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Trial Transcript, Vol. 21, Morning Session

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File 128
4379
Box 1D

Case # 4993

File # 128

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, STATE OF WYOMING

IN RE:)
)
THE GENERAL ADJUDICATION)
OF RIGHTS TO USE WATER)
IN THE BIG HORN RIVER)
SYSTEM AND ALL OTHER)
SOURCES, STATE OF)
WYOMING.)

Civil No. 4993

FILED

3/17 1981

Margaret W. Houston CLERK
DEPUTY

VOLUME 21

Morning Session

Wednesday, March 11, 1981

ORIGINAL

APPEARANCES

1

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3

FOR THE STATE OF
WYOMING:

MR. MICHAEL D. WHITE
Special Assistant Attorney General
2900 Energy Center One Building
Denver, CO 80202
ALSO: MR. STUART RIFKIN

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FOR THE UNITED STATES
OF AMERICA:

MS. REGINA SLEATER
Attorney at Law
Land and Natural Resources
Division
Department of Justice
Federal Building
Cheyenne, WY 82002

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10

and

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MR. TOM ECHOHAWK
Attorney at Law
Land and Natural Resources
Division
Department of Justice
1961 Stout Street
Denver, CO 80294

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14

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FOR THE ARAPAHOE
TRIBE:

WILKINSON, CRAGUN & BARKER
1735 New York Avenue
Washington, DC 20006
BY: MR. R. ANTHONY ROGERS

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FOR THE SHOSHONE
TRIBE:

SONOSKY, CHAMBERS & SACHSE
200 M. Street, N.W.
Washington, DC 20006
BY: MR. WILLIAM PERRY

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FOR THE PRIVATE
WATER HOLDERS:

MR. EDWARD WEBSTER
Attorney at Law
P.O. Box 69
Cody, WY 82414

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MR. GEORGE RADOSEVICH
Attorney at Law
910 15th Street, Suite 866
Denver, CO 80202

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1 THE SPECIAL MASTER: Are we ready to go?
2 I see one or two appearances, which may be appropriate
3 at this time. Mr. Webster.

4 MR. WEBSTER: My name is Ed Webster. I am
5 representing various private landowners and water
6 users in Division Number 3.

7 MR. RADOSEVICH: My name is George Radosevich,
8 and I represent the City of Lander and a variety of
9 other water users.

10 THE SPECIAL MASTER: Fine. All right. Mr.
11 White, if you would proceed with --

12 MR. ECHOHAWK: Mr. Master.

13 THE SPECIAL MASTER: Yes.

14 MR. ECHOHAWK: Yesterday during Mr. Billstein's
15 examination, I think you requested the totals by
16 percentage of the Type IV, V and VI lands that Mr.
17 Billstein had discussed, and during the break yesterday
18 he was able to prepare such a list and he has it with
19 him.

20 THE SPECIAL MASTER: Very well. Why don't
21 I finish my questioning then and ask you what that
22 is.

23 THE WITNESS: Fine.

24 THE SPECIAL MASTER: Go ahead with it now,
25 if you wish. You may want something to do with this

1 questioning anyway, so it's probably appropriate.

2 MR. WHITE: Why don't I save my voir dire
3 until cross, that may be the way to handle it.

4 THE SPECIAL MASTER: What is this document,
5 Mr. Billstein?

6 THE WITNESS: Your Honor, this is a listing
7 of the results of the lands in use for unadjudicated
8 areas by individuals photo by the respective types.

9 THE SPECIAL MASTER: When was this prepared?

10 THE WITNESS: Last night.

11 THE SPECIAL MASTER: That's what I thought.

12 It was never prepared in the work you did on the
13 Reservation at the time you were doing it?

14 THE WITNESS: Your Honor, we had summary
15 sheets for each photo which contained this basic
16 information. We never compiled it in an overall
17 summary form.

18 THE SPECIAL MASTER: But this is information
19 which you took from material that had been prepared
20 at the time you were out there working, and you
21 simply never totalled it is that what you're saying?

22 THE WITNESS: That's correct, Your Honor.

23 THE SPECIAL MASTER: Well, then in answer
24 to my question on total acreages for Types IV, V and VI,
25 what does this show?

1 THE WITNESS: If you would refer to sheet 3
2 of three, the last summary total claim and percentage
3 by type under Type IV lands, we identified 6,326 acres
4 or a total of 18.15 percent of the total land base.

5 Under Type V, 3,973 acres or a total of
6 11.4 percent of the total land base.

7 Type VI, 39 acres, which is .11 percent of
8 the total land base.

9 THE SPECIAL MASTER: Let me get my work
10 papers in order for today. I should have left them
11 here.

12 (Brief pause.)

13 THE SPECIAL MASTER: Okay, thank you. Mr.
14 Echohawk, do you wish to put this in evidence?

15 MR. ECHOHAWK: I don't think it's necessary,
16 Your Honor. I think he read the figures into the
17 record.

18 THE SPECIAL MASTER: Okay, thank you.
19 Okay, Mr. White.

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1 THE SPECIAL MASTER: You are continuing your
2 voir dire on this exhibits?

3 MR. WHITE: No, sir; I'm cross-examining
4 now.

5 THE SPECIAL MASTER: You are now on cross-
6 examination. Very good. Thank you.

7 MR. ROGERS: Excuse me, Your Honor. Just for
8 the record, the tribes have no cross-examination of this
9 witness.

10 THE SPECIAL MASTER: All right. Thank you.

11 MR. WHITE: Your Honor, I should also say
12 that normally the private counsel would cross before
13 I do, but Mr. Webster has replaced Mr. Cozzens and he's
14 asked if he could postpone his cross until a later time.

15 THE SPECIAL MASTER: Very well.

16 MR. RADOSEVICH: Your Honor, I would like
17 to postpone my cross until I have had an opportunity
18 of going through the deposition.

19 MR. WHITE: I'm sorry, George, I forgot to
20 mention that.

21 CROSS-EXAMINATION

22 BY MR. WHITE:

23 Q Mr. Billstein, I direct your attention to Exhibit
24 C-137 and ask you whether or not the acreages
25 billstein - cross- white

1 shown on there represent lands which are currently
2 in use or currently irrigated?

3 A. To the best of my knowledge, yes.

4 Q. Is there any distinction between land being in use
5 and land being irrigated in terms of your direct
6 examination?

7 A. The only difference is basically in some areas
8 of type 4 lands. At the time of the field
9 inspection, we're dealing with a very small land
10 base relative to spreader dikes or overflow systems
11 in the upper watersheds. It was obvious that
12 water had been delivered in the recent past to
13 those lands.

14 Without knowing the hydrology of the particular
15 area shown, our people in the field weren't able
16 to say specifically that at this particular season
17 they had received water on these very minor
18 isolated cases. This was the exception.

19 Otherwise, everything was evaluated as
20 actually being in use.

21 Q. Roughly how many acres did you include in your
22 grand total on Exhibit 137 involving lands
23 behind the spreader dikes?

24 A. A rough estimate of three to five hundred acres.

25 billstein - cross - white

1 Q Isn't it true that spreader dikes were constructed
2 not for the purposes of irrigation, but for the
3 purposes of sediment control?

4 A. There is multiple purposes for the spreader dikes.
5 This is an area that I thoroughly looked into.

6 I contacted the range personnel of the
7 Bureau of Indian Affairs as well as a couple of
8 the local operators. Most of the spreader dikes
9 were developed for sediment control purposes.

10 They have a secondary benefit, which is
11 for irrigation or increasing the vegetative
12 level behind the dikes. The individual ranchers
13 do use this vegetation.

