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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

WASHAKIE COUNTY, STATE OF WYOMING

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

Civil No. 4993

FILED
10/30 1981
Margaret W. Hampton
.....

VOLUME 100

Morning Session

Wednesday, September 2, 1981

ORIGINAL



APPEARANCES

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1 THE SPECIAL MASTER: We'll please come to order.

2 Mr. Facciola, we welcome you to the case.

3 MR. FACCIOLA: Thank you, Your Honor. I'll give the
4 Court Reporter my name.

5 THE SPECIAL MASTER: All righty.

6 MR. FACCIOLA: I have one of those names that's hard
7 to spell.

8 THE SPECIAL MASTER: I understand that.

9 MR. FACCIOLA: Excuse me, Mr. Merrill has a motion
10 or two.

11 MR. MERRILL: Your Honor, before Mr. Facciola begins
12 his presentation, I'd like to make two motions to the
13 Court. The first of those is a motion to strike Dr.
14 Cummings' testimony, and the grounds for that motion --

15 THE SPECIAL MASTER: All of it?

16 MR. MERRILL: Yes, Your Honor, as well as Tribes'
17 Exhibit 24, which, of course, rides on Dr. Cummings'
18 testimony.

19 The grounds for that motion are put simply, that the
20 secondary impact to which Dr. Cummings testified, secondary
21 benefits on which his analysis in part relies are in fact
22 impacts that would accrue to the people and the economy
23 of the Big Horn Basin, and by Dr. Cummings' own admissions
24 largely outside the boundaries of the Wind River Reservation,
25 and also by Dr. Cummings' own admission, those secondary



1 benefits will accrue only if the irrigation projects
2 that are under consideration here are constructed and
3 operated. As such, those are impacts within the full
4 meaning of the word, they happen to be a positive economic
5 impact on the remainder of the Basin. However, the
6 Court's ruling yesterday was that I could not inquire of
7 Dr. Cummings concerning the negative impacts, the opportunity
8 costs of water, the effect on the multipliers used in his
9 analysis, of possible changes in the Basin economy, and I
10 believe that it is inconsistent to allow indirect testimony,
11 testimony concerning one particular species of impact
12 and prohibit cross-examination with respect to another.

13 THE SPECIAL MASTER: May I inject only this, Mr.
14 Merrill, heretofore in my life I never heard the term
15 impact used in discussion of those elements or increments
16 of a benefit-cost ratio, in presenting a case to analyze
17 and to come to a conclusion of what is the benefit-cost
18 ratio of this proposed project. I never heard impact
19 used to describe some of the particular fallout, if you
20 will, or benefits that accrue or are about to accrue to
21 fish and wildlife enhancement or to the other factors that
22 are cranked into making the benefit-cost ratio. Somehow
23 that has become, in this case, that word has been used
24 as an impact, and then you use it to relate to the fact
25 that if the projects are put into effect they will have an



1 adverse affect upon the economy downstream and we call
2 that adverse impact.

3 I ruled earlier that we would hear testimony on that
4 later in the case, a reasonable degree so I don't
5 prejudice the fact that it basically had nothing to do
6 with inherent right of reserved water. If it's a right
7 of reserved water it's a right of reserved water. And to
8 the point that it would shock conscience, I ought not hear
9 evidence of adverse impact, so now you see you're
10 arguing well, but impact beneficially is used to justify
11 the additional acreage should so tinge his entire
12 testimony that I should strike it all, and I'm not inclined
13 to agree on that, although I can appreciate your argument.

14 MR. MERRILL: Well, Your Honor, my point is simply
15 that there are two sides to every coin, and we saw the
16 head side yesterday and that came in the form of what
17 Dr. Cummings described as secondary benefits, but there
18 is also a tails side of every coin and that's the tail
19 side that we've been calling impacts, which has become a
20 very emotionally charged word in this adjudication.

21 THE SPECIAL MASTER: I appreciate that.

22 MR. MERRILL: Perhaps it's not a very good word to
23 use anymore for that reason, and also because it's not a
24 particularly descriptive term. But I believe having
25 gone into the head side in Dr. Cumming's direct testimony,



1 that I should have been allowed to inquire into the tail
2 side in my cross-examination.

3 The second motion --

4 THE SPECIAL MASTER: Well, I believe that you will
5 do plenty of exposing the tail side when it comes to your
6 case, and that's more properly where that belongs rather
7 than striking the testimony and excluding all of the
8 testimony from the hearing, you see.

9 MR. MERRILL: My point was simply that a correct or
10 most accurate economic analysis, regardless of whether
11 evidence of impacts is directly admissible in this case,
12 that an accurate economic analysis that's used to justify
13 these future projects should also consider both sides of
14 the coin.

15 THE SPECIAL MASTER: And I consider that an affirmative
16 part of your case.

17 MR. MERRILL: I understand that, Your Honor, and I
18 understand that you're going to deny the motion to strike.

19 The second motion I would like to make is a motion
20 in limine with respect to the testimony which I believe
21 the Tribes are about to present, of Dr. Omer Stewart, and
22 that motion is based on information that we gleaned from
23 taking Dr. Stewart's deposition several weeks ago concerning
24 the proposed subject matter of his testimony, which I
25 believe will deal with the supposed historical reliance



1 of the Wind River Shoshone Indians on fishing as a source
2 of food. Instead Wyoming believes that the issue of
3 whether water was reserved for fishing or for fisheries
4 habitat and maintenance on the Wind River Indian
5 Reservation is a question of Congressional intent, and
6 that the historical use of food by a small portion of the
7 Indians who eventually came to settle on the Wind River
8 Indian Reservation is simply immaterial to the determination
9 of Congressional intent. And my motion in limine would
10 ask the Court for an order prohibiting Dr. Stewart from
11 testifying with respect to the subject matter of the
12 historical or alleged historical reliance of the Shoshone
13 Indians on fishing.

14 MR. SACHSE: Your Honor --

15 THE SPECIAL MASTER: I'm going to save you an
16 argument, I'm going to deny that.

17 MR. SACHSE: All right. I take it you're denying
18 the first motion too?

19 THE SPECIAL MASTER: First motion, yeah, I'm going to
20 deny both motions.

21 The second motion, you may argue with success that
22 there was no relationship to the Congressional intent or
23 that the intent flowed only to irrigation water uses and
24 not to such things as fish enhancement which wasn't a
25 known science, I don't think, in the disciplines of wildlife



1 management back in 18 -- 1905 or 1880. And you may have
2 a good point when that time comes, but I'm not going to
3 strike the testimony of this gentleman on that motion.

4 MR. MERRILL: Thank you, Your Honor.

5 THE SPECIAL MASTER: Okay. Mr. Facciola.

6 MR. FACCIOLA: May it please Your Honor, I'm John
7 Michael Facciola, and I'd like to call Dr. Omer C.
8 Stewart.

9 THE SPECIAL MASTER: Dr. Stewart, this is the
10 witness stand, despite its cluttered look this morning,
11 and if you'll raise your right hand we'll be happy to
12 swear you in.

13 OMER C. STEWART

14 having been first duly sworn, was examined and testified as
15 follows, to wit:

16 DIRECT EXAMINATION

17 BY MR. FACCIOLA:

18 Q Would you state your full name and your address.

19 A Omer C. Stewart. O-m-e-r C. S-t-e-w-a-r-t. 921 5th Street,
20 Boulder, Colorado 80302.

21 Q What is your occupation?

22 A I'm an anthropologist and ethno-historian.

23 Q Are you presently employed by any university?

24 A Yes, as an emeritus professor I retain an employment with

25 stewart-direct-facciola



1 the University of Colorado although I'm retired.

2 Q Doctor, could you describe for us briefly your educational
3 background.

4 A I received my Bachelor of Arts Degree from the University
5 of Utah in 1933 with a major in anthropology. I attended
6 the University of California at Berkeley and received a
7 Ph.D. in anthropology from the University of California
8 in 1939. Following that I received a post-doctoral
9 fellowship from the Social Science Research Council for
10 an additional year of research according to my interest.

11 Q Have you ever taught on the university level?

12 A Yes.

13 Q Where?

14 A My first teaching was at the University of California. I
15 was a teaching assistant, and then I taught at the
16 University of Texas and at the University of Minnesota.
17 I was teaching at the University of Minnesota when World
18 War II started and because I was a reserve officer, having
19 been trained at Fort Francis E. Warren on the Frank 75,
20 horse drawn, I was called for active duty as soon as
21 World War II started.

22 THE SPECIAL MASTER: What unit did you end up in?

23 THE WITNESS: In the chairborne infantry in the office
24 of Chief of Staff in Washington. I didn't see a field

25 stewart-direct-facciola



1 piece after I left Cheyenne.

2 Q (By Mr. Facciola) You mentioned your employment with the
3 University of Colorado, I take it you've taught there?

4 A Yes, following World War II I was hired at the University
5 of Colorado at Boulder and have been employed there since.

6 Q What positions have you been employed?

7 A I started as an assistant professor and have been employed
8 through the ranks to full professor and was chairman of
9 the department during its growth from my being the sole
10 anthropologist when I returned. I left 25 professors to
11 carry on my work.

12 Q Dr. Stewart, are you familiar with the term "The Great
13 Basin"?

14 A I am.

15 Q Would you please tell me what it means to you.

16 A There are two interpretations of the words "Great Basin".
17 The purely physiographic, the pure physiographic Great
18 Basin is the area between -- east of the Sierra and Nevada
19 Mountains to the Washatch Mountain of Utah which has no
20 external drainage. There is a Great Basin there that
21 included and is based more on vegetation and other use
22 which includes, which extends east of that and does not --
23 and extends from the Rocky Mountains to the Sierra Nevada.
24 That is based on the -- the type of vegetation, soil and

25 stewart-direct-facciola



1 climate and the use, and that the cutting of the Snake
2 River in a deep channel through part of the, that area
3 and the Colorado River through another part does not really
4 change the basic areas. So that for my purposes I prefer
5 to use the larger area from the Rocky Mountains to the
6 Sierra Nevadas, and I have in press a bibliography of
7 the Indians of the Great Basin being published by the
8 Newberry Library, University of Chicago, including, which
9 does include the Indians from the Rocky Mountains to the
10 Sierra Nevada, through that area.

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1 Q. (By Mr. Facciola) So I take it then you have engaged
2 in scholarly research in reference to the Indians who
3 have lived in the Great Basin?

4 A. Yes.

5 Q. What Indians or Indian -- with reference to
6 what Indian groups have you done your scholarly research?

7 A. I started my career as an anthropologist, as an under-
8 graduate doing prehistoric archeology at the Great Lakes,
9 with Dr. Julian Steward. We excavated on Promontory Point
10 in Great Salt Lake. We excavated some on the Ute
11 Reservation and other places.

12 The prehistory is identified in the general
13 way rather than identified with any particular Tribe.

14 I have done research with all of the living Tribes,
15 the historic Tribes in the Great Basin.

16 Q. What groups would that involve?

17 A. The Northern Piute, and part of them are called Bannock;
18 the Southern Piute, and they include the Chemehuevi.
19 Southern California, the Ute, and the Gosiute; the
20 Shoshone of Idaho and Wyoming.

21 Q. Have you published reports, monographs, or articles
22 which you have written pertaining to these Indian groups?

23 A. Yes.

24 Q. Could you tell me what kind of articles you have published?

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1 A. Well, four monographs, monograph-style ones on the
2 Northern Piute in which I visited all -- a sample of
3 the main groups of the Northern Piutes in Oregon and
4 Nevada; the Ute in the Southern Piute and Shoshone in
5 a different monograph; the Indians in Utah, primarily
6 in Arizona and Colorado; the Ute.

7 Q. Then I take it you have published reports and articles
8 pertaining to the Shoshone in particular?

9 A. Yes.

10 Q. What kind of articles were they?

11 A. One is a chapter in a textbook which reviews general
12 culture, the habits and rules and regulations and way
13 of life of Shoshone; and an article that I presented
14 to the International Congress of American Indians on
15 the social structure of the Shoshone; and some the
16 Shoshone -- one group, the Goshute, was included
17 in one of the other articles that I mentioned.

