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Trial Transcript, Vol. 24, Afternoon Session

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File 131
4382
Box 10

case # 4993

File # 131

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

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

Civil No. 4993

FILED

3/17 1981

Margaret L. Hampton CLERK
DEPUTY

VOLUME 24

Afternoon Session

Thursday, March 12, 1981

ORIGINAL

1 THE SPECIAL MASTER: Please come to order.
2 We will begin and resume.

3 MR. WHITE: Before I go forward with Mr.
4 Billstein's cross, Your Honor, I wanted to do
5 two things. First, I wanted to apologize on
6 the record to Ms. Sleater for not receiving at
7 her office the State's Ninth Interrogatories
8 and Requests for Production. It was sent to a
9 street address and not your Post Office box
10 number. One was sent to Mr. Echohawk, so we'll
11 deliver one now.

12 I haven't found that one yet, it's coming
13 up from Denver.

14 The second thing I'd like to do, Your Honor,
15 has to do with the involvement of groundwater in
16 this case. As you know, it's been the State's
17 position that the reserved right did not apply
18 to groundwater. Yesterday or the day before
19 you engaged in the colloquy with either Tribal
20 counsel or Justice Department lawyers, I can't
21 remember which, in which there was some discussion
22 whether western water law required senior water
23 right users to use wells, and I wasn't sure
24 about it at the time, but I have since become
25 sure, and I wanted to give to Counsel and to the

1 Court, a copy of the District Court Decision in
2 Colorado by Judge Eakes, January of last year,
3 in what's commonly referred to as Rules and
4 Rights Case in the Rio Grande and he addresses
5 this problem on Page 23 through 26 of the
6 opinion -- excuse me, 23 through 29. The facts
7 of that case are roughly described on Pages 23
8 through 26, and the portion of the opinion
9 that applies to the question raised by the
10 Master is on Page 27. The first full sentence,
11 the Court has been discussing the United States
12 Supreme Court case that goes by the name of
13 Schodde, a 1912 case that was described in the
14 opinion which said that "Every appropriator or
15 every user of water was required to have an
16 efficient means of diversion."

17 And then on Page 27, the first full sentence:
18 This may take the form of requiring the senior
19 appropriator to drill a new well or wells to
20 augment or replace the surface diversion before
21 I can require the curtailment of junior rights.

22 Now, Your Honor, I want to make clear the
23 State's position that reserved rights do not
24 apply to groundwater, but I felt constrained
25 because I was quiet, to let you know what I had

1 found.

2 THE SPECIAL MASTER: Did you file appearances
3 for both gentlemen from your office?

4 MR. WHITE: Yes, sir, during -- oh,
5 several weeks ago we --

6 THE SPECIAL MASTER: Okay.

7 MR. WHITE: I don't believe I showed that
8 Scott Krob was in attendance, and he's been in
9 and out, Your Honor. Both of them were admitted
10 for purposes of this case several weeks ago.

11 THE SPECIAL MASTER: I just didn't remember.

12 MR. WHITE: Mr. Rifkin and Mr. Krob,
13 they're my lawyers, Your Honor.

14 THE SPECIAL MASTER: Okay.

15 Q (By Mr. White) Mr. Billstein, do the annotations
16 indicating tract numbers on Exhibits HB-1083,
17 1082, 1084, 1097, 1099, 1098, 1111 and 1110
18 include all the parcels of land which comprise
19 the 1,204 acres in use shown for Muddy Creek
20 area on C-137?

21 A To the best of my knowledge they are.

22 Q Okay. Do you know, excuse me, is it true that
23 Tract 20-1 contains less than one acre of land?

24 A That's correct. I should point out that both,
25 billstein-cross-white

1 for Tracts 20-1 and 20-2, being that they are
2 less than one acre, they were rounded down and
3 aren't officially in our tabulations. I hope
4 the Court recognizes that at times we rounded up
5 and it gives us that proper --

6 THE SPECIAL MASTER: Balance.

7 THE WITNESS: Balance, yes.

8 Q (By Mr. White) Twenty-three contains 57.3
9 acres of Class 4 land?

10 A That's right.

11 Q Twenty-four, 95.1 acres of Class 4 land? It
12 should be on photo "13" 120.

13 A 95.1 acres?

14 Q Yes, sir. Class 4?

15 A Yes.

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1 Q (By Mr. White) 20-5, 19.7 acres, Class 2?

2 THE SPECIAL MASTER: 19.7, did you say?

3 MR. WHITE: Yes, sir.

4 A (By the Witness) I didn't write the types during the

5 break. I'll have to check my individual aerials.

6 Q (By Mr. White) Let's come back to this and get the types

7 later.

8 A That's fine.

9 Q The most important thing, next to the types, is to find out

10 which parcels go with which figure.

11 In 20-6, 7.3?

12 A I didn't think I responded to 20-5.

13 Q I'm sorry. 20-5, 19.7?

14 A That's correct.

15 Q 20-6, 7.3?

16 A Yes.

17 Q 20-7, 4.6?

18 A Yes.

19 Q 20- --

20 MR. PERRY: Your Honor, excuse me. I would object

21 to this. It seems that we are back to the same line of

22 questioning that we were on yesterday, and you said then

23 that the next time this came up and he was just checking

24 numbers that he had already from the information that he

25 had available to him, you would cut him off.

billstein - cross - white

Handwritten vertical text on the left margin: 10-1 V-eg 2326

1 THE SPECIAL MASTER: Objection overruled.

2 Go ahead.

3 MR. WHITE: I might state for the record we are
4 trying to make a record as to which parcels there are.

5 I'm sorry.

6 Q (By Mr. White) 20-8, 5.4?

7 A Yes.

8 Q 20-9, 5.5?

9 A I have 5.6.

10 Q 6. Okay. 20-10, 3.6?

11 A I have 3.9.

12 Q 20-11, 8.0?

13 A Yes.

14 Q 20-12, 13.9?

15 A Correct.

16 Q 20-13, 15 even?

17 A Yes.

18 Q 20-14, 50.6.

19 THE SPECIAL MASTER: Five oh you asked?

20 MR. WHITE: Yes. We couldn't read it.

21 A (By the Witness) 50.6.

22 Q (By Mr. White) We couldn't figure out the acreage at all
23 for 20-15. Could you give me that one, please?

24 A 37.6.

25 billstein - cross - white

- 1 Q Is 20-21, 125? Have you got "16"-92 on your photo?
- 2 A 1.5.
- 3 Q Okay. 20-22, 48.9?
- 4 A .5.
- 5 Q 20-23, 16.7?
- 6 A 6.7.
- 7 Q 6.7. Okay. 20-24, 18.3?
- 8 A 18.7.
- 9 Q 7. Thank you.
- 10 MR. ECHOHAWK: What number was that?
- 11 MR. WHITE: 20-24.
- 12 Q (By Mr. White) 20-25, 14.9?
- 13 A Correct.
- 14 Q 20-26, 2.3?
- 15 A Correct.
- 16 Q 20-18, 48.9?
- 17 MR. ECHOHAWK: What photo is that on?
- 18 MR. WHITE: That's "16"-96, I believe.
- 19 A (By the Witness) 48.9.
- 20 Q (By Mr. White) Okay. 20-19, 100.8?
- 21 A Correct.
- 22 Q 20-20, 85?
- 23 A Correct.
- 24 Q 20-16, it's either 35.1 or 55.1, or is it something else?
- 25 billstein - cross - white

1 A 64.0.

2 Q 64.0?

3 A Right.

4 Q For 20-16?

5 A 20-16. There's probably several types. You have to add

6 the accumulative types.

7 Q Okay. 20-7, 1.2?

8 A That's 20-17.

9 Q 17. I'm sorry.

10 A 1.2.

11 Q 20-27, 23.2?

12 A Which photo?

13 Q "16"-94.

14 A What was the number again?

15 Q 23.2.

16 A 23.2 for 20-27.

17 Q Right. 20-28, 9.8?

18 A Correct.

19 Q 20-29, we couldn't figure it out.

20 A 6.2.

21 Q 20-30, is that comprised of one parcel of 34 and one parcel

22 of 51.6?

