

No. 137, Original

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In The  
Supreme Court of the United States

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STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING  
and

STATE OF NORTH DAKOTA

Defendants.

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Before the Honorable Barton H. Thompson, Jr.  
Special Master

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**MONTANA'S OBJECTIONS TO WYOMING'S EXPERT DESIGNATION  
AND EXPEDITED MOTION FOR SUPPLEMENTAL DEPOSITIONS**

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April 12, 2013

**MONTANA'S OBJECTIONS TO WYOMING'S EXPERT DESIGNATION  
AND EXPEDITED MOTION FOR SUPPLEMENTAL DEPOSITIONS**

COMES NOW, the State of Montana, pursuant to Sections VIII.C.3.(b) and VIII.C.2.(j) of Case Management Plan No. 1 ("CMP No. 1"), as modified, and objects to the State of Wyoming's Expert Designation ("Designation") on the following grounds: (1) the description provided by Wyoming for its thirteen non-retained employee expert witnesses does not satisfy the requirements of Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure because it fails to articulate the substance of the opinions of the witnesses and fails to identify the facts upon which those opinions are based; (2) Wyoming's non-retained experts should not be permitted to offer undisclosed expert opinion testimony based on matters addressed in their previous, fact-based depositions; (3) Wyoming's expert witnesses may not offer commentary on the trial testimony of Montana's witnesses unless it is connected to opinions disclosed in Wyoming's Designation; and (4) Wyoming's expert witnesses may not offer sur-rebuttal testimony as Wyoming suggests. As more fully described below, based on these objections, Montana requests an order striking the designation of the non-retained experts, or alternatively requiring Wyoming to amend its Designation to comply with Rule 26(a)(2)(C), and an order limiting Wyoming's expert testimony to the substantive opinions disclosed in its Designation. In the event that Wyoming is permitted to amend its Designation, Montana further moves to be permitted to take supplemental depositions of the non-retained expert witnesses on their newly disclosed expert opinions.

**BACKGROUND**

On April 2, 2013, Wyoming filed its expert designation, as required under Section VIII.C.3.(b) of CMP No. 1. The Designation identifies a total of sixteen expert

witnesses. The first three witnesses, Bern Hinckley, Doyl Fritz, and Willem Schreüder, are the experts Wyoming has retained for this litigation (“Retained Experts”). These Retained Experts have all submitted expert reports in this proceeding in accordance with the requirements of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.<sup>1</sup>

In addition to the retained experts, the Designation names an additional thirteen individuals<sup>2</sup> that “may” provide expert testimony for Wyoming. These witnesses are all current or former employees of the State of Wyoming (the thirteen non-retained experts will collectively be referred to as the “Employee Witnesses”). The Designation follows a set pattern for each of these thirteen Employee Witnesses, a representative example of which is the information provided for Pat Boyd on page 12 of the Designation:

**7. Pat Boyd  
Wyoming State Engineer’s Office  
1833 South Sheridan Avenue  
Sheridan, WY 82801  
(307) 674-7012**

Mr. Boyd is a hydrographer-commissioner in Wyoming’s Water Division II, which includes all of Wyoming’s portion of the Tongue River basin. Mr. Boyd may testify to information or actions he has knowledge of, and opinions he has formed during his time working for the Wyoming State Engineer’s Office related to regulation and condition of specific rivers and streams in the Tongue river basin for surface water, reservoirs, and groundwater. Information regarding regulation may include, but not be limited to, methods and accuracy of stream flow measurement, actions taken to regulate, and conditions that trigger regulation. Mr. Boyd may also testify and provide opinions regarding return flows, irrigated acreage, augmentation of water supplies, reservoir usage, abandonment, consumptive use, irrigation patters and methods, changes to water rights, and any other opinions formed through his training and work experience for the Wyoming State Engineer’s Office. Mr. Boyd may testify at trial about all maters reasonably covered in his deposition. It is expected that

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<sup>1</sup> Montana reserves the right to challenge the content of the expert reports submitted by the Retained Experts, and the right to challenge the expert opinions and qualifications of the Retained Experts as permitted by the rules.

<sup>2</sup> Pat Tyrrell, Jeff Fassett, Sue Lowry, Pat Boyd, Mike Whitaker, David Schroeder, Dave Pelloux, Bill Knapp, Carmine LoGuidice, Kim French, Lisa Lindemann, John Barnes, and Alan Cunningham.

Mr. Boyd will review the trial testimony of Plaintiff's witnesses, and he may be asked to comment thereon for the Special Master. To the extent rebuttal testimony may be warranted and permissible on subject matter within Mr. Boyd's expertise, he may be called upon to give rebuttal testimony.

This same pattern is followed for all thirteen of the Employee Witnesses, so that for each the Designation states: (1) the person's address, phone number, and current or former position with the State of Wyoming; (2) a general statement that the person may testify about any information or actions the person had knowledge of, or opinions the person formed in the course of his or her employment; (3) the broad subject areas on which the person "may" provide testimony or opinions; (4) that the person "may testify at trial about all matters reasonably covered" in that person's deposition; (5) that the person will review the trial testimony of Montana's witnesses and "may be asked to comment thereon for the Special Master;" and (6) that the person may be called upon to give rebuttal testimony "to the extent [such] testimony may be warranted and permissible on subject matter within [the person's] expertise." Nowhere in the Designation does Wyoming provide a summary of the facts and opinions to be offered by the Employee Witnesses as required by Rule 26(a)(2)(C), Fed. R. Civ. P.

All but two of the non-retained experts named in the Designation have been previously deposed as to factual issues by Montana.<sup>3</sup> However, those depositions did not cover expert opinions, and indeed, Montana was expressly prohibited from inquiring into such matters under Section VIII.C.3.(b) of CMP No. 1 ("The State of Montana shall not seek the content of Wyoming's disclosure through prior discovery").

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<sup>3</sup> David Schroeder and Dave Pelloux have not been deposed.

## ARGUMENT

### **I. Objection No. 1: Wyoming's Designation Fails to Identify the Substance of the Expert Opinions and Testimony of the Employee Witnesses**

Federal Rule of Civil Procedure 26 requires parties to “disclose to the other parties the identity of any witness [they] may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” Fed. R. Civ. P. 26(a)(2)(A). The federal rules set up two classes of experts: those retained or specially employed to give expert testimony in a case, and those who are not retained or specially employed, but who nonetheless may provide expert testimony. An expert that falls within the first category is required to prepare a written report pursuant to Fed. R. Civ. P. 26(a)(2)(B). With respect to the second category of experts, the rule requires that a party provide disclosures stating both the subject matter on which the non-retained expert is expected to present evidence and a summary of the facts and opinions as to which the non-retained expert is expected to testify. Fed. R. Civ. P. 26(a)(2)(C)(i)-(ii).

While the disclosures under Rule 26(a)(2)(C) are designed to be “considerably less extensive” than those required in expert reports under Rule 26(a)(2)(B), they nonetheless serve the same purpose as expert reports – namely, to disclose the substance of any expert opinions, and thereby eliminate surprise. *See Brown v. Providence Medical Center*, 2011 WL 4498824 (D. Neb. 2011) (stating that both the Rule 26(a)(2)(B) written report and the Rule 26(a)(2)(C) disclosure “share the goal of increasing efficiency and reducing unfair surprise”). Thus, in addition to the general subject areas of the testimony, disclosures of non-retained experts must state with particularity the opinions to which the expert will testify and the specific facts upon which such opinions are based. Fed. R. Civ. P. 26(a)(2)(C)(ii); *see also Meredith v. Int'l Marine Underwriters*, 2012 WL

3025139, \*8 (D.M.D. July 20, 2012) (rejecting “conclusory and vague generalizations” in plaintiff’s expert disclosure, and stating that the court understands Rule 26(a)(2)(C)’s “reference to ‘facts’ to include those facts upon which the witness’ opinions are based, and ‘opinions’ to include a precise description of the opinion, rather than vague generalizations”); *Ingram v. Novartis Pharmaceuticals Corp.*, 282 F.R.D. 563, 565 (W.D. Okla. 2012) (stating that “mere reference to unspecified testimony is insufficient” under Rule 26(a)(2)(C)).

Wyoming’s disclosures of its non-retained experts do not meet the standard set forth in Rule 26(a)(2)(C). As can be seen from the representative example of Pat Boyd quoted above, Wyoming’s designation of the thirteen Employee Witnesses provides only general statements of the subject areas upon which those witnesses are expected to testify. Completely absent is any description of the particular opinions that will be offered or the facts upon which those opinions are based. Rather than comply with Rule 26, Wyoming’s general disclosures only “advise[] the reader that the witness[es] will have opinions in certain areas, but fail[] to state *what the opinions are*, and the factual basis for those opinions.” *Cooke v. Town of Colorado City*, 2013 WL 551508, \*4 (D. Ariz. Feb. 13, 2013) (emphasis in original). For example, following Wyoming’s designation, Montana is aware only that Mr. Boyd “may . . . provide opinions regarding return flows, irrigated acreage, augmentation of water supplies, reservoir usage, abandonment, consumptive use, irrigation patterns and methods, changes to water rights, and any other opinions formed through his training and work experience.” Designation at 12. What Montana does not know, is what Mr. Boyd’s expert opinion on return flows, or any other topic, is.

As one district court that has recently applied Rule 26(a)(2)(C) explained:

“An opposing party should be able (and be entitled) to read an expert disclosure, determine what, if any, adverse opinions are being proffered, and make an informed decision as to whether it is necessary to take a deposition and whether a responding expert is needed.” *Id.* at \*5.

Wyoming’s disclosures for its Employee Witnesses do not enable any such informed analysis by Montana, thereby running afoul of both the letter and the spirit of Rule 26(a)(2)(C). *See, e.g., Davis v. GEO Group*, 2012 WL 882405 (D. Colo. Mar. 15, 2012) (finding disclosure that stated that plaintiff’s expert witness was “expected to offer testimony about his evaluation of Plaintiff and Plaintiff’s emotional distress related to his work for and discharge from employment at [defendant company]” was insufficient under Rule 26(a)(2)(C) because it “state[d] nothing about the facts and opinions to which” the witness would testify”); *Continental Gas Co. v. F-Star Property Management, Inc.*, 2011 WL 2887457, \*7 (W.D. Tex. July 15, 2011) (disclosures of non-retained experts that contained subject matter that experts would testify to but lacked summary of the facts and opinions of the experts’ expected testimony found “deficient and in violation of [Rule 26(a)(2)(C)(ii)]”).