18 Q. Have you ever testified as an expert witness before
19 a Court or other tribunal?

20 A. Yes, I have.

21 Q. What Court or Courts?

22 A. I first testified before the Indian Claims Commission,
23 and have testified before the Indian Claims Commission
24 for all of these Great Basin Tribes. I have testified

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stewart-direct-facciola



1 in state courts, Colorado, Arizona, California, and
2 the State of Washington, regarding the question of
3 religious freedom for the native American church,
4 the Piute religion.

5 Q. You testified that you have testified as an expert
6 witness before the Indian Claims Commission?

7 A. Yes, sir.

8 Q. And one was a Shoshone case?

9 A. Yes.

10 Q. Can you tell me specifically -- first of all, when were you
11 retained to do that work?

12 A. Either 1950 or 1951. I've forgotten exactly.

13 Q. How many years were you engaged in that work?

14 A. I think it was about seven years from the time I was
15 first asked to do research till the hearing was held
16 in Denver.

17 Q. At which you testified?

18 A. At which I testified.

19 Q. What specifically did you do during those seven years
20 in reference to the Shoshone people?

21 A. The question that was presented to me was -- the primary
22 question of territorial use and evidence of uses of
23 definable areas. I was told that the Supreme Court
24 rulings had defined possibility of non-surveyed land,
25 stewart-direct-facciola



1 that is aborigines establishing their ownership of
2 a territory, if they could prove that they had owned
3 and occupied a definable area from time immemorial. And so
4 my job was to see if I could find a definable area that
5 could be assigned to the Shoshone at the exclusion of
6 all others from time immemorial, and that's what I did
7 for the Shoshone.

8 Q. What sort of documents did you collect and analyze?

9 A. I collected all of the documents I could find which
10 named the Shoshone or identified them in a manner that
11 was certain. This usually meant that the prehistoric
12 record was not used very much because archeology does
13 not speak Shoshone, and the Shoshone people are identifiable
14 primarily through their language through the fact that they
15 speak Shoshone. And it is through the identification
16 of Shoshone speakers that we can identify the Shoshone
17 people.

18 So I traced the territories of all of the Shoshone
19 speaking people through historic records, anthropological
20 research, travelers. I visited some of the Tribes,
21 although I did not do extensive field work at that time,
22 because I felt that the historic records -- that my
23 knowledge and materials that had been prepared before
24 I had been retained would have a greater value.

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1 Some other anthropologists or witnesses did not have
2 that same feeling about it, but I did. So I sought
3 records from the National Archives, from the Wyoming
4 State Historical Society Archives, and university
5 records, the Historical Society in Utah and Idaho,
6 Nevada, and through the various universities. I tried
7 to find -- read all of the books I could that would
8 explain -- find products that were available, and through
9 the anthropological literature where the Indians had
10 been asked what they ate or other reports that showed
11 the foods these -- that were edible and used by the
12 Indians.

13 The facts that were available in this area was
14 double evidence that was the territory that they could
15 survive on, that it -- so that I identified all of
16 the food that I could, and this meant hundreds of
17 plants and animals and, in fact, all of the edible animals
18 and plants and insects and so on within the area.

19 Q. Doctor, how many documents would you estimate you analyzed
20 and collected for the purposes of your testimony in the
21 Shoshone case?

22 A. The original number that I had, I had a rather large
23 number of graduate students at the University of Colorado
24 who were running down references. I hired graduate students

25 stewart-direct-facciola



1 at the University of Utah to search through the documents
2 there. And I finally duplicated about a thousand
3 documents, different documents, for use of other people.

4 Now, the attorney said, "Well, if it looks pretty
5 good to you, do it, duplicate it." And I was left
6 absolutely -- it was my choice whether I felt if the
7 document was worthwhile.

8 I knew at the time that the attorneys would probably
9 decide that some of them were too repetitive to be
10 required, and the final number that were submitted
11 as exhibits was about 500.

12 Q. Doctor, have you published articles on the foods consumed
13 by native American groups?

14 A. Yes.

15 Q. In preparation for your testimony today, Doctor, did you
16 bring with you a resume or curriculum vitae?

17 A. Yes, I did.

18 Q. I have a copy here. Doctor, I would like to show you a
19 document which I've identified, marked as OCS-1 and
20 ask you to examine it.

21 A. This is my curriculum vitae that I prepared and tried to
22 keep up to date as much as I can, and was used during the
23 deposition. But I had numbered it OSC-1. And it contains
24 the basic facts of my life and a list of my publications,
25 stewart-direct-facciola



1 major publications, articles and book reviews.

2 MR. FACCIOLA: Your Honor, at this time I'd like
3 to offer OCS-1 as evidence. In terms of the exhibits,
4 Your Honor, if I might be heard for a moment, I brought
5 with me four copies. It's my intention to give Your
6 Honor one, Mr. Merrill, and I was going to give one to
7 the person who represents the private parties. But,
8 apparently, he's not here.

9 THE SPECIAL MASTER: It makes no difference to me.
10 We can use two copies in my office.

11 MR. FACCIOLA: And I therefore renew my offer
12 of OCS-1.

13 THE SPECIAL MASTER: Mr. Merrill, do you care to
14 voir dire the --

15 MR. MERRILL: No, Your Honor, and I have no
16 objections to the introduction of OCS-1 into evidence.

17 MR. FACCIOLA: Your Honor, on the basis of
18 Dr. Stewart's testimony and the facts contained in OCS-1,
19 I offer Dr. Stewart as expert in the field of anthropology.

20 THE SPECIAL MASTER: All right, the same is hereby
21 admitted into evidence, and I will admit Dr. Stewart
22 as an expert in this place in the field of anthropology.

23

24

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stewart-direct-facciola



1 MR. MERRILL: No, Your Honor, I have no objection.

2 THE SPECIAL MASTER: I beg your pardon, my gosh, I
3 thought I heard someone say I had no questions. I thought
4 you said you had no questions of this Witness.

5 MR. MERRILL: I said I had no objections to OCS-1
6 into evidence. I have no voir dire of Dr. Stewart.

7 MR. FACCIOLA: Thank you, Your Honor. May I proceed?

8 Q (By Mr. Facciola) Doctor, have you been retained by the
9 Arapahoe and Shoshone Indians of the Wind River Reservation
10 to testify today?

11 A Yes.

12 Q Can you tell us how you came to be obtained?

13 A I received a phone call from, I think your office a few
14 months ago, and had arranged to meet with the members of
15 the -- of Mr. Sachse and I think a member of your firm
16 to discuss the possibility of my serving as an expert
17 witness for the other part of the case which I don't know
18 anything about because I wasn't retained. They decided
19 to hire someone else, and I'd forgotten it until a couple
20 of weeks ago when you phoned me and asked me if I could
21 quickly prepare some report on fishing, particularly, and
22 I thought I could so I accepted that offer.

23 Q Upon being retained, what, if anything, did you do,
24 Dr. Stewart?

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1 A First I went through my old files that I had arranged
2 an analysis of the various documents under headings that
3 had been thought important in the first --

4 Q If I may interrupt you for a second, when you say your
5 old files, I take it you mean the documents you collected
6 for the Shoshone case, the Shoshone claims case that you
7 described in your --

8 A Yeah. It's a little more than that because I was retained
9 for the other Tribes in the Great Basin, and they, some
10 of the documents apply to more than one Tribe.

11 Q I see.

12 A I have -- I have three file cabinets filled with files --
13 with manila folders, ranged chronologically with the
14 name of the author and the date and in some instances
15 the old case numbers, and the -- for the Shoshone case I
16 had analyzed the documents that I had used and had a --
17 had an index, one heading fishing and under that the list
18 of documents in short summary of what the particular
19 document was about, and why that was useful for fishing,
20 and that -- I went through my files and picked out those
21 first to see what I could find from a residue of older
22 research.

23 Q After -- I take it -- Did you work alone or did you have
24 some assistance?

25 stewart-direct-facciola



1 A I did ask for and received the approval from your office
2 to hire a graduate assistant and -- but I asked that
3 assistant to go through the -- I selected them out of the
4 initial file, then she went through each document and
5 put a slip in if that did have some information concerning
6 Shoshone fishing or use of fishing and so on.

7 Q So I take it then that after you collected these documents
8 you then analyzed them?

9 A Yes.

10 Q After you had analyzed them, did you have occasion to
11 write a report for the purposes of your testimony today?

12 A Well, before I started the report I did other research
13 which was since the -- my file work in this area of
14 the -- for the file had not been continued, I suspected
15 there were other newer documents and so I sent my
16 graduate assistant to the library to examine the card
17 catalog, the reports of publications, number of magazines,
18 journals and so on for the purposes of bringing up-to-date,
19 to see if there were newer publications after the end of
20 that, what I had in my files, and it was after that that
21 I started working on the -- my report.

22 Q Dr. Stewart, I'd like to show you a document that I've
23 identified as OCS-1-A, and I ask you to examine it, please.

24 A Yes.

25 stewart-direct-facciola



1 Q Doctor, is that the report which you have prepared for
2 your testimony today?

3 A Yes, it is.

4 MR. FACCIOLA: Your Honor, I'm going to hold off my
5 offer until I go on a little further.

6 Q (By Mr. Facciola) Dr. Stewart, based on the work you've
7 done and your expertise in this area, I would like to ask
8 you whether you have formed an opinion as whether the
9 Shoshone Indians fished and used fish as a part of their
10 diet?

11 A Yes, I have.

12 MR. MERRILL: Your Honor, I'd like to object to the
13 question in that it is ambiguous. We don't know which
14 group of Shoshone Indians is being discussed here. There
15 are many, many groups of the Shoshone Indians who occupy
16 a very large territory throughout the Great Basin, and
17 it seems to me until we narrow it down to a specific
18 group, the question, and therefore, the answer is ambiguous.
19 And unless the question is directed to the group of
20 Shoshones who eventually settled on the Wind River Indian
21 Reservation the question is irrelevant.

22 THE SPECIAL MASTER: Well, you'll narrow it down to
23 the particular area --

24 MR. FACCIOLA: I certainly will.

25 STEWART-DIRECT-FACCIOLA



1 THE SPECIAL MASTER: -- that you're involved in the
2 case.

3 MR. FACCIOLA: I'm going to.

4 THE SPECIAL MASTER: And I'm going to refer to a copy
5 of this too, Mr. Merrill, while he's referring to that.

6 MR. FACCIOLA: I take it Mr. Merrill's objection is
7 overruled --

8 THE SPECIAL MASTER: Yes, it is.

9 MR. FACCIOLA: -- and I should proceed?

10 THE SPECIAL MASTER: If you'll narrow it into the --

11 MR. FACCIOLA: I certainly will, Your Honor.

12 THE SPECIAL MASTER: -- the Wind River Indian
13 Reservation.

14 MR. FACCIOLA: Could you read back my question to
15 Dr. Stewart?

16 (Thereupon the following
17 question was read back as
18 follows: "Q Dr. Stewart,
19 (based on the work you've
20 done and your expertise in
21 this area, I would like to
ask you whether you have
formed an opinion as whether
the Shoshone Indians fished
and used fish as part of
their diet? A Yes, I have."

22 Q (By Mr. Facciola) Doctor, what group of people, if any,
23 had first contact with the Shoshone Indians who have left
24 us written records?

