
17 in New Jersey.

18 So the Special Master in that case
19 recommended that they draw the line just around the
20 edge of the building so that you wouldn't have the
21 governmental difficulties that occur with a building
22 in two different states. And the Court rejected
23 that. It said we are not a political organization.
24 We don't decide where boundaries go. In other words,
25 we don't decide allocations. We will enforce it, you

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1 give us one that has objective criteria. And they
2 decided the objective criteria in that case was the
3 high watermark, and that was the answer. And if it
4 goes through a building, that is too bad.

5 Maybe that was a mistake, but it wasn't
6 for the Court to come in, it felt, and fix that
7 mistake. That was a political decision that if the
8 States wanted to deal with it, they were perfectly
9 free to do so.

10 So we believe that the changes that
11 Nebraska is recommending are that kind. Here is the
12 agreement between the States, signed at the highest
13 levels, required to be nonseverable, and they want to

14 severe it. They want to come in, take one part,
15 change that, keep all of the rest in there. They
16 like the fact that we waived damages. They like all
17 of the other facts there, but they want to change
18 this one and thereby allocate more water to Nebraska.

19 We don't believe that the Supreme Court
20 would entertain that.

21 MR. BLANKENAU: If I could interject.

22 MR. DRAPER: Is this the way we are
23 going to work it, so we have interruptions? I just
24 want to know.

25 MR. BLANKENAU: I don't mean to
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1 interrupt, but in answering this first question, you
2 have gone on 25 minutes and I want to make sure that
3 we all get equal time. 30 minutes was the limitation
4 for all seven questions, as I understood it.

5 ARBITRATOR DREHER: That's correct, I
6 noted that.

7 MR. DRAPER: I appreciate the comment.

8 ARBITRATOR DREHER: I noted Kansas
9 started at 2:10, so you have got ten minutes --

10 MR. DRAPER: Ten more minutes? Okay.

11 ARBITRATOR DREHER: -- in your opening.

12 MR. DRAPER: Thank you.

13 ARBITRATOR DREHER: Yes.

14 MR. AMPE: Sorry, Carol, we are going to
15 have to start talking really fast now.

16 MR. DRAPER: Let me go on to the other
17 issues then, since I have ten minutes left for my
18 opening.

19 The second issue had to do with
20 nonfederal evaporation below Harlan County Lake, if
21 you would give me the formulation.

22 ARBITRATOR DREHER: Is the evaporation
23 from nonfederal reservoir below Harlan County Lake
24 required to be included in the Compact accounting?

25 MR. DRAPER: We agree with that
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1 formulation of the question. And we believe that it
2 needs to be -- that it is required to be included.
3 And I would just quickly refer you to several parts
4 of the Final Settlement Stipulation.

5 Appendix C is where the accounting
6 procedures are. There is a definition, on page C-10,
7 of nonfederal reservoir as reservoirs other than
8 federal reservoir that have a storage capacity of 15
9 acre-feet or greater and the principal spillway
10 elevation.

11 If you are turn to page C-37, we will
12 see -- I'm looking -- for the record, I'm looking at
13 the hard copy. This is -- this has been changed and
14 we provided the latest version of that Appendix 3 to
15 our first brief.

16 But at page C-3 of the printed one, we
17 see that there is a definition, or I guess it would
18 be an abbreviation, it's capital EvNFR, is
19 evaporation from nonfederal reservoir. And if you
20 turn, in the hard copy here, to page C-45 in
21 subparagraph 13, you will notice that in the CBCU,
22 Nebraska is included in that abbreviation with the
23 extra letter "n" which designates Nebraska. And this
24 is in paragraph 13 in the printed version, which is
25 the area that covers Harlan County Lake, both above
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1 and below, and there is no distinction between that.
2 This is a section that has been updated by agreement
3 of the parties.

4 For instance, one of the things they did
5 was to add that term, evaporation from nonfederal
6 reservoir, but with the postscript letter of "k" to
7 the CBCU Kansas listing, because in the original, it
8 was -- it was inadvertently left out and the parties
9 agreed that it should be included.

10 So these are the formulas that say what
11 to add, what to subtract in determining CBCU, which
12 is calculated beneficial consumptive use. And so to
13 us, this shows very clearly that there is no
14 exemption for reservoirs below Harlan County Lake.

15 Let's pass on to the next one, and that
16 is the issue with regard to the Harlan County Lake
17 evaporation split in 2006.

18 ARBITRATOR DREHER: The way I formulated
19 that question is: Does the Final Settlement
20 Stipulation allocate evaporative losses from Harlan
21 County Lake entirely to Kansas when the Kansas
22 Bostwick Irrigation District is the only entity
23 actually diverting stored water from Harlan County
24 Lake for irrigation?

25 MR. DRAPER: I think that is a large
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1 part of the question, Your Honor.

2 Really, what we are trying to get to
3 here for purposes of this arbitration is what is the
4 allocation for the year 2006, which is the one year
5 that the question arises in.

6 If the answer is no to the question as
7 you have formulated, the question still remains: How

8 should it be allocated for purposes of this
9 arbitration?

10 And so we would have that slight add on,
11 I guess I would call it.

12 As we have argued in our brief, there is
13 a general purpose that we find in the FSS to allocate
14 the evaporation associated with Harlan County Lake in
15 accordance with the uses made by the two states.

16 There are two types of irrigation use --

17 There is irrigation use for NBID,
18 Nebraska Bostwick Irrigation District; and the other
19 one is KBID, the Kansas Bostwick Irrigation District.
20 There is also other evaporation from that reservoir
21 because that reservoir has a pool that is even larger
22 than the irrigation pool, which is called the
23 sedimentation pool, and the evaporation from that has
24 to be allocated.

25 The way the States agreed was, under
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1 normal conditions, you have both NBID and KBID divert
2 and you just divide all of the evaporation, not just
3 from the irrigation water, but that it would be
4 associated with the nonirrigation water. You
5 allocate that, under normal conditions, according to
6 the diversions that are made there to the two -- two
7 projects.

8 Now, in 2006, Nebraska chose to change
9 the use. Instead of using it for irrigation on NBID
10 lands in Nebraska, it made it available to Kansas to
11 use in Kansas. And it is taking the position --
12 Nebraska is -- that because it did so, it shouldn't
13 be responsible for the evaporation associated with
14 its water, either its irrigation water or its share
15 of the rest of the water in the Harlan County Lake.

16 We think it's -- I don't -- I don't --
17 doesn't look like I have time to go into any more
18 detail on that; but we believe that the -- this is
19 not quite done in the FSS, there is a provision in
20 the -- in the accounting procedures that almost does
21 this. It talks about -- this is on page C-34 of the
22 printed version. Talks about the event in which
23 Nebraska chooses to substitute supply for the
24 Superior Canal for Nebraska's allocation below Guide
25 Rock in water-short year administration years.

0028

1 In those cases, the amount of the
2 substitute supply will be included in the calculation
3 of the split, as if it had been diverted to the
4 Superior Canal at Guide Rock.

5 That is pretty close to the situation,
6 not exactly what we have -- pretty close. It shows
7 when you make these kinds of changes and that is
8 change that obviously contemplated Compact compliance
9 use taking the Superior Canal water and making it
10 available, that that should not make any difference
11 in the evaporation.

12 Now, the Compact situations that was
13 created by the way Nebraska pursued things in 2006, I
14 don't think actually technically comes under that
15 language, but we believe that that shows the intent
16 of the parties that should apply here.

17 I'm ready for the next issue and if you
18 would restate that for me.

19 ARBITRATOR DREHER: The fourth
20 question -- and I'm not sure how you are going do
21 this in three seconds. Let me take a moment here and
22 offer something.

23 I don't know if you call it perspective
24 or not, but I have read the opening briefs, the
25 response briefs and the reply briefs from each State
0029

1 several times. So I don't know that it's going to
2 help me just to restate what is -- what is there.

3 I mean, I have noted a couple of things
4 that I may have passed over, but I have been living
5 this stuff now for a month. And so, you know, it --
6 the idea, I think, for the oral argument was to help
7 me perhaps realize some aspects of this that may be a
8 little more subtle that maybe I missed or to
9 highlight what each State believes is truly
10 important.

11 And I suspect that Question 4 is truly
12 important to Kansas. I mean, make no mistake about
13 my perspective in terms of compact violations; they
14 are serious -- if they are true, they are serious and
15 they have to be dealt with and it's painful. But I'm
16 certainly not interested in causing any more pain
17 than is essential.

18 So I need some help in terms of
19 identifying what really I need to focus on.

20 Now, having said that, given that you
21 have used your 30 minutes, I will move on to
22 Nebraska. If there are things that you want to raise
23 that you didn't have a chance to in that opening
24 30-minute slot, you know, I'm willing to do two
25 things.

0030

1 I'm certainly willing to adjust the time

2 that you have for rebuttal. If you want to use a
3 portion of that time to continue with an opening
4 statement on one or more of these remaining
5 questions, I would do that. And also, I mean, if
6 there is -- I don't want Kansas or Nebraska or
7 Colorado to leave here today with something really
8 important that was not given the chance to be aired.

9 So with that in mind, I would also
10 reduce the time that I have for questions to make
11 sure that any of the three States have really had the
12 chance to air what they believe is really, really
13 important here.

14 So as we listen to Nebraska, I would ask
15 that you consider that and see how you would like to
16 proceed. We will take a very short five-minute-type
17 break between the openings statement and -- opening
18 statements and rebuttal. So you will have a chance
19 to confer, if you need to.

20 So, with that, Nebraska.

21 MR. BLANKENAU: Thank you, Mr. Wilmoth
22 is going to make the argument for Nebraska.

23 MR. WILMOTH: I just want to ask a
24 procedural question. How are you envisioning
25 Nebraska's rebuttal time into the scheme of things?

0031

1 ARBITRATOR DREHER: Kansas has requested
2 that they be moved to the end and I'm inclined to
3 grant that. So Nebraska would be the first rebuttal.

4 So Nebraska opening --

5 MR. WILMOTH: Back to Colorado and back
6 to Nebraska?

7 ARBITRATOR DREHER: Back to Nebraska.

8 MR. AMPE: Back to Colorado, yes.

9 MR. WILMOTH: So we are looking at 30
10 minutes for opening?

11 ARBITRATOR DREHER: Yes, 30 minutes for
12 opening.

13 MR. WILMOTH: Given that, I would like
14 to do a couple of things. One, I will probably touch
15 on each of these issues quickly, I want to make sure
16 your questions are answered; and if you have any
17 residual things after I have spoken, ask them. I
18 will try to reserve five minutes for that purpose.

19 A couple of prefatory comments on the
20 background Mr. Draper offered.

21 I do want to simply say that, to the
22 extent Kansas looked back in time before the FSS to
23 try to explain Nebraska hasn't really been doing its
24 part or has acted in bad faith or something like

25 that, we do want to make clear the FSS, frankly, is
0032

1 irrelevant because all of those claims have been
2 waived.

3 With respect to the 1998 case that
4 Mr. Draper talked about, I also want to be clear in
5 the context of the time that was, for all intents and
6 purposes, a demand to change the accounting under the
7 Compact to include groundwater wells. So I have a
8 hard time understanding the leap now, that accounting
9 procedures cannot be changed.

10 But as you correctly highlighted, Mr.
11 Dreher, the real issue here that everybody is nervous
12 and concerned about is the damages issue, so I want
13 to start with that, if you would indulge me.

14 For the record, we don't have any
15 concern with the way you stated any of the questions,
16 except perhaps the seventh one, which I will address
17 at the appropriate time.

18 What I would like to do, with your
19 indulgence, is address Issues 4 first, and then 1,
20 and then 5, 6 and 7. And if we have time, 2 and 3.

21 With respect to the damages issue, it's
22 important to understand that this controversy
23 ultimately is rooted in an interstate compact. The
24 FSS implements that Compact and the FSS can't be
25 divorced from that Compact so that more general
0033

1 principles of decree enforcement can be applied in
2 this case.

