

3-9-1981

## Trial Transcript, Vol. 19, Afternoon Session

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File 126  
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Box 10

Case # 4993

File # 126

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

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

Civil No. 4993

**FILED**  
3/17 1981  
*Margaret W. Hayton* CLERK  
DEPUTY

VOLUME 19  
Afternoon Session  
Monday, March 9, 1981

**ORIGINAL**

1 THE SPECIAL MASTER: All right. Let's please  
2 come to order. Mr. Echohawk?

3 (Document was handed to the  
4 (witness and to the Special  
5 (Master.

6 THE SPECIAL MASTER: I thank you for that.  
7 You are calling this 55B, not 55A?

8 MR. ECHOHAWK: 55B because it's a new  
9 exhibit, a changed exhibit.

10 Q. (By Mr. Echohawk) Mr. Billstein, I hand you what  
11 has been marked as Exhibit 55B. Would you please  
12 identify that?

13 A. This is a table identified as Table 2, "Acres  
14 in Use by Photo." It shows three columns:  
15 Exhibit No., corresponding aerial photograph for  
16 that exhibit number and corresponding acres in  
17 use relative to the same exhibit number.

18 The table includes similar information from  
19 Exhibits 56 through 136 and shows a total of  
20 34,850 acres.

21 Q. Do you have a copy of C-55A over there also,  
22 Mr. Billstein?

23 A. Yes, I do.

24 Q. Would you briefly check and see if 55B is the  
25 same as 55A except for the exhibit number column?

billstein - direct - echohawk

1

(Brief pause.)

2

A. They are the same. However, they contain the same error on one of the columns.

3

4

Q. (By Mr. Echohawk) Please correct the error, whatever it is.

5

6

A. This would be on Exhibit 55B. Exhibit No. 131, instead of HR-284, it should be H4-284, and the corresponding change should be made on 55A for the exhibit between H4-280 and H5-264. That should be H4-284.

7

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11

Q. Thank you. In all other respects are 55A and 55B acreage totals the same?

12

13

A. Yes.

14

15

16

Q. Mr. Billstein, I show you what has been marked as United States Exhibit WRIR C-139. Would you please identify that exhibit?

17

A. Yes, this is a copy of my resume.

18

Q. Does it accurately reflect your qualifications?

19

A. Yes.

20

21

22

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25

Q. Mr. Billstein, earlier today we had some discussion as to the amount of participation that you had in the historic lands program or the identification of the lands that are in current use. You spoke of a field program -- or field review by yourself;

billstein - direct - echohawk



1 is that correct?

2 A. I participated in a field review.

3 Q. During that field review that you had, did you  
4 visit each parcel that is being claimed as historic  
5 lands in use that fall outside what is called the  
6 Federal Irrigation Projects?

7 A. I reviewed every tract of land in the non-project  
8 area land base plus those in the LeClair Irrigation  
9 District.

10 Q. And how was that review conducted again?

11 A. I utilized the services of the two primary field  
12 investigators, Mr. Saunders and Mr. Johnston. We  
13 took their notebooks and hydrographic copies and  
14 reviewed those areas by means of helicopter over  
15 a full three-day period.

16 Q. So then you visited every tract and confirmed that  
17 the land had been irrigated?

18 A. I reviewed their findings and I accepted their  
19 conclusions.

20 THE SPECIAL MASTER: He did visit every  
21 tract though? Is that your question?

22 Did you visit every tract?

23 MR. ECHOHAWK: That's correct.

24 THE WITNESS: We visited every tract.

25 billstein - direct - echohawk



1 Q (By Mr. Echohawk) In regards to the lands that  
2 are called project lands, what type of review  
3 did you yourself have as to determine whether  
4 or not those lands were irrigated or had been  
5 irrigated?

6 A As I previously testified to, the first mapping  
7 of irrigation for the Wind River Federal  
8 Irrigation Project took place in the fall of  
9 1978. In the spring of 1979 Mr. Waples, who  
10 is the principal investigator for that project,  
11 and I met with the representatives of the  
12 Bureau of Indian Affairs who run the projects,  
13 and reviewed the findings of Mr. Waples versus  
14 the official records of that project.

