
IN RE: NON-BINDING ARBITRATION PURSUANT TO THE FINAL
SETTLEMENT STIPULATION, KANSAS v. NEBRASKA and COLORADO
No. 126 Original, U.S. Supreme Court

TRANSCRIPT OF ARBITRATION PROCEEDINGS

before

KARL J. DREHER, ARBITRATOR

Friday, March 13, 2009

VOLUME V

BE IT REMEMBERED that the above-entitled matter came on
for Arbitration before KARL DREHER, Arbitrator, held at
Byron Rogers Building, 1929 South Street, Room C-205,
Denver, Colorado on the 13th day of March, 2009.

1 APPEARANCES:

2 For Kansas:

3 JOHN B. DRAPER, ESQ.
4 Montgomery & Andrews
5 325 Paseo de Peralta
6 Santa Fe, New Mexico 87501

7 SAMUEL SPEED, ESQ.
8 CHRISTOPHER M. GRUNEWALD, ESQ.
9 Assistant Attorney General
10 Civil Litigation Division
11 120 SW 10th Avenue, 3rd Floor
12 Topeka, Kansas 66612-1597

13 BURKE E. BRIGGS, ESQ.
14 Division of Water Resources
15 State of Kansas
16 109 SW 9th Street, 4th Floor
17 Topeka, Kansas 66612

18 For Nebraska:

19 DON BLANKENAU, ESQ.
20 TOM WILMOTH, ESQ.
21 Husch Blackwell Sanders LLP
22 206 South 13th Street, Suite 1400
23 Lincoln, Nebraska 68508

24 MARCUS A. POWERS, ESQ.
25 Assistant Attorney General
26 State of Nebraska
27 2115 State Capitol
28 Lincoln, Nebraska 68509-8920

29 JUSTIN D. LAVENE, ESQ.
30 Special Counsel to the Attorney General
31 State of Nebraska
32 2115 State Capitol
33 Lincoln, Nebraska 68509-8920

34 For Colorado:

35 PETER J. AMPE, ESQ.
36 First Assistant Attorney General
37 AUTUMN BERNHARDT, ESQ.
38 Assistant Attorney General
39 Office of Attorney General for Colorado
40 1525 Sherman Street, 7th Floor
41 Denver, Colorado 80203

1 MARCH 13, 2009 - FRIDAY Pgs 809-984 VOLUME V

2 WITNESSES: PAGE

3

4 Called by Nebraska:

5 JAMES WILLIAMS:

6 Cross by Mr. Draper..... 818

7 Redirect by Mr. Wilmoth..... 876

8

9 JAMES SCHNEIDER:

10 Direct by Mr. Wilmoth..... 888

11 Cross by Mr. Draper..... 914

12

13

14

15

16

17

18

19

20

21

22

23

24

25

BRIAN DUNNIGAN:

Direct by Mr. Wilmoth..... 945

Cross by Mr. Draper..... 961

Redirect by Mr. Wilmoth..... 978

1 EXHIBIT INDEX

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

KANSAS EXHIBITS: Admitted

57	Revised Statutes of Nebraska Annotated	836
58	Handouts for Upper RNRS, Special Meeting, July 13, 2006	944
60	Potential Benefits from the Purchase of Surface Water Rights in the RRB	944
61	An Open Letter to All Concerned About Nebraska Water Issues, Daniel Smiths, January 4, 2007	836
62	Electronic Files	814

NEBRASKA EXHIBITS:

15	Expert Report: Jim Schneider and James Williams	885
20	CV: James Williams	885
21	CV: James Schneider	944
25	Correct sheet for Appendix F	884
26	CD	885
27	Flip chart drawing	944
28	Flip chart drawings	944

1 PROCEEDINGS

2 ARBITRATOR DREHER: Good morning.

3 This is the fifth day of the hearing in the
4 Nonbinding Arbitration pursuant to the Supreme Court
5 Decree of May 19, 2003 resulting from Kansas v. Nebraska
6 and Colorado.

7 It is about 5 minutes after 9:00, and
8 unless there is some preliminary matter, we're ready to
9 resume, I think, with your cross, Mr. Draper.

10 MR. DRAPER: Thank you, Your Honor.

11 There is one preliminary matter.

12 Mr. Blankenau and I have the two States,
13 Nebraska's and Kansas', respective backup for the two --
14 respective reports that you asked for. One was the
15 Flatwater report of Nebraska and the other was the
16 Spronk report of Kansas. We have traded these, looked
17 them over and we're ready to give them to you.

18 MR. BLANKENAU: I think what we would agree
19 to do is that we don't agree that the numbers are
20 correct, but that these are the spreadsheets that we
21 used. Is that correct, Pete?

22 MR. AMPE: Yes.

23 ARBITRATOR DREHER: That's all I'm asking
24 for.

25 MR. DRAPER: Yes, this is what we used.

1 ARBITRATOR DREHER: Okay. Thank you.

2 MR. BLANKENAU: Should we have those marked
3 as exhibits?

4 MR. AMPE: I think so.

5 MR. DRAPER: Electronic exhibits?

6 MR. AMPE: Sure.

7 MR. DRAPER: Yes, maybe we should.

8 MR. BLANKENAU: And then they will be part
9 of the record that way.

10 MR. DRAPER: Let's decide what numbers they
11 would be.

12 MR. BLANKENAU: Nebraska 26.

13 MR. DRAPER: Kansas Exhibit 62.

14 ARBITRATOR DREHER: Thank you.

15 MR. BLANKENAU: I guess it's a joint
16 offering of each exhibit then at this time?

17 MR. DRAPER: Yes, we would join the request
18 that those be admitted.

19 ARBITRATOR DREHER: All right. I assume no
20 objection from Colorado?

21 MR. AMPE: Yes.

22 ARBITRATOR DREHER: All right, they're
23 admitted.

24 (WHEREUPON, Kansas Exhibit 62 and Nebraska
25 Exhibit 26 were admitted into evidence.)

1 ARBITRATOR DREHER: Mr. Williams, I will
2 remind you you're still under oath.

3 THE WITNESS: I understand.

4 CROSS-EXAMINATION

5 BY MR. DRAPER:

6 Q. Good morning, Mr. Williams.

7 A. Good morning.

8 Q. Mr. Williams, when did you begin working on
9 the Republican River Basin?

10 A. What I recall is that I attended my first
11 meeting in January of 2007 and accepted the position,
12 but it was a transition period and I had some other
13 duties within the department, approximately through
14 April of 2007. So it was something of a dual
15 appointment for a couple of months.

16 Q. So for about the last two years; is that
17 right?

18 A. That is correct.

19 Q. So you came on the job, so to speak, after
20 the IMP process had begun; is that right?

21 A. I believe that I was there for most of the
22 process working on the current IMPs. Most of that work
23 was completed during 2007. There was certainly some
24 preliminary modeling and other work that I was aware of
25 during 2006.

1 Q. But you were not there for the initial IMP
2 phase which began, what? -- in about 2004, 2005?

3 A. That is correct. I was with the Department
4 of Natural Resources, but did not have an active role in
5 the Republican Basin in respect to this matter at the
6 time.

7 Q. I would like to turn to your expert report,
8 which is Nebraska Exhibit 15.

9 You began your testimony yesterday with a
10 reference to the annual forecast of water supply that is
11 discussed on page 7 of the report. Let me just be sure
12 that we're straight on one thing.

13 Generally, you are here to testify about
14 Sections 2, 3 and 5 of the report and Mr. Schneider --
15 Dr. Schneider will be testifying after you on Sections 4
16 and 6; is that right?

17 A. That is correct. I think if you want to
18 get into the details of those sections, that would be
19 the appropriate people to talk to. I believe both Dr.
20 Schneider and myself are generally aware of information
21 throughout the report.

22 Q. And you're both prepared to discuss the
23 Introduction and Conclusions?

24 A. As best I can, yes.

25 Q. On page 7 you point out the annual

1 forecasting that has recently been inaugurated; is that
2 right?

3 A. That's correct.

4 Q. And you refer there to section -- the
5 section of the Nebraska Revised Statutes 46-715.5; is
6 that right?

7 A. That's what we wrote.

8 Q. And, in fact, throughout the report you do
9 refer to various sections of the Nebraska Groundwater
10 Management Protection Act; isn't that right?

11 A. That's correct.

12 Q. I have marked a copy of that statute as our
13 Kansas Exhibit 57. Donna will provide everyone with a
14 copy. This would be helpful since there are references
15 to it.

16 I just mention for everyone's information
17 there is the initial cover and Table of Contents for the
18 statutes in general and for Article VII, which contains
19 this Act. And at the back of the exhibit, the last few
20 pages are the 2008 cumulative supplement that brings it
21 up to date.

22 The section that you're referring to in
23 your report on page 7 is found in this document, isn't
24 it?

25 A. It should be. I haven't found it yet.

1 Q. Well, I looked for you and if you go to the
2 very back, since it's a new section, the second-to-last
3 side -- let's see if I'm right here -- is the final part
4 of the -- yeah, the final part of the new version of
5 this Section 46-715, and you will see at the bottom of
6 the page -- it shows a page number of 16 at the top
7 right -- that there is a paragraph 5?

8 A. I have located that.

9 Q. Is that the paragraph you were citing?

10 A. That was my intent.

11 Q. And you referred us then to Appendix D in
12 your report; is that right? Maybe I should just ask a
13 further question before I ask you to turn to Appendix D.

14 Does this section that you have referred to
15 and that we have just turned to in the Kansas Exhibit
16 57, does it specify what is to be done with these
17 forecasts?

18 A. To the best of my knowledge, no. I'm not a
19 lawyer. I can't offer a legal opinion.

20 Q. But you're the one who actually carries out
21 this function, aren't you?

22 A. That's correct, yes.

23 Q. And are you aware that other than
24 delivering this forecast, that anything else is to be
25 done with it?

1 A. Not according to this statute.

2 Q. Are you aware of any other usage you're
3 required or anyone else is required to make with this
4 information?

5 A. I am aware of ongoing communications
6 between the Department and NRDs with reference to this
7 forecast, and I am aware of the planning process that is
8 used along with this forecast.

9 I am also aware that the IMPs describe a
10 Dispute Resolution process if DNR and the NRDs do not
11 agree on something. All of these are in place.

12 As far as an absolute statute specifying
13 what is to be done with this information, I am not aware
14 of such a statute or any other requirement.

15 Q. Let's turn to the reference you have in
16 that paragraph on page 7 of your report to Appendix D.

17 You got it yesterday and I marked a spot,
18 but I'm not sure that everyone would have.

19 ARBITRATOR DREHER: Mr. Draper, I marked it
20 as well.

21 MR. DRAPER: Are you guys okay?

22 Q. (BY MR. DRAPER) And you referred us to
23 Table 1, which is a few pages back in the Appendix. Did
24 you provide us with backup for this Table? Actually,
25 there are two tables on the same page. For either of

1 these tables did you provide us the backup, as we
2 requested?

3 A. I don't recall if we provided spreadsheets,
4 if that's what you're asking. This document, the
5 forecast, was created for the purpose of administration
6 of water within the State and the forecast was included
7 in our compliance report as an example of the things
8 that Nebraska does to comply with the Compact.

9 Q. Do you have the backup for this -- this and
10 the other parts of the report that we requested for your
11 deposition? Do you have those with you now?

12 A. I do have the spreadsheets that were behind
13 this report, I believe, yes.

14 Q. Is that convenient to provide it to us at
15 this time?

16 A. I would need a break in order to do so, but
17 I believe that we could do it during this hearing, yes.

18 Q. And if that can include any of the other
19 matters for which we do not have the backup, that would
20 be included as well. Let's just leave it until the
21 break. Thank you.

22 Now, maybe it would be better for me to
23 come back to this, once we've had that.

24 MR. DRAPER: Maybe it would be a good idea,
25 Your Honor, if we just took a few-minute break. It

1 sounds like that would be possible so that we could
2 obtain this information at this point.

3 MR. BLANKENAU: Just so we can clarify
4 this, John, do you have something specific in mind that
5 you're missing? We were under the impression that
6 everything had been previously provided.

7 MR. DRAPER: We've never gotten this and we
8 asked for it in the deposition notice and then again at
9 the deposition. We have never received it. So if we
10 could be provided it now.

11 MR. BLANKENAU: And it's specifically a
12 spreadsheet that goes with this?

13 MR. DRAPER: Well, Mr. Williams, the expert
14 who created this, would know what it is. We haven't
15 seen it, so it would be spreadsheets and it looks like
16 the second table requires model runs, so that's what one
17 can infer from this.

18 I think it might be good for us to take a
19 short break, Your Honor, and see if this could be
20 provided.

21 ARBITRATOR DREHER: All right.

22 MR. DRAPER: Thank you.

23 (Break was taken from 9:15 to 9:44 a.m.)

24 ARBITRATOR DREHER: Mr. Draper, do you have
25 the information that you need?

1 MR. DRAPER: I believe so. Mr. Williams
2 kindly provided that and our experts are taking a look
3 at it. So while that is going on, I will go to a
4 slightly different topic if I may.

5 ARBITRATOR DREHER: You bet. Continue,
6 please.

7 Q. (BY MR. DRAPER) Mr. Williams, in the
8 meantime let's turn, if you please, to page 6 of your
9 report.

10 A. Page 6?

11 Q. Page 6 of Nebraska Exhibit 15.

12 On this page you start Section III of the
13 report entitled -- this section is entitled "Integrated
14 Management Plans and Annual Forecasting." This is the
15 section in which page 7 is located that we were talking
16 about a minute ago.

17 Let's turn our attention to a slightly
18 different topic.

19 If you look at the first paragraph under
20 the Roman numeral III heading, do you see down in that
21 first paragraph the third sentence from the bottom
22 starts on the right-hand side, and it says, "A
23 significant measure employed in the IMPs for the
24 Republican Basin is the setting of allowable pumping
25 allocations within each NRD"?

1 Do you see that?

2 A. I do.

3 Q. Now, the pumping allocations, in other
4 words, how much pumpers can pump, are 13 inches in the
5 Upper Republican, 12 inches in the Middle Republican and
6 9 inches in the Lower Republican; is that right?

7 A. That's my understanding, yes.

8 Q. Now, if pumpers are given those
9 allocations, how does that square with the standards
10 that you were discussing yesterday that appear -- I
11 think you were using the example of the Middle
12 Republican IMP? I'm trying to find that exact
13 reference.

14 ARBITRATOR DREHER: Mr. Draper, I believe
15 it's on page 5 of the Middle Republican IMP.

16 A. There is also information on page 8 in the
17 Middle Republican IMP under "Standards" at the bottom.

18 Q. (BY MR. DRAPER) Oh, yes, thank you.

19 So this is, just to identify it for the
20 record, we're talking about an appendix to your report,
21 which is part of -- it's Appendix C -- I'm sorry,
22 Appendix B relates to the Middle Republican NRD; is that
23 right?

24 A. That is my understanding, yes.

25 Q. And with respect to the Middle Republican

1 IMP -- or the Middle Republican there is an IMP and also
2 rules and regulations related to the IMP?

3 A. Correct.

4 Q. And we're looking at the IMP itself, page
5 8.

6 A. I believe there was a question in there.
7 Could you please repeat the question.

8 Q. Right. Just figured out how that should be
9 stated.

10 Perhaps you should just read for us the
11 paragraph 3 that appears on page 8 down through
12 subparagraph a.

13 A. Certainly. Paragraph 3 is headed
14 "Standards. The MRNRD shall adopt and implement rules
15 and regulations which shall meet the requirements of
16 both the following standards. a. provide for a
17 20 percent reduction in pumping from the '98-'02 pumping
18 volume using a combination of regulation and
19 supplemental programs so that the average groundwater
20 pumping volume is no greater than 247,580 acre-feet over
21 the long term."

22 Q. Now, we've said that for the Middle
23 Republican, the pumping allocation is 12 inches,
24 correct?

25 A. Yes, that's correct.

1 Q. Now, what happens if the pumping allocation
2 on the acres allow to apply groundwater in the Middle
3 Republican exceed this number of 247,580?
4 Administratively, what does that mean?

5 A. The process that we have planned out has
6 included an annual review by NDNR to be discussed
7 approximately the same time as the annual RRCA meeting.

8 So in the same timeframe that the numbers
9 are compiled and finalized for the year before, we'll
10 take a look at the pumping volumes in each NRD. We'll
11 also take a look at their allowable depletions to the
12 stream at the same time. We'll sit down with the NRDs
13 and we'll discuss where they are on average during the
14 IMP period.

15 They are allowed, in fact, to exceed this
16 pumping volume during an individual year, but on average
17 they are held to that pumping limit. And we'll discuss
18 with them any measures that they plan to take to
19 remediate the situation should they be overpumping or go
20 above that volume in any one year, such that their
21 average is higher than this.

22 Q. Do I understand you to say that if after
23 the fact, accounting determines that pumping has
24 exceeded the number of acre-feet specified here, that
25 that will then be taken into consideration for future

1 allocations?

2 A. The NRDs are allowed some flexibility as to
3 how they would modify this. The bottom line is that
4 they must stay within this pumping volume.

5 My understanding is that they may choose to
6 put in place rules and regulations that would decrease
7 pumping volumes in some or all of the District in the
8 future. They may choose to more aggressively work with
9 federal agencies to stop irrigation on some lands.
10 That's something that they would be allowed to work out.

11 I'm simply expressing some what-ifs that
12 have been discussed.

13 Q. This limit of paragraph 3.a. on page 8 is
14 expressed as being a limit over the long term. What
15 does that mean?

16 A. I couldn't point you to a reference. I
17 know that there is a reference in, at least, one of
18 these IMPs that specifies it is being the term of the
19 IMP, something that has been discussed in hearings and
20 is well known that this would be a five-year running
21 average in a -- so that it is analogous to both the term
22 of the IMPs, as well as the running average used by RRCA
23 accounting.

24 Q. But it's not clear whether that is actually
25 set out anywhere?

1 A. It is in, at least, one of the IMPs.

2 Q. But not necessarily this one?

3 A. Not necessarily.

4 Q. And this is not -- so this is not a limit
5 in any particular year. Looking at subparagraph little
6 i., just below what you read, could you read that for
7 us?

8 A. If precipitation is lower than average for
9 any given year, the groundwater pumping volume for that
10 year may be above 247,580 acre-feet.

11 Q. So is that an exception to the leading
12 paragraph a.?

13 A. I don't believe so. Paragraph a. uses the
14 word "average."

15 Q. And then the next subparagraph provides for
16 the general limit to be increased under certain
17 conditions; is that right?

18 A. That is correct, yes.

19 Q. And if the allocations that are allowed
20 individual pumpers are amounting to more than this value
21 of 247,580, they're not stopped from pumping, are they?

22 A. The individual pumpers at this time are not
23 stopped from pumping, that is correct.

24 Q. Now, back on page 6 of the main text of
25 your report, Exhibit 15, at the bottom of that page, the

1 last full sentence there at the bottom says, "The
2 allowable groundwater depletions are the maximum level
3 of depletions to streamflow from groundwater pumping
4 within the Compact area that can be allowed without
5 exceeding the Compact allocation."

6 Do you see that language?

7 A. I do.

8 Q. What are the current allowable groundwater
9 depletions?

10 A. An easy reference to get to would be our
11 forecast document.

12 Q. Is that the one in Appendix D?

13 A. That is correct. The -- as it states later
14 on in that same paragraph, pages 6 and pages 7, that
15 it's the allocation plus imported water supply, and
16 those are listed for recent years, Nebraska's estimates
17 of the allocation and imported water supply. So for
18 2005, it's something on the order of 210,000. For 2006,
19 something closer to 200,000 and so on.

20 Q. I'm sorry, you're on Table -- one of the
21 two tables?

22 A. That would be Table 2, the column headed
23 "Allocation" and the column headed "Imported Water
24 Supply Credit." The allowable depletion to streamflow
25 would include both of those.

1 Q. Let's see, we were talking about the term
2 "allowable groundwater depletions." Is that shown here
3 or is it some combination of the numbers?

4 A. Actually, it's a little bit more
5 complicated than that. The total allowable depletion to
6 streamflow would be the sum of those two columns.

7 As a practical matter, administratively the
8 three primary Natural Resource Districts consume about
9 95 percent of the groundwater depletions to stream. And
10 so what would actually be done in the calculation here
11 is we would sum those two columns for a particular year,
12 we would subtract off surface water consumptive use, we
13 would subtract off the groundwater usage in the
14 remaining NRDs that are in the model domain, and then
15 the remaining amount is the allowable depletion that
16 these three NRDs are allowed to deplete.

17 Q. And do you show that -- those numbers
18 anywhere in your report or in the appendices?

19 A. No.

20 ARBITRATOR DREHER: Excuse me, Mr. Draper.
21 What table are you referring to?

22 THE WITNESS: I'm referring to Table 2 out
23 of Appendix D, simply because it's one that is already
24 in the report and easy for me to get to. In the Compact
25 accounting worksheets, the Excel spreadsheet, if you

1 will, this is Table 3C, which is Nebraska's five-year
2 running average compliance table.

3 Q. (BY MR. DRAPER) And the allowable
4 groundwater depletions that you just described how
5 they're calculated based on some of the information we
6 see in Table 2 and Appendix D, those are values that are
7 determined after the year is over; is that right?

8 A. That is correct.

9 Q. So they do not exist during the year in
10 which the pumping is occurring as a limit?

11 A. That is correct; however, that is the
12 purpose of this appendix. It is a forecast document
13 that basically, in this case it's 35th percentile, which
14 is to say rather dry conditions. This is the allowable
15 depletions that we see and that that can be split out
16 into the depletions per NRD.

17 Q. I understand they are projections, but I
18 understand your statement here to be that these
19 groundwater depletions are the maximum level of
20 depletions that are allowed in a given year under the
21 IMPs. Is that not right?

22 A. Let's turn back to the same section in our
23 Middle Republican IMP, which would be page 8. If I
24 could, I would like to read the entirety of the bottom
25 paragraph on that page starting with Section 3.b. there.

1 "The District's net depletions shall
2 average no greater than 30 percent of the State of
3 Nebraska's allowable groundwater depletions as accounted
4 by the RRCAGWM. The average shall be computed using the
5 annual allowable groundwater depletion for the same
6 years as are used to determine the averages for
7 Nebraska's compliance with the FSS."

