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4367
Box 10

Case # 4993

File # 116

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

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

Civil No. 4993

FILED
2/6 1981
Margaret V. Haney CLERK
DEPUTY

VOLUME IX

Friday, January 30, 1981

Morning Session

ORIGINAL

1

APPEARANCES

2

FOR THE STATE
OF WYOMING:

3

MR. JAMES MERRILL,
MR. MICHAEL D. WHITE
Special Assistants Attorney
General
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Denver, CO 80202

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MR. MICHAEL KROB and
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FOR THE UNITED
STATES OF AMERICA:

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MS. REGINA SLEATER
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MR. TOM ECHOHAWK
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19

MR. JOSEPH MEMBRINO
U.S. Department of Justice
Washington, DC 20006

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FOR THE ARAPAHOE
TRIBE:

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

22

23

FOR THE PRIVATE
WATER HOLDERS:

24

WESTERN LAW ASSOCIATES, P.C.
431 Main St.
Lander, WY 82520
BY: MR. GREGG A. PARISH

25

1

THE SPECIAL MASTER: May we please

2

come to order. Ms. Sleater.

3

MS. SLEATER: Your Honor, I would

4

like to state for the record that this morning

5

the United States delivered to the State of

6

Wyoming a xeroxed copy of the enrollment lists

7

of the Tribes that Mr. Merchant had referred

8

to in his testimony. We had -- it's not in

9

the form of a computer printout, but rather

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the xerox of a printout because we have

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ordered from Billings twice, that we had

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air freighted down, printouts that when they

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arrived turned out to be not exactly what

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we had asked for. So we finally just

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xeroxed the printout. We were hoping to give

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the State a printout themselves so it would

17

be easier for them to read, but if they have

18

a problem with the names, we'll compare them

19

with the original.

20

THE SPECIAL MASTER: Thank you very

21

much.

22

Yes, Mr. Merrill.

23

MR. MERRILL: Your Honor, I appreciate

24

Ms. Sleater's effort on her behalf to supply

25

this information. Now that I see how much

1 there is I'm not sure I want it anymore.

2 Before we proceed this morning, it's my
3 pleasure to introduce to the Court two members
4 of our firm whom you've already met, a Mr.
5 Stuart Rifkin and --

6 THE SPECIAL MASTER: Good morning,
7 Mr. Rifkin.

8 MR. MERRILL: And Mr. Scott Krob.
9 Both of the gentlemen are members of the
10 Colorado bar in good standing.

11 THE SPECIAL MASTER: What was the other
12 person's name?

13 MR. MERRILL: Mr. Scott Krob, Your Honor,
14 and at this time I would move their admission
15 to the State bar of Wyoming for purposes only
16 for this case.

17 THE SPECIAL MASTER: You're admitted
18 and congratulations on being admitted to the
19 case.

20 May I be able to carry on in the great
21 traditions of one of your namesakes in a similar
22 kind of work.

23 MR. RIFKIN: The spelling of the
24 name is a little different.

25 THE SPECIAL MASTER: What?

1 MR. RIFKIN: The spelling is a little
2 different.

3 THE SPECIAL MASTER: His is with a D?

4 MR. RIFKIN: Right.

5 THE SPECIAL MASTER: The witness wants
6 to clarify, he's asked me if he might touch
7 upon an item or two, and if that's agreeable,
8 please proceed, Mr. Page, if you wish.

9 MR. PAGE: It's on page 984, it's
10 regarding the conducting of the seepage runs.
11 We don't -- I don't want imply that they
12 couldn't have gotten the money to do it if
13 we felt that it was necessary. And --

14 THE SPECIAL MASTER: Okay.

15 MR. PAGE: There was a particular
16 example that said "No response", that I nodded
17 my head. I just want to clarify that.

18 THE SPECIAL MASTER: Okay. Before
19 we begin this morning, the United States
20 attorney, Mr. Graves, has been kind enough to
21 suggest that he will be able to bring in a
22 tray of a couple of coffees, and we will
23 certainly appreciate that.

24 MR. GRAVES: It's at least something
25 I can do in this case, Your Honor.

1 MR. MEMBRINO: Before we resume,
2 Mr. Page is prepared to testify this morning,
3 although he did take a little decline last
4 night. I talked to Mr. White before the
5 hearing, and he expects about an hour and a
6 half of cross examination. And I think Mr.
7 Page is able to handle that, but we'll have
8 to play it by ear as we go along.

9 MR. WHITE: I also spoke with Mr.
10 Membrino, and indicated that I would have a
11 reduced cross examination today primarily
12 because of Mr. Page's health, and that if we
13 went ahead with the reduced cross examination
14 I wanted an assurance that we would finish any
15 redirect. In other words, I didn't want to
16 finish a reduced cross and have the witness
17 have a week and a half or so to think about
18 what the redirect might be, not so much the
19 witness, but counsel, and as I understand it
20 that's part of the arrangement and if that's
21 part of the arrangement I have no objection
22 to proceeding.

23 MR. MEMBRINO: We'll see how much
24 time is taken, but largely that's correct.

25 THE SPECIAL MASTER: All right. Okay,

Mr. White, proceed.

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1 THE WITNESS: Your Honor, will you close
2 that door?

3 THE SPECIAL MASTER: Sure.

4 MR. WHITE: If you need to stop, let us
5 know, Oliver.

6 THE WITNESS: I think the voice is okay.

7 MR. WHITE: The other symptoms are getting
8 worse.

9 (CONTINUED) CROSS-EXAMINATION

10 BY MR. WHITE:

11 Q When we stopped yesterday, my notes indicated
12 that we had just gotten into some question of
13 hydraulic connection; that you had testified
14 that you personally reached no conclusions with
15 respect to aquifer recharge or discharge areas.

16 A That's correct.

17 Q Did you do any modeling of any of these aquifers?

18 A No.

19 Q Hasn't the USGS done modeling for many similar
20 aquifers?

21 A The USGS does models, that's correct.

22 Q Hasn't it modeled very similar aquifers, both
23 alluvial and confined?

24 A They have modeled alluvial. I'm unaware of the
25 page-cross-white

1 specific confined they have modeled, but there
2 is no reason they couldn't have.

3 Q Why didn't you conduct any modeling?

4 A I was going to model a well field if we had
5 proceeded with major groundwater development,
6 but otherwise it was not in the scope of our
7 study to model.

8 Q Well, if you didn't model the aquifers, how are
9 you able to state with any certainty the affect
10 of pumping from those aquifers?

11 A Without -- with pumping -- first of all, I
12 haven't stated in specific terms if effects of
13 pumping from the aquifers, since we essentially
14 have very little known new development except
15 in the Riverton area, and in the Riverton area
16 information we had available to us particularly
17 from the City of Riverton, which is the major
18 pumper, we had nothing on their wells or well
19 responses.

20 We requested initially for pumpage and
21 initially they did not respond to us. At this
22 point that would be the only area that I can
23 see you would be interested modeling at this
24 time with existing pumping. Otherwise, you would

25 page-cross-white

1 just be putting in any hypothetical pumping
2 situation on there.

3 Q So then it's difficult to tell with reasonable
4 probability the effect of well pumping in any
5 of the deep formations at a particular distance
6 from that pumping?

7 A That's right, until you either -- whether you
8 model it with a computer, you model it by hand.

9 Q How far does the effect which you have described
10 from pumping in the Riverton area extend
11 throughout the Wind River Formation?

12 A We have the -- the only hydrographic we had,
13 I believe the closest one -- I can't give you --
14 I can't recall the well numbers, one of the
15 ones the USGS monitors on a continuous basis
16 and it is, I believe, located a little south
17 of the Wind River. Well, that circle you have
18 there (indicating), the population circle, I
19 believe it's on the periphery of it.

20 Q Down in the southern portion?

21 A A little north.

22 THE SPECIAL MASTER: Who owns that well?

23 Q (By Mr. White) Is that a USGS well?

24 A No, that I don't know. It is monitored by the
25 page-cross-white

1 U.S. Geological Survey. They monitor nine wells
2 on the Reservation continuously over a period
3 of time. Some are in the alluvium, some are in
4 the Wind River Formation. They essentially have
5 one -- their closest one to Riverton is not
6 right in the Town of Riverton. that well showed
7 some initial drop, and in recent years has been
8 fairly unlevel, ups and downs.

9 THE SPECIAL MASTER: How deep is that well?

10 THE WITNESS: I believe it's 400 feet,
11 in my mind, but I'm not sure of that.

12 Q (By Mr. White) So there is a 400 foot well
13 that's used for observation south of Riverton,
14 and in the last few years it has shown what,
15 a piezometric head or what --

16 A Well, artesian. When a piezometric head is
17 shown, we are not looking at a continuous
18 decline at that point. You had earlier drops
19 and then recovery.
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1 Q (By Mr. White) Based on your study, would you
2 please review plaintiffs' Exhibits WRIR GW-1 and
3 tell me whether you agree or disagree with the
4 facts contained that are set forth in the third
5 paragraph?

6 A. You're asking me to comment on whether these addi-
7 tional wells would seriously reduce water levels;
8 is that it?

9 Q Let's take the first sentence of the third para-
10 graph.

11 A. Okay.

12 Q Previous experiences have demonstrated that deep
13 wells to this aquifer seriously and permanently
14 lower the water table.

15 Do you have any idea what water table is
16 being discussed there?

17 A. Well, if they are deep wells, it would have to
18 be the potentiometric surface.

19 MR. MEMBRINO: Your Honor, I object to this
20 in that there's no description of the wells in-
21 volved, the conditions under which they are pumped.

22 THE SPECIAL MASTER: I would overrule the ob-
23 jection. It describes it accurately enough through
24 area.

25 page - cross - white

1 Q (By Mr. White) Do you know of any facts which
2 would show that previous experience demonstrates
3 that the deep wells to this particular aquifer
4 seriously and permanently lower piezometric head?

5 A It would depend on their proximity to one another
6 and the pumping rate. You would have an initial
7 lowering and then you would have a leveling off
8 or a continual decline.

9 Like you said, you would have to model those.

10 Q So unless you model it by hand or arithmetically
11 or mathematically or by computer, you don't know
12 for sure, do you?

13 A What the additional wells would do?

14 Q That's right.

15 A You can look at what's occurring presently and
16 historically with the existing wells that are
17 pumping and use water levels to look at it to
18 get the impression or the feeling of what's occur-
19 ring.

20 Q Are you aware of any past experience that does
21 demonstrate that deep wells to this aquifer
22 seriously and permanently lower the piezometric
23 head, any specific example that you can recall
24 based on your investigation?