3 The Compact itself and the FSS are
4 essentially negotiated contracts among three
5 sovereign entities.

6 What that means is that, for all intents
7 and purposes, whether it's an enforcement action or
8 an administrative-interpretive action, we need to
9 apply contract principles, tempered by and with due
10 deference to the special status of these particular
11 litigants.

12 Now, when you put that in mind, what it
13 really means is, Kansas has already lost this case on
14 the Arkansas River, this really is a second bite at
15 the Arkansas River apple.

16 Special Master Littleworth, in his
17 second report, basically addressed every single issue
18 that Kansas now offers to you. We say, Read the
19 Littleworth report, you will get everything you need
20 to know and you can follow that down the line.

21 Kansas very much wants to distinguish

22 the Littleworth report on the basis that this really
23 involves a Consent Decree and not a Compact.

24 Well, again, the Consent Decree in this
25 case is essentially a contract, as was the Compact,
0034

1 and Littleworth's analysis with regard to the
2 appropriate nature of damages being contract damages
3 is absolutely applicable here.

4 Kansas wants you to essentially issue an
5 order of civil contempt in order to enforce the
6 decree.

7 And it's very important to understand
8 the difference between civil contempt and criminal
9 contempt, because what we are really looking at here
10 is a discussion about criminal contempt and a request
11 for criminal contempt order.

12 The reality is this: All parties agree
13 and all case law that was cited by Kansas says civil
14 contempt orders are designed to put the injured party
15 back in the position he was before the breach.

16 Kansas' position is that in order to do
17 that, we must disgorge funds from Nebraskans who
18 utilized water that Kansas could have utilized, in
19 theory.

20 Now, the problem with that is it rests
21 on a series of patent law cases, patent infringement
22 cases.

23 If you think about it, if I make a
24 mousetrap and can sell you that for a buck and
25 Mr. Blankenau can make that same mousetrap and sells
0035

1 it to you for a dollar, he is selling you his
2 mousetrap and you are giving him my dollar. That
3 logic doesn't apply, that kind of fungible nature of
4 the market doesn't apply with respect to water cases.

5 Littleworth recognized this; he said if
6 you apply an unjust enrichment award in the
7 downstream, you are going to give a windfall to the
8 downstream state because, very simply, there are
9 multiple variables that make the water use in one
10 state different from another.

11 Getting back to the example, if
12 Nebraskans can make \$2 an acre-foot and Kansans can
13 only make a dollar on that same acre-foot, Kansas
14 can't come to Nebraska and start irrigating and make
15 \$2.

16 So there is no direct pecuniary loss to
17 Kansas in the same nature of a patent or trademark
18 infringement case. That is why a civil contempt

19 order in this case is not proper; there absolutely is
20 not any kind of unjust enrichment.

21 When you think what Kansas really wants,
22 it wants \$72 million based on the fact that Nebraska
23 utilized water in Nebraska. That can only be read as
24 a penalty, a punitive kind of measure that is
25 designed to vindicate Kansas.

0036

1 Let me transition briefly to the
2 accounting procedures.

3 I want to make sure that the proposed
4 changes to the accounting procedures are in no way a
5 response to the enforcement action by Kansas, nor are
6 these proposed changes in any way an amendment to the
7 FSS Compact.

8 In order to understand why you have to
9 have kind of a big picture outlook here, you have a
10 Compact which is the parent document with the consent
11 of Congress; you have an FSS, which is a document
12 that implements the Compact which is approved by the
13 Supreme Court. Neither of those documents can be
14 changed unilaterally without consent by Congress or
15 the Court.

16 Then you have something called Appendix
17 C to the FSS, which specifically says that it can be
18 changed by the RRCA in accordance with the FSS.

19 Now, what does that mean? In this case
20 what it really means is that the FSS dispute
21 resolution procedures apply to those changes. And if
22 we are going to go through the dispute resolution
23 process, as you well know, we have to bring it to
24 nonbinding arbitration and that, of course, is a
25 precursor to court review if we can't get things

0037

1 resolved.

2 Mr. Draper suggested this was somehow an
3 amendment. Again, by its nature, changes to the
4 appendix is not an amendment to the FSS or Compact
5 and, indeed, the appendix has been changed before,
6 indeed, to deal specifically with Harlan County Lake
7 evap. In 2005, the appendix was changed without the
8 consent of the Court or Congress.

9 The only difference is in that case, the
10 RRCA could resolve the dispute. Unfortunately, in
11 this case it could not be resolved. Kansas' position
12 is, Too bad, we exercised our veto power and you can
13 proceed no further.

14 That is completely inconsistent with the
15 provisions of the FSS itself, as well as Appendix C,

16 which specifically allows it to come through the
17 arbitration process and, if necessary, back to the
18 court.

19 Mr. Draper sites Texas versus New Mexico
20 Pecos River case. There is another Pecos River case
21 that is far more on point here, and that is the case
22 that dealt with the so-called 1947 condition.

23 In that case, there was -- the 1947
24 condition essentially was not properly defined and,
25 as a result of that, the two States could not agree
0038

1 because the two States had conflicting views and
2 there was essentially a deadlock.

3 That case came to the Supreme Court and,
4 over objection, the Supreme Court said in this
5 situation, we have to deal with this, there is no
6 other mechanism, it's our constitutional obligation
7 to do so, because these two States have nowhere else
8 to go.

9 That's essentially why we are here where
10 we are at today, so we do think that there is no
11 basis to distinguish this from what happened in 2005.

12 There is certainly no basis to
13 distinguish this from what Kansas now wants to do in
14 changing the evap accounting at Harlan County Lake.
15 That is an accounting procedure change, that is
16 Appendix C. The only difference is we agree we can
17 bring it forward and let's deal with it.

18 Now, how am I doing on the time?

19 The next thing that I want to address
20 just briefly is an issue that arose, this is, let's
21 see, your Issue No. 6, I believe: Is Kansas entitled
22 to damages for 2005?

23 ARBITRATOR DREHER: Question 6: If
24 Nebraska's alleged violations during both 2005 and
25 2006 are substantiated, is Kansas entitled to damages
0039

1 for both 2005 and 2006, or for 2006 only?

2 MR. WILMOTH: And we have no argument
3 with that phraseology.

4 The short answer, though, that the FSS
5 precludes Kansas from recovering any damages before
6 2006, period.

7 The FSS requires that averaging be
8 employed to determine Compact compliance in
9 water-short year 2006. The parties, I think, agree
10 on this point.

11 So you may have noticed an example in
12 the briefing that if one State was out of compliance

13 in '05 by 40,000 acre-foot, but underutilized its
14 allocation in 2006 by 20,000 acre-foot, you would
15 have an average overuse of 10,000 acre-foot. We all
16 agree, I think, on that basic premise.

17 And that is, in fact, supported squarely
18 by the terminology of the FSS and Appendix B of the
19 FSS, which is the implementation schedule.

20 The problem is -- and the controversy
21 arises because Kansas wants to impose a new
22 requirement, or a new calculation that is cut from
23 holy cloth which says essentially, now we take that
24 number and multiply it by its number of years in the
25 compliance period.

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1 What they are really saying is, we want
2 to get paid on an acre-foot because there was a
3 violation and, essentially, the Compact entitles us
4 to get paid.

5 The problem with that is, if you look at
6 Appendix B of the FSS, it specifically and
7 unequivocally says the first year of water-short
8 accounting compliance is 2006, period.

9 Now Kansas claims, Well, that can't
10 possibly be right because we didn't waive claims
11 through the 2006. Yes, they did. That is exactly
12 what happened and it was part of the benefit of the
13 bargain.

14 In your former position, I'm sure you
15 can appreciate the difficulty of bringing suddenly
16 under regulation thousands of groundwater wells that
17 were previously not subject to regulation.

18 That was what was occasioned by virtue
19 of the FSS and Nebraska knew that. And they said to
20 Kansas, we are going to need some time here to get
21 our house in order. And everyone understood at that
22 time that it was reasonable to provide some grace
23 period to do so, and that is reflected in Appendix B.

24 The next issue that I would like to
25 address, I believe, is your Issue 5. Your Issue 5,

0041

1 which is --

2 ARBITRATOR DREHER: Question 5: Is
3 Kansas' proposed remedy for future compliance with
4 the Republican River Compact a proper subject for
5 this arbitration and can the Supreme Court formulate
6 and mandate a remedy for future compliance?

7 MR. WILMOTH: I have no objection to
8 that phraseology, I think it's two part.

9 I believe our answer to the first

10 question is no, this is no place for the proposed
11 remedy.

12 Second part is to extent that the
13 Supreme Court finds us out of compliance, certainly
14 they could order us in compliance. But let's talk a
15 little bit about the way the issue, I think, was
16 presented by the parties in the appendices to the
17 Arbitration Agreement.

18 The short answer is, Kansas' compliance
19 plan is off the table for two reasons. Number one,
20 at least twice now, Kansas has said, as far as their
21 enforcement action is going, this proceeding is
22 limited to water-short year 2006. So there is really
23 no reason to get into anything else with regard to
24 enforcement in Nebraska.

25 Secondly, and probably more importantly,
0042

1 Kansas has conceded that she cannot impose a
2 compliance plan of her preference on Nebraska. So I
3 think this issue, as phrased in the Arbitration
4 Agreement is stipulated, for all intents and
5 purposes.

6 That said, and this is your Issue No. 7,
7 which if you would indulge me in restating that, I
8 would appreciate.

9 ARBITRATOR DREHER: Sure.

10 Question 7: Nebraska's issue of how
11 should damages paid for violations during one year or
12 years -- maybe that should be several years -- be
13 considered in determination of compliance in future
14 years, is that a proper subject for this arbitration?

15 So-called credit.

16 MR. WILMOTH: Yes, yes, it's a credit
17 issue. I think that's acceptable. Let me make clear
18 this is not an issue that theoretically only affects
19 future enforcement proceedings. If we need to tweak
20 that statement, then just take it for what that is
21 worth. Here is the reason.

22 First of all, you have heard all of the
23 arguments, Well, this is in the Arbitration Agreement
24 so we are entitled to have it heard, et cetera, et
25 cetera. I'm not going to worry about that, here is
0043

1 the problem.

2 Any award, assuming one is made in this
3 case for water-short year 2006, has an immediate
4 impact on accounting today because whatever you do
5 here, we need to know how to apply that to determine
6 compliance, for instance, with water-short year

7 '06-'07.

8 For the Court reporter's benefit "short
9 year," are you getting that? I slur those together.

10 I want to really impress upon you the
11 magnitude of this issue is very, very serious because
12 some calculations, as we have tried to illuminate,
13 the credit, or more specifically, its application may
14 well determine whether we are in compliance or not
15 for the '06-'07 accounting period and we need to know
16 that today.

17 That is not subject to some abstract
18 future concept, as Kansas would have you believe. So
19 we urge you to address that issue in this proceeding.

20 That brings us -- I think I have touched
21 on all of your issues, except 2 and 3; is that
22 correct?

23 ARBITRATOR DREHER: That's correct.

24 MR. WILMOTH: All right. I will start
25 with 3.

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1 With regard to Harlan County Lake
2 evaporation -- and this also applies to nonfederal
3 reservoirs below Harlan County -- quite frankly, the
4 plain language in the document is clear. The Harlan
5 County Lake provision unequivocally says that Harlan
6 evap split the proportions of the diversions made by
7 the two districts.

8 As everyone knows, no diversion was made
9 by Nebraska Bostwick in 2006. Kansas claims that
10 it's inequitable for some reason and wants to reform
11 that language to provide some kind of different
12 split, which, by the way, is again an accounting
13 procedure change; we disagree certainly that it
14 should be done.

15 The reason for that is very simple and
16 this addresses the provision that Mr. Draper cites
17 about diversions below Bostwick.

18 The consumptive beneficial use
19 associated with this water occurred in Kansas and
20 under the provision Mr. Draper cites, the consumptive
21 beneficial use would have occurred in Nebraska. An
22 evap follows consumptive beneficial under the Compact
23 and the FSS.

24 We think that that disposes of it, but
25 if you want to look at the larger context with regard

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1 to how does this provision really work in operation
2 and what happened here, you can look at it one of two
3 ways.

