

3-17-1981

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Case # 4993

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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 _____
3/27 1981
Margaret V. Hampton CLERK
~~_____~~

VOLUME 28
Morning Session
Tuesday, March 17, 1981

ORIGINAL

APPEARANCES

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FOR THE STATE OF
WYOMING:

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FOR THE UNITED STATES
OF AMERICA:

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FOR THE SHOSHONE
TRIBE:

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FOR THE PRIVATE
WATER HOLDERS:

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MR. MICHAEL D. WHITE
Special Assistant Attorney General
2900 Energy Center One Building
717 17th Street
Denver, CO 80202
ALSO: MR. STUART RIFKIN and
MR. SCOTT KROB

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

and

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

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

MR. MICHAEL McCARTY
Attorney at Law
P.O. Box 589
Cody, WY 82414

1 THE SPECIAL MASTER: Okay, let's resume
2 this morning.

3 Yes.

4 MR. MCCARTY: Your Honor, a request or point
5 of information as far as private individuals are
6 concerned that we represent is that on what time
7 frame does this hearing plan to be held in Worland?

8 THE SPECIAL MASTER: It would depend on how
9 soon we terminate the Case in Chief for the United
10 States and of the Tribes in Cheyenne. We had originally
11 hoped that that would be sometime following or in
12 June, hopefully. Nothing would please me more if we
13 could schedule the July hearings in Worland.

14 MR. MCCARTY: Thank you.

15 MR. WHITE: Your Honor, the last time I
16 heard, I thought we were going to have the Tribes'
17 Case in Chief in Worland. We're going to go to
18 the State's case in Worland, is that the plan? I
19 mean I don't care, but --

20 THE SPECIAL MASTER: No. We were to move
21 to Worland. I can look this up in five or ten minutes
22 and get an exact answer on it, but my belief was that
23 the scheduling was to conclude and leave for Worland
24 a reasonable time for showing of impact. And I had
25 asked Counsel for other defendants to be sure that

1 there was not duplicative or redundant material that
2 would go on and on. We would take two or three days
3 and get it done. Now, if the Indians, if the Tribes
4 desire that they want more time for hearings up there
5 instead of down here, they can say so, we can make
6 some arrangements if everybody agrees to it.

7 MR. PERRY: No, we prefer to have our portion
8 of the case down here.

9 THE SPECIAL MASTER: That's what I thought
10 you said before.

11 MR. McCARTY: Your Honor, on behalf of private
12 irrigators which we represent, I would like to request
13 that the State's case be held in Worland. I believe --

14 THE SPECIAL MASTER: We're set now with it,
15 you know, the less changes we make now from what's
16 set in the schedule I think the better off we're going
17 to be.

18 MR. WHITE: Your Honor, although I'm not
19 absolutely wild about spending weeks in Worland, I've
20 got no objection on behalf of the State of putting our
21 case on in Worland.

22 THE SPECIAL MASTER: I appreciate that, but
23 you also had no objection of leaving it where it is
24 at the time we set it, so that's why it's where it is.

25 MR. WHITE: Well, Your Honor --

1 THE SPECIAL MASTER: NO, I mean that in part
2 is why it's where it is. Everyone, virtually everyone
3 accepted the setting as it is now, and I'm reluctant
4 to change it..

5 MR. WHITE: Your Honor, for the record, I
6 want to say -- I don't want to argue with you. At
7 the time it was set the State of Wyoming joined with
8 private counsel in suggesting the hearing ought to be
9 in Worland. You can set it in Denver, I don't want
10 to argue whether it should be in Denver --

11 THE SPECIAL MASTER: I'd like you to cite
12 me -- you may be right. I'd like to be assured of
13 your correctness, Mr. White. Why don't you cite me
14 the page in the transcript of where you joined with
15 private counsel requesting that I hold the State's
16 case in Worland.

17 MR. WHITE: The whole case, Your Honor. I
18 think --

19 THE SPECIAL MASTER: I'd like to see just
20 what you said. If you'd be good enough, I'd like to
21 see that.

22 MS. SLEATER: Your Honor.

23 THE SPECIAL MASTER: Yes.

24 MS. SLEATER: Just for the record, the
25 United States would like to renew its position that

1 the hearings be held in Cheyenne.

2 THE SPECIAL MASTER: The hearings are set,
3 ladies and gentlemen; the hearings are set. We don't
4 have to make motions or resolutions, memorials,
5 impeachments, beseechments, supplications, none of
6 this is necessary. The hearings, subject matter is
7 set and the date is set.

8 Okay, Mr. Krob, you may continue.

9 Q (By Mr. Krob) Mr. Billstein, if we could just
10 pick up some of the loose ends from yesterday's
11 testimony. If you would, first turn to, examine
12 C-68. I believe yesterday we discussed a parcel
13 in Section 30 which covered the East 1/2 of the
14 SE 1/4. Do you recall that discussion?

15 A Yes. The problem we had was that there was no
16 map accompanying your exhibit so we didn't know
17 which 12-acre tract we were referring to.

18 Q I may be confusing you a little. I'm not on
19 the 12-acre parcel. This is roughly an 80-acre
20 parcel on Exhibit 68. I believe the 12-acre
21 parcel was on Exhibit C-93.

22 A I can't recall that. We might as well start
23 over in this exhibit.

24 Q Okay. We discussed proof 18913, which on its
25 billstein-cross-krob

1 face showed 40 acres in the NW 1/4 -- excuse
2 me, showed 40 acres in the NE 1/4 of the SE 1/4,
3 and 40 acres in the South 1/4 of the SE 1/4 as
4 having been adjudicated. I then asked you if
5 based on that proof, wasn't it true that all of
6 the East 1/2 of the SE 1/4 should be delineated
7 in red on Exhibit 68. Do you recall that
8 discussion?

9 MR. ECHOHAWK: Your Honor, I believe that
10 has been asked and answered, and gone through
11 and decided.

12 THE SPECIAL MASTER: The objection is
13 sustained.

14 MR. KROB: Your Honor, the reason that I
15 asked this, we went through the entire discussion
16 and Mr. Billstein at one point stated that it's
17 correct that the SW 1/4 -- the NE 1/4 of the
18 SE 1/4 is adjudicated and that the SE 1/4 of the
19 SE 1/4 is adjudicated, and then when I asked
20 him if that meant that the entire East 1/2 of
21 the SE 1/4 should be marked as adjudicated
22 rather than unadjudicated, he said not the entire
23 tract, according to the transcript. Now, the
24 reason that I've asked the witness these questions

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is because I would like to know what portions of the East 1/2 would not be marked as adjudicated if both the NE of the SE and the SE of the SE are adjudicated.

THE SPECIAL MASTER: I don't think we should permit that question. He said not the entire tract. I don't know what he meant by tract, but I can sure as heck add 40 and 40 and get 80 out of it and so can anybody else. I don't need his question answered to complete this case.

MR. KROB: Okay.

* * * * *

1 Q (By Mr. Krob) Turning next then to Exhibit 93,
 2 I believe was the tract we were discussing
 3 yesterday, and you were uncertain as to which tract
 4 you were referring to at the time?

5 A That's right.

6 Q Upon visual examination of Exhibit C-93, how many
 7 tracts or portion of tracts are there in the NE 1/4
 8 of the SW 1/4 of Section --

9 THE SPECIAL MASTER: Did you ask NE 1/4 of
 10 SW 1/4?

11 MR. KROB: Yes, of Section 32.

12 A (By the Witness) There's a portion of land out of
 13 a very large tract of land in Section 32 below the
 14 Coolidge Canal that's in --

15 Q (By Mr. Krob) And that's the only portion that's
 16 in that 1/4 corner section; is that right?

17 A If you want to break that tract into parcels,
 18 which they haven't been.

19 Q It's the only part of that 1/4 corner section
 20 that is marked in blue; is that correct?

21 A There's a portion of the NE 1/4 of the SW 1/4
 22 that's in blue that's a part of Section 32.

23 Q Handing you what's been marked Plaintiff's Exhibit
 24 HB-2011, would you examine that?

25 billstein - cross - krob

1 MR. ECHOHAWK: Your Honor, before we proceed,
2 I would again request from the State of Wyoming
3 the map that accompanies the permit because we are
4 not talking about the full 40-acre parcel.

5 MR. KROB: Your Honor, I believe the questions
6 I will address to the witness won't require the
7 use of the map.

8 THE SPECIAL MASTER: Objection overruled.
9 I think this in within the two breakdowns under
10 the SW 1/4, and it will not require a map.

11 However, go ahead and answer.

12 Q (By Mr. Krob) Have you examined the document,
13 Mr. Billstein?

14 A Yes.

15 Q Now, based on the Exhibit C-93 and the maps which
16 you have with you, can you tell us whether any of
17 the acreage that was adjudicated under permit
18 18414 was delineated in blue on Exhibit C-93?

19 A We're not looking at permit 18414.

20 Q Excuse me. Proof 18414.

21 A Okay. Did you have a particular acreage delineated
22 on your backup information for that small portion of
23 that tract?

24 Q No, I'm asking you to give us an opinion based
25 billstein - cross - krob

1 only on the HB-2011, the maps you have, and the
2 exhibit. I have no other information with me
3 right now.