For example, the United States District Court for the Northern District of California recently addressed the adequacy of non-retained expert witness disclosures pursuant to Rule 26(a)(2)(C), and explained:

Without information as to the opinions Plaintiffs’ non-retained expert witnesses are expected to testify to and the main facts on which these opinions are based, Defendant’s ability to meaningfully depose or cross-examine these witnesses is undermined. Further, absent disclosure of the information required under Rule 26(a)(2)(C), Defendant cannot make an informed decision on which, if any, of the twelve treating physicians it should depose. Indeed, as Defendant points out, given the inadequate disclosure, Defendant is relegated to deposing all thirteen non-retained experts in order to determine what these experts will testify to at trial.

*Pineda v. City and County of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. 2012). The Court concluded that the failure to comply with Rule 26(a)(2)(C) was prejudicial and excluded ten of the plaintiff's thirteen non-retained experts from testifying at trial. *Id.*

CMP No. 1 incorporates Federal Rule of Civil Procedure 37(c)(1). *See* CMP No. 1, § VII.B. Rule 37(c)(1) establishes the sanction of exclusion for failure to comply with the Rule 26(a) disclosure requirements unless the offending party provides substantial justification for its improper disclosure or demonstrates that the improper disclosure was harmless. This mandate of Rule 37 "is designed to provide strong inducement of disclosure of Rule 26(a) material." *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995) (internal quotation and citation omitted).

At the February 25, 2013, Status Conference the Special Master and parties acknowledged that the case management deadlines are extremely tight. Indeed, Wyoming assured the Special Master that it would make every effort to ensure its expert witness disclosures complied with the CMP and provided Montana with the necessary information to prepare its rebuttal reports and this case for trial:

MR. MICHAEL: Your Honor, this is Pete Michael. I will add one thing. I think we will absolutely make every effort we can to provide instantaneously with our designations all of our backup that we have. I mean, I think most of our model runs and that sort of thing are being done based on what Montana did. So I don't think there's going to be all that much new there. But we will make every effort to do that because we believe in the schedule, and we're going to work to -- so that Montana has everything they need from April 2nd to -- for Mr. Book to work with.

*See* Feb 25, 2013 Status Conference Transcript, Pg. 28, attached hereto as Exhibit A.

Well aware of the tight timelines and limited availability of Montana's expert to prepare a rebuttal report, Wyoming made the tactical decision to provide insufficient non-retained



expert disclosures that do not comply with the most basic requirements of Rule 26(a)(2)(C). Moreover, when Montana attempted to resolve the issue regarding the deficiency in the non-retained expert disclosures without involving the Special Master, Wyoming flatly refused to cooperate. *See* email from J. Wechsler to J. Kaste and C. Brown (dated April 10, 2013), attached hereto as Exhibit B; responsive email from J. Kaste to J. Wechsler (dated April 10, 2013), attached hereto as Exhibit C.

Wyoming's improper disclosure has prejudiced Montana and impedes its ability to evaluate Wyoming's expert testimony, prepare rebuttal testimony, determine which Employee Witnesses to depose, and prepare its case for trial. As a practical matter, there may not be sufficient time before Montana's rebuttal disclosures are due. Accordingly, the Special Master should strike Wyoming's designation of the thirteen Employee Witnesses.

At a minimum, Wyoming should be required to immediately amend its Designation to include a summary of the substance of each opinion that will be expressed by each of the Employee Witnesses, as well as the facts upon which those opinions are based.

## **II. Objection No. 2: Previous Depositions of Wyoming's Non-Retained Experts Were Limited to Fact-Based Matters**

In designating the Employee Witnesses as experts, Wyoming states that those experts "may testify at trial about all matters reasonably covered in [their] deposition[s]." There are two problems with this statement. First, Wyoming generally refers to the entire deposition, without specifying any portions which constitute expert opinion. Second, and more importantly, the individuals named in the Designation whose depositions have already been taken were only deposed in their capacity as fact witnesses. *See* Fed. R. Civ.

P. 26(a)(2)(C), advisory committee's note 2010 Amendment (stating that "[a] witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and provide expert testimony under Evidence Rule 702, 703, or 705"). Those depositions did not cover expert opinions, and at no time were they asked about their expert opinions. Indeed, Montana was expressly prohibited from inquiring into such matters under Section VIII.C.3.(b) of CMP No. 1, which provides that "Montana shall not seek the content of Wyoming's expert disclosures through prior discovery." For the same reasons outlined above with respect to Objection No. 1, Wyoming's non-retained experts should not be permitted to offer undisclosed expert opinion testimony based on matters addressed in their previous, fact-based depositions.

**III. Objection No. 3: Expert Testimony of Wyoming's Witnesses is Limited to Opinions Disclosed in the Designation**

Wyoming's Designation indicates that all of its expert witnesses, including the Retained Experts, will review the trial testimony of Montana's witnesses and may offer commentary on that testimony for the Special Master. However, for the same reasons outlined with respect to the previous objections, such testimony is inconsistent with the purpose of expert disclosures under Rule 26. Such disclosures are meant to prevent unfair surprise by informing litigants of substance of the expert opinions that will be proffered at trial. Witnesses are not permitted to wait to hear the trial testimony of the other side and then testify as to new opinions based on such testimony. Rather, the testimony of Wyoming's expert witnesses must be limited to the opinions previously disclosed. For example, in *Kansas v. Nebraska*, No. 126 Orig., Special Master Kayatta was careful to limit expert testimony to matters previously disclosed in expert reports. At

trial, he struck any pre-filed expert testimony that was not based on a previous expert disclosure. *See, e.g.*, Trial Transcript excerpts attached hereto as Exhibits D and E.

As explained above, Wyoming's Designation fails to disclose any specific opinions that will be offered by its non-retained experts. To the extent that Wyoming's expert witnesses attempt to offer expert testimony on matters that are unrelated to their previously disclosed opinions, such testimony should not be allowed.

**IV. Objection No. 4: Wyoming Is Not Permitted to Provide Sur-Rebuttal Testimony, or Offer Opinion Testimony Deemed "Rebuttal Testimony" that Is Unconnected to Previously Disclosed Opinions**

The Designation further indicates that all of Wyoming's experts, including the Retained Experts, may be called upon to give "rebuttal testimony" within their expertise. This statement appears to be an attempt to provide testimony in response to Montana's rebuttal expert testimony and rebuttal expert reports, and as such is properly deemed "sur-rebuttal" testimony. Such testimony is not permissible under the Federal Rules of Civil Procedure or the procedures currently governing this case, as outlined in CMP No. 1, Section VIII.C.3, and would only serve to set up a never-ending cycle of rebuttal. Montana has the burden of proof in this case, and is entitled to rebut Wyoming's responsive expert testimony; any further commentary by Wyoming's witnesses would be inappropriate. Moreover, as explained with respect to the previous objections, Wyoming's experts are limited in their testimony to matters connected to the opinions that were previously disclosed.

**V. Expedited Motion for Supplemental Depositions**

In the event the Special Master does not exclude the Employee Witnesses from offering expert testimony, Montana requests that Wyoming be ordered to amend its

Designation to comply with Rule 26(a)(2)(C), and that Montana be permitted to conduct supplemental depositions of the previously-deposed Employee Witnesses listed in the Designation no later than the week beginning May 13, 2013.

Section VIII.C.2.(j) of CMP No. 1 allows for supplemental depositions, upon good cause shown, “[t]o the extent a deponent . . . forms new opinions.” The expert opinions of previously-deposed fact witnesses disclosed as non-retained experts by Wyoming constitute “new opinions” subject to supplemental depositions. As explained below, good cause exists to allow supplemental depositions of these individuals because Montana was not aware at the previous depositions that those individuals would be designated as experts, and, even if it were, it was precluded from inquiring into matters of expert opinion under Section VIII.C.3.(b) of CMP No. 1. This motion is timely under Section VIII.C.2.(j), being made within thirty days of Montana learning that those individuals are being designated as experts to provide expert opinion testimony in this proceeding.

As discussed above, eleven of the thirteen Employee Witnesses listed in the Designation were previously deposed by Montana as fact witnesses. At that time, Montana was not aware that those individuals would be designated as experts, and, even if it were, Montana was precluded from inquiring into matters of expert opinion by Section VIII.C.3.(b) CMP No. 1. Montana has contacted Wyoming to set up depositions of those individuals to address their expert opinion testimony, but Wyoming has rejected that request, indicating that it believes Montana should have anticipated that those individuals would be designated as experts and should have violated CMP No. 1 by seeking information regarding their expert opinions. See Exhibit B, email from J.

Wechsler to J. Kaste and C. Brown (dated April 10, 2013); Exhibit C responsive email from J. Kaste to J. Wechsler (dated April 10, 2013). Wyoming's position is contradicted by the Federal Rules and case law applying those Rules, and Montana is entitled to conduct supplemental depositions of the previously deposed individuals who have now been designated as experts.

In addition to the disclosure of fact witnesses under Rule 26(a)(1)(A), Rule 26(a)(2)(A) requires disclosure of all witnesses who will give testimony under the Federal Rules of Evidence. In distinguishing between retained experts (Rule 26(a)(2)(B)) and non-retained experts (Rule 26(a)(2)(C)), the Rules recognize that a non-retained expert may testify as both a fact witness and an expert witness. *See* Fed. R. Civ. P. 26(a)(2)(C), Advisory Committee's Note 2010 Amendment (stating that "[a] witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and provide expert testimony under Evidence Rule 702, 703, or 705"). However, if a party seeks to have a person that was previously identified as a fact witness also offer expert testimony, that person must be separately designated as an expert, including the information required under Rule 26(a)(2)(C). *Musser v. Gentiva Health Svcs.*, 356 F.3d 751, 757 (7th Cir. 2004) ("[D]isclosing a person as a witness and disclosing a person as an expert witness are two distinct acts." (internal citations and quoted authority omitted)). If the person is not properly designated as an expert, he or she will only be permitted to testify as a fact witness. *See id.*

The Seventh Circuit addressed such a scenario in *Musser*, and upheld the district court's exclusion of expert testimony by witnesses that had been disclosed as fact witnesses under Rule 26(a)(1), but had not been properly disclosed as experts under Rule

26(a)(2). *Id.* The plaintiffs in *Musser* also made a similar argument to that advanced by Wyoming in its April 10, 2013 email, claiming that they had complied with Rule 26(a)(2)(A) because the defendant “was in fact made aware of the identity and records of all of [the plaintiffs’] witnesses, and . . . had an opportunity to depose [those] witnesses as to their opinions.” *Id.* The Seventh Circuit disagreed, reasoning as follows:

Formal disclosure of experts is not pointless. Knowing the identity of the opponent’s expert witnesses allows a party to properly prepare for trial. [The defendant] should not be made to assume that each witness disclosed by [the plaintiffs] could be an expert witness at trial. The failure to disclose experts prejudiced [the defendant] because there are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony on grounds set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. *Id.* at 757-58 (internal citations omitted).