14 They pay approximately ten cents per head
15 of cattle per acre to go into a maintenance fund
16 that allows these dikes to continue operating,
17 and the individuals I interviewed said that that
18 was a big part of the reason that they were involved
19 with that grazing unit.

20 Q So native vegetation is enhanced by water impounded
21 behind the spreader dikes; is that correct?

22 A. There was increased forage.

23 Q Is it true that those spreader dikes were, however,
24 installed using BIA money, primarily for sediment

25 billstein - cross - white

1 control?

2 A. My research showed that that was basically the case.

3 MR. WHITE: Excuse me just one minute, Your
4 Honor.

5 (Brief pause.)

6 Q. (By Mr. White) Those three to five hundred acres
7 then would be included within your Type 4 classification,
8 is that correct, or --

9 A. That's right. They would be in the Type 4, would
10 be assigned the proper water duty later on in
11 the case.

12 It's interesting to note that the spreader
13 dikes were inventoried as part of the 1968-1970
14 work by the State, those dikes identified as
15 active irrigation at that time.

16 Q. Do you -- well, we'll come back to that.

17 Now, by current irrigation or current use for
18 the lands summarized on C-137, isn't it true that
19 you mean lands that were irrigated or in use
20 during the irrigation seasons of 1978, 1979 and
21 1980?

22 A. During the course of my deposition I put approximately
23 a two-year band on it, but that two-year band was
24 basically geared at these water short systems

25 billstein - cross - white

1 where at the time of our field inspection we couldn't
2 tell whether there had been sufficient flood waters
3 in that drainage that year to delineate that it
4 had, in fact, been used.

5 It was an expansion of a pure 1980 criteria
6 to account for such things as spreader dikes.

7 Q So the answer to the question is yes?

8 THE WITNESS: Read the question.

9 THE SPECIAL MASTER: Well, his answer stands.

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billstein - cross - white

1 Q (By Mr. White) Isn't it true that currently
2 irrigated or currently in use lands reflected
3 on C-137 are those lands which were in use
4 or irrigated during 1978 and 1979 and 1980?

5 A No.

6 Q Why is that not true?

7 A Our people inventoried what was being used in
8 1980, they did not inventory what was being used
9 in 1978 or 1979.

10 Q So it's limited to 1980, is that the problem with
11 my question?

12 A That's not what I said.

13 Q Okay. For what years do you have an opinion that
14 the lands shown on Exhibit C-137 were under
15 irrigation or in use?

16 A For 1980, except for the spreader dike systems
17 that we evaluated and felt that they had been
18 used within the last couple of years, 1978 through
19 1980.

20 Q Okay. So you made no particular study of the
21 long-term irrigation of these lands; is that
22 correct?

23 A No, that was not important.

24 Q Isn't it true that the terms long-term irrigation
25 billstein-cross-white

1 and sustained irrigation are synonymous?

2 A They're -- They could be used interchangeably.

3 Q Isn't it true that you made no determination
4 with respect to the cost of irrigating these
5 lands?

6 A We discussed the respective programs, the analysis
7 of cost to serve lands that are, say in idle
8 status, are going to be evaluated. What my
9 program was all about was to define what lands
10 were receiving water.

11 Q So your program, with respect to the lands
12 described on C-137, did not involve a determination
13 of cost; is that correct?

14 A There were no cost analysis.

15 Q Mr. Billstein, I'd like you to assume that the
16 definition of practicably irrigable acres are
17 "Those acres susceptible of sustained irrigation
18 at reasonable costs."

19 THE SPECIAL MASTER: Is this witness a
20 competent one to answer one on practicably
21 irrigable acreage, Mr. White?

22 MR. WHITE: I just asked him to assume a
23 definition and then I'd like to see whether or
24 not the results meet the definition.

25 billstein-cross-white

1 THE SPECIAL MASTER: Do you want her to
2 read the question to you again?

3 Would you do that, please, Ms. Reporter.

4 (Thereupon the last
5 (question was read back as
6 (follows: "Q Mr. Billstein,
7 (I'd like you to assume that
8 (the definition of practicably
9 (irrigable acres are 'Those
10 (acres susceptible of
11 (sustained irrigation at
12 (reasonable costs.'"

13 THE SPECIAL MASTER: Wasn't there a question
14 in there?

15 MR. WHITE: I didn't get to the question
16 yet, Your Honor. I got the assumption out and
17 then you asked me about his competency.

18 Q (By Mr. White) Assuming that definition, isn't
19 it true that your opinion or the basis of your
20 opinion does not include the elements of sustained
21 irrigation or reasonable cost for the lands shown
22 on Exhibit 137?

23 MR. ECHOHAWK: Objection, Your Honor, calls
24 for a legal conclusion, and Mr. Billstein already
25 said the proof is whether it's irrigated or not.

THE SPECIAL MASTER: The objection will be
overruled, the witness may answer that question.

THE WITNESS: The proof, in my opinion, that
billstein-cross-white

1 it was reasonable to develop these systems,
2 was the fact that they were being irrigated.

3 THE SPECIAL MASTER: The proof, you said,
4 was the fact that they were being irrigated?

5 THE WITNESS: That's right.

6 Q (BY Mr. White) But you made no determination
7 with respect to sustained irrigation?

8 THE SPECIAL MASTER: I think he's already
9 answered that..

10 MR. WHITE: Your Honor, I'd like the Court --
11 I'd like to direct the Court's attention to
12 page 2 of the United States' Answers to State of
13 Wyoming's Eighth Set of Interrogatories, for
14 practicably irrigable acres were defined as those
15 acres susceptible of sustained irrigation at
16 reasonable costs.

17 THE SPECIAL MASTER: Well, that's fine,
18 Mr. White, but I think he answered the question
19 the way you wanted it answered.

20 MR. WHITE: I understand, I just wanted to
21 tie it together.

22 THE SPECIAL MASTER: Okay.

23 Q (By Mr. White) Mr. Billstein, I hand you what has
24 been marked for identification as Plaintiff's

25 billstein-cross-white

1 Exhibit HB C-1.

2 MS. SLEATER: Your Honor, I'd like to point
3 out that this is a copy of something that's not
4 in evidence yet, that was used for illustration
5 during the opening statements.

6 THE SPECIAL MASTER: Okay.

7 MR. WHITE: I won't dispute that, Your Honor.

8 Q (By Mr. White) Mr. Billstein, I'd like you to
9 assume that this is a scheme which shows the
10 development of the water rights claims for the
11 Wind River Indian Reservation, and ask you is
12 it true that the areas you've described in
13 Exhibit 137 fit into the area entitled historic
14 water use, that block with that label on it,
15 which is in the third set of blocks, second from
16 the top, third column of blocks, second from the
17 top?

18 A Without knowing who made up this table or knowing
19 what they meant by each one of the terms or
20 having any input into this, that would appear to
21 be the most reasonable place for any claim.

22 Q Well, I'll tell you what is already in the record,
23 and that this is a schema which was referred to
24 during opening argument by Ms. Sleater.

25 billstein-cross-white

1 Now, isn't it true that the work you've
2 done with respect to historic water use has
3 not, at least by you, been subjected to a systems
4 design and cost analysis, which is the only
5 block in the fourth column of blocks?

6 A As I described in my direct testimony, we
7 evaluated the systems to see if they were capable
8 of delivering the water to the actual use. The
9 system had to be in place to accomodate our
10 determination that it was actually being used.