15 Q What type of records would those be that you  
16 reviewed?

17 A Those are the records of the ditchriders.  
18 Basically the head of the ditchrider, Mr. Twichel  
19 went over each service area on a tract by tract  
20 basis from his personal knowledge. If he was  
21 confused or uncertain, he consulted ditchrider  
22 records.

23 Q Water resource planning, would that be a common  
24 way for you as a civil engineer to assess whether

25 billstein-direct-echohawk



1 lands had been irrigated or not?

2 A Certainly it's the standard way of doing it.  
3 Certainly an individual does not have the time  
4 when you're putting together a master plan to  
5 do every single increment himself. He hires  
6 competent people to do field work. His job is  
7 to conduct a review process that confirms in his  
8 mind that the information presented to him is  
9 accurate.

10 MR. ECHOHAWK: Your Honor, at this time I  
11 would like to offer into evidence, I'll read  
12 them by exhibit number and description of  
13 exhibit. Exhibit 55-B, which is the Table 2  
14 showing exhibit number, aerial photograph and  
15 acres in use. I will withdraw Exhibit 55-A.

16 MR. WHITE: No objection, Your Honor, to  
17 the withdrawal of 55-A.

18 THE SPECIAL MASTER: Oh, I thought you  
19 meant to the admission.

20 MR. WHITE: No, I'm sorry.

21 MR. ECHOHAWK: Exhibit 55, which is the  
22 study area map; Exhibit 56, which is the aerial  
23 photograph 7-209; Exhibit 57, which is the aerial  
24 photograph 7-312; Exhibit 58, which is the

25 billstein-direct-echohawk

1 aerial photograph 8-180.

2 THE SPECIAL MASTER: If you wish, Mr.  
3 Echohawk, we can follow those in exact sequence,  
4 the ones you just read through, all those  
5 offered on the front pages of both Exhibit C-55-B  
6 through and including 136, 137 and 138, the  
7 booklet. It would save you an awful lot of reading.

8 MR. ECHOHAWK: Okay.

9 THE SPECIAL MASTER: Would that be all right?

10 MR. WHITE: That's fine with us.

11 MR. ECHOHAWK: Thank you. I appreciate  
12 that.

13 THE SPECIAL MASTER: You bet. And do you  
14 wish to voir dire the materials?

15 MR. WHITE: Yes.

16 MR. ECHOHAWK: Do I understand Exhibit --  
17 Just to clear it up, 137 is offered, which is  
18 the summary table, which is over on the easel;  
19 138 is the report, and 139, which is the resume.

20 THE SPECIAL MASTER: Right. I believe that  
21 the essence of many of these exhibits is contained  
22 in 138.

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

24 THE SPECIAL MASTER: All right. Mr. White,

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1 you may voir dire the witness.

2 MR. WHITE: Your Honor, could I inquire  
3 the purpose for which they're being offered?  
4 Are they being offered for the truth of their  
5 contents as opposed to illustrative purposes?

6 THE SPECIAL MASTER: They're offered for  
7 whatever probative value they may have.

8 MR. ECHOHAWK: For the truth of their  
9 contents.

10 MR. WHITE: Could I have about five minutes?  
11 I need to reshuffle these and it will make the  
12 voir dire go a lot faster.

13 THE SPECIAL MASTER: We'll take the time you  
14 need for preparation unless you want to take a  
15 straight ten minute break.

16 MR. WHITE: A straight ten minute break will  
17 be fine.

18 THE SPECIAL MASTER: All right, a straight  
19 ten or fifteen minute break we'll have.

20 MR. WHITE: Why don't we go back on the  
21 record.

22 MR. ECHOHAWK: In my offer of Exhibits, 56  
23 through 136, I would offer them at this point  
24 only for the areas that are delineated in blue.

25 billstein-direct-echohawk

1 There are other areas that are delineated in  
 2 green that other experts will testify about,  
 3 so the foundation has not been laid for those  
 4 specifically. I would like to offer these only  
 5 for the blue areas that indicate unadjudicated  
 6 lands in use.

7 THE SPECIAL MASTER: Well, the figure 34,850,  
 8 which is a key figure this morning is also the  
 9 figure of the blue areas only, is it not?

10 MR. ECHOHAWK: That's correct.

11 MR. WHITE: I assume the offer is of the  
 12 photographs as well as the overlays, but for the  
 13 overlay, it excludes the red and green areas; is  
 14 that correct?