25 page - cross - white

1 A The only -- I saw one well hydrograph, again one
2 of those monitored by the U.S. Geological Survey,
3 and the initial potentiometric surface, I believe
4 the well they started measuring anyway in the '50's.
5 I think that data started in the '50's and it
6 dropped considerably, and then by the end of the
7 '60's, it recovered.

8 Now, that recovery, not necessarily since we
9 are aware the pump rate could be cut down. There
10 are many factors that could have influenced that
11 well.

12 Q Well recharge?

13 A Well recharge, but it's strange that it was down
14 for a prolonged period and then went back up be-
15 cause since the '70's, water levels changed from
16 the pumping, but it has been a very slight decline.
17 That well, initially there was a drop in the poten-
18 tiometric surface.

19 Q Okay. How long has that relatively steady state
20 condition existed?

21 A As I recall, since the '70's, since early '70's.
22 Now, that's one well and --

23 Q Do you know of any other wells?

24 A No, I don't, and it's not in the middle again, the
25 page - cross - white

1 center of Riverton's pumping, but from it you can
2 draw a general conclusion at least on the peri-
3 phery of Riverton you are not having major water
4 level decline.

5 Q Let's turn to your alluvial storage determination.
6 Did you make your alluvial storage determination
7 by determining the product of saturated thickness
8 times specific yield times area of the alluvial
9 materials?

10 A Yes, the corrected area --

11 Q The corrected area.

12 A -- or adjusted area.

13 Q What saturated thickness did you use for the Wind
14 River?

15 A Average saturated thickness of 20 feet.

16 Q Did you compartmentalize the Wind for purposes of
17 this study?

18 A In the study we had various ones for nodes along
19 the --

20 Q Could you describe those nodes and values?

21 A I don't have the values of the individual nodes
22 with me, but I would say we were looking at
23 reaches of anywhere from one mile to four or five.
24 They were selected in part based on the

25 page - cross - white

1 configuration of the channel on the saturated
2 thicknesses. And, as I indicated, the saturated
3 thicknesses ranged from 8 to 42 feet, and that
4 20 foot is a back calculation as an average.

5 Q How about Little Wind Spring, what was the satur-
6 ated thickness there?

7 A We had 21 feet with a range of 9 to 25, and we
8 had areas in there, node compartments.

9 Q Areas of node?

10 A Yeah.

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- 1 Q (By Mr. White) Do you remember the values
2 which you used for those particular nodes?
- 3 A No, I don't.
- 4 Q Can you remember the location of the nodes
5 which you used either on the Wind or the Little
6 Wind?
- 7 A Well, they essentially -- I can show you the
8 general, where some of them are, approximately.
- 9 We treated this separately, I believe.
- 10 At this point we treated this alluvium, stretch
11 of the alluvium have two nodes.
- 12 Q You're talking about the East Fork of the Wind?
- 13 A That's correct; showing a cross section in
14 this area we just used an average of 20 feet.
- 15 Q That's roughly the boundary between Township
16 6 and 7, crosses the North Fork?
- 17 A That's correct. We looked at the portion on
18 the Reservation.
- 19 Q Okay.
- 20 A We had a node covering essentially that small
21 portion in here. I don't recall the nodal break
22 of that constriction.
- 23 Q Let's get some record description. So you go
24 from the end of the Reservation down the Wind
25 page-cross-white

1 to the boundary between Sections 3 and 4?

2 A Approximately.

3 Q And Township North, Range 5 West?

4 A That's correct, North. Range 5 West and about
5 the line between sections 3 and 4.

6 Q Okay. And where did that next node end that
7 began there?

8 A And I believe we had one, it ended there
9 (indicating). Now, the next node, to my best
10 recollection, went to this constriction.

11 Q Which is --

12 A Which is in the same, it's in Township 5 North,
13 Range 5 West, about the break.

14 Q Between Section 11 and 14?

15 A That's right. Then in through this stretch
16 we had, I would say three of them, I can't
17 read the exact breaks on them.

18 Q That's from the break between Section 11 and 14
19 down to --

20 A Probably down to this constriction. We looked
21 at constrictions.

22 Q So that would be the constriction in the south-
23 east corner of Section 8, Township 3 North,
24 Range 2 West?

25 page-cross-white

1 A That's correct.

2 Q Okay. And there were three in this last --

3 A Three or four.

4 Q Three or four, and you can't remember where
5 they're located?

6 A No, I can't.

7 This work was done a year and a half ago.
8 I don't -- I can't even attempt -- we, again,
9 broke them up into nodes, the rest of the reach.

10 Q But you can't tell me where those nodes are?

11 A No, I can't.

12 Q How about the Little Wind?

13 A The Little Wind and also on Mill Creek, this
14 was the only three that we used for the nodes.

15 Q Okay.

16 A The reason we did this, we had saturated thick-
17 ness data where we can't have to -- we had
18 several values at least so that we could be
19 a little more specific. I cannot review the
20 breaks, but we're talking about nodes of two
21 to three miles.

22 Q Do you remember the specific saturated thickness --

23 A Not for each node.

24 Q -- for the nodes?

25 page-cross-white

1 A No, I don't have that information here with
2 me.

3 Q But that was a precise number that you relied
4 upon in your analysis?

5 A It was a specific number average for that node.

6 Q Okay.

7 A It wasn't necessarily a specific well in there.
8 It might have been an average of two. Some we
9 had a well and we achieved that value, rather
10 than just apply an average to the entire reach,
11 we did not do that on those three.

12 Q Go ahead and grab your seat.

13 So, where you had nodal values for sat-
14 urated thickness, those were based on actual
15 observations which have been made either by you
16 or which were reported in the literature?

17 A I didn't make them because I didn't drill any
18 test holes. What was reported in the literature,
19 the literature, and -- but again, not necessarily,
20 there was a point in the specific node, might
21 have been logs on either side of it.

22 Q Do you recall the specific facts and data upon
23 which you based your opinion as to the saturated
24 thickness for any of those nodal areas?

25 page-cross-white

- 1 A You mean the specific wells?
- 2 Q Yes.
- 3 A The bulk of them are in Water Supply 1576-I
- 4 supplemented by logs provided by, I believe
- 5 for domestic wells. Essentially a few, I think
- 6 were provided to the State by the BIA or Indian
- 7 Health Service.
- 8 Q What were those wells?
- 9 A I don't have those, the detail well numbers.
- 10 I might -- we took every log, every well we
- 11 could find. Again, the bulk came in Water
- 12 Supply Paper 1576-I and plotted them on them.
- 13 Q It's pretty easy to find lots of wells down
- 14 in the Little Wind area, wasn't it?
- 15 A That's right. There are plenty of them.
- 16 Q There's a flock of wells down there and there
- 17 aren't many up here.
- 18 A There are not.
- 19 Q And yet you're unable to describe those part-
- 20 icular wells which you used to develop saturated
- 21 thickness values for each node?
- 22 A This matter that I have reviewed, the basic
- 23 calculations, since they were done.
- 24 Q What saturated, average saturated thickness value
- 25 page-cross-white

- 1 did you use for Crow Creek?
- 2 A Crow Creek we used an average of 15 and a
- 3 Range from 11 to 20.
- 4 Q Mill Creek?
- 5 A 23 average, Range 18 to 26.
- 6 Q Popo Agie?
- 7 A Popo Agie we -- I don't believe we had a log
- 8 in Popo Agie. We used 10 feet because down
- 9 in Riverton area, at least to the Popo Agie
- 10 or the Wind, you're looking at not much more
- 11 than 10 feet.
- 12 Q Sage Creek?
- 13 A 20 feet, Range 20 to 30.
- 14 Q Owl Creek?
- 15 A Owl Creek, 20, and I just don't show a Range,
- 16 so my feeling is we didn't have one or, again,
- 17 it was saturated thickness was assumed.
- 18 Q Fivemile Creek?
- 19 A We assumed 20.
- 20 Q Muddy Creek?
- 21 A 10.
- 22 Q Kirby Draw?
- 23 A 25.
- 24 Q Beaver Creek?
- 25 page-cross-white

1 A 20. Now, on those, these last five, Mile,
2 Muddy, Kirby, on Kirby and Beaver I believe
3 there were a crosssection, and there were some
4 logs, at least where they drew the cross
5 sections. We used that basis. On Fivemile
6 and Muddy there may have been a log each on
7 those.

8 Q And can you remember with respect to these last
9 few streams we discussed, once we left the
10 Little Wind, the wells, precise wells which
11 you used for the facts and data upon which
12 you based your conclusions, for average sat-
13 urated thickness?

14 A I don't have any of these well numbers memorized.

15 Q Did you -- you used a 15 percent specific
16 yield, didn't you?

17 A That's correct.

18 Q And do you use that even though the USGS
19 indicated a 10 percent yield?

20 A A conservatively 10 percent.

21 Q Do they say "Conservatively"?

22 A I believe so.

23 Q They do? Let me check.

24 A They were talking 20 percent in Owl Creek, which
25 page-cross-white

1 I would say is liberally high. And the 15 is
2 not just an average of their 10 and 20 values
3 they were talking about.

4 Q Well, I see the 10 percent used on page I-67
5 of Water Supply Paper 1576-I, about a quarter
6 of the way down the page. I don't see it as
7 being described as conservative.

8 (Brief pause.)

9 A Here it says "The specific yield is unknown,
10 but specific yield of 10 percent is probably
11 conservative for the type of deposits discussed."

12 Q Okay. So when the USGS says that something's
13 conservative, you feel at liberty to add to
14 it a little bit for your own analysis?

15 A Well, I based on our analysis of the logs we
16 had, driller's logs which showed the range I
17 said yesterday, 13 to 18 percent. I believe
18 it's 12 to 18 percent, and from my professional
19 experience in these types of deposits I have
20 used 15 and other people in my field have used
21 15. It's a judgmental, and I feel 15 is
22 representative.

23
24 * * * * *

25

1 Q (By Mr. White) What planimeter variable did
2 you use for the Wind River?

3 A I will give you what I call the affective area
4 or that adjusted. That's all I have with me.

5 THE SPECIAL MASTER: Effective?

6 THE WITNESS: Affective.

7 THE SPECIAL MASTER: Affected.

8 THE WITNESS: Which reduced it because
9 of the size.

10 Q (By Mr. White) Did you make your reduction by
11 way of a percentage?

12 A Yes, sir.

13 Q Did you also add your percentage numbers?

14 A No, I did not. This so-called affective area,
15 Wind River 49,200 acres.

16 Was that the first one you asked me?

17 Q Yes, Wind River. Little Wind?

18 A Little Wind, Spring Creek, 25,400.

19 Q Crow Creek?

20 A 14,000.

21 Q Mill Creek?

22 A 8,900.

23 Q Popo Agie?

24 A 6,400.

25 page-cross-white

1 Q Sage Creek?

2 A 7,000.

3 Q Owl Creek?

4 A 8,000.

5 Q Fivemile Creek?

6 A 5,600.

7 Q Muddy Creek?

8 A 2,900.

9 Q Kirby Draw?

10 A 4,700.

11 Q And Beaver Creek?

12 A 2,300.

13 Q Thank you very much.

14 THE SPECIAL MASTER: Is there a total
15 acreage figure on all that?

16 THE WITNESS: I didn't add it up.

17 THE SPECIAL MASTER: Okay, That's all
18 right.

19 Q (By Mr. White) And that's your affective area
20 which is the planimetered area reduced by a
21 particular percentage?