4 A. The maps I have are downstairs being worked on.
5 There's 28 acres, according to Exhibit HB-2011,
6 in the NE 1/4 of the SW 1/4. There's no map
7 accompanying this proof. I'm looking at a very
8 small tract of maybe ten or twelve acres.

9 Q. That's fine. If you don't know, that's --

10 A. From the information you have given me, I don't
11 know the relationship between that twelve acres
12 and the remaining 28 acres.

13 Q. All right. That's all I needed to know.

14 THE SPECIAL MASTER: Could some of the
15 28 acres designated in the State water right
16 have been included in the blue that you have
17 indicated in that same 1/4 section?

18 THE WITNESS: Well, we're looking at 40
19 acres, and that shows about twelve -- we show
20 28 on the certificate of appropriation, Your
21 Honor. Our program was to not include those, and
22 without having the maps so I could tell exactly
23 where those 28 acres are, I would assume right
24 now that we've excluded that,

25 billstein ~ cross ~ krob

1 THE SPECIAL MASTER: But you are not sure?

2 THE WITNESS: I'm certainly not sure without
3 the map accompanying the permit, Your Honor.

4 THE SPECIAL MASTER: All right.

5 MR. KROB: One final matter, Your Honor.

6 Yesterday -- this involved Exhibit 94, a tract in
7 the NW 1/4 of the NW 1/4 of, I believe, Section 32.

8 THE SPECIAL MASTER: Section 32 or 34?

9 MR. KROB: Let me check.

10 Section 34. And although Mr. Billstein was
11 willing to testify that all of that tract should
12 have been delineated as adjudicated, it involved
13 a 1/4 Section of a 1/4 Section, roughly 40 acres.

14 We showed him the two proofs of 20 acres each.
15 There was some concern expressed by counsel for the
16 United States and by the Master that those two
17 parcels of land, 28 acres each, that they did not
18 overlap, that they were mutually exclusive.

19 In response to that concern, I would at this
20 time tender to the Court Plaintiff's Exhibit HB-2012A
21 and 2013A.

22 THE SPECIAL MASTER: They clear it, do they?

23 MR. KROB: Yes, they are proofs of
24 appropriation, and I believe Your Honor will find

25 billstein - cross - krob

1 that they also include affidavits filed in
2 connection with the proofs of appropriation which
3 show that one owner owned the east half of the
4 1/4 corner section and the other owner owned the
5 west half of the 1/4 corner section.

6 THE SPECIAL MASTER: So is it correct for the
7 Court to assume that the 40 acres were delineated
8 in blue and should not have been on C-94?

9 MR. KROB: Yes, Your Honor.

10 THE WITNESS: Your Honor, I think we were talking
11 about this small tract here (indicating), and
12 the area to the east of that is in fee ownership,
13 which was not included. I think the question was
14 toward that we were only talking about this
15 (indicating) --

16 THE SPECIAL MASTER: One 20?

17 THE WITNESS: Roughly 17 acres rather than
18 40 acres.

19 THE SPECIAL MASTER: So are you saying that
20 you do not believe that all 40 acres in these two
21 exhibits, 2012A and 2013A were delineated blue on
22 C-94, but only half of them were? Is that what
23 you are saying?

24 THE WITNESS: Let me just --

25 billstein - cross - krob

1 THE SPECIAL MASTER: Look them over?

2 THE WITNESS: Yes.

3 THE SPECIAL MASTER: Okay.

4 MR. KROB: I believe Mr. Billstein may be
5 correct, Your Honor, that it's not the entire
6 1/4 corner section that may be mismarked. The
7 rest of the 1/4 corner section was not marked at
8 all.

9 MR. ECHOHAWK: Mr. Krob, could we get 2012A?
10 We only have 2013A.

11 MS. SLEATER: Your Honor, if I could also point
12 out at this time, wasn't this the exhibit that they
13 were to provide the map? And in looking at the
14 exhibit that was provided to us in 2013A, there is
15 nothing in that that would support the statement
16 that Mr. Krob made.

17 I think the only way we will be able to
18 identify with specificity this acreage is with the
19 map.

20 MR. KROB: Your Honor, I have with me the map.
21 It's a large map showing the entire Coolidge Ditch
22 unit and lacks the specificity that the documents
23 contained in 2012A and 2013A contained because
24 they refer specifically to the 1/4 corner section
25 billstein - cross - krob

1 we are concerned with.

2 THE SPECIAL MASTER: In other words, you feel that
3 the two addendums will do a better job of describing
4 this than a map could?

5 MR. KROB: That's correct, Your Honor.

6 THE SPECIAL MASTER: With each boundary
7 description?

8 MR. KROB: Yes.

9 THE SPECIAL MASTER: All right. Regina, that
10 should be satisfactory.

11 MS. SLEATER: The United States is going to
12 object to this question on these exhibits insofar
13 as the exhibits do not break it down any further
14 than it was broken down previously.

15 THE SPECIAL MASTER: The objection will be
16 overruled. The witness has already cut it down
17 to an 18-acre involvement and not a 40-acre
18 involvement. I don't see how that can be improved
19 with the map, so let's proceed to the next point.

20 MR. WHITE: Your Honor, Mr. Krob finished
21 up our adjudicated lands overlaps, and I would
22 like to move into a different area.

23 THE SPECIAL MASTER: Very well. Okay,
24 Mr. White?

25 billstein - cross - krob

1 Q (By Mr. White) Mr. Billstein, referring to
2 Exhibit C-137 which is on the easel, isn't
3 it true that the vast majority of the land,
4 which is summarized by acreages on that exhibit,
5 is included within permits, not certificates
6 that we were previously talking about, but
7 permits issued by the State Engineer?

8 A There is a Permit of Record on most of the
9 34,850 acres defined in C-137.

10 Q Isn't it true that there would be a Permit of
11 Record on over 90 percent of that land?

12 A That kind of breakout wasn't terribly important
13 to me in that most of the Wind River Federal
14 Irrigation Project was part of a Permit of
15 Record. Ninety percent appears reasonable.

16 Q That would be for the entire 35,850 acres?

17 A Yes.

18 MR.. WHITE: Your Honor, I'm going to have
19 to ask for a recess. I thought this was going
20 to take about three hours to get that answer out.
21 I need to get some more exhibits.

22 THE SPECIAL MASTER: Did you say 35,000
23 just then?

24 MR.. WHITE: I said approximately 35,000 I

25 billstein-cross-white

1 think, Your Honor.

2 THE SPECIAL MASTER: I see.

3 Q (By Mr. White) Is that right?

4 A Approximately 35,000, of which 90 percent has
5 some Record of Permit over time.

6 THE SPECIAL MASTER: Permits, may I ask,
7 other than the specific -- Let's strike that.

8 Permits that have not gone to adjudication
9 with the Board of Control but that had been
10 issued?

11 THE WITNESS: That's right, Your Honor.

12 The main areas are the Wind River Federal
13 Irrigation Project where they had significant
14 acreage under permit in the early 1900's. Very
15 little of that acreage was taken by the
16 individuals to adjudication.

17 Q (By Mr. White) But isn't it true that the 90
18 percent figure would also apply to areas outside
19 the FIP's as well?

20 A Most certainly. Maybe not the same percentage.

21 Q But when taking them total, lands outside of
22 the FIP's would be overlapped to the extent of
23 approximately 90 percent by permits, unadjudicated
24 permits?

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THE WITNESS: Would you repeat that?

(Thereupon the following question was read back as follows: "Q But when taking them total, lands outside of the FIP's would be overlapped to the extent of approximately 90 percent by permits, (unadjudicated permits?"

THE SPECIAL MASTER: He already said in effect, yes, to that. I put down maybe. It could well have been 90 percent.

MR. WHITE: Could I get a yes or no, Your Honor? It might save us some time.

THE SPECIAL MASTER: He's already on record as having said maybe, could be.

THE WITNESS: I didn't understand the question. You were talking about overlap.

THE SPECIAL MASTER: Try to state it one more time, Mr. White.

Q (By Mr. White) On Exhibit 137 do you see the line that says 25,164?

A Yes.

Q Considering only the lands which are summarized below that value in the left-hand side of the exhibit and all the lands on the right-hand side of the exhibit, isn't it true that 90 percent of billstein-cross-white

1 those lands outside of the FIP's are covered by
2 an unadjudicated permit issued by the State
3 Engineer?

4 A It's a relatively high percentage. I don't know
5 90 percent. We're talking about a considerable
6 amount of private ditches that were never filed
7 over history. Perhaps they were advised that they
8 didn't have to file, but there is a lot of
9 acreage in that category.

10 The only thing I can say outside of the
11 Wind River Federal Irrigation Project, a significant
12 portion of those lands have some sort of Permit
13 of Record with the State Engineer's office. This
14 occurred in roughly the 1905 to 1915 time frame.

15 THE SPECIAL MASTER: Do you want a short
16 break?

17 MR. WHITE: No. I think I need to go ahead,
18 Your Honor. It's an important aspect of the
19 case to deal with the percentage of lands permitted.
20 We got a 90 percent figure and I was going to
21 call it quits.

22 THE SPECIAL MASTER: I'misunderstood you.
23 I thought --

24 MR. WHITE: If he would have said 90 percent
25 billstein-cross-white

1 applied to the lands outside the FIP, Your
2 Honor, I would have been done with this area.