23 A I'd have to check the aerial.

24 Q Well, what's the total?

25 billstein - cross - white

1 A 19.4.

2 Q 19.4. That was beyond our guess.

3 Could you check your photo and tell us if that
4 was made up of some component parts?

5 A Just looking at it, I know it was.

6 THE SPECIAL MASTER: That should be a sufficient
7 answer, I think. He said, "Just looking at it, I know it
8 was."

9 MR. WHITE: Okay.

10 Q (By Mr. White) 20-31?

11 MR. ECHOHAWK: Photo number?

12 MR. WHITE: "17"-83.

13 Q (By Mr. White) That's 150 something, I think.

14 A 156.7.

15 Q 20-31?

16 A 8.9.

17 Q That's probably better if you can give me -- 20-33.

18 A 0.9.

19 Q 20-34?

20 A 19.7.

21 Q 20-35?

22 A 15.9.

23 Q 20-36?

24 A 2.7.

25 billstein - cross - white

1 Q 20-37?

2 A 54.1.

3 Q 20-38?

4 A 7.4.

5 Q 20-39 --

6 THE SPECIAL MASTER: May I catch the last one,
7 please?

8 THE WITNESS: 7.4.

9 Q (By Mr. White) That was for 20-38?

10 A Correct.

11 Q 20-39?

12 A 3.4.

13 Q 20-40?

14 A This is on photo "17"-81, 33.8.

15 Q 20-41?

16 A 20.1.

17 Q 20-42?

18 A 7.8.

19 Q 20-43?

20 A 19.9.

21 Q Do all of the parcels which we have just gone through for
22 the individual acreage numbers comprise all of those parcels
23 which make up the 1,204 acres shown on Exhibit 137 for Muddy
24 Creek?

25 billstein - cross - white

1 THE SPECIAL MASTER: What?

2 MR. WHITE: Muddy Creek.

3 A (By the Witness) That should be correct.

4 MR. WEBSTER: Your Honor?

5 THE SPECIAL MASTER: Yes, Mr. Webster.

6 MR. WEBSTER: We are to a point where it might
7 be a little break in the State's case. I wonder if it
8 would be appropriate and not too much of an imposition upon
9 the various parties if I proceeded to ask Mr. Billstein
10 a few questions in cross-examination concerning the Owl
11 Creek area?

12 THE SPECIAL MASTER: It would be appropriate,
13 as far as I'm concerned unless I hear objections from the
14 United States.

15 MR. ECHOHAWK: No objections from the United
16 States.

17 MR. PERRY: No objection from the Tribe.

18 THE SPECIAL MASTER: I have no problem. Regina?

19 MS. SLEATER: Tom has stated the United States'
20 position.

21 THE SPECIAL MASTER: Very well, Mr. Webster,
22 please proceed. We will switch subject matter on you for
23 a little bit.

24

25 billstein - cross - white

1

CROSS-EXAMINATION

2

BY MR. WEBSTER:

3

Q I'm not going to ask any hard questions, Mr. Billstein.

4

Mr. Billstein, during your investigation and determination that there were approximately 340 additional acres irrigated in the Owl Creek area, did you make any determination or have any consideration with regard to the availability of water in that area?

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A We were mapping lands in current use. That was the object of the study.

10

11

Q And so the answer, I guess, to that is no; is that correct?

12

A Water was being delivered to those lands. In terms of overall water availability, no investigation was undertaken.

13

14

Q Thank you. With regard to water being delivered to those lands, as I picked up on the examination yesterday and as I read the transcript from Monday and Tuesday morning, it indicated that you had been on the parcels in February and that your team had been on the property sometime last summer. Is that basically correct?

15

16

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19

20

A That's correct.

21

Q Was any determination made as to how recently water had been delivered to those lands? I'm talking about the parcels now in Owl Creek that make up 340 acres.

22

23

24

I'm sorry. I'm advised that the visits of your

25

billstein - cross - webster

1 field workers were in October of '80; is that right?

2 A Let's see. The field season went from August through
3 October. I don't recall how Owl Creek fit into that.

4 Q It's not important, I don't think, but was any determina-
5 tion made as to how recently water had been developed to
6 those parcels -- or had been delivered to those parcels
7 of land?

8 A It should have been delivered in field season 1980 or
9 possibly at the utmost a year or two earlier.

10 Q Isn't it true really, Mr. Billstein, that you are not sure
11 and you can't tell the Court as to when water was actually
12 last delivered on those parcels of land?

13 MR. ECHOHAWK: Objection, Your Honor. I believe
14 this area has been covered by Mr. White in almost the exact
15 questions as to when these parcels were irrigated and when
16 they received water.

17 THE SPECIAL MASTER: If they were, I don't recall,
18 so I'm going to overrule only on that basis. He can answer
19 yes or no. Let the witness repeat the question, please.

20 THE SPECIAL MASTER: Will you read it please,
21 Miss Reporter?

22 (Whereupon the reporter read
23 back the following question:
24 "Q Isn't it true really, Mr.
25 Billstein, that you are not
sure and you can't tell the
Court as to when water was

billstein - cross - webster

1

(actually last delivered on
(those parcels of land?)

2

3 A

(By the Witness) I believe that the field notes reflect for the Owl Creek basin that water was being delivered in 1980. The only system that I had major concern about that was Typer No 3, and I had made some contacts with the Water Commissioner, and he described that tract and said that it was reinstated, and being that it was not adjudicated, that probably this field season they were going to have to take steps to take it out of direct service.

10

11 Q

Which tract was that please, Mr. Billstein?

12 A

Typer No 3.

13 Q

Where was that located?

14 A

In the upper watershed.

15 Q

On Owl Creek?

16 A

Yes, South Fork, Owl Creek.

17 Q

So you are prepared to advise the Court that water was delivered to all of these tracts and these acreages during the 1980 water season; is that what you are saying?

18

19

20

THE SPECIAL MASTER: I would be leary of the question because I don't think that's what he really said. "All of these tracts" makes it quite an ambiguous question. He was testifying to a specific one.

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billstein - cross - webster

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MR. WEBSTER: The tracts on Owl Creek with the exception of the one he mentioned, Your Honor,

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THE WITNESS: I'm trying to recall the field notes for all those tracts. It seemed to me that outside of Type III, they did reflect surface in 1980.

Q (By Mr. Webster) And so that would be your testimony, the water was put on there during the 1980 season on those tracts?

A Yes.

Q With regard to your classification, as I understand, you've made, in connection with the tracts in the Owl Creek Basin area, it would appear that out of the 341 acres, 340 acres, there's approximately 170 acres of Type IV or V land. Is that probably pretty close?

A Approximately 180 acres.

Q As I read the transcript of the Monday hearings, I believe there was some indication that Type IV lands were those lands, Type IV and V were those lands that had sporadic water use and there was some problem with getting water onto those lands; is that correct?

billstein-cross-webster

1 A That's not correct.

2 Q Would you tell me what Type IV is then.

3 A Type IV basically refers to an area that receives
4 good irrigation with water --

5 Q Received what kind of irrigation water?

6 A A good supply of irrigation water for a duration.

7 Usually the drainage itself may have some water
8 supply limitations such as you referred to,
9 relative to Owl Creek or there may be some
10 physical problems with delivery which doesn't
11 allow water to reach all portions of the tract
12 in a -- in a level sufficient to qualify it as
13 a full-service acre.

14 Q And yet all of those acres were included within
15 the totals that you made on Owl Creek, isn't
16 that correct, even those that weren't --

17 A Absolutely. I think, if you look back at the
18 SCS irrigated lands inventory, the vast majority
19 of their typings, which have been roughly the
20 same categories throughout the whole Basin, show
21 the same type of delineations.

22 Q When you classified some of the lands as No. IV,
23 and I think in one instance No. V, then you must
24 have taken into consideration some of the

25 billstein-cross-webster

1 limitations of water availability in that water-
2 shed, isn't it correct? In your definition.

3 A At this point in time it's a subjective type
4 of determination.

5 Q Do you have any knowledge as to -- strike that.

6 Isn't it true, Mr. Billstein, that the
7 Owl Creek area is an area of extreme water
8 shortage for the --

9 MR. ECHOHAWK: Objection, Your Honor.
10 The question is ambiguous as to what he means
11 as to extreme.

12 MR. WEBSTER: Maybe I'll try and rephrase
13 it, Your Honor.

14 THE SPECIAL MASTER: That would be good.

15 MR. WEBSTER: Knock out the word extreme.

16 Q (By Mr. Webster) Isn't it true, Mr. Billstein,
17 that the Owl Creek area is an area of water
18 shortage for the irrigable --

19 MR. PERRY: Objection.

20 THE SPECIAL MASTER: Let him finish the
21 question please.

22 Q (By Mr. Webster) Water shortage for the average
23 irrigable season?

24 MR. ECHOHAWK: Objection, Your Honor. It's

25 billstein-cross-webster

1 beyond the scope of direct examination.

2 THE SPECIAL MASTER: It's beyond the subject
3 matter on which this witness has been testifying.
4 He's not an expert on the availability of water
5 nor has he testified to it.

6 MR. WEBSTER: May I address that?

7 THE SPECIAL MASTER: Surely.

8 MR. WEBSTER: He just got through testifying
9 he classified some acreage as acreage where there
10 might be IV because water supply limitations.