22 A Anywhere's from 75 to 95 percent, I believe.

23 Q How did you determine the percentage?

24 A We did it by looking at those cross sections,
25 page-cross-white

1 looking at the side slopes and reducing the
2 width of the channel. In other words, we are
3 looking -- on the geologic map you see a long
4 surface width. We looked at the channel and
5 we plotted the cross sections and looked at
6 the average, the width at the water in the
7 saturated zone and really we reduced the width,
8 I believe. The length would not be affected.

9 Q Did you base you opinion with respect to the
10 total storage capacity in these alluvial
11 reaches on the percentage which you derived for
12 the adjusted areas?

13 A Did I -- did I use the affective area in my
14 calculation of storage, is that what you're
15 asking?

16 Q Right.

17 A Yes.

18 Q And did you use a percentage in your calculation
19 of affective area?

20 A That percent reduction -- no. To get --

21 Q To get to the affective area?

22 A From the surface area to the affective area
23 we applied those percentages and it was based
24 on -- that's where part of the nodals came in.

25 page-cross-white

1 Different nodes had different percentages.
2 In the Riverton area the sides were pretty
3 vertical. Of course, you are only talking
4 less than 10 feet of saturated thickness in
5 some places.

6 THE SPECIAL MASTER: Off-the-record.

7 (Off-the-record discussion.)

8 Q (By Mr. White) So you developed your percentages
9 from cross section areas of two varieties,
10 those shown in 1576-I and those at the two
11 reservoirs or proposed dam sites which you
12 described yesterday?

13 A That's correct.

14 Q And you developed your percentages from those
15 other sources other than the 1576-I cross
16 sections and those two dam site cross sections?

17 A That's correct.

18 Q You indicated that you had two nodes on the
19 East Fork to the Wind.

20 A I believe so, yes. There seems to be a break
21 in the alluvium there on the Reservation. I
22 think that was --

23 Q Did you calculate the water in storage to the
24 head of the river or to the other bank of the
25 page--cross-white

1 river?

2 A No, no, the part on the Reservation.

3 Q Okay. What part was that that was on the
4 Reservation?

5 A The part shown on the map.

6 Q Okay. It was your determination that that
7 part is on the Reservation rather than just
8 forming the boundary of the Reservation?

9 A Well, I assume the outer edge of that map there
10 is the Reservation. That's the Reservation
11 boundary, so we looked at the alluvium to the
12 east of that.

13 Q So your assumption is that the entirety of
14 the East Fork of the Wind River is within the
15 Reservation, is that correct?

16 A No, I'm not assuming that. I'm looking --
17 the alluvium shown on that map there is all
18 that we --

19 Q Okay, so the alluvium the, the Qs and "a" described
20 as being -- or shown on this map for the East
21 Fork of the Wind, you assumed was in the
22 Reservation?

23 A Yes, I did.

24 Q Did you develop a cross-sectional area from
25 page-cross-white

1 each node?

2 A No, I didn't.

3 Q Do you know or do you have an opinion of the
4 degree of accuracy of your estimation of water
5 in alluvial storage?

6 A I didn't make an estimate of the degree of
7 accuracy.

8 Q So you said you could not make an estimate?

9 A I don't.

10 Q Okay. Do you recall your testimony on voir
11 dire concerning the well yields, table 2?

12 In general do you recall that?

13 A Well, yeah.

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1 Q (By Mr. White) If I asked you the same questions
2 on cross-examination, would you answer them the
3 same way?

4 A Not that above fifty or less than fifty percent
5 because my meaning there was -- again my answer
6 is I don't make an estimate. I feel they are
7 accurate, and I do not see that type of
8 information probabilities in professional
9 literature, and my answer -- I didn't like my
10 answer to you in that case. The way it came
11 out it was less than fifty percent. My professional
12 opinion is it's considerably better.

13 Q How do you assign reasonable probabilities in
14 your profession?

15 A I don't assign reasonable probabilities unless
16 I'm working with stream flow data, or some
17 statistical data, and you're analyzing it and
18 doing a probability analysis or something like
19 that.

20 Q So you can't assign a reasonable probability to
21 those figures?

22 MR. MEMBRINO: I would object to that.

23 THE SPECIAL MASTER: It's argumentative.

24 He answered that.

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MR. WHITE: I just wanted to make sure
the Court heard it, Your Honor.

O (By Mr. White) With respect to Table 3 in
Exhibits C-31A --

A Yes.

O Did you make a determination that the amounts
shown on Table 3 were available indicated sources?

A The amounts presently -- what this indicates in
1980 as being used.

O Did you make that determination?

A No, I'm just basing it on Dornbusch's report
that we are in 1980 and --

O By 2020 those amounts in many cases, would
roughly double. Did you make a determination
that that larger amount of water would be
available from the indicated sources?

A Not specifically. I looked at them and didn't
consider the increases in total quantity that
significant as long as we have live streams in
these creeks for recharge because essentially
on the under -- pardon me -- on the underflow
we're looking at those galleries would strongly
depend on the surface flow.

O Now, as I recall your testimony, in another
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1 area you indicated that you had not made any
2 assumptions with respect to the impact of
3 irrigation as claimed under these Statements of
4 Claim on stream flow; is that correct?

5 A That's correct.

6 Q And if it should be that those irrigation claims
7 were granted, exercised and, in fact, dried up
8 the streams, would your conclusion differ with
9 respect to Exhibit 31A, Table 3?

10 A I do not believe so. I believe that that may
11 force them to put in another gallery or other
12 shallow wells and pump from storage or under-
13 flow during the 120 days. Or, if it's dry, if
14 that's the irrigation season, during that period
15 when there is no surface flow. This water would
16 then be recharged or in the periods when
17 irrigation water isn't taken, with these quantities,
18 the most it would require, I believe would -- they
19 would have to expand their system.

20 THE SPECIAL MASTER: May I ask a
21 question? This table doesn't deal with irrigation
22 water, but then this would require -- if I
23 understand your answer correctly, this would
24 require that there be an integration of the draw

25 page-cross-white

1 for domestic and commercial and municipal
2 with irrigated water?

3 THE WITNESS: No, Pardon me, Your
4 Honor. The way I understood, this is domestic,
5 and I was asked if it can meet these higher
6 sums.

7 THE SPECIAL MASTER: Yes.

8 THE WITNESS: And without surface water;
9 I believe they can meet them without surface water
10 flowing, and that assumption, without surface
11 water, that the river was dried up, you could
12 be pocketing at the most, I guess, three or
13 four months maybe.

14 THE SPECIAL MASTER: But you had
15 mentioned irrigation season.

16 THE WITNESS: Using that as the time
17 when the river might be diverted.

18 THE SPECIAL MASTER: I see. I think I
19 see. Thank you.

20 THE WITNESS: Because once they quit
21 diverting, the natural flow would be back down
22 on the river.

23 THE SPECIAL MASTER: And do the recharge?

24 THE WITNESS: In the case of the Popo Agie,

25 page-cross-white

1 Boulder Flats, I can't see going from 26 to 56
2 acre-feet, regardless of what they do. They
3 can get it. They may have to put in another
4 infiltration gallery.

5 On the Little Wind, from 712 to 1,500, that's
6 a larger quantity, but again I feel that system
7 expansion -- I have not modeled it.

8 MR. WHITE: You knew the next question.

9 Q (By Mr. White) I show you towards the bottom of
10 Table 3, Arapahoe will be obtaining 331 acre-feet
11 per year in 2020.

12 A Yes.

13 Q What's the source of that water?

14 A I believe the source for Arapahoe is the Wind
15 River Formation.

16 Q Did you make any determination with respect to
17 this -- you made no determination with respect
18 to the sources for the communities, for the
19 water demands of the communities shown under
20 groundwater?

21 A No, other than just a cursory examination.

22 Q So this wasn't like the mineral and resource
23 development where Mr. Merchant or Dornbusch
24 came to you and said, " This is where we want

25 page-cross-white

1 to put a development; is there enough water for
2 it"?

3 A That's correct.

4 Q This is a different approach?

5 A Just a different approach. I was just compiling
6 what is taken from groundwater and, in my
7 opinion, making sure there wasn't a real
8 problem showing up.

9 Q How about the other rural communities? What
10 did you decide in terms --

11 A Well, Pavillion, I believe, is the major one.
12 That's the only other name I really know. These
13 other rural communities also, I believe, includes
14 private individual wells scattered throughout
15 the area. That's my understanding.

16 THE SPECIAL MASTER: And in that
17 case you make no distinction between Indian and
18 non-Indian, do you?

19 THE WITNESS: I believe this is --

20 THE SPECIAL MASTER: Other communities,
21 other people, other wells. You have got a
22 world of inholdings in there by non-Indians.

23 THE WITNESS: I believe this is Indian.

24 In Dornbusch or Merchant's table this was taken

25 page-cross-white

1 from that was entered, you showed me, does
2 that state that's Indian or not?

3 MR. WHITE: I'm not sure I follow your
4 question.

5 THE SPECIAL MASTER: My question was
6 other rural communities --

7 MR. WHITE: No, I mean Oliver's
8 question.

9 THE WITNESS: You handed me a Table 3
10 from Merchant to compare that this was taken from
11 yesterday, and I was just curious if he has on
12 there --

13 MR. WHITE: I threw it away yesterday.
14 I'm sorry. I didn't want to get my records
15 fouled up.

16 THE WITNESS: This is Indian because
17 if you will notice for groundwater for
18 Riverton they have 22 acre-feet, and we know
19 they are pumping more than 22 acre-feet. This
20 is Indian water flow.

21 THE SPECIAL MASTER: All right.

22 Q (By Mr. White) I assume since you made no
23 determination with respect to the source of
24 these future municipals, you similarly made
25 page-cross-white

1 no determination as to the water quality
2 available from those sources?

3 A I'm assuming it's existing sources that are
4 adequate.

5 Q When you increase the demand or withdrawal from
6 a formation, does that sometimes have the effect
7 of reducing water quality?