3 MS. SLEATER: Your Honor, at this time we
4 would like to interpose an objection to the
5 entire line of questioning. I thought if it was
6 only going to be short answers with one or two
7 questions we wouldn't object. However, if this
8 is going to go on, the permits have no bearing
9 at all upon the claim being made for the United
10 States. This claim is being made, insofar as
11 Mr. Billstein is concerned, he's talking about
12 lands in use. The fact that there was a permit
13 or not a permit is not relevant to either Mr.
14 Billstein's testimony or the case as a whole.
15 It's a legal argument, not an evidentiary matter.

16 Mr. White has previously espoused his
17 views on this and the United States' position on
18 this is, of course, whether or not there was a
19 permit does not matter. That was only a courtesy
20 effort being made at the time and does not
21 affect one way or the other whether they're
22 reserved water rights for the Indian Tribes, and
23 I think it's inappropriate at this time for Mr.
24 White to so question Mr. Billstein since his

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1 testimony was totally that these lands were in
2 use at this time and not at all based on whether
3 or not they were permitted.

4 THE SPECIAL MASTER: The objection is
5 sustained, Mr. White.

6 MR. WHITE: Can I make an argument on that?

7 THE SPECIAL MASTER: Well, I was going to
8 say before the objection is sustained, if you
9 have an inquiry or a question or two that might
10 refresh the witness' memory regarding the
11 remaining 9,000 acres or so between the 25,164
12 and the 34 total, 9,000 say, give or take a few
13 acres difference to see if he can more accurately
14 determine whether the 70 percent of it may have
15 had permits, I'll permit that.

16 MR. WHITE: Thank you, Your Honor.

17 THE SPECIAL MASTER: But I think what Regina
18 has stated is primarily the case.

19 MR. WHITE: Well, Your Honor, in response
20 to what Ms. Sleater had to say, I would like to
21 suggest to the Court that this evidence is
22 perfectly relevant to the major issue in this
23 litigation. There are several major issues, but
24 one of the major issues that is perfectly relevant

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1 to is whether or not the United States made an
2 election of substantive remedies when these
3 permits were applied for.

4 THE SPECIAL MASTER: In 1905?

5 MR. WHITE: That's right. The law is, Your
6 Honor, and I'll pass out a page from Am Jur in
7 a moment, that when a person has the option of
8 going one of two ways, in this case applying for
9 a state water right or relying on a reserved
10 water right and he or she or it selects one way,
11 that's called an election of remedies or more
12 appropriately a choice between substantive rights.
13 I think that's the question. The State of Wyoming
14 takes the position here --

15 THE SPECIAL MASTER: May I interrupt you?

16 But if in 1905 there had not been an election,
17 there had not been an alternative yet, there had
18 been a ceding of some land, and the encouragement
19 of men of good will, both Indian and non-Indian
20 to file in Cheyenne with the State Engineer's
21 office and get yourself some state water rights
22 because the State is going to govern that water,
23 and it was done that way so there was no alternative
24 at that time when that selection was made,

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1 Mr. White,

2 MR. WHITE: Your Honor --

3 THE SPECIAL MASTER: Then came 1908 and
4 Winters.

5 MR. WHITE: Your Honor, if that was the
6 case, if there was no alternative in 1905, the
7 State of Wyoming would click its heels and clap
8 its hands and say the case is over. What the
9 position is, that the Tribes and the United States
10 is taking is that the reserved right existed
11 since the time of the Reservation. Winters at
12 best simply confirmed that particular right that
13 it always existed, and if in the period of 1905
14 to 1915, as Mr. Billstein described that option
15 was not available --

16 THE SPECIAL MASTER: Let me engage in this
17 very pleasant excellent legal discussion with
18 you on this point, that if it can be shown that
19 the Indians and their managers in 1905 knew that
20 there was an 1868 Reservation in their hearts and
21 souls in 1905, I'll buy your argument.

22 MR. WHITE: Your Honor, it's not only whether
23 they knew, but in this part of the case, specifically
24 whether the United States as trustee should have

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1 known and if Congress really did intend to
2 reserve water rights for the Reservation in
3 1868. If that's true, then there were two
4 alternatives available in the 1905 to 1915
5 time period. The United States elected one
6 of those and under the law this State -- and
7 I'll give you the Am Jur page now.

8 THE SPECIAL MASTER: Well, I'd like you to
9 put your argument in the record and put your
10 authorities in the record, Mr. White, because
11 it's an interesting and fascinating point, but
12 I'm constrained to say that I think Winters
13 settled this argument and I have no alternative
14 but to follow it.

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1 MR. WHITE: Your Honor, I don't think this
2 argument was involved in Winters because in
3 Winters the United States had not applied for a
4 State water right.

5 Here they did apply for a State water right,
6 and they elected their remedies. They made a choice
7 between substantive rights, and this is a page out
8 of Volume 25 of Am. Jur. 2d, and I would refer the
9 Court to -- that's shown at the top of the caption
10 of the page, and I would refer the Court to Section
11 7 in the last sentence.

12 It says, "Although the courts are not in
13 agreement whether an election of an inconsistent
14 remedial right is conclusive prior to judgment,
15 if a litigant chooses one of two or more substantive
16 rights, he is bound by his choice, regardless of
17 whether he obtains a judgment."

18 THE SPECIAL MASTER: Well, if you wish to
19 brief this, you are welcome, and if you wish to
20 reply brief, which you are both welcome to do -- I
21 don't want you to go to great tribulations.

22 MR. WHITE: It will be involved in a Rule 41
23 motion, Your Honor.

24 THE SPECIAL MASTER: That's what I was going to
25 say. It will no doubt be involved in a motion, but

1 that's interesting that you raised it.

2 MR. WHITE: It's part of the equitable
3 kaleidoscope of items in our earlier responses
4 which we previously raised which now we get to
5 when we are in the guts of the case on permits.

6 MS. SLEATER: Your Honor, if I could just
7 point out, briefly reading this and the footnote
8 attached, it appears that these citations and
9 this argument goes to an election of substantive
10 right when you are choosing one right in one lawsuit
11 and going to another in another lawsuit, which is
12 not the case here, and I would request that that
13 be kept in mind.

14 MR. WHITE: Well, Your Honor --

15 THE SPECIAL MASTER: We are not in danger of
16 excluding 34,000, give or take a couple of thousand,
17 acres of land in use without any water and let's --

18 MR. WHITE: We are only asking for 90 percent.

19 THE SPECIAL MASTER: I know you are.

20 MR. WHITE: I think the law is pretty solid
21 on this, but may I go ahead with a few questions,
22 and I think I can perhaps refresh the witness'
23 recollection on a couple of these items as the Court
24 suggested?

25 I might say the case law in Wyoming on that is

1 that the election need not be as a part of
2 the litigation.

3 Q (By Mr. White) Mr. Billstein, do you see on the
4 left-hand column about halfway down where it says,
5 "LeClair Irrigation District, 1,271 acres Trust
6 Land"?

7 A Yes.

8 Q I hand you what's been marked for identification
9 as Plaintiff's Exhibit HB-137-9, which is a copy
10 of a document which was received by discovery from
11 the United States, and I specifically direct your
12 attention to that portion of the document on the
13 right-hand side that says at the top, "Unadjudicated
14 Trust," and then those columns below that -- in
15 those words it says "In Use", and then a total
16 at the bottom of the page under the total column
17 of 1,260.1 acres, as well as the caption to the
18 page which says, "LeClair-Riverton."

19 Isn't it true that this document was prepared --
20 let me back up a second.

21 Isn't it true that those 1,260.1 acres,
22 according to this document, fall all within the
23 permit 7300 shown in the second column to the left?

24 A I believe there's an amended permit in approximately
25 billstein - cross - white

1 1940 that included these lands.

2 Q Isn't it true that the 1,260 acres shown in the total
3 for unadjudicated lands in use is approximately 99
4 percent of the 1,271 acres for the same area shown
5 on Exhibit 137?

6 THE SPECIAL MASTER: I shouldn't allow that
7 question, but go ahead. You can dig out what it
8 is.

9 MR. WHITE: Well, if he can't figure out
10 the percentage, he can tell us, Your Honor. He's
11 a qualified engineer.

12 THE SPECIAL MASTER: Here is my man with the
13 computer, a hand-held computer.

14 A. (By the Witness) That's basically correct.
15 There were some minor revisions between the time
16 this was submitted and the final numbers.

17 Q. (By Mr. White) Do those minor revisions affect
18 the totals -- the relative percentages, rather?
19 Excuse me.

20 A. An 11-acre difference, so --

21 Q. It doesn't affect the relative percentages; is
22 that correct?

23 A. No.

24 MS. SLEATER: Your Honor, I'm going to

25 billstein - cross - white

1 renew my motion at this time so far as --

2 THE SPECIAL MASTER: Let's let one more
3 question. If there's another 3,000 acres
4 involved in the Wind River Basin that Mr. White
5 can show that the 90 percent can apply --

6 MR. WHITE: Let me find a big one.

7 THE SPECIAL MASTER: If you can find a big
8 one, we will give you one more shot.

9 MR. WHITE: Could I have a couple of
10 minutes?

11 THE SPECIAL MASTER: Take five minutes and
12 I'll go get me my tape.

13 (Brief recess.)