15 I have no objection to the bifurcating offer.

16 THE SPECIAL MASTER: Fine. Good catch.  
 17 Okay. Mr. White, take your fifteen minutes.

18 (Thereupon a ten minute  
 19 recess was taken.)

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THE SPECIAL MASTER: We will now come to order.

Okay, Mr. White, are you ready to proceed?

MR. WHITE: Yes.

Your Honor, as a preliminary matter, the State would voice its objection to the admission of the photographic exhibits 56 through 136 in that there was no foundation that would establish that they accurately illustrated what they purportedly to represent.

The question was asked and I moved to strike. The answer was stricken, and I think that I ought to make it clear from the beginning that our position is there is no such foundation.

However, anticipating the Court's understandable tendency to let anything in for what it may be worth, I would like to proceed to deal with the question, among others, of accuracy.

THE SPECIAL MASTER: Very well.

VOIR DIRE EXAMINATION

BY MR. WHITE:

Q. Mr. Billstein, with respect to Exhibit C-56 through 136, and specifically the underlying aerial photographs, how do you know that they accurately represent, if they do, what they purport to illustrate?

billstein - voir dire - white



1 A. Those photographs that form the base maps for the  
2 exhibits were developed at the same scale as the  
3 hydrographic field maps which reflected the  
4 conclusions of the study.

5 Therefore, the overlays which were made from  
6 the field maps as shown over those base maps  
7 accurately reflect the conclusions.

8 Q I must have misasked the question. I asked about  
9 the underlying photographs, not the overlay.

10 How do you know that the underlying photographs  
11 accurately illustrate what they purport to represent?

12 A. The underlying photographs are blank copies of  
13 photographs. The overlays depict the results as  
14 defined by our hydrographic work aerials.

15 Q Is it true then that you do not know whether the  
16 underlying photographs accurately represent what  
17 they purport to depict?

18 A. They accurately represent that.

19 Q How do you know that?

20 A. They are one and the same photograph as the  
21 hydrographic work photographed and therefore,  
22 the use as defined on that photograph should match  
23 the results defined on the hydrographic aerial.

24 Q I'm talking about the base photograph, the unannotated  
25 billstein - voir dire - white

1 photograph that you got from Horizons. How  
2 do you know that that accurately portrays what  
3 it purports to depict?

4 A. The aerials were a set of three, so they do match  
5 the aerial photograph group that we ordered en  
6 masse from Horizons. Therefore, the scale of  
7 that map should reflect the same scale as the maps  
8 that we used for our field work.

9 The field work map was in a relatively rough  
10 state after the year of use. Therefore, it was  
11 reasonable to use a base map at the same scale with  
12 overlays extracted from the hydrographic copy to  
13 adequately depict the use.

14 Q Was the photograph that's mounted on Exhibit 56 or  
15 Exhibits 56 through 136 -- were those photographs  
16 that are actually mounted there the ones you got  
17 from Horizons?

18 A. That's right.

19 Q You didn't make a copy to come up with this  
20 particular photograph; is that correct?

21 A. Absolutely not.

22 Q So you got those from Horizon?

23 A. That's right, a set of three.

24 Q Now, what made you feel that the photographs you got  
25 billstein - voir dire - white

1 from Horizon were accurate?

2 A. Okay. We asked that the photographs be individual  
3 scale rectified to a scale of one inch equal  
4 a thousand feet.

5 By that, we asked that they undertake a  
6 rectification process in their lab to delineate  
7 for the areas of our interest, which was basically  
8 those areas of historic irrigation that we had  
9 defined for them to be rectified to that scale.

10 Q. Isn't it true that Horizon made no rectification  
11 for tilt?

12 A. Those photographs were reviewed by Horizons for  
13 tilt or drag. The method that we used was that  
14 we furnished quadrangles to Horizons, and they  
15 did what is known as a quadrangle rectification  
16 process, or a linear line rectification process,  
17 so they took actual points from quadrangles and  
18 rectified the aerial photographs so that the scale  
19 relationship between quadrangle and photograph were  
20 one and the same.