8 A Sometimes. It depends on situation and amount
9 of draw.

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1 Q (By Mr. White) (Continued) Turning to Table 4,
2 please, how did you determine that 400 and,
3 excuse me, 4,080 GPM would be available for
4 enhanced recovery?

5 A Well, that's existing, so I assume it's
6 available.

7 Q That's existing?

8 A That's existing.

9 Q And how did you make the determination that it
10 was taken out of the sources listed under water
11 sources?

12 A The ones I knew. We know that Steamboat Butte
13 takes it out of the Wind River underflow and
14 various sources of local production of water,
15 that's what I mean there.

16 We know that on the Lander field and
17 Winkleman Dome and Madison and Big Horn Dolomites
18 were used, I believe it's Ruff(phonetic) Lake for
19 the Frontier Formation. In other words, it
20 includes your production water which comes from
21 many of the oil producing formations that are
22 tapped by the well.

23 Q I'm a little curious about that language "but
24 not limited to", is there something else that
25 page-cross-white

1 we don't know about?

2 THE SPECIAL MASTER: Where is that
3 language, Mr. White, under water sources?

4 MR. WHITE: The second line under
5 water sources for enhanced recovery of oil.

6 THE WITNESS: That is my protection,
7 that you can't say it's just the Madison, Big
8 Horn and Frontier because you would be getting
9 production water from any, probably several
10 oil producing zones or other formations.

11 Q (By Mr. White) Did you make any specific
12 determination or form any specific opinion
13 as to the withdrawal of water for enhanced
14 recover out of any other water source except
15 those that are specifically described in the
16 exhibit?

17 A Those are the only ones I am specifically aware
18 of, but again, produced water would be coming
19 from other formations.

20 Q You've got a small amount, 4 gallons per minute
21 for refining of natural gas. What's the source
22 on that? I think it was inadvertently left out
23 of the exhibit.

24 A That's right, because I was -- at the time this
25 page-cross-white

1 was prepared, I wasn't sure. I looked -- on
2 my estimation it's the Wind River Formation.
3 I tried to find their filing with the State
4 Engineer's office and I found one there that
5 was in the Wind River formation. I believe it
6 was Humble(phonetic).

7 It said for drilling, but it might be used
8 for gas processing pumps. They're sitting on
9 top of the Wind River Formation, and that kind
10 of yield is probably shallow well.

11 Q Let's go down to natural gas sulfuric acid
12 production. I don't understand what you mean
13 by Wind River Formation and/or municipal surface
14 or groundwater. You're talking about the
15 Riverton municipal system there?

16 A That's what we're talking about, but, see, it
17 was my impression that they are going, this is
18 existing. I don't know if they have their own
19 well or if they are tied to the municipal system.

20 Q But -- well, if you don't know whether they're
21 tied to the municipal system or have their own
22 well, how would you know that the groundwater
23 comes from the Wind River Formation?

24 A Because that's the -- the Riverton gets --

25 page-cross-white

1 gets theirs from the Wind River Formation, and
2 it's possible they would get it from the
3 underflow of the Wind River there, but it's
4 very thin; most likely it would be the Wind
5 River Formation if it was a private well.

6 Q Is your conclusion that Riverton has no shallow
7 wells?

8 A Not to my knowledge.

9 Q Okay.

10 A By "shallow", you mean into a formation other
11 than the Wind River?

12 Q One that doesn't enjoy artesian.

13 A You could have a shallow Wind River that's
14 water table.

15 Q Okay. What's the depth of the Wind River in the
16 Riverton area, how much dirt is on top of the
17 Wind River Formation?

18 A Dirt?

19 Q Dirt, soil, soil.

20 A Soil?

21 THE SPECIAL MASTER: Do you want the
22 thickness of the Wind River Formation?

23 THE WITNESS: The thickness of the soil?

24 Q (By Mr. White) I want to know how much soil there
25 page-cross-white

1 is above the Wind River Formation.

2 A We're talking soils, and it doesn't show on
3 that map. Not being a soil scientist and not
4 being particularly interested in that, I didn't
5 determine --

6 Q How deep would you have to go from the surface
7 of the earth before you came into contact with
8 the Wind River Formation in the Riverton area?

9 A Well, where the terraces are located you'd have
10 to go through the terraces. They could be ten,
11 twenty, thirty, forty feet thick, I don't know,
12 in the Riverton area. And where it shows the
13 Wind River Formation outcropping at the surface,
14 except for the soil, essentially you would just
15 have to go through the soil and you'd be in it.

16 Q Okay. Do you know how deep the soil is at the
17 various Riverton wells?

18 A No.

19 Q How about the anhydrous ammonia production plant
20 in the Riverton area? That's a future demand,
21 isn't it?

22 A That's correct.

23 Q How did you determine that the 2,630 GPM, which
24 is like five and a half c.f.s. would come out of

25 page-cross-white

1 the Wind River Formation and/or municipal surface
2 for groundwater?

3 A I didn't determine it necessarily came out of the
4 Wind River Formation. That would be the source
5 of groundwater. It could also, if the municipal
6 system couldn't handle it, it could be handled
7 by surface water diversion also.

8 Q Is the municipal system here Riverton's?

9 A Yes. You have several options in the Riverton
10 area.

11 Q The phosphate rock beneficiation -- and I can't
12 read this copy -- but the beneficiation plant
13 requires 60 gallons per minute?

14 A Yes.

15 Q Is the municipal system involved there Riverton's?

16 A It could be, that's an option; just depends on
17 what their capacity is and their supply.

18 It could be private surface, it could be
19 private wells into the Wind River Formation.

20 Q How about the 250 gallons per minute for the
21 phosphoric acid production?

22 A That's in Riverton. It would be the same thing.

23 Q That's also --

24 A Those three sources.

25 page-cross-white

1 Q How about the 190 gallons per minute for
2 wallboard production?

3 A That would be the same thing.

4 Q That's Riverton as well?

5 A As well as what?

6 Q As well as the ones above?

7 A Yes. It's not necessarily on the Riverton
8 system because their capacity may not be able to
9 handle that. It would depend where it's located,
10 but that's an option that any construction of this
11 would have or would investigate.

12 Q What investigation did you make to determine
13 that the Riverton system had available capacity
14 for any or all of these amounts?

15 A I didn't. Dornbusch Associates indicated they
16 had talked to Riverton. I don't know in total
17 or individual, and that was a possibility.

18 Q Did Dornbusch tell you whether the City of
19 Riverton said to him, what the City Engineer
20 said to him?

21 A No. But we're not limited to the City of
22 Riverton.

23 MR. WHITE: Your Honor, could I have
24 about five minutes? I may be through or I may

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1 not.

2 THE SPECIAL MASTER: Yes, sir.

3 MR. WHITE: I'd like to check my

4 notes.

5 THE SPECIAL MASTER: Take your time.

6 (Thereupon a 5' minute recess
7 was taken.)

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1 MR. WHITE: Your Honor, I have no further
2 questions on cross-examination. At this time I
3 would move to strike several portions of Mr. Page's
4 testimony, a virtually carbon copy repeating a motion
5 Mr. Merrill made previously. I apologize for being
6 repetitive, but we do need to make it for purposes
7 of the record.

8 I would object -- or I would ask the Court
9 to strike Mr. Page's testimony with respect to
10 well yields and water in storage because of legal
11 tests of whether or not there is probative value
12 to testimony or exhibits as to whether or not it can
13 be said that the facts shown are shown with reasonable
14 probabilities. Mr. Page is unable to assign any
15 probability whatsoever to the accuracy of that infor-
16 mation. First he said he didn't know whether it
17 was above or below 50 percent, and today he said it
18 was a little higher than 50 percent, somewhat higher
19 than 50 percent, I believe, but still was unable to
20 give us an idea of the requirement of accuracy for
21 that particular information.

22 Next, I would move to strike various portions
23 of Mr. Page's testimony consisting of opinions for
24 which Mr. Page could not provide the facts and data
25 upon which they were based. The rule says he will

1 provide the facts and data, not sources, but facts
2 and data.

3 I move to strike his testimony relating
4 to yields from terrace deposits since he was unable
5 to state with specificity those areas which were
6 claimed to yield 100 gallons per minute from the
7 terrace deposits. He was unable to show wells where
8 such yields were actually obtained.

9 I move to strike those portions of his
10 testimony relating to the glacial deposits for the
11 same reasons, he was unable to show any facts and
12 data to support those values.

13 I move to strike his testimony with respect
14 to the groundwater in alluvial storage, 362,000 acre-
15 feet, and that he was unable to provide the facts
16 and data with respect to the identification of the
17 wells which he used to determine saturated thickness,
18 the location of the nodes which he used to determine
19 saturated thickness. He was able to indicate three
20 or four as we came down the Wind, Your Honor, but
21 then couldn't indicate anymore, the values of
22 saturated thickness which he derived for any particular
23 nodes. He had an average, but nothing he derived for
24 each node, and again, I repeat that he was not able
25 to describe the facts and data from which he got the

1 saturated thickness in the first place. He just
2 said they were wells, but he was not able to
3 identify which wells he used.

4 That's all I have with respect to the
5 motion to strike based on Rule 705, Your Honor;
6 that's the requirement to provide facts and data.

7 I would like to again move to strike
8 on the basis that a reserved right does not apply
9 to groundwater, and I know I have tried that myself
10 with no notable success in convincing the Master,
11 so I thought I would let somebody else try it, and
12 with your permission I thought I would let Mr. Rifkin
13 try it and see if he has any better success than
14 I do.

15 THE SPECIAL MASTER: Mr. Rifkin is going
16 to argue the principle that the reserved doctrine,
17 if any, does not apply to groundwater?

18 MR. WHITE: You bet, Your Honor.

19 THE SPECIAL MASTER: We will wait until
20 after we have heard from Mr. Rifkin.

21 MR. ROGERS: Your Honor, for the record,
22 I would like to note an objection to having the
23 attorney from the State's side argue any aspect.
24 I think it is a normal procedure for one attorney
25 to handle one witness for one side.

1 THE SPECIAL MASTER: It may be, but we
2 will make a slight adjustment at this time, if there
3 is.

4 MR. WHITE: That's a different motion.

5 THE SPECIAL MASTER: It is a different
6 basis for the objection, Mr. Rogers. Mr. White
7 took the motions on the specific testimony point
8 by point, table by table, and Mr. Rifkin is going to handle
9 the legal facet of the reservation.

10 MR. ROGERS: That's true, Your Honor, but
11 it still applies to this witness.

12 MR. GRAVES: May it please the Court,
13 could I point out to the Court it is my understanding
14 this motion has been made four times, and it seems
15 to me at some time it needs to be laid to rest.