4 For all intents and purposes, this
5 reservoir was operated as a reservoir in Article VI,
6 which essentially says one of the downstream states
7 can come into an upstream state and participate in a
8 project for the downstream states and, under no set
9 of circumstances, would anybody argue that the
10 upstream states should be eating the evap for that
11 beneficial use gains because the consumptive
12 beneficial use is going to take place downstream in
13 the state.

14 Alternatively, you can look at it as
15 though that reservoir was located in Kansas. In any
16 case, no consumptive use occurred in Nebraska. That
17 is what the Compact deals with; that is what FSS
18 deals with and Compact compliance is not to a
19 beneficial consumptive use; it's a nonuse.

20 To be perfectly clear, Nebraska paid
21 these people not to use water. They didn't buy the
22 water and send it somewhere; they paid them not to
23 exercise their water rights. That is a nonuse, not a
24 beneficial consumptive use.

25 Given the timing, I don't have too much
0046

1 time. I don't want to deal too much with nonfederal
2 reservoir; the arguments have been made. It's a
3 straightforward, plain language argument.

4 I would answer any questions you might
5 have in the limited time I have got. If you would
6 rather hear from Pete, that is fine.

7 ARBITRATOR DREHER: You still have
8 another seven minutes or something like that.

9 MR. WILMOTH: Do you have questions?

10 ARBITRATOR DREHER: The crediting
11 issue -- I didn't have a chance this morning to go
12 back and double-check, so I will just pose the
13 question.

14 Did Nebraska present that issue to the
15 RRCA?

16 MR. WILMOTH: That issue has been
17 presented to the RRCA, but it has been presented by
18 virtue of what Kansas brought to the RRCA. And by
19 that, what I mean is Kansas came before the RRCA and
20 Kansas said Nebraska is violating the Compact and in
21 order to make sure that they don't violate the
22 Compact, they make us whole, and in the future, that
23 they don't do anything wrong. Or, in other words,
24 they get their house in order, we want to impose a
25 remedy that is essentially based on the five-year

0047

1 compliance period.

2 Now, I think that whole concept has been
3 modified or retracted or slimmed down through the
4 course of this proceeding. They said, I don't think
5 that compliance plan is on the table anymore.

6 But that said, we took that seriously
7 and before the briefing started in this case, it
8 appears very clear to us -- and I think it still is
9 clear -- that whether you deal with just water-short
10 year 2006 or whether you are looking at a five-year
11 compliance period, how you deal with this crediting
12 issue is integrally related to all of that.

13 As I said, this is really a subissue
14 that arises from the issues that have been presented
15 to the RRCA. In other words, if I may, it's a
16 necessary issue. It must be resolved to accurately
17 and adequately address the issues that have been
18 presented to date.

19 ARBITRATOR DREHER: But if it only came
20 forward to the RRCA by virtue of Kansas' proposed
21 plan of remedy and if -- if you are correct, that
22 that is now off the table -- and I'm not saying you
23 are correct or incorrect --

24 MR. WILMOTH: Sure.

25 ARBITRATOR DREHER: If you are correct,
0048

1 that that is off the table, how could that have been
2 considered? I'm not tracking with how that was
3 considered by the RRCA.

4 MR. WILMOTH: Again, I don't think it
5 was ever off the table at the RRCA. I think it has
6 been taken off the table by virtue of this briefing.

7 You know, I will say that if we are only
8 dealing with 2006 water-short year enforcement, so to
9 speak, then this proceeding has constricted
10 significantly.

11 I will, though, say as a purely
12 practical matter, if you issue an award of damages in
13 this case for water-short 2006 only, that again has
14 an immediate effect on all of the parties and
15 unless -- I don't have a crystal ball, but unless we
16 want to be back here tomorrow, we should address it
17 because it makes the difference with being in
18 compliance potentially in '06-'07, which is the next
19 phase of this arbitration, I guess, or not.

20 So if for no other reason, judicial
21 economy commands that we take care of this issue now.

22 ARBITRATOR DREHER: Judicial economy may
23 dictate that, but that may not be in compliance with

24 the procedures put forth in the FSS.

25 Don't know. That's why I raised the
0049

1 question.

2 MR. WILMOTH: Fair enough.

3 ARBITRATOR DREHER: I understand
4 Nebraska's rationale about the nonuse of the water
5 from Harlan County Lake because it was -- they paid
6 the Nebraska, however you pronounce it, Bostwick
7 Irrigation District not to use that water, but
8 essentially you were providing it in lieu of having
9 to curtail other uses to comply with the Compact.

10 And even though the Nebraska Irrigation
11 District may not have used the water, by avoiding
12 curtailment of other uses, to me, Nebraska may have
13 indirectly used that water.

14 MR. WILMOTH: I think the key thing to
15 seize on is this: Again, the Compact is about
16 nonuse. When it comes to Nebraska, it says, Don't
17 use it too much. If we regulate and nonuse, there is
18 no evap associated with that nonuse by virtue of the
19 regulation. So this is simply an alternative
20 mechanism by which to nonuse. And on that rationale,
21 I don't think that the Compact contemplates there
22 should be an evap charge to it anymore than it
23 contemplates there should be an evap charge to nonuse
24 that results from regulation.

25 ARBITRATOR DREHER: The only provision
0050

1 that I have found that I am still mulling around in
2 my mind is in the revised accounting procedures as
3 submitted with Kansas' Opening Brief as Attachment 3,
4 I believe -- and this is on page 23 of that
5 Attachment. And, you know, I don't read anything
6 into this; I'm just raising the question as to
7 whether this may or may not be applicable. Maybe it
8 is and maybe it isn't.

9 But there is a provision that was added
10 apparently in this last revision that says: For any
11 year in which no irrigation releases were made from
12 Harlan County Lake, the annual net evaporation charge
13 to Kansas and Nebraska will be based on the average
14 of the above calculation for the most recent three
15 years in which irrigation releases from Harlan County
16 Lake were made.

17 MR. WILMOTH: Sure. And you are asking
18 if that is applicable?

19 ARBITRATOR DREHER: Might it be
20 applicable?

21 MR. WILMOTH: No. And the reason for
22 that is simply that that wasn't the fact pattern.
23 That is designed specifically to address the scenario
24 that the parties, you know, contemplated could
25 happen, which is that nobody takes. That is not what
0051

1 occurred. KBID took and if anybody takes, then the
2 other provision is triggered, which is a proportional
3 share.

4 Now, the problem with Kansas' argument
5 is they don't really know how to square what they
6 want with the plain language of the FSS on Harlan
7 County Lake evap. It says you split it in
8 proportion. The problem is they say it's not fair
9 and equitable, so it should be 50/50 if Nebraska
10 doesn't take.

11 Well, let's say, what if Nebraska takes
12 one acre-foot, then clearly the plain language of the
13 FSS would say Nebraska is charged .0001 percent of
14 the evap. Well, that is not fair, so it should be
15 50/50.

16 What if Nebraska takes 30 percent?
17 That's not fair enough. What if it takes 40 percent,
18 50 percent, 60 percent?

19 You have the spectrum, there is no way
20 to cut it off. There is no way to say that is fair,
21 that is not fair, that is equitable and that is not
22 equitable. And that is precisely why the language is
23 written the way it is. If you take, you take the
24 evap. However much you may take, you are taking the
25 evap on that and, again, that is consistent with the
0052

1 rest of the CBCU. You take the evap that is
2 associated with the consumptive beneficial use.

3 ARBITRATOR DREHER: Okay, we need to
4 move on to Colorado.

5 MR. AMPE: Thank you.

6 I will try to address your questions in
7 order and I think, as I heard the way you sort of
8 reformulated Issue No. 1, I agree with it. In fact,
9 I think you hit on the actual issue that is here on
10 this, which is: Are these issues brought by Nebraska
11 properly part of this nonbinding arbitration?

12 The question here is not would the
13 Supreme Court accept these arguments, because, quite
14 frankly, that's a very difficult question to answer
15 because they have almost complete discretion in
16 anything they take. Even if they have ability to
17 take a case, they don't have to take it.

18 More importantly, what is this whole
19 proceeding called? Dispute resolution. That is the
20 clear point, I believe, of paragraph 7, is to allow
21 a forum for these states to essentially make an
22 argument.

23 It's brought up through a long process.
24 You have to come to the RRCA, you are going to have
25 an Arbitration Agreement that says within the limits

0053

1 it was brought to the RRCA. But again, the point is
2 dispute resolution.

3 Without this process, there is nothing
4 between the RRCA and the United States Supreme Court
5 and its complete discretion in whether or not it
6 deems it worth its time to address an issue. So you
7 have what happened in so many compacts.

8 As you read in all of the cases we cite,
9 a few people tightened up staring across the table
10 from each other saying, No. And nothing is ever
11 accomplished.

12 Probably from reading that, the intent
13 here was to get around that and allow these States to
14 present their argument to essentially what is a
15 neutral party and get feedback.

16 This is nonbinding, although the results
17 of it may go before the Supreme Court or Special
18 Master if the Supreme Court takes it. This is
19 intended to resolve disputes prior to the United
20 States Special Master. This is not simply a
21 procedural hoop for all of the States to jump through
22 on their way to the Special Master.

23 The whole point of this is to get issues
24 before a neutral party, have them evaluated and come
25 back to the States and say, Here is what I think. I

0054

1 understand what you guys want, but, no, it's just not
2 going to happen, in my view. And allows the States
3 to take that to heart and review their own position.

4 So excluding anything that has been
5 brought up improperly under the procedure,
6 essentially this creates that entire purpose of the
7 dispute resolution. To the extent necessary you feel
8 it's proper to look at what the Supreme Court could
9 or could not do, of course, the United States Supreme
10 Court has wide discretion in what it can accept and
11 what it cannot, under both statutes and its own
12 interpretation of the rules.

13 And we discussed the 1983 Texas versus
14 New Mexico case there. It said the only limitation

15 on what the Supreme Court can do, the only thing it
16 cannot do is, whatever its results are, it cannot be
17 contrary to the Compact itself.

18 It can resolve disputes of State rights
19 under the Compact and, to the extent that a dispute
20 goes to properly determining what the beneficial
21 consumptive use is, that goes to the State rights.

22 And, most interestingly, in the 1987
23 Texas versus New Mexico case, at the very end what
24 the Court did was remand it back to the States to
25 determine in the future what the allocated water
0055

1 would be between the States, essentially. I'm
2 paraphrasing. Then added, quite sarcastically, but
3 we don't think the States will be able to agree,
4 based on their prior history.

5 So what did they do? They appointed a
6 river master to the State who couldn't agree who
7 would make that decision for them. In some ways, we
8 have states that cannot agree on how the Compact
9 could be administered. Whether or not the Supreme
10 Court would take that, I can't answer; I don't
11 pretend to know what the Supreme Court thinks about
12 anything, but certainly under a dispute resolution,
13 the procedure to follow is perfectly acceptable.

14 On your Issues 2 and 3, as with the
15 briefing, we do not weigh in on either side. This
16 has no impact that I have been able to discern in
17 Colorado whatsoever in either the briefing or the
18 argument.

19 For your Issue No. 4 -- could you please
20 read that to me again.

21 ARBITRATOR DREHER: If Nebraska has
22 violated the Republican River Compact or the Consent
23 Decree of May 19, 2003 causing damage to Kansas, is
24 Nebraska subject to remedies for civil contempt of
25 Court, including disgorgement of Nebraska gains, or
0056

1 should any damages awarded to Kansas be limited to
2 actual damages suffered by Kansas?

3 MR. AMPE: I think my only disagreement
4 is with, more simply, words more than anything else,
5 because I think the brief has shown, in general,
6 disgorgement is not really part of a civil contempt
7 proceeding, unless there is a specific statute that
8 allows that.

9 Now, obviously, as the Arbitrator, you
10 don't have true contempt power, other than that as is
11 contained in the Arbitration Agreement. However, you

12 are going to, of course, look towards what a federal
13 court would do in your position.

14 So it's not really a question, to me, of
15 inherent power of a court to issue a contempt
16 citation; courts do have such inherent power; but
17 even the U.S. Supreme Court has acknowledged that
18 Congress can place limitations on that power.