25 stewart-direct-facciola



1 A The members of the Lewis and Clark Expedition.

2 Q And after them were there any additional persons?

3 A Well, no, that's all.

4 Q When did Lewis and Clark go through the area where they
5 mentioned?

6 A 1805, 1806.

7 Q Did you have occasion to study the writings or the reports
8 left by Lewis and Clark?

9 A Yes, I did.

10 Q Do they support, in any way, your opinion that the
11 Shoshone fish?

12 A Yes, of course.

13 Q Could you explain to us how --

14 MR. MERRILL: Objection.

15 THE SPECIAL MASTER: They're a little leading, but
16 it's an expert witness.

17 MR. MERRILL: Also there has been no expert opinion
18 given thus far that the Shoshone Indians did indeed fish.

19 THE SPECIAL MASTER: You may ask what did they
20 contain and he will say so.

21 MR. FACCIOLA: Excuse me, I thought he had answered
22 the question and said that he had formed an opinion.

23 Excuse me, I should apologize.

24 Let me strike that and go back to where I started from.

25 stewart-direct-facciola



1 Q (By Mr. Facciola) You said you formed an opinion. What
2 is your opinion?

3 A My opinion is that the Shoshone fished.

4 Q Would you include among that group of people you call
5 Shoshone, those Shoshone who ultimately settled on the
6 Wind River Reservation in 1868?

7 A Yes, they do.

8 Q Now, speaking of the Shoshone, I asked you who had first
9 contact with them who left us a written report and you
10 explained to me it was Lewis and Clark.

11 A Yes.

12 Q And I asked you, I think, to begin where I left off, how
13 in any way their report supported your opinion. Now,
14 could you answer that question?

15 A Yes. Now, in traveling up the headwaters of the Missouri,
16 the Lewis and Clark met Shoshone Indians, they were --
17 There was no question about the identity of these Indians
18 as being Shoshone because the interpreter with Lewis and
19 Clark, one of the interpreters was named -- was an Indian
20 woman named Sacajawea, and it was when Sacajawea, as an
21 interpreter identified Indians on horseback who had been
22 avoiding the travelers, but when she identified her
23 brother as the chief of the particular band of Shoshone,
24 that there was no question but what these Indians were

25 stewart-direct-facciola



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Shoshone that were met at the headwaters of the Missouri.

 Their use of fish was well documented because the explorers were hungry, they bought fish, they explained about the marvelous help that they had and the great feast on fish that was possible because of the supplies provided by the Shoshone group that was met. Furthermore, very soon after they met the Shoshone they described the method of fishing; they had fish wares, fish traps, they had means of catching great quantities of fish. They dried the fish and in other ways prepared them for -- for their own use even away from the stream.

* * * * *

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1 Q (By Mr. Facciola) Were Lewis and Clark followed thereafter
2 by other men who went through the area who have left us
3 written reports?

4 A. Yes, they have.

5 Q Did you examine those reports?

6 A. I have.

7 Q Did they support your opinion in any way?

8 A. Yes, they do.

9 Q In what way?

10 A. By explaining how they obtained fish from the Shoshone:
11 by purchase, by exchange and by other things. They
12 explained the traveling of the Shoshone from great
13 distances to the places where fish were available in
14 great quantities at particular favorite spots, so that
15 the travelers left a record of the Indians themselves,
16 trading fish, traveling great distances to obtain dried
17 fish that were available to them as well as fishing
18 themselves.

19 Q Did there come a time when the Shoshone had contact with
20 officials of the United States government?

21 A. Yes.

22 Q Did those officials leave us written reports?

23 A. Yes.

24 Q Did you examine them?

25 stewart-direct-facciola



1 A. I have.

2 Q. Do they in any way support your opinion?

3 A. Yes, many of them make it very explicit that the Indians
4 were fishing on the streams in the entire Shoshone
5 Territory.

6 Q. Are you aware of any other anthropologists besides
7 yourself who studied the cultural and subsistence patterns
8 of the Indians?

9 A. Yes.

10 Q. Did you review any of the literature?

11 A. Yes.

12 Q. And did they support your opinion?

13 THE SPECIAL MASTER: May I have those?

14 THE WITNESS: The senior anthropologist is
15 Robert H. Lowie, who, when he first wrote, was research
16 anthropologist for the American Museum of Natural History
17 in New York. He became a professor of anthropology
18 at the University of California, and I studied with him.
19 One of his students was Julian H. Steward, who has
20 published several monographs on the Shoshone.

21 THE SPECIAL MASTER: S-t-e-w-a-r-d?

22 THE WITNESS: A-r-d, yes. He was also my professor
23 at the University of Utah and then, later, at the
24 University of California. And he was at the Smithsonian
25 stewart-direct-facciola



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Institute for a number of years, and one of his publications including the Shoshone was published by the Smithsonian Institution as a government publication.

Professor Steward became an endowed professor at the University of Illinois.

Demitri Shimkin was a colleague at the University of California with me.

* * * * *

stewart-direct-facciola



1 A. He did research on the Wind River Indian Reservation for
2 his Ph.D. thesis which was accepted by Professor Lowie
3 and by the University of California, and he was awarded
4 his Ph.D. Degree on the basis of his research and writing
5 regarding the Wind River Indian Reservation. He had
6 other monographs, one on the geography and way of life of
7 the Wind River Shoshone.

8 I know of Sven Lilieblad, L-i-l-i-e-b-l-a-d. Do you
9 have an extra copy of it that she could get?

10 Q. Yes, I do.

11 A. Sven was already a Ph.D. from Sweden when he came to
12 Berkley when I was a graduate student, and he started
13 around the 1930s to study the Shoshone, particularly,
14 and taught at the University of Idaho, lived in Pocatello,
15 and studied the Shoshone there. And he is still studying
16 the Shoshone language. He now has an endowed chair at
17 the University of Nevada.

18 Other anthropologists, Murphy, Dr. and Mrs. Murphy,
19 studied -- prepared a monograph, and Ake Hultkrantz of
20 Sweden had been making his summer visits to the United
21 States regularly to study the Shoshone, particularly the
22 Shoshone on the Wind River Indian Reservation, identifying
23 their former history and their present way of life.

24 And all of these have mentioned the use of fish by
25 Stewart - direct - facciola



1 the Shoshone wherever they were.

2 Q So then, to go back to my question before Mr. Roncalio
3 asked his question, I asked you whether they reviewed
4 their work and whether it supported your opinion.

5 A. Yes.

6 Q Can you explain it to me why it supported your opinion?

7 A. Simply it supports the opinion because it records the
8 evidence that these anthropologists have received from
9 their informants, usually older Indians on the reserva-
10 tions who have told them about their ancient life. Dr.
11 Hultkrantz has specialized on the sheep eater Indians who
12 often occupied the high east areas of the Wind River
13 Range and in the highlands around Yellowstone Park, and
14 even there where they had a very real specialty of living
15 on the mountain sheep that they hunted, still he did report
16 that wherever fish were available, in the larger ponds,
17 and even in other places, that they used fish whenever
18 they had them available. Since his informants were on
19 the Wind River Indian Reservation, he said they were try-
20 ing to carry on their old way of life at Wind River as well
21 as elsewhere.

22 Q Doctor, we commenced by talking about the Shoshone, and
23 then I inquired whether you would include among the
24 Shoshone who fish and use fish in their subsistence

25 Stewart - direct - facciola



1 pattern, the Shoshone who settled on the Wind River Indian
2 Reservation after the 1868 Treaty.

3 A. Yes.

4 Q. Now, I ask you why are you of that view that these people
5 fished and used fish as part of their diet?

6 A. The opinion starts with the evidence that the Shoshone
7 were observed or reported fishing in that area before
8 they were actually assigned the Reservation. Several
9 travelers, and I think the earliest one was -- excuse me.

10 THE SPECIAL MASTER: Right. Go ahead. Do you wish
11 to object?

12 MR. MERRILL: Your Honor, I should have made this
13 objection sooner, but I believe that the witness is about
14 to get into recounting observations of travelers, and that
15 would be at least one level of hearsay. We have already
16 had hearsay within hearsay presented thus far. I should
17 have objected sooner, but did not, with respect to the
18 other questions and answers given by Dr. Stewart. What
19 Indians who were interviewed and told these and those
20 reports that Dr. Stewart used and then reviewed is all
21 hearsay.

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MR. MERRILL (Continued):

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Who told someone who told someone else, those opinions are all hearsay. Those people are not available for cross-examination in the courtroom. I don't believe there is any exception to the hearsay rule that would apply. I believe this testimony is inadmissible insofar as Dr. Stewart relates things that were told to him or things that he learned from anything other than his personal observation.

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THE SPECIAL MASTER: If it is an offense, the gravamen of the offense is not severe. There is no other way, really, to inquire into what has been said or written except folklore, customs, and use. So I'll overrule that objection.

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MR. FACCIOLA: I would like to make clear Wyoming Rule of Evidence 803, Subsection 20, which says that an exception to the hearsay rule describes the path of evidence as follows: Reputation in a community arriving before the controversy as to boundaries and/or customs affecting land in the community and reputation as to events of general history important to the community or state or nation in which located.

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I can't think of a more accurate description of what Dr. Stewart is talking about.



1 THE SPECIAL MASTER: All right.

2 MR. FACCIOLA: Will you go back to where Dr. Stewart
3 was and read him the last sentence of his answer?

4 (Thereupon, the pending answer
5 (was read back by the Court
(Reporter.

6 A Captain Bob Ville recorded the Shoshone fishing in the
7 vicinity of South Pass, and there are other reports of the
8 Indians being on the Plains and on the way back fishing
9 in the area. But the first actual statement of the
10 followers of Washakie who were usually called the
11 Eastern Shoshone by the government representatives being
12 concerned with fishing was that the Treaty negotiation,
13 the 1868 Treaty establishing the Wind River Reservation,
14 was negotiated by General Augur, in which at one place
15 General Augur made it very explicit and told Washakie that
16 the President was giving him this land for his use, for
17 hunting and fishing, as long as that was possible. And
18 following the time when hunting and fishing was no longer
19 adequate for them, to become ranchers and farmers.

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stewart-direct-facciola



1 MR. MERRILL: Your Honor, I could not object not
2 knowing that the question was going to illicit more
3 hearsay testimony. I move to strike that portion of
4 Dr. Stewart's answer concerning General Augur told Chief
5 Washakie or any of the other Shoshone, on the basis of
6 hearsay.

7 THE SPECIAL MASTER: I'd be inclined to sustain you,
8 Mr. Merrill, but, gee, there is so much in the history
9 of the west, so much of it read, so much researched and
10 analyzed. You can't go to Fort Bridger and not be exposed
11 to what the Witness has just touched upon, and I don't
12 think it will do so much damage, so let me allow it to
13 stay.

14 MR. MERRILL: Your Honor, anticipating that you will
15 rule, consistently overrule my objections on this point,
16 may I simply enter a continuing objection based on hearsay
17 because I expect that we are going to have more of the
18 same.

19 THE SPECIAL MASTER: You may, you may.

20 Q (By Mr. Facciola) Doctor, I'd like to show you a
21 document which we've identified, I've identified as
22 OCS-24, if Mr. Rogers would be so kind to give everybody
23 a copy.

24 THE SPECIAL MASTER: You're going from 1 and 1-A to 24
25 stewart-direct-facciola



1 on the OCS series?

2 MR. FACCIOLA: Yeah, I'll explain why that's done.

3 THE SPECIAL MASTER: Okay. As long as --

4 MR. FACCIOLA: That happens to be my strong suit,
5 Your Honor.

6 THE SPECIAL MASTER: Okay.

7 Q (By Mr. Facciola) I'm going to ask you if you would,
8 Doctor, identify that document.

9 A OCS-24 are -- is a collection of a few pages from the
10 Annals of Wyoming publication of the Wyoming State
11 Library Archives and Historical Board, Volume 30,
12 April, 1958, Number 1, and the page that I -- I duplicated
13 are page -- Well, the important page that I'm going to
14 refer to was Page 81, and --

15 MR. FACCIOLA: Before you do, let me offer it at
16 this time. I'd like to offer into evidence a document
17 I've identified as OCS-24.