16 THE SPECIAL MASTER: I have no doubt
17 that if Judge Ewing Kerr were holding this hearing,
18 he would consolidate this into a much shorter time,
19 but I --

20 MR. GRAVES: I'm sure if Judge Kerr were
21 hearing it, it would be overruled, but you are hearing it.

22 MR. WHITE: If Judge Kerr were hearing it,
23 there would be no evidence --

24 THE SPECIAL MASTER: Maybe it isn't relavant,
25 but I --

1 Proceed, Mr. Rifkin.

2 MR. RIFKIN: At this time the State would
3 like to move to exclude all evidence on the
4 groundwater on the grounds that the Reserved Rights
5 Doctrine does not extend to groundwater. The
6 United States Supreme Court has never made an award
7 of groundwater in a reserved rights case. The
8 United States and the Tribes in this case would have
9 the Special Master to believe otherwise.

10 Yesterday Mr. Membrino stated in Cappaert
11 Case versus the United States, the United States
12 granted a reserved water right from underground water.
13 However, this is simply not the case since Cappeart
14 is actually a surface water case.

15 The attorney for the United States yester-
16 day probably mischaracterized the case because it
17 involved water in a pool in subterranean cavern,
18 In Chief Justice Burger's opinion, I would like to
19 read a portion of the opinion, Mr. Chief Justice
20 Burger stated, and I quote, "No cases of this
21 Court have applied the Doctrine of Implied Reservation
22 of Water Rights to Groundwater. Nevada argues the
23 Implied Reservation Doctrine is limited to surface
24 water. Here, however, the water in the pool is
25 surface water," unquote.

1 MR. RIFKIN: The Cappaert Case involves --

2 THE SPECIAL MASTER: Are you going to claim
3 that subsurface underflow is not groundwater and
4 is, in fact, surface water?

5 MR. RIFKIN: No, I'm just -- I'm arguing that
6 the Cappaert Case was a surface water case. The
7 facts in Cappaert were kind of unique. It involved
8 a cavern which was actually -- the entrance to the
9 cavern was on the side of a hill, and the level of
10 water was actually somewhere around ground level,
11 and I think that it's mischaracterized for that
12 reason because the pool was in a subterranean
13 cavern even though it's not underground water flow-
14 ing beneath the surface.

15 In the Cappaert Case the Supreme Court reserved
16 the amount of water in the pool necessary to support
17 the proclamation of endangered species, the fish. I
18 think this further causes confusion on the part of
19 the counsel for the Tribes and the United States
20 because they seem to argue that the water right
21 awarded included the underground water that supplied
22 this pool rather than just the water in the pool it-
23 self.

24 By express proclamation in the Devil's Hole
25 National Monument, the United States reserved the

1 amount of water sufficient to maintain the level
2 of the pool to reserve its scientific value.

3 The holding of the case is that private
4 appropriators were forbidden from pumping any water,
5 in the underground water, from wells adjacent to
6 this monument that would cause the level of the
7 pool to drop below a point that was required to
8 enable these fish to survive.

9 By doing this, the Supreme Court in no
10 means reserved the water supplying the pool. They
11 only reserved the water in the pool itself, which
12 the Court is very careful to point out was surface
13 water, not underground water.

14 The Counsel for the Tribes, the United
15 States, seem to argue that the water that was
16 reserved was the amount of water supplying the pool
17 also, and I think the language in the case in
18 the proclamation reserving the water in the pool
19 makes it clear that only the water in this surface
20 pool was reserved.

21 Mr. Page has been testifying as to the
22 complexities of the underground formations underlying
23 the Wind River Reservation and the difficulties in
24 determining the effect of pumping underground water
25 on different surface diversions in different locations.

1 Because of these complexities and because
2 of these difficulties, the Supreme Court's been
3 very careful to limit the Reserved Rights Doctrine
4 so as not to include the reservation of groundwater.

5 The State of Wyoming urges the Special
6 Master in this case to also so limit the doctrine
7 so as not to include groundwater.

8 MR. PARISH: On behalf of the City of
9 Lander, I would like to join in both of the motions
10 on both grounds today.

11 THE SPECIAL MASTER: Any other further
12 counsel wish to be heard on the motions?

13 MR. ROGERS: Yes, Your Honor.

14 MR. MEMBRINO: Yes, Your Honor.

15 MR. RIFKIN: I would like to file this
16 brief also.

17 THE SPECIAL MASTER: All right.

18 MR. MEMBRINO: Your Honor, I would like
19 to address the groundwater first, if I may, and
20 then I will get back to the specific objections
21 to the testimony of Mr. Page.

22 I think the Supreme Court in addressing
23 groundwater in the Cappaert Case made it very clear
24 that it was concerned with the Reservation purpose
25 and what was required to preserve the Reservation.

1 On Page 142 of the Supreme Court's
2 opinion the Court says: Thus, since the implied
3 Reservation of Water Rights Doctrine is based on
4 the necessity of water for the purpose of the Federal
5 Reservation, we hold that the United States can
6 protect its water from subsequent diversion whether
7 the diversion is of surface or groundwater.

8 We have in this case presented evidence
9 of natural resources on the Reservation which
10 development may require the use of groundwater. In
11 some cases we may be able to judge surface water.
12 That will be elaborated.

13 In any event, the purpose of the Reservation
14 is to preserve it as a permanent tribal homeland
15 and implicit in that is the development of the
16 Reservation to be viable. We are most concerned --

17 THE SPECIAL MASTER: Mr. Membrino, and
18 if a decent respect for their own surface of the
19 Indians as well as a decent respect for the require-
20 ments of their neighbors would dictate that ground-
21 waters be used for arts of civilization development
22 instead of surface waters, you would feel this is
23 an additional reason that the Implied Doctrine of
24 Water Rights Reservation Grant of Groundwater, would
25 you --

1 MR. MEMBRINO: I have two responses to
2 that. One is that the management of all the water
3 resources on the Reservation in an efficient way
4 will inure to the benefit not only of the Reservation,
5 but obviously to the other priority holders on the
6 river.

7 THE SPECIAL MASTER: The second?

8 MR. MEMBRINO: The second point, which
9 seems to have fled --

10 MR. WHITE: I'm glad that happens to
11 somebody else, Your Honor.

12 MR. MEMBRINO: It happens that some of
13 the -- as we saw in the testimony of Mr. Page, some
14 of the resource developments now rely on groundwater.
15 It's the practice, for example, in recovering oil
16 to use the production water in further development
17 of the natural resource.

18 I'm not sure that we're interested in
19 diverting from water efficiencies in the industry.
20 The most important consideration for us is that the
21 resources are subject to the claims of the United
22 States for the benefit of the Reservation, and I
23 think they are entitled to the least cost means of
24 obtaining the water for the resource development.

25 It's clear that the deeper you dig a well,

1 the more extensive it is to retrieve the water.

2 On the other hand, if you are diverting surface
3 water, then the costs are much less.

4 THE SPECIAL MASTER: But that's not
5 necessarily true if you cost efficient that into
6 the quantity of water that's being recovered. Other-
7 wise, you wouldn't be having your wells drilled to
8 the Madison to get the massive amounts that are
9 so readily available in the Madison compared to the
10 dearth of water on the surface.

11 MR. MEMBRINO: I'm not a geologist or an
12 oil developer, but it seems to me that when you
13 are going to the expense of putting in a well to get
14 at the oil, and water is produced by the same well,
15 it makes for good business sense to use the same --

16 THE SPECIAL MASTER: To utilize both.

17 MR. MEMBRINO: -- to use the same
18 facility to obtain both.

19 The Court certainly did not say that it
20 limited the reserve right in any way to exclude
21 groundwater under the case.

22 The Court said in its discussion of ground-
23 water that no cases of this Court have applied the
24 Doctrine of Reserved Rights to groundwater, no case
25 to date.

1 The Devil's Hole National Monument that
2 was set aside happened to include a pool. I don't
3 believe the proclamation itself said we are here
4 to preserve a pool. We are here to reserve Devil's
5 Hole National Monument as a point of scientific
6 and other interests.

7 I don't have the specific quote here.

8 In any event, what was integral
9 to this Reservation was a preservation of the
10 endangered species of pupfish, and the Court
11 clearly said that if curtailing the use of ground-
12 water is necessary to preserve that use, that purpose,
13 then the user of the groundwater will have to take a
14 junior priority, and I think it's most important not
15 to confuse the purpose of the Reservation with
16 whether we are in debate over surface or groundwater.

17 It is the development of the Reservation
18 in this case that requires the use of water, and
19 we believe we are entitled to use -- since the 1862
20 priority is the priority we are seeking, we believe
21 we have first call on the resource, the water
22 resource, to most efficiently meet our developmen-
23 demands.

24 THE SPECIAL MASTER: Whether ground or
25 surface?

1 MR. MEMBRINO: Whether ground or surface.
2 In this case I hasten to add though in this case
3 you can see from Mr. Page's testimony that in these
4 mineral -- in this mineral and resource development
5 Exhibit C-33-B, we have located and followed the
6 practice in the industry of identifying groundwater
7 sources.

8 It's not that we are in some kind of
9 process of taking water willy-nilly of any other
10 practical consideration.

11 The right is paramount in our contention,
12 but if groundwater serves a need, then we use it,
13 and I think our evidence so far has shown that we
14 intend to act --

15 THE SPECIAL MASTER: Well, I have permitted
16 your argument to go beyond the motion to which its
17 purpose serves right now, but that's my fault, not
18 yours.

19 I'm ready to rule on these.

20 MR. MEMBRINO: You don't need to hear our
21 arguments on the motions?

22 THE SPECIAL MASTER: No, I sure don't, Mr.
23 Membrino.

24 MR. MEMBRINO: Thank you, Your Honor.

25 THE SPECIAL MASTER: Thank both of you for

1 your assistance in giving us a full picture of
2 our problems.

3 Mr. White, I'm going to overrule again
4 your objection and, Mr. Merrill, on Mr. Page's
5 particular testimony, and I watched and followed
6 his language regarding the 50 percent up or down
7 that you commented on, and I think it's sufficient
8 to meet the test that he's permitted by his pro-
9 fessionalism.

10 Secondly, I will overrule the motions to
11 exclude on other factual material based upon his
12 evidence.

13 Thirdly, I will overrule the objection on
14 the basis that the Reservation, if any, to this
15 area does not flow to groundwater. If it flows
16 anywhere, in my belief, it must flow to the use of
17 groundwater, and the fact that groundwater has been
18 used for nearly 40 years in the recovery of the oil
19 on the Reservation makes it pretty difficult for me
20 to now have to accede to an argument that there
21 is no right to that water, that it's been used by
22 the Indians for the benefit of Indians and the private
23 sector to recover the resources and the others who
24 are employed in that area over these many years.