21 Q. Do you know whether or not they made a rectification  
22 of these photographs for tilt?

23 THE SPECIAL MASTER: I think he answered the  
24 question as best he could, Mr. White, in his last  
25 billstein - voir dire - white

1 answer.

2 Q (By Mr. White) Is it true then that the only  
3 rectification done by Horizons was to match the  
4 scale of the photographs against USGS quad sheets?

5 A. They were asked to do linear rectification with  
6 quad sheets as a basis.

7 Q. Isn't it true that when you do rectification  
8 with quad sheets you cannot rectify for tilt?

9 A. I'm not familiar with the process.

10 Q. Okay. I hand you a book entitled, "Photogrammetry"  
11 by Francis H. Moffitt, professor of civil  
12 engineering, University of California, published  
13 by International Textbook Company, Scranton,  
14 Pennsylvania, and I refer you to pages 70 and 71  
15 and ask you whether or not that refreshes your  
16 recollection?

17 A. This particular --

18 MR. ECHOHAWK: Your Honor, I believe before  
19 Mr. White can cross-examine Mr. Billstein regarding  
20 this book, he has to establish through Mr. Billstein  
21 that that is a standard textbook relied upon by the  
22 people in this field.

23 THE SPECIAL MASTER: Well, he's not cross-  
24 examining him on the book. He's asking him --

25 billstein - voir dire- white



1 MR. ECHOHAWK: He's asking him what was  
2 contained in the book.

3 THE SPECIAL MASTER: Well, I will overrule  
4 for now.

5 MR. WHITE: If Mr. Billstein doesn't know the  
6 process, then we have another objection for lack  
7 of foundation.

8 THE SPECIAL MASTER: Overruled.

9 MR. ROGERS: The book doesn't establish --  
10 the man that wrote the book has not been established  
11 as any sort of an expert in this case.

12 THE SPECIAL MASTER: Miss Reporter, what  
13 was the question that Mr. White asked of the  
14 witness?

15 (Thereupon the last question  
16 (was read back as follows:  
17 ("Q. Okay. I hand you a book  
18 (entitled, "Photogrammetry" by  
19 (Francis H. Moffitt, professor  
20 (of civil engineering, University  
21 (of California, published by  
22 (International Textbook Company,  
23 (Scranton, Pennsylvania, and I  
24 (refer you to pages 70 and 71  
25 (and ask you whether or not that  
(refreshes your recollection?")

\* \* \* \* \*

billstein - voir dire - white



1 THE SPECIAL MASTER: The objections are  
2 overruled.

3 Does that refresh your recollection?

4 THE WITNESS: Yes.

5 Q (By Mr. White) I hand you what's been marked  
6 for identification as Plaintiff's Exhibit WRIR  
7 HB-5 and ask you to compare that with pages 70  
8 and 71 of the photogrammetry book, and determine  
9 whether or not that accurately sets forth the  
10 contents of those pages?

11 A They appear to be one and the same.

12 Q Beginning at the top of page 70 and carrying  
13 over to the page 71 is the sentence that begins  
14 with the word "In" on the bottom of page 70 and  
15 on top of page 71 "In order to determine the  
16 scale of a particular point".

17 A Yes.

18 Q Isn't it true in order to rectify any tilt in  
19 the graph, you must know the elevation of a  
20 point at which you seek to determine the scale?

21 A That's correct.

22 Q How did Horizon determine the elevation of the  
23 points of these photographs where it determined  
24 the scale to be 1 to 5,000?

25 billstein-voir dire-white

1 A I'm not familiar with how they would do that.

2 Q How did Horizon determine the position on the  
3 photograph of that point with respect to both  
4 the accuracies of the tilt and the principal  
5 line as defined in the test?

6 A When I was investigating the lab and sent our  
7 person down, Horizon's explained to this  
8 individual that they had what is known as a  
9 tilt table, and that this tilt table was  
10 utilized in their scale rectification process  
11 such that the linear measurements that we  
12 defined by the series of lines that we depicted  
13 on a quadrangle for them to measure from were  
14 in fact correct from their photographs, so we  
15 would have a rectified print.

16 The actual process itself I did not participate  
17 in the review of. This is a licensed government  
18 contractor, and if they had the mechanical  
19 apparatus to handle a scale rectification from  
20 tilt or crab then it is my understanding that  
21 that was what was going to take place.