As indicated by the foregoing excerpt, an opposing party is not required, during the deposition of a fact witness, to anticipate that the witness may also be later designated as an expert and deduce what the subjects or substance of the witness’s expert testimony may be. Thus, if a person who was previously deposed as a fact witness is later designated as an expert, the opposing party is entitled to an additional deposition of that person to explore the substance of his or her expert opinions. *See Indemnity Ins. Co. of N. Am. v. Am. Eurocopter, LLC*, 227 F.R.D. 421, 425 (M.D.N.C. 2005) (“once a party identifies a potential witness as an expert under Rule 26(a)(2)(A), that witness is subject to being deposed as an expert,” and this is so even where the witness has previously been deposed as a fact witness).

For example, in *Compagnie Des Bauxites De Guinee v. Three Rivers Insurance Co.*, 2007 WL 403915, \*3 (W.D. Penn. 2007), the defendants identified two witnesses as

fact witnesses, produced them for depositions, and then subsequently informed the plaintiff that they intended to use them as expert witnesses at trial. Thereafter, the defendants refused to produce those same witnesses for an expert deposition and did not produce written expert reports. The court upheld the plaintiff's objections to these actions, and held that "once defendants designated [previously identified fact witnesses] as experts under Rule 26(a)(2)(A), they [were] subject to being deposed as experts notwithstanding their prior depositions as fact witnesses." *Id.*; see also *Paper Mill Holding Co., Ltd. V. D.R. Horton, Inc.*, 2009 WL 189936 (E.D. Penn.) (party entitled to redepose a previously disclosed fact witness because he was identified as an expert). The same reasoning applies in this case.

Finally, in rejecting Montana's request to take supplemental depositions of the individuals identified as experts, Wyoming ignores not only the requirements of Rule 26(a)(2), but the provisions of CMP No. 1. Section VIII.C.3.(b) of CMP No. 1 governs Wyoming's Rule 26(a)(2) expert disclosures. That section expressly precludes Montana from seeking "the content of Wyoming's disclosure through prior discovery." The prior depositions of Pat Tyrrell, Jeff Fassett, Sue Lowry, Pat Boyd, Mike Whitaker, David Schroeder, Dave Pelloux, Bill Knapp, Carmine LoGuidice, Kim French, Lisa Lindemann, John Barnes, and Alan Cunningham constitute such "prior discovery." See CMP No. 1, Sec. VIII.C.2 (provisions for "Deposition Discovery" are listed under general "Discovery" section). Thus, Montana was prohibited from inquiring into matters of expert opinion testimony during those depositions.

Accordingly, Montana should be allowed a supplemental deposition for each of the Employee Witnesses. Additionally, the Special Master warned Wyoming that the

failure to provide adequate disclosures by the April 2, 2013, deadline could provide a basis for an extension of time for Montana to provide rebuttal disclosures. *See* Exhibit A, Feb 25, 2013 Status Conference Transcript, Pgs. 28-29. Any prejudice caused by Wyoming's inadequate disclosure should be borne by Wyoming, not Montana. Accordingly, Montana should be granted an extension of time to file its rebuttal expert reports equal to the number of days between April 2, 2013 and the actual date Wyoming provides adequate non-retained expert disclosures.

### **CONCLUSION**

Wyoming's Disclosure reveals a strategy of trial by surprise contrary to the spirit of the discovery set forth in the Federal Rules of Civil Procedure and the specific requirements of Rule Rule 26(a)(2)(C) and the Special Master's CMP No. 1. Such dilatory trial strategy is not permitted by the Federal Rules and should not be permitted by the Special Master. For the reasons set forth above, Montana requests the following relief:

- a) With respect to Objection No. 1: An order either striking the Employee Witnesses listed in the Designation or requiring Wyoming to amend its Designation within three days to include a summary of the expert opinions and testimony for each of the Employee Witnesses, and the facts on which they base their opinions;
- b) With respect to Objection No. 2: An order precluding Wyoming from designating the entire transcripts for each of the fact-based depositions of the Employee Witnesses as expert testimony;



- c) With respect to Objection No. 3: An order clarifying that Wyoming's expert witnesses may only offer testimony that is based on or related to the opinions in the Designation;
- d) With respect to Objection No. 4: An order clarifying that sur-rebuttal testimony is not permitted under the procedures governing this case, as set forth in CMP No. 1;
- e) With respect to the Expedited Motion for Supplemental Depositions: Montana requests an order requiring that Wyoming make Pat Tyrrell, Jeff Fassett, Sue Lowry, Pat Boyd, Mike Whitaker, Bill Knapp, Carmine LoGuidice, Kim French, Lisa Lindemann, John Barnes, and Alan Cunningham available for supplemental depositions pursuant to Section VIII.C.2.(j), no later than the week beginning May 13, 2013; and
- f) Any other relief the Special Master deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Montana's Objection to Wyoming's Expert Designation and Motion for Supplemental Depositions was served electronically, and by placing the same in the U.S. mail on April 12, 2013, to the following:

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I further certify that all parties required to be served have been served.

Debatol Benjamin For  
John B. Draper

Deposition of:

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NO. 137, ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, )  
                    ) Plaintiff, )  
                    ) vs. ) No. 220137 ORG  
STATE OF WYOMING and )  
STATE OF NORTH DAKOTA, )  
                    ) Defendants. )  
\_\_\_\_\_)

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

STATUS CONFERENCE

FEBRUARY 25, 2013

Reported by: Antonia Sueoka, RPR, CSR No. 9007

1 Wyoming's expert designation in order to give them  
2 additional time, but also Montana some additional time.  
3 So I'm hoping that this can all be worked out. And,  
4 again, it looks like it's a long enough period of time  
5 that somehow it should be managed.

6 Certainly when I was in -- a trial attorney  
7 myself, two-month period of time we were always able to  
8 figure out some way of getting the schedule to work, so  
9 I'm hoping that's the case.

10 MR. WECHSLER: I hope so, too.

11 SPECIAL MASTER THOMPSON: Okay. So any other  
12 additional thoughts on the schedule at this stage?

13 MR. MICHAEL: Your Honor, this is Pete Michael.  
14 I will add one thing.

15 I think we will absolutely make every effort we  
16 can to provide instantaneously with our designations all  
17 of our backup that we have. I mean, I think most of our  
18 model runs and that sort of thing are being done based on  
19 what Montana did. So I don't think there's going to be  
20 all that much new there. But we will make every effort to  
21 do that because we believe in the schedule, and we're  
22 going to work to -- so that Montana has everything they  
23 need from April 2nd to -- for Mr. Book to work with.

24 SPECIAL MASTER THOMPSON: Okay. That would be  
25 appreciated, Mr. Michael. And obviously, you know, to the

1 degree that you're not able to do that, that can -- that  
2 might give Montana additional argument as to why they need  
3 more time. To the degree that you can actually speed it  
4 up and provide anything before the April 2 deadline, that  
5 presumably would make it even less likely that Montana  
6 could come forward and request more time, but I realize  
7 that you might not be able to do it ahead of that  
8 deadline, and the deadline right now is April 2.

9 MR. MICHAEL: Thank you, Your Honor.

10 SPECIAL MASTER THOMPSON: So is there any reason  
11 at this stage that we need to talk any more about the  
12 motions in limine and the scheduling of pretrial  
13 proceedings between September 16th and October 14th?

14 What I'll tell you is I'm keeping that entire  
15 period open, and so my expectation would be that as that  
16 date gets closer and we have a better sense of how the  
17 schedule is developing that we can then set the deadlines  
18 for any type of pretrial conferences and additional  
19 pretrial deadlines at that stage.

20 MR. MICHAEL: Your Honor, this is Pete Michael.  
21 I have a few thoughts.

22 I think we're built in now with the current  
23 schedule for nonexpert witness disclosures on June 11th,  
24 and so that really helps a lot. I think if you have that,  
25 then I think it's more -- as you get close to trial, it's

## Jeffrey Wechsler

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**From:** Jeffrey Wechsler  
**Sent:** Wednesday, April 10, 2013 4:15 PM  
**To:** 'james kaste'; John B. Draper  
**Cc:** chris brown; Cory Swanson  
**Subject:** RE: Expert Depositions

James and Chris,

I hope you are both doing well. I am writing regarding a number of issues related to Wyoming's Expert Disclosures:

1. We appreciate your efforts in checking on available dates for the depositions of Mr. Schreüder, Mr. Fritz and Mr. Hinckley. As I mentioned to Chris, Steve Larson is being deposed that same week in another case, and therefore unavailable to assist Montana for Mr. Schreüder that week. In addition, I am traveling on Wednesday, April 24<sup>th</sup> for a family wedding in New York. Given those restrictions, we would appreciate it if you could check on availability for depositions as follows:
  - a. April 23<sup>rd</sup>: Mr. Fritz
  - b. April 24<sup>th</sup>: Mr. Hinckley
  - c. May 7<sup>th</sup>: Mr. Schreüder (we can arrange for a location in Denver, CO, where Mr. Schreüder is located)
2. In Wyoming's Expert Designation, you list an additional 13 individuals as experts. Please inquire from each of those individuals when they are available for depositions on their expert opinions. We would like to take their depositions the week of May 6<sup>th</sup>, and we will prepare to take ½ day depositions in both Cheyenne and Sheridan as necessary. We recognize, that we have previously taken fact-based depositions for some of those individuals, but we were unaware that they would be designated as experts, and we were prohibited from inquiring on expert opinions. See CMP No. 1, Section VII.C.3(b).
3. In addition to the depositions of Wyoming's experts, we plan on taking the depositions of several Wyoming water users, beginning with the irrigators listed on page 90 of Mr. Fritz' expert report. Depending on availability, we plan on taking those depositions the weeks of April 29<sup>th</sup> and May 13<sup>th</sup>. Please advise as to whether you would like Montana to contact those water users directly, and if so, please provide their contact information.
4. On a related subject, Mr. Hinckley relied on discussions from individuals from the Wyoming State Engineer's Office and Board of Control, the Wyoming Department of Environmental Quality, and the U.S. Bureau of Land Management. See pg. 36-37 of his report. Please provide the names and positions of each of those individuals so that we may evaluate whether or not to take their depositions.
5. Montana has been attempting to download the back-up material from the website provided by Wyoming, but we have encountered problems. Apparently, Mr. Schreüder's website only allows a single document to be downloaded at a time, creating an extremely time-consuming process. This has impeded our ability to evaluate your expert reports in a timely fashion. In order to avoid a problem with meeting the rebuttal disclosure deadline, please provide a CD, DVD, or memory stick containing all of the back-up material as soon as possible.
6. One of the materials that is relied upon by Mr. Fritz is mapping of irrigated acreage in Wyoming. This mapping is a subset of a larger set of mapping of irrigated acreage in the Tongue River Basin in Wyoming that was created by Mr. Fritz, and originally disclosed to Montana in April of 2012. Rather than provide the copies that Montana requested, however, Wyoming claimed that the document was protected as work product. See WY Privilege Log





(dated April 30, 2012). It now appears that Wyoming has affirmatively placed that mapping at issue in the case. As a result, Montana will require copies of all maps of irrigated acreage created or reviewed by Mr. Fritz. Please include that mapping with the back-up information.