19 I think that is cited in our brief, the
20 Supreme Court acknowledging that in a civil case
21 where we are talking about how Congress had passed a
22 law intending to essentially restrict the court's
23 power to issue a contempt citation, because the power
24 to issue a contempt citation by courts can be rather
25 large and Congress attempted to put some limitations
0057

1 on that.

2 So I think, ignoring semantics of
3 whether we call something civil contempt or criminal
4 contempt, I think what we really have to look at is
5 basic difference. What Kansas has asked for is
6 essentially a punishment, which means it's in
7 criminal contempt. That really is what it comes down
8 to. It goes beyond their own damages, goes beyond
9 restoring their damages and, instead, goes forward
10 into punishing Nebraska; and not just punishing
11 Nebraska, vindicates the authority of the Court but
12 punishing Nebraska to the profit of Kansas.

13 I think another thing we have missed
14 here is that, of course, the courts have the power to
15 issue contempt citations to vindicate its own orders.
16 When it does so, it does not do so to benefit a
17 private party; it does it to benefit the Court. And
18 that is why you see these cases that say the
19 touchstone of contempt issues in damages is rarely
20 used and especially where you have a case where you
21 have a way to measure damages already.

22 And in this case, we have the Compact
23 which, as you have read numerous times, is also a
24 contract and we know numerous times contract damages
25 are appropriate.

0058

1 As far as this arbitration, that is what
2 is appropriate. We have a remedy that would make
3 Kansas whole. And going beyond that, to benefit
4 Kansas, to allow them to capture a windfall goes
5 beyond the civil damages, whether you want to call
6 them contract damages or whether you want to call
7 them civil contempt will resemble a criminal contempt
8 because it goes into punitive punishment.

9 And, once again, I will cite you 22 Am.
10 Jur.2d Damages 545, which stated -- I'm paraphrasing
11 again -- to the extent that coercion is necessary
12 as part of a contempt order, that contempt is not
13 meant to provide a windfall to plaintiff.

14 As I said earlier, it's there to
15 preserve the dignity of the Court, to make sure its
16 orders are obeyed but not to provide a windfall. And
17 I cite the discussion by Special Master Littleworth
18 in Kansas versus Colorado.

19 ARBITRATOR DREHER: What was that case
20 that you cited?

21 MR. AMPE: It was cited, I believe 22
22 Am. Jur.2d Damages 545.

23 ARBITRATOR DREHER: Thank you.

24 MR. AMPE: Am Jur is not a case.
25 Unless you have any questions, I think

0059

1 we can go forward.

2 ARBITRATOR DREHER: Let me ask you a
3 question on Issue 4. I have read Special Master
4 Littleworth's report, and I think Kansas noted in one
5 of their briefs that he seemed to leave the
6 opportunity open for disgorgement of gains in the
7 appropriate circumstances.

8 MR. AMPE: Yes, yes, sir.

9 ARBITRATOR DREHER: Colorado is
10 obviously part of that litigation. I mean, can you
11 help me understand what circumstances he might have
12 been thinking of when he said, maybe this would be
13 appropriate in some instance?

14 MR. AMPE: I cannot tell you what
15 circumstances he was actually thinking of. However,
16 that would go to inherent power of the Court to -- I
17 think that was -- excuse me, let me back up.

18 That was in the nature of looking at
19 whether or not Colorado's violations were
20 intentional, whether they acted in bad faith, whether
21 they knew they were doing it and they thumbed their
22 nose. Essentially, there he is saying, in some cases
23 where the conduct is so egregious, it may be
24 permissible to order disgorgement.

25 But that goes -- you are moving into the
0060

1 criminal contempt, which has a much higher burden of
2 proof and a lot of other things are inappropriate and
3 they discuss that as purely punishment. I think that
4 is what he was looking at.

5 There may be a time when a Court simply

6 has to punish a State that is within its inherent
7 authority, but even the allegations of Kansas, taken
8 at face value here, I don't think reaches anywhere
9 near that sort of level.

10 Issue No. 5, I'm fine with the way you
11 phrased that and I will just touch on this, again
12 fairly briefly, to the extent it's still on the
13 table.

14 I think almost, as with Mr. Littleworth
15 saying that it may be appropriate, in some
16 circumstances, to allow disgorgement, it may be
17 proper, in some circumstances, to have a Supreme
18 Court come in and order how compacts will be met.
19 And to me, at least, that is an appropriate
20 circumstance for a State who does absolutely nothing
21 or its Compact compliance plan consists of pray for
22 rain.

23 However, that is a very high standard,
24 very much like criminal contempt, to invade the
25 sovereignty of a State that has a plan that can go
0061

1 forward, it has some reasonable opportunity.

2 And another issue may be where it would
3 not be appropriate, where a State can simply not
4 comply with the Compact; there is simply no way.

5 That is another difficult issue, but
6 here, it is fairly simple, much like the criminal
7 contempt. These are very rare circumstances where it
8 is needed and accepting Nebraska's facts as alleged
9 doesn't reach that.

10 ARBITRATOR DREHER: Nebraska's facts or
11 Kansas?

12 MR. AMPE: Certainly not Nebraska.

13 Accepting Kansas' facts doesn't reach
14 that.

15 And speaking, actually, of facts, I
16 would just like to respond very briefly to Nebraska's
17 Footnote 9 in its reply brief where it discusses what
18 its evidence will show. I respectfully disagree with
19 what their evidence will show; however, this is, of
20 course, not the point or the time to argue about
21 that. However, just to make the record clear that we
22 don't agree with their proposed factual finding,
23 shall we say.

24 And as for Issue 6, Issue 6 applies
25 solely to the water-short-year test. We briefed
0062

1 that. Colorado is not subject to water-short year
2 test when they are -- in fact, there is a small

3 impact on those and there is only one area in our
4 state, that is why I address that.

5 As far as I can tell, Issue No. 7 is
6 similar for that where it really only applies to the
7 water-short year.

8 Colorado only goes on five-year tests,
9 so I think the issue is if that were to come up on
10 five-year test different, so I don't think I will
11 address that here.

12 I will, I suppose, donate the remainder
13 of my time to the Arbitrator as he sees fit.

14 ARBITRATOR DREHER: So you have got,
15 actually, almost 15 minutes left. Why don't we take
16 a five-ten minute break, something like that, and I'm
17 going to donate your 15 minutes to Kansas, see if
18 they can finish their opening statement and maybe get
19 back to where we thought we were at the beginning of
20 this.

21 Is that acceptable?

22 MR. DRAPER: We appreciate the gesture
23 from Colorado.

24 ARBITRATOR DREHER: So let's try to show
25 up back here 3:30, a couple of minutes later.

0063

1 (Break was taken.)

2 ARBITRATOR DREHER: The break lasted a
3 little longer than I thought it would; but,
4 nonetheless, we will continue with Kansas using the
5 last 15 minutes of Colorado, if you so chose.

6 MR. DRAPER: Thank you very much, Your
7 Honor.

8 I will -- I think I will first respond
9 to some of the points that we have heard from the
10 other States and I would request that you, if you
11 have the slightest urge, interrupt me, ask me any
12 question that you feel would be helpful to have
13 discussed.

14 ARBITRATOR DREHER: Okay.

15 MR. DRAPER: I think we all see
16 ourselves here to try to answer questions that you
17 have. We realize we've got things in the briefs, we
18 want to make sure that some of them are noticed;
19 there may be things that aren't sufficiently
20 explained that we can explain today.

21 So any time you want to interrupt me, I
22 welcome it.

23 We heard argument just now from both
24 other States on the issue -- on the issue of gains
25 versus losses, and I might just say a few words about

0064

1 that to begin with.

2 A lot is made, and it was mentioned
3 here, that the consent decree is a contract and
4 therefore needs to have contract remedies. That is
5 not -- that is not quite right.

6 The case law that has been discussed
7 indicates that consent decrees originate in
8 agreements of the litigating parties. So contract
9 principles, in terms of figuring out what the words
10 mean, interpreting it, may be useful in figuring that
11 out. But that is not -- this is not the source of
12 law for enforcement.

13 One thing is understanding what it says,
14 interpreting it. The other is with respect to
15 enforcement. As to enforcement, it's a Court order.
16 It's not being enforced because the party is
17 aggrieved; it's being enforced because the Court
18 ordered it.

19 If you look at the cases, they make that
20 distinction and other states are failing to make that
21 distinction.

22 They also indicate that the remedy that
23 we are asking, the opportunity to present as a fact
24 matter, varies from facts that need to be presented.
25 The question here: Should Kansas be allowed to

0065

1 present evidence as to the profits that were made
2 based on the use of water in excess of Nebraska's
3 allocation under the Court's Decree?

4 That -- that remedy of disgorging the
5 gains obtained through violation of the Court Decree,
6 if those are disgorged, it's not punitive. It's
7 merely taking away the gains that were achieved
8 through violating the Court's order. It's not a
9 penalty because it puts -- it puts the violating
10 State back where it was. If you -- if you don't do
11 that, they have a windfall. They violated under the
12 assumed facts -- for now, assuming that that is shown
13 at trial, they have violated the court's order. They
14 have been able to create profits in Nebraska and if
15 their position is agreed to, Kansas would not be
16 allowed to show and ask for the remedy that they give
17 up those ill-gotten gains. They would be able to
18 keep those profits from violating to the extent they
19 exceed the damages downstream in Kansas. And if they
20 are allowed to do that, that is a windfall. And if
21 they are not allowed to do it, that's not punitive.

22 That is putting them back into the

23 status quo ante that existed before their violation.

24 It's putting them right back where they were.

25 Now, I think that also goes to this red

0066

1 herring that we are seeing where they are alleging

2 that this is somehow criminal in nature.

3 It's not criminal. Criminal relates to

4 some kind of punitive situation. We are just asking

5 that, unlike a normal compact enforcement action,

6 like the Arkansas River Compact enforcement action

7 that Mr. Littleworth was involved in, this is not one

8 where you apply mere contract damages where, even if,

9 as was indicated in that case, there was a large

10 difference between the gains in Colorado and the

11 losses in Kansas, Colorado was allowed to keep its

12 gains in that case and the ordered remedy was to just

13 reimburse Kansas for part of the losses that it could

14 prove.

15 Here, the situation is different. Now

16 you have not just a Supreme Court -- a compact, but

17 also a Supreme Court order.

18 The question is: Can a party be allowed

19 appropriately to retain its profits by flouting a

20 U.S. Supreme Court order?

21 If you limit it just to Kansas losses,

22 they will be able to keep profits from violating this

23 order. And we believe we ought to be able to show

24 the facts and argue for a remedy that would put them

25 back in the position as if they hadn't violated.

0067

1 ARBITRATOR DREHER: Let me ask you,

2 John, are you aware -- I mean, I have looked at all

3 of the -- I'm not going to say I read page for page

4 all of the cases that you sent, but I don't see -- I

5 haven't been able to find any case where there was a

6 consent decree entered as part of an enforcement

7 proceeding for compact compliance that then, upon

8 violation, there was ever any sort of contempt.

9 Well, number one, I haven't found that

10 fact pattern anywhere. This -- and this proceeding

11 seems to be unique in that case.

12 Is that fair or not?

13 MR. DRAPER: That's very fair. That is,

14 I think, a pretty accurate description of the case

15 law as we see it, as we understand it to exist.

16 You don't find states doing this. For

17 instance, the Pecos River is a good example. It was

18 hard-fought litigation in the 1970s and 1980s between

19 Texas and New Mexico. It resulted in a 1988 Amended

20 Decree that requires the use of certain accounting
21 procedures and so on, they are all set out there in
22 exhibits and so on, they are referred to in the
23 Supreme Court order. And they appointed a master in
24 that case to be river master and do an annual
25 accounting because of the extreme difficulties they
0068

1 had had in that particular case.

2 But New Mexico, since 1988, has never
3 violated that decree. That is the kind of decree we
4 have got here. Since 1988 -- that is 20 years now --
5 the State of New Mexico has spent millions of
6 dollars -- and I mean more than a hundred million
7 dollars -- buying up water rights and making sure
8 that it does not violate that decree, even by one
9 acre-foot.