11 Q Okay. How about the economic feasibility block
12 immediately to the right? You haven't covered
13 that, have you?

14 A No, I haven't.

15 Q Okay. Mr. Billstein, in reaching the conclusions
16 which are summarized on Exhibit C-137, isn't
17 it true that you relied on the following sources
18 of information or facts and data in reaching
19 that conclusion: Aerial photography, including
20 that which is in evidence as Exhibits 56 through
21 137; personal visits by you to roughly 25 percent
22 of the sites; the field notes of the field
23 investigators; the interviews conducted with some
24 of the owners or operators of parcels you've

25 billstein-cross-white

1 identified; the private ditch schedule developed
2 by BIA; Wind River Federal Irrigation Project
3 facility map package; water user's ledgers for
4 the LeClair Project -- District, excuse me; BIA
5 assessment photos; planimeter sheets; Soil
6 Conservation Service Study, 1968 to '70, and
7 infrared photography? Anything else?

8 A Yes, a personal work session with the Bureau of
9 Indian Affairs relative to the Wind River Federal
10 Irrigation Project, occurred in June of 1979, and
11 also I utilized the expertise of my handpicked
12 field people that performed the vast majority of
13 the field investigations.

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1 Q (By Mr. White) During the June, '79, meeting with
2 the BIA personnel, did you keep notes?

3 A The results were reflected in the work maps that
4 we had at that time. Any changes were delineated
5 on those maps.

6 Q Is it true then that except for the changes
7 delineated on your work maps, your then current
8 work maps, there's no written memoranda of any
9 type made of that meeting?

10 A I have no detailed description in the files of
11 that meeting.

12 Q Do you have any description, detailed or non-
13 detailed, in the files of that meeting?

14 A I can't recall that I do.

15 Q Anything else which you relied upon?

16 A I had some telephone conversations with a few
17 of the operators and a few of the BIA representatives.
18 That would be in addition to that.

19 Q Which operators did you speak to?

20 A Jim Fike, Jr. He runs the assignment on Crow
21 Creek.

22 Let's see. Discussed with Earl Large,
23 Washakie Ditch area; Mr. Snyder, who operates
24 at the lower end of Crow Creek; Louie Twitchell,
25 billstein - cross - white

1 who runs cattle on the Big Horn Draw area using
2 the spreader dikes; and Bob Robertson, who is a
3 range representative for BIA, Fort Washakie office.

4 Q I'm sorry. Bob who?

5 A. Robertson. That, to the best of my knowledge,
6 should cover all of my sources.

7 MR. WHITE: Your Honor, can I have about
8 three or four minutes to get a bunch of exhibits
9 in order and we'll be ready to go?

10 (Brief pause.)

11 Q (By Mr. White) Mr. Billstein, I direct your
12 attention to Exhibit C-137 and ask you whether
13 you can describe for the record those specific
14 parcels of land which make up the 341 acres
15 listed for the Owl Creek Basin?

16 A. I can point them out on the respective exhibits.

17 Q Okay. Maybe I could make it a little bit
18 easier.

19 Let me direct your attention to what's been
20 marked for identification as Defendants' Exhibit
21 HB-1129, which I believe you'll find to be a
22 blue line, opaque version of the overlay, that
23 is on United States Exhibit C-129.

24 Is that what that rascal is?

25 billstein - cross - white

1 A. It looks to be. There's some additional numbers
2 in it.

3 Q Right.

4 MR. ECHOHAWK: Mr. White, could we have a copy
5 of Exhibit HB-1129?

6 MR. WHITE: I'll let you look at it. We
7 haven't had time to make a copy.

8 (Off-the-record discussion.)

9 MR. ROGERS: Your Honor, I think for the record
10 I'm going to have to make the point that during
11 yesterday when Mr. White was using certain of his
12 own designated exhibits, he was only furnishing to
13 the two tribal attorneys one copy.

14 I think we're, as two separate tribes, two
15 separate parties, entitled each to a copy, and I
16 think we're also entitled to a copy of this
17 exhibit here, as is the United States entitled to
18 its own copy.

19 MR. WHITE: Well, Your Honor, if this cross-
20 examination had been conducted with respect to
21 the evidence put on in the normal case of normal
22 litigation, where there's full notice and
23 unquestionably full discovery beforehand, I think
24 Mr. Rogers would have a point.

25 billstein - cross - white

1 At least it's the custom -- not the requirement,
 2 but the custom -- which we would intend to comply
 3 with to provide all counsel with copies at the time
 4 the exhibit is identified.

5 Unfortunately, we haven't had time to do that
 6 in this situation. We will supply counsel with
 7 copies.

8 The only difference between the copies which
 9 we provided counsel or have shown to counsel and
 10 the document which was given us by the United
 11 States and given, I assume, by the United States
 12 to the tribes, is that certain tract numbers have
 13 been written in to assist the witness and the
 14 Court in identifying which tracts we're talking
 15 about on the aerial photographs which are numbered
 16 56 through 136.

17 I can hardly imagine that anyone is deprived
 18 or injured, and I'll be glad to take as much time
 19 as necessary to make sure that the tribes and the
 20 United States are able to annotate their own copies
 21 with those numbers, and when we have an opportunity
 22 to, we will make copies, and provide them to them,
 23 but it seems just a little bit unusual under the
 24 circumstances to be demanding a copy at this time.

25 billstein - cross - white

end of

1 THE SPECIAL MASTER: How many similar
2 copies -- How many similar exhibits will there
3 be to HB-1129? I see a stack of them.

4 MR. WHITE: About 80 of them, Your Honor.

5 THE SPECIAL MASTER: Eighty?

6 MR. WHITE: Yes, when we're done.

7 THE SPECIAL MASTER: Eighty of them?

8 MR. WHITE: Yes, sir.

9 THE SPECIAL MASTER: Virtually one for every
10 one of the series?

11 MR. WHITE: Yes, We were given copies of
12 the exhibits which were marked 56 through 136.
13 Instead of being a clear version, we were given
14 this type of blue line, we didn't have the
15 clear version, and this is the best copy we can
16 make using our blue lines that we were given
17 with our annotations. And it also takes a
18 significant amount of time to make each one of
19 these copies, and we didn't have time to make
20 them last night. We will make copies.

21 THE SPECIAL MASTER: Mr. Rogers, I hope you
22 can accept that explanation, I think it's a
23 fair one.

24 MR. ROGERS: I want to clarify one thing.

25 billstein-cross-white

1 He's referred to notations that are different
2 from the United States' Exhibits.

3 THE SPECIAL MASTER: Additions rather than
4 differences; additions rather than differences.

5 MR. WHITE: Yes.

6 MR. ROGERS: I said notations. Are they
7 reflected on the blue line copy?

8 MR. WHITE: Yes.

9 MR. ROGERS: And there will be no further
10 additions made to it?

11 MR. WHITE: Well, the witness may, I really
12 can't speak for him.

13 MR. ROGERS: You do not intend to make any
14 additional --

15 MR. WHITE: Not right now.

16 MR. ROGERS: And those additions will be on
17 all the copies that we ultimately receive?

18 MR. WHITE: Yes.

19 MR. ROGERS: That takes care of this one as
20 far as I'm concerned, if we are given them in a
21 reasonable time.

22 I do not think however, that Mr. White's
23 response satisfactorily answers the situation
24 that was yesterday when already three or four --

25 billstein-cross-white

1 maybe Monday -- three or four exhibits of normal
2 size that don't require blue line copies, which
3 we were only receiving one copy of, and I would
4 request that the State furnish Mr. Perry and
5 myself each with a copy.

6 THE SPECIAL MASTER: If you'll make those
7 requests at the time the exhibits come by, I
8 think we can run off another copy, Mr. Rogers.
9 I have one copy of each of those Monday exhibits
10 marked for me, for myself, and I'll be glad to
11 help any counsel, either side as you need copies
12 made of those today.