Please call or email if you would like to discuss any of these issues.

Best regards,  
Jeff

***Jeffrey J. Wechsler***

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**From:** james kaste [<mailto:james.kaste@wyo.gov>]

**Sent:** Tuesday, April 02, 2013 2:57 PM

**To:** John B. Draper; Jeffrey Wechsler

**Cc:** chris brown

**Subject:** Expert Depositions

John and Jeff,

I have checked with our experts about their availability during the week of April 22nd for their depositions, and I think we can make the following schedule work:

April 23rd: Dr. Schreuder

April 24th: Mr. Fritz

April 25th: Mr. Hinckley

We can accommodate these depositions in our office in Cheyenne which is centrally located and convenient for all the witnesses. I assume that you will want to schedule a full day with each witness.

Please let me know at your earliest convenience if this schedule will work for you.

Thanks,

James.

James C. Kaste  
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Water & Natural Resources Division

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## Jeffrey Wechsler

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**From:** james kaste <james.kaste@wyo.gov>  
**Sent:** Wednesday, April 10, 2013 4:52 PM  
**To:** Jeffrey Wechsler  
**Cc:** John B. Draper; chris brown; Cory Swanson; peter michael  
**Subject:** Re: Expert Depositions

Jeff,

Mr. Fritz is not available on the 23rd. We can switch the order and use the same dates or you can move Mr. Fritz to the 24th and then do Mr. Hinckley on the 25th. We'll check with Dr. Schreuder about the 7th.

Montana is not entitled to retake the depositions of Wyoming's employees who were designated as experts. Each of those employees by virtue of their education, training, experience, and employment will be offering testimony under Rules 702, 703, and 704 the minute they open their mouth at trial to testify about the facts of this case. Montana knew or should have known as much when it took their depositions and was in no way prohibited from inquiring into any area with these witnesses. These witnesses will testify about their knowledge of the facts in this case and opinions they formed in the course of their employment as would any employee in any other case. This will necessarily include scientific and technical information or other specialized knowledge. Montana will want to file a motion if it insists on wasting more time on this subject, and Wyoming will vigorously oppose any attempt to derail the current schedule as a result of such a motion.

Of course, Wyoming reserves the right to object to testimony from Montana employees that may implicate Rules 702, 703, or 704 and who were not identified in Montana's disclosure. Frankly, we were astonished that Montana's designation did not include more Montana employees, who by virtue of their job would likely be offering scientific or technical information in the course of their testimony about the facts of this case. Nevertheless, Wyoming intends to hold Montana to the contents of its disclosure. We expect the same from Montana, and therefore, consistent with routine and prudent practice disclosed Wyoming employees in conformity with Fed. R. Civ. Pro. 26(a)(2)(C).

We'll look into the remaining matters in your e-mail and be in touch shortly.

James.

James C. Kaste  
Senior Assistant Attorney General  
Water & Natural Resources Division  
123 State Capitol  
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1 SPECIAL MASTER KAYATTA: Which numbers  
2 are we talking about?

3 MR. WILMOTH: We are talking about  
4 N9129, which was the electronic communication  
5 we reviewed yesterday with Mr. Barfield  
6 concerning Harlan County's lake evaporation.

7 SPECIAL MASTER KAYATTA: That was the  
8 e-mail?

9 MR. WILMOTH: Yes, Your Honor, and the  
10 other document, the other exhibit is N9627,  
11 which is Mr. Barfield's testimony before the  
12 Kansas Legislature on Senate Bill 89.

13 SPECIAL MASTER KAYATTA: And Mr. Draper,  
14 are you pressing objections to either of  
15 those two exhibits?

16 MR. DRAPER: Your Honor, the e-mail had  
17 handwriting on it that was not identified as  
18 to whose handwriting that was.

19 SPECIAL MASTER KAYATTA: With this  
20 e-mail, was this the e-mail that this witness  
21 was not shown as the sender or recipient?

22 MR. WILMOTH: Your Honor, he was the  
23 sender.

24 SPECIAL MASTER KAYATTA: He was the  
25 sender.

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1 MR. DRAPER: Yes, Your Honor.

2 MR. LAVENE: Yes, Your Honor.

3 SPECIAL MASTER KAYATTA: And then we do  
4 have, as we discussed yesterday, we have a  
5 motion by Kansas, a motion in limine  
6 objecting to the pre-filed testimony, at  
7 least portions of the pre-filed testimony of  
8 Dr. James Schneider based principally on the  
9 argument that that testimony contains  
10 statements that are expert testimony that did  
11 not previously appear in the reports or the  
12 declaration of this witness.

13 Mr. Draper, I believe this is your  
14 motion.

15 MR. DRAPER: Yes, Your Honor. We have  
16 submitted a motion that in -- this is dated  
17 July 27, 2012, entitled Kansas' Motion in  
18 Limine to Strike Portions of the Direct  
19 Testimony of James C. Schneider, Willem A.  
20 Schreüder and Dick Wolfe re: Nebraska's  
21 Proposed Changes to the RRCA Accounting  
22 Procedures and Appointment of a River Master.

23 With respect to Dr. Schneider, we have  
24 attached Appendix A and indicated the  
25 portions of that testimony to which we were

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1 MR. WILMOTH: And to be clear, the  
2 handwriting is irrelevant. That's not  
3 anything -- we would stipulate that the  
4 handwriting has --

5 SPECIAL MASTER KAYATTA: Does that  
6 address your concern, Mr. Draper?

7 MR. DRAPER: Yes, I think so. Thank  
8 you.

9 SPECIAL MASTER KAYATTA: So that was  
10 Exhibit N129 is admitted with the caveat that  
11 the handwriting on that exhibit will be  
12 disregarded as having -- as if it's not in  
13 the record.

14 MR. WILMOTH: Thank you, Your Honor.

15 SPECIAL MASTER KAYATTA: And then Mr.  
16 Draper, N9627, the witness' testimony, is  
17 there any objection to that?

18 MR. DRAPER: No, Your Honor.

19 SPECIAL MASTER KAYATTA: N9627 is  
20 therefore admitted. Mr. Barfield, you are  
21 excused.

22 THE WITNESS: Thank you, Your Honor.

23 Now, is the plan, counsel, worked out  
24 still that the next witness would be Dr.  
25 Schneider?

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1 objecting.

2 SPECIAL MASTER KAYATTA: Thank you, Mr.  
3 Draper. I have before me Kansas' motion in  
4 limine to strike portions dated July 27th,  
5 and I have Exhibit A, in which you have  
6 copied the pre-filed testimony of Dr.  
7 Schneider, and as I understand it, the  
8 sections that are boxed, in which someone had  
9 drawn a box on my copy in blue around them,  
10 are these sections to which you're objecting?

11 MR. DRAPER: That's correct, Your Honor.

12 SPECIAL MASTER KAYATTA: Well, why don't  
13 we proceed then as we have with Nebraska's  
14 motion in limine and if you would direct me  
15 to, I believe, if my notes are correct, Page  
16 6; is that your first?

17 MR. DRAPER: Yes. Your Honor, here  
18 Paragraphs 21, 22 and 23 refer to the  
19 relationship between the Five-Run Proposal  
20 and the Sixteen-Run Proposal.

21 In the Five-Run Proposal, and this will  
22 run throughout our objections, the Five-Run  
23 Proposal was not even mentioned in the  
24 underlying expert report and so to raise it  
25 for the first time in testimony and compare

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1 it to what was discussed in the underlying  
2 expert report is clearly outside the scope of  
3 the expert report and violates the rule that  
4 preserves fairness and guards against  
5 surprise which requires that an expert's  
6 testimony be based on the expert report  
7 required to be filed under Rule 26.

8 SPECIAL MASTER KAYATTA: Mr. Draper, I  
9 draw a distinction, having re-read the  
10 witness' original expert report which counsel  
11 filed with me, I believe that report was not  
12 addressed to the Five-Run Proposal. It was  
13 obviously addressed to the 16.

14 Going from there then I see two issues;  
15 one is was the Five-Run Proposal a,  
16 quote/unquote, subset and then the second  
17 issue is what about the merits of the  
18 Five-Run Proposal, et cetera.

19 On the first issue, whether it's a  
20 subset, it seemed to me that was an issue  
21 that was brought to the forefront in April,  
22 May and June and, in fact, we discussed that  
23 at considerable length and I required, I  
24 believe, Dr. Schneider to file a declaration  
25 on that and I believe you filed the

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1 declaration by Mr. Larson.

2 So I think on that issue of whether it's  
3 a subset or not, for purposes of allowing him  
4 to at least take a step forward and get to  
5 this point, that there's been joinder on that  
6 issue, but I'm sympathetic to your argument  
7 that apart from arguing whether this is a  
8 subset or not, this witness, at least in  
9 what's been shown to me so far, did not  
10 submit an expert report or declaration  
11 discussing the merits of the Five-Run  
12 Proposal on its own two feet or five feet, I  
13 suppose I should say.

14 So I see this, what you're pointing to  
15 on Page 7, as falling into the first category  
16 in which they are just saying it's a subset.

17 MR. DRAPER: Very good, Your Honor.

18 MR. BLANKENAU: Your Honor, on behalf of  
19 Nebraska, may I respond?

20 SPECIAL MASTER KAYATTA: Well, as I -- I  
21 suppose you may, although I'm basically  
22 rejecting the argument on Page 7.