8 I would interpret that, and it was
9 discussed with the Middle Republican NRD, that this
10 means either the five-year or the two-year or, should
11 the alternative water-short year administration be put
12 in place, a three-year average. So during any one year
13 they may well exceed 30 percent of their allowable
14 groundwater depletions to streamflow, but on the same
15 running average that the RRCA accounting is, they would
16 be held to that average.

17 Q. And the 30 percent that is referred to in
18 this paragraph you just mentioned, that's the Middle NRD
19 share of the depletions, correct?

20 A. That's correct. As I described earlier,
21 first of all, surface water depletions would be
22 subtracted from the allowable total, and that can vary
23 quite a bit from year to year.

24 Secondly, depletions from the five NRDs
25 that are in the model domain, there is a total of eight

1 I am told, which those other NRDs total about 5 percent,
2 5 to 6 percent of the depletions, I'm told again. I'm
3 not a modeling expert.

4 And so the remaining 95 percent of
5 depletions are divided up and the Middle Republican is
6 held to that average maximum of 30 percent of the
7 allowable depletions.

8 If I may say so basically in terms of
9 groundwater, the three NRDs are required to comply with
10 the allowable groundwater depletions.

11 Q. Has the department calculated the annual
12 ground -- allowable groundwater depletions?

13 A. Yes.

14 Q. Do you know what that is for the most
15 recent year you calculated?

16 A. I don't have a spreadsheet with the
17 calculations, but that may be easily done based on Table
18 1 in the RRCA accounting spreadsheet where state by
19 state the surfacing groundwater depletions are sorted
20 out, if I am not mistaken.

21 Anyway, it's one of the tables in the RRCA
22 accounting. It's a rather simple calculation to do.

23 Q. And was the Middle -- was the pumping in
24 the Middle District limited in some way to stay within
25 30 percent of that number?

1 A. The first year of the current IMP was 2008.
2 We will formally have that discussion with the Middle
3 Republican around the time of the annual meeting this
4 coming summer. So at this point, we have not had that
5 discussion. Therefore, in the past we've done this
6 calculation on an informal basis, just to go through
7 with them how their IMP is going to be working.

8 Q. Now, these IMPs became effective in late
9 2007 or early 2008, right?

10 A. That is correct.

11 Q. And you're saying it was not applied in
12 2008 with respect to the 30 percent figure you just
13 pointed to, that was not applied as a limit to the
14 Middle Republican for the first year in which this IMP
15 was in effect?

16 A. This is a backward-looking analysis. The
17 first data exchange from the RRCA is not due until
18 April 15; final data won't be due until early summer.

19 Q. 2009?

20 A. 2009. So, no, this has not been applied to
21 2008 yet.

22 Q. Now, the allocations are stated somewhere
23 close by here. You may be able to point me to where
24 that is.

25 A. That would be in the rules and regulations,

1 which in our report was in front of the IMP, page 22 at
2 the bottom.

3 Q. The regulations which indicate in the upper
4 right-hand corner of each page to help us identify it
5 indicate they were revised November 13, 2007?

6 A. That's correct.

7 Q. At the bottom of page 22 there is a Section
8 5-3-7 entitled "Irrigation Uses," and you have there a
9 base allocation of 12 inches, base allocation period of
10 five years and a cumulative allocation of 60 inches; is
11 that right?

12 A. Yes, that's correct.

13 Q. Turning to the top of the next page, there
14 is a subsection. Would you read that subsection that
15 starts with the word "cumulative"?

16 A. Yes. "Cumulative allocation may be
17 increased by one bonus inch each time the State of
18 Nebraska has stayed within its yearly allocation the
19 previous two years."

20 Q. So that provision allows the 60 inches to
21 be bumped up?

22 A. That is my understanding, yes.

23 Q. Let's say there has been large inflows
24 because of large precipitation for a couple of years and
25 this would -- this provision would come into play.

1 How does this address the legacy effect of
2 the pumping depletions that are working their way
3 through the system in Nebraska to increase the amount of
4 pumping based on two years of good surface runoff?

5 A. I'm not a modeler, but I understand that
6 increasing pumping does increase the coming lag effect
7 or legacy effect as it is known.

8 Q. So it would actually exacerbate that
9 somewhat?

10 A. Potentially, yes.

11 Q. Just following that set of subsections
12 we've been looking at, there is a heading provisions for
13 sub areas. Do you see that? This is on page 23 of the
14 same Middle Republican Rules and Regulations.

15 A. Yes.

16 Q. And there are special provisions for the
17 Upland Sub Area, Quick Response Sub Area, and Platte Sub
18 Area; is that right?

19 A. Correct.

20 Q. Do those subareas essentially cover all of
21 the area within the Middle Republican Natural Resource
22 District?

23 A. Yes, that's my understanding.

24 Q. Would you read the special rules that apply
25 to the quick response subarea. And let me confirm as

1 you do that, quick response subarea is an area along the
2 Republican River and its tributaries; is that right?

3 A. That is my understanding. I do not believe
4 that the definition for quick response area has been
5 formalized, but it is analogous to alluvium that
6 responds quickly to pumping or other stresses.

7 And you asked me to read that as well?

8 Q. Yes, if you would.

9 A. Sure. Under 5-3-1, Quick Response Area.

10 Q. 5-3-9?

11 A. 9, I'm sorry. "For the period commencing
12 January 1, 2008 and ending December 31, 2012."
13 Subsection 1, "allocation 60 inches for the entire
14 period; 2, maximum allocation year use; unrestricted.
15 3, maximum allocation year use in water-short year
16 unrestricted subject to any changes made pursuant to
17 Rule 4-7."

18 Q. Have there been any changes with respect to
19 the water-short year provision?

20 A. I'm not sure what you're asking.

21 Q. Just the language you read said "subject to
22 any changes made pursuant to Rule 4-7."

23 Have any such changes been made?

24 A. 2008 was not and 2009 is not predicted to
25 be a water-short year. So as far as I know, there are

1 no changes in place.

2 Q. And this allows water-short years
3 unrestricted pumping as it sits here?

4 A. Up to the maximum for the entire period,
5 yes.

6 Q. Let me ask you about the provisions for
7 variances from the IMPs.

8 Generally, what do they provide before we
9 look at them specifically?

10 A. In this context, the NRDs are allowed to
11 provide pumping variances for various purposes.

12 Q. They allow individual pumpers to exceed the
13 allocations?

14 A. I am not aware of -- I'm not aware of
15 individual pumpers being allowed to exceed allocations
16 unless they have -- potential example would be
17 consolidation of certified acres, such as that the
18 acreage was reduced, but that the overall pumping would
19 remain the same.

20 Q. For the Middle NRD, where does the variance
21 provision appear?

22 A. Well, it's in the definitions, which would
23 be page 7 of the IMP.

24 Q. Did you say page 7 of the IMP?

25 A. Yes. Sorry, in the Rules and Regulations.

1 Q. How is --

2 A. And it's in Chapter 2, Rule 2, page 1 of
3 the Rules.

4 Q. Looking at page 7, the definition, how is
5 it defined?

6 A. Page 7, the definition, variance approval
7 to act in the manner contrary to existing rule or
8 regulation from a governing body whose rule or
9 regulation is otherwise applicable.

10 Q. And then turning back to page 1, would you
11 read Rule 2-1.1?

12 A. Page 1, Rule 2-1.1, The board may grant
13 variances from the strict application of these rules and
14 regulations upon good cause shown.

15 Q. What is meant there by "good cause shown"?

16 A. That sounds to me more like a legal
17 opinion. Just taking the words at their face value, if
18 there is a good cause or a good reason, I understand the
19 board is allowed to grant a variance.

20 Q. Is it defined on page 5?

21 A. Yes, it is.

22 Q. Would you read the definition, please.

23 A. "Good cause shown shall mean a reasonable
24 justification for granting a variance to consumptively
25 use water that would otherwise be prohibited by rule or

1 regulation in which the District reasonably and in good
2 faith believes will provide an economic, environmental,
3 social or public health and safety benefit that is equal
4 to or greater than the benefit resulting from the
5 prohibition from which a variance is sought."

6 Q. So economic reasons are part of that, what
7 you just read, right?

8 A. Potentially, yes.

9 Q. That would include expense; if a farmer
10 decided that it was too expensive to comply, he could
11 approach the NRD, under this provision?

12 A. I understand that is the case, yes.

13 Q. And if he could argue that any economic,
14 environmental, social or public health and safety
15 benefit would be greater than the benefit resulting from
16 his not pumping, he would be entitled to a variance,
17 right?

18 MR. WILMOTH: Excuse me, Mr. Arbitrator. I
19 think that's a legal question. I don't know that the
20 witness is qualified -- the witness has personal
21 knowledge about whether that has been done. I think
22 that would be appropriate to answer, but what qualifies
23 as good cause doesn't seem to me to be something that
24 Mr. Williams can speak to.

25 ARBITRATOR DREHER: Well, I agree it is

1 somewhat of a legal interpretation, but he is Nebraska's
2 Republican River coordinator, and he does have to make
3 interpretation. So I am interested in hearing how he
4 would answer that, recognizing that he is not an
5 attorney.

6 You may answer.

7 A. I'm sorry, could you please repeat the
8 question.

9 MR. DRAPER: Perhaps the court reporter
10 could read it back.

11 (The last question was read.)

12 A. Potentially, yes.

13 Q. (BY MR. DRAPER) And if we turn from page 1
14 to page 2 of the regulations, there is actually a
15 section for expedited variances; is that right?

16 A. I'm sorry, which page?

17 Q. Page 2.

18 A. Yes.

19 Q. Now, the other NRDs, the Middle -- other
20 than the Middle, particularly the Lower and the Upper,
21 also have similar variance provisions, don't they?

22 A. Yes, that's correct.

23 Q. And I notice that this definition of good
24 cause shown in the regulations comports with the
25 statutory definition. In the authorizing legislation

1 which we provided as Kansas Exhibit 57, there is Section
2 46-706 entitled "Terms, defined," and on page 257 of the
3 copy that I provided you, you can see the number in the
4 upper left-hand corner of that page from the statute
5 book, you can see subsection 23 there defining good
6 cause shown, right?

7 A. Correct. And variance defined at the
8 bottom, Section 29.

9 Q. Yes, thank you.

10 So right upfront in the regulations for the
11 IMPs, there are very prominent provisions that would
12 allow any number of individuals to apply for and
13 potentially receive relief from the allocations that
14 would otherwise limit their pumping; is that right?

15 A. I'm sorry for my long pause. The word
16 "allocation" kind of threw me a little bit, because my
17 knowledge, the variances are not used to allow them to
18 exceed the inches or the acre inches per acre; in other
19 words, the depths. But, yes, the variance procedure
20 would be allowed -- does allow individual producers to
21 have new uses and they are also commonly used for
22 municipalities or potential industries.

23 Q. And they would also be available to
24 irrigators if they --

25 A. Yes.

1 Q. -- if they had a need to go above the
2 allocation that applies to them?

3 A. I suppose potentially that would be the
4 case.

5 Q. Let's turn back to the first page of your
6 report, Nebraska 15.

7 Looking at the Introduction, you state in
8 the introductory paragraph there, down about
9 three-fifths of the way starting six lines above the
10 bottom, you say, "Attempting to predict both the likely
11 hydrology and the regulatory mechanisms that may be in
12 place well beyond the life of the current IMPs is not
13 realistic."

14 Are you saying that any attempt to evaluate
15 potential effects of increasing depletions due to the
16 legacy impacts from historical pumping beyond a four-,
17 five-year period is unrealistic?

18 A. Again, I'm not a modeler, but to the best
19 of my knowledge, that is one of the few things that can
20 be predicted quite well for many years into the future.

21 And I'm told that in our scenario, it's
22 typically starting with 1918 and we go 40 years beyond
23 the present with our modeling scenarios and our modeler
24 could describe that in better detail.

25 Q. So you're not supporting that statement at

1 this time?

2 A. I would state that when we use the term
3 "hydrology," that would include precipitation as well,
4 and that's a complete unknown for much longer than --
5 that's an unknown for this coming summer and some would
6 argue for next week as well.

7 Q. But with respect to the impacts of
8 groundwater pumping, it was not meant to apply to that?

9 A. No. The groundwater pumping, the lag and
10 the legacy effect, will be affected by precipitation,
11 but it is rather easy to model potential precipitation
12 scenarios and basically bracket the potential coming lag
13 effect, depending on whether you would use average
14 conditions, dry or even wet conditions, as I understand
15 it.

16 Q. In that regard, it makes me recall our
17 earlier discussion about the 1-inch bonus, the increase
18 in the cumulative allocation that is allowed if there is
19 two years of compliance. A 1-inch increase in the
20 Middle NRD would result in how much extra pumping?

21 A. I would have to multiply that out. I don't
22 have that easily --

23 Q. Are there about 292,000 acres in the Middle
24 NRD?

25 A. Possibly. I don't have that information at

1 my fingertips.

2 Q. And if there were 292,000 acres, all of
3 which applied an extra inch, about how much extra
4 pumping would that be?

5 A. Well, rougher than back of the envelope,
6 just back of the hand, if you have approximately 300,000
7 acre-foot adding a tenth of a foot would be
8 approximately 30,000. So it would be something under
9 that because I rounded up in both cases.

10 Q. Something on the order of 25,000 perhaps?

11 A. Acre-feet, yeah.

12 Q. And what effect would that have on the
13 continuing legacy effect of groundwater pumping?

14 A. That would increase the lag effect, the
15 legacy effect.

16 Q. Let me just be sure I understand the
17 relationship between the IMPs and their regulations. Is
18 it the regulations that are intended to be enforced or
19 is it the IMP or both?

20 A. I'm not a legal expert and they're actually
21 handled slightly different from NRD to NRD.

22 My understanding is, for example, in the
23 case of the Middle Republican, in any case, the
24 regulations are, in fact, the legally binding portion,
25 but the plan is the plan, Integrated Management Plan.

1 Q. And who is responsible for implementing
2 that plan?

3 A. That would be the NRD.

4 Q. Not you?

5 A. No, not me, not the department.

6 Q. And if I understand, the witnesses who are
7 testifying do not include anybody from the NRDs; is that
8 right?

9 A. In regards to compliance, yes, that would
10 be correct, that's true.

11 Q. What happens if the NRDs don't implement
12 the regulations or the IMPs?

13 A. Well, that's a legal question, but that
14 would be -- that's analogous to what happens when a
15 particular city's police force does not enforce the law.
16 I mean, the law is the law, and that is the entity to
17 enforce the law.

18 Q. So the DNR is not involved with the
19 implementation or enforcement of the regulations in the
20 IMP? Once they're established, I know there is a
21 coordination together, but then it's pretty much in the
22 hands of the NRDs from then on?

23 A. It is, with the understanding that we have
24 constant communications with the NRDs. I meet with the
25 managers or their boards or we have basinwide meetings

1 on an approximately monthly basis.

2 For the two years that I've been in the
3 position, we cover these kinds of issues pretty much
4 every time that we meet. So DNR is -- has been working
5 with them from an overall compliance aspect.

6 Having said that, should we have a major
7 dispute with them, there is a Dispute Resolution process
8 that includes the Interrelated Water Review Board.

9 Q. Now, the NRDs can change the allocation; is
10 that right?

11 A. My understanding is they cannot do so
12 without a public hearing process; but, yes, they can be
13 changed.

14 Q. And that would be a change either down or
15 up, correct?

16 A. I believe that to be the case, yes.

17 Q. And do they need your permission to do
18 that?

19 A. I don't know exactly how that would work.
20 The question has not come up.

21 MR. DRAPER: Your Honor, this might be a
22 time to consider a break and then I can see where we are
23 on review of the materials we've received, also.

24 ARBITRATOR DREHER: So you're proposing how
25 long of a break? We had a half-hour break early on, so

1 I'm concerned we don't run out of time. So what are you
2 proposing specifically?

3 MR. DRAPER: I think we should keep it to
4 ten minutes.

5 ARBITRATOR DREHER: All right, ten minutes
6 it is.

7 MR. DRAPER: Thank you very much.

8 (Break was taken from 10:40 to 11:00.)

9 ARBITRATOR DREHER: Mr. Draper, please
10 continue.

11 MR. DRAPER: Thank you very much.

12 Q. (BY MR. DRAPER) Mr. Williams, let's look at
13 one of the sections that you particularly identified
14 that you are prepared to address -- that is, the Closing
15 the Gap, Section V, starting on page 10 of your report,
16 which is Nebraska Exhibit 15.

17 And that section discusses various
18 possibilities that may be available to supplement the
19 allocations imposed by the IMPs and their associated
20 regulations.

21 In Section C -- or subsection C of that
22 section, starting on page 12, you address dry-year
23 leases of surface water.

24 What leases do you currently have in place
25 for this purpose?

1 A. I do not recall any leases currently in
2 place for the year 2009.

3 Q. Do you have any contracts for water at any
4 other time in the future?

5 A. Not in the future, no.

6 Q. Have you made advanced arrangements with
7 the entities who would need to agree to dry-year leases
8 of surface water, should they be needed in the future?

9 A. We had discussions and the NRDs have had
10 discussions with two irrigation districts for leases
11 either in '09 and/or potentially long term that -- that
12 I know about.

13 Q. And are you prepared to say who those are
14 or is that confidential?

15 A. The Riverside Irrigation District and the
16 Frenchman Valley Irrigation District have both expressed
17 an interest in foregoing diversion during 2009.

18 Q. No contracts in place at this time?

19 A. Not that I'm aware of.

20 Q. Let's see, we're now in March. So that
21 would be for 2009, possibly, with those two districts.
22 Anything else for 2010?

23 A. To the best of my knowledge, DNR does not
24 intend to execute such contracts, although we have
25 discussed them. I believe the NRDs have an interest in

1 working with one or the other or both of the Districts,
2 and those may be long term, but I don't know the exact
3 status of those discussions.

4 Q. And it would be necessary to obtain the
5 cooperation of other governmental entities, wouldn't it?

6 A. I think there is greater benefit if we can
7 work with the Bureau of Reclamation or with other
8 irrigation districts, but there is a benefit simply in
9 those Districts not irrigating that would benefit
10 Nebraska's balance sheet.

11 Q. But in order to do that, you would need the
12 approval of the Bureau of Reclamation, would you not?

13 A. Not in the case of natural flow for these
14 two districts, to the best of my knowledge, but I'm
15 certainly not an expert on the details of those
16 contracts.

17 Q. So you're not aware of any approval that
18 would be required from the Bureau of Reclamation?

19 A. I'm not aware, no.

20 Q. And from your point of view as the
21 coordinator for the Republican Basin, would the
22 cooperation of the Kansas Bostwick Irrigation District
23 be necessary?

24 A. If a contract is in place, such that either
25 of these two districts forego diversion, to the best of

1 my knowledge, Kansas Bostwick need not be involved in
2 such a contract.

3 Q. I would like to provide you and counsel and
4 Mr. Dreher with Kansas Exhibit 61. This is a document
5 that was discussed in depositions of you and Dr.
6 Schneider.

7 Have you seen this document before,
8 Mr. Williams?

9 A. Yes, I have.

10 Q. This is dated January 4, 2007, isn't it?

11 A. It appears to be so.

12 Q. And it's entitled "An Open Letter to all
13 Concerned with Nebraska Water Issues"; is that right?

14 A. Yes.

15 Q. And it's from the Middle Republican Natural
16 Resources District, correct?

17 A. Yes.

18 Q. And this discusses, among other things, a
19 meeting that was held on December 15, 2006 of the NRDs
20 with the Governor and with the Director of the
21 Department of Natural Resources; isn't that right?

22 A. I believe so, yes.

23 Q. If you turn over to page 3 under the
24 heading of "Where we go from here."

25 In the first paragraph under the heading

1 "Where we go from here," we see that the Director of DNR
2 made a recommendation at this meeting in order to
3 achieve compliance.

4 Do you see the second sentence where it
5 says, "She recommended the following"?

6 A. I do.

7 Q. Could you read from there down to the end
8 of the paragraph for us, please.

9 A. "She recommended the following, which
10 represents a 15 percent pumping reduction in upland
11 areas and a 50 percent reduction in quick response
12 areas: For upland wells, allocations of: 11.38 inches in
13 the Upper Republican NRD; 9 inches in the Middle
14 Republican NRD; and 9.6 inches in the Lower Republican
15 NRD. For quick response areas, allocations of 2.8 -
16 5.7 inches in the Upper Republican NRD; 2.7 to
17 5.3 inches, in the Middle Republican NRD; and, 2.4 to
18 4.8 inches in the Lower Republican NRD."

19 Q. Thank you.

20 The allocations that you testified to
21 earlier are considerably larger than the allocations
22 that were recommended in December 2006 by the head of
23 your department; isn't that right?

24 A. That is correct, yes.

25 MR. DRAPER: No further questions,

1 Mr. Dreher.

2 ARBITRATOR DREHER: Well, I have a couple
3 before we go to redirect.

4 And part -- you know, just so counsel
5 understands, in part, the reason I try to ask my
6 questions in groups at the end of these is so that
7 counsel has an opportunity to modify their cross or
8 redirect, as they deem appropriate.

9 Mr. Williams, referring to this exhibit
10 that Kansas has just referred to and, in particular, the
11 statements, or whatever presentation was made
12 December 15, 2006 -- she is not here to speak for
13 herself -- but Director Bleed obviously had some grave
14 concern about the ability of Nebraska to meet its
15 Compact compliance requirements or she wouldn't have
16 proposed what appears to be a sizable reduction in
17 consumptive beneficial use in Nebraska.

18 THE WITNESS: I would agree with that.

19 ARBITRATOR DREHER: And at least from a --
20 I don't know if it's a 20,000-foot level or 100,000-foot
21 level, but it seems like the thrust of the IMPs, the
22 current IMPs that were put in place in 2008 seem to vary
23 from that. I mean, they don't seem to reflect the --
24 what I have characterized as the grave concern that
25 Director Bleed had in 2006.

1 And I'm wondering why.

2 THE WITNESS: Yes, I would be happy to
3 discuss that with you.

4 Let me preface it by saying that, as I
5 mentioned earlier this morning, this was before my time,
6 just barely before my time, so I was not able to be at
7 the McCook meeting. And, in fact, this letter was
8 distributed before I became the Republican River
9 coordinator, but I am aware of a lot of discussion in
10 the department regarding the analysis that went into
11 these numbers and how that was modified during 2007.