11 MR. ECHOHAWK: That was Mr. Webster's
12 interpretation.

13 MR. WEBSTER: I think he just testified to
14 that and the record will so indicate.

15 THE SPECIAL MASTER: His earlier testimony
16 on Type IV was its definition, which is land
17 irrigated sporadically or irregularly by water
18 spreading systems or by conventional system. The
19 heading on Type IV land is occasionally irrigated,
20 partial service, but I don't think that because
21 he types land as Type IV that he is testifying
22 as to the availability of water in that general
23 area.

24 I don't know whether he can answer that

25 billstein-cross-webster

1 question or not because he has been typing some
2 lands that he observes as to whether they fall
3 in class meadow irrigation or Class 4, occasionally
4 irrigated or whether they are seeped lands, but
5 I'm going to overrule the objection and say to
6 the witness that he may answer the question if
7 he's able to answer the question or has knowledge
8 of the availability of water on Owl Creek.

9 THE WITNESS: A lot of things go into the
10 typing rather than the classing of land use.
11 Basically it's the appearance of the vegetation
12 on the land tract, it's obvious whether it's
13 getting a full water supply or a partial water
14 supply. With respect to Owl Creek, literature
15 has defined that it is water short, but it's
16 a function of priority as to how it's water short.
17 The problem of Anchor Reservoir compounds the
18 issue with the leakage that's now occurring. Any
19 of the old water availability issues are now
20 somewhat into a gray area because the hydrology
21 has changed. It was basically the physical
22 appearance of the land, and the appearance of the
23 physical systems that led to the typing of the
24 land.

25 billstein-cross-white

1 Q (By Mr. Webster) Just to try to confuse the
2 record a little further, perhaps, that's not
3 my intention, isn't it one of the determinations
4 that you make in typing Class 4 lands as to
5 water supply limitations, isn't that what
6 you just testified to a few minutes ago?

7 A It's a subjective determination.

8 Q Can you tell me how many of the acres included
9 within that figure for the Owl Creek Basin are
10 subject to existing permits with the State of
11 Wyoming?

12 A Permits or certificates?

13 Q Permits?

14 A Permits?

15 Q Yes.

16 THE SPECIAL MASTER: I don't recall him
17 testifying under direct anything regarding permits.

18 MR. WEBSTER: I don't know if he did, Your
19 Honor. I was just asking if he could tell me
20 that.

21 MR. ECHOHAWK: Well, Your Honor, if it's
22 beyond the scope of direct examination the cross
23 is improper.

24 THE SPECIAL MASTER: I hate to provoke Counsel,
25 billstein-cross-webster

1 but I guess I should have shut up.

2 MR. WHITE: I should say he did testify
3 some of the lands that are in current use
4 unadjudicated were the use of unadjudicated
5 permits. He didn't specify which ones, and that
6 was on direct examination.

7 MR. WEBSTER: What prompted my question was what
8 came out yesterday, basically what Mr. White
9 indicated.

10 THE SPECIAL MASTER: He may answer if he
11 knows the answer.

12 THE WITNESS: There are certainly some of
13 the unadjudicated areas that have a permit of
14 record. That wasn't important to us in that our
15 breakout was between adjudicated lands and
16 unadjudicated lands. It helps delineate the
17 area of study for us.

18 Q (By Mr. Webster) So can you answer that question
19 or not, Mr. Billstein?

20 A You want a listing of every single permit?

21 Q No. I just want to know approximately how many
22 acres included within that 340 acres or whatever
23 you finally determined, are subject to some
24 type of permit with the State of Wyoming, if you

25 billstein-cross-webster

1 know?

2 A It's really not important.

3 THE SPECIAL MASTER: Whether it's important
4 or not is really up to me to decide, I suppose,
5 but if you can answer it, if you can't, say you
6 can't, that's all.

7 THE WITNESS: To the best of my recollection,
8 most of those acres are a matter of permit of
9 record, unadjudicated.

10 Q (By Mr. Webster) Mr. Billstein, yesterday,
11 while you were testifying with regard to Exhibit
12 130, for annotation purposes it was referred to
13 as 35 -- a parcel on there, Parcel A was referred
14 to as 35.1 A, and I wonder, somehow it didn't
15 get put on the map, I wonder if you would
16 annotate that for the record so the record would
17 be clear, in marking 35.1 A.

18 A If someone could clarify to me that this is
19 actually 35.1 A. I can't recall.

20 Q Why don't you take a look at HB-11.

21 (Brief pause.

22 Q Would you please annotate that then on U.S.
23 Exhibit C-130.

24 (Witness complied.

25 billstein-cross-webster

1 Q Thank you. I think that will help clarify the
 2 record a little bit.

3 Mr. Billstein, in review of the record and
 4 my conversation with you this morning, you
 5 indicated that you determined the acreages in
 6 these various parcels by use of a plan meter,
 7 basically on those aerial photographs; is that
 8 correct?

9 A It's called a planimeter.

10 Q I appreciate that. And that, I think I under-
 11 stand what the devise is, Mr. Billstein, even
 12 if I can't pronounce it. Some of the parcels
 13 which you have indicated as being within the
 14 total figure in the Owl Creek Drainage, are one
 15 acre or 2.7 acres or something like that. Do
 16 you have confidence that your planimeter is
 17 that accurate that it can define a one-acre
 18 parcel or a 2.7-acre parcel or a 5.9-acre parcel?

19 A The standard procedure for planimentering
 20 require three determinations of the acreage, and
 21 then taking the average of those. If there's
 22 a great amount of deviation between those you
 23 go back and repeat the process. That type of
 24 analysis is very accurate.

25 billstein-cross-webster

1 Q Did you ever, through the use of your field
 2 workers or yourself when you viewed the acres,
 3 take any steps to confirm the acreage you had
 4 previously set forth for these parcels?

5 A Well, of course, the standard procedure of
 6 running acreage on a tract three times, of course,
 7 is the first step. Then we had a lot of
 8 modifications with changes of boundaries in
 9 adjudicated areas, changes in land use types,
 10 all of which required additional breakouts of
 11 those lands into either smaller or larger tracts
 12 over the course of the investigation. Cumulative
 13 adding and subtracting of the tracts always
 14 came within the very small variance.

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1 Q (By Mr. Webster) Was any of this confirmed on the ground?

2 A There were no surveying efforts made. The scale of the
3 photographs, the accuracy of the sectionizing of the
4 photographs, allowed an accurate planimeter determination
5 to be made.

6 Q You mentioned earlier to me the Typer No 3 area, I believe?

7 A Right.

8 Q As on the upper drainages of the Owl Creek; is that correct?

9 A Yes.

10 Q Would you be able to identify what parcel that particular
11 area was designated as?

12 A Certainly. While I'm researching this, you may have to
13 grab the Owl Creek exhibits because I don't believe I have
14 the tract numbers written down in front of me.

15 (Pause.

16 A (By the Witness) H4-17.

17 MR. WHITE: That's not the number.

18 THE WITNESS: No, that's not right.

19 (At this time an off-the-record
20 discussion was held.

21 A (By the Witness) H5-270. That is tract 33-2.

22 Q (By Mr. Webster) And do you know offhand how many acres
23 that is?

24 A Approximately nine acres.

25 billstein - cross - webster

1 Q I'll get that off your desk.

2 Do your field notes indicate that this area had
3 been irrigated?

4 A The field notes for the October visitation said: Good
5 laterals in field. Ditch in very good condition. Diversion
6 is in low area next to creek. Creek's banks are very low.

7 In the backup or follow-up form that the field
8 inspectors put together when they returned to the office,
9 it says: Typer Number 3 Ditch is in very good condition,
10 has run water this year. Diversion is just a cut in creek
11 bank and would run water when creek is high.

12 My observation --

13 Q Before we go on, could you tell me --

14 MR. ECHOHAWK: Your Honor, he's entitled to finish
15 an answer.

16 MR. WEBSTER: Well, while he's got that out, Your
17 Honor, may I ask him the book and page number that he takes
18 that from on his field notes?

19 THE SPECIAL MASTER: Sure.

20 A (By the Witness) Mr. Johnston's book, Book A.

21 Q (By Mr. Webster) And what page?

22 A Page 1-6-2. The follow-up field form would be in the Owl
23 Creek file under H5-270. My notations were: System needs
24 some rehabilitation. Evidence of recent use.

25 billstein - cross - webster

1 MR. WEBSTER: Your Honor, I don't believe I
2 have any further questions. Thank you.

3 Thank you, counsel.

4 THE SPECIAL MASTER: Very good. Mr. White?

5 MR. WHITE: May we have about three minutes to
6 get out some more exhibits?

7 (Whereupon the proceedings
8 recessed.)