10 And so far it has succeeded and it plans
11 to stay that way. It does not want to be in the
12 position of violating the U.S. Supreme Court Decree.

13 The closest thing that we found, we have
14 provided to you in the briefs is the 1940 case where
15 Wyoming was alleging a violation of a Supreme Court
16 Decree and that's similar to this case.

17 Now, the background on that, the
18 underlying allocation had been achieved in a
19 different way. There, the underlying allocation
20 there was the result of a Supreme Court decree, but
21 just like a compact, it gave an allocation between
22 the States.

23 And to my way of thinking, it doesn't
24 matter how that allocation was arrived at; the
25 constitution gives the Supreme Court the power to do
0069

1 that if the States can't agree in the forum of
2 Compact. And you have to have that because then if
3 you didn't have that, the upstream state would never
4 agree to limit its water use.

5 So I think it does have a lot of
6 similarity here. There, the Court decided that there
7 were extenuating circumstances and it was a
8 momentary, almost momentary thing where they had been
9 diverting too much, and it was actually surface
10 water. And that's the closest that -- it just
11 doesn't happen. You don't -- you don't find
12 violations, for instance.

13 Another example is on the Delaware
14 River. You may be aware of the litigation there. It
15 started when New York City was looking for a new
16 water supply back in the early part of the 1900s and

17 it started to move the dam, the tributaries of the
18 Delaware River. And New Jersey sued New York to stop
19 that and they entered into a Decree. And there they
20 have a river master, also. That is the one other
21 place where there is a river master and they adopted
22 the Decree and that's been modified once over the
23 years, but there has never been a violation that I'm
24 aware of there.

25 And the states are very assiduous. The
0070

1 State -- the City of New York has its own police up
2 there. The environmental police of the City of New
3 York are up there because -- I have been up to those
4 dams and you don't get to stay there very long before
5 one of their squad cars arrives to find out what you
6 might be doing.

7 But it just goes to show the extreme
8 care that has traditionally been placed on the
9 obligation to comply with the Supreme Court Decree.

10 And that's why we don't see court cases
11 treating violations. That may be -- did that cover
12 as much as you wanted to hear?

13 ARBITRATOR DREHER: Yes. Let me -- I
14 have one other question maybe related to that.

15 It seems like you are almost saying --
16 you are not quite saying it, but you are almost
17 saying -- that the Court has no choice but to find
18 civil contempt.

19 MR. DRAPER: Well, I think ultimately,
20 ultimately the Court and, therefore you, in
21 recommending what you think the Court ought to do,
22 which will be of great benefit to all of the parties
23 here, I think ultimately they have the discretion.
24 They -- they have a highly equitable, flexible scope
25 of remedies that they can apply. They will -- they

0071

1 will ultimately determine, and I think in your case,
2 where, in essence, you are acting like a pre-Supreme
3 Court for the States, there is -- there is great
4 discretion to provide a fair and equitable remedy
5 that properly balances the interstate concerns.

6 The interest in the rule of law, there
7 is allegations that somehow forcing this to Court
8 decree would undermine compacts.

9 Well, violating a compact is a much,
10 much more direct way to undermine, if you are looking
11 for people who are undermining the compact. And the
12 whole process, it's people who flout and feel that
13 once they have done that, they ought to be able to

14 keep their profits from doing that and not -- not
15 have a strict rule that they stick with it.

16 Now, most states understand that you
17 have to observe that very strictly. It's being
18 argued here that that shouldn't be so strictly
19 applied.

20 We, of course, have been waiting for
21 compliance since the mid-1980s, we are trying to work
22 this out. We have tried to go through mediation, we
23 finally had to sue. We were persuaded that
24 settlement was better than going through a long case,
25 the way we have on the Arkansas. We thought we would
0072

1 have the cooperation of Nebraska and, unfortunately,
2 it hasn't worked out that way.

3 The very first opportunity to be out of
4 compliance has turned out to be a very serious
5 violation, in our view.

6 So yes, the Supreme Court and, therefore
7 you, in making your recommendation, I think have full
8 discretion looking at the precedents; in other words,
9 the Supreme Court has said for a straight violation
10 of a compact, like the one in the Pecos and the one
11 on the Arkansas, those are separate -- the Court is
12 involved in interpreting what do these general terms
13 mean.

14 And in the arbitration, for instance,
15 there were 270 days of trial developing a model that
16 is now the standard for compliance. That is taking
17 the general terms of the Arkansas River Compact that
18 turning it into what do you do, how do you apply that
19 to the number of wells that are varying distances
20 from the river? How do you do that? We have
21 achieved that over a great period and with great
22 effort.

23 This is a much different situation we
24 have now. We are way ahead of that. The delineation
25 of the quantification that has gone on through trial
0073

1 in that case was achieved through the settlement
2 negotiations in this case and resulted in the
3 accounting procedures and the RRCA groundwater model.

4 Now, there is no doubt about what the
5 standard is: Over what period, how do you account
6 for all of these various things. That was settled in
7 the Final Settlement Stipulation. So that made a
8 great leap forward, so to speak, and now we are in
9 that situation where the Supreme Court has, at the
10 request of all three States, has adopted a very, very

11 specific set of rules as to how to comply with the
12 Compact.

13 And, of course, depending what is shown
14 at trial, that we intend to show that there has been
15 a serious violation here pursuant to those
16 principles.

17 I will stop there to see if there was
18 any further answer that you were interested in.

19 ARBITRATOR DREHER: That's fine. I have
20 some other questions, but I will save them for later.
21 I want to make sure that you have the chance to make
22 a direct statement on any issue that you want to
23 bring forward, so . . .

24 MR. DRAPER: I appreciate that, but to
25 me, it's more important I leave enough time for your
0074

1 questions.

2 ARBITRATOR DREHER: All right.

3 With that, I think your 15 minutes are
4 shot, so . . .

5 MR. DRAPER: I shot the 15 minutes?

6 ARBITRATOR DREHER: They are gone,
7 that's right.

8 MR. BLANKENAU: Few extra.

9 ARBITRATOR DREHER: Listening instead of
10 watching the clock, but that is all right.

11 Now, given what we have done thus far,
12 let's consult with each other about how best to
13 handle rebuttal.

14 Kansas sort of started rebuttal in some
15 ways, which -- I mean, that is fine. Is Nebraska and
16 Colorado willing to have -- let Kansas have the last
17 word, so to speak, with the understanding that I
18 still am going to ask some questions?

19 MR. AMPE: I think ultimately the way
20 this is run is up to your discretion.

21 MR. LAVENE: I guess the only tweak I
22 might have on it is the accounting issues that we
23 brought in are equal to the issues that Kansas
24 brought in with regard to damages and compliance and
25 our accounting issues are equal, I guess to the
0075

1 extent if we want to do rebuttal and give Kansas the
2 last opportunity to discuss the damages and
3 compliance plan and maybe possibly have an
4 opportunity for us to discuss anything on our
5 accounting issues might be proper; but once again,
6 it's up to you how you would want to run that.

7 ARBITRATOR DREHER: I'm trying to make

8 sure there is no advantage derived from this briefing
9 on that, and that's what I'm really trying to do. So
10 far, I don't think there has been.

11 MR. AMPE: Perhaps I might suggest -- we
12 have about an hour left, I'm not sure how many
13 questions you have. We all agree that it is most
14 important to answer your questions. Rather than
15 having us read our briefs for 20 minutes, spend the
16 time answering your questions.

17 ARBITRATOR DREHER: Is that a good way
18 to proceed?

19 MR. DRAPER: I certainly support having
20 you address your questions first.

21 ARBITRATOR DREHER: Some of them have
22 been addressed, of course, but let's try that. Let's
23 go through the questions and make sure those get
24 addressed and then we will see what is left.

25 MR. WILMOTH: As a point of

0076

1 clarification, we would like to reserve a little bit
2 of time to rebut some statements made by Kansas,
3 but . . .

4 ARBITRATOR DREHER: Understand.

5 MR. WILMOTH: Thank you.

6 ARBITRATOR DREHER: You know, in looking
7 at the Consent Decree that approved and adopted the
8 FSS, I mean, it's -- the FSS and all of its
9 appendices is certainly not an abbreviated thing, but
10 the -- the Decree actually adopting or approving it
11 and adopting it is only three sentences long,
12 something like that.

13 All that I have is the Proposed Consent
14 Judgment that was Attachment A in the Volume 1 of 5
15 of the Final Settlement Stipulation.

16 So I guess the first question is: Was
17 the Consent Judgment that was entered, is it
18 identical to the Proposed Consent Judgment in
19 Appendix A, or were there differences? And if so,
20 what are those differences? Because I don't have a
21 copy of the Consent Judgment as it was entered; I
22 only have the proposed.

23 MR. DRAPER: I have a copy of it here,
24 and I think it's generally the same, but I would be
25 glad to show this to the other parties, we could give

0077

1 you my copy, I could always get another copy.

2 MR. BLANKENAU: If it's an accurate
3 copy, we have no objection.

4 MR. AMPE: Photocopy.

5 MR. DRAPER: Out of the Supreme Court
6 Reporter.

7 MR. BLANKENAU: That's fine.

8 MR. WILMOTH: That's fine.

9 MR. DRAPER: Yes, I think that is a very
10 nice thing for you to have. I hadn't realized
11 before --

12 MR. WILMOTH: I can't believe there is
13 anything you don't have in paper that hasn't been
14 produced, I'm stunned.

15 MR. AMPE: I think it may also be part
16 of Colorado's appendix, but the thickness of that,
17 I'm not surprised one page got -- I think that was a
18 simple reference to Kansas versus Nebraska, et al.
19 Read on, unless you have a question.

20 ARBITRATOR DREHER: Okay. I'm going to
21 ask this as a question and I obviously have my own
22 answer kind of what I'm beginning to formulate.

23 But do any of the States see any implied
24 remedies in the Final Settlement Stipulation?

25 MR. DRAPER: Well, answering for Kansas
0078

1 first, we don't, we think that this -- this set the
2 standards for compliance in a very detailed way, but
3 in terms of what -- what do you do if a State does
4 not comply with the FSS? We don't see that is in
5 there and that, therefore, has to go to the Supreme
6 Court and you, as the first instance.

7 I'm not -- I don't -- I'm not aware of
8 any guidance that is given in the FSS or the Compact,
9 for that matter.

10 ARBITRATOR DREHER: Okay.
11 Nebraska?

12 MR. WILMOTH: I think as far as remedy
13 goes, the dispute resolution process is the remedial
14 provision, if you will, for how you resolve disputes.

15 MR. LAVENE: First administrative step
16 that must be taken and completed before moving on to
17 Supreme Court, if that is what you are getting at, I
18 think, or is there something else?

19 ARBITRATOR DREHER: There is something
20 else there, but rather than come out with that at
21 this point, I'm just asking the question at this
22 point, I think, to get your perspective.

23 MR. AMPE: As far as the FSS stating a
24 specific remedy for any type of compact breach, no,
25 it does not. It's analogous to the Court in Texas
0079

1 versus New Mexico that the Compact simply does not

2 state any remedies for that.

3 ARBITRATOR DREHER: Kind of a follow-up
4 question to that is: Did the States contemplate or
5 ever attempt any sort of settlement negotiations as
6 part of the FSS mediation negotiation?

7 MR. BLANKENAU: Prior to adoption?

8 ARBITRATOR DREHER: Prior to adoption,
9 during that one-year period.

10 MR. BLANKENAU: Well, that is a fact,
11 that negotiations took place. They did take place
12 extensively and that is what ultimately lead to the
13 creation --

14 ARBITRATOR DREHER: Right, but were
15 potential remedies considered as part of that
16 negotiation?

17 MR. WILMOTH: There is what I was
18 saying, I don't mean to be evasive, I think there is
19 a confidentiality requirement with regard to that
20 that all States be subject to and it has nothing to
21 do with being evasive.

22 Your question, I would say is a very
23 good one, I don't think we can respond to that unless
24 you all sit here and waive.

25 MR. DRAPER: Even then, I don't know
0080

1 that this is waivable.