12 And so my understanding of it is, there has
13 been some discussion as to whether we were in a drought
14 situation or not.

15 If you look at precipitation, we had
16 actually had above-average rainfall for several years.
17 At this point, 2006 was above average, 2005 was above
18 average, but the streamflow continued to drop, which is
19 to say the water supply continued to drop.

20 And so, just in layman's terms, there was
21 something in a feeling that we might be in a free-fall
22 and we didn't have a complete handle on it. We did a
23 lot of work to understand that and to put together
24 potential plans that would deal with an ongoing
25 situation where the water supply would continue to drop.

1 And the situation changed in a key respect
2 in 2007 while the current IMPs are being put together in
3 that we got some very good rainfalls and we were able to
4 refill some reservoirs and we were able to get some
5 pretty decent streamflows during 2007. And that became
6 known, especially I would say we were aware that the
7 situation had turned around by June and July timeframe
8 early in 2007, certainly in the timeframe of this
9 document, but the early meetings we had that was not yet
10 the case, it was not yet apparent.

11 Having said that, I would again direct you
12 to, not only the pumping volume limits in each NRD, but
13 also that total depletion percentage allowed in each
14 NRD. And that language was specifically designed to
15 deal with a situation that Director Bleed was attempting
16 to address at the end of 2006.

17 Let me add that the discussions we were
18 having at the time, the DNR was not dictating to the
19 NRDs what allocations they had to have in place. This
20 was simply an example of allocations that would be
21 necessary, should conditions continue. And it
22 allowed -- you know, it's an example of the
23 flexibilities that could be put into place within the
24 NRDs in terms of dividing up geographic areas, if you
25 will, with different allocations.

1 And based on discussions with the NRDs,
2 that's actually a very difficult thing to do, to treat
3 two groups of people differently within an NRD, and they
4 have chosen not to go with separate allocations for
5 quick response in upland at this time.

6 So these are my thoughts on these numbers
7 and what we ended up with in the IMPs.

8 ARBITRATOR DREHER: Regarding your
9 statement that things appeared to be turning around, I
10 think is what you said in, 2007 --

11 THE WITNESS: Yes.

12 ARBITRATOR DREHER: -- I assume that you
13 have had occasion to read Mr. Barfield's report, I think
14 it's Kansas Exhibit 6.

15 THE WITNESS: I did read the report. I
16 don't consider myself an expert on it, but I --

17 ARBITRATOR DREHER: No, I'm not asking you
18 necessarily to dissect it or critique it, but I would
19 like you to look at Figure 3 with me.

20 THE WITNESS: I don't see page numbers on
21 here, but it looks --

22 ARBITRATOR DREHER: That's the correct
23 figure, right. And it looks like the version you have
24 got is in black and white.

25 THE WITNESS: Yes.

1 ARBITRATOR DREHER: The upper curve, curve
2 or graph, whatever, the upper plot is -- on my copy is
3 red, and it's entitled "Nebraska model domain
4 precipitation." And the lower plot is blue and it's
5 entitled "Inflows to Harlan County Lake."

6 Now, recognizing that, you know, I'm
7 assuming that this is accurate, and also recognizing
8 that inflows to Harlan County Lake don't necessarily
9 reflect the entirety of the streamflow conditions in the
10 basin, but it certainly is an indicator.

11 When I look at 2007, it doesn't appear to
12 me that things have turned around. Certainly, there has
13 been a bounce off the recent low that was reached in --
14 let me see if I can figure out what year -- maybe 2006,
15 but it doesn't appear to me to be a very significant
16 turnaround.

17 And again, I'm asking it kind of in the
18 context of the comparison between Director Bleed's
19 significant concerns that she expressed and the more
20 flexible approach reflected in the IMPs.

21 I don't know if you have a comment about
22 that or not, but I would be interested in your
23 perspective of how significant things have or have not
24 turned around.

25 THE WITNESS: I believe we would have to

1 ask the author exactly what goes into this, but I would
2 point you to the 5-year Moving Average statement --
3 that's part of the title there at the top center -- and
4 I assume that would apply to both the precipitation, as
5 well as the Harlan County Lake inflows.

6 What I am aware of was that during 2007, we
7 went from a situation where reclamation defined the
8 bottom of the irrigation pool somewhat low and they
9 reevaluated that upward. That was filled during 2007.

10 And then the 119,000 acre-foot trigger for
11 water-short year administration was on top of that, and
12 we missed the deadline by about a week. In other words,
13 there was well over 120,000 acre-foot that went into
14 Harlan County Lake during 2007. And we did, in fact,
15 reach that level to get us out of water-short year
16 administration a week late. So 2007 is, in fact, a
17 water-short year.

18 So if this were not a five-year moving
19 average, there would be a significant bounce up, and
20 then 2008, again in reference to Harlan County Lake, was
21 a very wet year, as well.

22 My earlier statement about declining
23 streamflow, declining water supply in the basin is, in
24 fact, borne out quite well by this figure.

25 ARBITRATOR DREHER: Okay.

1 THE WITNESS: I hope that answers --

2 ARBITRATOR DREHER: No, that's fair.

3 The five-year average is certainly a valid
4 point. I may ask your current director of this a little
5 bit later, but, you know, under these IMPs,
6 hypothetically, let's say that an NRD exceeds its
7 allocation, you don't know it until after the fact of
8 year one, and let's assume it's just normal -- a normal
9 year for a second, not necessarily the water-short year
10 administration.

11 So they miss their allocation in year one,
12 not a problem because it's a five-year average. They
13 miss it in year two, still a five-year average. And
14 again, you're not knowing this until after the fact.
15 And then they miss it in year three.

16 Now they're in a hole that they have to
17 make up. How do they do that? And what -- what
18 mechanism does the State of Nebraska have, whether it's
19 in the Department of Natural Resources or elsewhere,
20 what mechanism does the State of Nebraska have to -- at
21 that point, for some pretty tough measures so that they
22 don't miss at the end of five years?

23 THE WITNESS: Let me do what I can to talk
24 openly and candidly about that with the usual
25 disclaimers of that I'm not a lawyer and we haven't done

1 this before and so on and so forth.

2 My understanding is the department signs
3 orders approving the IMP that we've negotiated. And I
4 know, for a fact, we have a lot of the ongoing
5 discussions with the NRDs about where they are at. And
6 as you can imagine in a state that is trying to meet a
7 compact like this, a multistate compact, the NRD
8 managers and pretty much the board members, for the most
9 part, are quite aware that they're in a very tough
10 situation, because they do need to regulate to comply.
11 And yet, on the other hand, they have a number of users
12 whose livelihoods are at stake.

13 And I would simply reiterate that -- well,
14 first of all, I have another statement.

15 Getting to the depletion allowed in each
16 NRD is really a simple calculation, can be done quickly.
17 We simply need to sort out -- sort out surface water
18 usage during the prior year; preliminary groundwater,
19 model run, so that's a number that is easy to get to.

20 What the NRD actually did would require
21 several additional modeling runs where you are turning
22 on or off the individual NRDs. And that's an effort we
23 have not done yet for 2008.

24 So once we've done those runs, once we've
25 made those calculations, the intent is to sit down with

1 them, as we have in previous years, and discuss with the
2 individual NRDs exactly how they're -- how they're doing
3 and what they're going to do about it.

4 And I cannot imagine us allowing the
5 situation to go on for three years with any one of the
6 NRDs where they were consistently or dramatically in the
7 red, if you will.

8 The options open to them would include the
9 measures under Closing the Gap. And, of course, the
10 first one they're going to turn to, or at least we have
11 historically, is surface water leasing, but they are
12 putting considerable effort into investigating
13 streamflow augmentation plans.

14 And the three NRDs are working together on
15 that. They have gotten state-matching moneys, they're
16 throwing moneys in themselves. So that is another
17 one -- that's a very serious option for us at this time
18 and there is a number of other measures there, as well.

19 To be honest with you, asking the growers
20 to cut the water pumping is, of course, an option that
21 is -- that is available to them.

22 So the overall point is that the State will
23 comply and each of these three NRDs have IMPs that state
24 that they will comply with their portion.

25 ARBITRATOR DREHER: Can an NRD do more than

1 ask a grower to reduce his consumption?

2 THE WITNESS: Again, with a disclaimer that
3 I'm not a lawyer, it would involve a hearing and I
4 believe they would do it districtwide. I can't imagine
5 that they would do it for an individual grower, unless
6 they're offering him money to stop, at least just seeing
7 the way that they have discussed it, talking with the
8 board members.

9 ARBITRATOR DREHER: And the hearing
10 timeline, am I remembering right, 180 days or something
11 like that?

12 THE WITNESS: I don't recall the timeline.
13 It does take some time, yes.

14 ARBITRATOR DREHER: So if this was
15 happening in year three or year four, potentially
16 another growing season is gone before the situation has
17 been addressed. And, you know, I'm not -- don't read
18 into my questioning criticisms. I'm just trying to
19 understand how this works.

20 THE WITNESS: Right.

21 ARBITRATOR DREHER: I mean, in the end, at
22 least this is nonbinding, but I'm going to have to make
23 some sort of assessment as to the suitability of this.
24 And so I need to make sure that I --

25 THE WITNESS: And I'm framing my response

1 to you in kind of the same vein in that this is how I
2 will see it.

3 ARBITRATOR DREHER: That's right. Fine.

4 THE WITNESS: We'll actually have to see
5 how this works out. But the idea would be that by July
6 or August, we would have the model runs in place with
7 all of the official RRCA data for the prior year. So
8 we're a year late there.

9 But in the same timeframe, Nebraska would
10 complete the model runs for the individual NRDs. And we
11 haven't completely sorted it out, but we would put the
12 other NRDs into a package pretty much. So the other
13 five would be there; we would know the 5, 6, 4 percent,
14 whatever the number is, for the remaining NRDs. And we
15 would make that available to them right away, and we
16 would have that in mind when we would do the forecast,
17 which this year we held a basinwide meeting in November
18 of 2008 where we were able to discuss the coming year
19 with the NRDs.

20 And I believe in that timeframe, prior to
21 February or March or April when they were ordering seed
22 and fertilizer, the NRDs and their growers would be well
23 aware of the situation and potential allocations for the
24 following summer.

25 So, in fact -- yes, like it is with RRCA

1 accounting, there is a lag effect here, as well, where
2 you don't know really where you were until a year later.
3 But that is the season that would be lost, if you will,
4 and it would feed into what would be done that following
5 year.

6 ARBITRATOR DREHER: This kind of ties back
7 to the question I asked you yesterday about the legacy
8 effect continuing to come through. And in light of
9 that, and if you recall, I think we were talking about
10 the -- and I'll probably visit some with Dr. Schneider
11 when he is up there about this, as well.

12 THE WITNESS: I would urge you to do so.

13 ARBITRATOR DREHER: But, you know, we're
14 talking about something on the order of 100,000
15 acre-feet on an annual basis of additional streamflow
16 depletion coming through; maybe more, maybe less. I
17 think yesterday I kind of used the number maybe 130,000,
18 something like that.

19 And that's coming over a period of time,
20 assuming the model is correct and, you know, all of the
21 qualifying aspects of it.

22 But in light of that legacy effect that we
23 see -- we think we see it, at least -- I find the
24 statement in your report -- I'll say it's a statement of
25 interest so, you know, where there is a qualification

1 made that you're not aware of anything that compels
2 Nebraska to prove today that its existing IMPs will
3 ensure compliance with the Compact for the next 50
4 years. And certainly there is no provision in the
5 Compact or the FSS that says -- that requires Nebraska
6 to show how they're going to comply 50 years from now.

7 But on the other hand, with the size of
8 this legacy effect -- and maybe I'm overestimating it,
9 but with the size of the legacy effect that is coming
10 through, I don't understand completely yet why Nebraska
11 would believe that a five-year IMP is good enough.

12 THE WITNESS: Boy, you've asked about a
13 dozen -- I can speak to about a dozen different things
14 in your statement there.

15 Start with your most recent statement
16 first.

17 While these IMPs are for a current
18 five-year period based on current Nebraska state law,
19 the NRDs will always have IMPs in place as long as
20 they're part of a fully appropriated or an
21 overappropriated basin. So for practical purposes, I
22 would view the IMPs as permanent.

23 And so the question is: What will the IMP
24 say five years from now when we begin a new period,
25 presumably a five-year period, but that remains to be

1 seen.

2 These IMPs are designed to keep Nebraska in
3 compliance through 2012 and the following IMPs will be
4 designed to keep Nebraska in compliance for whatever the
5 period, through 2017 or what have you. So that's there.

6 You also spoke to the coming lag effect.
7 And I can't quote back to you numbers. Perhaps Dr.
8 Schneider can actually give you some idea of the coming
9 lag effect.

10 I do know that when we put into place the
11 compliance under average-conditions paper that we
12 submitted to the RRCA last March and then the compliance
13 under dry-conditions paper, which assumed an ongoing
14 period of 35 percentile rainfall, that we ran those --
15 those model runs for a considerable distance into the
16 future, something on the order of 40 years. And so we
17 are well aware of the lag effect.

18 And, quite frankly, the answer is, if you
19 pump a lot more, then the coming lag effect is going to
20 become a lot greater. And if you cut pumping, as we
21 have, to 20 percent, then the lag effect is going to be
22 less. And so the current reductions we have in place
23 have kind of delayed the -- any particular level of lag
24 effect, if you will. And that future IMPs will take
25 that into account, I guess would be the best way of

1 saying that.

2 So I think I've answered your question in
3 general terms.

4 ARBITRATOR DREHER: One last question.

5 If I understand the measures that are being
6 considered -- was it stop-gap measures?

7 THE WITNESS: Closing the gap.

8 ARBITRATOR DREHER: Closing the gap -- that
9 includes the notion of augmentation water?

10 THE WITNESS: That's correct, yes.

11 ARBITRATOR DREHER: A source of which could
12 be pumping wells into the river?

13 THE WITNESS: That would probably be
14 pumping wells into the river.

15 ARBITRATOR DREHER: And don't those wells
16 cause depletions?

17 THE WITNESS: Yes. In the Settlement
18 Stipulation, it outlines some of the rules and it also
19 has the stipulation that the accounting must be approved
20 by the RRCA. So depletions caused by those wells would
21 show up as part of -- taken into account with
22 groundwater model accounting; that is correct.

23 ARBITRATOR DREHER: And my understanding
24 would be that these would, most likely, be exercised
25 during water-short year administration as kind of a

1 closing the gap measure.

2 THE WITNESS: Not necessarily. Keep in
3 mind that many of us use the term "water-short year"
4 rather loosely to mean that it looks like we're going to
5 be in the red, if you will.

6 Water-short year, as defined in the FSS, is
7 very -- similarly means there is not quite enough or not
8 enough irrigation water in Harlan County Lake.

9 During water-short year, certainly a major
10 goal would be to deliver water at or above Guide Rock
11 because we have the additional two-year average where we
12 cannot allow our usage to exceed allocations above Guide
13 Rock.

14 One potential goal of augmentation may be
15 to deliver water to Harlan County Lake. And so when the
16 lake were especially empty, it would probably be futile;
17 but if we were -- for example, in 2007 where we were
18 within a few hundred or a couple thousand acre-feet of
19 being in water-short year administration or not, then it
20 might make sense to try to get some more water into the
21 lake.

22 And then, of course, if we're okay on our
23 Guide Rock average, it might make more sense to deliver
24 water, as best we could, directly to Hardy again, during
25 a year in which Nebraska would be in the red, whether or

1 not they were in water-short year administration or not.

2 ARBITRATOR DREHER: But if you've got
3 depletions to streamflows that are increasing, whether
4 it's a water-short year administration or not, and
5 you're pumping augmentation wells to put water in the
6 river, which are causing additional depletions, that
7 doesn't sound very sustainable to me.

8 THE WITNESS: It would really depend on the
9 augmentation plan and the way in which that was actually
10 used. And I think you're correct in terms of
11 sustainability.

12 Nebraska and the NRDs would need to look
13 ahead at the way those wells are being used and make
14 sure that it was, in fact, a sustainable situation.

15 My understanding of a potential
16 augmentation plan would be to help Nebraska stay in the
17 black at all times on their average, but, you know, to
18 help out when there was less water available.

19 I would state that the areas that Nebraska
20 is looking at are similar to Colorado's in that they are
21 a combination of something that's geometrically easy to
22 get water to whatever point you need to get it to.

23 If I may say so, Colorado intends to get it
24 to the Colorado stateline and deliver it directly. And
25 as I described to you, that's the goal here, while

1 having the depletions as far away as is practicable from
2 the river or its tributaries.

3 And so if you're looking at something that
4 is more than 5 or 10 miles away from any one tributary,
5 then you can get some rather large-pumping volumes
6 during occasional years out of that area without causing
7 an instantaneous large depletion in the river. So the
8 effect would be smoothed, it would be attenuated, it
9 would show up some years later, if you will.

10 But you're absolutely correct, overall, it
11 has to be sustainable to be useful over the long term.

12 ARBITRATOR DREHER: All right, thank you.

13 Mr. Wilmoth.

14 MR. WILMOTH: Thank you. If we could make
15 take five, if we could go to 12:15 today, I think we
16 could wrap this up. Actually, I don't think it's going
17 to take that long. If we could take five now, we could
18 probably get back and be done by lunch.

19 ARBITRATOR DREHER: All right.

20 (Break was taken from 11:37 to 11:47.)

21 ARBITRATOR DREHER: Mr. Williams, before I
22 ask Mr. Wilmoth to continue, there were two other short
23 questions that I failed to ask.

24 If I look at Figure 2 -- actually, it's not
25 Figure 2; it's Map 2 in your report on page 5 --

1 THE WITNESS: Yes, sir.

2 ARBITRATOR DREHER: -- that shows that the
3 Department of Natural Resources, as of December 16,
4 2008, has classified many of the groundwater, I'll call
5 them basins in the larger Republican River Basin as
6 being fully appropriated.

7 Am I reading that correct?

8 THE WITNESS: That is correct, yes.

9 ARBITRATOR DREHER: And it seems to me that
10 kind of a fundamental difference in the perspective
11 between Nebraska and Kansas, is Nebraska is viewing the
12 resource as fully appropriated, whereas I haven't asked
13 Kansas the question; but based upon the testimony that
14 has been offered, they use characterizations like "out
15 of balance," which would imply that, from their
16 perspective, it's overappropriated.

17 THE WITNESS: Two quick comments.

18 First of all, the purplish area, that's a
19 preliminary determination and it's still going through
20 process. That may or may not hold at this time.

21 Secondly, the term "overappropriated" in
22 the statute has a pretty specific meaning that applies
23 in the Upper Platte River system.

24 Although the term "fully appropriated" is
25 used and however elsewhere you want to characterize it,

1 the effect of these IMPs is to keep Nebraska within --
2 in compliance with the Compact.

3 So let me put it this way. If, in fact,
4 there is an out-of-balance situation that is current or
5 ongoing, it is going to show up in the Compact
6 accounting. And that percentage of allowable depletions
7 clause in the IMPs and the associated rules will require
8 a situation where it will -- Nebraska will get back into
9 balance, no matter whether it is called fully or
10 overappropriated.

11 ARBITRATOR DREHER: That raises actually a
12 third question. I apologize, Mr. Williams.

13 Earlier this morning when I was rereading
14 this, I could not find the standard for the Lower
15 Republican River Natural Resource District that I did
16 for the others. In other words, if I look at page 8 --

17 THE WITNESS: There is no compliance
18 standard section in the Lower Republican.

19 ARBITRATOR DREHER: Why is that?

20 THE WITNESS: They are allowed some leeway.

21 These IMPs are written in discussions
22 between DNR and the NRDs, and they were just very gun
23 shy about that clause.

24 Having said that, they essentially traded a
25 much larger cut in the allotment or the allocation

1 allowed to the individual grower. They took a 2- or a
2 3- inch cut from the earlier IMP, and they still have
3 that remaining standard, as we discussed yesterday,
4 where the lower must remain within 26 percent of its
5 allowable depletions to streamflow.

6 So the piece of the compliance standard
7 that is not in there is, there is no overall pumping
8 volume limit as specified, but the concept is still
9 there, and the overall need to remain in compliance is
10 still there.

11 ARBITRATOR DREHER: Is there a specific
12 reference to the 26 percent? I didn't see that either.

13 THE WITNESS: Yes, there is.

14 ARBITRATOR DREHER: Okay.

15 THE WITNESS: So it would actually be in
16 the rules and regulations, page 16 of 34. In the center
17 of the page, you have Section 7-2.2, General Provisions,
18 and the first pieces there talk about the allocation,
19 based allocation and allocation period.

20 Section 6, the LRNRDs net depletions shall
21 not exceed 26 percent of the state's allowable
22 groundwater depletions as determined by the Republican
23 River Compact Administration groundwater model.

24 ARBITRATOR DREHER: All right, thank you.
25 One last question.

1 The Interrelated Water River Board, is that
2 an existing body or is it provided for in statute, but
3 has not really been -- there is no appointment has been
4 made to it or anything like that?

5 THE WITNESS: As I understand it, the
6 latter would be the case.

7 ARBITRATOR DREHER: And if appointed, who
8 would be the representatives on that? I'm not asking
9 for their names; but I mean, is there some sort of
10 prescribed representation: one groundwater user, one
11 surface water user, one -- you know, I don't know what
12 the makeup would be. What would the makeup be?

13 THE WITNESS: I'm sorry to say I can't
14 recall exactly, but your description fits my
15 understanding.

16 It would be persons familiar enough with
17 the types of issues that would come up that they
18 wouldn't take a lot of effort to get them up to speed on
19 whatever the dispute was they would be working with.
20 But I honestly can't really tell you exactly how that
21 would happen or who would be on the board.

22 ARBITRATOR DREHER: Can you refer me to the
23 section of the statute, by chance?

24 THE WITNESS: I cannot.

25 ARBITRATOR DREHER: Well, I won't take any

1 more time, but at some point in this maybe during --

2 MR. WILMOTH: We can do for you at lunch,
3 Mr. Arbitrator.

4 ARBITRATOR DREHER: If you wanted to
5 include that as part of the record, you could maybe do
6 that with Director Dunnigan's testimony.