13 MR. WHITE: I apologize to the Tribes. I
14 inadvertently had given the United States two
15 copies and the Tribes only one, and from now
16 on I'll reverse the number.

17 MS. SLEATER: Your Honor --

18 THE SPECIAL MASTER: Maybe that would be
19 objected to, so just add it to the numbers.

20 MR. WHITE: I can get as many copies as I
21 can get in the time available, and if I run short,
22 maybe I can get a recess and we'll run some more.

23 THE SPECIAL MASTER: This current exhibit
24 which you've handed the witness, HB-1129 is the

25 billstein-cross-white

1 overlay for WRIR C-129, is that correct?

2 MR. WHITE: Yes, sir.

3 THE SPECIAL MASTER: And are you giving the
4 same two digit endings as the others?

5 MR. WHITE: The same three digits.

6 THE SPECIAL MASTER: The same three digit
7 ending to match the other exhibits.

8 MR. WHITE: What we tried to do was just
9 make ours a 1,000 series.

10 THE SPECIAL MASTER: All right.

11 MR. WHITE: In other words, 129 is the Federal
12 Exhibit which becomes 1,129 of the State's
13 Exhibit.

14 THE SPECIAL MASTER: Very good. I think it
15 will be helpful to us in working with these.
16 Thank you.

17 MR. ECHOHAWK: Your Honor, the point that I
18 was concerned about is that Mr. Billstein has a
19 different exhibit up there, something that has
20 notations on it, it's hard for us to follow along.

21 THE SPECIAL MASTER: Different from what?

22 MR. ECHOHAWK: Different from the main exhibits.

23 THE SPECIAL MASTER: Well, Mr. White, will you
24 tell us again or have the witness -- what is the

25 billstein-cross-white

1 addition? I find that there was no difference
2 but some additions.

3 MR. WHITE: Your Honor, as I pointed --

4 MR. ECHOHAWK: He has some parcel numbers
5 that Wyoming has assigned to individual pieces
6 there, and it's hard for us to follow along at
7 the counsel table unless we have such a copy,
8 unless we are permitted to stand next to Mr.
9 Billstein.

10 MR. WHITE: That would be fine with me.

11 THE SPECIAL MASTER: For the time being, why
12 don't you try standing over by Mr. Billstein or
13 sitting with him, maybe that will help a little
14 bit.

15 MR. WHITE: Mr. Echohawk, the only notation --
16 I believe the only notation on this Exhibit 1,129
17 is the notation I showed you at counsel table,
18 which is Tract 33-1.

19 THE SPECIAL MASTER: That's the only thing
20 added to that that is different from the overlay?

21 MR. WHITE: As far as I can tell, Your Honor,
22 and I did most of them.

23 Could we have about a five minute recess?

24 THE SPECIAL MASTER: All right, if it will

25 billstein-cross-white

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help. We'll stand in recess for ten minutes.

(Thereupon a 20 minute
recess was taken.

* * * * *

1 THE SPECIAL MASTER: Okay. Let's go on record
2 and resume, Mr. White.

3 MR. WHITE: We have to wait for Tony, if we
4 might.

5 MR. PERRY: Tony said we could proceed.

6 THE SPECIAL MASTER: All right. Thank you.
7 Will you need the other easel now?

8 MR. WHITE: It would be nice to have it,
9 Your Honor. We don't need it right now. We can
10 wait until after lunch.

11 THE SPECIAL MASTER: We will bring it at
12 the next break.

13 Q (By Mr. White) Ron, I hand you what's been marked
14 for identification as Plaintiffs' Exhibit HB-1129
15 and ask you whether or not that is a blue line
16 of the overlay on US Exhibit C-129 with the
17 addition of a tract number annotation?

18 A. That appears to be correct.

19 Q Is that tract number 33-1B?

20 A. It looks like just 33-1.

21 Q Can you change it to 1B, please?

22 MR. WHITE: Hold it just a second.

23 (Brief pause.

24 MR. WHITE: I'm sorry.

25 billstein - cross - white

6-7

- 1 Q (By Mr. White) Does it read 33-1?
- 2 A Yes.
- 3 Q Just leave it that way.
- 4 Is that one of the tracts that's included
- 5 within the 341 acres that you've determined for
- 6 the Owl Creek Basin?
- 7 A Yes, it is.
- 8 Q And is that tract located on Exhibit C-129 in
- 9 the southeast and the southwest in the west half
- 10 of the southeast of Section 16 in the northeast
- 11 of section 21?
- 12 A That's an approximate legal description for it.
- 13 Q What is the source of water that currently serves
- 14 that tract?
- 15 A It's a tributary, I believe, of Goat Creek.
- 16 Q That would fall then within the tributaries
- 17 portion under Owl Creek Basin on Exhibit 137?
- 18 A That would be part of the 110 acres under
- 19 South Fork Owl Creek and tributaries.
- 20 Q So that goes with Owl Creek and tributaries.
- 21 Do you know whether or not there is a
- 22 ditch serving that property or that parcel?
- 23 A Yes, there is.
- 24 Q Do you know the name of the ditch?
- 25 billstein - cross - white

- 1 A We named the ditch, I believe, off of the old
2 permit. We called it Carney Ditch.
- 3 Q C-a-r-n-e-y?
- 4 A That's right.
- 5 Q Is that land the subject of active or incidental
6 irrigation?
- 7 A Active irrigation.
- 8 Q Could you explain to the Court briefly the
9 difference between active and incidental?
- 10 A Incidental irrigation would be those lands which
11 receive only seep water or are subirrigated
12 without any direct distribution of water to
13 that tract from a ditch system.
- 14 Q Who was the field investigator that visited
15 that particular tract?
- 16 A Bill Johnston investigated the tract in
17 October. I reviewed the tract in February.
- 18 Q October of '80 and February, '81?
- 19 A That's right.
- 20 Q Was February, '81, the time in which you made
21 your helicopter visit to 25 percent of these
22 tracts?
- 23 A That's correct.
- 24 Q So your personal observations do not reflect
25 billstein - cross - white

1 or would not reflect the actual use of these
2 tracts in 1980?

3 A. I don't believe that's correct. You can tell
4 the condition of the ditches. You can see the
5 condition of the lateral systems in evidence.
6 It gives you a good indication of what they found
7 in the October field season.

8 Q. Who's the owner or operator of that tract?

9 A. I don't know.

10 Q. Isn't it true that you conducted no follow-up
11 interview with the owner or operator of that
12 tract?

13 A. We developed a listing of all the individuals
14 who were affected by our claims. Those people
15 were contacted either by mail or by representatives
16 that we hired on the Reservation to appear at
17 an interview forum that we held over several
18 days on the Reservation. This individual did
19 not show up at that interview meeting.

20 Q. Did you conduct an interview of that person,
21 whoever it might be, at any other time?

22 A. No, we had no follow-up on it.

23 Q. Does that tract of land contain approximately
24 47 acres?

25 billstein - cross - white

1 A. Our planimeter sheet shows 47.4 acres.

2 Q. Was that tract of land identified as currently
3 irrigated in the '68 to '70 time period by
4 SCS, if you know?

5 A. Let's see.

6 THE SPECIAL MASTER: By whom, Mr. White?

7 MR. WHITE: The Soil Conservation Service.

8 THE SPECIAL MASTER: SCS. I'm sorry. I
9 thought I heard SPS.

10 THE WITNESS: I would like to consult my
11 SCS photos.

12 MR. WHITE: Sure.

13 THE SPECIAL MASTER: I'm going to go off the
14 record.

15 (Off-the-record discussion.)