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billstein - cross - white

1 MR. WHITE: One last inquiry in this area
2 with respect to permit overlap, Your Honor.

3 Q (By Mr. White) Mr. Billstein, referring to
4 Exhibit 137, in the upper or the top portion of
5 the right-hand side, do you see an entry of
6 1,812 acres within the North Fork of the Little
7 Wind?

8 A Yes.

9 Q I hand you what's been marked for identification
10 as HB-137-22, which is a similar document
11 provided during discovery by the United States,
12 and ask you whether or not -- or ask you whether
13 it is true that of the roughly 1,812 acres
14 shown on Exhibit 137 for North Fork Little Wind,
15 approximately 1,761 of those acres or 97 percent
16 fall within the permits shown on or in the
17 second column of that Exhibit HB-137-22? And I
18 would also point out that the fifth row in that
19 exhibit, 5th, 6th and 7th row indicated under
20 permitted acreage, and my total comes from the
21 first four rows where permit numbers are shown.

22 A Approximately 1,761 acres of unadjudicated lands
23 in use as defined on this exhibit fall within
24 areas of Permits of Record.

25 billstein-cross-white

1 THE SPECIAL MASTER: All right.

2 MR. WHITE: Your Honor, before going on
3 to the next area of cross-examination, I'm
4 wondering whether or not there might be an
5 arrangement which could ease that cross-examination,
6 particularly with respect to those tracts claimed
7 by the United States through Mr. Billstein, which
8 are located in or have acreages of two acres or
9 less. There are approximately 71 such tracts
10 comprising about 120 acres, and perhaps the
11 easiest thing to do would be to forego cross with
12 respect to those 120 acres if the United States
13 would simply eliminate those 120 acres located
14 in those one and two-parcel tracts from their
15 claims. And at this time I would ask the United
16 States to do so.

17 MS. SLEATER: I'm sorry, Your Honor, we
18 cannot agree to that.

19 MR. WHITE: Okay. Your Honor, I think then
20 we're going to have to --

21 THE SPECIAL MASTER: I may do something
22 about that if you're going into 71 questions on
23 these, or into 71 tracts with more than a few
24 questions on each tract to get to 120 acres total.

25 billstein-cross-white

1 You may be not just taxing the patience, my
2 patience, but really going beyond even what
3 records of endurance we know of in cases of
4 this kind. In Washington last month AT & T
5 has been sued by the Federal Trade Commission
6 the last four years on a horrendous anti-trust
7 case which has about 400 lawyers at work,
8 half of them going over depositions and records
9 of AT & T from the year it began and is just
10 now starting to talk finally some semblance of
11 settlement, although I see that's off again last
12 week. I'm reminded a little bit of this because
13 if something like this can be touched into in
14 a discovery and something made of it in a case
15 and presented, fine, but to think that we now
16 have to take what, Mr. White, four or five days
17 to deal with 120 acres in a Reservation of how
18 many acres on this Reservation?

19 MS. SLEATER: Approximately two and a half
20 million.

21 THE SPECIAL MASTER: Two and a half million
22 acres, our children won't be finishing this
23 lawsuit.

24 MR. WHITE: Your Honor, the problem is this
25 billstein-cross-white

1 is not what the State of Wyoming's claiming.
2 The United States made the claims with these
3 extremely small parcels.

4 THE SPECIAL MASTER: But you're doing cross-
5 examination on them, and you should recognize
6 120 acres give or take is a diminimus -- what's
7 the legal term for this?

8 MS. SLEATER: Diminimus.

9 THE SPECIAL MASTER: It's a bagetelle. Who
10 could care less if we come down to something
11 near justice on a matter of several thousand acres
12 difference let alone several hundred in this
13 litigation?

14 MR. WHITE: Well, Your Honor --

15 THE SPECIAL MASTER: I respect you for
16 fighting for every, you know, every conceivable
17 acre. I can appreciate that's your duty and
18 you're doing it, but I appeal to both sides on
19 this. But there has to be some reason and some
20 limitation upon minuteness, some limitation of
21 minute items or we'll just, as I say, we'll be at
22 this for decades. That's why you may proceed
23 into this and make one or two cases from which
24 the Court can draw some conclusions regarding
25 billstein-cross-white

1 the validity which the Court can draw some
2 conclusions regarding the validity of the claim
3 of 120 acres, but to spend three or four days
4 on it is, in my opinion, not justified nor
5 necessary, nor proper.

6 MR. WHITE: Well, 120 acres are sort of
7 folded into larger areas in cross-examination.
8 Your Honor, I suppose I'll just go ahead and
9 get started. I know the Court doesn't want me
10 to go very long, and I'll state that I am
11 prepared to make an offer of proof in each of
12 these areas we go into.

13 THE SPECIAL MASTER: Very good.
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1 MR. WHITE: I'm not encouraging you to make
2 me make an offer of proof, Your Honor. I just wanted
3 you to understand that I was ready.

4 THE SPECIAL MASTER: Very good.

5 MR. WHITE: Off the record.

6 (Off-the-record discussion.)

7 THE SPECIAL MASTER: On the record.

8 Q (By Mr. White) Mr. Billstein, I direct your attention
9 to Exhibit No. 78 -- let me strike that.

10 MR. WHITE: Your Honor, at this point we
11 intend to review the areas covered in blue on a
12 number of the exhibits in the series 56 through 136
13 and address the conclusion of draws and ravines
14 in the acreage totals of Mr. Billstein. That's
15 where we are starting, and we'll go on to other
16 areas after you shut me off in each area, if
17 you do.

18 Q (By Mr. White) With respect to Exhibit 78, isn't
19 it true that there is a draw or ravine traversing
20 a blue area in Township 1 South, 1 West, in the
21 NW 1/4 of Section -- excuse me -- in Section 16,
22 in the NW to the NE, as well as the NE of the NW,
23 and the NW to the NW, and in Section 9 in the SE
24 to the SE and the SW of the SW?

25 billstein - cross - white

1 A. What was the first section?

2 Q. Sixteen.

3 (Brief pause.

4 (Off-the-record discussion.

5 THE SPECIAL MASTER: Let's go off the record
6 until you come back if you want.

7 (Off-the-record discussion.

8 THE SPECIAL MASTER: Back on the record, please.

9 THE WITNESS: I've found the small drainage
10 way you're talking about.

11 Q (By Mr. White) Is that shown as Dead Horse Slough?

12 A. Looking at the Wind River quadrangle, there is a
13 small drainage called Dead Horse Slough that
14 crosses through that tract and corresponds to the
15 area that you're asking about.

16 Q How deep is that slough, if you know of your
17 personal knowledge?

18 A. I can't recall the physical characteristics of
19 the slough, although it's interesting to note
20 on the assessability records where if there's anything
21 that is of any major physical significance, the
22 Bureau of Indian Affairs would go in and map it
23 out as a 3 land and --

24 THE SPECIAL MASTER: As a what land?

25 billstein - cross - white

1 THE WITNESS: As their designation as a Class 3 --

2 THE SPECIAL MASTER: Land?

3 THE WITNESS: -- which it would have no
4 correlation to Mr. Kersich's classes. This is a
5 separate designation that has not been introduced
6 in the court case yet, Your Honor.

7 THE SPECIAL MASTER: I see.

8 THE WITNESS: It's just an assessability
9 designation, if you would.

10 THE SPECIAL MASTER: It's neither a class
11 or a type as we know it in water law or in
12 engineering?

13 THE WITNESS: I think the proper way to refer
14 to it would be as assessability class.

15 Q (By Mr. White) To your personal knowledge, have
16 any crops been grown on that land within the Dead
17 Horse Slough?

18 A Again, crops, specific crops was not a part of
19 our mapping exercise. Again, three-quarters of
20 the slough, if you would, are mapped as presently
21 assessable or lands under the BIA definitions that
22 are paying O&M water, so we're talking about a
23 drainage way that is, in fact, paying on water to
24 be delivered to it.

25 billstein - cross - white

1 From that standpoint, I can't believe that we're
2 talking about much of a physical barrier at all,
3 and the very lower end of that drainage way is
4 shown as a Class 3 and --

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billstein - cross - white

1 Q (By Mr. White) Isn't that non-assessable
2 Class 3?

3 A It's non-assessable, but the length and the
4 extent of that Class 3 is almost like a pencil
5 width.

6 THE SPECIAL MASTER: Which tells you what?

7 THE WITNESS: Which tells me we're talking
8 about a very minor amount of acreage of which
9 the vast majority of it has no way to have water
10 delivered to it.

11 THE SPECIAL MASTER: Mr. White's questions
12 have raised a very interesting new area of
13 cross-examination. I'd like to ask a few questions
14 about it to help me and maybe help with our
15 work too. And the questions are these: By
16 their very term "Draw" or the very term "Ravine",
17 does it carry with it an engineering definition
18 which would exclude it as practicably irrigable
19 land or can the draw actually be irrigated? Do
20 you feel competent to give me evidence and
21 testimony on that question in mind? If you don't,
22 just say so, that's not your expertise, just
23 say so.

24 THE WITNESS: An agricultural engineer would
25 billstein-cross-white

1 best answer that. My only feeling, Your Honor,
2 is that we're applying terms like draw and
3 ravine when it could be a small drainage way
4 that's going through an area, and in the particular
5 case that we're talking about here, being that
6 the vast majority of this slough is assessable,
7 would imply that we're talking rather than a
8 deep ravine, we're talking about a small drainage
9 way, and these people are getting down and
10 getting some beneficial use out of that.