18 MR. MERRILL: Your Honor, I will object on the grounds
19 that there is no showing of relevance of this document
20 thus far to the controversy at hand, and I'll object
21 most importantly on the ground that this document appears
22 to be an excerpt rather than a complete copy of either
23 this volume of the Annals of Wyoming or even the single
24 article which is reported. You'll notice that there is

25 stewart-direct-facciola



1 a cover sheet to the document, then we simply go to
2 Page 52, next page that appears after that in my copy
3 is Page 80.

4 THE SPECIAL MASTER: We've been doing that in this
5 lawsuit now for a year and a half. I can't change
6 portions of the river -- the tent under the stream.

7 MR. MERRILL: Your Honor --

8 THE SPECIAL MASTER: I'll overrule it and admit it
9 into evidence.

10 MR. MERRILL: Your Honor, I would like to point out
11 that twice there have been objections made by the United
12 States and the Tribes against the State of Wyoming's
13 use of excerpts of documents, first with respect to our
14 cross-examination of Mr. Vogel in the fisheries area,
15 you required that we withdraw the excerpts and --

16 THE SPECIAL MASTER: Only if the full document were
17 requested. Now, if you request a full document they can
18 go to the library and bring it to you and they will if
19 I ask them to.

20 Now, if you want to require them to do that with a
21 document, with a copy of the Annals of Wyoming, fine, but
22 it shouldn't have to be that technical about the thing.

23 These are at the library of the University of Wyoming,
24 they're in the library here across the street and I doubt

25 stewart-direct-facciola



1 if we have to, but if you require a copy of the full
2 publication in this case, Volume 30, Number 1, of
3 April, '58, I will request that it be brought into the
4 Courtroom for your use.

5 That's what we did on the Vogel testimony.

6 MR. FACCIOLA: Your Honor, in reference to --

7 THE SPECIAL MASTER: Just a second, please.

8 MR. MERRILL: Your Honor, I don't want to request that
9 they bring the whole volume, I would like to request that
10 the entire text of the article Washakie and the Shoshone
11 be brought into the Courtroom and in fact entered into
12 evidence.

13 THE SPECIAL MASTER: So you may look over the entire
14 article.

15 MR. MERRILL: That's correct, because all we have
16 are a few isolated pages, some 30 pages after the
17 beginning of the article and not even being able to read
18 the entire introduction of the article seems to me that
19 there is a great possibility of quotation out of context
20 or all the other evils that we've heard about.

21 THE SPECIAL MASTER: Let me -- Let the attorney first
22 proceed to have the Witness tell, from Page 81, what he
23 wishes to sustain what he just testified to in the
24 conversation of General Augur, and you may not need to have
25 stewart-direct-facciola



1 the rest of the article.

2 Go ahead.

3 MR. FACCIOLA: Perhaps he could go on.

4 Well, I'd like to renew my offer of OCS-24.

5 THE SPECIAL MASTER: I've admitted it.

6 (Whereupon, Exhibit OCS-24 was
7 (hereby admitted into
8 (evidence.

9 MR. FACCIOLA: Okay. I'm sorry, okay.

10 Q (By Mr. Facciola) Doctor, you were testifying, before
11 I showed you the document, about a man named General
12 Augur, and the role he played in the 1868 Treaty
13 negotiations, and then you were telling us how this
14 material that you have in front of us bears on that.
15 Could you please resume where you were interrupted.

16 A Yes. The section of the several articles, actually this
17 volume is part 10 of a series of -- of executive -- of
18 correspondence, a series of copies of correspondence from
19 the National Archives that historian Dale L. Morgan
20 selected and presented to the Wyoming Historical Society
21 and various full letters, each one of the documents
22 actually copied was a full report with the letter, the
23 address and finally the person who -- person's signature
24 at the end. Now, I have not attempted to select that
25 because of this section I'm to cite, it is identified as
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1 Brevet Major General C. C. Augur to the President of the
2 Indian Peace Commission, dated Headquarters Department of
3 the Platte, Omaha, Nebraska, October 4, 1868. But there
4 are only a few pages or few, one paragraph that is
5 pertinent, and this is shown on Page 82 of this volume
6 of Annals of Wyoming, and it starts out, "I spoke to the
7 Chiefs as follows:"

8 "I" being General Augur. And there is a quote of
9 his, of his statement, and the quote is to "Washakee,
10 Taggie, and Chief of the Shoshones and Bannacks." And in
11 that -- In that first paragraph he -- Augur wrote -- He --
12 and the text leaves no doubt when Augur said "he", he
13 was referring to the President of the United States, who
14 Augur, as a representative of the United States Government
15 was representing. So that I've inserted in brackets in
16 my -- It's not on the, on the page here, but in my report
17 I've inserted in brackets, "He (The President)" wishes
18 however, to set apart a portion of it for your permanent
19 homes, and into which no white man will be permitted to
20 come or settle. Upon this Reservation he wishes you to go
21 with all your people as soon as possible, and to make your
22 permanent home, but with permission to hunt wherever you
23 can find game. In a few years the game will become scarce,
24 and you will not find sufficient to support your people.

25 stewart-direct-facciola



1 you will then have to live in some other way than by
2 hunting and fishing." Is the part that I found as
3 evidence that with the establishment of the Wind River
4 Reservation Commissioner representing the United States
5 Government stated that he was to find fish and use the
6 fish on the Wind River Reservation.

7 Q Thank you.

8 MR. MERRILL: Your Honor, I originally intended to
9 voir dire these exhibits as part of my cross-examination
10 as I have done throughout my cross-examination of the
11 Federal and Tribal witnesses in this case. Since Mr.
12 Facciola intends to offer these exhibits one at a time
13 and I have no objection to that, I would ask that I be
14 allowed to voir dire each exhibit individually.

15 THE SPECIAL MASTER: All right. I will do that.
16 I'm sorry, I hadn't recognized you before for that
17 purpose.

18 MR. FACCIOLA: I don't have any such intention, by
19 the way.

20 I'm about to ask Dr. Stewart some questions about
21 his report and offer that into evidence. May I proceed
22 on that basis?

23 MR. MERRILL: Your Honor, there's been an offer made,
24 and I think you already admitted OCS-24 into evidence.

25 stewart-direct-facciola



1 THE SPECIAL MASTER: Yeah, I think Mr. Merrill is
2 right, I've admitted OCS-24 into evidence.

3 MR. MERRILL: I would like to voir dire after the
4 fact, if I may.

5 THE SPECIAL MASTER: You can do that with OCS-24,
6 we can do that now if you wish.

7 MR. MERRILL: I would like to do that.

8 VOIR DIRE EXAMINATION

9 BY MR. MERRILL:

10 Q Dr. Stewart, after the portion of Page 83 which you just
11 quoted into the record --

12 THE SPECIAL MASTER: I thought he was quoting from
13 82.

14 THE WITNESS: Page 82.

15 MR. MERRILL: Page 82, Your Honor, I'm sorry.

16 Q (By Mr. Merrill) Would you please continue reading for
17 the next several sentences starting with "He wishes you".

18 A "He wishes you therefore to go to this Reservation now,
19 and commence to grow wheat and corn, and raise cattle
20 and horses, so that when the game is gone you will be
21 prepared to live independently of it. Your Agent will
22 bear with you, and you will be provided with store-houses,
23 and sawmills and grist mills to make your flour, and a
24 place to teach your children. Men will be sent to teach

25 stewart-voir dire-merrill



1 you to cultivate your farm, and a blacksmith and a
2 carpenter will be sent to assist you, and a physician
3 to cure you when sick so that in a few years your people
4 will be able to live comfortably in their new home."

5 MR. MERRILL: Thank you, Dr. Stewart.

6 THE SPECIAL MASTER: You want to hear more promises,
7 promises, promises?

8 MR. MERRILL: No, Your Honor, I think those promises
9 are sufficient to make the point. Thank you.

10 MR. FACCIOLA: May I resume my examination?

11 May I just have a moment?

12 THE SPECIAL MASTER: Gentlemen, we've been at it an
13 hour. Do you want to take five or ten minutes? All right.
14 Let's stand in recess for a few minutes.

15 (Thereupon a five-minute
16 (recess was taken.

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1 THE SPECIAL MASTER: Okay, let's come to order please.
2 The record should reflect that I was handed a notice of
3 appearance of the Attorney General of the State of
4 Wyoming, Mr. Stephen F. Higginthal, who enters appearance
5 for the State on all matters in this case.

6 Q. (By Mr. Facciola) Dr. Stewart, just before we broke, I
7 believe I handed you a copy of an exhibit I had had
8 marked as 1-A, and you were telling me that it was a
9 report that you prepared for today's preparation.

10 A. Yes.

11 Q. Doctor, that is the report you prepared, I take it,
12 and I take it also, it sets forth the opinions you
13 discussed and your basis for having those opinions?

14 A. Yes, it does.

15 Q. And you intend them to be offered into evidence as
16 truthful and accurate?

17 A. I do.

18 MR. FACCIOLA: Your Honor, I offer it into evidence
19 as OCS-1-A.

20 MR. MERRILL: Your Honor, if this concludes his
21 direct examination, I would like to examine Dr. Stewart on
22 all of the exhibits.

23 MR. FACCIOLA: Your Honor, after you have ruled
24 upon the admissability of the report, and if you rule
25 stewart-direct-facciola



1 it's admissable evidence, then it would be appropriate to
2 do it. I plan at that point to go to a section called
3 bibliography. We have documents numbered 1 through 59
4 or whatever, which were the documents sitting there
5 which form the bases for the conclusion that Dr. Stewart
6 has reached. Then I will conclude examination.

7 THE SPECIAL MASTER: Either way is fine with me.

8 MR. MERRILL: Your Honor, I would prefer to reserve
9 my voir dire until the evidence is all in.

10 THE SPECIAL MASTER: I will reserve my ruling until
11 we move on to the presentation of your direct case.

12 MR. FACCIOLA: Then I take it it will be appropriate
13 if I ask the witness to turn to a page of it?

14 THE SPECIAL MASTER: Yes.

15 Q. (By Mr. Facciola) Doctor, will you turn to the section
16 of the document that has been marked for purposes of
17 identification as a section called bibliography?

18 A. Yes.

19 Q. Obviously that is a list. What is it a list of, Doctor?

20 A. The list includes or is a compilation of the sources that
21 I have used and nearly always sited, although -- there
22 are not quotations from every document. But most of them
23 do provide the basis for my opinion that the Shoshone
24 fished when they were first discovered, have continued to

25 stewart-direct-facciola



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1 fish up to the present, wherever they've lived,
2 wherever fish were available.

3 And the organization is possibly chronological,
4 but broken down in the process, so that it's just
5 simply identified the documents that I have used,
6 primarily for data as the basis for my opinion.

7 Q. I note in your bibliography the existence of articles
8 by the anthropologists that you mentioned; gentlemen such
9 as Lowie and Hultkrantz and others?

10 A. Yes.

11 Q. And as you testified, you're personally familiar with
12 their work and have relied upon them; is this correct?

13 A. Yes.

14 Q. I notice, for instance, books, for example, would recap the
15 adventures, if I may use that term, of trappers and
16 traders who went through the area; is that right?

17 A. Yes.

18 Q. Are these articles and references used by persons of
19 your profession as authoritative and worthy of credence?

20 A. Yes. They were the historical records, often diaries,
21 correspondence, reports that have been made by the trappers
22 to their headquarters or to the government. And it is the
23 grist for the mill of history. I have become an ethno-
24 historian by strange coincidence. I discovered that I was

25 stewart-direct-facciola



1 an ethno-historian before we used the word ethno-historian
2 because of my first research for my Doctors -- my
3 Ph.D. Again I had to take into account each individual of
4 the Northern Piute and martial Tribes in order to identify
5 their roles in the ative merican hurch which was the
6 subject of my thesis.

7 Many anthropologists only use culture patterns, and
8 .limit their discussion to the whole pattern or
9 customs or so on. But I found I have to pay attention
10 to the movement of individuals. And for the Shoshone
11 case before the Indian Claims Commission I had identified
12 every one of the Shoshone leaders and documented where
13 they were at what time within the area or traveling
14 outside as part of the process of identifying their
15 territory. So, this is an ethno-historical listing
16 more than simply an anthropological listing.