7 Thank you, Mr. Wilmoth.

8 MR. WOLMITH: Thank you. And I will try
9 and get us out of here by maybe five after noon.

10 THE WITNESS: By that clock, I think we're
11 okay.

12 REDIRECT EXAMINATION

13 BY MR. WILMOTH:

14 Q. Mr. Williams, I would like to direct your
15 attention to Footnote 2 of your report.

16 A. What page was that on?

17 Q. Page 6?

18 A. Yes.

19 Q. What is the meaning of that footnote,
20 generally?

21 A. Well, it goes to the IMPs are going to
22 remain in place as they are if they're being effective.

23 Q. And if they're not effective, they will be
24 changed; is that correct?

25 A. That is correct, yes.

1 Q. And with reference to Kansas Exhibit No.
2 57, which was a statutory language of 46-715, you
3 understand this statute to have some bearing on that
4 issue?

5 A. Yes.

6 Q. And what does it say?

7 A. If you look at page 270, 3(b) near the
8 bottom, it states that basically the ground and surface
9 water controls from earlier shall be sufficient to
10 ensure that the state will remain in compliance with
11 applicable state and federal laws and with any
12 applicable interstate water compact or decree.

13 Q. Thank you very much.

14 And I would like to return your attention
15 to Kansas Exhibit 61 for a moment, please.

16 A. Yes.

17 Q. Do you have a copy of that?

18 A. Yes, I do.

19 Q. And there was some recommendations made in
20 this -- or some references to recommendations made in
21 this letter during December 2006, correct?

22 A. Correct.

23 Q. And in your view, what is the most
24 important change between then and now with regard to
25 these issues?

1 A. Actually, there is a couple of most
2 important changes. And at the top of the list, I would
3 put the change in precipitation, the good rainfall that
4 we had in '07 and '08; and, secondly, the new IMPs that
5 been put into place since that time.

6 Q. And those IMP includes measures, in your
7 view, that are more stringent than their predecessors?

8 A. They certainly are, both in terms of total
9 volumes pumped and both allowable depletions in each
10 NRD.

11 Q. And you made reference to a turnaround
12 generally in the basin. Do you recall that?

13 A. Yes.

14 Q. In your view, what is the best evidence of
15 that fact?

16 A. If I could use the illustration that we put
17 up earlier yesterday. And basically, this has
18 Nebraska's best evidence using current accounting
19 procedures of how we're doing.

20 And if you take a look at 2007 and 2008,
21 both of those are solidly in the black. 2007, which was
22 what I referred to as a turn-around year is something on
23 the order of 30,000 acre-foot in the black. And 2008 is
24 something on the order of 75- to 80,000 acre-foot in the
25 black.

1 Q. Thank you very much.

2 One of the issues that was raised was a
3 problematic nature of the Republican River Compact
4 accounting and how it's retrospect, essentially. Do you
5 recall that?

6 A. Yes.

7 Q. Does the IMP -- IMP evaluation process that
8 you referred to earlier reflect that after-the-fact
9 accounting?

10 A. Yes, the IMP review process goes along with
11 that backwards reflection in the averaging periods.

12 Q. And so if I understand your earlier
13 testimony, if a ground -- if one of the NRDs, for
14 example, in 2010 exceeded their allowable pumping
15 threshold by, say, 10 units, is it your understanding
16 that in the next period or time in that averaging period
17 of five years, that they would have to be made up; is
18 that correct?

19 A. That is correct.

20 Q. And so that average pumping total remains
21 the same?

22 A. Yes, that is correct.

23 Q. And there was some reference to --

24 ARBITRATOR DREHER: Mr. Wilmoth, before you
25 move on, since this is not an exhibit, I would -- for my

1 benefit, I would appreciate having the numbers -- the
2 last column heading and those numbers read into the
3 record.

4 Q (BY MR. WILMOTH) Please do.

5 A. I'll read into the record, the third Table
6 on this illustration is "Nebraska's Allocation and
7 CBCU." The last column heading is Allocation - (CBCU -
8 IWS Credit,) and for the year 2003, negative 25,420; for
9 the year 2004, 36,640. Again, that is a negative
10 number. 2005, negative 42,325. 2006, a negative
11 29,175; 2007, a positive 30,960; 2008, a positive
12 78,059.

13 ARBITRATOR DREHER: And the averages,
14 please.

15 THE WITNESS: Certainly. These would be
16 under current accounting procedures, using Nebraska's
17 estimates for 2006, '07 and '08 because these are not
18 finalized RRCA numbers. The average from 2003 to 2007
19 is negative 20,520. The average 2004 to 2008 is a
20 positive 176.

21 ARBITRATOR DREHER: Thank you.

22 Q (BY MR. WILMOTH) And Mr. Williams, do you
23 recall some discussion that would cause variances from
24 the NRD rules?

25 A. Yes.

1 Q. And, for example, those variances apply to
2 individual groundwater users; is that correct?

3 A. Correct. Municipalities.

4 Q. Do those variances apply at all to the
5 total groundwater pumping limitations with regard to
6 each NRD?

7 A. No. The total applies and remains static.

8 Q. Do you recall some discussion also about
9 the concept of leasing surface water rights?

10 A. Yes.

11 Q. And Mr. Draper, I believe, asked you if we
12 had any -- pardon me, if the State of Nebraska had any
13 leases in place for 2009, 2010 or into the future.

14 Do you recall that?

15 A. Yes.

16 Q. And I believe you indicated Nebraska did
17 not have any leases in place this year; is that right?

18 A. That's correct.

19 Q. Why is that?

20 A. As we just read into the record, Nebraska
21 has had two solid years in the black. The system is
22 wet; the lower reservoirs are full. We do not believe
23 it is necessary to remain in compliance at this time.

24 Q. And with regard to one of the other tools
25 in the toolbox --

1 ARBITRATOR DREHER: Did I just hear you say
2 it wasn't necessary to remain in compliance?

3 THE WITNESS: The leasing of surface water
4 is not one of the tools that we need to put into force
5 in 2009 for us to be in compliance in 2009.

6 MR. BLANKENAU: Thank you.

7 THE WITNESS: It is necessary for the State
8 to be in compliance.

9 Q (BY MR. WILMOTH) The good news is, it's
10 only noon, so we are accomplishing our objective. I
11 only have one last question.

12 With regard to some of the other tools in
13 the toolbox, there was some discussion about
14 augmentation plans; is that correct?

15 A. Yes.

16 Q. And for the record, those augmentation
17 plans would need to be presented and approved by the
18 RRCA, correct?

19 A. That is correct, yes.

20 Q. And by their definition, those augmentation
21 plans would not be allowed to increase CBCU, would they,
22 for Nebraska?

23 A. Yes. The augmentation plans, the pumping
24 related to that would have to be offset in some means,
25 such that the total groundwater depletions would not be

1 allowed to increase, due to implementation of the
2 augmentation plan.

3 MR. WOLMITH: Very good.

4 I believe that's everything we have.

5 ARBITRATOR DREHER: Now, I need to ask a
6 clarifying question about the last answer.

7 I mean, Compact compliance is based upon
8 beneficial use and these depletions from augmentation
9 wouldn't necessarily be -- I mean, that wouldn't go
10 against -- be added on top of computed beneficial use,
11 would it? So I mean, you could pump a well for
12 augmentation potentially, create a streamflow depletion
13 that would not show up in computation of Nebraska's
14 computed consumptive beneficial use.

15 THE WITNESS: The RRCA has not approved an
16 augmentation plan yet. The concept that has been
17 discussed, primarily in reference to Colorado's proposed
18 system, is that pumpage related to streamflow
19 augmentation would be included in the groundwater model
20 similar -- in a similar manner to any other groundwater
21 usage, via it industrial, municipal or irrigation usage.

22 So it would, in fact, show up as overall
23 depletions to ground -- to streamflow due to groundwater
24 pumping.

25 ARBITRATOR DREHER: Thank you.

1 MR. WILMOTH: May I just ask one follow-up
2 with that, I just want to be sure the record is clear.

3 Q (BY MR. WILMOTH) If there were an
4 augmentation plan put into place, then would that not
5 include a component of essentially retiring or
6 offsetting some other use?

7 A. Yes. That would be -- the plan would be
8 to, probably in a similar geographic area, if you will,
9 retire wells and pumping that would offset augmentation
10 wells.

11 Q. And so just to follow through, the general
12 purpose of an augmentation plan is not necessarily to
13 add negative impacts on the system, right?

14 A. Right. So that there is no negative impact
15 on the groundwater system.

16 ARBITRATOR DREHER: Well, that was not
17 flushed out very well in Mr. Williams' report, so it's
18 not clear what parameters Nebraska is thinking of
19 augmentation.

20 All right.

21 MR. DRAPER: Your Honor, one housekeeping
22 thing, if I may.

23 ARBITRATOR DREHER: Yes, please.

24 MR. DRAPER: In the information that
25 Mr. Williams provided, it consisted of a spreadsheet,

1 and it did not include the underlying model runs.

2 And we would like to renew our request for
3 that and I wonder if it would be possible for
4 Mr. Williams to bring those when we reconvene for trial
5 next week.

6 MR. WILMOTH: I think Mr. Williams can
7 respond to that now. My understanding is that those
8 runs were previously provided to the RRCA. Do you know
9 the nature of those runs or should Dr. Schneider speak
10 to that?

11 THE WITNESS: I think he could answer that
12 question better.

13 MR. WILMOTH: I believe the sum and
14 substance is that the runs were previously provided, but
15 we'll clarify that.

16 ARBITRATOR DREHER: But, Mr. Wilmoth, even
17 if the runs were previously provided, I think what
18 Mr. Draper is asking for is an opportunity to look at
19 them during the hearing --

20 MR. WILMOTH: Okay.

21 ARBITRATOR DREHER: -- so that if there is
22 some question that he would like to pose during
23 cross-examination, he would have that opportunity.

24 MR. BLANKENAU: They should be in their
25 possession now, though, I think is what Mr. Wilmoth is

1 saying.

2 MR. DRAPER: These are 2008 runs, and we do
3 not believe -- we've been very thorough in looking at
4 what we've been given, and we are quite convinced that
5 we've never been given these runs.

6 ARBITRATOR DREHER: Well, perhaps -- I'm
7 not sure what the arrangements are for lunch. I think
8 you're going to stay here. I don't know what Nebraska
9 is thinking, but perhaps you could have your respective
10 experts check with each other; and to the extent that
11 you can provide the information, I think that would be
12 helpful.

13 MR. WOLMITH: Absolutely.

14 MR. DRAPER: Thank you very much.

15 We do need to offer and receive exhibits.

16 ARBITRATOR DREHER: All right.

17 MR. WOLMITH: Nebraska would offer Nebraska
18 Exhibit 15, which is the report itself; Nebraska 20,
19 which is the CV of Mr. Williams, Nebraska Exhibit 25,
20 which is the corrected sheet for Appendix F, and I
21 believe the only other thing is Nebraska 26, which is
22 the CD, which may have already been admitted.

23 MR. DRAPER: I think there might be one
24 further one. I believe there was an exhibit which was
25 the missing regulations for one of the NRDs that was not

1 in Exhibit 15 with the other NRD materials.

2 MR. WILMOTH: I think that was actually
3 Exhibit 16, which was I thought received --

4 MR. DRAPER: Already?

5 MR. WILMOTH: -- during Dr. Larson's
6 testimony.

7 ARBITRATOR DREHER: It was received. I
8 don't remember -- I wasn't thinking it was Dr. Larson's.
9 I thought it was Mr. Williams.

10 MR. DRAPER: Well, if it has been
11 covered --

12 ARBITRATOR DREHER: But it was received,
13 Mr. Draper.

14 MR. WILMOTH: That's all we have.

15 ARBITRATOR DREHER: All right.

16 Any objection to those?

17 MR. DRAPER: No objection.

18 ARBITRATOR DREHER: All right, they're
19 admitted.

20 (WHEREUPON, Nebraska Exhibits 15, 20, 25
21 and 26 were admitted into evidence.)

22 MR. DRAPER: And our two exhibits: Kansas
23 Exhibit 57, the set of the Nebraska revised statutes;
24 and No. 61, the January 4, 2007 Open Letter of the
25 Middle NRD.

1 ARBITRATOR DREHER: I would assume there is
2 no objection to those?

3 MR. WILMOTH: There is not.

4 ARBITRATOR DREHER: All right, they're
5 admitted as well.

6 (WHEREUPON, Kansas Exhibits 57 and 61 were
7 admitted into evidence.)

8 MR. DRAPER: Thank you.

9 ARBITRATOR DREHER: And how long of a break
10 do we think we need?

11 MR. WILMOTH: Back at 1:30 again, to stay
12 on schedule.

13 MR. DRAPER: Maybe until 1:30.

14 ARBITRATOR DREHER: All right, we'll
15 reconvene at 1:30.

16 (Lunch recess taken from 12:09 to 1:30
17 p.m.)

18 ARBITRATOR DREHER: Mr. Wilmoth, you can
19 call your next witness.

20 MR. BLANKENAU: Mr. Dreher, if I could just
21 take care of one quick housekeeping first.

22 Mr. Draper and I had a chance to discuss
23 his request for the model run during the break period.

24 We agreed to provide that to them, but just
25 to perhaps make sure there is no misunderstanding, that

1 forecast document was not prepared in anticipation of
2 litigation; rather it was -- it was provided as an
3 example of the forecasts that are routinely prepared
4 pursuant to the law that Mr. Williams referenced.

5 We also renewed our request to Mr. Draper
6 for additional documentation related to the IPYsim Model
7 and we'll work together to make sure we get our
8 respective information exchanged.

9 MR. DRAPER: Yes. Both States need to
10 exchange the economic data. And we did establish that
11 there were runs that we had not received and they are
12 glad to say they're going to be providing them shortly,
13 probably by Monday.

14 ARBITRATOR DREHER: The intent is by
15 Monday?

16 MR. BLANKENAU: That is the intent, yes.

17 ARBITRATOR DREHER: And then if they wish
18 to have the opportunity to cross examine the witness,
19 how is that going to work?

20 MR. BLANKENAU: Well, I don't know. And
21 again, this is not something that we prepared in
22 anticipation of litigation. It was just an example of
23 the runs that are routinely done.

24 MR. DRAPER: Well, I think we can wait and
25 see what the material shows. And if we need to address

1 you about it, we can do so and figure it out at that
2 time.

3 ARBITRATOR DREHER: Okay.

4 To the extent you glean -- either State
5 gleans something from their additional analysis, how do
6 I benefit from that? What's the idea in terms of
7 informing me?

8 MR. DRAPER: Well, the States will have to,
9 I think, mutually work out whether it makes sense to
10 have some additional submittal to you; and if so, how to
11 do that in a fair way.

12 ARBITRATOR DREHER: Okay.

13 MR. DRAPER: I feel sure that we can work
14 that out, once we know what we're dealing with.

15 ARBITRATOR DREHER: All right, fair enough.

16 MR. BLANKENAU: I would agree.

17 ARBITRATOR DREHER: Mr. Wilmoth, please
18 proceed.

19 MR. WILMOTH: Thank you very much.

20 Nebraska would call as their second
21 responsive witness in their compliance phase of the case
22 Dr. James Schneider, please.

23 DIRECT EXAMINATION

24 BY MR. WILMOTH:

25 Q. Good afternoon, Dr. Schneider. How are you

1 today?

2 A. I'm great.

3 Q. Dr. Schneider, could you begin just very
4 briefly by identifying your position at the department
5 and explain a little bit about what you do in that
6 capacity and the folks that work with you and under you.

7 A. Certainly. Currently, I am the head of the
8 Integrated Water Management Division for the Department
9 of Natural Resources. This division was formed this
10 last fall to sort of respond to the growing need
11 throughout the state for designing and implementing
12 these Integrated Management Plans in the fully and
13 overappropriated areas.

14 And we have roughly ten full-time
15 professionals in this division, including the three
16 full-time professionals that work underneath me on
17 Republican River issues.

18 Q. And specifically, what do you yourself do
19 in that role?

20 A. Well, I was originally hired as a senior
21 groundwater modeler for the department. So I, in
22 particular, use that expertise to direct quite a bit of
23 the technical work, but also work with all of my staff
24 and other staff throughout the department to integrate
25 that technical work into the planning process that we

1 have and ensure that we are compliant with the statutes.

2 Q. Very good, thank you.

3 And do you have a copy of Nebraska Exhibit
4 21, which would be your curriculum vitae?

5 A. Yes, I have it here.

6 Q. And is that, indeed, a copy of your CV?

7 A. Yes.

8 Q. Thank you.

9 And do you also have a copy of the expert
10 compliance report that you and Mr. Williams prepared?

11 A. I do.

12 Q. And that would be Nebraska Exhibit 15?

13 A. Yes, I have it.

14 Q. Very good.

15 Before we get into the details of the
16 report itself, I wanted to ask you a couple of questions
17 perhaps to address some questions that I anticipate
18 Mr. Dreher might have regarding legacy impacts, if I
19 may.

20 Were you here, generally yesterday, for
21 this discussion and even today about legacy effects of
22 groundwater development?

23 A. Yes, I was.

24 Q. And are you familiar with Figure 5 of
25 the -- Mr. Barfield's compliance report?

1 A. Yes, I am.

2 Q. Do you have a copy of that handy?

3 A. Yeah, it's here. I'm quite familiar with
4 it.

5 Q. Do you have an opinion about the nature of
6 that particular figure?

7 A. Well, I do. And if I could, I would like
8 to write a few things up on the board.

9 As has become apparent through reading
10 their reports and through the testimony that I have
11 heard, the status quo or baseline condition that Kansas
12 used in this analysis contains approximately 1,180,000
13 acre-feet per year of pumping on average. And, you
14 know, we've heard how this was developed, and it was
15 based on previous depths of groundwater pumping and
16 current acres. And this simply isn't accurate in terms
17 of the future for Nebraska.

18 And as we've also heard, the IMPs that
19 Nebraska has developed mandate average pumping levels
20 that are -- I hope everyone can read that --
21 approximately 866,000 acre-feet per year on average.

22 So the difference between the two is over
23 300,000 acre-feet per year of pumping.

24 And in my opinion, the overestimate of
25 pumping greatly overestimates that apparent legacy

1 effect that is shown in that figure.

2 ARBITRATOR DREHER: Let me ask a question
3 at this point.

4 The 866,000 acre-feet per year is what?
5 It's the future irrigation?

6 THE WITNESS: I'm sorry. That is -- well,
7 it's based on the 80 percent reduction from the 1998 to
8 2002 pumping volumes. So it's a volume of pumping that
9 is allowed as a combination between the three NRDs on
10 average.

11 ARBITRATOR DREHER: Now, I'm getting more
12 confused.

13 We heard Mr. Williams testify that there
14 were essentially three measures of allocation that each
15 NRD has. There is this 20 percent reduction.

16 THE WITNESS: Right.

17 ARBITRATOR DREHER: There is an annual
18 amount that they're not to exceed, with the exception of
19 the lower NRD, as I recall.

20 And then there is this further restriction
21 on allocation that is -- it's a percentage of Nebraska's
22 total computed consumptive beneficial use for
23 groundwater, the one figure I remember was 44 percent
24 for the Middle -- I think it was 44 percent for the
25 Middle NRD.

1 THE WITNESS: Right.

2 ARBITRATOR DREHER: The 866,000 doesn't
3 reflect all three constraints; it only reflects the
4 20 percent reduction; is that correct?

5 THE WITNESS: That figure reflects a
6 20 percent reduction from that baseline pumping volume.
7 And it's -- just to be clear, the Lower Republican NRD
8 actually doesn't have that value -- it doesn't mandate
9 that 20 percent reduction, per se; but what it does have
10 is approximately a 20 to 25 percent reduction in
11 their -- from their previous allocation with the -- with
12 the intention of achieving a 20 percent reduction from
13 that baseline volume.

14 ARBITRATOR DREHER: But when I look at
15 Figure 5 in Kansas Exhibit 6, the year at which the --
16 what they call the status quo, or I think you
17 characterize it as baseline, the year at which they
18 begin to project into the future is the year 2007 is the
19 first year that they project.

20 And they -- from 2007 on, they project what
21 they call the status quo, and then they project what
22 they would show for their proposed remedy.

23 Now, it was my understanding that the
24 status quo didn't take into account the IMP.

25 THE WITNESS: Well, yeah, I'm sorry, maybe

1 I wasn't being clear, but that's entirely my point; that
2 when they're trying -- when they're attempting to
3 reflect what the status quo is into the future, the
4 status quo is, in fact, the IMPs, as they are now
5 written.

6 ARBITRATOR DREHER: Well, I guess my only
7 point is that they started their projections in 2007,
8 and they couldn't have -- I mean, at the time that this
9 was done, they couldn't have included the IMPs for 2008
10 because they hadn't been adopted yet.

11 THE WITNESS: Well, it was my understanding
12 this report was drafted in January of 2009. And it's
13 also my understanding that the pumping volumes in 2007
14 were approximately 750,000 acre-feet.

15 And so that's not -- apparently not
16 reflected in this analysis and neither is the IMPs that
17 were completed nearly a year before this report was
18 authored.

19 ARBITRATOR DREHER: Okay. Well, perhaps
20 Kansas will have more to say about this under redirect.
21 So I just wanted to get some clarification as to what
22 those numbers were.

23 MR. WILMOTH: Sure. I think there may be
24 conflicting of Mr. Barfield's compliance report and
25 Dr. Larson's addendums. I'm sure that can be cleared

1 up.

2 ARBITRATOR DREHER: You can continue, I'm
3 sorry.

4 Q (BY MR. WILMOTH) And you have some numbers
5 on the board here, Dr. Schneider, but you mentioned
6 something about 750,000 acre-feet. Could you --

7 A. Yeah, I'm sorry. That was just in response
8 to the notion that they started their analysis in 2007.
9 And, you know, I'm -- I'm -- my general understanding is
10 that the sum of the pumping in the three NRDs in 2007
11 was approximately 750,000 acre-feet.

12 Q. So the 866- is not a number that will be
13 pumped every year; it's essentially an outside number?

14 A. Well, it's an average.

15 Q. And now I would like to --

16 ARBITRATOR DREHER: I'm confused again, I'm
17 sorry.

18 How can it be an average if in 2007, you
19 pumped 750,000 acre-feet? How can this be an average
20 unless you're going to increase pumping or increase
21 irrigated acreage?

22 THE WITNESS: Yeah, and I'm -- 2007 was a
23 fairly wet year. So their pumping was low and there may
24 be years when the pumping is slightly higher than
25 866,000. And the intention is that, on average, over

1 the long term, that that volume is -- does not exceed
2 866,000.