11 THE SPECIAL MASTER: Well, again, trying
12 to -- I'm trying to learn everything there is
13 about this, and I'd like to keep the ravine
14 away from becoming a deep ravine, you know, the
15 poor people and the truly poor people these
16 days in the government, and I'm a little worried
17 what can take water for irrigation and what
18 cannot.

19 In your total acreage, Mr. Billstein, on
20 your exhibit, of the 34,000 acres, did it also
21 include area that is used for laterals, drainage
22 return canals, ditches, irrigation ditches, roads
23 within irrigated parcels and other lands that do
24 not specifically take water and absorb it for

25 billstein-cross-white

1 crop growth?

2 THE WITNESS: Your Honor, it might be a
3 good time for you to look over my shoulder on
4 a hydrographic copy as I have in front of me
5 here. We felt that it was our responsibility
6 to delineate any major physical obstacles, whether
7 it be a road, a series of farmsteads, a drainage
8 ditch, large drainage ditch, anything that
9 would basically be wider than say a pen length
10 on, a pen length or two on our exhibits, because
11 you can't really planimeter any closer than that.

12 I think if you wanted to look at this
13 particular exhibit you could see that we've
14 excluded all the major drainage ways, we've
15 excluded the major roads, secondary roads, any-
16 think but dirt roads into the fields. The major
17 farmsteads, areas have been excluded, river bottom
18 lands were not receiving beneficial use from
19 man made delivery systems were excluded. It was
20 our feeling that we had to exclude any significant
21 obstacle.

22 And the example that we are looking at, this,
23 in my field investigator's opinion, would have
24 been a drainage way. Looking at the assessability

25 billstein-cross-white

1 records, basically would confirm that.

2 THE SPECIAL MASTER: Is there any particular
3 reason that Dead Horse Slough was not one of those
4 excluded areas?

5 THE WITNESS: I would guess just the
6 physical impression of the field man in the field
7 that it was not a significant physical obstacle
8 and that there was beneficial use being made along
9 and through that drainage way, and also that we're
10 talking about a pencil-width size physical
11 obstacle here, and a matter of an acre or two
12 excluded.

13 THE SPECIAL MASTER: Plus the fact, just
14 as you said, some assessment was made on it?

15 THE WITNESS: Yes. The assessable records
16 show that the whole upper part of that slough is
17 assessable which implies that it certainly couldn't
18 be that much of a physical constraint.

19 MR. WHITE: Could I ask a couple of questions?

20 THE SPECIAL MASTER: Yes, you may indeed.

21 Q (By Mr. White) What's the date of those assessability
22 records?

23 A Okay. These photos are 1954. The official
24 designation was completed in 1957. Instead of
25 billstein-cross-white

1 going to the actual water ledgers for every
2 single tract, in our meetings, which I conducted
3 with the Bureau of Indian Affairs on this
4 matter, I was assured that these lands, as
5 reflected on this mapping, was 98 to 99 percent
6 current, that there's been very little assess-
7 ment changes since the time of the official
8 designation in 1957. Those changes that would be
9 evident would be picked up at the time of our
10 official review with the ditchriders, specifically
11 Mr. Twichel. He could bring us up-to-date on
12 that.

13 So it was my conclusion, having that
14 informational base, rather than work with legal
15 descriptions on 25 or 30,000 acres, much more
16 expeditious to use a map to correlate from,
17 given the official records as being estimated
18 by those who use them on a daily basis as being
19 98 to 99 percent correct.

20 MR. WHITE: Your Honor, I'd like to say at
21 this point, it's very difficult in cross-
22 examining a witness who relies on other people's
23 physical impressions or their assurances to him.
24 We made the objection before, you overruled it.

25 billstein-cross-white

1 I don't want to argue with it, I was just
2 illustrating the point because we'll run into
3 it time and time again.

4 Q (By Mr. White) When were those photographs --

5 THE SPECIAL MASTER: Let me say, Mr. White,
6 you're welcome to renew that objection when the
7 facts of a specific statement may feel in your
8 mind that it warrants it compared to the over-
9 ruling of it on earlier occasions. The evidence
10 does change in these matters. One can work with
11 people and make a professional conclusion, and
12 one can listen to hearsay and make a conclusion,
13 or one can be sloppy about his work and make a
14 conclusion, so don't let me bar you from making
15 objections down the road.

16 MR. WHITE: Okay, I'll do it then, Your
17 Honor.

18 Q (By Mr. White) Mr. Billstein, of your personal
19 knowledge, do you know whether --

20 (Brief interruption.)

21 THE SPECIAL MASTER: Okay, go ahead, Ron.

22 MR. WHITE: I don't think I got the question
23 out, Your Honor.

24 THE WITNESS: I should correct something

25 billstein-cross-white

1 before that, Counselor. In reexamining both
2 the quads and the hydrographic copy, Dead Horse
3 Slough is not the small drainage way we're talking
4 about. It is the area to the south of that
5 small drainage way which we've excluded as
6 Type IX lands. So this is an example where we
7 did go into a physical feature such as Dead
8 Horse Slough and it is reflected as being out of
9 our acreage totals. That drainage way that
10 you're talking to me about was so insignificant
11 as to not show up on the quads.

12 Q (By Mr. White) Let's try the last question again,
13 see if I can get it out.

14 Of your personal knowledge, Mr. Billstein,
15 do you know whether assessments or money was
16 paid by the operator of the land across which
17 that slough traverses --

18 MS. SLEATER: Your Honor --

19 Q (By Mr. White) -- in 1980?

20 MS. SLEATER: In view of Mr. Billstein's
21 correction that the Dead Horse Slough area is
22 not included as part of the United States' claim,
23 I would object to the question as being totally
24 irrelevant to these proceedings and request that

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we get on to a matter that relates to the claim
of the United States.

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1 MR. WHITE: Well, Ms. Sleater has got it a
2 little muddied up. The only issue is what that
3 slough is called, and Mr. Billstein has said that
4 his rereading of the topo sheet says that the slough
5 we are talking about isn't called Dead Horse Slough.
6 It's a slough to the north of that, and I think
7 I'm still entitled to inquire.

8 THE SPECIAL MASTER: I think you are.

9 MR. ECHOHAWK: I don't think Mr. Billstein
10 called it a slough.

11 MR. WHITE: He called it a drainage way. I'm
12 sorry.

13 THE SPECIAL MASTER: He may answer.

14 Q (By Mr. White) Now, with respect to that drainage
15 way -- we'll try it again -- do you know of your
16 personal knowledge that assessments were paid
17 for water to irrigate that drainage way or the
18 lands covered by that drainage way in 1980?

19 A I did not investigate the water ledger for that
20 particular tract of land. My information comes
21 only from a question to the Bureau of Indian Affairs
22 officer saying, "Are all the presently assessable
23 acres paying O&M charges and do you receive those
24 on a yearly basis?"

25 billstein - cross - white

1 His answer was yes.

2 MR. WHITE: That is hearsay, Your Honor.

3 THE SPECIAL MASTER: Well, he answered your
4 question.

5 Q (By Mr. White) Let me ask this: Do you know of
6 your personal knowledge of any tract of land
7 covered by the assessability photographs for
8 which money was paid during 1980 to receive
9 irrigation water?

10 A I didn't personally examine the water user ledgers.

11 MR. WHITE: Your Honor, I have pages of what
12 I've loosely denominated as draws and ravines
13 to go through. This is illustrative.

14 If you want to require me to make an offer
15 of proof with respect to the remainder, now is
16 as good a time as any, or I can go ahead through a
17 few more. I'm just trying to be a little accommodating
18 with the Court and counsel.

19 THE SPECIAL MASTER: Well, I would like to
20 discuss this just a little bit and get into the
21 record what I will need to get in the record on
22 a report regarding this area.

23 In your list you just thumbed through, are
24 there areas of draws and ravines which would give us
25 billstein - cross - white

1 by specific elevation marks proof that there is
2 such a disruption in the levels of the land that
3 they would not be a practicably irrigable area
4 that were included in some of this acreage?

5 MR. WHITE: We've not reviewed the quad sheets,
6 Your Honor, so we have no contrary information to
7 give you.

8 As you know, the level of accuracy with respect
9 to elevation contour lines in quad sheets can be
10 pretty significant.

11 THE SPECIAL MASTER: In military life as well
12 as in agricultural life.

13 MR. WHITE: I have learned that the hard
14 way a couple of times.

15 THE SPECIAL MASTER: I have too in my youth.

16 MR. WHITE: So I did not ask our experts to look
17 at the quad sheets because out of personal knowledge
18 I knew they weren't that accurate.

19 What we did ask our people to do was estimate
20 the number of acres involved in each of the loosely
21 called draws and ravines -- it could have been
22 drainage ways.

23 THE SPECIAL MASTER: All right. Why don't
24 you --

25 billstein - cross - white

1 MR. WHITE: Involved in that number of acres,
2 I will give the Court some idea of what we are
3 talking about, is approximately 99.

4 THE SPECIAL MASTER: Why don't you proceed
5 then to make -- would the United States and the
6 tribes agree that we may allow a statement of
7 Mr. White's into the record showing that the 99
8 acres in this category of draws and ravines,
9 productivity of which is negligible at best on
10 grasses, as the witness has shown -- marginal at
11 best, so far as -- well, I guess I shouldn't say
12 that.