17 Q To return again to those anthropological reports by the
18 professors you mentioned, Lowie and the others, are
19 those the kinds of materials that are traditionally relied
20 upon by persons in your profession?

21 A. Yes.

22 Q In their scholarly research?

23 A. Yes.

24 Q Doctor, obviously there has been, as your testimony

25 stewart-direct-facciola



1 indicates, a numbering system we have been using. For
2 purposes of clarifying the record, we have been using
3 your initials, OCS, obviously initials of your name.
4 We've been using 1 and thereafter.

5 A. Yes.

6 Q. In writing your report, Doctor, did you use that numbering
7 system?

8 A. I did.

9 Q. How did you do it? In other words, if the document bore
10 a certain number, how did you identify that in your report?

11 A. Usually the number is close to the authors-- or the
12 author of the report. A few times I missed putting the
13 number immediately after and so I added it at the end
14 of a paragraph, but usually it's right. On page 16 and the
15 sentence starts with, "In 1872, Felix B. Brundt (OCS-3 Notes
16 on Council Page 10; Spring 1279.) That means I was using
17 a microfilm of the original Council notes, and identifies
18 it was Brundt's report on that Council.

19 Q. I just put in front of you on the table a large
20 accumulation of documents which have been labeled OCS-1
21 through -59. Now, I take it that those are the documents
22 referred to in your bibliography and cited by you in
23 your report?

24 A. Yes.

25 stewart-direct-facciola



1 MR. FACCIOLA: Your Honor, I would like to offer
2 into evidence the following: I would like to offer
3 into evidence the document I have identified as 1-A,
4 the report of Omer C. Stewart as Exhibits in evidence
5 OSC-1-A. I'd like to hand you the originals, if I may
6 use that term, of the documents. And I will offer and
7 make the following offers into evidence of the documents
8 I've just handed to you.

9 THE SPECIAL MASTER: Has a set of these been
10 handed to the State?

11 MR. FACCIOLA: Yes, and delivered in accordance
12 with your five day rule.

13 THE SPECIAL MASTER: All right. I will reserve a
14 ruling.

15 MR. FACCIOLA: Can I please make my offering?
16 I would like to offer in evidence documents numbered
17 OCS-1 through -10, OSC-12 through -23. The absence of
18 a number 11 occurred during the deposition, Your Honor.
19 I would like to make that for the record so that five
20 years from now no one will wonder where OCS-11 is. The
21 document marked as OCS-24 is already in evidence. I
22 would offer documents OCS-25 through -59 into evidence.

23 THE SPECIAL MASTER: How about 12 through 23?

24 MR. FACCIOLA: Didn't I say that? I offer as well
25 stewart-direct-facciola



6-7

1 OCS-12 through -23.

2 THE SPECIAL MASTER: And 25 through 59?

3 MR. FACCIOLA: Twenty-five through 59.

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stewart-direct-facciola



1 THE SPECIAL MASTER: And the originals are under
2 my hand now, very well.

3 Okay, Mr. Merrill.

4 MR. MERRILL: Your Honor, since we have about 60
5 documents involved, I would like to voir dire each of
6 them individually, and depending on how you want to
7 proceed, I can offer my objections to each document at
8 the conclusion of the voir dire for that particular
9 document or reserve all of my objections until the end.

10 THE SPECIAL MASTER: Either way is fine with me.
11 If you have a generic objection that goes to the heart
12 of all of these for some reason, you may want to do it
13 first and then take each one. Either way is fine with me.

14 MR. MERRILL: I think I'll go through them
15 individually, Your Honor, if I may.

16 THE SPECIAL MASTER: All right, very well.

17 MR. FACCIOLA: I should say, Your Honor, that before
18 Mr. Merrill does, that subject to Your Honor's ruling
19 on the offers I made, I have no further questions of the
20 Witness.

21 THE SPECIAL MASTER: All right. Thank you for that,
22 Mr. Facciola.

23 MR. FACCIOLA: Excuse me, Mr. Merrill, I'll get this
24 junk out of your way.

25 MR. MERRILL: That's all right.



VOIR DIRE EXAMINATION

1

2

BY MR. MERRILL:

3

Q Dr. Stewart, would you please take out your copy of

4

OCS-2. What is that document?

5

A This is my copy, is a typed copy from a letter in the

6

National Archives that was recovered from the Idaho

7

superintendent. Letter was received for 1868, and is

8

numbered in the Archives F-90. It was typed by a clerk

9

and reproduced by -- for my purposes in the claims

10

commission case.

11

THE SPECIAL MASTER: What number are we talking about,

12

I beg your pardon?

13

MR. FACCIOLA: OCS-2, Your Honor.

14

Q (By Mr. Merrill) Dr. Stewart, isn't it true that the

15

text of OCS-2 makes no mention of the Wind River Indian

16

Reservation?

17

A Yes, it is true.

18

Q Isn't it true that this letter was written by the

19

Superintendent of Indian Affairs in Boise City, Idaho?

20

A That's the address of origin on the letter, yes.

21

Q Isn't it true that according to the first paragraph of

22

the letter it concerns the Indians of the Fort Hall

23

Reservation?

24

A Yes, that's true.

25

stewart-voir dire-merrill



1 MR. MERRILL: Your Honor, the State objects to the
2 introduction of OCS-2 on the grounds that there has been
3 no showing that it's relevant to the Wind River Indian
4 Reservation.

5 THE SPECIAL MASTER: Oh, technically I will sustain
6 you, but then all Mr. Facciola has to do is show that the
7 Bannacks, of course, were referred to in this document
8 and that they in fact -- actually the first treaties were
9 with the Bannacks rather than the Shoshone. I think that
10 the name of the treaty itself is with the Bannacks.

11 THE WITNESS: Bannacks and Shoshones.

12 THE SPECIAL MASTER: And Shoshone.

13 MR. MERRILL: Your Honor, I'd simply point out that
14 from the face of the document and admission of the
15 Witness, the letter is directed to "The Indians of the
16 Fort Hall Reservation", and later down in the letter it
17 mentions --

18 THE SPECIAL MASTER: The Wind River Mountains.

19 MR. MERRILL: That's correct, Your Honor, the Bannacks
20 to hunt buffalo in the vicinity of the Wind River
21 Mountains. It doesn't say anything about the Shoshone
22 of the Wind River Reservation, and Dr. Stewart states in
23 his report --

24 THE SPECIAL MASTER: Well, this was only one year
25 stewart-voir dire-merrill



1 after the treaty. I'm not sure it was called the Wind
2 River Indian Reservation one year after the treaty.

3 MR. MERRILL: I don't know.

4 THE SPECIAL MASTER: I don't know if it even had a
5 name then.

6 MR. MERRILL: But on its face there is no showing
7 that's it's relevant at all to the Reservation we're
8 talking about in this case, and I would object to it on
9 those grounds.

10 MR. FACCIOLA: Your Honor, may I be heard?

11 THE SPECIAL MASTER: Yes.

12 MR. FACCIOLA: Your Honor, I thought that Dr.
13 Stewart had made it quite clear the basis of his opinion
14 as to first of all the Shoshone fishing, describing
15 generically a group of people and then for the basis of
16 his opinion why those Indians who were settled on the
17 Wind Reservation under Washakie should be included within
18 his opinion that they continued to fish. Proof, as this
19 document is of Shoshone fishing, supports Dr. Stewart's
20 first opinion, i.e.: Shoshone fish. Of course it's
21 relevant.

22 MR. MERRILL: Your Honor, I don't know how we can use
23 the statements of Mr. Facciola to determine the relevancy
24 of evidence, but since on its face it says nothing about
25 stewart-voir dire-merrill



1 the Shoshone Indians who settled on the Wind River
2 Reservation, on its face it talks about Fort Hall
3 Reservation, that's consistent with the title of the
4 gentleman who wrote it as well as the location in which
5 it was written. I see absolutely no relevance to this
6 case whatsoever.

7 THE SPECIAL MASTER: The fact that it refers to the
8 hunting that they're to do in the Wind River Mountains
9 and the Shoshones, the fisheries and hunting grounds
10 about the headwaters of the Malad River, which is just
11 west thereof, some of them are on the line, I think is
12 sufficient to tie it to the boundaries of the land which
13 this lawsuit involves itself, so I'm going to rule that
14 way. So I will overrule the motion to exclude it,
15 probably go and admit it with the other for whatever
16 probative value it may have, which would be quite
17 negligible, or quite doubtful, but it's a foundation
18 document.

19 (Thereupon, Exhibit OCS-2 was
20 (received into evidence.

21 MR. MERRILL: Your Honor, with respect to OCS-3
22 I find that I am absolutely unable to voir dire the
23 exhibit because I can't read my copy of it. I don't know
24 if the original copy given to the Court is any better,
25 but my pages are pretty blank but for a few black marks



1 on it.

2 THE SPECIAL MASTER: This brings back memories of
3 the fights on the dates and boundaries.

4 MR. FACCIOLA: I have a copy.

5 THE SPECIAL MASTER: I was about to wishfully hope
6 for the days before the days of the copy machines and
7 xerox machines for the simplicity, but I'm not so sure
8 they were all that clear in those days, but beautiful
9 caligraphy though.

10 MR. ROGERS: Your Honor, this is an inquiry that
11 Mr. Merrill is referring to, another copy was furnished
12 five days or more ago under the five-day rule. I don't
13 know whether his other copies of this particular
14 document is any better than in that group or not.

15 MR. FACCIOLA: I think Mr. Merrill will be able to
16 read it.

17 (Brief pause.)

18 THE SPECIAL MASTER: What is the date of this
19 document, Mr. Facciola?

20 THE WITNESS: Could I answer that?

21 THE SPECIAL MASTER: Well, I'd like to know the date
22 of the document, if someone can illucidate it.

23 MR. FACCIOLA: Mr. Stewart.

24 MR. STEWART: Yes. OCS-3, as enlarged, the original
25 stewart-voir dire-merrill



1 microfilm copy was not very clear, and I located the,
2 a copy of the entire handwritten report and it has on
3 the cover sheet from the National Archives the date
4 received, October 23, 1872. And as the cover letter,
5 cover letter from Felix R. Brunot, the chairman of the
6 negotiating -- who actually is the Board of Indian
7 Commissioners that had negotiated the treaty is -- was
8 dated Pittsburg, October 22, 1872.

9 When he sent the signed treaty and the negotiations
10 resulting from the council with the Shoshone Indians at
11 the Wind River Indian Reservation, September 25, 1872,
12 which is on the frame of the original microfilm frame,
13 12/69.

14 The quotation that is most meaningful for me and the
15 main one that is involved is on frame 12/79, Page 10 of
16 the council minutes.

17 THE SPECIAL MASTER: Go ahead, Mr. Merrill.

18 MR. MERRILL: Your Honor, I find from the copy of
19 this document, which Mr. Facciola kindly supplied to me,
20 that on OCS-3 is but an excerpt of that document. The
21 full document appears to be the minutes or the transcript,
22 if you will, of the meeting between Mr. Brunot and Chief
23 Washakie, and the other head men of the Shoshone Tribe.

24 I would object, first and foremost, on the grounds that it
25 stewart-voir dire-merrill



1 is an excerpt and that for the statements that Dr.
2 Stewart relies on, to be placed in context I think we
3 ought to have the entire transcript.

4 THE SPECIAL MASTER: I'm going to sustain that
5 observation.

6 MR. FACCIOLA: Can we be --

7 THE SPECIAL MASTER: If the full documents -- the
8 full minutes --

9 MR. ROGERS: Can we be heard on this, Your Honor?

10 THE SPECIAL MASTER: -- minutes of the meeting should
11 be introduced if anything is going to be introduced.

12 MR. MERRILL: They appear to be, Your Honor. I have
13 a very lengthy document which I'm now trying to skim
14 through, in order to voir dire it, but the entire document
15 in my hand is not being offered into evidence and I find
16 myself effectively unable to voir dire because it is --

17 THE SPECIAL MASTER: Is this the council meeting that
18 Mr. Brunot held which resulted in the withdrawal of the
19 Thermopolis area?