25 That's a factual basis for it, not the legal

1 basis, and I listened to the legal argument.

2 All right. Are we ready for redirect,
3 Mr. White, or is there some recross by anybody?

4 MR. WHITE: It's up to the United States,
5 Your Honor.

6 MR. MEMBRINO: Your Honor, the United
7 States has no more redirect.

8 THE SPECIAL MASTER: That's fine. Can
9 we move on?

10 Ms. Sleater?

11 MR. MEMBRINO: Before we go on to the
12 next order of business, Your Honor, I would like to
13 know if Mr. Page may be excused?

14 THE SPECIAL MASTER: Well, that depends
15 upon you.

16 MR. WHITE: That's fine, but under the
17 same provision as the other witnesses he's been
18 excused, subject to the jurisdiction of the Court.

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MR. MEMBRINO: Thank you, Your Honor.

THE SPECIAL MASTER: All right. Let's
move to the next order of business.

MR. MERRILL: Your Honor, the next
order of business that the State of Wyoming would
like to raise is one that's rather unpleasant
to have to do, but it's a problem which we've
been unable to resolve informally thus far,
and thus seek your help in it. And that concerns
the ability of the State of Wyoming's expert
witnesses to obtain public information from the
various agencies of the United States Government.
As you'll recall, you probably received a
letter sometime about Christmas, a carbon copy
of a letter that I wrote to Ms. Sleater and
Mr. Meredith, who is a regional solicitor for
the Department of Interior, concerning this
problem. The brief history is that up until
mid-December or so of 1980, the various agencies
of the United States Government have given us
their utmost cooperation in responding to
requests for public records and information
which they maintained. Sometime around the
middle of December that policy changed, and
the requests that our experts had been making

1 informally, directly to the agencies up to that
2 time were no longer honored, and we were advised
3 that it would be necessary to channel all
4 requests for information, even for public
5 information, through the Department of Justice
6 and obtain their prior approval before any
7 information could be released.

8 Now, as everyone connected with the lawsuit
9 is well aware, the State of Wyoming has never
10 taken the position that the clearance of the
11 Attorney General's office is necessary before
12 information may be taken by the United States
13 or the Tribes or any other parties to this
14 litigation. We have given -- essentially
15 opened the doors to the State Engineer's office,
16 to the Wyoming Water Development Commission,
17 the Wyoming Geologic Survey, all of the other
18 agencies, and the experts for the United States
19 and the Tribes have taken out literally
20 boxfulls of information without our having
21 any knowledge of what they have taken or any
22 concern because as far as we're concerned all
23 of this information was compiled and put
24 together at public expense, it's public records,
25 even though it may concern a matter that's in

1 litigation.

2 The United States and the Tribes have as
3 much right as any other member of the public
4 to obtain this information, and we have no
5 right to impose any limitations on the release
6 of public information.

7 Now, the United States abided by this
8 policy up to approximately a month ago, and I
9 do not know exactly why they changed, perhaps
10 Ms. Sleater will be able to respond to that,
11 but I would ask that the Court enter an order
12 if it cannot be agreed informally on the record,
13 to compelling the United States to make public
14 information available to us.

15 As Your Honor is well aware, much of the
16 records and information compiled by agencies
17 such as the Bureau of Reclamation are done
18 using public funds, and as Your Honor also is
19 well aware, an agency like the Bureau of
20 Reclamation is generally a major repository,
21 a clearing house of much of the information
22 that is available. And the fact that we're
23 now having to go through various steps
24 requiring attorney approval before we can even
25 get our hands on public records is making it

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more difficult than it ought to be for the

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State's experts to prepare their case.

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THE SPECIAL MASTER: Most of these

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bureaus and agencies and departments all are

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within the Interior?

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MR. MERRILL: Yes, Your Honor, they are.

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THE SPECIAL MASTER: Virtually all

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within the Interior.

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MR. MERRILL: I believe so. There may

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be some exceptions, but I think generally they

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are all within the Interior.

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THE SPECIAL MASTER: Regina, can you

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respond to that?

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MS. SLEATER: Your Honor, I certainly

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would love to. First of all, I'd like you to

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know Mr. Merrill has misstated the position of

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the United States. As we have stated on the

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record and at least two occasions before Your

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Honor and informally to Mr. Merrill at numerous

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times, any request to any agencies that the

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State of Wyoming chose to sue in this matter

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should come through their attorneys. It is

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not up to the agencies to determine what is

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public information and what is not. Any public

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information will be turned over.

1 Mr. Merrill has conveniently chosen not to
2 tell the Court that in the previous information
3 which he received he first asked me if they
4 could do it and I said sure. They asked for a
5 computer program that the Water and Power
6 Resources Services had prepared. I checked with
7 them to see if that was public information,
8 they said, yes, in turn if we would give it to
9 the State Engineer anyway. I said fine, turn
10 it over.

11 That, in fact, the State is using for a
12 basis for some of their hydrology work.

13 However, the requests that have been through,
14 that have been through me, that has always been
15 the position of the United States. You'll find
16 that if we get into, you know, if it becomes
17 serious, we can certainly pull pages where it
18 says this is a public hearing. We are not
19 meaning, in any way, to limit the access of the
20 State of Wyoming to public record. We are
21 merely concerned that our clients' best interests
22 be preserved. Now, if the State of Wyoming at
23 this time is willing to settle out the claims
24 of the Bureau of Reclamation in this matter, that
25 might present another situation, but until it

1 does, and that's something we talked to Wyoming
2 about on numerous times, since the Reclamation's
3 are based on state law, we don't quite understand
4 the problem with them, but we have brought it
5 up and the State has not chosen to respond to
6 those, what shall we say, initiative. In that
7 case, these people are one of my clients being
8 sued by their people and I am not going to
9 have attorneys or experts for the State of
10 Wyoming contacting my client without me knowing
11 about it.

12 Secondly, I have been holding this off
13 because I had hoped it was an inadvertence on
14 the part of Mr. Merrill's secretary, but it
15 is totally inappropriate for counsel for any
16 party to send copies of letters between
17 parties regarding information which they have
18 not chosen to make formal discovery relating to,
19 information which is not in evidence, which
20 could prejudice the Master's determination,
21 putting facts which the Master cannot consider
22 before the Master. And I had, as I said, hoped
23 that these various miscellaneous correspondence
24 that had been sent out by the State regarding
25 requests for information that may or may not be

1 appropriate as well as discussion of witnesses
2 and policy were getting to Your Honor by mistake.
3 But at this time I would like to enter, for the
4 record, the formal objection of the United
5 States to any continuation of the practice
6 that places before the Master information
7 that is not evidence in the case, arguments in
8 the case or pleadings in the case.

9 MR. WHITE: Your --

10 MS. SLEATER: If I could finish, please.

11 THE SPECIAL MASTER: Go ahead.

12 MS. SLEATER: The request in December
13 that Mr. Merrill has said they sent you a copy
14 of, I became aware of because one of the
15 representatives of the State of Wyoming called
16 the Billings office about some information as
17 a backup to the computer program and supply. I
18 received a call because our people said this
19 isn't public information, we don't -- do we
20 have to give this to them, it's not something
21 we would normally give to anyone, it's not
22 public information. I said I don't know anything
23 about it, I did not receive my copy until it
24 was given to me sometime during depositions
25 this month, probably through the mail, I'm willing

1 to admit. But all I'm saying is I have no
2 problem giving the State of Wyoming public
3 information, but -- and this is an important
4 but -- it's not up to the engineers, technicians
5 and employees of the United States Government,
6 especially the agencies that are being sued in this
7 action to determine what is public information
8 and what is not. The request can be sent to me,
9 I will immediately forward them to the agencies.
10 And in terms of what Mr. Merrill is discussing,
11 we are still trying to analyze the material.
12 There was more than one request in the letter
13 involved, and we are trying to determine whether
14 or not, in fact, one, it's public information
15 and then for those items which we deem not to
16 be public information, whether we're going to
17 give it to Mr. Merrill anyway.

18 Now, if Mr. Merrill would like this to
19 be resolved in a formal matter, he can take
20 advantage of the Rules of Discovery at this time.
21 I would note that there has been no formal
22 discovery request. I have been acting on this
23 matter in good faith with the State of Wyoming.

24 I would also like the record to reflect
25 that insofar as the information that has been

1 provided to the United States, I would like to
2 note another thing, we first went and received
3 the permission of the attorneys for the State
4 of Wyoming to approach their agencies, we were
5 going to them with the same rule that I used
6 for my people, and they said, hey, please, just --
7 you can go if it's from the State Engineer, etc.

8 Secondly, this information is not being
9 provided to us on the same basis as it's being
10 provided to the members of the general public.
11 For instance, the feed ration which Dr. Yates,
12 a member of the Extension Service, provides
13 free of charge to all interested farmers in the
14 area of Lander -- I know this for a fact because
15 he originally said he would do it, you know,
16 for us, when he met Mr. Merchant at an extension
17 meeting out in Lander. He said he would do it,
18 sure, we run this, this is part of our service
19 to the public. We later received a phone call
20 saying, well, since you're suing the State and
21 stuff, could you pay us. And I'm not going to
22 tell you the amount, but could you pay us something,
23 and then we'll do it. It seemed to us that that
24 was, you know, reasonable. He said, well, you
25 know, we're two opposite parties in this suit,

1 we wouldn't feel right doing this. Now, I don't
2 know if he checked with his attorneys or who
3 he checked with on this at all, but that seemed
4 to be a reasonable rule. All I'm saying is
5 I want to know what they're getting from my
6 people and I don't want them putting some nonlawyer
7 in a position of having to make a legal determination,
8 and that position has been stated for the record
9 a number of times.

10 We are not objecting to informal discovery.
11 We try to cooperate to the greatest extent possible
12 to hopefully help this matter proceed along as
13 rapidly as possible, but in some areas when the
14 State is making requests that do not come in fact
15 within the quick and easy term that is a public
16 record, we'll get it to you, it takes a little
17 time to look at it and that's all I'm saying.
18 And I'm afraid I'm going to have to remain firm
19 on that.

20 I should note also that other public
21 facilities of the United States such as the
22 Archives have been fully open to the State of
23 Wyoming, but I don't think they can expect to
24 sue the parks, the forests, the reclamation
25 projects and all BLM and the Indians and then

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expect those agencies to be told, oh, sure,

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give them whatever you want without checking

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with your lawyers. Because we do have a duty

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to represent all the instrumentalities who

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have been sued in this action, and that's all

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we're trying to do.