13 Let's put it this way: Would the United
14 States and the tribes permit a statement in
15 evidence by Mr. White to this total acreage in
16 this particular area?

17 MS. SLEATER: No, Your Honor.

18 MR. ECHOHAWK: No.

19 THE SPECIAL MASTER: All right. In that
20 case would you proceed with one or two more of them
21 and see what you can elicit by way of evidence?

22 MR. ECHOHAWK: I think the proper way we could
23 accomplish this is let Mr. White ask his questions,
24 object, exclude the testimony, and then he can make

25 billstein - cross - white

1 an offer of proof, and then he can put that on in
2 his own case.

3 THE SPECIAL MASTER: I was hoping before this
4 case was completed that there might be a little
5 less fighting, and this tremendous -- well, I guess
6 it's just fighting.

7 All right. Go ahead, Mr. White.

8 MR. WHITE: Let me get a few examples ready,
9 Your Honor.

10 THE SPECIAL MASTER: All right.

11 THE WITNESS: While he is doing that, Your
12 Honor, would you like to look at this --

13 THE SPECIAL MASTER: I will look -- this is
14 not in evidence?

15 MR. WHITE: No, this is not in evidence.

16 THE SPECIAL MASTER: I will wait until it
17 goes in.

18 (Off-the-record discussion)

19 MR. WHITE: Your Honor, this might be a good time
20 for you to take a closer look.

21 THE WITNESS: Pretty selective, isn't he?

22 Q (By Mr. White) Mr. Billstein, I direct your attention
23 to Exhibit C-87 and specifically at a large tract of
24 blue land that lies -- that overlaps Sections 26 and
25 billstein - cross - white

1 27 and ask you whether or not there isn't a
2 draw or a drainage way that proceeds in a north-
3 south direction in that parcel?

4 A Right here (indicating).

5 Q What is that?

6 A That's a dike.

7 Q Okay.

8 A And the vegetation showing is the remnant
9 vegetation collected behind the dike. This was in
10 October of '79, which would mean that there would
11 be very little flood waters going down this small
12 tributary.

13 Therefore, the remnants of the water ponded
14 behind the dike should still be reflected.

15 Q How tall is that dike, if you know of your personal
16 knowledge?

17 A Those on Big Horn Draw were only about two to three
18 feet tall.

19 Q Now, there appears to be running along the eastern
20 side of that dike a road; is that correct?

21 A There's a small road that cuts through that area.

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25 billstein - cross - white

- 1 Q (By Mr. White) Isn't it true that the area
2 covered by that dike and that road is sub-
3 stantially more than a pencil width in size?
- 4 A Are you talking about the road as it goes
5 northeast?
- 6 Q As it goes north along the side of that dike,
7 along the east side of that dike.
- 8 A That's the dike.
- 9 Q Is that the dike?
- 10 A Yes.
- 11 Q Are you sure?
- 12 A What you see in front of it, the road cuts
13 through the middle and the light part is the
14 dike itself. The vegetation in front of it
15 is the remnant vegetation from where the water
16 ponded. The road cuts right through that low
17 point in the dike and heads in the northeasterly
18 direction.
- 19 Q What amount of acres did you exclude from this
20 particular parcel to account for the dike and
21 the road?
- 22 A That road is easily within a pencil, ink length,
23 and my opinion the dike is too.
- 24 Q So you excluded no acreage for the dike and the
25 billstein-cross-white

1 road; is that correct?

2 A Right. That acreage would have been insignificant.

3 Q I direct your attention to Exhibit C-87 again,
4 Section 22, parcel of blue-colored land in the
5 NE 1/4.

6 MR. WHITE: Your Honor, do you want to look
7 at the figure there?

8 THE SPECIAL MASTER: Yes.

9 Q (By Mr. White) I direct your attention to what
10 appears to be a ravine or drainage way going
11 through the western part of that parcel.

12 A I see it.

13 Q Was that included within the acreage which you
14 established for the blue parcel in the NE 1/4 of
15 Section 22 on Exhibit C-87?

16 A No.

17 Q How do you know that?

18 A We planimeter from our hydrographic copy. The
19 hydrographic copy shows that drainage way
20 excluded. There must be a slight shift in this,
21 these exhibits have been banged around quite a
22 bit, and it may have been pulled a little bit
23 to the west. But I believe you have copies of our
24 hydrographic maps.

25 billstein-cross-white

1 Q Mr. Billstein, the maps points on this map
2 fit exactly. Is it true then that this blue
3 area is inaccurately depicted?

4 THE SPECIAL MASTER: Oh, Mr. White, I think
5 between what he's working with at his desk,
6 which showed the planimeter boundaries, which
7 he described, I think we're in an area that
8 would hardly warrant that question.

9 THE WITNESS: I apologize for the inaccuracy
10 of that, Counselor, in that, that's what drew
11 your question, but we do use the hydrographic
12 maps as the official planimeter of maps.

13 THE SPECIAL MASTER: Mr. White, I've heard
14 two of these examples now, and I think I'd be
15 ready for your offer of proof on the remainder
16 of this particular category of 90 acres.

17 MR. WHITE: Okay. Your Honor, it might be
18 a good time for the Reporter to take a break.
19 It will take 15 or 20 minutes to do it.

20 THE SPECIAL MASTER: All right, fine.
21 We'll take a ten minute recess.

22 (Thereupon a ten minute
23 recess was taken.)

24 * * * * *

25 billstein-cross-white

1 THE SPECIAL MASTER: Let's go on the record.
2 Mr. White, you may make an offer of proof.

3 MR. ECHOHAWK: Before Mr. White makes his
4 offer of proof, I would like to put an objection
5 in the record to Mr. White's former line of
6 questioning before he starts his offer of proof,
7 which I think is the proper way to do it.

8 THE SPECIAL MASTER: You may state it.

9 MR. ECHOHAWK: That Mr. White's line of
10 questioning was a total waste of time in that the
11 two examples that he put out and discussed with
12 Mr. Billstein, each time he was wrong.

13 One turned out to be a dike instead of a
14 ravine, and the other was on assessable land,
15 and each time it was a very minute parcel, wasting
16 the Court's time. We had to get a magnifying glass
17 to look at each exhibit and see whether or not
18 we could delineate it.

19 The second one was shown by Mr. Billstein's
20 hydrographic copies to not be included in the
21 acreage that is on Exhibit C-137.

22 So I would like to put that objection on
23 the record.

24 MR. WHITE: I would also like to observe with
25 respect to your objection -- and I know you will

1 sustain the objection, Your Honor -- that the
2 ravine that was excluded in the hydrographic
3 copy was shown as being included on the exhibit
4 that was admitted.

5 The assessability records could not be tied
6 to irrigation in 1980 based on the witness' own
7 testimony.

8 We are updating '57, and somebody told him
9 that they were currently used, but he didn't know
10 whether any payments had been made for that land,
11 so I think it's entirely appropriate to make those
12 inquiries to draw those distinctions, and if you
13 sustain the objection, to make an offer of proof.

14 THE SPECIAL MASTER: Well, we have discussed
15 it earlier. Proceed with your offer of proof,
16 Mr. White.

17 MR. WHITE: Thank you. Your Honor, the State
18 offers to prove that if it were allowed
19 to thoroughly cross-examine Mr. Billstein with
20 respect to the location and the extent of what
21 have been generally referred to as draws and ravines,
22 the testimony would show that there are approximately
23 99 acres of lands colored in blue on Exhibits 56
24 through 136 in the following described parcels:
25 Beginning with the Ray unit, which is the first

1 entry on Exhibit 137, and, parenthetically, I
2 apologize, Your Honor. I hoped to be able to give
3 tract numbers instead of legal descriptions to make
4 it go a lot faster.

5 THE SPECIAL MASTER: Whichever saves time
6 is welcome.

7 MR. WHITE: We don't have the tract numbers
8 done yet, Your Honor, so on Exhibit -- beginning
9 in the Ray unit, Exhibit 78, in Section 8, and
10 for the convenience of the Court, I'll simply
11 give a 1/4 section description --

12 THE SPECIAL MASTER: In fact, it's agreeable
13 with the Court if you just give totals on each of
14 the categories, if you wish.

15 MR. WHITE: All right, Your Honor. That
16 will make things go a lot faster.

17 THE SPECIAL MASTER: Yes.

18 MR. WHITE: In the Ray unit, 28 acres will be
19 included in blue, but within draws and ravines;
20 Coolidge unit, 3 acres; Subagency unit, 7; Wind
21 River A Canal, 13; Dinwoody Bench, 4; Dinwoody
22 Creek, 8; Dry Creek, 1; Muddy Creek, 1; North Fork
23 Little Wind, 17; South Fork Little Wind, 3; Sage
24 Creek, 1; Crooked Creek, 2; Spring Creek, 9; South
25 Fork Owl Creek, 1 -- for a total of 99.

1 And we can go on to the next area. Thank
2 you for that suggestion, Your Honor.

3 THE SPECIAL MASTER: Very good.

4 MR. WHITE: The next area I'm going to inquire
5 into, Your Honor, are those areas which appear from
6 the photographs which are part of Exhibits 56 through
7 136 to not contain lands which were currently
8 irrigated, and I would like to start with Exhibit 122.

9 Q (By Mr. White) Ron, that should be the last
10 hydrographic photograph that you obtained, and
11 I'll give you the number in just a second. That's
12 "20"-233. Do you have it?