2 MR. AMPE: It would be difficult, I
3 think, for us to even answer because you are
4 essentially, in a lot of ways, asking us to rely on
5 memories or what we may have perceived. So it's kind
6 of a hard question. Even if we could answer, it
7 would be really hard and even subject to a lot of
8 personal views of what happened.

9 MR. DRAPER: I think the short answer is
10 we did agree that that would be confidential and to
11 get into one side tried to do this, the other side
12 said, No, we are not going to do it, anything like
13 that, we don't feel that that is something that we
14 can refer to.

15 We just have to go with the final
16 document and, except for the procedures that relate
17 to this dispute resolution as a procedural matter,
18 there is no specific remedy.

19 You could think of things, liquidated
20 damages or any of those kinds of options, none of
21 that appears in the FSS and, frankly, it's very
22 consistent with all of the compacts. If you look at
23 the compacts around the country, and so on, at least
24 most of them, thinking now of, say, the Pecos Compact

25 or the Arkansas River Compact, they allocate the
0081

1 water but they do not get into the remedies if the
2 allocation is violated.

3 MR. WILMOTH: I think also, Mr. Dreher,
4 Special Master McKusick has some discussion of this
5 in his second report -- I mean in his report that
6 talks about the nature of the FSS. And you might
7 refer to that. I'm sorry, I can't give you a page
8 citation off the top of my head; but, in essence, my
9 recollection of it is essentially the process.

10 MR. LAVENE: I don't think there is
11 anything that forecloses the states, even after your
12 decision, after you give a recommendation on what you
13 believe are the proper remedies in this case, you
14 determine Compact violations, even after your
15 decision, from us stepping away from your decision
16 and agreeing jointly that ultimately we could fashion
17 our own remedy or change it or tweak it in any manner
18 that we see fit.

19 ARBITRATOR DREHER: Correct.

20 MR. LAVENE: With priority discussions
21 not being with the FSS and the model and the County
22 and all of the new stuff that was included after that
23 settlement, how that would be done.

24 MR. DRAPER: They -- I think the States
25 can always agree to how we work this out up to the
0082

1 point that the Supreme Court itself tells us what is
2 going to happen.

3 ARBITRATOR DREHER: Right. Both in
4 Nebraska's response brief and reply brief and then
5 they mention it again here today, they seem to be of
6 the opinion that Kansas is now limiting the period of
7 years for which it is alleging violations to be 2006
8 or, from Kansas' perspective, 2005 and 2006, not
9 looking at violations that may or may not be evident
10 from the five-year running average.

11 So can -- I mean, where -- where is
12 Kansas in all of this? I mean, do you agree with
13 that limitation or not? Or what is it -- over what
14 period of time is Kansas alleging violations as part
15 of this process?

16 MR. DRAPER: As to whether we agree with
17 their statement, absolutely not. We have provided
18 them, I guess it was just about the time of the
19 previous hearing conference, with our list of claims
20 in a draft form which they were going to look at. We
21 haven't had further discussions about that. But at

22 some point, it might be helpful for us to state --
23 restate our list of claims which are set out
24 basically in our original letter of December 19 where
25 we established -- or started the process by which we
0083

1 established that there was a real disagreement here
2 and that we needed to take it through to the dispute
3 resolution process.

4 That remains unchanged. They have taken
5 a few words that they think makes some huge change --
6 we didn't mention anything about this, but they will
7 grab some word and say, Well, that means they have
8 given up the remedies that they have been asking for.
9 Absolutely not.

10 I think one thing that they neglect to
11 do is differentiate between remedies for past
12 violations and remedies for -- to prevent future
13 violations. In other words, it's one thing to say,
14 Okay, we have a test now that has become applicable,
15 we have the data, it's now time to test whether,
16 indeed, they did comply or didn't, as we allege, that
17 relates to the years 2005 and 2006. That is how you
18 test that, and you have to look at both years and we
19 believe that if the total out of those two years is
20 79,000 acre-feet, that is the amount of the
21 violation.

22 Now, they have taken a different view of
23 that, but it seems very clear to us that while there
24 is -- there were some reasons to talk about an
25 average for these two years, they think it ought to
0084

1 be, that averages out at, say, 40,000 acre-foot per
2 year, that 40,000 acre-foot ought to be the basis of
3 the past remedy.

4 That begs the question if it's 40,000
5 acre-foot per year, as we mentioned in the briefs,
6 per year, it's not to quantity; it's a rate. And a
7 rate over what period would tell you the quantity.
8 And if you are using a two-year accounting period,
9 it's obviously two years. I think it's denominated
10 the 2006 water-short year, but that requires
11 accounting in that year and the previous year.

12 They failed to differentiate between
13 past remedies that requires '05-'06 and the question
14 is: What do they need to do to keep this from
15 happening again? They have shown a clear potential
16 for this to continue to happen.

17 They agreed to this specific accounting.
18 Nebraska has been unable, or unwilling to meet that

19 test. That means what do we do to keep this from
20 happening in the future?

21 And this is separate from what kind of
22 damages -- how you measure damages for the past and
23 so on. That is separate.

24 The next question is: Do we need to
25 appoint a river master to put this system in order
0085

1 and what are the standards? Can you leave all of
2 this groundwater pumping going just the way it is or
3 according to the way they are proposing to marginally
4 reduce it?

5 We don't think so and that's why we
6 tried to be as specific as we could going into this
7 whole process about what we thought was the necessary
8 future remedy. And it's -- it's looking at -- based
9 on the fact that they have for this accounting
10 period, which is actual, that they have not, or could
11 not or would not comply, what further restrictions
12 are now needed in order to assure that.

13 Up to now, it has just been, Don't do
14 it, they -- it's now appropriate, since they have
15 done it, in our opinion, if we can show that they
16 have done it, what further remedies are now
17 necessary.

18 Now, instead of letting them figure out
19 how to do it, I think we have to propose exactly how
20 it ought to happen.

21 Now, as we have said, we are open to a
22 hydrologically equivalent remedy that would return
23 the water to the river in the same way that our
24 proposed remedy of shutting down groundwater pumping
25 is. There are other possibilities. You could reform
0086

1 all of the federal projects, the surface water
2 projects and make them the supporter of the
3 groundwater pumping.

4 That is possible, but that takes an act
5 of Congress. It takes a reversal of the purposes of
6 the Bureau of Reclamation projects in the basin.
7 That is not something we felt that we could propose.

8 The problem here, the real problem is
9 the groundwater pumping. So that is why we
10 formulated that to address it through a reduction in
11 groundwater pumping. And in order to have the right
12 amount of reduction, we needed to look at an
13 appropriate period to assess what is -- what is the
14 hydrology going to be like in the future?

15 Only when you know that and have the

16 proper assumptions about that, can you then say,
17 Well, we need to make these changes because we know,
18 for certainty, that if they keep doing what they are
19 doing now, or even put these marginal reductions in,
20 they will surely violate the Compact in the future.

21 Now, we know that the supply goes up and
22 down. Some years, you get flooded out and nobody is
23 worried about Compact compliance or Decree compliance
24 because water is everywhere and those were taken into
25 account in our long-term analysis, but there are also
0087

1 the other years, where you have got to be ready so
2 that you can be in compliance, even in water-short
3 years, which were specifically focused on in the
4 Final Settlement Stipulation.

5 You need the water when conditions are
6 dry. That's when it's most important and that's why
7 that special two-year period was put in there and
8 called water-short year administration and a greater
9 flexibility was allowed when things were not so dire
10 in terms of water supply.

11 Obviously, you have to look at a longer
12 period in order to have a viable hydrologic analysis
13 and that is why, for that, we went outside the '05
14 and '06 period.

15 ARBITRATOR DREHER: You are alleging a
16 violation in 2005. You are alleging a violation in
17 2006. The first normal year compliance, as set forth
18 in Appendix B of the Final Settlement Stipulation, is
19 2007. Presumably that accounting has been done.

20 Is Kansas alleging a violation for the
21 five-year running average from 2003 to 2007?

22 MR. DRAPER: Not in this proceeding. We
23 wanted to keep this simple. We will learn a lot from
24 this. We are taking the first -- data became
25 available last -- last year for the '05-'06

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1 accounting period, which was the first one, as has
2 been pointed out in Appendix B, that is applicable.
3 And we moved as quickly as possible because we know
4 that if we don't move, there can be arguments raised
5 that we somehow acquiesced in their violation.

6 But that also meant starting this
7 process before the data was in for '07 -- for 2007
8 and that data was needed in order to finalize the
9 accounting for the five-year period 2004 to through
10 2007.

11 ARBITRATOR DREHER: I thought in the
12 letter that of December 19, 2007 letter that Kansas

13 wrote to Ann Bleed, I thought you were alleging that
14 there would be a violation in 2007 with the five-year
15 running average.

16 MR. DRAPER: I would have to look back
17 at it. We may have mentioned that the five-year
18 accounting didn't look good, but we didn't have the
19 data at that point to make a final determination.

20 ARBITRATOR DREHER: Well, you can see
21 the confusion that it causes me because it's part --
22 it's an Attachment to Exhibit 1 of the RRCA
23 Resolution. And so that's why I was struggling
24 trying to figure out what period of time are you guys
25 really talking about.

0089

1 So it does sound like you are really
2 looking at 2005-2006.

3 MR. DRAPER: As far as past damages,
4 yes.

5 ARBITRATOR DREHER: As far as past
6 damages, that correct.

7 MR. LAVENE: And I guess those are
8 where, our point, Nebraska clearly understands what
9 Kansas is looking at is the damages portion, doesn't
10 look at past noncompliance or alleged noncompliance;
11 but they seem to confuse that you can take a look and

12 snapshot of '05-'06 compliance and then base a remedy
13 on that that we will be out of compliance.

14 The sole reason why they put that in
15 there was to show that a compliance plan was needed
16 for Nebraska, that we needed to come into compliance,
17 that we couldn't do it ourselves, somebody needed to
18 mandate how we did a compliance. But this is the
19 very specific reason why we brought in the crediting
20 issue.

21 For you to get to a remedy and implement
22 a remedy against Nebraska, you can look at damages
23 past them for '05-'06 compliance measure, however
24 that is determined. If you don't rule on the
25 crediting issue, then we don't know whether or not we

0090

1 were in compliance for '06-'07, which we could have
2 been and which will make and change the scope of
3 compliance for the five years '03-'07.

4 And we have presented to your in our
5 briefs, and we can state today, right now, even
6 without that crediting issue, it looks and appears
7 that Nebraska will be in compliance on the five-year
8 average from '04-'08.

9 To implement a remedy against Nebraska
10 when we are now currently, today, in compliance with
11 a five-year average makes absolutely no sense. But
12 Kansas doesn't want you to look at, they don't want
13 to deal with the crediting issue. They want to say,
14 Look at '05-'06, they were out of compliance and,
15 therefore, remedy for all future needs to be imposed
16 on Nebraska.

17 They don't want to look at '07, they
18 don't want to deal with the crediting issue that
19 could change the scope of our compliance and they
20 don't want to deal with the fact or look at the
21 evidence that we are potentially in compliance with
22 the five-year deal.

23 Why is a remedy needed if we are in
24 compliance? That is why these issues were raised
25 because they were relevant to the action that Kansas
0091

1 now seeks, which is a future compliance penalty.

2 We clearly understand.

3 ARBITRATOR DREHER: If it's that -- I
4 will give you a chance here in a minute.

5 If it's that important in Nebraska, why
6 didn't Nebraska bring this forth as a separate issue
7 to the RRCA, instead of relying on it indirectly
8 being part of Kansas' proposed remedy?

9 MR. WILMOTH: May I address that?

10 The reality is that this issue has to be
11 resolved. It's an issue ancillary to the larger
12 issue of enforcement that Kansas has brought. There
13 is plenty of black letter law that indicates -- and I
14 think Colorado did a good job of citing some of it in
15 its brief -- an Arbitrator is empowered and required
16 to decide all issues that are ancillary with or
17 subsumed within a larger issue.

18 This issue is no different than the
19 issue about whether we incorporate '05 into the
20 damages calculation or not. That issue is not in
21 exhibits either, under the Arbitration Agreement, but
22 we all recognize that, given its impact on this
23 proceeding, it has to be addressed and I think the
24 crediting issue is no different.