9 THE SPECIAL MASTER: Okay. I'm ready to proceed
10 if all of you are.

11 Mr. White, what was the name of the judge in this
12 case on the last page? It fell off.

13 MR. WHITE: Are you missing the last page?

14 THE SPECIAL MASTER: No, I have it, but I can't
15 read it.

16 MR. WHITE: That's William Eakes, E-A-K-E-S.

17 THE SPECIAL MASTER: E-a-k-e-s.

18 MR. WHITE: He was the water judge for Water
19 Division 7, which is assigned by special appointment to hear
20 this case, and right after the case was over, he retired.

21 THE SPECIAL MASTER: He knew what he was doing.

22 Are we ready to proceed? Regina and Mr. Webster?

23 In the recess Mr. Webster presented to me a draft
24 order stemming from this morning's discussion, and I think

25 billstein - cross - webster

1 it's appropriate that we proceed to discuss it now
2 because if we can arrive at an agreement on this now, it
3 will alleviate a day or a half a day devoted to this
4 special matter in the weeks ahead.

5 This is an order proposed by Mr. Webster --
6 well, go ahead, Mr. Webster. You are there and you may
7 proceed.

8 MR. WEBSTER: You were doing fine.

9 THE SPECIAL MASTER: Okay. I'll try it. It's
10 on his oral motion to limit access onto and through private
11 lands within Water Division Number 3, and the order would
12 have me order that the United States, as well as the Tribes and
13 including the State, shall enter -- shall not enter onto,
14 fly over, or obtain access through any private land in the
15 Division for the purpose of gathering information or con-
16 ducting tests or interviewing occupants thereof pertaining
17 to the lawsuit without first having, one, identifying the
18 owner of said parcel and determining if such owner is
19 represented by counsel.

20 I'll stop there to observe that it will be very
21 difficult for them to comply with number one without break-
22 ing the admonitions before it which is that they shall not
23 enter the land without first having identified the owner.
24 They may have to first enter the land and ask the owner if
25 he has counsel. I don't know how else he could find out if

1 the owner has counsel in this complicated lawsuit.

2 MR. WEBSTER: Can I address that, Your Honor?

3 THE SPECIAL MASTER: Yes, I welcome it.

4 MR. WEBSTER: It seems to me they can find out,
5 once they find out the owner of the property, they can go
6 to the pleadings in this case to determine whether or not
7 a pleading has been entered on behalf of those private land-
8 owners. For every individual I've entered a lawsuit for,
9 I have entered an appearance and I've identified the land
10 and I've certainly identified the owner.

11 THE SPECIAL MASTER: A year and a half ago I
12 can almost see Mr. Jack Palma getting up and saying, "Well,
13 I think the Attorney General's Office maybe could help with
14 this," and maybe if we can inquire of your office, is that
15 still true, Mr. White? He's been gone a year and a half,
16 but --

17 MR. WHITE: Well, I'm sure if Jack said it it
18 was true or was true at that time.

19 THE SPECIAL MASTER: Would you find out if it's
20 still maybe the case?

21 MR. WHITE: It's my impression that we have gone
22 through the pleadings in the case and have tried for our
23 own purposes to identify those persons who have appeared
24 pro se, who have appeared by counsel, or who have not appeared
25 at all.

1 If we have such a list, I doubt that it is up
2 to date more than within about a month. It's probably
3 about a month old because that's the way our bookkeeping
4 seems to work.

5 We will provide it to the Court. Mr. Webster
6 is right that anybody could develop the list, but we'll
7 be glad to provide it to the Court for the Court's files,
8 for the convenience of the parties and the Court.

9 I can't say that it's a hundred percent accurate,
10 but it's accurate enough that we rely on it.

11 THE SPECIAL MASTER: Well, you have the computers.
12 You have the personnel, and in the early stages of the
13 lawsuit, you had, you know, the facilities to offer to try
14 to help and expedite it.

15 Let's assume that a genuine or an attorney or
16 an engineer with BLM would have need to inquire of places
17 and have need to comply with this other than to determine
18 whether an owner is represented by counsel. He ought to be
19 able to understand that they are making an effort to comply
20 with the order that says they have to talk to the attorney
21 before they can get onto the ground and they are making that
22 inquiry by going to the owner's house and asking.

23 I don't think that's an intrusion or a trespass.
24 The Defendant can say, "No, I don't have any lawyer and I
25 don't want any lawyer, and you get off of my land."

1 He found out in a hurry if he has counsel or
2 not.

3 MS. SLEATER: I would like to raise a procedural
4 point at this point before we go any further, which is to
5 state that as Mr. Webster represents certain specified
6 individuals, he can probably make motions for them, but
7 unless he has the agreement of all other counsel in this
8 case to make such a motion on behalf of everyone, I don't
9 think it's appropriate to consider this motion at this time.

10 THE SPECIAL MASTER: Well, it would be inapprop-
11 riate to sign it at this time, but I think we can go ahead
12 with the discussion.

13 MS. SLEATER: Further, Your Honor, I would like
14 to point out that this motion is totally untimely and in-
15 appropriate insofar as there is no pending request for entry
16 onto the Reservation.

17 The United States has not at any time made such
18 request. The Rules of Evidence, Rule 34 of the Wyoming
19 Rules of Evidence, particularly makes provisions for what
20 is and is not required.

21 Now, it may be when we get to the situation where
22 the United States is asking, as Wyoming did for the third
23 or fourth entry, that it would be appropriate for the Court
24 to make some modifications in the Rules of Evidence, but
25 until that time, Rules of Evidence are set up for exactly

1 the situation, and when it becomes appropriate, it ought.
 2 to be available, and as of this time there has been no
 3 such pending request, and this order would be totally
 4 inappropriate and untimely, whatever its conditions are.

5 THE SPECIAL MASTER: Let me meet your observation
 6 by saying I would be remiss in my duties as The Special
 7 Master if I didn't take the time and the trouble to allevi-
 8 ate the potential of hostility and ugliness that I see down
 9 the road involving the Forest and BLM lands that we have
 10 experienced some degree on on the Reservation with the
 11 Indians, and that's why I think it's altogether proper
 12 that we discuss this at this time, Regina.

13 If we can come to a meeting of the minds on a few
 14 landowners here regarding the visits from the BLM people,
 15 we will be diffusing something that has been growing and
 16 growing to some very strong degree in all western states
 17 in the last four or five years.

18 MS. SLEATER: If I could point out that the Rules
 19 themselves, when you deal with discovery, the appropriate
 20 place to serve notice of discovery is on their counsel.--

21 THE SPECIAL MASTER: We are not talking about
 22 discovery now at all. We are talking about the difficulties
 23 brought on by the fact that some of the Indians on their
 24 own fee lands, so to speak, in Class 2 don't like to have
 25 a visit on the area without knowing who is coming in for

1 what purpose, and a non-Indian is in exactly the same
2 category. A human is a human.

3 MS. SLEATER: Your Honor, I quite understand
4 that, and I would point out that this is, in fact, dis-
5 covery.

6 Rule 34 addresses in particular and specifically
7 entry onto land. The only time the situation came up was
8 that the fact that the State of Wyoming's request was out-
9 side of the normal discovery and that they were coming
10 back for a third and fourth bite of the apple, as it were.

11 At this point in time, I asked Mr. Webster to
12 identify any particular areas so we could check them out
13 and see if there was a problem.

14 As far as I am aware -- and I have done a little
15 checking -- we have not had people out in those areas doing
16 any checking in regards to this case. I think it is a
17 problem that is premature at the very best.

18 I appreciate Mr. Webster's concern and will make
19 every effort, as we have instructed people in the past, not
20 to enter onto private lands. When we wish to enter onto
21 private lands, we will comply with the Rules of the State
22 of Wyoming at that time and at that time perhaps a motion
23 would be appropriate.

24 Until that time occurs, the motion is premature,
25 and, in fact, what they are asking the Court to do is

1 modify the laws that were passed upon by the Supreme Court
2 and the Legislature of this State for the conduct of
3 court proceedings.

4 THE SPECIAL MASTER: It may be premature, but I
5 was involved in the subject matter and, hopefully, in the
6 hopes that I would rather have it be premature now than
7 be behind the fact after an incident or after an unfortunate
8 occurrence happens, it can only add to misunderstandings,
9 tempers, and other things that I want to keep out of this
10 litigation, which has no place in the adjudication of these
11 water rights.

12 Let's have a look at the Rule, please.

13 MR. WHITE: Your Honor, for the record, the State
14 of Wyoming, which is one of the parties against whom the
15 proposed order would be issued, has absolutely no objection
16 to it being considered now. I have a feeling we have been
17 one of the unintentional offenders, and we are more than
18 happy to deal with the problem now.

19 THE SPECIAL MASTER: It's a Rule of Civil Procedure,
20 Regina, not a Rule of Evidence.

21 MS. SLEATER: Yes, I'm sorry. It's Rule 34.

22 THE SPECIAL MASTER: Rule 34.

23 MR. WEBSTER: Your Honor, my attempt in all of this
24 is to give my clients the same protection as the Indians got
25 this morning, nothing more, nothing less.