3 ARBITRATOR DREHER: All right. I'm sorry.
4 You can continue.

5 THE WITNESS: No problem.

6 Q (BY MR. WILMOTH) That's the point, if I'm
7 correct, that Mr. Williams was trying to make, is that
8 what you heard? The five-year averaging concept?

9 A. Right, right. And obviously, that will be
10 extended into the future and this design will remain in
11 place, unless further modifications are required on a
12 five-year evaluation point in 2012.

13 Q. And turning now to your report, page 7,
14 please. I would like to ask you to walk through the
15 highlights of this portion of the report that you
16 prepared or were primarily responsible for preparing as
17 I understand it.

18 Could you start by explaining what the --
19 this section essentially does.

20 A. Certainly.

21 There are three -- three separate analyses
22 that we performed to evaluate the performance of the
23 IMPs.

24 The first and the third that are listed
25 here were done in -- as we were developing the IMPs and

1 then they were later provided to Kansas approximately a
2 year ago.

3 And then the second one here was done more
4 recently to try to evaluate the performance of those
5 IMPs under the future scenario of years that were
6 selected by Kansas to repeat into the future.

7 So the first bullet refers to the average
8 climatic conditions analysis that was done and the full
9 details of this analysis are presented in Appendix E.

10 And the upshot of that analysis is that,
11 under average climatic conditions, with the pumping
12 restrictions of about 20 percent reduction from the
13 baseline volume, the -- Nebraska's expected to exceed
14 her allocation, plus imported water supply, by
15 approximately 20,000 or 19,000 acre-feet per year.

16 We also attempted to analyze the effect of
17 the IMPs under the future condition that Kansas created
18 in their analysis.

19 Essentially, this amounted to running
20 what -- we already had 2008 behind us, so we repeated
21 1992 through 1995 to finish out the period of the IMPs
22 through 2012. And so it's using those previous years as
23 an assumption about what will happen in the future. And
24 Appendix F reproduces those results.

25 It's a little problematic to try to do that

1 with those years before 1995, because we didn't have the
2 post-FSS accounting and the accounting spreadsheets and
3 all the data that goes along with that available to us,
4 so we used the RRCA publication and reproduced that as
5 best we could.

6 In my opinion, the allocations that were
7 produced by that analysis are reasonable for the years
8 that -- and the climatic conditions that they're meant
9 to represent.

10 And under that analysis, the five-year
11 average for Nebraska would be slightly positive at the
12 start and increase to, I believe, approximately 42,000
13 acre-feet by 2012.

14 The last analysis was our, what we call our
15 dry-year analysis. And that is detailed in Appendix G,
16 and I might just walk through that one in a little more
17 detail.

18 Q. Dr. Schneider, before you proceed, I want
19 to make sure that I understood your answer to the first
20 scenario that you ran.

21 What was the conclusion of that scenario,
22 the normal-year scenario?

23 A. I'm sorry, and maybe I didn't state it
24 well.

25 But that Nebraska would underuse her

1 allocation, plus imported water supply, by approximately
2 19,000 acre-feet. We would be in the black, so to
3 speak, by 19,000 acre-feet.

4 Q. Thank you.

5 A. So Appendix G provides the details. I'm
6 going to flip to that and walk through that in a little
7 more detail.

8 It provides the details for the dry-year
9 condition, the dry-year scenario that we put together.
10 And I'll apologize for fact that there are appendices
11 within appendices within this report. It's an artifact
12 of the -- that, you know, that we had already provided
13 these to the RRCA last year and we wanted to reproduce
14 them in their original form.

15 Appendix G is entitled "Future Compliance
16 by Nebraska Under Dry Conditions," and Table A lays out
17 the data that was used for the future scenario that was
18 run.

19 Q. Dr. Schneider, could you give the
20 Arbitrator a moment to catch up with you.

21 A. Certainly.

22 So just to talk a little bit about what is
23 in Table A, essentially it's using mostly data from the
24 2006 model run.

25 One thing we did do was start the model

1 simulation with using preliminary 2007 starting heads.
2 This essentially -- because 2007 was so wet, essentially
3 it just has the effect of increasing the streamflow
4 depletion somewhat. I notice that Mr. Barfield's report
5 makes mention of that, as we heard other testimony
6 mention it. That actually works against us and
7 increases those depletions somewhat.

8 The Table B shows the pumping that was used
9 and you will note that the volumes for the Lower, Middle
10 and Upper Republican NRD are roughly equal to this
11 866,000 acre-feet I've put up on the board here.

12 The total for Nebraska is much higher, but
13 this primarily includes pumping that goes on outside of
14 the basin or in the Tri-basin NRD. As we've said that
15 before, that has -- those NRDs have a minimal effect on
16 streamflow in the Republican Basin.

17 At the bottom of page 2, just some details
18 on some additional adjustments we made. Let me back up
19 for a second.

20 We needed to put together a spreadsheet
21 that reflected the similar dry conditions of
22 approximately the 35th percentile precipitation that we
23 used in this model run. And so we needed to --
24 unfortunately, we don't have -- obviously, don't have
25 accounting data from 1918 through 2005 that we could use

1 to apply those data -- 35th percentile to.

2 So we had to look at more recent years, and
3 we discovered that 2000 through 2005 had a similar
4 climatic condition of about the 35th percentile for that
5 period. So we averaged the input data for 2000 through
6 2005 to be able to fill in that accounting spreadsheet.

7 We had to make a couple of additional
8 adjustments because there was still some unrealistic
9 values in terms of going into the future under dry
10 conditions.

11 For example, the streams coming out of
12 Kansas, from northwest Kansas wouldn't be expected to
13 have any streamflow going forward under a dry scenario.
14 So those were all set to zero. And that, essentially,
15 has the effect of reducing Nebraska's allocation, as
16 well, in the final analysis.

17 And there was -- some additional
18 modifications of some of the canal data as outlined
19 there.

20 So I'll just note Table D kind of compares
21 what those streamflow values are relative to the
22 streamflow values that were used in the average --
23 average condition's analysis. Notably the streamflows
24 at Hardy were approximately 55,000 acre-feet less than
25 under average conditions.

1 And then in Appendix A of Appendix G, we
2 have the output data from the -- that we get from
3 running the groundwater model.

4 And, again, this model run repeated 35th
5 percentile precipitation and repeated and utilized that
6 average of pumping of volume of 80 percent of that
7 baseline.

8 And if you're not familiar with looking at
9 these output sheets, just key in on the bottom under the
10 total and that gives the total impacts for the three
11 States and the imported water supply credit.

12 Q. Dr. Schneider, in the interest of time,
13 what is the general conclusion with regard to this run?

14 A. Yeah. The average groundwater impacts
15 under this condition were approximately 185,000
16 acre-feet.

17 You know, I notice that Mr. Barfield notes
18 in his report that their future scenario has much higher
19 groundwater model impacts. I believe they were 225,000
20 acre-feet for the same year.

21 This is to be expected because their --
22 their future simulation has much wetter conditions over
23 this period from 2008 to 2102. I believe it's
24 approximately 70th percentile rainfall, primarily
25 because it includes 1993, which was the wettest year on

1 record.

2 So, you know, these are -- I believe,
3 are -- are representative numbers for what we would
4 expect in terms of groundwater pumping impacts going
5 forward under dry conditions with the IMPs that we have
6 in place.

7 ARBITRATOR DREHER: Mr. Wilmoth, can I
8 interrupt again?

9 MR. WOLMITH: Of course.

10 ARBITRATOR DREHER: Looking at this table
11 titled "Impacts 2008," tell me again how you arrive at
12 the 185,000.

13 THE WITNESS: Oh, certainly. I was
14 actually averaging the five -- all five years here. For
15 2008 Nebraska's impacts are 190,517.

16 ARBITRATOR DREHER: With or without the
17 mound?

18 THE WITNESS: This is just the pumping
19 impact; this is not the net.

20 ARBITRATOR DREHER: Okay. So the net would
21 be the 190,517 less 17,538?

22 THE WITNESS: That's right. That's right.

23 And then if you look through the rest of
24 them, there is a sheet for every year. And averaging
25 the Nebraska pumping impacts for each year, it gives you

1 a number that is slightly less than 185,000 acre-feet
2 per year.

3 And, yes, so the net impacts are probably
4 on the order of 170- to 175- when you adjust for the
5 mound.

6 So the upshot of the whole analysis is the
7 last two tables. Just to start off, we've reproduced
8 the Tables 3 and Table 5C from the accounting
9 spreadsheets.

10 Table 3C shows the resulting allocations,
11 CBCU and imported water supply credit for the five-year
12 period and an average of those. And you can see the
13 average is slightly negative, about minus 340 acre-feet.

14 And then Table 5C shows that if water-short
15 year administration were in effect during any of this
16 period, we might have a deficit, averaging approximately
17 8300 acre-feet that we would have to make up through
18 some other means.

19 Q (BY MR. WILMOTH) And, Dr. Schneider, are
20 those means essentially the means that Mr. Williams
21 explained earlier today?

22 A. Yeah, those would certainly be available to
23 us for that.

24 Q. Surface water purchases, augmentation,
25 things like that?

1 A. Right, right.

2 Q. Very good.

3 And then could you please tell us just a
4 little bit about the final section of this analysis.

5 A. Certainly. I believe that's Section 6 and
6 just real briefly, the upshot -- I'll give you a second
7 to get there.

8 Q. This would be on page 16 of your report?

9 A. That's correct, yeah. It begins on page
10 16 -- 16 and 17.

11 Q. And this is essentially an analysis of the
12 potential impact of what?

13 A. Well, we attempted to take the results that
14 Kansas produced and, you know, obviously we took them at
15 face value. We now have quite a bit of doubt about
16 that, given the flaws in their status quo analysis that
17 we've discovered here.

18 But taking them at face value and comparing
19 them to historic allocations and the imported water
20 supply credit that was produced, essentially shows that
21 the upshot of this is that if their remedy were
22 implemented, Kansas would receive over 1.7 million
23 acre-feet in excess of their allocation over this
24 50-year period.

25 MR. WOLMITH: Thank you, Dr. Schneider. I

1 have nothing further.

2 ARBITRATOR DREHER: In terms of your last
3 answer, that's assuming that Nebraska made no effort to
4 capture and divert this additional water when it was
5 available?

6 THE WITNESS: That's correct.

7 ARBITRATOR DREHER: Given your concerns
8 with the Kansas baseline or status quo scenario, do you
9 have an opinion about the magnitude of the legacy effect
10 that is yet to be realized between streamflow
11 depletions -- pick your year, I don't care whether it's
12 2007-2008 -- but average streamflow depletions in
13 2007-2008 versus average streamflow depletions 50 years
14 from now?

15 THE WITNESS: Well, certainly. I believe a
16 large part of the reason that we implemented this
17 reduction, in this case it would reflect reduction of
18 over 300,000 acre-feet on average going forward, was to
19 get a handle on that legacy effect and to keep the
20 stream depletions at a minimum constant going forward if
21 not going down.

22 And from the model runs that we've done,
23 and I don't -- this wasn't presented in here, this is
24 off the top of my head, but if I remember under average
25 conditions, stream depletions stayed fairly -- fairly

1 steady for several decades. And after some time, they
2 started to increase again, but -- so there may be
3 additional reductions that are needed in the future,
4 but -- but I believe that the reductions we've
5 implemented right now will, at least, keep a handle on
6 those legacy effects for some time.

7 ARBITRATOR DREHER: I realize this isn't
8 part of your report, but why would streamflow depletions
9 essentially stabilize and then start to increase again?
10 What kind of stress would cause that?

11 THE WITNESS: Well, I mean, you know -- and
12 we've been kind of talking about these legacy effects
13 like it's something that is increasing over time. And,
14 in fact -- actually, maybe I can draw a picture that
15 will help.

16 We kind of separate this into two different
17 pieces.

18 MR. WILMOTH: Dr. Schneider, would you mind
19 flipping the board and using a separate paper.

20 THE WITNESS: Sure. This will just be a
21 real rough sketch.

22 If you have streamflow depletions that are
23 kind of increasing over time and then, say, this is the
24 present day, the legacy effects can actually be
25 evaluated by doing a model simulation where you turn

1 everything off and run it forward.

2 And, in fact, those -- this is what I would
3 actually term the residual effect of the past pumping,
4 something that is going to be there, no matter what, and
5 that actually declines over time.

6 So what we're really trying to control,
7 then, is the effect to which pumping going forward
8 either has this total impact line going up or
9 essentially stabilizing through controlling the pumping
10 that occurs from the present day forward. So we're kind
11 of working within these bounds.

12 This residual here is something that we
13 can't -- we can't control because that's something that
14 is going to happen, no matter what.

15 And so we need to control the level of
16 pumping going forward so that the increase above that
17 residual will keep this fairly steady.

18 I don't know if that helps.

19 ARBITRATOR DREHER: No, I understand, but
20 I'm trying to --

21 THE WITNESS: So by reducing the current
22 levels of pumping it -- and, really, this is a
23 substantial reduction from pumping amounts that have
24 happened more recently. Say, in the late '90s, 2000,
25 2002 we had very high pumping rates and we've reduced

1 those substantially and we believe that will keep the
2 impacts fairly stable for some time.

3 ARBITRATOR DREHER: Well, it's hard to get
4 much of an estimate from this; but, you know, it would
5 be, I guess it would have been useful to me if I could
6 have had some direct comparison between what Kansas
7 simulated versus what you simulated.

8 I mean, you know, essentially the effects
9 from reduced pumping -- I mean, those don't show up
10 right away. That's going to take some time.

11 THE WITNESS: That's right.

12 ARBITRATOR DREHER: So, you know, it would
13 have been useful, I think, for me to have a figure
14 similar to Figure 5 that demonstrated simulated
15 streamflow depletions without the IMPs, with the IMPs,
16 and with whatever other measures Nebraska had in mind.

17 I mean, it's a little -- again, my concern
18 is that -- I mean, I can look at the numbers that you've
19 done for the five-year period ending in 2012, but we are
20 dealing with groundwater depletions. And even though
21 the Compact doesn't require 50-year compliance in
22 advance. I mean, I understand that. You don't have to
23 demonstrate how you're going to comply 50 years from
24 now, I understand, but it would be useful to see how
25 significant these unrealized streamflow depletions from

1 groundwater withdrawals are. And I can't get that, I
2 don't think, from what you presented in your report, and
3 I can't get it from a figure that doesn't have any
4 number.

5 THE WITNESS: Sure, I understand. And
6 it's -- you know, I mean, we struggle with, to be quite
7 honest, with really putting a lot of faith in these
8 scenarios that go out, you know, many decades because it
9 is so dependent on many things, you know, not the least
10 of which is the pumping and the precipitation that
11 occurs.

12 You know, we really have -- we know what
13 our pumping restrictions are going to be in the next
14 five years, and they may be -- those pumping amounts may
15 have to be reduced again. And so -- you know, really
16 trying to predict where we're going to be 50 years from
17 now when we don't know those climate conditions and we
18 don't know all the additional regulatory measures.

19 Another thing is all the incentive programs
20 that are being explored right now, and so acres may be
21 substantially reduced as well. And all of these things
22 can affect that total stress on the system.

23 ARBITRATOR DREHER: I agree with that, but
24 that doesn't mean that we lack the tools to develop a
25 range of future scenarios and be able to assign

1 probabilities to those scenarios to construct a -- I
2 hate to term it a single likely outcome, but certainly a
3 likely range of outcomes that would be useful, not just
4 for my use, but for Nebraska and Kansas use in terms of
5 making future decisions.

6 THE WITNESS: Yeah. And I might say one
7 other thing about that.

8 You know, one of the really difficult
9 things in terms of climate is, you know, like we've
10 heard, you know, wetter conditions do result in more
11 impacts and dryer conditions actually reduce the
12 impacts.

13 And so it's problematic to try to say if
14 things are dry going forward, what will this legacy
15 effect be because, in some cases and in some runs we've
16 done, the total impacts actually just go down over time.
17 And that's more a function of the fact that things are
18 very dry and streams are drying up due to the reduced
19 recharge.

20 So, you know, it -- we've explored this in
21 some depth and it is problematic to try to come up with
22 a real range of what those possible outcomes are.

23 When you do a dry condition scenario and
24 you're running out of time and the impacts actually
25 go -- are less after 50 years than they are when you

1 started, you're really left scratching your head, if you
2 can understand.

3 ARBITRATOR DREHER: Well, I have to admit
4 that statement doesn't make a lot of sense to me on the
5 surface because you would presume that under dry
6 conditions, the irrigators that are trying to grow crops
7 are going to pump more water --

8 THE WITNESS: Right.

9 ARBITRATOR DREHER: -- not less?

10 So what's your explanation for why
11 streamflow conditions would decrease during a dry
12 period?

13 THE WITNESS: Well, it is definitely
14 counterintuitive. You know, the recharge becomes so
15 little that the streamflow in the no-pumping condition
16 goes down substantially. So there is less -- a simple
17 way of saying it is there is less water in the streams
18 to impact, so the impacts are less.

19 It is very counterintuitive, I will admit,
20 and, you know, it really --

21 ARBITRATOR DREHER: Well, they can only not
22 be less once they go to zero. But, you know, as long as
23 the response is reasonably linear, I'm not sure I would
24 agree with that conclusion.

25 THE WITNESS: Well, this is -- this is a

1 very nonlinear system, actually. So that's really the
2 short of it is -- and you'll hear quite a bit more about
3 this next week as we talk about the accounting problems
4 that we found. But this model and the way this model
5 reacts is very nonlinear, in the sense that the streams
6 go dry in the model and this has an effect on what those
7 impacts are.

8 ARBITRATOR DREHER: I understand that, but
9 that's why I said, until the streams go dry, isn't it
10 essentially linear, in which case I'm not sure I
11 understand why streamflow depletions would be less under
12 dry conditions than they would under wet conditions if
13 the streams aren't going dry.

14 THE WITNESS: Well, certainly. The
15 streams -- in the model, many of the streams have
16 already gone dry in some years.

17 ARBITRATOR DREHER: I see. Okay.

18 THE WITNESS: So depending on where you
19 start your simulation from, you know -- again, we'll
20 show you in 2003, many of these streams were dry and
21 that persisted for some time.

22 And now, I think, with the extra recharge
23 that has gone on in the last few years, they are
24 probably wet again, but, you know, that can reverse.

25 ARBITRATOR DREHER: But it could be a

1 little -- I hesitate to use the word "misleading"
2 because that implies some kind of a value judgment and
3 that's not what I intend to do.

4 But it's not like once a stream goes dry,
5 that there are no impacts from groundwater pumping; it's
6 withdrawing the depletions from groundwater pumping are
7 pulling out of groundwater storage --

8 THE WITNESS: That's right, yes.

9 ARBITRATOR DREHER: -- which is dropping
10 groundwater levels.

11 So, I mean, it's not like there is no
12 impact, all of a sudden. There is an impact; it's just
13 whether it's to a live stream or whether it is to
14 groundwater and storage.

15 THE WITNESS: Right. And so the real
16 difficulty comes into play when you're trying to put it
17 into context with the Compact accounting, which really
18 only looks at streamflow.

19 ARBITRATOR DREHER: Okay. Well, that's all
20 I have.

21 Mr. Draper.

22 MR. DRAPER: Thank you, your Honor.

23 CROSS-EXAMINATION

24 BY MR. DRAPER:

25 Q. Good afternoon, Dr. Schneider.

1 A. Good afternoon.

2 Q. In your testimony you drew our attention to
3 page 7 of your report. If you could turn there.

4 A. Yes.

5 Q. Under the heading Roman IV, "Performance of
6 IMPs," you say "This section describes studies Nebraska
7 completed to estimate the long-term performance of the
8 current IMPs (e.g. including their 20 percent reduction
9 in baseline pumping). The following are our
10 conclusions:"

11 And you give three bullets for three
12 different hydrologic conditions, I believe?

13 A. That's right.

14 Q. And the first one is under average climatic
15 conditions; is that right?

16 A. That's right.

17 Q. And why did you analyze average conditions?

18 A. Well, because we would expect conditions to
19 be average, on the average, going forward, I suppose. I
20 mean, we -- that was kind of -- that's one of the
21 analyses we did. In the long term, things are going to
22 be average.

23 Q. And does that imply that you would believe
24 that the long-term performance of the current IMPs would
25 result in Compact compliance and be sufficient if they

1 achieve compliance under average climatic conditions?

2 A. Well, obviously, Nebraska needs to stay in
3 compliance under all conditions.

4 Q. So even if they were to pass this test,
5 that's not the -- that's not the answer yet, right?

6 A. It's one of the analyses we did.

7 Q. You refer us to Appendix E under that
8 bullet?

9 A. That's right. Would you like me to turn
10 there?

11 Q. Yes, if you would. I was just trying to
12 find my Appendix E.

13 Now, you think you warned us that there
14 were two appendices to Appendix --

15 A. I believe so, yeah. We should have chosen
16 attachments or something like that for the overall
17 report. I guess we didn't realize this.

18 Q. If we go to the last page of the appendix,
19 which I believe is also -- it's just before Appendix F
20 is probably the way to find it. It's part of Appendix B
21 to Appendix E, if I'm counting correctly here. It has a
22 copy printed sideways of Table 5C.

23 A. Okay.

24 Q. That shows an average statewide allocation
25 for the period that you postulated for average

1 conditions as having an average Nebraska allocation of
2 268,000 in round numbers.

3 A. It depends on the two-year period, but,
4 yeah -- for 2001-2011, that would be accurate.

5 Q. That's for two-year analysis.

6 If we turn to the previous page, that's
7 where you have the five-year analysis with the various
8 versions of Table 3?

9 A. Okay.

10 Q. And there you have average for the full
11 period that you are utilizing here; is that right?

12 A. Yes.

13 Q. So the allocation -- the average allocation
14 for Nebraska that you have postulated is about 267,000
15 acre-feet, on average?

16 A. Yes.

17 ARBITRATOR DREHER: Mr. Draper, what table
18 are you looking at?

19 MR. DRAPER: It's the second page from the
20 end of this whole appendix. So if you happen to know
21 where Appendix F is, it's two pages before that. It has
22 three tables arrayed down the page, and they all have a
23 Table 3A, 3B or 3C designation.

24 ARBITRATOR DREHER: I have it.

25 Q. (BY MR. DRAPER) These are the numbers that

1 you used for your first analysis, the one analysis of
2 average conditions; is that right?