20 This is not. Can someone respond to that on the
21 record of counsel?

22 MR. FACCIOLA: Well, may I be heard on a couple of
23 questions?

24 THE SPECIAL MASTER: Well, I'd like to have my
25 stewart-voir dire-merrill



1 question answered, if I may. Does this document have
2 a bearing on the Thermopolis withdrawal?

3 MR. FACCIOLA: No.

4 THE SPECIAL MASTER: Do you know, Mr. Facciola?

5 MR. FACCIOLA: It's certainly not tendered for that
6 purpose.

7 THE SPECIAL MASTER: It's not tendered for that
8 purpose. I presume it is tendered for the fact that Mr.
9 Brunot said, "I went to see the country above Bull Lake.
10 You have much good land there, plenty of beaver and plenty
11 of fish. That land belongs to you." I think that's what
12 you want it in evidence for.

13 MR. FACCIOLA: Exactly.

14 THE SPECIAL MASTER: If Mr. Merrill wants the full
15 document, I'll rule that it should be introduced.

16 MR. ROGERS: Well, may we be heard on that before
17 you rule, Your Honor?

18 MR. FACCIOLA: Could we be heard on that? First of
19 all, this has a substantial background and I'd like to
20 be heard on a couple of questions.

21 First of all, Your Honor, we start with the
22 proposition that on August 7, 1981 we took Dr. Stewart's
23 deposition in Mr. Merrill's office. At that time we
24 tendered OCS-1 through 33. On August 17, 1981, I wrote
25 Mr. Merrill referring to those exhibits, I said we are



1 now able to provide better copies of the few that were
2 difficult to read, to wit: Exhibits 3, 22 and 23.
3 You're holding 3 in your hands. The fact that Mr. Merrill
4 can't read the copies he's holding in his hand is not
5 my problem because he was provided with a better copy.
6 And it's facetious, in my view, to quibble over that,
7 he's got a better copy.

8 THE SPECIAL MASTER: All righty.

9 MR. FACCIOLA: Now, in terms of the other question
10 presented, the situation is as follows: The Witness has
11 testified that he has written a report directed to two
12 issues. And from these documents he excerpted documents
13 that support the proposition he asserts in his report.
14 It is therefore appropriate for us to place in evidence
15 that excerpt. There is no rule of law that the admissibility
16 of the excerpt is a function of the production of the
17 entire document.

18 Mr. Merrill has had these documents, he could, if he
19 wanted to, produce the entire document, cross-examine
20 about it or offer it himself.

21 The absence of the full document might go to weight,
22 but it doesn't go to admissibility.

23 Additionally, Your Honor, this business to which Mr.
24 Merrill has referred, of the insistence upon the full
25 document when an excerpt is relied upon, has a history



1 in this litigation which I am not familiar and I would
2 ask your permission for either Mr. Rogers or Mr. Sachse
3 to speak to that issue.

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1 MR. ROGERS: He has raised the point, Your Honor,
2 that we objected on a similar point. And the government
3 objected during two other witnesses' appearances on the
4 stand when he asked for the entire document that
5 Mr. Merrill was using for being introduced. That is a
6 different situation than we are faced with here because
7 in that instance Mr. Merrill was using documents
8 excepted from documents for the first time. The
9 introduction was not required under the five-day rule,
10 and we were seeing it for the first time here in court
11 as were the two witnesses involved in those cross-
12 examinations. In these instances, as Mr. Facciola said,
13 a good part of all these documents the State has had
14 since August 7, more of them later on August 17, and
15 they've certainly had them all under the five-day rule,
16 and have had full opportunity to produce whatever excerpts
17 of them or the rest of the document that they wish to use
18 on cross-examination.

19 MR. MERRILL: Your Honor, I simply point out that
20 with respect to the law, there was a rule of evidence
21 which was in the case of the United States Commission.
22 The gist of it was if a portion of a document is intended
23 to be used by a party, the Court may request production
24 of any other part of that document that, in fairness,
25 stewart-voir dire-merrill



1 ought to be used with the proffered evidences. This
2 rule was used several times with the United States
3 and Tribes against Wyoming in several cases. You
4 ordered that we produce copies of the exhibits that we
5 were using, and the State complied with your order.
6 I think it's only fair to require that the Tribes put
7 all their cases in.

8 THE SPECIAL MASTER: This is a different situation,
9 Mr. Merrill, and the difference is that you were provided
10 with this in the depositions a couple of weeks ago, so
11 there was no element of surprise that there was when
12 you conducted the cross-examination with United States
13 witnesses. Then the adverse parties had to ask for the full
14 documents from which the experts took their opinions.
15 There there is a basic difference, but I have sustained
16 your objection to³, and if you wish the full document,
17 it should be substituted with these full pages. I'm
18 glad to know you were supplied with it on the 17th.

19 MR. MERRILL: Your Honor, I believe the full
20 document ought to be introduced. The places of it that
21 do indeed involve the discussion of trading lands, I
22 believe it's the land down in the southern portion of
23 the Reservation, and it appears from what I've been able
24 to review so far that this document reviews a portion
25 stewart-voir dire-merrill



1 of the negotiations that led up to that says, "by the
2 Brunot agreement," which would comport with what I see
3 here.

4 THE SPECIAL MASTER: It still doesn't poison
5 the document for which it's offered. Historically
6 I want to know about some of these things.

7 MR. MERRILL: Your Honor, I would like to make that
8 request that the counsel for the Tribes put the entire
9 document into the evidence rather than an excerpt of
10 the document.

11 THE SPECIAL MASTER: Let me read, to sustain my
12 own ruling, Rule 106 of the Wyoming Rules: "The statement
13 or part thereof is introduced by a party and adverse party
14 may require him at that time to introduce in part or other
15 writing or recorded statement . . .
16 to be considered contemporaneously with it."

17 MR. FACCIOLA: In light of that, Your Honor, I want
18 to tender to Your Honor, I suppose, in substitution, Your
19 Honor, the document to which Mr. Merrill referred to
20 which, to my knowledge, is the full proceedings.

21 MR. MERRILL: Your Honor, in that case, I would
22 like to reserve my voir dire of the substituted OCS-3
23 until I've had time to prepare my case and study the
24 document.

25 stewart-voir dire-merrill



1 THE SPECIAL MASTER: You have a copy of it. You
2 were given it.

3 MR. MERRILL: About three or four pages.

4 MR. ROGERS: You knew what the entire document was,
5 Mr. Merrill. This is a waste of the Court's time when
6 you've had a half a month already.

7 THE SPECIAL MASTER: Let's proceed, gentlemen, with
8 4.

9 I'm going to change -- the remainder have Stewart
10 written across them rather than OCS, but they are OCS?

11 MR. FACCIOLA: I thought I marked that one. I
12 think in the upper right-hand corner you'll see OCS-3.

13 Q (By Mr Merrill). Dr. Stewart, would you please take out
14 your copy of OCS-4?

15 A. I have it.

16 Q Would you explain to the Court how you used this
17 document, which I believe is a 1955 report, in your
18 analysis?

19 A. Merely as a reference to the amount of fish available
20 in Wyoming in 1955 with the assumption that probably
21 most of the twenty thousand miles of fishing streams
22 available in 1955 were already available in 1868.

23 Q Does this document make any specific reference to the
24 streams of the Wind River Indian Reservation or the

25 stewart-voir dire-merrill



1 population of fish in the streams?
2 A. No. It just lists the variety of fish, but not the
3 amount. I did not have names of all of the fish. This
4 isn't all of the names, but it does mention 83 species
5 of fish in twenty thousand miles of fishing streams.
6 I'm not familiar with the blocking of the streams or
7 the loss of the streams in Wyoming, and this merely
8 is the available -- the one document available to me that
9 actually named the miles. And I thought that would be
10 useful to show that there were fish streams, and since
11 the Reservation is within the state, that one might assume
12 that part of the streams were within the Reservation.

13 Q. Dr. Stewart, is the one page shown in Exhibit OCS-4 the
14 entire text of the portion under fish and game?

15 A. No, it's a whole pamphlet.

16 Q. Do you know if elsewhere in the pamphlet the text under fish
17 and game invokes a more detailed discussion of particular
18 species of fish and game and where in Wyoming it might
19 be found?

20 A. I did not locate that.

21 Q. Did you receive the entire text of the document from
22 which OCS-4 is excerpted?

23 A. I did.

24 Q. And you did not find any more references?

25 stewart- voir dire-merrill



1 A. No, I did not.

2 MR. MERRILL: Your Honor, the State of Wyoming
3 objects to the introduction of OCS-4 in that it is not
4 probative of any evidence that fish might have been found
5 in any other Reservations, and furthermore, it's a
6 statement of the occurrence of fish and game within the
7 state generally. It has no probative value. It states
8 only generalities. And, furthermore, it's talking about
9 more than conditions of fishing, and I believe Dr. Stewart's
10 testimony has been about the historical reliance of the
11 Shoshone on fish as a source of food. I don't see that
12 it bears relevance to the testimony.

13 THE SPECIAL MASTER: It may be so, but I'm going
14 to admit it. I don't believe that it is all that
15 important or relevant that it should be stricken from
16 the records. An exclamation goes through my mind which
17 is "what difference does it make?"

18 Q (By Mr. Merrill) Dr. Stewart, would you take out your
19 copy of OCS-5, please? Would you please explain to the
20 Court what portions of this document you relied upon and
21 how you used them?

22 A. This is another section from the annals of Wyoming fish
23 and game. This happens to be Volume 26, Number 2, July,
24 1954. And on Page 172 of this, there is a footnote

25 stewart-voir dire-merrill



1 written by historian Morgan mentioning the Shoshone and --
2 or Snakes, fishing in Green River and Bear River in their
3 area since the general -- the article: which contains
4 the footnote is dated -- well, the whole section I have
5 covers a period that's part three of a series 1852 to
6 1857 and its purpose was to add to any other references
7 that the Shoshone, as a cultural pattern, fished.

8 And it is a law, cultural law of anthropology,
9 that food habits that people acquire, that they develop,
10 they try to follow the habits, the food habits, that they
11 have developed. And the food that they have learned to
12 eat where they were reared, and especially over long
13 periods, as we have for the question of fish, this is
14 evidence of the continuation or a period of 1857 where
15 it demonstrates that earlier reports of Shoshone interest
16 in fishing and later reports of Shoshone interested in
17 fishing was continuous. So that it's a cumulative and
18 does support cultural law about food habits.

19 I consider it important that we do know that the
20 Shoshone never lost their interest in fish.

21
22
23 * * * * *

24
25 stewart-voir dire-merrill



1 Q (By Mr. Merrill) Dr. Stewart, are you referring to
2 footnote 91 at the bottom of Page 172?

3 A Yes.

4 Q Isn't it true that that footnote speaks of an encounter
5 with a group of about 60 or 70 men under a chief by the
6 name of Little Soldier or Showets?

7 A Yes.

8 Q Do you have any evidence that this group of Shoshone
9 actually settled on the Wind River Indian Reservation?

10 A My evidence that Little Soldier settled on the Reservation
11 is lacking because he was an old chief long before that.
12 The offering and the recognition that the evidence, the
13 statement of Little Soldier being over in Utah near Ogden
14 is simply that this is part of the entire culture pattern
15 of the Northern Shoshone, and that all of the Shoshone,
16 wherever they lived, even those in Death Valley, ate fish
17 when fish were available, and it's surprising how
18 persistent and how eager it was for these Indians to eat
19 the food that they could find and provide variation and
20 nourishment and variety, and wherever fish were available
21 the Shoshone ate fish, and this goes to substantiate that
22 assertion which I declared as a cultural law regarding the
23 food habits of people.