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THE SPECIAL MASTER: Well, particularly the Indians could say they didn't get it this morning, but they tried.

MR. WEBSTER: Well, they have got an order that is going to be very similar to this, Your Honor.

THE SPECIAL MASTER: " . . . to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

And the request will be served upon the Plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party, which shall set forth the items to be inspected either by individual item or category and describe each item and category with reasonable particularity.

The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

* * * * *

1 MS. SLEATER: Your Honor, as I previously
2 stated, the United States, when it would get
3 to the point of wishing to conduct discovery on
4 private lands, would comply with that, and to
5 the extent a party was represented by Counsel,
6 the appropriate thing to do would be to serve
7 that counsel. All I'm trying to state is that's
8 how things went with respect to the Indian Tribes
9 for the first entries of the State of Wyoming..
10 It was only when it became burdensome that we
11 felt it was necessary to have the Court enter into
12 it.

13 I think most of the items Mr. Webster is
14 talking about are covered by the rule to begin
15 with, but I think furthermore, until there is
16 a request pending, it is inappropriate for the
17 Court on its own to modify the rules of discovery.
18 And that when and if such an occasion arises
19 that we would wish to make entry on the land, we
20 would comply with the Rules of Civil Procedure.

21 MR. WHITE: On behalf of the State of
22 Wyoming, we will confess the order. We have no
23 objection, and I think it's perfectly within
24 the rules.

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1 THE SPECIAL MASTER: The rule gives the
2 Court a right to make a shorter or longer time
3 and to make modifications, so I'm not violating
4 the rule by doing this, Regina. I may be
5 premature.

6 MR. WEBSTER: Your Honor, may I address
7 that? That just simply isn't the case. The
8 United States has had people out in the field
9 time and time again checking out private
10 landowner's rights on public and private land.
11 I know that to be a fact, Your Honor. The Court
12 can take notice that last summer --

13 THE SPECIAL MASTER: In this case.

14 MR. WEBSTER: Yes, sir. Last summer when
15 we had those hearings in Worland, you recall
16 the young lady from BLM, and she started testifying
17 with regard to private landowner's rights, and
18 it just isn't the case, and it's a misrepresentation
19 for the United States to come in at this time
20 and say, hey, Judge, we haven't done any of this.
21 That isn't the situation.

22 The Forest Service has been working for
23 two years on it, Your Honor. I don't know how
24 long the BLM has been, but we know they were

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1 working prior to last summer.

2 MS. SLEATER: Your Honor, if I could
3 correct Mr. Webster's statement. For the
4 record, Ms. Biarley, when she testified, testified
5 about three rights. The reason for the testimony
6 was those rights were filed on Federal lands.

7 MR. ECHOHAWK: I might also point out, Mr.
8 Webster is about a year late on his motion.

9 MR. WHITE: Oh, for crying out loud.

10 THE SPECIAL MASTER: He can't be both late
11 and early.

12 MR. ECHOHAWK: He's been a year late as
13 to the instances he's addressing.

14 THE SPECIAL MASTER: That's true. He's
15 a little late on those, but he's anticipating
16 some.

17 MR. WEBSTER: You aren't kidding. And when
18 they start to challenge my individual water
19 rights, I'm entitled to some protection.

20 The only difference is the State of Wyoming
21 asked for permission, the Federal Government
22 has never asked for any permission, they've just
23 gone in there and done it.

24 MS. SLEATER: Your Honor, again I request
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1 that Mr. Webster document the specific instances
2 he's alleging occurred.

3 THE SPECIAL MASTER: We're not into that.
4 He's just reading some examples that happened
5 to be true edges on this sword is what he's
6 saying, and that's pretty obvious.

7 I'm trying to be factual in anticipating
8 actual pragmatic circumstances, and one of them
9 is the BLM official and an engineer and lawyer
10 want to examine a ditch on somebody's land or
11 have to traverse that land to get to it and they
12 want to comply with this order, Mr. Webster.
13 And they'll go to the owner's home and ask, "Sir,
14 we're identified under Big Horn Water Case and
15 we need to do some research here." And he'll
16 say, "Who are you with"?

17 "We're with the United States."

18 "Well, get the hell off of my property"
19 might be the next question, but before he makes
20 that charge, which is an unreasonable one, I
21 think, he might say "What do you want to know"

22 "Well, the first thing we like to know, sir,
23 is do you have an attorney because we want to
24 get permission to do this. If we're right we

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1 want to see your lawyer if we do. We have a
 2 right to ask that." So this order has to be
 3 reflected, should any of your clients or
 4 any owner of water rights be asked if they have
 5 counsel, they should answer forthwith whether
 6 they do or don't. That's the first thing. And
 7 if they do have counsel, the parties will then
 8 leave immediately and check with counsel. And
 9 then the matter comes into court for orders as
 10 was done this morning in the case of the Indians
 11 living on allottees. So that makes it in
 12 compliance, and I think if we will restate the
 13 numbers that way, add the words from said
 14 counsel. Number 2, if it's determined from
 15 said counsel.

16 Now, let's go to Number 3. If it's
 17 determined that he's not represented by counsel,
 18 that written permission should be obtained
 19 prior to the inspection.

20 MS. SLEATER: Your Honor, I point out that
 21 that's exactly the condition you refused to
 22 impart against the State of Wyoming this morning
 23 when they were asking for repeat entries. In
 24 this case the United States does not even have --

25 THE SPECIAL MASTER: Let's see if that's

1 exactly what I refused to allow this morning.
2 We'll get a look at the rough draft, the order
3 that Tony had prepared. Kind of wish he was
4 still here, frankly, because we went over it
5 point by point, but I don't recall refusing
6 that exact situation on his order.

7 (Brief pause.)

8 THE SPECIAL MASTER: Number 2 ordered the
9 State of Wyoming to identify the legal owner
10 and the beneficial owner and show proof of
11 notice to each individual owner by the State
12 when requesting to enter his or her tract.

13 MR. WHITE: Your Honor, I would state for
14 the record, Mr. Rogers and I have agreed on
15 provision in paragraph 2 which is very similar
16 to the one that you read. It just simply said
17 that the State should notify the United States,
18 the Tribes and individual owners, if any, by
19 writing, which identifies the legal owner and any
20 beneficial owner. We're willing to assume it
21 for the Reservation; the United States ought to
22 do it for non-Indians.

23 THE SPECIAL MASTER: You agreed to Number 2,
24 in fact, by notifying the United States, the
25 Tribes and the individual owners.

1 MR. WHITE: Yes, sir, if any.

2 THE SPECIAL MASTER: Then Number 3 should
3 stand in this order.

4 MS. SLEATER: Your Honor, what Mr. White
5 just said is he agreed to notify them, he did
6 not agree to receive written permission, which
7 is a totally different thing. I would like to
8 point out the United States has not seen
9 whatever Mr. White and Mr. Rogers has agreed to.

10 MR. WHITE: Your Honor, if we could stop
11 yaking about this long enough --

12 THE SPECIAL MASTER: Regina has a point.
13 Let's change the language in Number 3 that if
14 he determines the owner is not represented by
15 counsel, written request to enter the lands
16 shall be -- shall be given to the owner prior
17 to inspection.

18 Now, if the owner is arbitrary or capricious,
19 did not give a reasonable request to enter, then
20 we'll have to have a hearing on it, and I'll
21 give some language along the line of what the
22 agreement is. In other words, let's use a
23 similar burden on each of the two parties.

24 MR. WEBSTER: I thought I was, Your Honor.

25 THE SPECIAL MASTER: What?

1 MR. WEBSTER: I thought that's what I was
2 doing.

3 THE SPECIAL MASTER: I can appreciate that,
4 but I wasn't around when Mr. Rogers and Mr. White
5 agreed on the language of 2.

6 MR. WHITE: We haven't agreed on the whole
7 language, but we have just gotten it back from
8 the typist and before he left we agreed, or I
9 agreed to his proposed language that I read to
10 you.

11 THE SPECIAL MASTER: Now, your A, B, C, D
12 I think is -- there should be no problem on
13 that. The purpose of the entry is to detail
14 what is to be examined, what is to be tested.
15 Who designates the individuals that will actually
16 go on the land, they may or may not be consulted,
17 the lawyers, engineers or something, I don't
18 know. It's just a thought, and it specifies the
19 purpose, that's all right.

20 I think Number 1 is appropriate, vice versa,
21 it's almost the same as this one. In fact, it
22 is, you've taken it verbatim.

23 Number 2. All right, that's exactly
24 identical, and the party shall be prohibited from
25 making any written or oral inquiry with respect

1 to any issues in this litigation, with respect
2 to -- what does the other one say?