16 A. (By the Witness) Looking at my SCS photos,
17 it was not mapped as being in current service
18 at that time.

19 I should add to that, and if you want to
20 take the time to explore this, they did a very
21 poor job of documenting use in the higher
22 tributary areas. I would assume that logically
23 in that kind of an inventory that they were
24 conducting, that any time they dealt with a

25 billstein - cross - white

1 small amount of acreage, which you would find
2 in these higher watersheds, that wasn't of a
3 major concern to people, but, no, there was no
4 documentation on that.

5 Q (By Mr. White) In 1980 to you know the crop
6 that was raised on that 47-acre parcel?

7 A. Just a notation from my field inspection that
8 was in grass, pasture.

9 Q. Based on your experience working with aerial
10 photos, isn't it true that areas receiving water
11 from irrigation generally appear in dark colors
12 and those which are not appear in relatively
13 light colors?

14 A. I don't think a person could make a conclusion
15 like that. You are dealing with a lot of variables.

16 It could be the position of the sun at the
17 time that the particular tract was shot. In
18 some cases you would get a reflection off the
19 water which would show white, and in other areas
20 it would show dark.

21 It could be the time of the season that they
22 were irrigating. If they were irrigating at
23 the time that the photo was taken, then it would
24 show up in a darker shade of vegetation.

25 billstein - cross - white

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If they were between irrigations or letting
 it go to pasture, then it would show lighter.
 There's a tremendous number of variables
 here.

* * * * *

billstein - cross - white

1 Q (By Mr. White) Would you please mark Exhibit C-129
2 with a red pencil, showing the tract which we've
3 been discussing as 33-1.

4 (Witness complied.)

5 Q Ron, would you please explain to the Court --
6 First of all, can you locate that tract now
7 without the overlay? Is it in this general area
8 right here?

9 A Yes.

10 Q Would you please explain to the Court, based on
11 your experience, the reason why all of the area,
12 save a small two to four acre parcel, is very
13 like the same color as the surrounding bluffs
14 perhaps, whatever these features are, and yet
15 only about two to four acres look more like it's
16 in a little creek bottom, colored dark?

17 A That could be a low point in the field where
18 water aggregates.

19 Q Isn't it true that the areas in the northwest
20 portion of this photograph are areas under
21 irrigation?

22 A Yes.

23 Q Isn't it true that the type of gray shading in
24 those areas occurs only in that two to four-acre

25 billstein-cross-white

1 tract within tract -- two to four-acre parcel
2 within Tract 33-1?

3 A Again, just -- There's a certain amount of
4 liability with this, taking a look at shading,
5 as you can see in this instance, extending along
6 the end of this major block of use there. They
7 again start to shade into the general terrain
8 and you can see laterals in those.

9 Q Do you know that the laterals in those were in
10 operation during the irrigation season 1980?

11 A I don't know that.

12 THE SPECIAL MASTER: Mr. Billstein, why is
13 the obviously irrigated area in the northwest
14 corner to which Mr. White referred to not marked
15 on this overlay?

16 THE WITNESS: It's off the Reservation,
17 Your Honor.

18 Q (By Mr. White) Mr. Billstein, are you sure that
19 that's off the Reservation or is that fee land
20 that's on the Reservation?

21 A That's off the Reservation. The Reservation
22 boundaries are identified on the photo.

23 THE SPECIAL MASTER: Either one or the other,
24 that's good enough for me.

25 billstein-cross-white

1 Q (By Mr. White) Are there any other tracts of
2 land on Exhibit 129 which fall within the
3 341 acres in the Owl Creek Basin?

4 A No.

5 MR. WHITE: Your Honor, at this time I would --
6 Well, I'll just postpone my offer until the end.

7 Q (By Mr. White) I direct your attention to
8 Exhibit --

9 A Don't I get to introduce my field findings? We're
10 still talking about this tract.

11 MR. WHITE: He can do it on redirect. We'll
12 be all day if we go through everything. I suppose
13 we can, it's up to you, but using the format of
14 cross-examination that we've just been through,
15 speeded up as we become more familiar with the
16 process, I expect it will take ten days.

17 THE SPECIAL MASTER: Do you feel all your
18 answers have been fully -- Do you feel all your
19 questions have been fully answered?

20 MR. WHITE: Yes, sir.

21 THE SPECIAL MASTER: All right then, the
22 answer is no.

23 MR. ECHOHAWK: Your Honor, it would appear
24 to be that if the witness has additional information
25 billstein-cross-white

1 to meet Mr. White's concerns, that he should be
2 able to give them at the appropriate time which
3 is now.

4 THE SPECIAL MASTER: If Mr. White feels
5 that his questions have been fully answered on
6 cross-examination I think that's adequate. We
7 can proceed.

8 If you wish to put something on on redirect,
9 you're welcome to.

10 Q (By Mr. White) Mr. Billstein, I direct your
11 attention to Exhibit C-134 as well as State's
12 Exhibit HB-1,134.

13 MR. WHITE: Off the record.

14 (Off-the-record discussion.)

15 Q (By Mr. White) With the exception of an annotation
16 33-2, is Exhibit 1,134 a blue line of the overlay
17 on Exhibit C-134?

18 A That appears to be correct.

19 Q Is the tract of land annotated as 33-2 on
20 Exhibit 1,134 a tract of land whose acreage is
21 included within the 341 acres of the Owl Creek
22 Basin on Exhibit 137?

23 A Yes.

24 Q Does that tract of land have approximately 9 acres
25 billstein-cross-white

1 in it?

2 A Yes.

3 Q Would you please annotate Exhibit 134 with the
4 tract number 33-2 which appears on Exhibit 1,134.

5 (Witness complies.)

6 Q Is that tract located in Section 10, NE 1/4
7 and SE 1/4 as well as -- excuse me, the NE, the SW
8 and the SE portions of those quarters?

9 A In Section 10?

10 Q Yes.

11 A I believe you're on the wrong side of the creek.

12 Q Well, get me on the right side.

13 A You should be in Section 21, 43 North, 99 West.

14 Q Okay. So you're on the North side of the South
15 Fork of Owl Creek?

16 A That's right.

17 Q Isn't it true that when the SCS inventoried that
18 land, parcel 33-2 was not considered as being
19 in irrigation?

20 A You show it in use.

21 Q I do?

22 A Sure do.

23 Q Let's see.

24 (Brief pause.)

25 billstein-cross-white

1 MR. WHITE: That's what happens with overnight
 2 preparation, Your Honor. I'm sorry.

3 Q (By Mr. White) Is that land the subject of
 4 active or incidental irrigation?

5 A Active.

6 Q Do you know who the owner/operator is?

7 A No, I don't.

8 THE SPECIAL MASTER: Do you know the actual
 9 acreage in that parcel?

10 THE WITNESS: 9.4 acres.

11 THE SPECIAL MASTER: That's a minute amount
 12 of land to take up this much time, and I hope
 13 we can do something about it and I'd be grateful
 14 to you, Mr. White.

15 MR. WHITE: Thank you, Your Honor.

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1 Q (By Mr. White) Are the parcels that we have
2 just discussed, being Parcel 33-1 and 33-2, both
3 Type 4 lands?

4 A Yes, they are.

5 Q Mr. Billstein, how did you determine that that
6 particular parcel was within the Reservation
7 boundaries?

8 A We obtained the ownership maps from the Bureau
9 of Indian Affairs. It showed that this was a
10 tract of land that was part of the Merrill and
11 Curtis Land Exchange that took place in the 1940's
12 and is now in trust land and considered a part
13 of the Reservation.