24 Q Dr. Stewart, isn't it true that the aboriginal territory
25 stewart-voir dire-merrill



1 of the Shoshone that you have mapped that territory
2 yourself, extends from Death Valley, in a large swath
3 across Nevada, Northern Utah, Southeastern Idaho,
4 Northwestern Colorado and Southwestern Wyoming?

5 A Yes.

6 Q Isn't it true that the aboriginal territory that you have
7 mapped covers many, many thousands of square miles?

8 A That's right.

9 Q Isn't it also true that of the people generically known
10 as Shoshone, there were many different bands roaming these
11 territories?

12 A There were different groups occupying different areas, yes,
13 of course.

14 Q Isn't it also true that the reliance on fish as a food
15 source varied between these individual bands depending
16 upon the availability of other sources of food?

17 A And also the availability of fish. They didn't eat fish
18 where there were no fish, but they did eat fish wherever
19 the fish was found, even minnows in small streams, little
20 springs in Death Valley. And all of the streams of
21 Nevada where fish occurred the Shoshone ate fish.

22 Q But isn't it true, Dr. Stewart, that the reliance on fish
23 as a primary source of food varied between the individual
24 bands of Shoshone?

25 stewart-voir dire-merrill



1 A Yes, according to the availability of the fish.

2 Q So in some areas the availability of fish was great and
3 the reliance upon it as a staple food was great, whereas
4 in other areas it was available only occasionally and a
5 great reliance was not put on fish as a staple?

6 A That's a rule, that's a law. I'd have to admit that's a
7 law of nature. They could not eat great amounts if they
8 were not available.

9 Q So that within the Shoshone culture you have a variation
10 between a very heavy dependance on fish and a food source
11 down to the point where the reliance on fish as a food
12 source is incidental; isn't that correct?

13 A Yes, because the availability was that variable.

14 MR. MERRILL: In light of the Witness' answers,
15 Your Honor, I would object to the introduction of OCS-5
16 on the grounds that the Witness himself admits that the
17 reliance of different bands of Shoshone on fish as a
18 traditional source of food varied from almost complete
19 reliance to almost incidental reliance as a source of
20 variety in the food diet, and based on that admission of
21 the Witness it seems to me that any document which
22 generically refers to Shoshone and does not identify in
23 some way that Dr. Stewart can tie to those Indians who
24 eventually settled on the Wind River Indian Reservation,
25 stewart-voir dire-merrill



1 absent a tie in of that type, either through Dr. Stewart's
2 testimony or a particular exhibit, that there is no
3 relevance of that exhibit.

4 This group of Shoshone who were led by Little Soldier
5 or Showets may have been a group that relied very heavily
6 on fishing, and that's fine, and that may explain the
7 comments in footnote 91, but that has nothing to do with
8 the group of Shoshone led by Chief Washakie who eventually
9 settled on the Wind River Reservation because by the
10 Witness' own testimony their reliance on fish may have
11 been radically different from this particular group of
12 people. I would further object to OCS-5 on the grounds
13 that my copy, at least begins with the first page of an
14 article and no page numbers appear, then it jumps to
15 142, 143 and then it jumps to 172, 173. It's an excerpt
16 of the document. There may be references elsewhere that
17 refer to a group of Shoshone more directly related to
18 those that we're talking about in this case, and I believe
19 that in all fairness the entire article should be put
20 into evidence so that it can be considered by the Court.

21 THE SPECIAL MASTER: Well, in this case I would
22 take and differ with you, Mr. Merrill. The reference in
23 the footnote is merely again to a piece of historical
24 evidence to sustain some conclusions of the Witness done
25 stewart-voir dire-merrill



1 on a piece of scholastic research supporting the
2 proposition of Shoshones being a society depending upon
3 fishing, and that's all its purpose is. It's not adduced
4 for anything more or anything less, and this shows that
5 a group of them got as far as Bear River in Utah to fish.
6 That's all it shows; no more, no less. I'm going to admit
7 it for that purpose, just for that purpose; no more, no
8 less.

(Thereupon, Exhibit OCS-5
(was admitted into evidence.

9
10
11 Q (By Mr. Merrill) Dr. Stewart -- I'm sorry, I have the wrong
12 document pulled out.

13 THE SPECIAL MASTER: Six.

14 Q (By Mr. Merrill) Would you please pull out your copy
15 of OCS-6.

16 A Yes, I have it.

17 Q Would you please explain what portions of OCS-6 you used
18 to support your analysis?

19 A OCS-6 is an article written by the Swede Hultkrantz
20 entitled The Indians of Yellowstone Park. It was
21 published in Swedish and under my direction, was translated
22 into English as shown in the earlier title page.

23 I selected only page -- the pertinent page
24 particularly to this case would be Page 30 -- 135.

25 stewart-voir dire-merrill



1 Hultkrantz is an anthropologist who has studied --
2 specialized on the sheepeaters, most of whom were interviewed
3 at -- on the Wind River Reservation, which he explained
4 in a number of articles about these people. And in this
5 case he talks about the Shoshone, the Sheepeater Shoshone
6 who sometimes went down to Yellowstone Park. And on
7 Page 135 he mentions the foods that they ate and how they
8 hunted them, and the pertinent paragraph is quote, "Where
9 there are waters abounding in fish, fishing was pursued;
10 and a lot of vegetables were gathered, though probably not
11 as much as among the Western Shoshones in the Great
12 Basin;" but it is -- "Where there were waters abounding
13 in fish, fishing was pursued." That is the important one,
14 and since Hultkrantz did most of his interviewing in --
15 on the Wind River Reservation, that tied that directly
16 with the Wind River people, Wind River Reservation people.

17 Q Dr. Stewart, isn't it true that OCS-6 speaks of the
18 Dukurika or Sheepeater Shoshone?

19 A That's right.

20 Q Isn't it also true that according to OCS-6, this group
21 of people lived as primitive hunters in Eastern Idaho
22 and Western Wyoming, mainly pursuing the wild mountain
23 sheep?

24 A That's right.

25 stewart-voir dire-merrill



1 Q Isn't it also true that they subsisted on other animals
2 and also roots and berries and lots of other sources of
3 food?

4 A It's true that the Indians in the -- in the hunting and
5 gathering level of culture, which the Shoshone, all of
6 the Shoshone were in prehistoric times or when they were
7 first met, ate all of the available foods, available in
8 their territory. They did not neglect any food available
9 to them, and where there were, the food was abundant, they
10 ate more of that food. But they liked variety and they
11 ate everything edible within the entire region of the
12 Shoshone.

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1 Q (By Mr. Merrill) Dr. Stewart, of the sheep eaters would
2 you characterize their reliance on fish as a part of
3 their diet, as a major component, as an incidental
4 component or whatever word?

5 THE SPECIAL MASTER: Mr. Merrill, is that a proper
6 question of cross-examination? Are you doing both at
7 the same time, voir dire and cross-examination?

8 MR. MERRILL: No, Your Honor. I'm not trying to
9 go into cross-examination. I believe it directly affects
10 the testimony. If the sheep eaters' reliance on fish was
11 only incidental, I believe the document would not be
12 relevant.

13 THE SPECIAL MASTER: I'm going to try to give a lot
14 of latitude, but I'm concerned to show that there is
15 additional references by authorities mentioning fish
16 and fishing by the Shoshone, and I don't believe it
17 warrants this minute attention and massing of the
18 platoons to attack it on the basis of failure of adequate
19 qualification. We mustn't make a side show of this thing.
20 This conclusion may or may not have some probative value
21 to me, but I don't think we should attack every facet
22 of the scholarship that's gone into it. That's how I feel
23 about it, Mr. Merrill.

24 MR. MERRILL: I'm sorry. I apologize if my voir dire
25 stewart-voir dire-merrill



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appears to be a side show. I do not intend it to be.

THE SPECIAL MASTER: I don't mean that. But this can drag into several days of just examining on documents. It can drag into several days of going through this, and I don't believe we should take days on these documents, although the conclusions and the cross-examinations of the witness may.

MR. MERRILL: Your Honor, what I'm trying to do is examine the relevance particularly, but other evidentiary questions concerning each of these documents and have Dr. Stewart explain how he used each particular document in his analysis, because it's documents on which his report is based. I would try to expedite my examination of these documents. I don't intend to take several days going through them one by one.

I would object to OCS-6 on the grounds it's irrelevant.

THE SPECIAL MASTER: The objection is overruled.

Q (By Mr. Merrill) Dr. Stewart, will you please explain to the Court how you used OCS-7 in your analysis?

A. OCS-7 contains an early letter dated October 20, 1851, from Subagent Rose, who was assigned to Wyoming. And he mentioned Shoshone or Snake Indians in the vicinity of the Wind River mountains, Henry Forks, Snake, Bear River,

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1 and so on. And he also mentions those in the eastern
2 area, mentions -- particularly the -- and I'm quoting a
3 bit, a quote from Page 170, " Their main band numbers
4 about twelve hundred. They subsist upon hunting and
5 fishing and are terribly well armed, and have a very
6 large number of horses." This adds to the theory or
7 point of view that I maintain that they continued
8 using the foods that they had become habituated to even
9 though in this case with many horses that they might have
10 lived entirely by hunting buffalo, but they didn't.
11 They continued eating fish because that was part of their
12 ancient habit, and it confirms the proposition of
13 anthropology that food habits are very difficult to
14 change, and people will maintain them as long as possible.

15 Q Dr. Stewart, does not OCS-7 and the letter you quoted
16 go on to quote, "They seem to be perfectly aware that in
17 a few years their food supply will be destroyed and that
18 it will become necessary to seek some other modes of
19 living"?

20 A. Yes.

21 MR. MERRILL: Your Honor, the State has no objection
22 to OCS-7.

23 THE SPECIAL MASTER: Good.

24 Q (By Mr. Merrill) Dr. Stewart, would you please tell the
25 stewart-voir dire-merrill



1 Court how you used OCS-8 in your analysis?

2 A. OCS-8 is a historical document by Dr. Grace Raymond
3 Hebard, head of the Department of Political Economy and
4 Sociology at the University of Wyoming. The book is
5 entitled Washakie, dated 1930.

6 Dr. Hebard spent a lot of time studying the Shoshone
7 and this -- this page or two is selected to demonstrate
8 that the Indians who finally occupied the Wind River
9 Reservation came from many sources, and it's just
10 possible that Washakie himself had his earliest records
11 as being along the Lemhi and -- was friendly with the
12 Lemhi and he may have been a Lemhi himself, but ended up
13 on the Wind River Reservation -- simply as evidence
14 that many -- this adds to the assertion that we have from
15 Hultkrantz and others that Shoshone from almost all of
16 the northern areas did settle on the Wind River Reservation.
17 Washakie was a very hospitable and friendly and good man,
18 and because of this he welcomed anyone he could
19 accommodate on the Reservation.

20 MR. MERRILL: Your Honor, I believe in light of the
21 title of this document and the thought that OCS-8 has
22 been an excerpt of pages of the document, it would be
23 particularly appropriate to put the entire book into
24 evidence. And if the entire book is offered into

25 stewart-voir dire-merrill



1 evidence as a substitution for OCS-8, the State will
2 have no objection to its introduction. If the entire
3 book is not offered, we will object on the grounds that
4 it's but an excerpt.

5 MR. FACCIOLA: To review the point again, Your Honor,
6 this is not an occult document stuck in the files of
7 the CIA. It's in a library. He's had the use of
8 these pages for a long time. Mr. Merrill remains free
9 to go to the library and obtain the book himself. All the
10 offer is for is to explain by a scholar in his written
11 report as to why they bear on his conclusions. He should
12 not be able to make these frivolous objections.

13 THE SPECIAL MASTER: Once in a while because of
14 contemporaneously produced material, it's important
15 to produce the entire book. Since Grace Raymond Hebard
16 is a historical figure and important to the State of
17 Wyoming and a prominent figure of the University of
18 Wyoming and everybody should be aware of her perhaps that
19 alone may be the reason her book should be offered into
20 testimony. I'm not going to exclude the exhibit here,
21 Mr. Merrill. If you want to produce it, we'll let you
22 on your case.