23 MR. BLANKENAU: I think I can help move  
24 this discussion along.

25 SPECIAL MASTER KAYATTA: Okay. Go

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1 ahead, Mr. Blankenau.

2 MR. BLANKENAU: Your Honor, what we --  
3 Nebraska did was to go through the objections  
4 raised by Kansas and go through the record  
5 and pinpoint in the record where these  
6 particular issues were previously disclosed  
7 to Kansas.

8 They may not have been done exclusively  
9 in the expert report or in the declaration,  
10 but they were made available to Kansas.

11 SPECIAL MASTER KAYATTA: Just a minute  
12 then. So you're not discussing what I was  
13 just discussing with Mr. Draper, which is his  
14 objection to Paragraphs 21, 22 and 23 on Page  
15 7?

16 MR. BLANKENAU: Yes, we are and I think  
17 we can pinpoint for you -- we have available  
18 electronically where we can pull up each  
19 reference to where we had previously provided  
20 Kansas the information contained in  
21 Paragraphs 21, 22 and 23.

22 I can cite those for you, if you'd like.  
23 We have documents prepared and we can provide  
24 them to you electronically for each one of  
25 these paragraphs the previous reference in

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1 the record where this information was made  
2 available.

3 SPECIAL MASTER KAYATTA: Well, I've just  
4 explained to Mr. Draper that I didn't really  
5 see anything in Paragraphs 21, 22 and 23 that  
6 fell under the second category and therefore,  
7 they were in the first category unless he is  
8 going to direct me to something I'm missing  
9 in those three paragraphs, so I don't think I  
10 need those three references.

11 MR. BLANKENAU: I guess I was just  
12 offering it for the entire set of objections.

13 SPECIAL MASTER KAYATTA: Well, let's  
14 take them one at a time because I would like  
15 to hear Mr. Draper out on this one. If I get  
16 to one where Mr. Draper is convincing me,  
17 then I'll turn to you.

18 MR. BLANKENAU: All right. Thank you,  
19 Your Honor.

20 SPECIAL MASTER KAYATTA: Mr. Draper, you  
21 have the floor and is there anything in  
22 Paragraphs 21, 22 or 23 that you contend goes  
23 beyond simply making the point that this is a  
24 subset that starts to, in a meaningful way,  
25 commenting on the merits of the claim that

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1 the Five-Run Proposal should be adopted by  
2 the Court?

3 MR. DRAPER: I think Your Honor is  
4 correct, it's largely an argument as to why  
5 one's a subset of the other.

6 SPECIAL MASTER KAYATTA: Let's turn to  
7 Page 8 then.

8 MR. DRAPER: Should we discuss Page 7?  
9 What page we've been discussing under  
10 Paragraphs 21, 22 and 23 are on Page 6.

11 SPECIAL MASTER KAYATTA: I'm looking at  
12 the upper right-hand corner of the exhibit  
13 where it says Page 7 of 23, but yes, that's  
14 Page 6 of the pre-filed testimony, it  
15 appears.

16 MR. BLANKENAU: If you're looking at  
17 Nebraska Exhibit N1000.

18 SPECIAL MASTER KAYATTA: What was filed  
19 with the Court as Exhibit A to Kansas'  
20 July 27th motion in limine is a copy of the  
21 direct testimony of Dr. James Schneider which  
22 bears in the upper right-hand corner Exhibit  
23 N1000, 1 of 23.

24 So then when I turned to the second page  
25 which shows N1000, 2 of 23, there are on Page

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1 up on the screen if that would be helpful to  
2 you.

3 SPECIAL MASTER KAYATTA: What is N1002?

4 MR. BLANKENAU: That would be the expert  
5 report of James Schneider.

6 SPECIAL MASTER KAYATTA: That's the  
7 November 18, 2011, report?

8 MR. BLANKENAU: Yes, Your Honor.

9 SPECIAL MASTER KAYATTA: Page 11 and  
10 then 52?

11 MR. BLANKENAU: Yes.

12 SPECIAL MASTER KAYATTA: I have Page 11  
13 before me. Where are you referring on that  
14 page?

15 MR. BLANKENAU: If I may put it up on  
16 the screen, Your Honor.

17 MR. WILMOTH: May I approach the  
18 illustrator just to help him provide that?

19 SPECIAL MASTER KAYATTA: Sure.

20 MR. BLANKENAU: My apologies, Your  
21 Honor, that should have been to the exhibit,  
22 Exhibit 11 of Nebraska Exhibit N1002. So  
23 with respect to N1002, there would have been  
24 a number of exhibits attached.

25 SPECIAL MASTER KAYATTA: Exhibit N1002  
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1 1, I've got the cover sheet of Dr.  
2 Schneider's testimony.

3 MR. DRAPER: Yes, Your Honor.

4 SPECIAL MASTER KAYATTA: So I think what  
5 we were just discussing was N1000, 7 of 23,  
6 or looking below paginated Page 6 of the  
7 testimony. In any event, it was Paragraphs  
8 21, 22 and 23 of the testimony.

9 MR. DRAPER: Yes, Your Honor.

10 SPECIAL MASTER KAYATTA: And now you're  
11 directing my attention to Paragraphs 25, 26  
12 and 27?

13 MR. DRAPER: Yes. Here the discussion  
14 is different. It describes the history of  
15 the Five-Run Proposal as seen by Nebraska.  
16 It begins the argument as to why that  
17 proposal should be approved and gives certain  
18 statistics supporting that in Paragraphs 25,  
19 26 and 27.

20 SPECIAL MASTER KAYATTA: Well, Mr.  
21 Blankenau, what about Paragraph 26 first;  
22 what is the provenance of that paragraph?

23 MR. BLANKENAU: We believe, Your Honor,  
24 that that information was previously provided  
25 at N1002 at 11 and 52, and we can bring that

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1 has a pagination marked in the upper  
2 right-hand corner 1 of 401?

3 MR. BLANKENAU: Correct.

4 SPECIAL MASTER KAYATTA: Which page?

5 MR. BLANKENAU: It is Page 11 of --

6 SPECIAL MASTER KAYATTA: Of 401?

7 MR. BLANKENAU: Correct. Perhaps, Your  
8 Honor, if we could get some technical  
9 assistance to get it up on the screen, that  
10 would expedite this.

11 SPECIAL MASTER KAYATTA: Well, I have it  
12 sitting right before me.

13 MR. BLANKENAU: If it's all right, I'm  
14 going to run back and forth because I don't  
15 have it before me. I'll try to navigate back  
16 and forth here, Your Honor.

17 MR. DRAPER: And just to confirm  
18 further, Your Honor, this is the expert  
19 report of Dr. Schneider dated November 18th  
20 of 2011; is that correct?

21 SPECIAL MASTER KAYATTA: That's what I'm  
22 looking at, November 18, 2011.

23 MR. DRAPER: Very good.

24 SPECIAL MASTER KAYATTA: ES-3 on the  
25 original report, Page 11 of 401 on Exhibit

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1 N1002.

2 MR. BLANKENAU: So at this particular  
3 reference point, Your Honor, we talk about  
4 the current accounting procedures and the  
5 effects of the Five-Run remedy.

6 SPECIAL MASTER KAYATTA: Where is the  
7 reference to the Five-Run?

8 MR. BLANKENAU: I think you can -- can  
9 you scroll?

10 SPECIAL MASTER KAYATTA: Is it on the  
11 prior page?

12 MR. BLANKENAU: Trying to find it, Your  
13 Honor. Your Honor, it is the last sentence  
14 before the blocked area. It is rather  
15 difficult from a scientific perspective to  
16 reconcile.

17 SPECIAL MASTER KAYATTA: I don't see how  
18 that says anything about the Five-Run  
19 Proposal. We're looking at expert testimony  
20 that Kansas has addressed that says by  
21 revising the Current Accounting Procedures  
22 and by implementing the Five-Run Proposal,  
23 the net effect to Nebraska's groundwater  
24 pumping in the Mound recharge in the  
25 Swanson-Harlan Reach of the Republican River

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1 Basin would be properly represented. Then  
2 goes on to make further comments about the  
3 results of the Five-Run Proposal.

4 I don't see anything on Page 11 or Page  
5 10 that even hints of that.

6 MR. BLANKENAU: I'm looking for the  
7 second reference that we had previously  
8 identified, Your Honor, which was at Page 52  
9 of that report.

10 SPECIAL MASTER KAYATTA: Page 52 of the  
11 exhibit or 52 --

12 MR. BLANKENAU: 52 of the exhibit.  
13 Thank you, Your Honor.

14 MR. DRAPER: For reference, what is the  
15 page number in the original document?

16 MR. BLANKENAU: It would be 39.

17 MR. DRAPER: Thank you.

18 SPECIAL MASTER KAYATTA: Mr. Blankenau,  
19 I've just read Page 39 and gone over to Page  
20 40, those being Pages 52 and 43 of Exhibit  
21 N1002. Again, I don't see anything in there.

22 MR. BLANKENAU: Okay. We also had  
23 identified the Schneider -- I believe it's  
24 Declaration N1003 at 10.

25 MR. DRAPER: Your Honor, if I may, we  
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1 are now going away from the expert report to  
2 a different document; is that correct?

3 SPECIAL MASTER KAYATTA: Yes. I think  
4 where they're pointing me now is he's  
5 pointing me to Dr. Schreüder's expert report.  
6 It's 1003, but we're talking about Dr.  
7 Schneider.

8 MR. BLANKENAU: Yes, Your Honor, that is  
9 correct. I apologize.

10 SPECIAL MASTER KAYATTA: So Mr.  
11 Blankenau, it seems that Mr. Draper has a  
12 fair point here, that this commentary by Dr.  
13 Schneider is unprecedented as far as any  
14 further earlier disclosure or report, either  
15 formal or informal, that was made in this  
16 case.

17 MR. BLANKENAU: All right, Your Honor.  
18 I guess I should qualify somewhat here as  
19 well that when we constructed the testimony,  
20 we assumed that there would be at least some  
21 latitude to direct at the four corners of the  
22 expert report because there would have been  
23 no reason to provide testimony then, that is,  
24 the report itself would speak for itself.

25 SPECIAL MASTER KAYATTA: Well, yes,  
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1 that's a fair assumption. I think I've given  
2 both sides, by the mere fact that you filed  
3 testimony, I expected some narrative  
4 presentation highlighting, framing on what  
5 was in the expert reports, but here we have  
6 an expert report that, as I read it and  
7 you've directed me to nothing to contradict  
8 that, made absolutely no mention to the  
9 Five-Run Proposal, no analysis, no nothing.