3 A. Well, we didn't choose these numbers. I
4 suppose, you know, the full analysis that we did
5 resulted in these numbers.

6 Q. You did choose some numbers for future
7 periods, is that right, that have not yet occurred? I
8 see years 2009, '10, '11, '12.

9 A. Well, again, we didn't choose any of the
10 numbers in these tables. They're the result of the
11 analysis we did.

12 Q. You were relying in some form on previous
13 hydrology?

14 A. Yes. This takes into account -- for the
15 spreadsheet and the surface water flows and surface
16 water uses that are needed takes into account an average
17 of some past conditions.

18 Q. At any rate, for whatever reason those are
19 the numbers you used, right?

20 A. I'm still confused -- these are the result
21 of the analysis, yes, in Table 3.

22 Q. And the analysis you did was associated
23 with allocations that averaged 267,000 acre-feet per
24 year to Nebraska?

25 A. The allocations that resulted from the

1 analysis are approximately 267,000 acre-feet per year.

2 Q. Could you turn to Appendix D in your
3 report. Going forward, it looks like it might be 20
4 pages. We had been directed to this earlier, I think,
5 by Mr. Williams.

6 A. Is that the forecast document?

7 Q. Yes. The December -- the first document in
8 Appendix D is a December 30, 2008 forecast letter.

9 A. Sure.

10 Q. The available water supply that you're
11 estimating there, or that the department is estimating
12 there for 2009 is 261,000 acre-feet; isn't that right?

13 A. Oh, yes. That's the combination of the
14 forecasted allocation, plus the forecasted imported
15 water supply credit.

16 Q. And so the forecast, even for this upcoming
17 year, is less than what you have for your average
18 allocations in your average analysis?

19 A. Yes.

20 Q. And if you project ten years ahead, which
21 is what was done in this letter, to the year 2019, the
22 water supply is forecast to have fallen 58,000 acre-feet
23 to about 203,000 acre-feet; is that right?

24 A. Yes. When we -- when we project out
25 repeated 35th percentile climatic conditions for ten

1 years, that's the result.

2 Q. And that's considerably less than was used
3 in your average analysis, correct?

4 A. Well, again, we didn't use those. I mean,
5 that was the result of the average analysis and those
6 are different, yes. It's not -- it's not the same
7 thing.

8 As I said, the forecast includes a --
9 utilizes the 35th percentile climate. And so one would
10 expect that the next year's allocation under dry
11 condition would be less than under an average condition
12 and you would expect that to continue to decrease if dry
13 conditions persisted.

14 Q. Looking back at page 7, the three
15 bullets --

16 A. Flipped right to it.

17 Q. Pardon me?

18 A. I said I flipped right to.

19 Q. When you can flip right to it in this
20 document, you're a lucky man.

21 Now, let's take a look at your second
22 bullet.

23 As I understand the second bullet, it says
24 that using the scenario presented by Kansas that
25 slightly positive results were achieved for Nebraska

1 compliance; is that right?

2 A. For the five-year average. Those are in
3 Appendix F. And, in fact, one of the years was a
4 negative result for the annual balance. You can see
5 those in Appendix F.

6 Q. If we turn to Appendix F and, of course, we
7 were very close to a few minutes ago.

8 A. Not flipping right to this one.

9 Q. And, hopefully, you can flip right to this
10 one. Yes.

11 A. Almost there.

12 MR. BLANKENAU: Example of averaging.

13 MR. WILMOTH: We've been here too long if
14 this is this funny.

15 MR. DRAPER: It seems to be an inside joke.

16 Q. (BY MR. DRAPER) Okay.

17 If you found Appendix F, that's a single
18 sheet that -- in fact, this was replaced by Nebraska
19 Exhibit 25 yesterday, I guess, just for the record.

20 A. I don't have that in front of me, but it's
21 my understanding the numbers are nearly identical.

22 Q. Looking at the allocations that were
23 associated with this analysis -- with some help -- and
24 determine the average of the allocations that are
25 associated with this analyses, and it appears that it is

1 about 280,000 acre-feet per year.

2 Does that sound like it might be about
3 right?

4 A. I don't know which years you're talking
5 about. What group of years?

6 Q. These would be years 2003 through 2012.

7 A. I can't do quite that much math in my head,
8 but it could be right.

9 Q. Now, do you recall the average of Nebraska
10 allocations for the analysis that Mr. Book did?

11 A. I believe they were the average of 2002
12 through 2006.

13 Q. Right. And do you recall that that was
14 211,000?

15 A. It sounds right.

16 Q. So the average allocations that are
17 associated with your second bullet analysis are
18 associated with quite different and much higher Nebraska
19 allocations than were associated with the years 2002
20 through 2006 used by Mr. Book; isn't that right?

21 A. Well, I didn't choose the period of years;
22 those were chosen by Kansas. But the fact of the matter
23 is -- and we did substitute 2008, being that 2008 is
24 over, so that was a very wet year.

25 And when you look at 1992 through 1995,

1 which were used to simulate 2009 through 2012, I believe
2 the average precipitation is approximately the 70th
3 percentile. So there is a lot of wet years that got
4 thrown in there at the end. 1993, in particular, was
5 the wettest year on record, and that was used to -- as a
6 substitute for 2010.

7 Q. So I think it's fair to say that this
8 analysis is not comparable to Kansas analysis, given
9 that it's using different years, has different average
10 allocations to Nebraska. Wouldn't you agree?

11 A. I guess I wouldn't. I mean, we used --
12 took the years that Kansas chose. We didn't do the same
13 thing with it; but, you know, Kansas used a dry period
14 2002 through 2006 for part of its analysis. Then they
15 choose a broader period of 1990 to 2006 for the other
16 part of their analysis.

17 And that's the part of the Kansas analysis
18 that we drew it from, and -- for 2009 through 2012
19 Kansas chose 1992 through 1995 as surrogates, and that's
20 what we did, as well.

21 Q. Then maybe we can reach agreement on a more
22 refined statement.

23 To the extent that Mr. Book's analysis is
24 part of the Kansas analysis, you did not follow that
25 part of the Kansas analysis?

1 A. Oh, there is nothing in Appendix F that
2 attempts to replicate Mr. Book's analysis.

3 Q. So the second bullet on page 7 needs to be
4 understood with that in mind, doesn't it?

5 A. Yeah, certainly.

6 I mean, when you read Part C on page 8, I
7 think it's clear quite what we did. I hope it's clear.
8 I would be happy to elaborate further.

9 Q. Well, let me take us to the next bullet, if
10 I may.

11 A. Okay.

12 Q. You state there that, Under an
13 exceptionally arguably unrealistic scenario of repeated
14 dry conditions through 2012, additional measures would
15 be required to ensure Nebraska remains within its
16 allocation by making up for a negative five-year average
17 of between 340 acre-feet of a normal-year administration
18 and 8288 acre-feet under water-short year
19 administration, correct?

20 A. That's what it says.

21 Q. And you refer us then to Appendix G.

22 A. That's right.

23 Q. From here if we turn to Appendix G, and
24 it's actually right at the end of Appendix G that I
25 would like to turn our attention.

1 Counting back from the back of the report,
2 four pages, you come to a page with, again, three
3 tables, different parts of Table 3 from the RRCA
4 accounting procedures and the bottom Table 3C shows
5 Nebraska's five-year average allocations CBCU, correct?

6 A. That's right.

7 Q. And there, the average allocation
8 associated with your Bullet 3 analysis, the one that is
9 arguably unrealistically dry, has an allocation
10 averaging 231,000 acre-feet per year; is that right?

11 A. That's right.

12 Q. Now, that's about 20,000 acre-feet per
13 year, on average, higher than the average used by
14 Mr. Book, which was the actual average 2002 through
15 2006; isn't that right?

16 A. That's correct. I would like to restate,
17 though, that we didn't select these or we didn't choose
18 these. These are the results of an analysis that is
19 well documented in this Appendix.

20 Q. But you are suggesting under Bullet 3 on
21 page 7 that performing an arguably unrealistic,
22 exceptionally dry scenario in testing the sufficiency of
23 the IMPs results in only a minor -- well, 340
24 acre-feet-per-year violation; isn't that right?

25 A. Well, that's what Table 3C shows. And I

1 would like to clarify, as we discussed in my deposition,
2 that the arguably unrealistic applies primarily to the
3 35th percentile climate condition that we selected, and
4 then we tried to match a similar period of Compact
5 accounting that has similar climatic condition.

6 In this case, we were able to find -- we
7 utilized 2000 through 2005. Now, it is what it is.

8 We averaged the input values from 2000
9 through 2005 for the surface water uses and for the
10 stream gage data and then we conducted the groundwater
11 model to run under 35th percentile conditions, and I
12 believe it is arguably unrealistic that 35th percentile
13 conditions would persist year after year for five years
14 straight.

15 Q. But if we recall the prediction in Appendix
16 D, your letter of December 30, 2000, you are predicting
17 that the Nebraska allocation would fall to 203,000 in
18 ten years, which would compare to your 231,000 for the
19 scenario that you call unrealistically dry.

20 It's not as dry as what you are predicting
21 in ten years, is it?

22 A. I don't understand -- can you repeat the
23 question.

24 Q. I'm comparing your allocations --

25 A. Okay.

1 Q. -- your third bullet analysis with your
2 prediction for 2019 in your December 30, 2008 letter in
3 Appendix D which forecasts 203,000 acre-feet of Nebraska
4 allocation.

5 A. It's a very different analysis that was
6 used for the forecast, the long-term forecast.

7 Q. So you have used different analyses, but
8 wouldn't you agree that your third bullet on page 7 does
9 refer to an analysis that assumes Nebraska allocations
10 significantly higher, 20,000 acre-feet higher, than what
11 you're predicting will take place ten years from now?

12 A. Yeah, I would agree that they're not the
13 same.

14 I should say that the long-term forecast
15 doesn't utilize any -- any groundwater modeling runs.
16 It's a pretty simplistic analysis that just projects out
17 some recent trends.

18 And actually, I believe it's projecting out
19 those trends, not taking into account the recent wet
20 years. So it's probably something we need to modify
21 here in the future to update that trends analysis.

22 Q. Now, I would like to ask you to look at
23 what has been marked as Kansas Exhibit 58. Donna will
24 bring you a copy, I think.

25 This is a document that we discussed during

1 your deposition. Would you identify it for the
2 Arbitrator, please.

3 A. Well, the title page reads "Handouts for
4 Upper Republican Natural Resources District, Special
5 Meeting, July 13, 2006." So it appears to be some
6 handouts that were used in a meeting 2006.

7 Q. And it contains a general description on
8 the second page with definitions of various acronyms
9 that are used on the graphs that follow; is that right?

10 A. Oh, yeah. I believe we discussed these in
11 my deposition.

12 Q. Yes.

13 A. It looks like we had it right.

14 Q. I would like to ask you to turn to the
15 third graph. The easy way to identify it, in lower
16 right-hand corner, it has DNR Bates number of 008653.

17 A. Okay.

18 Q. As we discussed during your deposition,
19 this is a graph of a type that you have reviewed as the
20 senior groundwater modeling at the department?

21 A. Well, as I stated in my deposition, I was
22 not with the department when these model runs were done.
23 These were done by -- I believe by Paul Koester, our
24 RRCA groundwater modeler, and I have certainly seen
25 these, though.

1 Q. And Mr. Koester is on your staff?

2 A. Yes, he is one of my staff.

3 Q. And for the court reporter, his name is
4 spelled K-O-E-S-T-E-R.

5 A. That's right.

6 Q. What is the title of this graph?

7 A. It's "Predicted Acre-Foot Baseflow Impacts,
8 Future Scenario 2006 - 2045 Based on repeating 1981 -
9 2000 Climate Conditions, with NRD Groundwater Pumping
10 Allocations."

11 Q. And it has a number of different lines
12 identified in the legend that's inside the graph there?

13 A. That's right. Oh, I looked back at this
14 actually, and it is quite -- it's clear that the
15 reduction 100 is the bottom line.

16 There is two -- there is two boxes on the
17 line with black and white, and the RED100 represents the
18 bottom lines. That's the same thing as that residual I
19 was talking about before, if we turned off groundwater
20 wells going forward, that's the impacts it would have
21 made.

22 Q. And that acronym simply means reduction by
23 100 percent throughout the basin -- throughout the
24 basin?

25 A. That's right.

1 Q. And that's referring to groundwater
2 pumping?

3 A. Yes.

4 Q. That's what is being reduced?

5 A. Yeah. I believe it's probably only the
6 reduction of the pumping in the three NRDs. I'm not
7 certain on that, but I'm quite sure he wasn't --
8 wouldn't be reducing the pumping in the Platte Basin or
9 other areas in the model.

10 Q. And of this suite of lines, the top line is
11 labeled the "Baseline"; is that right?

12 A. That's right.

13 Q. And that would have been, more or less,
14 current pumping conditions at the time of the analysis?

15 A. Well, what this reflects is -- and again,
16 as I said, I looked back at this after my deposition and
17 talked to Mr. Koester about it. And you will see that
18 the previous graph shows a difference as no allocations
19 and with allocations.

20 And so what he did was he took the pumping
21 depth from 1981 to 2000 and he capped those at the
22 then-current allocations so it had the NRDs pumping
23 there. In many years, they're full allocation on all
24 the 2006 acres. So it results in average pumping
25 volumes that are far greater than the current IMPs are

1 mandating.

2 Q. And that line gradually increases over the
3 period shown on the graph, rising slightly above 300,000
4 towards the end of the time period?

5 A. Well, it depends on which year you look at.
6 That looks like -- if you count backwards, the last year
7 would represent 2000, so that would be 1996 conditions,
8 a very wet year. So the pumping impacts go up
9 accordingly in that very wet year.

10 I think if you put a trend line through it,
11 they certainly don't increase by that much.

12 Q. And he used a cycle of hydrologic or cycle
13 of years to replicate hydrologic condition?

14 A. 1981 to 2000. So he would have repeated it
15 twice to achieve a 40-year run.

16 Q. Now, the acronym QR, that stands for quick
17 response area, doesn't it?

18 A. Yes, it does. And I believe those are --
19 as you said, are outlined on the first page.

20 Q. And that's an area 2 1/2 miles on either
21 side of the stream?

22 A. Well, not exactly. More or less, it is,
23 although what this really is is the area that -- and
24 this is indicated on this page, this first page here.

25 It's the area that was eligible for our

1 CREP program, and that was, more or less, the area 2 1/2
2 miles from the stream, but it didn't extend all the way
3 up most streams because we didn't want to get CREP
4 sign-up at the far upper headwaters of many of these
5 streams where we wouldn't expect to achieve a
6 considerable benefit in those areas.

7 And, I believe, it was -- it may have been
8 expanded out slightly beyond 2 1/2 miles in some other
9 areas.

10 Q. Yes. And I can see where it is identified
11 as the "CREP quick response area" --

12 A. Yeah.

13 Q. -- consistent with what you're saying.

14 Thank you.

15 Now, the line on this graph on the page
16 that has the number ending in 8653, the line in the
17 graph, as you go up from the RED100 line at the bottom,
18 the next line up is the one that is identified as
19 RED15QR100, correct?

20 A. Oh, the -- yeah, the second from the
21 bottom, that's right.

22 Q. And that indicates that there is a
23 basinwide reduction in pumping of 15 percent and a quick
24 response area -- CREP quick response area reduction of
25 100 percent, correct?

1 A. I'm sorry. I was just -- yeah, I was just
2 checking exactly what -- I mentioned before I didn't
3 think he was turning off the entire model area. That --
4 and, as it says here, it represents -- anywhere the RED
5 symbol is labeled, it represents reduction over the
6 entire Lower Republican, Middle Republican, Upper
7 Republican and Tri-basin NRD.

8 Q. Thank you for that clarification.

9 A. The NRD boundaries are roughly along basin
10 lines; but, I believe, there is some of the surface
11 water basin that falls in the twin Platte NRD, for
12 example, a small number of sections.

13 Q. Now, that line that is labeled RED15QR100,
14 that declines to about 150,000 acre-feet per year, and
15 then gradually increases by the end of the period to
16 something maybe about 170,000, would you say, in that
17 range?

18 A. Sure.

19 Q. Now, that modeling analysis that produces
20 that line, that line is quite reminiscent of the line in
21 Mr. Larson's exhibit showing the impact of the proposed
22 Kansas remedy, isn't it? If we turn to Kansas Exhibit
23 3.

24 A. You are going to have to tell me the title
25 of it.

1 Q. It's the one that has the title starting
2 out "Attachment 5 . . . RRCA groundwater model analysis
3 (revised)." It has that funny designation because it
4 was an original attachment to the December 19, 2007
5 letter.

6 A. Thanks.

7 Q. And it shows a date of January 4, 2008. It
8 has been marked as Kansas Exhibit 3.

9 A. I have it.

10 Q. If you turn past the text in the first
11 table to the first graph there, it's labeled Figure 2.

12 If you compare the graph we've been talking
13 about to the graph -- the part of Figure 2 beginning in
14 about 2007 and it's in blue and labeled just underneath
15 the line as "Projected Nebraska pumping impact under
16 proposed remedy."

17 Do you see that line?

18 A. I do.

19 Q. Doesn't it share a great similarity to the
20 RED15QR100 line on the DNR graph?

21 A. Reasonably so, yes.

22 Q. Doesn't this indicate that, at least, one
23 of the scenarios that was being considered by the
24 department is very close to the proposal that Kansas
25 independently came up with to achieve what it felt was

1 necessary for compliance?

2 A. I don't think it indicates that -- none of
3 these curves in this figure -- in this figure were
4 necessarily being considered by the department. It
5 simply indicates that the department has actually run
6 the scenario that is somewhat similar to the one that
7 Kansas has also run. It's very helpful to run a wide
8 variety of these scenarios to better understand the
9 response of the model.

10 Q. Now, I would like to identify for the
11 record Kansas Exhibit 60. This is entitled "Potential
12 Benefits from the Purchase of Surface Water Rights in
13 the Republican River Basin," and it is by you and dated
14 March 2007.

15 Do you recognize this document?

16 A. Well, yeah. Obviously, I authored it and I
17 remember discussing it with you at our deposition.

18 Q. Very good.

19 Would you read for us, please, the first
20 paragraph of this memorandum.

21 A. "In order to estimate the potential
22 benefits of a surface water buyout in the Republican
23 Basin, the DNR has developed some projections of the
24 potential supply of water in the future. The purchase
25 of surface water irrigation rights in the Republican

1 Basin will bring Nebraska into compliance with the
2 Republican River Compact Settlement. The purchase of
3 surface water rights will continue to be a potentially
4 valuable option for approximately five years. The
5 purchase of surface water rights within the Republican
6 Basin will allow ground water irrigation allocations to
7 be 1 1/2 to 2 inches more than they would be with the
8 purchase of surface water rights."

9 Q. Was there a typo there?

10 A. May have been, yeah.

11 Q. It looks like the last "with" at the end,
12 second-to-last line should have been "without"?

13 A. Maybe. Probably. That would make a lot
14 more sense, wouldn't it?

15 Q. That would make more sense if the sense was
16 saying that the purchase of rights would allow 1 1/2 to
17 2 inches more groundwater irrigation than would be
18 possible without the purchase of surface rights?

19 A. That would make more sense, yes.

20 Q. Does that sound more consistent with your
21 recollection of what you were trying to express here?

22 A. Yes.

23 Q. And you analyzed in this memorandum what
24 could be expected in the future with respect to the
25 physical availability of streamflows and surface water;

1 is that right?

2 A. That's true under certain assumptions and
3 at the time that this was written, yes.

4 Q. Would you turn to the last page of
5 memorandum, please, and read for us your concluding
6 paragraph, which has the title "Ground Water Allocation
7 Reductions."

8 A. "The results indicate that surface water
9 buyout would significantly assist Nebraska with compact
10 compliance, particularly in the short term. However,
11 unless water supplies are significantly greater than
12 expected in the future, additional reductions in
13 groundwater use will probably also be needed in the
14 short term, and will definitely be needed to keep
15 Nebraska in compliance with the Compact in the long
16 term."

17 Q. And do you still agree with your conclusion
18 there?

19 A. Well, this analysis is very out of date.
20 It really has no relevance anymore.

21 Q. What has changed?

22 A. Primarily, the current IMPs have been
23 implemented and significant reductions in groundwater
24 pumping under those IMPs have been implemented. As
25 well, significant surface water supplies are currently

1 present in the basin whereas, at the time of writing
2 this paper, Harlan County Lake was essentially empty and
3 as were many other reservoirs.

4 So, you know, they've been spilling water
5 out of Harlan County Lake all winter and that's
6 obviously a substantial change.

7 I should also note just to -- just to
8 clarify that, too, that, as with the previous exhibit
9 that we were looking at, this utilizes model runs that
10 repeated previous years' depths of irrigation.

11 I mean, it suffers the same fundamental
12 shortcomings that the Kansas analysis does. It simply
13 takes previous years' depth of allocations and applies
14 it to the existing acres. And the volumes of pumping
15 that were in those -- in this model run were
16 substantially higher than the current IMPs allow.

17 Q. So your thought about this memorandum is
18 that it suffers from the same flaws that the Kansas
19 analysis does?

20 A. In part.

21 Q. And is it your opinion that the fact that
22 there is water in Harlan County Reservoir at present
23 tells you how much is going to be there in future years
24 when water is needed?

25 A. I didn't state that.

1 Q. What was it about the fact that there is
2 water in Harlan County right now that was a fundamental
3 change to the circumstances here?

4 A. Apparently, when you wrote this, it was
5 very low. Now it's very full. Does that make a
6 fundamental change in your analysis?

7 A. Well, if you look at Figure 3, the starting
8 point on that graph of going into the future is quite
9 low.

10 A. And, right now, the starting point on that
11 graph would be much higher and we would project a trend
12 going forward from that that would then be quite
13 different.

14 A. I don't know what the result would be. I
15 haven't done a similar analysis recently, but I'm quite
16 sure it would come out substantially different.

17 Q. Do you think it would change the trend?

18 A. The trend would be affected by the
19 reductions in groundwater pumping that have been
20 implemented in the current IMPs.