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1 MR. WHITE: Your Honor, before Mr. Merrill
2 talks about the problem of getting public information
3 out of the agencies, I would like to respond to a
4 different matter which Ms. Sleater brought up. She
5 suggested there had been settlement discussions
6 concerning the Bureau of Reclamation claims, and I
7 believe that she did not accurately present what
8 occurred with respect to those settlement discussions.
9 I believe it's appropriate to describe those settle-
10 ment discussions, in any event. If the Court would
11 like to have a full, complete and accurate description
12 of settlement discussions, the State of Wyoming would
13 be glad to participate in that presentation. Until
14 that time, Your Honor, I think the State would ask
15 you to disregard what it feels to be a remarkably
16 inaccurate discussion of the settlement efforts
17 described by Ms. Sleater.

18 THE SPECIAL MASTER: Well, I'm sorry that
19 you are at each others throats again. You know, we
20 had about four months of relative peace in this
21 regard, and I was so pleased with it all. The last
22 time something like this came up, we were in argument
23 and briefs regarding whether a deposition could ask
24 questions along those lines, on the possibility of
25 settlement in the Basin regarding the certificated

1 rights.

2 I think that if you will -- I think there
3 is enough residual goodwill with the two sides, if
4 you will try to proceed with the suggestion of
5 Regina, that she be notified of what department you
6 want or what you want, and if that's not forth-
7 coming, then let me know and we will see if we can
8 compel with whatever it is you wish through the
9 Freedom of Information Act, if that's the only way
10 to get what you want.

11 Secondly, Regina, I hope you will recognize
12 that the Bureau of Reclamation, although it meets
13 the description of an agency, ought not be handling
14 any materials that are not public information, in
15 my opinion. I believe they are funded to do work
16 in the public wheel and I'm at a little bit of a
17 loss to see how they can hide behind privileged
18 communications or privileged materials or private
19 work because if they are doing work for private
20 irrigators, they are beyond what I believe is what
21 the authority of congress has given them in
22 creating them.

23 MS. SLEATER: Well, Your Honor, as you are
24 well aware, there are various stages that the
25 reclamation people go through, and some things that

1 they regard as very preliminary that have not been
2 reviewed, information of that sort --

3 THE SPECIAL MASTER: Does this deal with
4 downstream potential expansions to irrigation
5 programs on the Wind River around Thermopolis, Hyatt-
6 ville, Shoshoni, does it also touch Hart Mountain?

7 MR. MERRILL: Yes, Your Honor. In fact,
8 Mr. Sostrom made a request in December concerning
9 exactly --

10 THE SPECIAL MASTER: Is that what this is
11 about?

12 MR. MERRILL: -- the expansion of the
13 Hart Mountain-Shoshoni Irrigation District.

14 THE SPECIAL MASTER: If you have trouble
15 getting what you want on those materials and you
16 feel you are not being dealt with fairly, you have
17 your recourse available to you under the rules.

18 MR. MERRILL: Your Honor, I have a
19 specific example of the problem which I'm asking
20 for your help on today, and that concerns a request
21 made by Mr. Fassett in December, December 17, 1980
22 requesting copies of the existing area capacity
23 curves or tables for Boysen Reservoir, Buffalo Bill
24 Reservoir, Bull Lake, Pilot Butte Reservoir, Anchor
25 Reservoir and Yellowtail Reservoir, which is

1 Bighorn Lake. Those curves simply show the capacity
2 and surface areas of these reservoirs.

3 THE SPECIAL MASTER: Is that information
4 requested being supplied, Regina?

5 MS. SLEATER: Your Honor, I believe that's
6 part of the information they are gathering at this
7 time. There have been numerous requests made. Right
8 now one of the main problems is that the State
9 has numerous experts contacting the agencies asking
10 for the same information and hitting at different
11 levels, and we are trying to figure out what they
12 have been doing.

13 THE SPECIAL MASTER: You refused them all
14 except one, and will provide that for Mr. Merrill?

15 MS. SLEATER: No, Your Honor. At this
16 time I do have to get back in consultation with my
17 clients and --

18 THE SPECIAL MASTER: You misunderstood
19 my question. Will you see that the other State
20 officials asking for the same information are denied
21 it : the basis that the key person entitled to this
22 is the counsel for the State of Wyoming, not the
23 other agencies of the State asking for it?

24 MS. SLEATER: Well, Your Honor, at this
25 time I would like to point out that I have not

1 received -- that the requests Mr. Merrill is
2 talking about have been coming one from Mr.
3 Fassett of the State, one from Mr. Solstrom
4 of the State, one from this, and the State of
5 Wyoming attorneys have not taken it upon them-
6 selves to make one request. Now, I think --

7 THE SPECIAL MASTER: I believe Mr.
8 Merrill has just made one request.

9 MS. SLEATER: Okay.

10 THE SPECIAL MASTER: Can you see that
11 Mr. Merrill is so obliged and see that he
12 receives what he has requested?

13 MS. SLEATER: Yeah, I will after
14 consultation with my clients if it's appropriate.

15 THE SPECIAL MASTER: All right. That's
16 all I ask of you, I ask nothing more or less,
17 and I would like to, in fact, order it and you
18 see how you can get along getting it taken
19 care of.
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MS. SLEATER: If it's proper, Your Honor, the agencies will if it is public information and it will be provided.

THE SPECIAL MASTER: The second thing, if there is a feeling on the part of either of you that there are materials sent to me that are ex parte activity or bring to the Special Master materials not being raised here without the others, then I'll ask you to be a little more careful in your correspondence of that. I have not been influenced in one iota by communications by either side over the past many months. I wonder about the communications that I received from the Assistant Attorney General that forward to me matters of ongoing adjudication of various permits and rights of various people in the area, and I don't really believe they ought to be sent to me.

MR. WHITE: I don't understand what you are talking about, Your Honor.

THE SPECIAL MASTER: I'm talking about petitions for redesigning of structures, I'm talking about what else is there, Leo, they were sent to us by the Attorney General's office by Mr. Carroll with copies to Judge Joffe.

1 MR. WHITE: I think those are new
2 petitions in Water Division 3 and the Board
3 of Control, I believe, is taking the position,
4 Your Honor, that it no longer has jurisdiction
5 since the beginning of this lawsuit to handle
6 those, so it's back in the Court's lap.

7 THE SPECIAL MASTER: So it's sent
8 to Judge Joffe and copies to me?

9 MR. WHITE: You don't want the copies
10 anymore?

11 THE SPECIAL MASTER: I've got enough
12 to do, and they really don't have any bearing
13 on this matter.

14 MR. WHITE: Your Honor, I'm sorry,
15 it's just the Board of Control is saying we
16 don't have jurisdiction, we want to get rid
17 of it. I will tell them not to send carbon
18 copies anymore.

19 THE SPECIAL MASTER: I don't think I
20 should be provided with it. If Judge Joffe
21 receives the originals, fine. I only raised
22 that as a matter of the kind of correspondence
23 I am receiving that I could do without. Now,
24 I believe supplying me with a copy of the
25 witnesses is in order, and I would like to have

1 that continue.

2 What was the objection a moment ago?

3 Well, whatever the objection in that regard, if
4 both sides will be careful not to one-sided
5 one shot, I'll appreciate that and everybody
6 else will.

7 I was led to believe earlier in the week
8 there would be material and evidence offered
9 this week regarding the Wind River stream flows
10 and the gauging stations specifics over the
11 past hundred years.

12 MS. SLEATER: Your Honor, I'm sorry
13 if I led Your Honor to believe it would be this
14 week. As a matter of fact, it will be in the
15 course of this hearing on this matter, but --

16 THE SPECIAL MASTER: See, I just
17 wanted to make sure it didn't get away from
18 us.

19 MS. SLEATER: No, Your Honor, I assure
20 you we are putting on a hydrologist who is
21 going to address that issue.

22 THE SPECIAL MASTER: Mr. Rogers,
23 do you have something to bring up?

24 MR. ROGERS: Yes, Your Honor. I
25 guess I had a question which one is going to go

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first, but you saw me so I will do it.

We have not been able to resolve, Your Honor, with the State a modification of the existing ten-day rule. We raised the matter with them, and had suggested a five day prior to the witnesses rule that would require the exchange of exhibits five days before the witness was to testify. As I understand the position of the State, and obviously they can state it for themselves, they may not have had any objection to that, for us, but they apparently view the case that they will present first, following the case presented by the United States and the Tribes, and they view their case as a rebuttal case, not a case in chief. We think that is inappropriate, and the gist of their position on that was that if their case is a rebuttal case, they are perfectly willing to give us a five-day rule, but they don't want any day rule with respect to themselves because they see theirs as only a rebuttal case.

I think Your Honor realizes that the procedure for presenting cases does require the opposing side to present a case in chief, assuming that the party with the burden of proof,

1 which the United States and the Tribes find
2 themselves here, provided that that case in
3 chief from the proponents of the burden of
4 proof, survive a motion to dismiss. That
5 establishes a prima facia case, as I
6 understand the law, and the opposing party
7 has an obligation to present a case in chief
8 in opposition to that.

9 If that were -- if there were any other
10 rule, you would find yourself in the unfair
11 position which I think the State is asserting
12 upon us now, that the proponents in the
13 position have to comply with a ten-day rule or
14 five-day rule or whatever, and they don't.
15 Therefore, Your Honor, I am moving formally
16 on behalf of the Tribes, hopefully to be joined
17 in by the United States, that the ten-day rule
18 in the pre-trial order be amended to provide
19 that the exchange of exhibits relating to
20 witnesses. by all parties with respect to their
21 case in chief, including the State, be made
22 five days before that witness is to testify.

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1 MR. ECHOHAWK: Your Honor, the United States
2 joins in the motion of the Tribes to modify the
3 five-day rule to apply to all parties in the case.

4 THE SPECIAL MASTER: Do you wish to be heard?

5 MR. WHITE: When the United States is done,
6 Your Honor.

7 THE SPECIAL MASTER: I beg your pardon.

8 MS. SLEATER: Your Honor, at this time the
9 United States would note that if the ruling as
10 stated in the Pre-trial Order is not amended,
11 either to reflect that the amendment is ten days
12 before testimony or five days before testimony,
13 which is what we are moving for, that the United
14 States would raise an objection to any exhibit
15 that was not presented to them ten days before
16 trial also, and we want that to be very clear on
17 the record.

18 THE SPECIAL MASTER: Well, the ten days for
19 trial, as it now reads, I believe, applies to ten
20 days from the beginning of its trial session.