3 MR. WEBSTER: I think it's more restrictive
4 than that.

5 THE SPECIAL MASTER: Parties shall be
6 prohibited from making written or oral inquiry,
7 formal or informal. It doesn't say with respect
8 to, but that sounds all right.

9 Okay. I think if you'll take a few
10 suggestions that I made, you can have an order
11 that I can sign next time we get together.

12 MS. SLEATER: : Your Honor, I'd like to again
13 object insofar as to who Mr. Webster represents.
14 He does not represent everyone. I would like
15 to point out that as a matter of fact, the
16 Court is now applying a stricter standard --

17 THE SPECIAL MASTER: He doesn't represent
18 everyone. What's your next one?

19 MS. SLEATER: The Court is applying a
20 stricter standard to the United States than it
21 has applied to the State of Wyoming in this
22 action insofar as the State of Wyoming was
23 granted unlimited entry for three times previous.
24 Furthermore, I'd like to point out that the
25 motion as stated, seems to be to be over-broad

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and that Mr. Webster is trying to, he is concerned about fly-overs. Now, perhaps I can see his concern with low level helicopter fly-overs, however, I do not believe people are entitled to have control over the air space, and --

THE SPECIAL MASTER: We're not raising that point. If I want to take a Bonanza and fly it, I'll fly it. If anybody else wants to they will.

MS. SLEATER: Your Honor, if I could read from the proposal. It is prohibiting any entry onto, fly-over or obtaining access --

THE SPECIAL MASTER: Well, by fly-over he means a helicopter hovering and studying, which I think that's understandable. If you want to have to define it any further, we can modify it. Let's don't quarrel that closely again.

MS. SLEATER: Well, Your Honor, I just wanted to make this clear that --

THE SPECIAL MASTER: Do you want to put the word "Helicopter" in? Would that be better?

MR. WEBSTER: That would be satisfactory to me, Your Honor. It's limited for the purposes of gathering information for this litigation, so

1 I --

2 THE SPECIAL MASTER: Surely.

3 MR. WEBSTER: -- think you're protected.

4 MS. SLEATER: Your Honor, low level
5 flights might be possible but in some areas
6 whether you're in a helicopter, you fly over
7 people's lands.

8 THE SPECIAL MASTER: All right, Regina.

9 MS. SLEATER: But the most important
10 thing I would like to stress is a double
11 standard is being applied here, which is, I
12 think, grossly unfair insofar as the Rules of
13 Discovery have been held more than adequate
14 for everyone, apparently, except for the United
15 States.

16 THE SPECIAL MASTER: Once again I take
17 your objections last first. A double standard
18 is exactly what we have avoided by the careful
19 comparison, paragraph to paragraph and word to
20 word of the order drafted by Mr. Webster and
21 of the order submitted to me by Mr. Rogers this
22 morning on behalf of the Indians.

23 The next item that there is a definite --
24 well, the next item I cannot agree with either,
25 and the first one, that Mr. Webster does not

1 represent all of the parties. Of course he
2 doesn't, but he does represent some and some
3 is enough to justify the order. I don't propose
4 that Mr. Webster should have a duty to check
5 with everyone of the attorneys for other
6 defendants. If he wishes I guess he will, but
7 if he doesn't want to I don't think that he
8 should have to in order to get an order of
9 this kind any more than the other way around.
10 I'm not sure who's speaking for the particular
11 Indians who own, who live on allotted lands.
12 The one position was that nobody represents them.

13 MS. SLEATER: Your Honor, that's possible.
14 The United States is trustee for certain trust
15 assets. The people who own other lands are
16 entitled to take their own positions. If they
17 don't agree with me they can come in and
18 represent themselves. I do not represent
19 individual Indians in their individual capacity. .

20 THE SPECIAL MASTER: Well --

21 MS. SLEATER: Let me just say once more,
22 the order this morning was on a third request,
23 it wasn't on a first shot. We haven't gotten
24 out there yet.

25 THE SPECIAL MASTER: I haven't signed an

1 order here on the first shot. I said let's
2 draft what we have and probably I will sign
3 it as an order at our next gathering. In the
4 meantime you have chances to raise additional
5 objections.

6 MS. SLEATER: Your Honor, all I would like
7 to be is very clear and say we have not yet
8 requested discovery on the land, and as such the
9 State has requested previous times, which is --

10 THE SPECIAL MASTER: I appreciate that very,
11 very much.

12 MS. SLEATER: Okay, all right.

13 THE SPECIAL MASTER: And if the -- In the
14 first place regarding the BLM portion of this,
15 any rancher who has lands that he is enjoying
16 on BLM lands, recognizes that he occasionally
17 has to let BLM service people on as a part of
18 his a.u.m. management, so he's not going to be
19 all that put out.

20 Secondly, if a rancher has a forest
21 grazing permit, he's used to seeing forest people
22 coming around and asking questions about that
23 annually. It's with regard to this particular
24 case and water rights that this thing is going to
25 apply to and it won't disturb too much of the

1 interfacing, interaction of federal people
2 and state people in this area except that this
3 water suit means this particular application.

4 MS. SLEATER: Your Honor, as long as it
5 doesn't interfere with the obligations of the
6 government. And I've made my other objections
7 and we are going to discuss it at a later point
8 in time when perhaps more people will have
9 notice that this is happening, and with that,
10 I'll shut up.

11 THE SPECIAL MASTER: All right.

12 MR. ECHOHAWK: That just brought one other
13 thing to mind. I have Forest Service people,
14 they said they were going to conduct some of
15 their additional work during the same time
16 they're doing their normal daily routine or
17 whatever, and they might just be out working
18 someplace and go over and check a certain parcel
19 or whatever that's on our land, but, you know,
20 that seems like it's going to unduly restrict
21 their work if we've got to go through this big
22 to do every time they want to go look at something.

23 MR. WHITE: That's what the State has got
24 to do, Your Honor.

25 MR. ECHOHAWK: They're just doing it in the

1 course of their daily activities.

2 THE SPECIAL MASTER: We have completed this
3 subject matter, let's go to the next subject
4 matter.

5 MR. WHITE: Mr. Perry and I would like to
6 have a very brief recess. We believe we've
7 agreed to the language of our order and we'd
8 like to have a recess so we might share it with
9 Ms. Sleater and see if we are able to present an
10 order without having --

11 THE SPECIAL MASTER: You and who would like
12 this?

13 MR. WHITE: Bill Perry.

14 THE SPECIAL MASTER: All right. Mr. Perry
15 and Mr. White, take five minutes and work out
16 what you can.

17 MR. RADOSEVICH: May I say something before
18 we conclude?

19 THE SPECIAL MASTER: Yes, Mr. Radosevich.

20 MR. RADOSEVICH: I've had the opportunity of
21 reading the motion, and I would like to say that
22 I support the order that has been drafted or the
23 oral motion that Mr. Webster made as another
24 representative of private parties in this litigation.

25 THE SPECIAL MASTER: Very good. Okay, we'll

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have a 15 minute recess.

(Thereupon a 15 minute
recess was taken.

* * * * *

1 THE SPECIAL MASTER: Let us resume on the
2 record. Mr. Radosevich?

3 MR. RADOSEVICH: Yes, Your Honor. I have mainly
4 a question because of several concerns either of clients
5 of individuals who I personally know in the Lander area
6 with respect to who is representing who on the Reserva-
7 tion.

8 It's been this person's understanding that the
9 Federal Government is representing his interests on the
10 Reservation. They are fee simple land, and in some cases
11 it is leased land, and my question here is, what I would
12 like clarified, is actually who the Federal Government is
13 representing.

14 I understand there was a discussion on this this
15 morning.

16 THE SPECIAL MASTER: Is your person an Indian or
17 non-Indian?

18 MR. RADOSEVICH: No, this person is a non-Indian.

19 THE SPECIAL MASTER: Did he take that land from
20 an Indian individual?

21 MR. RADOSEVICH: This land is held in fee at the
22 moment. I think there is sufficient concern in and around
23 particularly Lander and some of the areas there as to exactly
24 who is representing their claims, and I presume there was
25 a part of the discussion this morning, but I think it has

1 to be clarified with respect to the representation of
2 non-Indian fee-held land.

3 THE SPECIAL MASTER: There was an excellent
4 question this morning that answers your question. Do you
5 want it from the record, or do you want it repeated by
6 Regina?

7 MS. SLEATER: I can do it very simply, leaving
8 out the theory.

9 Mr. Echohawk and I represent the United States
10 as Trustee for the trust assets on the Reservation.

11 We do not represent any Indian or non-Indian fee
12 lands.

13 The only claims we are making are claims that
14 we think are appropriate for the needs of the trust assets
15 within the Reservation.

16 MR. PERRY: If I might add, Your Honor, the
17 Tribes are making a claim with respect to fee lands owned
18 by Tribal members and direct descendents of Tribal members,
19 but not to the people you have been referring to, non-
20 Indians.