23 MR. MERRILL: The burden that I know of should not be
24 imposed on Counsel for the Tribes. I've not been overly
25 stewart-voir dire-merrill



1 burdensome about these excerpts. I've only made it twice
2 now and we've gone through eight documents. Given the
3 title of this book, I think it's very likely that other
4 material could be found in the book that could be
5 relevant to this case.

6 THE SPECIAL MASTER: Yes. You see, this isn't used
7 for the fish premise as much as it is on the thought to
8 show Washakie himself was a unique human being, to show
9 that others gravitated towards this Reservation from
10 other bands. And, therefore, it has a tangential importance
11 to their work.

12 MR. MERRILL: I understand. To the comment we have
13 no other use of these documents, I would point out that
14 the Wyoming Rules of Evidence require that the party
15 proffering an excerpt of a document be prepared at trial
16 to produce the entire document. It doesn't say I have
17 to come up with it on cross-examination. The Rules
18 say that the party offering it should be prepared to
19 offer the whole document.

20 THE SPECIAL MASTER: We have gone through a year
21 of a trial, and we've filled five rooms of exhibits,
22 and we've avoided this quarrel. Let's see if we can avoid
23 the confrontation a little while longer. OCS-9.

24 Q (By Mr. Merrill) Would you please describe how you used
25 stewart-voir dire-merrill



10-7

1 OCS-9 in your analysis?

2 A. Yes. OCS-9 is a small section of a 41-volume study
3 entitled Survey of Conditions of the Indians of the
4 United States, authorized by Congress in 1929 and was
5 continued for a long time. Volume Part 25 -- Volume 25
6 of this 41-volume series contains hearings conducted
7 in Wyoming, Idaho, and Utah in 1932.

8 The section that I took from the microfilm that
9 was all that was available to me, the only thing available
10 to me at the University of Colorado, the microfilm concerns
11 interviews conducted at Fort Washakie. The witnesses
12 are named and the senators and staff available are also
13 named.

14 Senator Frazier was one of the -- was the chairman
15 of the subcommittee conducting this hearing and was the
16 most active interrogator.

17 The section that I've reproduced from the microfilm
18 is really in two parts. It's concerned with a petition of
19 the Indians of the Wind River Reservation. And the
20 first petition shown on Pages 14502 of the original
21 publication really concerns the complaints of the Indians
22 about non-Indians using resources of the Reservation,
23 fishing particularly, on the Reservation. There was
24 considerable discussion on that. Again they decided to

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resubmit the petition, and on Page 14504, again, a section identified as Petition B, is a little shorter, but does give the gist of the discussion, and I will read a paragraph. "We, the undersigned, members of the Shoshone Arapahoe Council, request that our agent stop the promiscuous fishing and hunting by others than Indians or those whom the Council may deem to be accorded this privilege in all lakes."

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1 A. (Continued) Second paragraph, "In that one clause where
2 it says hunting and fishing by others than Indians, now
3 whether it means or applies to our own Indians on the
4 reservation or other Indians that may come on the reser-
5 vation at any time, now that it is up to my fellow mem-
6 bers of the council to consider, and we -- and see what
7 we can work out there."

8 It's concerned -- it's given as -- That's the end
9 of the quotation. My own interpretation and my reason
10 for selecting this is that it really supports the general
11 thesis of the continuity of culture, of the Shoshone.
12 We don't know of the fishing habits of the Arapahoe before
13 they settled on the reservation because they were chasing
14 buffalo over the prairies too much and didn't have time to
15 fish, but the -- once they settled on the -- on the
16 reservation where fish were available, they enjoyed the
17 variety and very soon became, became fishermen along with
18 the Shoshone.

19 And this is simply a verification of the continuity
20 of interest in fish and fishing, and the fact that Arapahoe
21 had, by then, acquired a taste for fish also.

22 Q Dr. Stewart, I direct your attention to, I believe it's
23 Page 14505. I'm having some trouble reading the page
24 numbers. They're not easy to read. They sort of white out
25 stewart - voir dire - merrill



1 in the upper corner.

2 A. I see 6, so I can turn back and assume it's 5, yes.

3 Q. Now, isn't it true that in the bottom portion of the top
4 paragraph on Page 14505 that there is discussion of the
5 number of finger lengths contributed by Hudson, Lander
6 and Riverton and some of the communities within and
7 surrounding the Wind River Reservation?

8 A. Yes, that is there.

9 MR. MERRILL: Your Honor, I have no objection to
10 OCS-9.

11 THE SPECIAL MASTER: Thank you. It is admitted.

12 (Thereupon, State of Wyoming
13 (Exhibit OCS-9 was received in
14 (evidence.

15 Q. (By Mr. Merrill) Let's go on to OCS-10, Dr. Stewart, and
16 if it's agreeable, we'll just go to each document. My
17 question with respect to each one would be to describe to
18 the Court how you used particular information within that
19 exhibit in your analysis.

20 A. Eleven is absent. Ten is really in two parts. One, I think,
21 one I had to make from a microfilm, has been remade from --
22 from a -- reprinted, so that there's a white copy as well
23 as the black copy.

24 Q. I see.

25 A. And I'll use the white copy that does not have the
stewart - voir dire - merrill



1 deposition number on it.

2 Q All right.

3 A But we can use it. This section from -- from the original
4 anthropological work produced in the United States was
5 produced by Henry R. Schoolcraft under a special grant
6 by Congress of 1847, and the six-volume work had its first
7 volume called here, Part One, in 1851. Schoolcraft had
8 been an agent of the Bureau of Indian Affairs, mostly in
9 the Great Lakes area, but broadened his perspective when
10 he went to Congress and had his Congressional friends vote
11 money to subsidize his beginning of the collection of
12 available information about the Indians before it became
13 too late.

14 THE SPECIAL MASTER: Isn't it an irony, Dr. Stewart,
15 that the work he did was commendable, scholastic, excellent,
16 helped us with our work in our nation. Had that same
17 procedure been tried today, he would be impeached for doing
18 the same thing; such as are morals and standards in
19 government work in this country in one hundred years, one
20 hundred fifty years.

21 THE WITNESS: The process of accumulating history,
22 culture patterns, languages of the Indians, although
23 started by Schoolcraft, certainly was very soon added to
24 greatly by the establishment of the Bureau of Indian -- the
25 stewart - voir dire - merrill



1 Bureau of -- of the Smithsonian, and through the
2 Smithsonian, the Bureau of Ethnology continued within
3 twenty years of this, continuing collecting the type of
4 things as well as others, so that we do have a few
5 thousand volumes of the -- the languages and history of
6 the Indians as produced by themselves and recorded by
7 the anthropologist who went out to talk to them.

8 Schoolcraft was dependent on correspondence, he
9 accepted, for his recording, the folklore of the Chippewa
10 himself, he received letters and sent out letters to others,
11 and Wyeth was one of the traders at Fort Hall who followed
12 -- followed not long after Lewis and Clark, but in the --
13 in the 1830's, wrote summaries of the -- the life of the
14 Shoshone. And the first pages of this -- of this collec-
15 tion is sort of an introduction by Schoolcraft summarizing
16 the life of the material -- summarizing material that he
17 had received by -- from Wyeth. On Page 61, the first page,
18 and all it does is say, "The Shoshonees or Snake Tribe,
19 who dwell in the arid valleys, about the area of Fort Hall,
20 and the southern pass," -- which would be the road through,
21 into Wyoming or out to the plains, the southern passes
22 where they eat fish along with the rest of the animals.
23 It merely is recognizing that was -- that was recorded by
24 Wyeth at -- before 1851. The other pages appear also to be
25 Stewart - voir dire - Merrill



1 from Wyeth and repeat the, the same story. When they
2 could get buffalo, they hunted buffalo, and they went to
3 great problems to go to the plains to hunt buffalo, and
4 then they would return to Snake River and trade buffalo
5 for fish that went up the Snake River and were caught at
6 the -- at the falls, at the head waters of the salmon run.
7 And that this was part of the -- of their effort to maintain
8 their variety of -- of food that the Shoshone thus utilized
9 the resources available to them, either by going on to the
10 plains for -- for buffalo and then returning to the fish
11 streams in -- as far as Idaho and sometimes in southern
12 Idaho; different groups, the Shoshone and Bannock, who were
13 often together in their wanderings back and forth.

14 On Page 213, which is the last of the -- of this
15 selection, are a list of some of the instruments that
16 were used in fishing that they mention. They mention fish
17 spears, they hunted with arrows, and they had various uses
18 of -- in trying to collect fish that were not always easy.

19 THE SPECIAL MASTER: Dr. Stewart, I don't mean to be
20 so crude, but what is the word "obsidian", o-b-s-i-d-i-a-n?

21 THE WITNESS: Obsidian is a natural volcanic ash,
22 some volcanoes ooze a black material, that's the name,
23 obsidian, and it's fairly consistent like, like flint, and
24 is used often in the place of flint.

25 stewart - voir dire - merrill



1 Q (By Mr. Merrill) Dr. Stewart, I note on Page 199 of these
2 excerpts, a mention of Lewis and Clark in encountering
3 the Shoshones. In the group of Shoshones which Lewis and
4 Clark encountered in 1805, were they a group, a subgroup
5 of the Shoshones that you would call the Lemhis?

6 A The people he visited that he met first were also know as
7 Lemhi.

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1 Q (By Mr. Merrill) Did any significant portion of the Lemhi
2 band of Shoshones eventually settle on the Wind River
3 Indian Reservation?

4 A Well, Washakie was known as a Lehmi. I guess the chief
5 was there. He may have attracted a number of his
6 followers.

7 Q Do you know if he did, in fact, attract a number of Lehmis
8 as opposed to other bands?

9 A I have not made an analysis of the censuses that were
10 available. The Wind River Shoshone today do have in
11 their oral traditions that this family was from that area,
12 or another family from another area, so that if it were
13 a very important point, the ultimate origin, we do have
14 a number of statements by Hultkrantz and others that they
15 did come from all areas, and it would be possible to
16 probably find in oral traditions where a number of people
17 were.

18 I was talking today with one of the men from the
19 Reservation, and they mentioned Mr. Nipwater, that was
20 one of my informants, and he told me that he originally
21 had lived on the Shoshone Reservation in Nevada, but had
22 decided to move over to the Wind River, and was there
23 and was an honored citizen on the Wind River Reservation.

24 Q Dr. Stewart, do you know if the document from which
25 stewart-voir dire-merrill



1 OCS-10 contains excerpts has any other information than
2 the pages you selected here concerning the dietary habits
3 of the Shoshone Indians?

4 A No. I couldn't say it lacked them. I selected these
5 pages because they dealt with the Shoshone at the time
6 when I was interested in the Shoshones, and I took all of
7 the pages at that time which seemed to have relevance
8 for the Shoshone food habits and territory, but there may
9 be myths of the Shoshone in that volume. Schoolcraft
10 published a lot of pictures or drawings of pictographs
11 and petroglyphs and many things, and it's hard to --
12 Schoolcraft was not very well known because there was no
13 index to the six-volume large format work until it had
14 been in print 100 years, then they finally got around to
15 publishing an index. It's not as well-known as it might
16 be otherwise. It's now a rare volume, rare set.

17 Q Dr. Stewart, isn't it true that on Page 202 of OCS-10,
18 Mr. Schoolcraft speaks in terms of the little resources
19 that the Shoshone possess in game and fish are quickly
20 wasted?

21 A Yes, that's what it says.

22 MR. MERRILL: Your Honor, the State has no objection
23 to OCS-10.

24 THE SPECIAL MASTER: Very well. Gentlemen, it's about
25 stewart-voir dire-merrill



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ten minutes to twelve. Why don't we take a break for lunch and reconvene at 1:30 today. All right, we'll recess until that time.

(Whereupon, the noon recess (was taken.

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