13 A. Yes.

14 Q Mr. Billstein, do you see a tract of land
15 colored in blue in Section 4, Township 4 North,
16 4 East, on Exhibit 122 for which the base
17 photography was taken on June 7, 1980?

18 A. Yes.

19 MR. WHITE: Your Honor, would you like to look
20 at this example, and we will go through three or
21 four, I assume, before the objection is overruled.

22 THE SPECIAL MASTER: Your objection here is
23 on what basis again, Mr. White?

24 MR. WHITE: Well, I'm going to go into whether
25 billstein - cross - white

1 or not those were currently irrigated lands and
2 draw the distinction between those areas in
3 the southeastern portion --

4 THE SPECIAL MASTER: I see.

5 MR. WHITE: -- in that gray and light area.

6 THE SPECIAL MASTER: I see.

7 (Off-the-record discussion.)

8 THE WITNESS: Okay.

9 Q (By Mr. White) Have you found the area that I
10 described?

11 A. Yes.

12 Q In the lower right-hand corner of Exhibit 122,
13 isn't it true that there's a very dark irrigated
14 area?

15 A. Yes.

16 Q Isn't it true that the majority of the land shown
17 in the large blue area in Section 4, that being
18 that portion to the southeast of the long white
19 line running through that area, is virtually white
20 in contrast to the very dark color in the lower
21 right-hand corner?

22 A. It's considerably lighter than the vegetation
23 shown in the lower right-hand corner.

24 Q Okay, but it's your opinion that that land in its
25 billstein - cross - white

1 entirety was irrigated in 1980, and, if so,
2 upon what facts that you know of your personal
3 knowledge was that opinion based?

4 A. Okay. That was one of the areas that we visited
5 in my February field trip.

6 Q. That was February of 1981; is that correct?

7 A. That's right. The notes from the October field
8 trip defined that the system --

9 Q. Excuse me, Mr. Billstein. Was the October field
10 trip one that you made that you have personal
11 knowledge of, or is it one that someone else made
12 and gave you notes on it?

13 A. That was the original one that Mr. Johnston made
14 the first inspection.

15 Q. Let me ask you first what facts do you know of
16 your personal knowledge which support your opinion
17 that tract of land was irrigated in 1980?

18 A. Just the notes that I took for the spreader dike
19 system showing my findings that there was limited
20 vegetation throughout. The spreader dikes were in
21 good operational condition, that the source was the
22 main stem of Cottonwood Creek, and that the lower
23 dike distributes in both directions, which means
24 that it would distribute flow from the north and

25 billstein - cross - white

1 from the south into the lower areas.

2 Q What type of vegetation did you say that your
3 notes reflected? Was that limited vegetation?

4 A That's right.

5 Q Did you personally see water being applied to
6 the entirety of this large blue area during 1980?

7 A During 1980 I was not in the field.

8 Q Okay. Do you have notes from your field investigators
9 which show -- no, strike that question.

10 Isn't it true that as part of your review
11 of these tracts you also relied on color infrared
12 photography?

13 A That was one of the review items. Another one
14 was the SCS Irrigated Inventory, which showed,
15 based on their field trip, that the land was in
16 use.

17 Q What was the date of that?

18 A That would have been in the 1960 to 1962 timeframe.

19 Q Mr. Billstein, is this the same color infrared that
20 you based your opinion on in part?

21 THE SPECIAL MASTER: What are you looking at?

22 MR. WHITE: This is a color infrared photograph,
23 Your Honor, and it's not been marked as an exhibit
24 because I believe that it's part of Mr. Billstein's
25 billstein - cross - white

1 background information.

2 THE WITNESS: 8719.

3 MR. WHITE: The same as the hydrographic
4 maps he's referring to.

5 A. (By the Witness) Infrared No. 8719 was part of
6 the review process.

7 Let me check on the background information.

8 8719 was an infrared that was flown September 9,
9 1978. We are talking about a late season in a
10 relatively water-short drainage.

11 Q (By Mr. White) Did you rely on this photograph
12 in reaching your conclusions?

13 A. It was one of the points of review that I had.

14 Q On this photograph can you find the areas that
15 were under irrigation probably by center pivot
16 sprinklers that are located in the southeast
17 corner of Exhibit 122 and would show up as dark
18 red on the color infrared aerial, 8719?

19 A. Certainly.

20 Q Isn't it true that the vast majority of the blue
21 parcel shown on Exhibit 122 in blue in 1978 shows
22 no red whatsoever?

23 A. For that particular day in 1978, that's correct.

24 Q We have a photograph in June of 1980 that shows
25 billstein - cross - white

1 that the majority on that blue area on Exhibit 122
2 to be very light colored, and we have an aerial
3 photograph of 1978, a color infrared photograph
4 which shows that area to be virtually white -- let
5 me ask you, are there any other facts and data
6 which you know of your personal knowledge that
7 supported your opinion that that land was irrigated
8 in 1980?

9 A. In 1980?

10 Q. Yes.

11 A. Again we're talking about that type of land that
12 went back for a couple of years in terms of being
13 that water supply is so critical to a Type IV land,
14 in particular to a spreader dike system. What you
15 are looking at is, in fact, a view of a particular
16 tract using pictorial coverage or an infrared of what
17 it looked like at that particular day at that
18 particular time.

19 Rationalizing that we are talking about a
20 watershed like Cottonwood which drains to Boysen,
21 where the vast majority of the water would come
22 out earlier, even a June date might show less
23 vegetation than an April or May date.

24 I relied on basically the notes my field
25 billstein - cross - white

1 investigators took, their impression of the
2 vegetation in the area, as well as my impression
3 of when I later visited the tracts.
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25 billstein - cross - white

1 Q (By Mr. White) Your field investigators visited
2 that tract in October of 1980, is that not
3 correct?

4 A That's right.

5 Q Even farther beyond the irrigation season, --

6 A That's right.

7 Q -- your water supply season that you described?

8 A That's right.

9 MR. WHITE: Let me find a few more of these,
10 Your Honor, and maybe we can get through those
11 before noon.

12 THE SPECIAL MASTER: All right.

13 (Brief pause.

14 THE SPECIAL MASTER: It will not hurt my
15 feelings, ladies and gentlemen, if we move
16 ahead or even have to work late tonight or
17 tomorrow if all of you will say in lieu of the
18 progress we made this week we don't have to work
19 Friday, and that would give all of you a weekend
20 with your families.

21 MR. WHITE: The only problem with that, Your
22 Honor, I'd love to have some more time with my
23 family --

24 THE SPECIAL MASTER: I know you would, that's
25 billstein-cross-white

1 one reason I suggested it.

2 MR. WHITE: Is we still have to complete
3 the tract analysis under the stipulation, and
4 I'm afraid that if we work in the evenings or
5 even late afternoon that takes away from that.

6 THE SPECIAL MASTER: I see that. Well, if
7 we have to work Friday we will, you know, but
8 my thought was save the weekend for you all.

9 MR. WHITE: I'm all for taking off.

10 THE SPECIAL MASTER: I would almost rather
11 work real late Monday, Tuesday, Wednesday,
12 Thursday and give you the Friday off on a work
13 week, as far as I'm concerned, I don't mind
14 coming back after dinner. Those days you're
15 not doing anything anyway. Or work an hour or
16 two later, say until six o'clock.

17 MR. ECHOHAWK: Your Honor, along that line
18 Mr. White, do you still plan on finishing Mr.
19 Billstein tomorrow? I wonder whether it's
20 really --

21 THE SPECIAL MASTER: Well, that's a solemn
22 commitment written in blood.

23 MR. WHITE: I think it was written in blood
24 with a few white corpuscles around. We're talking
25 billstein-cross-white

1 about getting these tracts and the identification.

2 MR. ECHOHAWK: I was wondering whether it's
3 really worth bringing Mr. Kersich down for a
4 portion of a day.

5 MR. WHITE: I don't care, Your Honor. If
6 it's more convenient for the United States to
7 not have him here this week, I'm not going to
8 argue that.

9 THE SPECIAL MASTER: You be the judge of
10 that.

11 MS. SLEATER: Our concern is with the Court,
12 and if we put him on for a day, unless Mr. White
13 is going to finish his cross-examination in a
14 day, which wasn't the impression he left us with --

15 THE SPECIAL MASTER: I may have a day with
16 Mr. Kersich too with the questions I find that
17 I should be asking.

18 MS. SLEATER: Maybe it would be better to
19 wait until April 14th.

20 THE SPECIAL MASTER: Whichever.

21 MR. WHITE: That is fine with me, Your
22 Honor.

23 MR. ECHOHAWK: That's what I'll do then.

24 Q (By Mr. White) Let me back up just a second to
25 billstein-cross-white

1 that tract that we were talking about on
2 Exhibit 22. Is that Type IV land, did you say?

3 A Yes.

4 Q Now, on Exhibit 107, do you find a parcel of
5 land of about 190 acres or so that spreads
6 across the top of Sections 9 and 10 colored in
7 blue?

8 A Yes.

9 MR. WHITE: Your Honor, do you want to look
10 at this example?

11 (Brief pause.)

12 Q (By Mr. White) Do you also see, I assume Section 8,
13 would be on the western portion of the exhibit,
14 fields that are laid out and are quite dark?