21 MR. RADOSEVICH: Would that also include then land
22 that is presently being leased by a non-Indian on the
23 Reservation?

24 THE SPECIAL MASTER: That's strictly between the
25 Lessor and Lessee.

1 MS. SLEATER: Is it trust land?

2 MR. RADOSEVICH: Yes.

3 MS. SLEATER: We are concerned with both the trust
4 land.

5 MR. RADOSEVICH: Then I would suggest that some-
6 how or another notice be given to many of these individuals.
7 I am sure they are under the impression that they are being
8 represented by the Federal Government in this particular
9 case.

10 Just in general discussions in that area and a
11 person who is not a client of mine in a water matter, but
12 he is under the impression that he is being represented by
13 the Federal Government, and I would presume there are other
14 individuals in the same situation.

15 THE SPECIAL MASTER: It's hard to answer that
16 question.

17 MR. WHITE: Your Honor, I might state that the
18 Attorney General's Office, one way or the other, has had
19 inquiries from, I believe, approximately half a dozen non-
20 Indians who are situated exactly the same as Mr. Radosevich's
21 clients are situated.

22 For some reason they are under the impression that
23 their interests are being protected by the Federal Government
24 and he's called us to get confirmation of that, and we have
25 suggested either that they are not being represented by the

1 Federal Government or that they contact Regina or Tom.

2 I know that -- or I believe and have some
3 personal knowledge that that's a widespread belief among
4 non-Indians on the Reservation, and I think Mr. Radosevich
5 has hit the nail on the head that something ought to be
6 done.

7 THE SPECIAL MASTER: Aren't virtually all of
8 those non-Indians on the Reservation residing in the ceded
9 portion that was given by title from the patent by the United
10 States after the ceding, in which case they are owned in
11 fee simple in effect and they have State water rights?

12 MR. RADOSEVICH: Yes, Your Honor. I'm not sure
13 whether that is true, but being located within the Reserva-
14 tion boundaries, my impression is from discussion that they
15 are being represented simply because they are in the
16 Reservation boundaries.

17 THE SPECIAL MASTER: That's not necessarily so.

18 MR. RADOSEVICH: Well, I realize this, but the
19 question is if, in fact, it is not so, and particularly now
20 when we are concerned about who has rights to water, what-
21 ever information or permission we are going to have to have
22 in order to determine what the land is being used for and
23 the water on it and particularly the ground water, I think
24 these individuals should somehow be noticed, whether it be
25 through directly the Federal Government in terms of a

1 statement of who they are representing --

2 THE SPECIAL MASTER: If you, Mr. Radosevich and
3 Regina and Mr. White and Mr. Rogers and Mr. Sachse and Mr.
4 Perry were to agree on what that notice should contain and
5 would direct that I publish it, I'll be glad to, but I
6 would be a little wary of drafting that notice.

7 You have non-Indians living in the ceded portion of
8 patented land and State water rights and, certainly they
9 should know better than the United States is going to
10 defend them, but maybe they do so.

11 The Attorney General's Office in some ways is
12 defending them, but I don't think the Attorney General
13 would want to say they have a duty to.

14 They have been served like anybody else and so
15 some have lawyers and some do not.

16 Then you have the non-Indians living on the leased
17 land, and maybe some fee land on a portion of the Reserva-
18 tion that is still trust land, and it may be a unique area,
19 so I'm not sure that a notice could apply to all of them
20 without adding to the confusion, and that is something to
21 avoid, and if you can all agree on what you think that notice
22 should be, I'll be happy to look it over.

23 MR. RADOSEVICH: I think there is one more aspect
24 to it which is being brought to light by the proposed Rules
25 for the Indian Water Code.

1 If these Rules are placed into effect, the
2 question is if you have land within a Reservation to
3 administer those lands, if the Code does not allow or if
4 the Indians Code is not consistent with the State Code, for
5 the administration of water, somehow or other these people
6 have to be taken into account to administer in an efficient
7 manner.

8 THE SPECIAL MASTER: Now, what you say is a
9 philosophical subject matter that I have discussed before.

10 When I go back to my rather well-worn old
11 cliché that you simply cannot have two managers on a river
12 -- and I have had some experience of trying to make peace
13 by use of a joint council or a joint commission for the
14 management of the levels of the lake and with power gener-
15 ation, agriculture and the other interests all represented,
16 and that has to be of major concern in this State, but
17 I can't do it in my lifetime unless I were to drop everything
18 else I'm doing and the good Lord gave me about twenty more
19 years than I'm entitled to, but maybe you younger people
20 can fashion the right kind of laws that will give the total
21 management of the Wind River number 3 -- or Water Division
22 3 and all the rivers in it to a State official, be he the
23 State Engineer, and he understands that he's charged with the
24 Constitutional duty of protecting all the water rights in
25 that area, including those interests involved of the United

1 State of America, of the Indians, and of various types
2 of individuals, the Tribes, and all others.

3 When he does and the codes are simplified, when
4 he recognizes the exceptions from existing State law now,
5 of these Indians' rights and when the Indians understand
6 that we are trying not to integrate the society, but
7 certainly make possible the management of these resources
8 with a fair hand to everybody, that day will come, but I
9 don't think you can do that now.

10 I would like to do that now in this case if I
11 can, and maybe I will take a whack at it in the Decree and
12 probably get in trouble, but I would like to do something
13 like that if I can.

14 The longer I'm in the case the more I'm restrict-
15 ing myself back to the fundamentals of what Judge Joffee
16 asked me to do, and that is to adjudicate any interests in
17 the right to use the water and all other sources arising
18 from the premise described in paragraph two, and I'm going
19 to do that and nothing else, and if I have to say I haven't
20 had time to look at the permits, all I did was adjudicate
21 a water right, he'll understand.

22 MR. RADOSEVICH: I certainly understand you want
23 to focus and understand the parameter, but I think in this
24 particular case there is sufficient question that this
25 ought to be addressed somehow giving these people notice

1 that they are not being represented and should seek
2 independent counsel or themselves ... participate in
3 these matters.

4 Several other questions arise whether because
5 the land was originally part of the Reservation and later
6 -- I'm not sure when that was -- will actually that water
7 right relate back to 1868? These individuals may have
8 sufficient claims. If they have irrigable land that is
9 not presently being irrigated, should they be --

10 THE SPECIAL MASTER: This Decree will certainly
11 state with clarity and unambiguous language, I hope, that
12 a reserved right going back to 1868 shall inure to and it
13 will be specific and as to who it will not inure to, and
14 that will be quite clear.

15 If the 1868 date applies to the entire reservation
16 or approximately the entire Reservation, I suppose there
17 ought to be some notice with virtually none of the State
18 rights, but if it applies to only a certain portion, then
19 we will have to open up the whole stipulation, and you may
20 be years in the United States wanting an examination of
21 every water right as meticulously as you see the Reservation
22 being examined now in virtually every acre, so all we can
23 do is hope that as we progress, some of these matters will
24 be attended to, reconciled, laid to rest or resolved, and
25 if you think we have to put a notice in the papers regarding

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those specific people on the Reservation whose water
position is a unique one and they are not sure whether
they are in the Federal protection or State protection or
neither, again I say if you will confer on it with the
Attorney General of Wyoming and with Regina and somebody
through the Indian Tribes, we'll try to work out something
agreeable, but I don't feel the duty to have to do that.
I feel that service has been had on all Defendants and
all parties involved.

* * * * *

1 MS. SLEATER: Your Honor, if I could
2 state for the record, the United States has
3 tried, I've only personally received one
4 inquiry from a fee owner on the Reservation
5 who wanted to know if I was representing them,
6 and I told them no, regrettably I wasn't.
7 But we did serve our Statement of Claims because
8 we wanted as much as possible people to know
9 who we were representing and who we weren't,
10 and when we served our statement of claims, it
11 says in its opening portion, this claim is only
12 for trust lands or trust lands on the Reservation,
13 was served on the mailing list of 800 or 1,400,
14 whatever, the counsel and pro se, because I
15 remember I got hassled by my office for the
16 copying bill. But we did try to let them know
17 what our claim was, and I feel at this time in
18 an awkward situation because I understand Mr.
19 Radosevich's concern. It's been a concern of
20 mine not only insomuch as people on the Indian
21 Reservation, but there are a lot of people in
22 the Basin who you bump into on the street and
23 they say I'm not participating because I don't
24 want to get involved in that, I want to keep
25 my rights separate. And the people don't

1 understand a legal process, and the fact that
 2 if there's been a notice of a lawsuit, they
 3 have to come in or not, but either way it
 4 might affect their rights.