21 Q. Do you think the fact that there is water
22 in Harlan County now would affect the trend?

23 A. I guess I can't say. The trend would be
24 what it would be, depending on the analysis and the
25 outcome of that.

1 MR. DRAPER: Should we take a little break.

2 ARBITRATOR DREHER: I would prefer if you
3 could complete your cross and then take a break before
4 redirect.

5 MR. DRAPER: Okay.

6 ARBITRATOR DREHER: Having said that, I
7 mean, if you want a couple of minutes to confer, that's
8 certainly appropriate.

9 MR. DRAPER: No. That's fine.

10 Q. (BY MR. DRAPER) Dr. Schneider, you've
11 mentioned several times that 1993 was the wettest year
12 on record?

13 A. I may not be completely accurate on that.

14 I believe I'm referring to the rainfall
15 precipitation gages within the model that are located in
16 Nebraska and looking at the -- that's generally what I'm
17 looking at. And if it's not the wettest year, it's
18 second or third, but it's my -- it's my recollection
19 that it's the wettest year in terms of precipitation in
20 Nebraska.

21 Q. In fact, I have no quarrel with that.

22 I think it's often referred to as the
23 "Great Flood of 1993," isn't it?

24 A. It might be. I was in a different place
25 then; second year of college.

1 Q. Looking at your report under your
2 discussion in Section VI, Impacts of Kansas Plan, you
3 have a graph Figure 1 which shows -- what you calculate
4 to be extra water that flows to Kansas.

5 A. Yeah, and I should be clear that I believe
6 we just simply used past allocations and tried to draw
7 some conclusions based on that. In other words, this
8 didn't try to reproduce spreadsheets for this whole
9 50-year period going forward, the Compact accounting
10 spreadsheets.

11 Q. Now, did the analysis you did here include
12 the -- include the 1993 Great Flood?

13 A. It used every year that Kansas used in
14 their analysis, and that was 1990 to 2006. So, yes, it
15 did. We didn't select that time period.

16 Q. Is your point here that when there is a
17 flood and extra water passes stateline, that somehow
18 Kansas has done something wrong or obtained a benefit it
19 shouldn't have under the Compact?

20 A. I don't think so. I think the point is
21 that the Kansas' analysis projects reductions in
22 Nebraska impacts exceeding 100,000 acre-feet -- I don't
23 remember the exact numbers, I would have to go back to
24 the report -- but it reduced Nebraska's impacts by up to
25 and over 100,000 acre-feet through the analysis that

1 they did. And then we were trying to apply that to
2 previous allocations to see what that outcome would be.

3 Q. Did you do any analysis of the unused
4 allocation during the period 1990 through 2006?

5 A. Are you speaking historically?

6 Q. Yes, for purposes of this analysis.

7 A. I'm still trying to catch on to what you
8 mean.

9 Do you mean, did we look at the historic
10 period 1990 to 2006?

11 Q. Yes.

12 A. No. This is a future analysis. We were
13 simply evaluating Kansas' future analysis.

14 Q. But you used the water supply for the
15 period 1990 through 2006, didn't you?

16 A. That's -- that's my recollection, yes, that
17 we -- and I'll admit that that may not be an accurate
18 representation. And, certainly, trying to assume that
19 we're going to have 1990 through 2006 repeat three times
20 is not going to happen either; but, you know, we simply
21 used what we had at our disposal in terms of the
22 previous Compact water supply and allocations.

23 Q. Is your purpose here to indicate that
24 Nebraska should not be required to comply with the
25 Compact if it means that extra water goes across the

1 stateline under high flow condition?

2 A. I think the purpose here is, as is well
3 stated in the title under Section B, to attempt to show
4 the practical effects of the Kansas proposal.

5 Q. And do you assume that Nebraska takes no
6 steps to either store or otherwise use the water while
7 it's in Nebraska?

8 A. The only assumption is that the storage and
9 use is the same as it was in the historic period 1990 to
10 2006.

11 As I said, it's simply replicating the
12 same -- the same things that happened. I mean, there
13 was a lot of water. Nebraska stored what it could and
14 used it. It just used what it had.

15 Q. Isn't it true that when a compact is needed
16 is when that water is scarce, not when there is a lot of
17 water; isn't that right?

18 A. I understand we have to comply with the
19 Compact every year.

20 MR. DRAPER: No further questions.

21 ARBITRATOR DREHER: All right.

22 I was trying to think if I had one more. I
23 don't believe I do.

24 So I guess you want to wait for redirect to
25 address these exhibits, or what do you want to do?

1 MR. DRAPER: Well, I guess the next step is
2 for redirect by Nebraska. And I can move the admission
3 of the exhibits right now, if that would be helpful.
4 Why don't I do that.

5 We would move the admission of the two
6 Kansas exhibits addressed during cross-examination,
7 Exhibit 58 for Kansas, which are the handouts from the
8 department; and Exhibit 60, which is the paper by Dr.
9 Schneider.

10 ARBITRATOR DREHER: Any objection?

11 MR. WILMOTH: We have no objection. We
12 would also -- I'm sorry.

13 MR. AMPE: No objection.

14 MR. WILMOTH: We would also move admission
15 of Nebraska 21, the curriculum vitae of Dr. Schneider,
16 as well as request that the two charts -- flip charts be
17 numbered -- or labeled as Exhibits 27 and 28
18 respectively and move the admission of those.

19 And for the record, we have no redirect, so
20 we're prepared to continue with Director Dunnigan after
21 a short break, if you would indulge us.

22 ARBITRATOR DREHER: Any objection to the
23 admission of those?

24 MR. DRAPER: No objection.

25 MR. AMPE: No.

1 ARBITRATOR DREHER: They're admitted.

2 (WHEREUPON, Kansas Exhibit 58 and 60 and
3 Nebraska Exhibits 21, 27 and 28 were admitted into
4 evidence.)

5 ARBITRATOR DREHER: We'll take our
6 customary 15-minute break and when we continue at 3:30,
7 we'll begin with Director Dunnigan.

8 (Break was taken from 3:15 to 3:30.)

9 ARBITRATOR DREHER: Mr. Wilmoth, you can
10 call your next witness, please.

11 MR. WOLMITH: Thank you very much,
12 Mr. Arbitrator.

13 For the third responsive witness on the
14 clients portion of this matter, Nebraska would like to
15 call the Director of the Department of Natural
16 Resources, Mr. Brian Dunnigan.

17 BRIAN DUNNIGAN,
18 having been first duly sworn, was examined and testified
19 as follows:

20 DIRECT EXAMINATION

21 BY MR. WILMOTH:

22 Q. Good afternoon, Mr. Director.

23 A. Good afternoon.

24 Q. Let me start by thanking you for taking
25 this much time out of your schedule to attend the

1 entirety of this proceeding.

2 Could you please start just a little bit by
3 explaining your personal and professional background for
4 the Arbitrator.

5 A. Sure. I have a bachelor of science degree
6 in civil engineering from the University of Nebraska
7 obtained in December of 1981. My State employment
8 started in 1983. I was a structural bridge engineer for
9 three years. Went to the Department -- or the Natural
10 Resources Commission in 1986 and -- as a hydraulic
11 engineer. Was in that position until 1991 when I became
12 a division head for the Flood Plain Management Division
13 of the department up through 2000.

14 When the Department of Water Resources and
15 the Natural Resources Commission merged, I became the
16 division head for Flood Plain Management Damage Safety,
17 Photogrammetry and Survey position. I held that
18 position up until 2005, when I became acting Deputy
19 Director and that position lasted through, I guess,
20 until, I think, January of 2007 when I became Deputy
21 Director and was in that position until March 24 of 2008
22 when I became Acting Director. And on December 9, 2008
23 became the Director of the Department of Natural
24 Resources.

25 Q. Thank you very much.

1 And that was -- and appointment was made by
2 Governor Heineman?

3 A. Yes, it was.

4 Q. Thank you very much.

5 And in your position, do you have occasion
6 to speak with the Governor?

7 A. Yes.

8 Q. And you report to him on matters involving,
9 among other things, this Republican River Basin?

10 A. All matters.

11 Q. Thank you.

12 As you're well aware, I'm sure after being
13 here all week, one of the issues that is of great
14 interest to the folks here is this concept of the
15 Integrated Management Planning process and IMPs,
16 Integrated Management Plans.

17 Can you explain briefly the process of
18 developing these IMPs?

19 A. Sure.

20 The IMPs are developed jointly between the
21 specific Natural Resources Districts that are involved
22 in the planning process and the Department of Natural
23 Resources. After the planning process is over, they're
24 jointly adopted by both entities.

25 Q. And, generally speaking, what is the

1 objective of the IMPs in the Republican River Basin?

2 A. The main objective of the IMPs would be to
3 ensure compliance with the Compact.

4 Q. And in your understanding or experience, is
5 an IMP enforceable?

6 A. Absolutely.

7 Q. And are you aware of whether any
8 enforcement actions have actually been taken?

9 A. I'm aware of enforcement actions at the
10 local level that have taken place.

11 Q. That's at the NRD --

12 A. At the NRD level.

13 And I would just like to add, that the NRDs
14 are a political subdivision of Nebraska government.

15 Q. The NRDs are a political subdivision of the
16 State of Nebraska?

17 A. Yes. Of the State of Nebraska, excuse me.

18 Q. Very good.

19 And I realize you're not an attorney and
20 may not have details on the proceedings of those
21 enforcement actions; but, generally speaking, is that
22 designed to ensure that the provisions of the IMPs and
23 the NRD rules and regulations are followed?

24 A. Yes, it is.

25 Q. What happens if an NRD refuses to honor an

1 IMP?

2 A. Well, certainly the department would look
3 at that; and if there was an issue with that, we would
4 certainly confer with the Attorney General's office to
5 see if action would be taken by the State against
6 Natural Resources District. The department could also
7 look at and the State could look at enforcement actions
8 against individuals.

9 Q. For noncompliance?

10 A. For noncompliance.

11 Q. With rules and regulations?

12 A. Yes.

13 Q. Were you present the other day when you --
14 when, I believe it was Mr. Pope who explained his view
15 that IMPs were ad hoc?

16 A. I was.

17 Q. And do you have a view of that issue?

18 A. I would certainly think they're much more
19 comprehensive than ad hoc. We've put a lot of time and
20 effort in the agency and the agency structure to make
21 sure that we have a comprehensive view on how they're
22 put together and carry them out and providing the
23 necessary information, tools, other things to the
24 districts in support of those IMPs.

25 Q. Thank you.

1 You mentioned, in that last discussion,
2 some of the efforts that the department makes and some
3 of the resources at the department's disposal.

4 Could you please elaborate on your staff,
5 for example, and who was involved in this issue of
6 ensuring both the IMP development and Compact
7 compliance?

8 A. Certainly.

9 We did, under my direction, reorganize the
10 structure of the agency a little bit -- well, more than
11 a little bit, I guess, by forming what we call an
12 Integrated Management Position to take action
13 specifically related to, not only the development of
14 Integrated Management Plans, but also to make sure that
15 we could provide the technical resources of modeling and
16 have the people involved in the entire process,
17 including compliance and everything else, as we move
18 forward.

19 Q. And is it true that much of that is done
20 pursuant to statutory mandate?

21 A. Yes, it is.

22 Q. And would that be what is referred to
23 generally as LB 962 and related statutes?

24 A. Yes, the Groundwater Management Protection
25 Act.

1 Q. A copy of which, I believe, has been
2 provided to the Arbitrator.

3 With respect to the tools in the toolbox,
4 so to speak, to ensure Compact compliance, I think that
5 testimony has been to date that the first and foremost
6 thing, is that groundwater management, groundwater
7 reduction is kind of the paramount issue.

8 Would you agree with that?

9 A. Yes.

10 Q. And there are other alternatives, however,
11 available to the State in case groundwater reduction
12 were insufficient in certain years; is that accurate?

13 A. That's accurate.

14 Q. Would one of those be surface water
15 buyouts?

16 A. Yes, it would.

17 Q. And could you describe just briefly the
18 available sources of funding -- the potential available
19 sources of funding for that.

20 A. One of the available sources of funding
21 within the department would be the Water Resources Cash
22 Fund. In any particular year, there could also be
23 funding appropriated through the legislature, if need
24 be, I guess.

25 Q. Now, there was some recent legal activity

1 in Nebraska concerning something called LB 701. Do you
2 have an understanding generally of that case?

3 A. Yes, I do.

4 Q. And the Supreme Court addressed an issue
5 with regard to a funding mechanism, I believe, in that
6 case.

7 Can you explain that?

8 A. Yes. One of the mechanisms in LB 701 was a
9 property tax that the NRDs could use for activities
10 within their districts.

11 Q. And what did the courts say about that?
12 Again, just your understanding.

13 A. Yeah. My understanding is that that
14 provision was ruled unconstitutional.

15 Q. Are there any other courses of 701 that
16 remain in place?

17 A. Yes. The occupation tax is still in place.

18 Q. Is it your understanding that the court did
19 not strike down the concept of purchasing surface water;
20 it merely said that one of the funding mechanisms was
21 not available; is that your understanding?

22 A. That is my understanding.

23 Q. One of the issues that has arisen with
24 regard to surface water purchases is the potential for
25 difficulty in obtaining cooperation of third parties.

1 Have you heard testimony to that effect?

2 A. Yes, some.

3 Q. And, in your experience, has the department
4 had any difficulty obtaining cooperation of irrigation
5 districts that might be involved in that process?

6 A. Not to my knowledge.

7 Q. And, in fact, certain irrigation districts
8 have been involved in surface water purchases, have they
9 not?

10 A. That's correct.

11 Q. And were you here earlier to hear reference
12 to potential difficulties in getting Bureau of
13 Reclamation approvals?

14 A. There was intimation made of that, yes.

15 Q. And in your experience, do you have any
16 reason to believe that the Bureau would present a hurdle
17 or difficulty in executing on these plans?

18 A. Not to my knowledge.

19 Q. And, of course, not all agreements between
20 the State and third parties would necessarily involve
21 Bureau approval, would they?

22 A. That's my understanding.

23 Q. So, for example, do you understand that the
24 state could reach out and contract with an individual to
25 retire acreage?

1 A. Yes.

2 Q. And that would not involve the Bureau?

3 A. No, it would not.

4 Q. And in your view, is that relevant because
5 of the nature of the Compact? In other words, it's not
6 a delivery compact, is it?

7 A. It's not a delivery compact. The State of
8 the Nebraska has to live within its allocation.

9 Q. Finally, as I say, you've been here all of
10 this week. And have you inferred from some of the
11 comments that Nebraska may be posturing itself to simply
12 pay to play, if you will, and continue to violate
13 because it's in economic -- in the state's best economic
14 interest to do so?

15 A. Yes.

16 Q. How would you respond to that implication?

17 A. I would simply respond in my opinion, that
18 is not an option to the State of Nebraska. It's not an
19 option to me, as the Director of the Department of
20 Natural Resources, and it's not an option of the
21 Governor's, either.

22 MR. WILMOTH: Thank you.

23 We have nothing further.

24 ARBITRATOR DREHER: Director Dunnigan, I
25 would like to first ask you about Nebraska -- I'll come

1 up with it here in a minute -- Nebraska Exhibit 15,
2 which is entitled "Nebraska Compact Compliance by James
3 Schneider and James Williams." And an appendix to that
4 report, Appendix D, includes a letter that you wrote to
5 the NRDs.

6 MR. WILMOTH: Excuse me, Mr. Arbitrator,
7 may I give the witness a copy?

8 ARBITRATOR DREHER: Yes.

9 MR. WILMOTH: Did you say Appendix D?

10 ARBITRATOR DREHER: Appendix D, that's
11 correct. It's a letter dated December 30, 2008 to the
12 Republican River NRDs and then the Tri-basin NRD.

13 And I just want to direct your attention to
14 the short- and long-term forecasts. The available water
15 supply during 2009 is forecasted to be 261,138 acre-feet
16 and the available water supply during 2019 is forecasted
17 to be 203,225 acre-feet.

18 Do you recollect who on your staff is
19 responsible for preparing those forecasts?

20 THE WITNESS: Yes, I do.

21 ARBITRATOR DREHER: Could you tell me who
22 that individual was?

23 THE WITNESS: It would be both Jim
24 Schneider and Jim Williams.

25 ARBITRATOR DREHER: Changing subjects a

1 little bit, how does the transfer of groundwater rights
2 from, either changing the place of use or purpose of
3 use, how does that work in Nebraska? I'm just not
4 familiar with that.

5 THE WITNESS: Well, I'm not as familiar
6 with it either. And you're talking groundwater now?

7 ARBITRATOR DREHER: Yes, groundwater.

8 THE WITNESS: That would be something that
9 would be handled at the Natural Resources District.
10 That would be within their authority.

11 ARBITRATOR DREHER: To your knowledge, do
12 they take into account changes in proximity to
13 hydraulically connected surface water sources? In other
14 words, do they allow the transfer of groundwater rights,
15 say, for irrigation from a location that may be 10 miles
16 removed from the Republican River to a location that is
17 immediately adjacent to the Republican River?

18 THE WITNESS: I think they're aware of what
19 the implications of that would be, and I think that
20 would help to govern how they individually would
21 approach that. And "individually," I mean each NRD
22 could do things a bit different.

23 ARBITRATOR DREHER: Are there statutory
24 provisions that --

25 THE WITNESS: Yes, there are statutory

1 provisions.

2 ARBITRATOR DREHER: Could you refer me to
3 those.

4 THE WITNESS: We could certainly do that.

5 ARBITRATOR DREHER: I would like to take a
6 look at that.

7 THE WITNESS: We would be happy to do that.

8 ARBITRATOR DREHER: Has Nebraska ever, to
9 your knowledge, considered establishing a water bank?

10 THE WITNESS: There are water banks --
11 water banks, per se, being established now in the Platte
12 River Basin.

13 ARBITRATOR DREHER: How about in the
14 Republican River Basin?

15 THE WITNESS: There has been discussion of
16 water banks in the Republican, but I'm not -- not aware
17 of any that are operating right now.

18 ARBITRATOR DREHER: One of the things that
19 I began to think about as I got involved in this, and
20 I've raised it a couple of times in a couple different
21 ways and actually alluded to it in the first decision
22 that I wrote on legal issues pertaining to this, or the
23 final decision.

24 But it seems to me that one of the problems
25 with this is the after-the-fact accounting. And I

1 recognize that final accounting probably can't be done
2 until after the fact because of the way the Compact is
3 structured in allocating water based upon volume. Other
4 compacts allocate water differently. Some allocate on
5 volume, but other compacts allocate a division of the
6 flow and makes realtime administration much more readily
7 available.

8 But in your involvement with the RRCA, have
9 they ever considered some sort of in-year compliance
10 accounting with subsequent year final accounting,
11 including the provision of credits and debits?

12 THE WITNESS: My experience with the RRCA
13 is very limited, beginning last March. So I am not
14 aware of those. Somebody with more history certainly
15 would have a better answer for you.

16 ARBITRATOR DREHER: Okay. Who would that
17 somebody be, I wonder?

18 THE WITNESS: There are people in this
19 room, definitely.

20 ARBITRATOR DREHER: Okay. Maybe I'll have
21 a chance to ask them during rebuttal, I suppose. That's
22 really all I have.

23 Mr. Draper.

24 MR. DRAPER: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. DRAPER:

2 Q. Good afternoon, Director Dunnigan.

3 A. Good afternoon, Mr. Draper.

4 Q. What has been your involvement in the
5 current IMP process?

6 A. I'll try to -- I guess I'll ask you a
7 question.

8 In the Republican River IMPs or in IMP
9 processes, in general, because they do go on across the
10 state?

11 Q. Yes, I did mean to limit it to the
12 Republican River Basin.

13 A. Only peripherally when they were being
14 redone in late 2007 and early 2008. I was not directly
15 involved in that IMP process, but certainly knew, as a
16 deputy director, what was going on with the process.

17 Q. And were you the person who approved the
18 IMPs on behalf of the department?

19 A. I did sign that, yes, shortly after --
20 shortly after I became interim director, yes.

21 Q. So you're the one who gave the final
22 approval, from the department's point of view, on the
23 latest version of the IMPs?

24 A. That is correct.

25 Q. And that's true of all of the three major

1 ones that we tend to refer to: The Lower, the Middle
2 and the Upper Republican?

3 A. Yes, I don't believe either of those were
4 signed prior to March 24 by the department.

5 Q. And did you consult with former Director
6 Bleed in determining whether to sign those documents?

7 A. Actually, I did.

8 Q. Did you and she jointly agree that they
9 should be approved?

10 A. Yes.

11 Q. Did you have a certain transition period
12 with the former director?

13 A. No, I did not.

14 Q. So any consultation you had was prior to
15 her quick departure?

16 A. A bit before her departure and very little
17 bit after her departure, yes.

18 Q. I believe it's Kansas Exhibit 61. I'm
19 trying to lay my hands on it here.

20 Do you have a copy of Kansas Exhibit 61
21 available? If Mr. Wilmoth would be so kind.

22 Thank you very much.

23 A. Yes, I do.

24 Q. Have you seen this letter before?

25 A. I believe I just saw it today, actually.

1 Q. Turning to the third page of this, we
2 discussed then, as you may have heard, some of the
3 language on the third page that refers to a meeting that
4 was held on December 15, 2006 involving Director Bleed
5 and the Governor and the NRDs. And as you can see there
6 in first full paragraph on that page, there were
7 allocations that were recommended to the NRDs that were
8 significantly below the ones that had been adopted in
9 the current allocations.

10 And my question to you is: Do you know
11 why, or what the thinking was that caused such a change
12 from the allocations that were indicated at the
13 December 15, 2006 meeting?

14 A. I am aware of some of the discussions that
15 Director Bleed had with the NRDs during the timeframe
16 after this letter was written, and I know that there was
17 a lot of negotiation on what an IMP should look like and
18 what kind of provisions should be in the IMP. And I
19 know that there was a lot of discussion regarding what
20 we refer to in this department as a compliance standard,
21 and that ended up being the direction that two of the
22 IMPs went. And there were provisions that were put in
23 there that were much different than what we had looked
24 at before other than just straight allocation.

25 Q. Would you be referring to the Upper

1 Republican NRD and the Middle Republican NRD as being
2 the two that took a different approach to the IMP
3 limits?

4 A. Well, yes. Specifically, those two would
5 have different -- at least on face value, different IMPs
6 as they're presented; but all three of the NRDs were
7 involved in the discussions and it was just very late in
8 the process where the Lower Republican NRD decided to go
9 with an allocation.