25 ARBITRATOR DREHER: Which issue did you
0092

1 say was not?

2 MR. WILMOTH: This was the issue, I
3 believe, was your Issue No. 6.

4 This issue really, as I said, this issue
5 hit us blindsided because we thought the FSS was very

6 clear. This is a new thing for us and it came up
7 really in the course of the briefing. But it is
8 clearly ancillary to the dispute and needs to be
9 resolved.

10 And this is really no different than the
11 crediting issue, to the extent, as Mr. Levine said,
12 we are going there and apparently now we are.

13 Now, just for the record to be clear,
14 Nebraska is not parsing words here. Page 40 of
15 Kansas' responsive brief says, This issue, quote, is
16 not relevant to the subject of the arbitration, which
17 is Nebraska's compliance in Water-Short Year 2006,
18 period, close quote.

19 So to the extent Kansas is intimating we
20 are trying to manipulate the verbiage of their
21 briefing, that is incorrect.

22 ARBITRATOR DREHER: Well, let me tell
23 you why I'm concerned, why I keep asking those
24 questions and it's because of the very specific
25 provision in the dispute resolution process in the
0093

1 FSS, that before an issue can be raised in nonbinding
2 arbitration, it has to be raised specifically with
3 the RRCA so that the States have an opportunity to
4 resolve it themselves.

5 And that's -- that's the concern I'm
6 expressing. Have the States had the opportunity to
7 resolve the crediting issue themselves? And if it
8 wasn't specifically raised before the RRCA, the
9 States may not have had that opportunity.

10 That's my concern.

11 MR. LAVENE: I think when we step back
12 in this, what we are trying to say is that the issues
13 that are presented before you are Kansas' alleged
14 damages, Kansas' alleged compliance and basically our
15 accounting procedures.

16 I think the point that we are trying to
17 make is those are the broad umbrella magnifying
18 issues that are before you. Simply because we did
19 not foresee or identify every nuance, ancillary
20 subissue of the major issues is not to say that it
21 would not properly be before you. Simply because
22 these issues weren't raised before the RRCA in its
23 smallest minute detail, in our opinion, doesn't mean
24 that you shouldn't or can't address it because we
25 feel that you need to.

0094

1 These are subissues within the issues of
2 damages, compliance measures and technical accounting

3 issues. And we are just trying to get at the point
4 that, you know, through this whole conversation, we
5 are where even Kansas is saying, No, look, we want
6 the remedy because, based on this, we need to show
7 that Nebraska does it.

8 It comes to the point that you can't
9 separate some of these issues out and deal with that,
10 too, because it would seem improper to make that
11 determination.

12 I guess, from Nebraska's point of view,
13 there are going to be multiple subissues that are
14 going to come up through this briefing, through this
15 hearing, through our deposition discovery; things
16 might be found, issues are raised at trial that are
17 going to be ancillary and side issues to the three
18 umbrella issues.

19 To the extent you feel they need to be
20 resolved to resolve the bigger issues, I think
21 Nebraska states you should resolve those issues; if
22 they are important to be resolved, to resolve them.

23 MR. AMPE: I would like to point out,
24 the language doesn't talk about specific issue in
25 paragraph VII.A.1. It says, any matter should first
0095

1 be submitted to the RRCA -- leaving out some words.
2 It's "matter" submitted. It doesn't say the issue
3 must specifically. I think "matter" is little bit
4 broader and has some similar issues that are not
5 specific, but certainly modeling, they didn't bring
6 up every specific issue with modeling because there
7 is so much ancillary, when you think about everything
8 that goes into it.

9 What is an ancillary issue? I think
10 that is what the standard is, not a specific
11 identification of the issue. That's the way I read
12 that language, so it will be up to you to decide
13 whether that was properly a matter before us today.

14 ARBITRATOR DREHER: So the crediting
15 issue is part of the matter of the future compliance?
16 Is that the line of reasoning here?

17 MR. BLANKENAU: Yes.

18 MR. LAVENE: Yes.

19 MR. WILMOTH: Yes.

20 ARBITRATOR DREHER: Okay.

21 MR. DRAPER: The statement that you just
22 made, which Nebraska agreed with, shows the mixtures
23 here that I think causes some confusion. It's mixing
24 the past remedy; if there is a remedy determined, we
25 suggested a particular amount of money for remedying

0096

1 the failure. We can't get those years back, we can't
2 get those crops back, they died. They didn't get
3 planted. That's gone.

4 There is -- the law provides a past
5 remedy for that and their -- as I understand, their
6 suggestion, Well, we need to know how you are going
7 do integrate this with future damages, they are
8 saying, Well, if we are in violation for the
9 five-year accounting period or for the '06-'07
10 period, that would be the other -- the next
11 water-short-year period, how do you integrate that?
12 That is something for a future proceeding.

13 We may never -- we might not even have a
14 dispute about that. Once we know what the remedy is
15 for '05-'06, it's freestanding. Whatever happens at
16 later accounting doesn't change what happened in '05
17 and '06 and what the appropriate remedy is. Just
18 looking at '05 and '06, we don't understand the
19 position they take that it's absolutely necessary
20 that this be decided and it's going to have to be
21 decided sometime and we have to do it now and we have
22 got to decide it now.

23 You don't have to decide it now and the
24 reason we resist these side issues is because you can
25 see that a proceeding like this can very quickly get

0097

1 bogged down. If we start entertaining issues that
2 are not necessary for the -- for the decision that
3 the Arbitrator is requested to make, then it
4 confuses, at least, the issue and takes away things
5 like trial time and so on that get devoted to things
6 that don't need to be decided. We frankly don't
7 understand.

8 Eventually, there will be an issue --
9 let's say, we do bring a claim against them for
10 water-short year '07, okay, now we have to account
11 for '07 and '06. Okay, there is some overlap there,
12 how do you deal with it?

13 That is a very valid question and we
14 don't know whether we have a dispute with them about
15 that yet.

16 We may, if you and/or the Supreme Court
17 tell us how it works for '05 and '06, we may be able
18 to agree how we integrate that application of
19 accounting period, but it's not something that we
20 need to anticipate in this proceeding. There is no
21 need for them to know the answer; we haven't accused
22 them of anything yet.

23 MR. WILMOTH: May I respond.
24 We have one final statement on this
25 point and maybe we should move on to make sure we get
0098

1 all of your questions answered.

2 ARBITRATOR DREHER: All right.

3 MR. WILMOTH: This is not about what we
4 need to do; we do need to know -- from the accounting
5 standpoint, you need to know the answer because what
6 you are hearing from Kansas is we do complain -- or
7 claim we should entertain a proposed compliance plan
8 for Nebraska.

9 If you look at that December 19 letter,
10 there is not some vague reference to overuse from
11 2003 to '07. What that specifically says, after
12 detailed analysis you need to shut down half of the
13 acres in the Republican River Basin on a
14 going-forward basis essentially to make sure you get
15 into compliance on the five years. That is what it
16 says; it's that compliance plan, in turn, is based on
17 accounting from '03 to '07 and it assumes, after
18 their analysis, that we are out of compliance by
19 143,000 acre-foot and we need to make that up
20 essentially to get into future compliance.

21 What I am suggesting to you,
22 respectfully, is that unless you know how to deal
23 with that '06 stuff and if they are correct, they are
24 entitled to damages for '05, '05 you have no idea
25 whether that 143,000 acre-foot is remotely reasonable
0099

1 or related to the problem that we are trying to
2 resolve.

3 In other words, you cannot, in my
4 view -- and I don't mean us, I mean you are going to
5 have a heck of an awful time trying to determine
6 whether the proposed plan that Kansas has offered is
7 remotely related to the real problem.

8 And I won't say anything further.

9 ARBITRATOR DREHER: No, I understand
10 your point. I'm not sure where I stand on that.

11 MR. DRAPER: I'm not going to belabor
12 the issue, but we are asking for a lot of acres to be
13 shut down, but it's not half.

14 MR. LAVENE: It is.

15 MR. DRAPER: Like 1.3 million in the
16 Republican Basin.

17 ARBITRATOR DREHER: Well, it is what it
18 is.

19 MR. DRAPER: Yes, that will be shown at

20 trial.

21 ARBITRATOR DREHER: Back to the
22 accounting procedures for a moment, I'm a little
23 puzzled by the argument that somehow accurate
24 accounting changes the allocation in the Compact.

25 It seems to me that -- me, in this

0100

1 proceeding, as well as the Special Master in a later
2 proceeding, shouldn't they be concerned with accurate
3 accounting? Not to the benefit of one State or the
4 disbenefit of another, but for the accurate
5 apportionment of the water pursuant to the Compact,
6 shouldn't they be concerned with accurate accounting?

7 MR. DRAPER: The answer to that is this
8 is not a question of accurate accounting. They call
9 it that. They don't like the answer, so they say
10 things like it's not accurate accounting. It's like
11 saying a Compact allocates it this way, that is not a
12 correct allocation. Well, for a party after the fact
13 to say, Oh, it's not correct -- correct allocation,
14 you wouldn't want to do something that is an
15 incorrect allocation, well, the parties agreed to
16 that allocation.

17 Now someone might argue that they would
18 come out differently, but that's essentially what
19 they are saying; they don't like the allocation that
20 results from the FSS accounting procedures.

21 Now, we all agreed to those. We
22 thought, Yes, there is a lot of detail that the
23 Compact doesn't specify and we are going to go in and
24 specify it. And it was a lot of give and take.

25 And one of the things was this is how we

0101

1 are going to treat the -- this mound credit. And
2 there were some options; these options were debated.
3 This one was ultimately -- as you can see looking at
4 the FSS, there was a -- there was an agreement as to
5 how to do this.

6 Now, is it appropriate for the Supreme
7 Court or you, as a pre-Supreme Court Arbitrator, to
8 come in and say, Well, the parties made a mistake
9 here, it's not accurate. Even though the parties
10 said it was consistent with the Compact and there is
11 nothing in the Compact about which runs of a computer
12 model invented 60 years after the Compact should be
13 added or subtracted, and the parties agreed that you
14 should analyze that import water credit with the
15 pumping on, which has the water levels down at their
16 real level, rather than what they are suggesting,

17 turn that off and artificially raise the level and
18 then use that answer.

19 The parties made a very definite choice
20 about that and to call it inaccurate accounting is a
21 gross mischaracterization.

22 MR. AMPE: As you well know, all models
23 are wrong, but some are useful.

24 And the question, to me, goes back to,
25 is it appropriate for dispute resolution? And that's
0102

1 the focus, not the ultimate answer.

2 I would assume that Nebraska is going to
3 have a very high burden to prove their factual case
4 to the Arbitrator as to why the model should be
5 changed when we all know they are trying to simulate
6 something that essentially cannot be measured, is the
7 ultimate issue; not whether or not as part of a
8 dispute resolution process that argument can be made.

9 MR. BLANKENAU: I guess I would echo
10 with Colorado. You can hear the evidence and if you
11 think that we are, in fact, changing the allocation
12 as suggested by -- or argued by Kansas, you don't
13 have to go and accept our facts.

14 But we think we can show you that, in
15 fact, what we propose does increase the accuracy of
16 accounting within the allocation specifically stated
17 in the Compact itself.

18 MR. DRAPER: I might just say, Your
19 Honor, that we don't think this is a matter of
20 evidence. You can tell directly from the FSS and the
21 appendices whether evidence is needed on this and
22 it's not needed.

23 It would be doing -- it would be doing
24 what the Supreme Court refused to do in that Ellis
25 Island case. It would be redrawing that line around
0103

1 that building. Doesn't say to do that, but now we
2 are going to change that. We are going to change
3 what the Compact, and in this case, the detailed
4 implementation of this Compact says.

5 It says draw that line at a place that
6 Nebraska has now decided, even though it recommended
7 this to begin with, it recommended, just like Kansas
8 and Colorado, that the Supreme Court adopt that exact
9 way of doing it, now they are coming in and saying,
10 No, you should act as a political board and change
11 the allocation this way.