10 So to submit testimony from this witness  
11 that comments on the Five-Run Proposal beyond  
12 reaffirming the points he made in his  
13 declaration regarding it be a subset is not  
14 simply extrapolating or highlighting  
15 disclosed testimony, it's introducing new  
16 subject matter.

17 MR. BLANKENAU: We're prepared to  
18 proceed on the additional paragraphs. With  
19 respect to --

20 SPECIAL MASTER KAYATTA: Let me just  
21 make sure then. Paragraph 25, I'm going to  
22 allow the first sentence because that's a  
23 statement of historical fact rather than  
24 expert opinion. Then the remainder of  
25 Paragraph 25, Paragraph 26, the second

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1 sentence of Paragraph 27, I'm granting  
2 Kansas' motion to strike on the grounds  
3 stated and otherwise denying the motion with  
4 respect to Paragraphs 25, 26 and 27.

5 MR. BLANKENAU: Just so I'm clear, Your  
6 Honor, references to -- that would have been  
7 drafted from Dr. Schreüder's work would not  
8 be considered an appropriate previous  
9 disclosure?

10 SPECIAL MASTER KAYATTA: Excuse me?

11 MR. BLANKENAU: References to Dr.  
12 Schreüder's work would not be an appropriate  
13 disclosure to counsel?

14 SPECIAL MASTER KAYATTA: Well, I think  
15 it is for Dr. Schreüder's testimony.

16 MR. BLANKENAU: Okay, thank you.

17 SPECIAL MASTER KAYATTA: Mr. Draper, is  
18 there -- Mr. Draper, the next one is  
19 Paragraph 29?

20 MR. DRAPER: Yes, Your Honor.

21 SPECIAL MASTER KAYATTA: And is that,  
22 are you contending that falls into the first  
23 category which is the subset category which  
24 I'm allowing or is it a substantive  
25 commentary on the Five-Run Proposal that goes

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1 beyond what was in the witness' declaration?

2 MR. DRAPER: Your Honor, I believe this  
3 language goes to justification of the  
4 Five-Run Proposal.

5 SPECIAL MASTER KAYATTA: Well, the  
6 beginning of the first sentence, "the use of  
7 the Sixteen-Run Proposal addresses all  
8 unaccounted impacts," I believe the witness  
9 has said that in his report, but I don't  
10 recall him saying that it's not necessary to  
11 bring the Current Accounting Procedures into  
12 conformance with the FSS.

13 MR. DRAPER: That's correct and  
14 testimony specifically about the Five-Run  
15 Proposal as constituting approximately  
16 80 percent of the adverse impacts, that  
17 sentence in the middle of the paragraph is a  
18 direct comment on the Five-Run Proposal.

19 SPECIAL MASTER KAYATTA: Mr. Blankenau,  
20 was any of this contained in the reports or  
21 the witness' declaration?

22 MR. BLANKENAU: I'm referring to my  
23 exhibit right now, Your Honor. I believe it  
24 is in this.

25 SPECIAL MASTER KAYATTA: Well, given  
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1 that, I'm going to deny Kansas' motion with  
2 respect to Paragraphs 29 and 30 as far as the  
3 first clause in Paragraph 29 as we will leave  
4 in the use of the Sixteen-Run Proposal  
5 addresses all unaccounted impacts, and I'm  
6 also going to deny with respect to Paragraph  
7 30, but I'm otherwise granting Kansas' motion  
8 to strike the remainder of Paragraph 29.

9 I left in Paragraph 30 because the  
10 witness and counsel have disclosed certainly  
11 in April that Nebraska's prepared to accept  
12 the Five-Run Proposal. Mr. Draper?

13 MR. DRAPER: Thank you, Your Honor.  
14 Turning to page, in the upper right-hand  
15 corner, N1000 page, we have Paragraphs 50 and  
16 51 marked. This is a discussion with respect  
17 to the validity of the current Five-Run  
18 Proposal.

19 Paragraph 50 is introductory to that,  
20 describing the so-called VWS Memo,  
21 characterizing that memo and then continuing  
22 to 51 to State that Nebraska's Five-Run  
23 Proposal actually addressed some of these  
24 unaccounted impacts that are referred to in  
25 Paragraph 50 and to otherwise support the

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1 Five-Run Proposal, which again is not  
2 mentioned in the underlying expert report.

3 SPECIAL MASTER KAYATTA: Mr. Blankenau,  
4 you've heard Mr. Draper's assertion that  
5 there isn't any disclosure for the opinions  
6 expressed in Paragraphs 50 and 51. Is there  
7 anything you would like to direct me to to  
8 dispute that assertion?

9 MR. BLANKENAU: I don't believe that  
10 that paragraph involves seeking an expert  
11 analysis. It looks to me to be more  
12 historical and interpretive.

13 SPECIAL MASTER KAYATTA: Which paragraph  
14 are you --

15 MR. BLANKENAU: Paragraph 50.

16 SPECIAL MASTER KAYATTA: Paragraph 50?

17 MR. BLANKENAU: Yes, sir.

18 SPECIAL MASTER KAYATTA: Well, the first  
19 sentence certainly expresses an opinion as an  
20 expert about the adequacy or the conclusion  
21 in the VWS Memo. If there was some prior  
22 expression of this opinion, then I would  
23 leave it in, but I don't think you're  
24 pointing me to anything.

25 The second sentence, it is historical in  
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1 that it places in time when the witness says  
2 that Nebraska learned something, but then  
3 what he says they learned is in this witness'  
4 expert opinion regarding how Current  
5 Accounting Procedures comply with the VWS  
6 Metric. Has this witness ever said anything  
7 like that in his reports or his declaration?

8 MR. BLANKENAU: I believe he stated it  
9 in his deposition in response to questions by  
10 counsel.

11 SPECIAL MASTER KAYATTA: Would you point  
12 me to that?

13 MR. BLANKENAU: I believe it is -- if  
14 you can pull that up.

15 SPECIAL MASTER KAYATTA: What you're  
16 directing me to, the witness stated in the  
17 deposition that the flaw in the use of Virgin  
18 Water Supply Metric memo was that it didn't  
19 look at the sub-basins.

20 What Paragraph 50 says is that Current  
21 Accounting Procedures only appear to closely  
22 match the VWS Metric because they were both  
23 positive and negative Unaccounted Impacts  
24 that roughly balance themselves out in most  
25 years. Those seem to be distinctly different

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1 Draper is saying because I don't think in  
2 preparing expert testimony one operates under  
3 the assumption that you have to go through  
4 every document produced in the case and find  
5 tidbits that someone might have said and then  
6 assume the expert can say that.

7 I also think part of the problem we're  
8 dealing with here, Mr. Blankenau, is that for  
9 reasons of its own, and I'm not commenting on  
10 the adequacy of those reasons, Nebraska chose  
11 not to present the Five-Run Proposal to the  
12 RRCA or in the arbitration below or in its  
13 counterclaim here and then only raised it  
14 late in the game and I think you know that I  
15 was not pleased to then find out that you  
16 made an intentional decision to sit on it for  
17 five weeks after entering into the  
18 stipulation so you placed Kansas and me in  
19 quite a bind.

20 I nevertheless, I think, cut Nebraska  
21 quite a lot of slack by overruling Kansas'  
22 request that I not even allow it, but to then  
23 seek to having sold it as a subset that isn't  
24 a big change, then come in with added expert  
25 testimony that he didn't produce even before

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1 points.

2 MR. BLANKENAU: I think, Your Honor,  
3 that's about as close as we get in that  
4 particular deposition. I'm told in the  
5 stipulation between Nebraska and Kansas there  
6 is also some language that may be helpful.  
7 This would be N1009 at 482.

8 MR. DRAPER: Your Honor, if I might.

9 SPECIAL MASTER KAYATTA: Yes, Mr.  
10 Draper.

11 MR. DRAPER: I would point out that they  
12 are now taking you to documents that are not  
13 the expert report, are a deposition that was  
14 conducted, I think, three days before they  
15 submitted this testimony.

16 These are not expert reports. I think  
17 we are about to go to the stipulation that  
18 they entered into and brought forward in May.  
19 I think looking at these documents is not  
20 responding to our objection here.

21 MR. BLANKENAU: The question was were  
22 you surprised and I think these documents are  
23 relevant to that proposition.

24 SPECIAL MASTER KAYATTA: Well, I will  
25 look at this, but I'm sympathetic to what Mr.

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1 the day of filing, you're stretching beyond  
2 the slack that I'm willing to give.

3 MR. BLANKENAU: I guess one final  
4 comment on that which I think bears on the  
5 analysis and that is I think it's important  
6 for the Court to recall that the real issue  
7 before the Court is the consumption of  
8 imported water.

9 This particular issue bears on a  
10 proposed remedy and I don't know if it makes  
11 a difference in your analysis, but it seems  
12 to me that that is an important distinction.

13 SPECIAL MASTER KAYATTA: Well, aren't  
14 there two issues and one is, is there a flaw  
15 in the sense that you can define it in terms  
16 of the consumption of imported water and then  
17 secondly -- I guess there's three issues --  
18 secondly, how would one correct that flaw  
19 without creating other problems and then  
20 thirdly, there's sort of the legal issue of  
21 can we just -- can the Court reach in and  
22 tweak the Accounting Procedures on a  
23 piecemeal basis or is this something that  
24 everyone knew was not reality in the first  
25 instance, was an attempt to model reality of

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1 all its imperfections and there was give and  
2 take which is Kansas' argument.  
3 So of those three issues, as I read the  
4 arbitrator's report, Nebraska actually failed  
5 on the second rung before the arbitrator  
6 which you did not find the proposal adequate.  
7 Nebraska then chose to advocate for that same  
8 proposal until the spring of this year.

9 So it's kind of a major sub-issue to  
10 then introduce new expert testimony for the  
11 first time from Nebraska's witness addressing  
12 that second issue and that's what my concern  
13 is.

14 Any of you want me to look, at least, at  
15 the stipulation?

16 MR. BLANKENAU: Pardon me?

17 SPECIAL MASTER KAYATTA: I'm still  
18 willing to look at the stipulation, although  
19 it's going to have to be pretty clearly  
20 prominent and what is -- I'm looking at what  
21 page of what document?

22 MR. BLANKENAU: Halfway down the  
23 paragraph, it talks about the sum of the  
24 residuals and I just lost it.

25 SPECIAL MASTER KAYATTA: Remind me again  
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1 MR. BLANKENAU: No, it was not.