14 It does extend north of the South Fork of
15 the Wind River -- I mean the South Fork of
16 Owl Creek.

17 Q Is that land that was acquired by the United
18 States?

19 A That's right. It was purchased.

20 MR. WHITE: Your Honor, I believe that the
21 stipulation of the parties concerning the
22 exterior boundaries of the Wind River Indian
23 Reservation excludes the portion or the Parcel 33-1
24 that's just been described, and I probably will move
25 billstein - cross - white

1 to strike all similar ones when we get done.

2 THE SPECIAL MASTER: What's the total
3 acreage in this area?

4 MR. WHITE: This is still the 9-acre one,
5 Your Honor, but we've got some more.

6 THE SPECIAL MASTER: Okay.

7 Q (By Mr. White) What crop was grown there in
8 1980, if you know?

9 A. Again, it looked like grass, in my inspection.

10 Q Is that served out of a ditch that's a permitted
11 water right?

12 A. It's a permitted water right.

13 Q Do you know the permit number?

14 A. I believe it's 10719.

15 Q Do you recall the permit number for the Carney
16 Ditch?

17 A. I believe it's 9055, in terms of the land that
18 has all the laterals, and that on Carney, let
19 me check my photos and see if I do have a permit
20 boundary to see if there's anything unpermitted
21 that's beyond that.

22 (Brief pause.)

23 A. (By the Witness) With respect to the active
24 area on Carney that we found in our field

25 billstein - cross - white

1 inspection of 1980 and my field review, there
2 are some small isolated tracts that fall outside
3 of the permit of record. It is not adjudicated,
4 however.

5 We recorded those as any other land base,
6 if it fell outside of the adjudicated boundaries,
7 Your Honor.

8 Q (By Mr. White) With respect to Parcel 33-2,
9 was the field investigator Mr. Johnston again
10 in October of '80?

11 A That's right.

12 Q And you visited it in February of this year?

13 A Yes, I did.

14 Q Directing your attention to Exhibit C-133 and
15 HB-1133 --

16 A Okay.

17 Q Could you ascertain whether or not HB-1133 is
18 a blueprint copy of the overlay on Exhibit C-133
19 with the exception of an annotation of tract 33-3?

20 A There are other annotations on that, counselor.

21 Q Are those 33-4 and 33-5?

22 A Yes, that appears to be all of them.

23 MR. WHITE: Okay.

24 MR. ROGERS: Your Honor, may I ask just for
25 billstein - cross - white

1 the record what the reference, the repetitive
2 reference number 33 in these additions -- what
3 does it refer to?

4 MR. WHITE: It's just a code number we put
5 on it for our own bookkeeping purposes, Your
6 Honor, and I think it refers to the source of
7 the water. I'm not sure.

8 I didn't devise the system. It was an
9 overnight production, and that's the best
10 answer I can give you. When I can figure it out,
11 I'll let you know.

12 MR. ROGERS: For the record, since I have
13 sat here and counted, on Exhibit 137 it appears
14 that South Fork Owl Creek comes out to about 33,
15 and I wondered if that was your system.

16 MR. WHITE: It beats me.

17 MR. ROGERS: All right. Thank you.

18 Q (By Mr. White) Could you please annotate Exhibit
19 133 with the tract numbers for 33-3, -4, and -5?

20 A. (Witness marked on document.)

21 THE SPECIAL MASTER: And once again may I
22 ask the acreage totals for each of those three
23 parcels?

24 MR. WHITE: Yes, sir. As soon as I get back,
25 billstein - cross - white

1

I'll tell you.

2

THE SPECIAL MASTER: Either you or the

3

witness, as long as I can have his concurrence

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in it.

5

Q (By Mr. White) With respect to Tracts 33-3,

6

-4, and -5, is it true that they are comprised of

7

25.7, 12.8 and 15.3 acres, respectively?

8

A Let me just check one other --

9

(Brief pause.

10

THE WITNESS: Would you read me back

11

the acreages?

12

(Thereupon the last question

13

(was read back as follows:

14

"Q. With respect to Tracts

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(33-3, -4, and -5, is it true

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(that they are comprised of

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A. (By the Witness) I concur in that.

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1 Q (By Mr. White) What investigation did you make
2 to determine whether or not Tract 33-3, which
3 is located in Section 25, SW of the SW 1/4 was
4 unadjudicated?

5 A Plotted the water right of record.

6 Q Which was the Shoop Ditch?

7 A I believe it was the Large Ditch.

8 Q It was the Large Ditch?

9 (Brief pause.)

10 THE WITNESS: Excuse me, Your Honor, I just
11 have to check my water right file.

12 THE SPECIAL MASTER: These three are all
13 three on the main stem of the Owl Creek, are
14 they?

15 MR. WHITE: I think they're on the South
16 Fork, Your Honor.

17 Q (By Mr. White) What are you looking at now,
18 Ron? Do you mind if I look over your shoulder?

19 A Sure, it's my copy of the Certificate of
20 Appropriation for the Shoop Ditch together with
21 its map and accompanying ditch. I also have a
22 copy of the map of the Large Ditch with a legal
23 description for that respective water right.

24 Is your copy handy of the Shoop Ditch
25 billstein-cross-white

1 Certificate?

2 Q I don't have the Certificate, I just got the map,
3 Ron.

4 A Okay. I'll use mine then, the way it reads.
5 It's a little faint, but I believe I can see the
6 legal description on it.

7 MS. SLEATER: Your Honor, --

8 THE SPECIAL MASTER: Speak up for the record --
9 just a minute, Regina, please. If what you want
10 to say is to go on the record, speak up nice and
11 loud, if not, keep a sotto vocci whisper between
12 the two of you and that would be all right.

13 MS. SLEATER: I would object to any
14 whispering between any defense counsel and --

15 THE SPECIAL MASTER: Let's take five minutes
16 and let them shout at each other. We'll take a
17 five minute break. I think the two want to
18 confer and I think they have a right to do so
19 without it being on the record.

20 MS. SLEATER: Your Honor, I'm sorry.

21 THE SPECIAL MASTER: We're out of session
22 right now for five minutes.

23 (Thereupon a five minute
24 recess was taken.)

24 * * * * *

25 billstein-cross-white

1 THE SPECIAL MASTER: Okay. Any time you are
2 ready. All right. Let's resume.

3 Q (By Mr. White) Mr. Billstein, in determining
4 the unadjudicated status of Parcel 33-3, did
5 you consult the certificate of appropriation
6 and find that only 17 acres of that permit had
7 been adjudicated?

8 A I found 17 acres of adjudicated land in the
9 Northeast Quarter of the Southeast Quarter of
10 Section 25, which is the quarter above the area
11 that we're talking about.

12 Q How did you determine that that was the only
13 portion of that permit which had been adjudicated?

14 A From our office study we had compiled, to the
15 best of my knowledge, adjudicated rights on
16 Owl Creek, and they were plotted on original
17 work maps, and we could establish the location of
18 those adjudicated water rights in relation to
19 permitted lands.

20 It's my feeling that in working with the
21 State Engineer's Office that we obtained all
22 certificates of appropriation that were available.

23 Q Is it true that Parcels 33-3, 33-4 and 33-5 all
24 take from the South Fork of Owl Creek as their
25 billstein - cross - white

1 source of supply?

2 A. That's correct.

3 Q. Is it true that Parcels 33-4 and 33-5 are
4 served by the 'McCanaughy' and Morrison-McCanaughy
5 Ditches?

6 A. The ditch system that we found in the 1980
7 field investigation that served those tracts
8 related to the Morrison-McCanaughy Ditch system.