12 And why would they be doing it? It's to
13 change the allocation. There is no point in them

14 pursuing it, if it doesn't mean more water for
15 Nebraska. It does.

16 MR. WILMOTH: Mr. Dreher, that is
17 absolutely incorrect. That is a complete
18 mischaracterization of the position of Nebraska and,
19 in my view, the Supreme Court.

20 This case is not at all unlike the case
21 on the Pecos River, involving the 1947 condition
22 where the States could not agree and they
23 specifically changed that definition and one State
24 specifically said, as Kansas is saying so you know,
25 you bargained for it and you lost that deal and now
0104

1 you are bound by that inaccuracy.

2 And the Special Master in that case
3 looked at that and said, No, no, the States are not
4 bound by that, by something that doesn't reflect a
5 purpose and intent and effectuate the Compact.

6 And that is what essentially we are
7 saying here.

8 MR. DRAPER: Just want to comment on
9 that since I have not addressed that point, Your
10 Honor.

11 That -- what was going on there on the
12 Pecos River in the Supreme Court was, what was the
13 agreement of the States? And once the Supreme Court
14 determined what that agreement was, it enforced it.

15 And that's really the issue that is
16 being presented to you: What was the agreement? And
17 if there was an agreement, that's what is enforced.

18 ARBITRATOR DREHER: Okay. Now, we
19 obviously have a court reporter here today and the
20 intent is to get a transcript of this.

21 How do the States propose to use this
22 transcript and how do they propose for me to use it,
23 given that your timeframe sets forth me issuing a
24 decision in nine days?

25 MR. DRAPER: Well, I think our
0105

1 assumption has been that this would be available to
2 you quickly, and so that if you had any -- I'm
3 looking at the court reporter and Carol is giving me
4 the eye -- that it would be available to you in time
5 to be helpful if you wanted to look back at what did
6 a certain person say about that issue, that you be
7 able to look back to it; and if the particular
8 phraseology was helpful to you, then you would be
9 able to see it.

10 MR. AMPE: To me, essentially as a

11 supplement your notes. As when you went through your
12 seven questions, I was not able to keep up at all, I
13 wasn't sure that you would be able to keep up with
14 our various arguments.

15 So if you have a question about what did
16 Kansas say about something or what did Colorado say
17 about something, you would have something more
18 accurate than simply a memory or note to refer to, if
19 you needed it.

20 ARBITRATOR DREHER: I appreciate that.

21 MR. AMPE: And nothing says even if you
22 do get it in time, that you have to use it. For a
23 fee, I assume, there is always an expedited fee.

24 MR. DRAPER: There is.

25 MR. WILMOTH: The fee is going up the
0106

1 more we talk here.

2 MR. DRAPER: Maybe we could go off the
3 record.

4 (Discussion off the record.)

5 ARBITRATOR DREHER: We are back on the
6 record.

7 We went off the record for some minutes
8 to talk about how to comply -- best comply with the
9 States' intent for the timeframe that was designated
10 and set forth as Exhibit 2 to the Arbitration
11 Agreement. And essentially what I'm going to
12 consider doing -- and we will see how much progress I
13 can make over the next nine days, and I do intend to
14 work each of those nine days -- what I will consider
15 doing is issuing a preliminary arbitrator's decision
16 for the purpose of guiding pretrial procedures. And
17 then I will supplement that just as quickly as
18 possible with a final decision -- final Arbitrator
19 decision and analysis supporting the decision and
20 that way the States are in the position of proceeding
21 with their expert reports and the deposition process.
22 And I can take a little extra time, then, to make
23 sure that my decision is thoroughly supported by the
24 analysis.

25 So, I think the States concurred in that
0107

1 approach, I will -- that's what I will intend --
2 that's what I intend to do unless, by some other
3 mechanism, I chose not to sleep during the next nine
4 days, if I get it all done. Okay.

5 Now we have about ten minutes left until
6 5:00. We have to exit this room by 5:00.

7 I wanted to leave time for Nebraska to

8 come back to the accounting issues, I believe, is
9 what you wanted a chance to respond to.

10 MR. WILMOTH: With your indulgence, I
11 think we will call it a day.

12 ARBITRATOR DREHER: Okay, fair enough.
13 And Kansas, true to my prior concern and
14 decision to give you the last word, now is your
15 chance for the last word.

16 MR. DRAPER: Thank you, Your Honor.
17 And again, I will just try to hit the
18 high points, but if any questions should occur to you
19 that you would like to address to me or to any of
20 other counsel in the time that we have left, it would
21 be perfectly fine with me if you want to interrupt
22 and address questions that occur to you.

23 ARBITRATOR DREHER: Well, there is one
24 question I haven't asked that I probably should.

25 MR. DRAPER: Very good.

0108

1 ARBITRATOR DREHER: I'm trying to give
2 you the last word, but, you know, some of the
3 supporting materials that were submitted with the
4 briefs clearly -- they not only show the dual
5 character of a Compact as being, on the one hand, a
6 contract between the compacting States and, on the
7 other hand, a federal law that is enacted by
8 Congress. They paint a similar dual character for
9 consent decrees, on the one hand, being a contract
10 between the consenting parties and, on the other
11 hand, being a decree of the Court.

12 And I didn't see a lot of guidance --
13 I'm not saying I didn't see any guidance, but I
14 didn't see a lot of guidance as to when the Court
15 properly interprets the consent decree as a contract
16 and when the Court properly enforces it as a Decree
17 of the Court.

18 That doesn't mean I ignored what you
19 submitted; I didn't. But I'm not seeing as clear of
20 a picture on that issue as I would like.

21 MR. DRAPER: Well, I think the comments
22 you have just made are helpful and perceptive.

23 I think on the distinction between
24 contract and order, the consent decree is a clearer
25 distinction as to when you use which aspect, than it

0109

1 is in the compact contract versus federal law
2 distinction, because in the case of a consent decree,
3 when you are trying to figure out what it means, you
4 can use basically the same kind of approach you would

5 in interpreting what a contract means. That's what
6 the cases say.

7 But when you go to enforce it, you are
8 not trying to figure out what it says; you have
9 already figured that out.

10 The question is: How do you enforce an
11 order of the Supreme Court? And you don't go -- you
12 don't go to the Compact model, which is okay, that's
13 liken enforcing a contract, we will give you some
14 past damages. That's what happened in the Arkansas
15 River case that Special Master Littleworth ordered.

16 That's not -- that's not what we are
17 dealing with here, just like that dichotomy on the
18 Pecos, we are post-decree of the Pecos. New Mexico
19 had a lot of problems before that decree and it paid
20 damages in that case by agreement.

21 After that Decree, it has had no
22 problems and that's because it knows that it can't --
23 it's not same thing anymore, if you are talking about
24 violating a U.S. Supreme Court decree. Everything is
25 set out very specifically in a quantitative way, both
0110

1 as to amount and timing. You don't have the
2 questions that can arise in interpreting the general
3 terms of a compact, which, by its nature, has to be
4 general wording.

5 ARBITRATOR DREHER: I understand that
6 that is your position. I don't know if Nebraska
7 wants to respond.

8 MR. WILMOTH: Absolutely. Thank you.

9 There is some support for what Kansas is
10 saying in the lower courts and lower courts have some
11 flexibility to enforce their general consent decrees,
12 but the only case that is remotely on point in this
13 very highly unique context which involves three
14 interstate sovereigns is Littleworth's analysis.

15 And yes, he was looking at it in terms
16 of a compact, but he awarded contract-based damages
17 and I would close with simply citing to you the U.S.
18 v. ITT Continental Banking case which we provided in
19 our briefs, which is the Supreme Court saying that a
20 consent decree, quote, is to be construed for
21 enforcement purposes basically as a contract, close
22 quote.

23 I think particularly in this unique
24 circumstance, where fairness and equity are really
25 paramount, as Littleworth mentioned, you have got to
0111

1 look at this through the contract lens.

2 ARBITRATOR DREHER: Okay.

3 MR. DRAPER: Your Honor, just to address
4 that particular point, the language that Mr. Wilmoth
5 just referred to said for enforcement purposes, the
6 interpretation was separate from that, you don't use
7 a contract remedy. That's not what the Court was
8 saying right there.

9 You use contract interpretation
10 principles to understand what the standard was and
11 determine whether there was a violation or not.

12 ARBITRATOR DREHER: I will go back and
13 look at the case and see. I will use it to the
14 extent it's pertinent and I will ignore it to the
15 extent it's not.

16 MR. DRAPER: That's all we could ask
17 for.

18 MR. WILMOTH: Sounds more and more like
19 a judge every day.

20 ARBITRATOR DREHER: Another question
21 that is similar to this.

22 In Special Master McKusick's second
23 report on the Final Settlement Stipulation at page
24 45, he makes a statement that then -- I didn't see
25 any follow-through with. He says -- and I'm

0112

1 quoting "in their pleadings all three compacting
2 States asked for injunctive relief to enforce future
3 Compact compliance."

4 He doesn't say anything more about why
5 an injunctive type order wasn't included in the
6 consent judgment.

7 MR. DRAPER: Well, we understand that to
8 be a decree, which is, in essence, injunctive relief:
9 Each of you three States shall comply with this
10 Decree and the FSS supplies the details.

11 ARBITRATOR DREHER: Care to respond?

12 MR. LAVENE: Compliance with the Compact
13 is basically what that is saying and ultimately the
14 FSS implements the Compact. You comply under this
15 new agreement between the States that is now approved
16 by the U.S. Supreme Court because we are now
17 including groundwater to the extent it could deplete
18 stream flow, we are including new accounting
19 procedures, but still you are responsible for
20 compliance with the Compact.

21 There was, I guess, a restatement of
22 what must be done which, once again, the FSS
23 effectuate the term of the Compact and that is the
24 contract analysis.

25 MR. BLANKENAU: Not surprisingly, the
0113

1 ultimate form of the FSS is a lot different than the
2 relief sought by all three States at the initiation
3 of the litigation.

4 ARBITRATOR DREHER: Not surprising.

5 MR. BLANKENAU: Yes.

6 ARBITRATOR DREHER: Yes. All right.
7 Kansas, anything further?

8 MR. DRAPER: I would just mention a few
9 things since we have a couple of minutes.

10 There is the argument on the accounting
11 procedure proposal to change the accounting
12 procedures by Nebraska.

13 One of the arguments is, Look, the RRCA
14 has changed it and, therefore, you are able to change
15 it and we would to suggest to you how you ought to
16 change it against the will of Kansas.

17 The simple difference there, it says the
18 RRCA can do it. And they then take that and say,
19 Oh, well, when it can't act, then -- then the Court
20 is empowered to act; but that is -- that -- that
21 misconstrues the situation because the acts we are
22 talking about at the RRCA is changing the accounting
23 procedures, which is changing the allocations.

24 The role that a Court can play where
25 there is a refusal to act of an interstate body like
0114

1 the RRCA is where there is a complaint like we had
2 originally of violation, not -- the issue here is,
3 can we change the allocation? And that, of course,
4 the Supreme Court won't do.

5 I think that does it.

6 ARBITRATOR DREHER: Okay.

7 MR. DRAPER: Thank you.

8 ARBITRATOR DREHER: Anything else from
9 Colorado?

10 MR. AMPE: Not at this time, sir.

11 MR. BLANKENAU: Nothing from Nebraska.
12 Thank you for your indulgence.

13 MR. DRAPER: Yes.

14 ARBITRATOR DREHER: No problem. It is a
15 challenging set of issues or is it the math?

16 MR. BLANKENAU: It's the math.

17 ARBITRATOR DREHER: Well, that will
18 conclude today's argument and I will get, at least,
19 an initial arbitrator's decision out by the 19th.

20 (Hearing concluded at 4:59 p.m.)

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C E R T I F I C A T E

1
2 I, Carol Patterson, Registered Merit Reporter, do
3 hereby certify that I was present at and reported in
4 stenotype the within proceedings; and that the
5 foregoing transcript is true and correct, to the best
6 of my knowledge and belief.

7 Dated this 12th day of December, 2008.

8
9

Patterson Reporting & Video
Carol Patterson
Registered Merit Reporter

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