5 But I don't think it's appropriate at
 6 this time for all of us to send out notices
 7 saying who we represent and who we don't
 8 represent. Perhaps ~~it~~ generally as the suit
 9 is going on there's been coverage in the local
 10 papers, and I think that's one of the reasons
 11 these questions are coming out more now because
 12 people are becoming aware of it, and as individuals,
 13 are talking to a lawyer or talking to someone
 14 involved, that the issue is resolving itself
 15 with some clarification.

16 MR. RADOSEVICH: I think there are as
 17 many lawyers that are confused about this particular
 18 issue as there are individual water rights and
 19 landowners in that area. And I disagree with
 20 Regina to the extent that I don't think we
 21 should do nothing. I think we ought to have a
 22 procedure, whether there's a legal notice, who
 23 is represented and who is not so that they can
 24 make this choice. I think they can call down
 25 to the office, they can check with some attorneys,

1 but I've had an attorney call me and he said
2 who is really representing who here. And
3 frankly, I presumed in all honesty that you were
4 representing all of the area in the Reservation.
5 And that I think the question is legitimate
6 enough and it's important enough, and in the
7 aggregate, the acreage may not be very large,
8 but to the individual --

9 THE SPECIAL MASTER: Again, I repeat what
10 I've said twice now regarding my willingness
11 to cooperate. I don't feel a duty upon me to
12 proceed much further by way of notice. I've
13 run some big notices, not that I'm worried about
14 the coverage, but everytime I run one I get
15 some back in the mail with big language across
16 it; "What's this all about? If this affects me
17 I'm all 'agin' it."

18 What this stuff means, all sorts of stuff
19 comes back in the mail to me. But if you feel
20 there are some who should have a notice and you
21 all will agree to that notice, your agreement
22 ended as a concurrence, and Counsel don't
23 take exception to it or find that in some way
24 that I erred, I will certainly do it.

25 MR. WEBSTER: I'd like to, on behalf of

1 some people in Owl Creek, I notice there is
2 substantial confusion with regard to those water
3 rights. But I've set through here today and I
4 heard the discussion this morning, and I've
5 heard what Mr. Perry just said this afternoon,
6 and I'll be doggone if I'm still not confused
7 as to who is representing the Indians owning
8 fee land on the Reservation.

9 Now, if their claim includes some land
10 on the Reservation that's in fee, the Indians
11 claim, the Tribal claim, then it would seem to
12 me that they would be representing the Indians
13 who own that fee land. From the discussion
14 this morning, I understood that they were not,
15 and I think Mr. Radosevich, what he's saying
16 is absolutely correct, because I think it's
17 far from clear, and it's a problem in my mind
18 and I'm sure it's a problem in yours as to who
19 are representing those people.

20 MR. PERRY: If I could respond to that.

21 THE SPECIAL MASTER: Yes.

22 MR. PERRY: First of all, the United
23 States is making no claim on behalf of Indians
24 who own fee lands on the Reservation.

25 MR. WEBSTER: I'm misunderstood you, I'm sorry.

1 MR. PERRY: Your Honor, excuse me --

2 THE SPECIAL MASTER: Maybe we ought to
3 adjourn.

4 MR. PERRY: Excuse me, Your Honor, If
5 I was misunderstood, we do not represent the
6 individuals involved, we represent the Tribes.

7 THE SPECIAL MASTER: You just got through
8 saying that you represent those individuals who
9 own their own land if they're members of the
10 Tribe.

11 MR. PERRY: I'm making a claim on behalf of
12 the Tribes, only on behalf of the Tribes to serve
13 lands that are owned by Tribal members in fee.
14 The clan is a Tribal clan.

15 MR. WHITE: I'd just like to find out, Bill,
16 are you saying the Tribes are claiming water
17 rights based on land owned by people that you
18 don't represent?

19 MR. PERRY: The Tribes, it's the same as
20 we were talking about this morning with lands
21 owned in trust by individual members. The Tribes
22 are asserting a claim based on lands owned by
23 the Tribes, by individuals in trust and by
24 Tribal members in fee. It's a Tribal claim,
25 Tribal members have a right to share in the use

1 MR. PERRY: The Tribes now -- I represent
2 the Shoshone Tribes. The Tribes are making
3 claim for lands owned by Tribal members and
4 direct descendants on the Reservation. It's
5 a portion of the Tribal claim and that seems to
6 me that that's a clear explanation for you.
7 Does that --

8 MR. WHITE: I sure don't understand it
9 now.

10 THE SPECIAL MASTER: Does it -- By that
11 token, does Mr. Rogers and his firm, represent
12 the Shoshones who own their own land in fee
13 who are members of the Tribe?

14 MR. WEBSTER: That's the issue.

15 MR. WHITE: That's the point.

16 THE SPECIAL MASTER: You just got through
17 saying your firm represents the Indians on the
18 Reservation who owned their own fee as long as
19 they are members of the Tribe. That's just what
20 you said, I believe. Is that a fact?

21 MR. PERRY: Yes, Your Honor.

22 THE SPECIAL MASTER: All right. That's
23 not what I understood this morning.

24 MR. WHITE: That's right, Your Honor. And
25 I'm not sure I still understand it.

1 of that water.

2 THE SPECIAL MASTER: I have rather specific
3 notes, and I think they're accurate, taken from
4 Regina's statement this morning. And this will be
5 in the record, and I think it will govern and it
6 deals with three classes of Indian and their land
7 on the Reservation. Class 1 is Tribal trust land
8 period, and that's owned and administered by the
9 Tribal officials. And it's theoretically owned
10 by every member, the beneficial owner of it is
11 every enrolled member of the Tribe.

12 Class 2, those lands, the title is in the
13 United States but it's beneficially and in
14 trust for certain particular individuals who
15 live on it who are Indians.

16 And Class 3, the Indian is the owner in fee
17 simple having taken a title in fee simple.

18 MR. PERRY: That's right, Your Honor. On
19 behalf --

20 THE SPECIAL MASTER: You have garbled that
21 up a little bit by now telling us that you do
22 not -- First you said you represent people in
23 all three of these categories.

24 MR. PERRY: We don't represent people in
25 all three categories, we represent the Tribes.

1 The Tribes are asserting a claim on behalf of
2 the lands which fall in these three categories.

3 THE SPECIAL MASTER: All three categories?

4 MR. PERRY: That's right, Your Honor.

5 MR. WHITE: Your Honor --

6 THE SPECIAL MASTER: Then you do represent
7 the fellow whose got himself a piece of land?

8 MR. WHITE: I think I got it figured out
9 I think, Your Honor, and I've got a motion.

10 I would move, Your Honor, that those
11 portions of the Tribes' claim which are based
12 on lands owned by persons which either Mr.
13 Rogers' firm or Mr. Sachse's firm do not
14 represent, in other words, if they're claiming
15 water for lands owned by people that they do
16 not represent, that those claims be dismissed.
17 I'll follow it up --

18 THE SPECIAL MASTER: That portion of the
19 claim be dismissed. I'd be happy to do that if
20 you tell me who those people are.

21 MR. WHITE: I think we can do it pretty
22 easily with a little bit of discovery and I'll
23 make a written motion to follow up on it.

24 THE SPECIAL MASTER: We're not going to
25 move on those things right now because you'll

1 get those things active now. But I will get
2 back, George, to your --

3 MR. RADOSEVICH: I'd like to make it as a
4 motion.

5 THE SPECIAL MASTER: You think some notice
6 is in order now?

7 MR. RADOSEVICH: I move --

8 THE SPECIAL MASTER: How many people do you
9 feel are involved?

10 MR. RADOSEVICH: Your Honor, I don't know.
11 My representing private individuals --

12 THE SPECIAL MASTER: Do you still represent
13 the City of Lander?

14 MR. RADOSEVICH: Yes, I do.

15 THE SPECIAL MASTER: Well, let me strongly
16 suggest and urge upon you, as a part of your
17 duties as an excellent member of the bar and
18 helper to the Special Master, as all of you are
19 to help do justice, you, see if you and Mr.
20 White and Regina and the counsel for the Tribes
21 can agree on what kind of an order, and I will
22 sign it and I will run it in the papers at your
23 direction.

24 MR. RADOSEVICH: Thank you, Your Honor.

25 THE SPECIAL MASTER: Thank you. Okay.

1 Do we want to continue for an hour or so, Mr.
2 White and Regina?

3 MR. WHITE: Could I have just a minute,
4 Your Honor?

5 THE SPECIAL MASTER: All right.

6 (Brief pause.

7 MR. WHITE: Could we have about a five
8 minute recess, Your Honor?

9 THE SPECIAL MASTER: All right. I'll just
10 stay, we'll stay in session. You go ahead and
11 take your five minutes.

12 (Thereupon a five minute
13 (recess was taken.

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THE SPECIAL MASTER; All right. We will
stand in recess until 9:15 in the morning.
MS. SLEATER; Thank you, Your Honor.
(Recess at 4:08 p.m.)

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