9 Q. Are those three parcels active or incidental
10 service irrigation?

11 A. The previous question -- did you ask me if all
12 three parcels were served from the Morrison-
13 McCanaughy??

14 Q. Only the last two, Ron, 33-4 and 33-5.

15 A. Okay. To answer your current question, yes,
16 they are all active irrigation.

17 Q. Are they all Type 2, all three?

18 A. Yes.

19 Q. Do you know the crops grown on those parcels
20 in 1980?

21 A. Let me -- on Tract 33-4, let me check my notes
22 once more. There may be a small area of Type 4
23 included.

24 Q. 4.1 acres?

25 billstein - cross - white

1 A. That's right.

2 Q Now, do you know the crop that was grown there in
3 1980, in those three parcels?

4 A I'll see if there's any record on that.

5 (Brief pause.)

6 A (By the Witness) I see no notation on crops.

7 Q Again, our responsibility was to map irrigated
8 lands.

9 Q Was the field investigator for those three tracts
10 Mr. Johnston in October of 1980 and -- excuse me, --
11 go ahead and answer that part of the question.

12 A It was Mr. Saunders based on my notes.

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billstein - cross - white

- 1 Q (By Mr. White) For all three tracts?
- 2 A Yes.
- 3 Q Did you personally visit these tracts by
- 4 helicopter in October of '80 -- excuse me,
- 5 February of '81?
- 6 A Yes.
- 7 Q Referring to Exhibit 133, isn't it true that
- 8 Tract 33-4 has large gullies going through the
- 9 middle of it?
- 10 A I can recall no large gully, maybe a low point in
- 11 the field where there's a drainage way.
- 12 Q How deep is that drainage way?
- 13 A I really can't recall. It wasn't marked
- 14 otherwise I would have recorded it.
- 15 Q Did you keep any notes with respect to the
- 16 size of that drainage way?
- 17 A No, nothing of that nature.
- 18 Q I direct your attention to Exhibit -- With
- 19 respect to that same parcel, 33-4, doesn't your
- 20 hydrographic copy that you're referring to have
- 21 a Class 6 designation for that land?
- 22 A We're talking about Tract 33-4?
- 23 Q Yes.
- 24 A That is not reflected on the hydrographic copy.
- 25 billstein-cross-white

1 Q Now, turning to Exhibit 132, C-132 as well as
2 Exhibit HB-1132, isn't it true that Exhibit
3 HB-1132 is a blueprint copy of the clear
4 overlay of Exhibit 132 except for the addition
5 of parcel annotations for 34-1, 34-2 and 34-3?

6 A Except for annotations 34-1, 34-2 and 34-3 they
7 should be the same.

8 Q Okay. Would you please annotate Exhibit 132 with
9 the parcel numbers you've just described.

10 (Witness complied.)

11 Q Do parcels 34-1, 34-2 and 34-3 have 24 acres,
12 12 acres and 3 acres respectively -- excuse me,
13 2.7 acres respectively?

14 THE SPECIAL MASTER: Is that a total of
15 40 acres?

16 MR. WHITE: About, Your Honor,

17 THE WITNESS: Repeat the numbers for the
18 record.

19 Q (By Mr. White) Twenty-four, 12, 2.7.

20 (Brief pause.)

21 A That's correct.

22 Q Are they Type II, II and IV lands respectively?

23 A Type II, II, V respectively.

24 Q Five?

25 billstein-cross-white

1 A Right.

2 Q Are they all three located in Township 43 North,
3 97 West?

4 (Brief pause.)

5 A That's correct, Township 43 North, Range 97 West.

6 MR. WHITE: Your Honor, I point out to
7 the Court that those are outside the exterior
8 boundaries of the Wind River Reservation as
9 stipulated by the parties.

10 MS. SLEATER: Your Honor, I'd like to point
11 out as you are undoubtedly aware and Mr. White's
12 aware, as to the answers and other documents
13 filed by the United States, that there are
14 certain lands in trust status which are in fact
15 the northern part of the Reservation and the
16 claims are being made for that land as they are
17 held in trust by the United States for the Tribes.

18 MR. WHITE: I'd just --

19 THE SPECIAL MASTER: What was the date --
20 Was this land also obtained by exchange and
21 added to the Reservation?

22 THE WITNESS: To the best of my knowledge
23 that was part of the 1940 purchase.

24 THE SPECIAL MASTER: 1940 exchange or

25 billstein-cross-white

1 purchase?

2 THE WITNESS: Yes, sir.

3 THE SPECIAL MASTER: Like the nine acres
4 in 1134?

5 THE WITNESS: Yes, sir.

6 MR.. WHITE: I'd just say that the stipulation
7 speaks for itself with respect to the exterior
8 boundaries.

9 THE SPECIAL MASTER: If the State of Wyoming
10 will run up a total of lands like this which
11 were added to the Reservation by exchange and
12 submit a request that these particular acres be
13 deducted from the totals of this man's exhibits,
14 I'll entertain such a motion. If Counsel would
15 want to get together and try to work that out,
16 they can, or argue the proposition that this
17 should be included.

18 MS. SLEATER: Your Honor, I would like to
19 state for the record that the United States is
20 not saying that the Arapahoe Ranch area is part
21 of the Reservation at this time. What we are
22 saying is it is held in trust for the United
23 States -- by the United States for the Tribes and
24 this hearing is scheduled to consider the total

25 billstein-cross-white

1 water claims made on behalf of the Tribes, and
2 as such, this is part of the total water claim.

3 THE SPECIAL MASTER: All right. I under-
4 stand that. Whether or not the Reservation
5 will apply to this water, however, is a serious
6 question that I will determine.

7 Were not appropriations acquired at the
8 same time this land was acquired?

9 MS. SLEATER: To some extent, Your Honor.

10 THE SPECIAL MASTER: Why should anybody be
11 allowed a double dip?

12 MS. SLEATER: Your Honor, we're not double
13 dipping, I think as you'll see as the case
14 progresses where this fits in.

15 THE SPECIAL MASTER: We'll see if we can
16 get the case to progress, then we'll see.

17 MR. WHITE: I'm sorry, Your Honor. We're
18 finding out as much as we can as fast as we can.
19 I'm lumping them together.

20 THE SPECIAL MASTER: All right. We're making
21 progress.

22 MR. WHITE: We will submit a list --

23 THE SPECIAL MASTER: How ever small and
24 modest it appears at times, we are making progress.

25 billstein-cross-white

1 Go ahead, Mr. White. could get ...
2 MR. WHITE: We will submit a list, Your
3 Honor. It will take some time because we've
4 gone through about, oh, ten or twelve man hours
5 of work for the cross-examination so far, and
6 we're not yet done with these areas along the
7 northern part of the Reservation. In other
8 areas that might be outside of the Reservation.
9 When we get that done we will submit the list.
10 MR. ECHOHAWK: Your Honor, I'd like to
11 suggest a way, hopefully, to move things along,
12 that maybe Mr. White can put this information
13 on in his own case. I was advised by some of
14 the workers of HKM, there are approximately --
15 the total part of the Reservation we're talking
16 about is two to three thousand of these parcels,
17 and we've covered about six of them so far. If
18 we attempt to do this, we're going to be here for-
19 ever; that perhaps a lot of this work can be
20 done outside of Court by Mr. White's experts.
21 It's just a matter of bookkeeping and perhaps
22 we could speed things up that way.

23 MR. WHITE: Your Honor, I asked for a
24 continuance, which I believe was opposed by the

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1 Go ahead, Mr. White.