2 SPECIAL MASTER KAYATTA: Okay. Well,  
3 looking at Paragraph 50, I'm going to strike  
4 all of 50 except for the first sentence. I'm  
5 striking all of 50 and all of 51 except for a  
6 last sentence of Paragraph 51 which simply  
7 seems to be a statement about the Compact  
8 which I can discern for myself.

9 Page 14, Paragraph 56, is that the next  
10 one, Mr. Draper?

11 MR. DRAPER: Yes, Your Honor. Your  
12 Honor, this paragraph is identified as an  
13 objectionable paragraph because it seeks to  
14 justify the new Five-Run Proposal that is not  
15 even mentioned in the expert report.

16 SPECIAL MASTER KAYATTA: Where does it  
17 mention the Five-Run Proposal?

18 MR. DRAPER: Well, it doesn't do that  
19 specifically, but it is part of the  
20 justification for the Five-Run Proposal.

21 SPECIAL MASTER KAYATTA: Mr. Draper, I  
22 just see this as a recitation of the history  
23 of this matter prior to it either being filed  
24 in court by expressing a substantive opinion  
25 of any import.

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1 what exhibit number I'm looking at. This is  
2 a 214 page document?

3 MR. BLANKENAU: Correct.

4 SPECIAL MASTER KAYATTA: And you want to  
5 reference --

6 MR. DRAPER: Excuse me, Mr. Blankenau,  
7 can you identify where in the exhibits it is,  
8 what attachment and what page of that  
9 attachment, that kind of thing?

10 MR. BLANKENAU: I believe we had it at  
11 the top of the screen originally.

12 SPECIAL MASTER KAYATTA: It says N1009,  
13 Page 182 of 214. This is the large  
14 stipulation document that was the subject of  
15 a motion to compel?

16 MR. BLANKENAU: That is correct, Your  
17 Honor.

18 SPECIAL MASTER KAYATTA: Mr. Blankenau,  
19 I don't think -- I commend you on your  
20 thoroughness on going back and looking for  
21 stuff, but I don't think I would expect  
22 counsel for Kansas in preparing for expert  
23 issues to look through 214 pages.

24 This wasn't a declaration, I'm assuming,  
25 with the witness?

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1 MR. DRAPER: Actually, I think I'm  
2 inclined to agree with Your Honor on that.

3 SPECIAL MASTER KAYATTA: I'm focused in  
4 particular and particularly sympathetic to  
5 expert testimony of some import that was not  
6 previously disclosed.

7 I have read Colorado's brief in which  
8 Colorado argues that the motion, that the  
9 remedy of sanctioning -- well, not  
10 sanctioning, striking expert testimony is not  
11 a proper remedy, at least in most situations.  
12 That is correct in many situations when your  
13 pretrial, but when you get to trial and  
14 people are actually submitting testimony at  
15 that point, the prevailing rule is that there  
16 should not be surprise expert testimony and  
17 whatever that prevailing rule might be,  
18 particularly in the case where we've had the  
19 history that I recite to Mr. Blankenau, I  
20 think it's particularly inappropriate to  
21 introduce brand new substantive opinion  
22 testimony from a witness.

23 In any event, Paragraph 56 doesn't fit  
24 that so I'm therefore denying the motion with  
25 respect to Paragraph 56.

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1 Are we next on to Paragraph 62, 63?

2 MR. DRAPER: Yes, on Page 16.

3 SPECIAL MASTER KAYATTA: Well, you are  
4 moving to strike from Paragraph 62 through  
5 the conclusion, if I've read your motion  
6 correctly.

7 MR. DRAPER: Yes. I think using the  
8 distinction that Your Honor has set out, I  
9 think Paragraphs 62, 63 and 64 are more  
10 comparative.

11 SPECIAL MASTER KAYATTA: So your motion  
12 is withdrawn with respect to 62, 63 and 64?

13 MR. DRAPER: Yes.

14 SPECIAL MASTER KAYATTA: Okay. Let's  
15 turn to 65. That's clearly an expert opinion  
16 about the Five-Run Proposal. Mr. Blankenau,  
17 is there any prior disclosure of this  
18 opinion?

19 MR. BLANKENAU: Just a moment, Your  
20 Honor. I believe all we have to that, Your  
21 Honor, concerns Dr. Schreüder.

22 SPECIAL MASTER KAYATTA: I will strike  
23 Paragraph 65. Paragraph 66.

24 MR. DRAPER: Your Honor, this appears to  
25 be a running area with different paragraph

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1 numbers and it, in part, supports the  
2 Five-Run Proposal and, in part, leads to a  
3 comparison. For instance, I would put in the  
4 comparison category Paragraph 69 and  
5 therefore, we would withdraw our motion with  
6 respect to 69. But you can see as we go into  
7 Paragraph 70 is an explanation of the  
8 rationale for the Five-Run Proposal.

9 Paragraph 71 describes the quantitative  
10 effect of both proposals, so it's hard to  
11 separate those out because it's supporting  
12 the Five-Run as well as the Sixteen-Run.

13 Paragraph 72, part of it describes the  
14 Sixteen-Run Proposal and then it goes into  
15 the merits of the Five-Run Proposal so I  
16 think the description of the Sixteen-Run  
17 would be unobjectionable. In fact, when it  
18 passes into the later part of Paragraph 72,  
19 it's purely support for the unmentioned  
20 Five-Run Proposal.

21 Paragraph 73 could fall into Your  
22 Honor's category of simply being historical  
23 as opposed to expert opinion so I would  
24 withdraw the motion on that paragraph.

25 MR. BLANKENAU: I'm sorry, which one?

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1 MR. DRAPER: Paragraph 73. I think the  
2 same applies to Paragraph 74.

3 SPECIAL MASTER KAYATTA: Let me ask Mr.  
4 Blankenau, Paragraph 72, the second sentence  
5 of Paragraph 72 of Dr. Schneider's report  
6 which says on the other hand, the Five-Run  
7 Proposal accomplishes this by assigning the  
8 Unaccounted Impact, et cetera, am I correct  
9 in assuming, based on our prior discussions,  
10 Mr. Blankenau, that there is no precursor for  
11 that in Dr. Schneider's report or  
12 declaration?

13 MR. BLANKENAU: I'm verifying that right  
14 now, Your Honor. This is the declaration of  
15 Dr. Schneider which is up on the screen. I'm  
16 sorry, this is not his declaration yet. It  
17 will be.

18 MR. WILMOTH: I apologize, it's taking a  
19 little time to shuffle through the documents,  
20 but we're doing as best we can.

21 MR. BLANKENAU: Your Honor, with respect  
22 to the second part of Paragraph 72, the  
23 sentence that begins on the other hand,  
24 that's found in Dr. Schreüder's declaration  
25 and is not in Dr. Schneider's.

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1 SPECIAL MASTER KAYATTA: Okay, we will  
2 let Dr. Schreüder address it then and I'm  
3 striking the second sentence of Paragraph 72  
4 and then how about Paragraph 73.

5 MR. BLANKENAU: I believe counsel  
6 withdrew his objection to that.

7 SPECIAL MASTER KAYATTA: Right and then  
8 Paragraph 75, the last sentence.

9 MR. DRAPER: Paragraph 75, Your Honor, I  
10 think that is objectionable except for the  
11 first sentence. The first sentence refers  
12 only very obliquely to the Five-Run, but  
13 beginning with the second sentence of  
14 Paragraph 75, "the Current Account Procedures  
15 charge Nebraska's account," this is a  
16 justification for the Five-Run Proposal.

17 SPECIAL MASTER KAYATTA: Except that's  
18 an assertion he did make in his report, that  
19 the Current Accounting Procedures charge  
20 Nebraska's compact account for consumption.

21 MR. DRAPER: Actually, the assertion  
22 that was made in the expert report was that  
23 the additivity principle was not met unless  
24 the Sixteen-Run Proposal was adopted.

25 SPECIAL MASTER KAYATTA: But let me put  
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1 THE WITNESS: Thank you, your Honor.  
 2 SPECIAL MASTER KAYATTA: And do I  
 3 understand Colorado would now call Mr. Wolfe?  
 4 MS. BERNHARDT: Yes, sir. He's in the  
 5 gallery, but he's available.  
 6 Colorado now calls Dick Wolfe to the  
 7 stand.  
 8 THE CLERK: Please raise your right  
 9 hand. Do you solemnly swear that the  
 10 testimony you will give in the cause now in  
 11 hearing will be the truth, the whole truth,  
 12 and nothing but the truth, so help you God?  
 13 THE WITNESS: I do.  
 14 THE CLERK: Please be seated. Pull  
 15 yourself right up to that microphone and  
 16 state your name and spell your name for the  
 17 record.  
 18 THE WITNESS: Dick Wolfe.  
 19 D I C K, W O L F E.  
 20 SPECIAL MASTER KAYATTA: Good morning,  
 21 Mr. Wolfe. I think you will find this seat  
 22 at least physically more comfortable than the  
 23 gallery seats.  
 24 THE WITNESS: It is. Thank you, your  
 25 Honor.