10 And that's my recollection. I was
11 superficially involved as a deputy director, but not
12 directly involved.

13 Q. So there is a distinction to be drawn among
14 the three NRDs with respect to this standard or separate
15 potential limitation, in addition to allocations; and
16 that is, that the Upper and Middle have allocations plus
17 the standards that have been mentioned in the testimony
18 here and the Lower Republican relies simply on the
19 allocations?

20 A. The Upper Republican and Middle Republican
21 chose to have a 20 percent reduction in pumping volumes
22 as part of their IMP. And I believe that standard was
23 also something that the Lower Republican was considering
24 and decided to go to more of a straight allocation -- a
25 reduction in allocation that would achieve similar

1 results. And so they put an actual allocation as their
2 standard in their IMP.

3 Q. And did the Lower -- to the extent of your
4 knowledge, did the Lower achieve the same limitation as
5 the two other NRDs?

6 A. I would say they're complementary, yes.

7 Q. Complementary in what sense?

8 A. In that the 20 percent reduction I would
9 believe that that would be achieved through the 9-inch
10 allocation from where they were before.

11 Q. What is your involvement and knowledge of
12 any efforts that are currently underway to lease or
13 purchase surface water or retire existing rights?

14 A. I'm not aware of any right now from the
15 State's standpoint on retiring or leasing water rights.
16 There are discussions within the NRDs on purchasing or
17 leasing surface water rights right now. Those
18 discussions are going on.

19 Q. I believe you testified that one of the
20 mechanisms by which the NRDs can raise money to purchase
21 surface rights was declared unconstitutional recently?

22 A. Yes.

23 Q. And there is another method also in place
24 that has not been declared unconstitutional?

25 A. That's correct.

1 Q. Is that other method of funding, is that in
2 dispute with respect to its constitutionality?

3 A. It is being challenged, yes.

4 Q. So the mechanisms to which the NRDs can
5 resort to raise money to purchase or lease surface water
6 have been curtailed, in part, by this recent Supreme
7 Court decision; and whether the other funding source
8 will be curtailed is still open to question?

9 A. I would say that's correct.

10 Q. In your discussions and in discussions that
11 you're aware of that the department has had in playing
12 its role in the adoption of the IMPs, is it fair to say
13 that the IMPs were negotiated between the NRDs and the
14 DNR?

15 A. It's a joint effort, yes, yes; a joint
16 effort, a collaboration between the two entities.

17 Q. Is the department having any discussions at
18 the present time with the Bureau of Reclamation to
19 ensure that the Bureau of Reclamation would agree to
20 cooperate with any surface water leases or purchases
21 that would require its approval?

22 A. No.

23 MR. DRAPER: Mr. Dreher, if I could just
24 have a minute, I may be at the closing point here.

25 ARBITRATOR DREHER: Certainly.

1 MR. DRAPER: Thank you.

2 (Pause in the proceedings.)

3 MR. DRAPER: Just a few additional
4 questions, if I may.

5 THE WITNESS: Sure.

6 MR. DRAPER: And if I may?

7 ARBITRATOR DREHER: Yes.

8 Q. (BY MR. DRAPER) Just to follow up on the
9 questions we were discussing on the negotiation of the
10 IMPs, I understand that those have been successfully
11 negotiated up to this point, and there has been no
12 dispute between the DNR and NRDs that could not be
13 resolved. If there were a dispute, I understand that
14 there is -- is it called an Interrelated Water
15 Management Board?

16 A. Interrelated Water Review Board, I believe.

17 Q. Water Review Board that's provided for by
18 statute?

19 A. Yes.

20 Q. And do you, offhand, know what the size of
21 that board, who constitutes that?

22 A. I do.

23 Q. Could you enlighten us?

24 A. Sure. I believe it's in Statute 46-719 and
25 it's a five-member board. The Governor appoints two

1 people to that board, a list of up to six -- at least
2 six names are submitted by the Natural Resources
3 Commission for the Governor to pick the three other
4 positions on that board.

5 And that's my understanding.

6 Q. So the members are not ex officio; for
7 instance, people in your position are on it just because
8 they're in that position, but they would simply be
9 chosen by the Governor or the Natural Resources
10 Commission?

11 A. That's correct.

12 Q. And how long of a process is it expected to
13 be?

14 A. It's spelled out in statute and there are
15 some specifics that I'm not totally aware of. I would
16 always refer to that statute when the question would
17 come up, but I believe the statute makes it so that it
18 is fairly fast track.

19 I think it has to meet within 45 days and
20 there are some other provisions within that statute to
21 move it right along.

22 Q. Is my understanding generally correct, that
23 while it is a joint effort by the department and the
24 individual NRDs to formulate and adopt the IMPs, it is
25 actually the regulations which are developed in concert

1 with the IMPs and adopted by the NRDs that are the
2 enforcement -- meant to be the enforcement mechanism?

3 A. Certainly -- certainly, there are
4 enforcement mechanisms at the NRD level, but there would
5 also be enforcement mechanisms at the State level for
6 that IMP -- for compliance with that IMP, I would more
7 correctly state.

8 Q. And are you aware of the enforcement
9 mechanisms that are employed by the NRDs?

10 A. Cease and desist orders, is that what
11 you're looking at for?

12 Q. Yes. Do they go out and shut down a well
13 user who has exceeded his allocation, for instance?

14 A. Yes, they can.

15 Q. Are you aware that they have eventually
16 done that?

17 A. I'm aware of some enforcement actions by
18 the NRDs early on in the first IMP process.

19 Q. And so they have not found it necessary to
20 go down and -- go out and actually shut down any well
21 owners under the current IMPs?

22 A. I'm not aware of that, but certainly their
23 actions would be public record.

24 Q. Is there -- is the NRD implementation of
25 the IMPs monitored in any systematic way by the

1 department?

2 A. Certainly, we're involved with the NRDs in
3 that joint partnership from the beginning of the
4 planning process onward, so we would be looking at that.

5 Q. But it remains, in the first instance, the
6 NRDs who are expected to enforce the IMPs and their
7 regulated regulation?

8 A. The department also has requirements in
9 that IMP that the department would be responsible for,
10 for instance, on surface water regulation and things
11 like that. So it's very much a joint plan question and
12 responsibility.

13 Q. What responsibilities, just in general,
14 would the department have with respect to the
15 groundwater aspects of the IMPs?

16 A. Very little actually, except in the overall
17 nature of the compliance aspect of the IMP. And I'm
18 referring to the compliance with the Republican River
19 Compact.

20 Q. We all think of Compact compliance
21 responsibilities to be the responsibility of the
22 respective States. What motivation is there for the
23 NRDs to try to achieve compliance?

24 A. That is a statutory provision that the
25 State has and we're obligated to uphold that.

1 Q. And so here you sit, at the center of the
2 State structures that has this responsibility for
3 Compact compliance and yet, the enforcement with respect
4 to groundwater is in a political -- a set of political
5 subdivisions of the State over which, at least
6 traditionally, you have no direct control.

7 So it appears to me that, at least in the
8 first instance, you need to depend, to a large degree,
9 on the cooperation of the NRDs in achieving the Compact
10 compliance responsibilities that you have?

11 A. That would be true, to a certain extent.
12 That's the responsibility that the legislature gave to
13 the Natural Resource Districts and we would carry out
14 our function as the Department of Natural Resources to
15 make sure that there is Compact compliance.

16 Q. And what is the motivation, again, for the
17 NRDs to cut themselves back and their members back from
18 obviously economically beneficial groundwater use in
19 order to achieve a goal that is not something they're
20 individually required to achieve?

21 A. I would look at it a little differently.

22 I would say they're absolutely also
23 obligated under statute for Compact compliance, because
24 ultimately, they're an entity with the rules and
25 regulations and with statutory authorities and they need

1 to -- they need to comply with those.

2 Q. And if there is a failure of compliance,
3 does that come under the NRDs or is that the problem of
4 the DNR?

5 A. I would say it's both and, ultimately, it
6 would come to the DNR and we would take whatever
7 measures we needed to take to make sure that we were in
8 compliance.

9 Q. Director, let's see if I can address to
10 you, from your position, one of the quandaries that we
11 had with the NRD allocations.

12 We see limitations in some of the NRD IMPs
13 to amounts that are less than the allocations times the
14 certified acres that can have groundwater put on them.

15 How is it resolved -- how is it intended to
16 be resolved when everybody using their allocations,
17 they're over the standards that have been imposed, at
18 least in two of the districts?

19 A. Well, we would certainly look at it and I
20 believe -- not believe. I know that the NRDs look at
21 that standard as a volume standard, so they will be held
22 to that on the average -- that pumping volume standard,
23 regardless of what the allocation is, meaning that an
24 individual can use the allocation, but it probably means
25 that not all individuals will use that allocation or can

1 use that allocation continuously and remain in
2 compliance with the volume pumping average over the long
3 term.

4 Q. Is there a mechanism set up like this
5 Interrelated Water Review Board to deal with the
6 situation -- this kind of situation when it comes up, or
7 is it something that has to be done in an ad hoc way and
8 people are going to have to figure out, do they go
9 complain to the attorney general and the attorney
10 general has to decide whether, under his general powers,
11 he is going to bring some unique kind of action against
12 the NRDs? Or is there a set procedure for how to deal
13 with a failure of that respect?

14 A. Well, a failure could be dealt with just in
15 the way that you mentioned. It could go to the attorney
16 general's office for the State to take action against it
17 or, more importantly, with the forecasting or other
18 things that we have set up and with the dialogue with
19 the NRDs. We're joint partners in this, and that's how
20 we would want to handle this issue going forward.

21 MR. DRAPER: I think that will do it for
22 me, Your Honor.

23 Thank you very much and thank you,
24 Director.

25 ARBITRATOR DREHER: All right.

1 MR. WILMOTH: Your Honor, may we have five
2 minutes before we do redirect?

3 ARBITRATOR DREHER: Sure. Let me ask a
4 question first.

5 MR. WOLMITH: Oh, absolutely.

6 ARBITRATOR DREHER: Back to Kansas Exhibit
7 61, which I believe you were handed, it's the open
8 letter dated January 4, 2007.

9 On the last page of that letter it talks
10 about the Governor -- it refers to the Governor making a
11 statement that funding for water management programs
12 will be critical, assured the NRDs that the need for
13 such funding would be reflected in his budget proposal
14 in January, and that he would propose establishing a
15 water cash fund.

16 Did that fund get established?

17 THE WITNESS: Yes, it did. That was the
18 funds that I referred to earlier as the Water Resources
19 Cash Fund. It was established under the LB 701
20 authorities that we spoke of other programs.

21 ARBITRATOR DREHER: And how much money is
22 in that fund, do you know?

23 THE WITNESS: That fund is appropriated
24 \$2.7 million per year.

25 ARBITRATOR DREHER: And that fund can be

1 used to do what?

2 THE WITNESS: That fund can be used to do
3 anything that the Director of the Department of Natural
4 Resources needs to be able to do.

5 The first authority is to the director and
6 then if the director doesn't allocate moneys out of that
7 fund, the NRDs have an ability to tap in that fund also
8 and get moneys out of that fund.

9 ARBITRATOR DREHER: If you will bear with
10 me a second, I have to find something in this myriad of
11 paper. Perhaps Mr. Draper can help me.

12 What I'm looking for is the exhibit that
13 you submitted -- wait a second, maybe this is it. Well,
14 I'm not finding it.

15 There was a memorandum that you submitted
16 as an exhibit that showed the amount of moneys that were
17 expended to lease water in 2006.

18 MR. DRAPER: Yes. That has been identified
19 as Kansas Exhibit 44.

20 ARBITRATOR DREHER: Well, that's why I
21 can't find it. I don't have it. Was that admitted?

22 MR. DRAPER: Yes.

23 ARBITRATOR DREHER: I don't have it. Does
24 Nebraska have a copy of this?

25 MR. WILMOTH: We do, but I have to confess

1 that we have written on it.

2 MR. AMPE: My copy also has notes on it.

3 ARBITRATOR DREHER: You have written on
4 yours now?

5 MR. WILMOTH: You can't give a lawyer this
6 much paper and not expect him to scribble on it.

7 ARBITRATOR DREHER: And there is no extra
8 copy around that hasn't been written on, I guess.

9 MR. DRAPER: Your set doesn't have one?

10 ARBITRATOR DREHER: It does not have one.
11 I had one at one time, and I don't know what happened to
12 it, but it is not in the book, and I believe that either
13 the reporter, or someone, had the book and rearranged
14 some things and so we need to find it.

15 MR. DRAPER: At least we have one. They
16 have two, and it is just us and the witness that don't
17 have one.

18 ARBITRATOR DREHER: Director Dunnigan, I
19 realize this is a disadvantage for you not having it,
20 and after I read this, I will be happy to let you look
21 at it before you answer the question, if you feel you
22 need to; but this is a memorandum from the previous
23 Director Ann Bleed to Jeanne Glenn, who I don't have a
24 clue who that is; but it includes a table showing the
25 costs of the water leases that the state incurred in

1 2006. And it lists four -- no, excuse me. It lists
2 three leases: One with a Frenchman Valley Canal or
3 Irrigation District -- I'm not sure I remember what they
4 are -- at a cost of \$400,000 for 6400 acre-feet; one
5 with Riverside at a cost of \$100,000 for 2000 acre-feet;
6 and then the last one for \$3 million for 15,118
7 acre-feet from the Bostwick -- I presume it's the
8 Nebraska Bostwick Irrigation District.

9 Do you know where those funds came from to
10 do that?

11 THE WITNESS: I do.

12 ARBITRATOR DREHER: Okay.

13 THE WITNESS: And I won't look at the
14 sheet, but those were basically out of what we would
15 call our Program 310 Funds, which were program funds
16 that came to us under the -- I believe under the LB 962
17 authorities and were continued for a few years to help
18 the department implement its responsibilities under LB
19 962, which was passed in 2004.

20 ARBITRATOR DREHER: So do you have ongoing
21 funding for this other type of fund?

22 THE WITNESS: Those funds actually stopped.
23 We do have a Water Resources Cash Fund, which I
24 mentioned, that goes on. We also have other funding
25 sources within the department, but those Program 310

1 Funds that I refer to are not ongoing.

2 ARBITRATOR DREHER: And you said that this
3 Water Resources Cash Fund is appropriated 2.7 million
4 annually?

5 THE WITNESS: Yes.

6 ARBITRATOR DREHER: Do you happen to know
7 about what the balance is in that fund currently?

8 THE WITNESS: I do not know what the
9 balance is in that fund right now. I don't. I know
10 that we spent 1.6 million of it in 2008 on water leases.
11 So it would be somewhere under 1.1 million.

12 ARBITRATOR DREHER: So 2008 was the first
13 year that you had an appropriation in that fund, then?

14 THE WITNESS: No. 2007 was.

15 ARBITRATOR DREHER: So how many
16 appropriations have you had for it? One or two?

17 THE WITNESS: Two. It's an ongoing
18 appropriation in a biannual budget, so we get 2.7 per
19 year in each year in the biannual.

20 ARBITRATOR DREHER: So that would be a
21 total of 5.4 million you've spent --

22 THE WITNESS: Well, in 2007, we would have
23 spent all of it, plus a deficit appropriation on water
24 leasing, and then we would have spent 1.6 in 2008 on
25 water leasing.

1 ARBITRATOR DREHER: All right. Thank you.

2 We'll take a brief recess then.

3 MR. WILMOTH: Thank you. I don't think
4 we'll take more than about five minutes.

5 (Break was taken from 4:30 to 4:44.)

6 ARBITRATOR DREHER: Mr. Wilmoth, you may
7 proceed with redirect.

8 MR. WOLMITH: Thank you. We'll try to take
9 it home here in just a couple minutes. Before I get
10 started, though, I did want to respond to a request that
11 you had regarding groundwater transfer rules.

12 ARBITRATOR DREHER: Okay.

13 MR. WOLMITH: I would refer your
14 attention -- I'm sorry, I haven't had time to find all
15 of them, but if you would look, for example, in the
16 Upper Republican IMP and rules, which is -- I think it's
17 Nebraska Exhibit 15. If you look at page 14 of that
18 document, which is actually Rule 11, there is a Rule 11
19 entitled "Transfers."

20 ARBITRATOR DREHER: Okay.

21 MR. WOLMITH: And there should be a
22 comparable rule for those, I believe -- I stand
23 corrected. It's Nebraska Exhibit 16.

24 REDIRECT EXAMINATION

25 BY MR. WILMOTH:

1 Q. Mr. Director, just a couple very brief
2 questions, and then we might hit that happy hour yet.

3 I would like to ask you to clarify whether
4 there are any other additional funding sources that
5 might be utilized or relied upon either by the State of
6 Nebraska or the Natural Resource Districts to assist
7 with Compact compliance.

8 A. There are other funding sources within the
9 agency. I think I mentioned a couple of them in my
10 deposition.

11 One of them that I would point out would be
12 the Natural Resources Development Fund, which is a fund
13 mostly used for projects which could be used by NRDs,
14 and the fact is, is used by NRDs for projects that could
15 be projects such as flood control or augmentation or
16 things like that. And that's funded, I believe, at
17 about an annual appropriation \$3.3 million per year.

18 There is another fund within our agency,
19 the IWMPP, Interrelated Water Management Program Plan
20 Fund, I think is what it is. And it's a fund that NRDs
21 can utilize for a number of different things, and it's
22 funded at a level of about \$2.4 million a year.

23 Q. And could you elaborate just very briefly
24 on the deficit appropriation that was made I believe you
25 said, in which year?

1 A. There was a deficit appropriation in 2007.
2 That was a \$3 million deficit appropriation that the
3 legislature appropriated to the department.

4 Q. Thank you very much.

5 And there was some discussion about LB 701
6 and various authorities that the NRDs possess.

7 Do you recall that discussion?

8 A. Yes.

9 Q. And do the NRDs possess any other general
10 taxing authority?

11 A. Yes, they do. They have a property tax.

12 Q. And that's not subject to this 701
13 litigation, is it?

14 A. No, it's not.

15 Q. In fact, you pay that property tax, don't
16 you?

17 A. I think everybody in Nebraska pays it.

18 Q. Mr. Draper asked you a series of questions
19 about hypothetically how the State might go about
20 enforcing a noncompliant -- taking an enforcement
21 action, excuse me, against a noncompliant NRD.

22 Has that ever happened?

23 A. No, it hasn't. There has never been a need
24 for it to occur.

25 Q. And finally, there was a line of

1 questioning from Mr. Draper regarding the motivation of
2 NRDs to comply with the law.

3 In your experience, is there a
4 motivation -- there is an obvious motivation to comply
5 with the law, but what else was driving that?

6 A. Well, I guess one thing that would
7 certainly drive it is the NRDs are political units of
8 government in the State of Nebraska; and as such, they
9 do have local control, and they can exercise some
10 autonomy in that local control. And, ultimately, if we
11 can't reach Compact compliance as a State, those
12 authorities could be taken away from them.

13 Q. And the State would step in and do what is
14 necessary?

15 A. The State will do what is necessary to
16 achieve Compact compliance.

17 MR. WOLMITH: Thank you very much, Mr.
18 Director, I appreciate your time.

19 And we have nothing further.

20 ARBITRATOR DREHER: Let me ask another
21 question, then.

22 The -- when you were testifying about the
23 other sources of funding, you talked about some taxing
24 authority. Is that the taxing authority of the NRDs?

25 THE WITNESS: The NRDs do have occupation

1 tax, is one of the authorities that we discussed in LB
2 701 that the NRDs have. And it's currently being
3 challenged, but they do have a mill levy and do collect
4 a property tax right now.

5 ARBITRATOR DREHER: But in looking at
6 Kansas Exhibit 61, which is that open letter, the
7 statement is made that taxing authority -- and I'm
8 quoting: Taxing authority for the Republican Basin NRDs
9 is limited, and one penny levied across the basin does
10 not raise even a half-million dollars per year.

11 THE WITNESS: That was raised under 701 and
12 that was one of the -- that was the authority that was
13 ruled unconstitutional when they -- my understanding,
14 they did allow an increase in property tax, but an NRD
15 can raise its mill levy up to a certain amount.

16 ARBITRATOR DREHER: So there is not this
17 cap of a half-a-million dollars? It's higher than that
18 now?

19 THE WITNESS: I couldn't speak to that, I'm
20 sorry.

21 ARBITRATOR DREHER: What funding mechanism
22 was ruled unconstitutional? I'm not following you guys.

23 THE WITNESS: It was a specific property
24 tax piece of the legislature in LB 701. There were two
25 authorities -- an occupation tax and a property tax --

1 and the property tax portion was ruled unconstitutional.

2 ARBITRATOR DREHER: It wasn't the property
3 tax authority of the NRD?

4 THE WITNESS: Absolutely not. They have
5 separate authorities for property tax.

6 ARBITRATOR DREHER: And they're capped.
7 You don't know what it is, but it could be higher than
8 the half-million dollars?

9 THE WITNESS: I don't know what it is, and
10 they vary, yes.

11 ARBITRATOR DREHER: Mr. Wilmoth.

12 MR. WOLMITH: Yes. Absolutely, we can get
13 that information. I would just -- we will get you that
14 information. I'm sorry, I didn't hear the request, or
15 the issue, but we will get you the information on the
16 property tax and related taxing powers of the NRDs.
17 We'll get you the statutes that we're aware of.

18 Just for clarity sake, though, I think if I
19 may ask just one more question, it might help.

20 ARBITRATOR DREHER: Yes.

21 Q (BY MR. WILMOTH) Mr. Director, LB 701 was
22 not the initial taxing authority of these districts; it
23 was an additional taxing authority; is that your
24 understanding?

25 A. That's exactly right, yes.

1 Q. So it was a supplemental source of
2 potential revenue, not the sole source?

3 A. That's exactly right.

4 MR. WILMOTH: Thank you very much.

5 ARBITRATOR DREHER: All right.

6 By prior agreement, we will recess until
7 Monday morning at 9:00, at which time the State of
8 Kansas will present their rebuttal case.

9 MR. DRAPER: Very good. And I wish
10 everyone a very good weekend.

11 (WHEREUPON, the hearing recessed at 4:50
12 p.m. to be continued Monday, March 16, 2009, at 9:00
13 a.m.)

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I, Dyann Labo, Registered Professional Reporter, do hereby certify that the above-named proceedings were reported by me in stenotype; that the within transcript is true and correct, to the best of my knowledge and belief.

Patterson Reporting & Video
Dyann Labo
Registered Professional Reporter.