22 Q Do you know of your personal knowledge whether  
23 or not Horizon used the tilt table?

24 A Yes.

25 billstein-voir dire-white

1 Q Do you know of your own personal knowledge  
2 that they did use the tilt table for the  
3 rectification work on these photographs?

4 A Only I should rephrase that in terms of Mr.  
5 Saunders was my representative to Horizon's  
6 Incorporated. He made telephone calls to this  
7 contractor and he talked to the man in the lab and  
8 the man in the lab described that he was in fact  
9 using the tilt table to arrive at the scale  
10 rectified prints.

11 Q Isn't it true that if the tilt table were not  
12 used that would adversely affect the reliability  
13 of any scale of these photographs?

14 A It depends if there was tilt in the photographs.

15 Q How did you determine which photographs, if any,  
16 had tilt which would require a tilt rectification?

17 A That was not a determination of mine. We paid  
18 four individuals, scale rectified photographs  
19 utilizing the expertise of that company to  
20 furnish those. We made the necessary checks with  
21 our own people to enable us to feel comfortable  
22 that they were in fact carrying out procedures  
23 to give us the proper rectifying prints. It was  
24 not necessary for me to understand the entire

25 billstein-voir dire-white

1 process to feel secure that they were giving  
2 me a product that was rectified.

3 Q Wasn't it true that you were concerned enough  
4 about the rectification to undertake your own  
5 verification work?

6 A That's true in terms of scale.

7 Q I hand you what's been marked for identification  
8 as WRIR HB-1 and ask if you can identify that?

9 A Yes. This was a series of random checks for  
10 scale accuracy that Mr. Saunders of our company  
11 undertook to review the overall accuracy of the  
12 photographs in the area of study.

13 Q Did you make any verification of the rectification  
14 on US Exhibit C-56?

15 A No.

16 Q C-57?

17 A No.

18 Q C-58?

19 A No.

20 Q C-59?

21 A No.

22 Q C-66?

23 A No.

24 Q C-67?

25 billstein-voir dire-white

1 A No.

2 Q C-71?

3 A No.

4 Q C-74?

5 A No.

6 MR. ECHOHAWK: Your Honor, I'd like to  
7 object. The exhibit speaks for itself. The  
8 particular aerial photographs were checked,  
9 they're listed on the exhibit.

10 MR. WHITE: It doesn't include the exhibit  
11 number, Your Honor.

12 THE SPECIAL MASTER: The objection is  
13 overruled. We'll proceed with the voir dire.

14 Q (By Mr. White) Did I ask you about 74, Ron?  
15 If I didn't, I'll ask you again. Did you, in  
16 your verification work, include C-74?

17 A No.

18 Q C-75?

19 A No.

20 Q C-76?

21 A No.

22 Q C-79?

23 A No.

24 Q C-81?

25 billstein-voir dire-white



1 A Nope.

2 Q C-82?

3 A No.

4 Q C-83?

5 A No.

6 Q C-86?

7 A No.

8 Q C-87-A?

9 MR. WHITE: I think the offer ought to be  
10 amended to include 87-A. Did you mean 87 or 87-A?  
11 Its got 87-A at the bottom.