15 THE SPECIAL MASTER: Do you want -- Did you
16 see him then, he was pointing? I don't think
17 you saw him, Mr. Billstein.

18 MR. WHITE: I believe this is Section 8,
19 it's the next section to the west of Section 9
20 on Exhibit 107, particularly in the NE 1/4 of
21 that Section 8.

22 THE WITNESS: I see the areas you pointed
23 out.

24 Q (By Mr. White) Isn't it true that within this
25 billstein-cross-white

1 190-acre parcel or so the only dark colors are
2 dark grays that are associated with the creek
3 bottom or slough?

4 A There's some Type V's delineated along that
5 cross drainage.

6 Q So the slough area that runs from the cross
7 drainage area that runs from approximately NW
8 to SE is classified as Type V -- excuse me,
9 typed as Type V?

10 A That portion which is on this exhibit is typed
11 Type V.

12 Q Is the remainder of that 190 approximately acre
13 tract typed as Type IV or some other type?

14 A There's two separate types that are predominate
15 in there, a Type IV and a Type II.

16 Q Did you personally visit this area during the
17 year 1980?

18 A No.

19 Q Did you visit this particular tract during your
20 February, 1981 helicopter survey?

21 A No.

22 Q What facts of your personal knowledge did you
23 base your opinion on to conclude that during
24 1980, the light areas included within this 190-acre
25 billstein-cross-white

1 tract in Sections 9 and 10 were irrigated
2 during 1980?

3 A Just the review process that was undertaken.

4 Q Are the two areas which we have reviewed so
5 far typical in terms of the portrayal on the
6 aerial photographs of Type IV lands?

7 A I don't think that's correct. Some of the
8 Type IV lands in the major tributaries, that's
9 the predominate land use, and the only reason
10 that those lands are categorized as IV is
11 because they don't have a late season water
12 supply source. They carry out good irrigation,
13 but they don't have the water that you need for
14 a full-service irrigation tract. When the
15 water's available they carry out darn good
16 irrigation.

17 The other thing that you have to understand
18 in the Wind River Federal Irrigation Project is
19 that a lot of these users only utilize their
20 tracts during certain parts of the year, and they
21 use it for basically pasture associated with
22 their cattle and horses. And the water that's
23 needed or the management that's required to carry
24 out the irrigation on those tracts is not nearly

25 billstein-cross-white

1 as intensive, therefore, it would naturally
2 show lighter.

3 Q Mr. Billstein, I hand you what's been marked
4 for identification -- while we're on the subject
5 of these different types -- has HB-61, and
6 ask you if that is not a document concerning
7 the breakdown of types into acreage units on
8 which you've previously testified in answer to
9 a Court's question as to the number of acres,
10 being Types IV, V and VI?

11 A This is what we furnished the Court.

12 Q Does that truly and accurately reflect the break-
13 down by types within the roughly 35,000 acres
14 shown on Exhibit C-137?

15 A Yes.

16 Q Well, let's go on to Exhibit No. 103, and I
17 direct your attention to approximately a 100-acre
18 tract that lies roughly in the SW 1/4 of Section 7.

19 MR. WHITE: Your Honor, do you want to look
20 at this one too?

21 (Brief pause.

22 * * * * *

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25 billstein-cross-white

1 Q (By Mr. White) Do you find her?

2 A Right.

3 Q On Exhibit C-103, in the SW corner of that
4 exhibit, do you find dark areas that are
5 clearly under irrigation?

6 A I see darker areas that reflect irrigation.

7 Q Isn't it true that the predominate portion of
8 the lands within the parcel located in Section 7
9 are of much lighter color?

10 MR. PERRY: Excuse me, Your Honor. I would
11 like to object at this time.

12 Mr. Billstein has already testified that
13 the Type IV lands appear lighter than the
14 Type II lands. He's explained why that is. He's
15 explained his whole review process on all of
16 these lands, and I think we are getting into a
17 period of redundant questions that are not going
18 to be more helpful to the Court.

19 THE SPECIAL MASTER: It may be, but I will
20 overrule now because that hasn't been designated
21 Type IV yet, and I think one or two more examples
22 may be in order.

23 Q (By Mr. White) In the previous light area that
24 was in part Type II, the question was isn't it
25 billstein-cross-white

1 true that the lands shown on the aerial photograph
2 for the parcel in Section 7 are much lighter
3 than those lands which appear in very dark
4 shades of gray in the SW corner of Exhibit 103?

5 A Those lands which are in Section 7 are Type IV,
6 and they do appear lighter, Type IV and Type V.

7 THE SPECIAL MASTER: Okay.

8 THE WITNESS: Again, recognize that you're
9 looking at a photo which reflects the condition
10 of a tract on June 25, 1980, and to get the
11 proper perspective, one has to go to the field
12 and follow up from this initial impression.

13 THE SPECIAL MASTER: I have a question that
14 I must ask because it bears precisely on these
15 parcels on which the cross-examination is taking
16 place.

17 These areas you've mentioned twice now are
18 classified as Type IV lands. Type IV lands are
19 lands on which there's a sparcity of water supply,
20 among other things?

21 THE WITNESS: Among other things. Let me
22 go ahead and give you some more background on that,
23 Your Honor.

24 There can be a number of reasons why a land
25 billstein-cross-white

1 would be in Type IV. One could be that there
2 is a late season shortage of water and, therefore,
3 during the time when there is sufficient water,
4 they carry out full service irrigation.

5 In the late season they don't have the
6 water supply, so they -- we did not allow them
7 to reflect a full season type of depletion.

8 You could have physical delivery problems
9 to an area. In other words, it may be some
10 land at the end of a canal system and there needs
11 to be some rehabilitation at the end of that
12 canal system, and this rehabilitation could be
13 done and done quite readily. It just hasn't
14 been done at that particular point in time, so
15 it's difficult to get the water from the diversion
16 point all the way down to the bottom of the canal.

17 It was Type IV because these people at this
18 particular point in time have a physical problem
19 which doesn't allow them to get the water all the
20 way through, which could be remedied by some
21 rehabilitation.

22 We're talking about management considerations.
23 A Type IV land could be as good as a Type II land.

24 In this particular tract maybe this individual
25 billstein-cross-white

1 didn't want to intensively farm this year.
2 "I just want to turn some water out for some
3 pasture for my horses or cattle," but he certainly
4 has the option of increasing that intensity.

5 This particular tract we are looking at
6 here is presently assessable, He could call on
7 as much water as he did.

8 THE SPECIAL MASTER: Once again I want you to
9 assure me, at least in your judgment, that there
10 is no correlation between a class land as has
11 long been established in irrigation land, Class 1's,
12 Class 2's, Class 3's, to the typing of lands that
13 you have testified to these past several weeks.
14 There's no correlation based upon the analysis
15 of the soil, the depth to barrier, the other --

16 THE WITNESS: In terms of the investigative
17 programs carried out --

18 THE SPECIAL MASTER: In terms of your defining
19 and classifying lands in types.

20 THE WITNESS: We did not categorize them in
21 terms of an arability classification. We typed
22 them based on the use that was being made at that
23 time, recognizing, that there are certain physical
24 features that were in evidence and also the ability

25 billstein-cross-white

1 of the surface water supply to fully service
2 those land tracts.

3 THE SPECIAL MASTER: Okay. Mr. White?

4 Q (By Mr. White) When Type IV land has a limited
5 water supply or is irrigated sporadically, as
6 set forth in Exhibit HB-8, how does that differ
7 from Type VI lands that are irrigated sporadically?

8 A Type VI lands are usually associated with like a
9 high water table or a possible soda condition.

10 Q So if I'm distinguishing between sporadically
11 irrigated Type IV lands and sporadically irrigated
12 Type VI lands, isn't it true that you must take
13 into consideration the nature of the land as well
14 as the nature of the irrigation of that land?

15 A On a Type VI one it was obvious that there perhaps
16 could be some soil chemistry problem with it that
17 was stressing it. We tried to document those
18 and felt it was a reasonable investigative effort.

19 Q What specific tests did you run on the Type IV
20 land to determine that the sporadically irrigated
21 Type IV lands did not have the chemical insufficiencies
22 that you described -- or deficiencies, I guess, that
23 you described for sporadically irrigated Type VI
24 lands?

25 billstein-cross-white

1 A There were no tests run to make that type of
2 determination. It was a visual breakout.

3 Again getting back to the main concept here,
4 we were there to map irrigation service and
5 irrigation use. The typing was a secondary
6 consideration to this whole program.

7 Q Now, with respect to Exhibit 103 and the parcel
8 of land shown in light color in roughly the SW
9 1/4 of Section 7, what facts, if you know, of
10 your own personal knowledge did you rely on in
11 reaching the conclusion that that light area was,
12 in fact, irrigated during 1980?

13 A Just my review process, using assessability
14 records, using delivery system mapping, and
15 establishing a field program too, in fact,
16 verify that.

17 I did not visit that tract myself personally.

18 THE SPECIAL MASTER: Mr. White, should we
19 take off for lunch? It's five to twelve.

20 MR. WHITE: Might as well do it, Your Honor.

21 THE SPECIAL MASTER: All right. We will
22 stand in recess until 1:30.

23 (Whereupon the proceedings
24 (recessed at 11:55 a.m. and
(reconvened at 1:30 p.m.

end

25 billstein-cross-white