2 MR. WHITE: We will submit a list, Your
3 Honor. It will take some time because we've
4 gone through about, oh, ten or twelve man hours
5 of work for the cross-examination so far, and
6 we're not yet done with these areas along the
7 northern part of the Reservation. In other
8 areas that might be outside of the Reservation.
9 When we get that done we will submit the list.

10 MR. ECHOHAWK: Your Honor, I'd like to
11 suggest a way, hopefully, to move things along,
12 that maybe Mr. White can put this information
13 on in his own case. I was advised by some of
14 the workers of HKM, there are approximately --
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16 about is two to three thousand of these parcels,
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19 ever; that perhaps a lot of this work can be
20 done outside of Court by Mr. White's experts.
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22 we could speed things up that way.

23 MR. WHITE: Your Honor, I asked for a
24 continuance, which I believe was opposed by the

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1 United States, so I could get our experts to
2 see what we could decide for ourselves, and
3 there's simply has not been time, in the amount
4 of time we had, to make that bookkeeping -- as
5 Mr. Echohawk calls it -- exercise, go through
6 to completion. And I will state to the Court
7 that to date there have been approximately 20
8 man days put into the analysis that we've been
9 able to accomplish so far, which covers about,
10 between 15 and 20 percent of the land areas,
11 and I think we're entitled to at least be told
12 which parcels are included in which acreage
13 figures.

14 THE SPECIAL MASTER: Well, no one is
15 restricting your right to do it without cross-
16 examination, as part of your own case, but
17 whatever we can do to speed it up, I think is
18 what Mr. Echohawk is asking, and I hope you
19 can try to work it out with the goal to saving
20 time and expediting, hopefully an early
21 conclusion of the case.

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1 MR. WHITE: Your Honor, perhaps this might
2 resolve the dilemma, because I realize we're
3 going very slowly, and yet we need to do it.

4 Perhaps we could have the right to recall
5 Mr. Billstein for cross-examination during our
6 part of the case. That would give us time to
7 do this and see if there are any apparent
8 questions that come out of our work.

9 THE SPECIAL MASTER: You have that right
10 in any event.

11 Where we might also maybe save some time,
12 because we are coming near lunch hour now, is
13 that we can discuss that in the cross-examination
14 of Mr. Billstein, if a question is asked which
15 has as its purpose merely testing his veracity
16 or double-checking his accuracy, once that's
17 done on one or two or three exhibits, it perhaps
18 ought not to be raised again on the remainder
19 of them, if this purpose was as I have just
20 stated, and I have noticed, and I have been trying
21 to be quite restrained -- in other words, I
22 want to give you full rein, full latitude in the
23 cross-examination, but there may be a point where
24 the asking of the same question for the same

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1 purpose after so many exhibits becomes redundant
2 or repetitive and would be subjected to being
3 stopped.

4 Yes, Mr. Webster?

5 MR. WEBSTER: Your Honor, I represent some
6 people in the Owl Creek area.

7 THE SPECIAL MASTER: I know you do.

8 MR. WEBSTER: I am very concerned about the
9 testimony. I recognize that I am under a
10 handicap and I'm afraid that my handicap might
11 spill over into your situation because of my
12 inability to be here all the time, which again
13 gets back to the fact that it's unfortunate we
14 are doing it in Cheyenne, but we have crossed
15 that bridge before.

16 THE SPECIAL MASTER: We haven't heard that
17 this week.

18 MR. WEBSTER: But I would certainly ask --
19 You know, I would like to be able to have the
20 State go forward with its and would seek the
21 Court's indulgence, when we are talking about
22 giving an additional 20 or 40 acres of water,
23 we are talking really about taking it away from
24 my client, and because of that, I would hope that

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1 we could have some indulgence, particularly
2 in this area because of the clients I represent
3 in that area.

4 THE SPECIAL MASTER: Only one thing comes
5 to my mind, Mr. Webster. If back in the
6 beginning of this trial we would have taken and
7 examined every State water right with the
8 minute thoroughness with which the State is now
9 examining every square foot of every acre of
10 every parcel of the Reservation, isn't it your
11 opinion that perhaps 60 percent of the State
12 water right acreage would be removed from those
13 rights or 50 percent or so?

14 MR. WEBSTER: I guess I wouldn't agree with
15 you on that, Your Honor.

16 THE SPECIAL MASTER: Well, I have just been
17 reading Professor McIntyre's excellent Water
18 Law Review Article of 1970, which has been
19 cited in some of the briefs already, of the
20 problems of water rights administration by the
21 State.

22 I also have with me an excerpt from the
23 Constitution of the State of Wyoming which
24 charges the State of Wyoming and the State Engineer

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1 with guarding all of the water rights of this
2 State, not just those under the water rights.

3 Those include the rights of the Indians
4 as a right which the State Constitution gives the
5 State the duty to guard, and this is what I hope
6 will be forthcoming in this lawsuit in that
7 while it is an adversarial proceeding now, the
8 State has a duty to protect the Indian water
9 rights as well as it does the State water rights
10 that's been granted by the State Engineer, and
11 the Constitution grants that duty to the State
12 Engineer's office.

13 Now, if this lawsuit can just use the same
14 standards or inquiry and allow it to both sides,
15 it would be much to be hoped for. I don't think
16 it can be done unless this lawsuit takes the
17 next 15 years because we have many thousands of
18 water rights up there, and it will take much more
19 machinery than a mere Special Master, one
20 assistant, one or two writers, and the staff we
21 have now.

22 I hope that this can be done without having
23 to require the minute examination of every
24 document issued by the State Engineer's office.

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1 This lends itself into the actions of the
2 State Bar Association, of the legislature of
3 half a dozen western states over the last decade,
4 and into what has been done to modernize and
5 make much more efficient the administration of
6 adjudicated water rights in this State, so we
7 are going to let you go ahead, Mr. White, the
8 way we are going and hope that we can get the
9 totals, and, Mr. Webster, we are glad that you
10 are here so you can watch this, each area of
11 Owl Creek of the northern part of the Reservation,
12 but again I only want to hope that where there
13 is obviously the basis for subtracting some
14 acreage from totals and this C-137 exhibit figure,
15 if the totals can be arrived at, you don't have
16 to agree to them, merely be arrived at in each
17 case where this was exchanged land, it will save
18 us an awful lot of time.

19 MR. WHITE: Your Honor, my primary purpose
20 of this part of the cross-examination is not
21 to attack or discredit Mr. Billstein's work.
22 It's to gather information for the State concerning
23 the basis of his opinion, and I should state on
24 behalf of the State of Wyoming that we recognize

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1 the duty -- the State recognizes the duty that
2 you have described, and once a decree is entered
3 by this Court, the State Engineer as well as
4 the Board of Control and all other offices of
5 State Government will do everything that they
6 are required to do within not only the letter
7 but the spirit of the law to protect the rights
8 that are awarded to the Tribes or the United
9 States in the Tribes' behalf.

10 THE SPECIAL MASTER: There are many, many,
11 many more questions involved in these 34,000
12 acres before they become acceptable as acreage
13 to be given a water right, the economic test, the
14 irrigability tests, an inquiry into irrigation
15 or sprinkler, an inquiry into source, an inquiry
16 into duties flowing to those protected surface
17 waters where there is rapid groundwaters available --
18 all of these factors have to be considered before
19 we come down with a total that will deny anybody
20 else some water, but if we deny anybody else some
21 water, they are really not denying water.

22 They are making a replacement of priorities
23 in this society of ours as to the availability
24 of water.

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