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1 MS. BERNHARDT: Your Honor, Mr. Wolfe  
 2 filed his direct testimony.  
 3 DICK WOLFE, having been duly sworn, was examined and  
 4 testified as follows:  
 5 DIRECT EXAMINATION  
 6 BY MS. BERNHARDT:  
 7 Q. Mr. Wolfe, do you still stand by your direct  
 8 testimony?  
 9 A. I do.  
 10 SPECIAL MASTER KAYATTA: Mr. Draper, so  
 11 you have some objections?  
 12 MR. DRAPER: I have a motion pending on  
 13 this witness.  
 14 SPECIAL MASTER KAYATTA: Yes.  
 15 Mr. Wolfe, you're going to get to enjoy  
 16 that relatively more comfortable seat for a  
 17 few minutes while we go ahead with these  
 18 objections.  
 19 MR. DRAPER: To identify the motion for  
 20 the record, it was Kansas's motion in limine  
 21 filed on July 27, 2012. And Mr. Wolfe's  
 22 testimony is particularly considered on pages  
 23 12 through 15 of the motion. And attached as  
 24 Exhibit C is his testimony with the  
 25 particular language that is objected to

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1 highlighted.  
 2 SPECIAL MASTER KAYATTA: And that would  
 3 be on page 3, the second half of section 2  
 4 would be the first section. Am I correct?  
 5 MR. DRAPER: Yes.  
 6 SPECIAL MASTER KAYATTA: Beginning with  
 7 the words "to correct"?  
 8 MR. DRAPER: Yes.  
 9 SPECIAL MASTER KAYATTA: Ms. Bernhardt,  
 10 I read Mr. Wolfe's prefiled testimony less as  
 11 sort of scientific expertise that he was  
 12 tendering, although as state engineer he has  
 13 lots to offer, but more as a statement of  
 14 position in his capacity as director of the  
 15 Colorado Division of Water Resources.  
 16 To the extent it's being offered in that  
 17 capacity, Mr. Draper, I think having them set  
 18 forth their position, I don't think that  
 19 causes any prejudice to Kansas.  
 20 Ms. Bernhardt, if you are offering this  
 21 as testimony by an expert on an area of  
 22 expertise, I didn't find it addressing any  
 23 engineering issues.  
 24 MS. BERNHARDT: It is offered for his  
 25 expertise as the chief water administrator

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1 for the State of Colorado. And he is also a  
 2 member of -- he's a Compact Commissioner for  
 3 the RRCA as well. So he also has that role.  
 4 SPECIAL MASTER KAYATTA: Well, let's  
 5 take Mr. Draper's concerns then. On page 3,  
 6 the first sentence that Mr. Draper is  
 7 concerned about says, "To correct inequities  
 8 or errors, the RRCA can, and has, amended the  
 9 accounting procedures."  
 10 Am I correct that that's a simple  
 11 statement of historical fact that the RRCA  
 12 can, and has, amended accounting procedures?  
 13 MR. DRAPER: Yes.  
 14 SPECIAL MASTER KAYATTA: So I think we  
 15 can leave that in.  
 16 The next is a -- it says it's a quote  
 17 from the FSS. And I obviously have the FSS  
 18 and can read it, so it makes no difference  
 19 whether that stays or leaves.  
 20 The next sentence, I agree with  
 21 Mr. Draper, that says, "The current version  
 22 of the accounting procedures violates this  
 23 requirement." I think that's ultimately  
 24 a legal judgment that I would make,  
 25 Ms. Bernhardt, or the Court make on my

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1 recommendation.

2 I would treat that differently if this

3 witness were offering his engineering

4 expertise to address the way in which the

5 accounting procedures worked from -- that

6 would then provide the basis for me to make

7 this decision. But I think you're relying on

8 Dr. Schreüder and others to say that.

9 So I'm going to grant -- grant Kansas's

10 motion with respect to the sentence, "The

11 current version of the accounting procedures

12 violates this requirement."

13 And the last sentence, Mr. Draper, I

14 think the witness has the expertise; and it's

15 no surprise for him to say the 5-run proposal

16 is consistent with historic operations. And

17 you can examine on how and the extent to

18 which it's a change. The rest I would agree

19 with you on that it's -- so I'm going to

20 strike the 5-run -- I'm going to strike the

21 words, "would comply with the explicit

22 requirements of the FSS and Compact," so that

23 that sentence will now read, "The 5-run

24 proposal would provide a simple and effective

25 modification to the accounting procedures,

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1 and is consistent with historical

2 operations."

3 Ms. Bernhardt, do you have any objection

4 to my ruling on that sentence?

5 MS. BERNHARDT: No, your Honor.

6 SPECIAL MASTER KAYATTA: Let's turn to

7 section 3. Mr. Draper, I think you're

8 objecting on page 3, section 3, only to the

9 second, third, and fourth sentence, if I'm

10 correct?

11 MR. DRAPER: Yes. Yes, your Honor.

12 SPECIAL MASTER KAYATTA: I think that's

13 all argument and a characterization of the

14 Compact.

15 Ms. Bernhardt, do you have anything to

16 say further on those three sentences?

17 MS. BERNHARDT: Your Honor, this is just

18 his opinion. He administers the Compact

19 within Colorado. So he is qualified, and

20 that's within the scope of his duties.

21 SPECIAL MASTER KAYATTA: Well, the first

22 two sentences, I think it's for the Court to

23 interpret and read the Compact. And the

24 Court will certainly note it does not mention

25 a River Master in the Compact, for what

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1 that's worth.

2 And it certainly -- I don't think this

3 adds anything, Ms. Bernhardt; so I'm going to

4 strike it.

5 MS. BERNHARDT: Yes, your Honor.

6 SPECIAL MASTER KAYATTA: Then,

7 Mr. Draper, Kansas is objecting to page 4 in

8 its entirety?

9 MR. DRAPER: Yes, your Honor.

10 SPECIAL MASTER KAYATTA: Ms. Bernhardt,

11 where in here do I find something that would

12 allow me and the Court to have the benefit of

13 Mr. Wolfe's engineering expertise or some

14 other -- or his expertise as a water resource

15 manager?

16 MS. BERNHARDT: Let me help you find

17 that provision.

18 SPECIAL MASTER KAYATTA: I read this

19 almost as much as it's something that you

20 might say to me in your opening or closing

21 arguments.

22 MS. BERNHARDT: Yes. As far as water

23 administration, he does say that he is the

24 state engineer, Colorado Commissioner, and

25 then also talks about administering water

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1 resources pursuant to statutes, interstate

2 Compacts, and international treaty

3 obligations.

4 SPECIAL MASTER KAYATTA: Right. And I'm

5 not questioning -- I haven't heard any

6 examination or cross-examination on

7 Mr. Wolfe's expertise; but I don't believe

8 Kansas is questioning that he does have

9 expertise. My question is is this testimony

10 offering me the benefit of that expertise as

11 opposed to a statement of Colorado's

12 position?

13 MS. BERNHARDT: It's offering as far as

14 his expertise. He is a Compact Commissioner.

15 The FSS does contemplate augmentation plans.

16 He's simply talking about it in that

17 capacity.

18 Your Honor, we would also add that he

19 does have extensive experience administering

20 Compacts and also with River Masters

21 personally.

22 SPECIAL MASTER KAYATTA: Well, let me

23 proceed then to Mr. Draper's second point.

24 Could you show me where in his -- if this is

25 being offered as expert testimony, could you

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1 show me where in his expert disclosure the  
 2 information in these two paragraphs appears?  
 3 MS. BERNHARDT: You said Mr. Draper.  
 4 I'm sorry. Were you referring to me, sir?  
 5 SPECIAL MASTER KAYATTA: I'm turning to  
 6 Mr. Draper's second -- he has -- I believe,  
 7 if I'm understanding you correctly,  
 8 Mr. Draper, your second principal argument is  
 9 to the extent this is expert testimony, there  
 10 was not disclosure of it.  
 11 MR. DRAPER: That is correct, your  
 12 Honor.  
 13 SPECIAL MASTER KAYATTA: So I'm asking  
 14 you, Ms. Bernhardt, where in the -- where do  
 15 I find these two paragraphs or something like  
 16 them in the expert disclosure?  
 17 MS. BERNHARDT: Yes, your Honor. I  
 18 understand now.  
 19 Your Honor, I think that similar to  
 20 Mr. Schreüder's report when he refers to the  
 21 final report of the Special Master, this is  
 22 in some ways simply background information to  
 23 provide context for the report. It's a  
 24 reasonable elaboration of what was in his  
 25 expert report.

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1 SPECIAL MASTER KAYATTA: Well, point me  
 2 to what was in -- I think there was -- if I  
 3 remember Mr. Wolfe's expert report correctly,  
 4 I think there was one sentence in that  
 5 report?  
 6 MS. BERNHARDT: Yes. There is in  
 7 opinion 1 -- sorry. One second.  
 8 Oh, got you. I apologize.  
 9 Kansas has also not adequately explained  
 10 in its expert reports whether the appointment  
 11 of a River Master is necessary or if the  
 12 appointment of a River Master would apply to  
 13 the State of Colorado.  
 14 SPECIAL MASTER KAYATTA: Period?  
 15 MS. BERNHARDT: Yes.  
 16 SPECIAL MASTER KAYATTA: He can  
 17 certainly state that here today.  
 18 MS. BERNHARDT: Yes, sir. And I believe  
 19 that what you see on the last page of his  
 20 testimony is an elaboration as to why a River  
 21 Master is unnecessary -- so it was fully  
 22 noticed -- and why it should not apply to  
 23 Colorado.  
 24 SPECIAL MASTER KAYATTA: I think that  
 25 one sentence is a little thin read to carry

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1 these two paragraphs. So I will allow him to  
 2 reassert that point, which I do read this as  
 3 saying; but I'm going to otherwise strike  
 4 these two paragraphs.  
 5 MS. BERNHARDT: Thank you, your Honor.  
 6 SPECIAL MASTER KAYATTA: So in lieu of  
 7 his direct testimony, you may ask him if it's  
 8 his opinion and read that sentence to him;  
 9 and he can confirm that for the record.  
 10 MS. BERNHARDT: Yes, your Honor. Thank  
 11 you.  
 12 SPECIAL MASTER KAYATTA: So before you  
 13 proceed, Mr. Draper, Ms. Bernhardt is going  
 14 to finish the direct examination of  
 15 Mr. Wolfe.  
 16 MR. DRAPER: Very good.  
 17 BY MS. BERNHARDT:  
 18 Q. Mr. Wolfe, I'm referring to your expert report.  
 19 If you would look to your opinion 1, in the last  
 20 sentence you state that, "Kansas has not  
 21 adequately explained in its expert reports why  
 22 the appointment of a River Master is necessary,  
 23 or if the appointment of a River Master would  
 24 apply to the State of Colorado." Why do you  
 25 believe that the appointment of a River Master is

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1 unnecessary and should not apply to Colorado?  
 2 SPECIAL MASTER KAYATTA: I think you're  
 3 going a little far beyond what I suggested  
 4 you do. I'm allowing him to repeat his  
 5 entire disclosed expert testimony on the  
 6 River Master. So if you want to read him the  
 7 sentence that's in his expert report and then  
 8 ask if that's still his opinion.  
 9 MS. BERNHARDT: Okay.  
 10 SPECIAL MASTER KAYATTA: And then I  
 11 sense you would like to get him to elaborate  
 12 a little bit on it.  
 13 MS. BERNHARDT: Thank you.  
 14 BY MS. BERNHARDT:  
 15 Q. We have read this. Is that still your belief?  
 16 Do you agree with the last sentence in opinion 1?  
 17 A. Yes, I do.  
 18 Q. Why?  
 19 A. I think after my review of the expert reports by  
 20 Mr. Barfield and Mr. Pope, I did not feel that  
 21 adequately explained how a River Master would be  
 22 implemented in terms of the request they're  
 23 making and how that would affect Colorado.  
 24 Colorado has been successful in administering  
 25 nine interstate Compacts and certainly has

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