21 MS. SLEATER: Oh, is that the interpretation,
22 Your Honor? I wasn't aware of that.

23 THE SPECIAL MASTER: The parties by mutual
24 agreement will submit copies of their exhibits to
25 counsel for the major parties at least ten days

1 before the commencement of trial unless otherwise
2 agreed or persuasive reasons are shown for inability
3 to present exhibits within the ten-day rule.

4 I see your point, Regina. You feel that this
5 Pre-trial Order that has been issued before the
6 trial in December and then moved to January would
7 apply only to the beginning of the trial date and
8 not to the subsequent sessions. So it requires an
9 amendment in any event?

10 MS. SLEATER: Yes, Your Honor, that's my point.

11 THE SPECIAL MASTER: In the amendment can we
12 use the five-day --

13 MR. WHITE: No, Your Honor.

14 THE SPECIAL MASTER: We might anyway, but let's
15 hear your reasons.

16 MR. WHITE: The reason is that the State has
17 relied on the Pre-trial Order. We have provided
18 approximately 2,000 exhibits to the United States
19 and the Tribes, provided a great slug of them ten
20 days prior to the trial setting in December. I
21 mean, they have had those exhibits for seven weeks
22 before trial, provided other exhibits ten days be-
23 fore this trial began.

24 Those are exhibits which may be used to sup-
25 port those matters upon which we have the burden

1 of proof.

2 That's what a case in chief is all about. If
3 you have the burden of proof, you have a case in
4 chief.

5 Now, there is no way in the world that I can
6 imagine that the Master will say that if we want
7 to come in with an exhibit that rebuts this general
8 columnar section like 32, or any other exhibit that's
9 been put in by the United States, which, by the way,
10 we didn't even get until after the ten days before
11 trial, that you have got --

12 MR. MEMBRINO: Objection. That was provided,
13 offered, tendered ten days before the trial, and I
14 believe it was on the 16th of January. It was made
15 available. They declined to receive it.

16 MR. WHITE: Wait a minute. Do you want to
17 take the stand and tell the Court that?

18 MS. SLEATER: I certainly will. In my office
19 we offered to hand that over, and he said, "I don't
20 want to carry this roll around with me. Just leave
21 it here and I will get it later."

22 MR. WHITE: That isn't quite what was said,
23 Regina.

24 THE SPECIAL MASTER: In any event, it may or
25 may not have been offered.

1 Go ahead with your argument.

2 MR. WHITE: The point is we have given them
3 our exhibits that we will use in our case in chief
4 on which we will rely in establishing our burden
5 of proof. We have not given them exhibits, and we
6 are not required to give them the exhibits, that
7 must be used to rebut the rebuttal exhibits, or
8 exhibits such as these which were provided to us
9 shortly before trial, and we have the right to re-
10 but by creating rebuttal exhibits.

11 If we think this map is wrong, we have the
12 right to show you a map that we think is right,
13 and when I told the Attorney General the position
14 taken by the counsel for the United States and
15 the Tribes on that, that we had no right to bring
16 in rebuttal exhibits, he laughed out loud.

17 We learned that the procedure in Wyoming, in
18 his opinion, is the same as in Colorado. You always
19 have the right to bring in things that rebut. So
20 if there needs to be a five-day rule, I think it
21 ought to be applied to rebuttal exhibits.

22 If there's going to be a five-day rule, that's
23 all it should be applied to where the parties do
24 not have the burden of proof involving the matter
25 for which the exhibit's offered.

1 We have relied on the ten-day rule. We have
2 provided approximately 2,000 exhibits. We provided
3 those exhibits for matters upon which we had the
4 burden of proof and we have a case in chief.

5 We will have rebuttal exhibits that rebut the
6 exhibits that were put in by the United States as
7 well of rebuttal testimony.

8 Frankly, Your Honor, I'd be glad to say that
9 the State of Wyoming would have no rebuttal exhibits
10 and still keep the ten-day rule, but the ten-day
11 rule is all-important.

12 The United States has had four years now to
13 prepare this case, and to come in with an exhibit
14 five days before some expert testifies and expect
15 us to be able to deal with that exhibit in a mean-
16 ingful way is practically unconscionable.

17 THE SPECIAL MASTER: Your offer is that the
18 State of Wyoming will have no rebuttal exhibits
19 if I keep the ten-day rule; is that correct?

20 MR. WHITE: If the ten-day rule applies with
21 respect to the date of January 25 -- or 26, rather.

22 THE SPECIAL MASTER: Well, I don't think you
23 can continue to have a reasonable trial under those
24 circumstances. The ten-day rule has to apply to
25 each --

1 MR. WHITE: That's not the way the Pre-trial
2 Order was phrased and that's not what the State of
3 Wyoming. We shipped all 2,000 of them out before
4 the trial.

5 What is happening here is that the United
6 States and the Tribes are trying to gain a substan-
7 tial advantage, and that substantial advantage is
8 to provide information with respect to four years
9 of work five days before we have to respond and
10 expect State's experts to be able to work over
11 four years of work in five days. That's uncon-
12 scionable.

13 THE SPECIAL MASTER: Let me take this under
14 advisement, and this can keep until before our
15 next session.

16 MR. WHITE: I would like to make the State's
17 position clear, Your Honor. We think the ten-day
18 rule applies. We think all parties are entitled
19 to rebuttal exhibits that do not come in within
20 the ten-day rule, and I think it's very important
21 that that rule be continued, and I think that the
22 State would be remarkably prejudiced if, having
23 bared its soul on those matters which it bears
24 the burden of proof, the 2,000 exhibits, the United
25 States is not required and the Tribes are not

1 required to do the same thing.

2 THE SPECIAL MASTER: All right.

3 MS. SLEATER: Can I just make one very brief
4 statement for the record, Your Honor? Rather than
5 belaboring the point, as you know, we have discussed
6 what the various cases mean at numerous times, and
7 I would like to point out that it is the position
8 of the United States that the State has an affirma-
9 tive burden. If they do not agree with what is go-
10 ing on, it is part of their case in chief to state
11 affirmatively what they think the situation is, and
12 that is all part and parcel of the case in chief,
13 and I don't want Your Honor to be misled into
14 thinking that the statement by Mr. White of various
15 statuses at trial is, in fact, an accurate reflec-
16 tion of what goes on in a courtroom.

17 MR. WHITE: I'll match courtroom experience
18 with Ms. Sleater any day, and I think you will just
19 have to take it all under advisement.

20 THE SPECIAL MASTER: Well, assuming there are
21 no further matters to be brought before --

22 MR. MERRILL: One further matter, Your Honor.
23 I don't mean to turn the end of these proceedings
24 into a cat fight, but there's one other thing that
25 I would like to bring up, and that is if Ms. Sleater

1 could inform us the witnesses she intends to call
2 for the week of hearings to begin on February 9th
3 and the order in which those witnesses would appear,
4 it would greatly assist us in, number one, preparing
5 to effectively deal with that witness; and, two,
6 scheduling the appearance of our corresponding ex-
7 perts without having to bring the whole shooting
8 match in to town on February the 9th and wait to
9 see who is going to be the first witness on the
10 stand. So if Ms. Sleater would give us an indica-
11 tion of those matters, we would really appreciate
12 it.

13 MS. SLEATER: At this time, at the risk of
14 sounding like I don't know what's going on at all,
15 I understand Mr. Merrill's problem, and I realize
16 we'll have the same problem later on, so our cur-
17 rent thinking, after long discussions last night,
18 which we have not totally resolved, I think I can
19 narrow the field down for him, if not give him one
20 precise answer.

21 At the time we do finally determine who will
22 be our witness, we will endeavor to make it avail-
23 able to Wyoming in sufficient time such that they
24 can schedule their experts because we would like
25 to have the same courtesy when the problem comes up.

1 Our current thinking is the week of February
2 9th we will either be putting on Dave Vogel on
3 fisheries, who will explain the fisheries resources
4 on the reservation and the various needs for stream
5 flows to maintain those resources or will start with
6 what Your Honor, I know, is waiting to hear, which
7 is what are the claims for the land, and put on
8 Mr. Kersich to give a discussion of the future
9 lands programs and how that was analyzed and what
10 the looks like. And at this time, due to various
11 scheduling problems with both of these witnesses,
12 due to other commitments that they have had, we've
13 not been able to resolve precisely this issue.

14 MR. MERRILL: Well, Your Honor, we have got
15 precisely the same scheduling problems. We are
16 talking about ten days in the future, and we have
17 got a batch of folks who are working on this as
18 well as other projects.

19 It really puts us in a bind to not know
20 whether to bring our fisheries people or our soils
21 people.

22 THE SPECIAL MASTER: Bring them both. I don't
23 think she can do any better than she has. She has
24 told you who she may very well start with to the
25 best of her ability to tell now, and I think that's

1 about all you can ask.

2 MR. MERRILL: I just want to make sure that
3 their first witness for the next week of hearings
4 will be either Mr. Vogel or Mr. Kersich; is that
5 correct?

6 MS. SLEATER: As far as I know now, Jim.

7 THE SPECIAL MASTER: All right. If there is
8 nothing further, we stand in recess until Monday
9 morning, February 9th, at 9:15, and that hearing
10 will be held --

11 MR. SALAZAR: Courtroom No. 3.

12 THE SPECIAL MASTER: -- in Courtroom No. 3
13 in this building, Cheyenne, Wyoming.

14 MS. SLEATER: Your Honor, for the record, do
15 I understand that you would like the United States
16 to take custody of its exhibits and store them?

17 THE SPECIAL MASTER: Yes, I think you for
18 bringing that up. If the United States will take
19 custody of all exhibits in the courtroom now and
20 store them with the United States Attorney with
21 instructions that they may be checked out and
22 sign for receipts or whatever they may require, we
23 will appreciate it. We want them all back here on
24 Monday morning, February 9th.

25 MS. SLEATER: We will check with Mr. Salazar

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1 as to his procedure.

2 THE SPECIAL MASTER: Okay. We are through.

3
4 (Proceedings concluded at
5 (10:10 a.m.
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REPORTERS' CERTIFICATE

State of Wyoming)
County of Laramie)

We, Merissa Racine, Mary Nelson and Viola J. Lundberg, Registered Professional Reporters and Notary Publics, hereby certify that the facts as stated in the caption hereof are true; that we did at the time, date and place, as set forth, report the proceedings had before the Honorable Teno Roncalio, Special Master, in stenotype; that the foregoing pages, numbered 1000-1092, inclusive, constitute a true, correct and complete transcript of our stenographic notes as reduced to type-written form under our direction.

We further certify that we are not agents, attorneys or counsel for any of the parties hereto, nor are we interested in the outcome thereof.

Dated this 30th day of January, 1981.

Merissa Racine
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