12 MR. ECHOHAWK: It should have been just 87.

13 THE SPECIAL MASTER: You want to amend that  
14 now?

15 MR. ECHOHAWK: Yes, Your Honor.

16 THE SPECIAL MASTER: All right. It's  
17 ordered. Just strike the A from it, why don't  
18 you, to comply.

19 MR. WHITE: Can I just put a line through  
20 the A?

21 MR. ECHOHAWK: Yes. Thank you.

22 Q (By Mr. White) Okay. C-87?

23 A No.

24 Q C-88?

25 billstein-voir dire-white

1 A Yes.

2 Q It did, okay.

3 C-91?

4 A Nope.

5 Q C-92?

6 A No.

7 Q Yes?

8 A No.

9 Q Ninety-four?

10 A Nope.

11 Q Ninety-five?

12 MR. WHITE: It's got an A. Do you want to  
13 do the same thing with 95-A?

14 MR. ECHOHAWK: Yes.

15 MR. WHITE: I'll just put an X across the  
16 bottom.

17 Q (By Mr. White) Ninety-five?

18 A No.

19 Q I'm sorry, I didn't hear you.

20 A No.

21 Q No for 95.

22 Ninety-eight?

23 A No.

24 Q Ninety-nine?

25 billstein-voir dire-white

- 1 A No.
- 2 Q One hundred?
- 3 A No.
- 4 Q One hundred two?
- 5 A No.
- 6 Q One hundred three?
- 7 A No.
- 8 Q One hundred four?
- 9 A No.
- 10 Q One hundred five?
- 11 A No.
- 12 Q One hundred seven?
- 13 A No.
- 14 Q One hundred eight?
- 15 A No.
- 16 Q One hundred nine??
- 17 A No.
- 18 Q One hundred eleven?
- 19 MR. WHITE: And may I strike the A again?
- 20 MR. ECHOHAWK: Yes.
- 21 THE WITNESS: No.
- 22 Q (By Mr. White) One hundred twelve?
- 23 A No.
- 24 Q One hundred thirteen?
- 25 billstein-voir dire-white

1 A No.

2 Q One hundred fifteen?

3 A No.

4 Q One hundred sixteen?

5 A No.

6 Q One hundred eighteen?

7 A No.

8 Q One hundred twenty?

9 A No.

10 Q One hundred twenty-one?

11 A No.

12 Q One hundred twenty-two?

13 MR. WHITE: May I strike A?

14 MR. ECHOHAWK: Yes, thank you.

15 THE WITNESS: No.

16 Q (By Mr. White) One hundred twenty-three?

17 MR. WHITE: May I strike A?

18 MR. ECHOHAWK: Yes, thank you.

19 THE WITNESS: No.

20 Q (By Mr. White) One hundred twenty-four?

21 A No.

22 Q One hundred twenty-six?

23 MR. WHITE: May I strike the A?

24 MR. ECHOHAWK: Yes.

25 billstein-voir dire-white

1 THE WITNESS: No.

2 Q (By Mr. White) One hundred twenty-seven?

3 A No.

4 Q One hundred twenty-eight?

5 A No.

6 Q One hundred twenty-nine?

7 A No.

8 Q One hundred thirty?

9 MR. WHITE: May I strike the A?

10 MR. ECHOHAWK: Yes, thank you.

11 THE WITNESS: No.

12 Q (By Mr. White) One hundred thirty-one?

13 A No.

14 Q One hundred thirty-three?

15 MR. WHITE: May I strike the A?

16 MR. ECHOHAWK: Yes, thank you.

17 THE WITNESS: No.

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1 Q (By Mr. White) 134?

2 A No.

3 Q 135, and may I strike the A?

4 A (By Mr. Echohawk) Yes.

5 A (By the Witness) No.

6 Q (By Mr. White) 136 A? May I strike the A?

7 A (By Mr. Echohawk) Yes.

8 A (By the Witness) No.

9 THE SPECIAL MASTER: Mr. White, let me have a  
10 look at 136 before you put it back. That has one acre on  
11 it. That's an unbelievable -- I don't even see --

12 MR. WHITE: Right there (indicating). It is shown  
13 on the eastern edge right there at the point --

14 THE SPECIAL MASTER: All right. Thank you.

15 A (By the Witness) The answer was no, that there were  
16 no points on Billstein's deposition exhibit 102, plaintiffs'  
17 exhibit HB-1. There were, however, checks carried out by  
18 Mr. Saunders of our office. Any time a photo came in he  
19 would locate points on that photo and do a check between a  
20 series of points to try to ascertain whether that particular  
21 photo was in an acceptable accuracy.

22 These were unrecorded, but they took place, and  
23 this was the standard procedure.

24 We received a flight strip. In many cases before

25 billstein-voir dire-white

1 the sectionizing was complete, he would select a couple  
2 of known locations, do a linear distance measure of those,  
3 and then compare those against the quad, and this was a  
4 quick way of doing a spot scale check. This particular  
5 exhibit was done on a random sample, which we felt would  
6 give us a representative group set of the total study area,  
7 and it accomplished that purpose.

8 Q Well, you did make one of your random tests on Exhibit 132,  
9 didn't you?

10 A Yes.

11 Q Didn't you check the boundaries of Section 5?

12 A One of the boundary areas for Section 5 --

13 Q Which boundary did you check?

14 A I can't tell from this tabulation. Let me check my hydro-  
15 graphic copy.

16 (Pause.

17 A (By the Witness) I can't see right now the second set of  
18 section lines that would have been involved.

19 These photographs had hydrographic work performed  
20 on them for basically a half a year after we received them,  
21 and it would not be uncommon to have a section line erased  
22 and not put back in in the process of putting the conclu-  
23 sions on irrigation use and the delineations of the acreage  
24 associated with that use.

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1 Q Well, isn't it true that the south boundary of Section 5  
2 as shown on Exhibit 132 runs in a southeast direction and  
3 it's roughly six inches long?

4 A Let me check my ownership map.

5 We are in a situation where we are transitioning  
6 from the Wind River Meridian into the State Meridian and  
7 it's a transitional section.

8 Q Let me ask you a preparatory question and then you are  
9 welcome to answer back, but would you point out to me and  
10 the Court where the corners of Section 5 are as you have  
11 established them on Exhibit 132?

12 A Let me refer to some backup sources.

13 (Pause.

14 Q (By Mr. White) Mr. Billstein, let me ask you first, with-  
15 out referring to anything else, can you tell me where the  
16 section corners of Section 5 are located on Exhibit 132?  
17 Then you can refer to anything you would like.

18 (Pause

19 A (By the Witness) The section corner markings are not shown  
20 clearly on the exhibit, so right now, unless I can check  
21 with my backup set of data, I couldn't give you the exact  
22 location of the entire section.

23 Q Okay. Well, let's go ahead and check the backup data.

24 THE SPECIAL MASTER: While you are there, Mr.

25 billstein-voir dire-white

1 Billstein, can you give me the exact location of the 39  
2 acres that you claim are by historic use in that area?  
3 Is that identified on the map?

4 THE WITNESS: Yes, it is. It's shown in two  
5 separate pieces in blue (indicating).

6 THE SPECIAL MASTER: Two pieces and not three?

7 THE WITNESS: That's right. This says out, Your  
8 Honor.

9 Q (By Mr. White) Mr. Billstein, is one of those portions in  
10 Section 5 and the other in Section 3?

11 A That's correct.

12 Q How do you know that this particular tract of land is located  
13 in Section 5 (indicating)?

14 A Just that the section number usually is placed in the center  
15 of the section, and that area is located directly north of  
16 the 5 designation.

17 Q But isn't it true that without referring to other documents  
18 you cannot indicate to the Court where the corners of  
19 Section 5 are located?

20 THE SPECIAL MASTER: I think the question has been  
21 asked and answered.

22 Q (By Mr. White) Why don't you look at the other material?

23 THE SPECIAL MASTER: We may take our seats,  
24 gentlemen.

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(END)

25 billstein-voir dire-white



1 THE SPECIAL MASTER: Mr. Billstein, would  
2 you like to take five or ten minutes on this?

3 THE WITNESS: We better, Your Honor. We  
4 can't seem to find the ownership plats that  
5 are adjacent to this area, and also I'm trying  
6 to find the seven and one-half minute quads  
7 that I brought with me and those don't seem to  
8 be here.

9 THE SPECIAL MASTER: We'll take a ten  
10 minute recess. It's about time for one. It's  
11 nearly three o'clock, I promised one.

12 (Thereupon a ten minute  
13 recess was taken.)

14 THE SPECIAL MASTER: All right. Ladies  
15 and gentlemen, we'll come to order.

16 Q (By Mr. White) Okay. Mr. Billstein, having  
17 referred to other material which I wish you'd  
18 please identify for the Court, are you able to  
19 indicate whether or not the corners for Section 5  
20 are correctly set forth on Exhibit 132?

21 A I refer to the hydrographic copy that we performed  
22 the sectionizing work on originally, and it has  
23 the same indentification number, 179-264, and  
24 I also reviewed the location of that section line

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1 on the seven and one-half minute quad called  
2 Arapahoe Ranch quadrangle, and the section  
3 corner that you're inquiring about is the section  
4 line which is identified as the east section line  
5 or between these two points in Section 5.

6 Q What about the south section line that I asked  
7 you about before?

8 A The --

9 Q The one that runs about six inches long and runs  
10 from the NW to the SE.

11 A Okay. Now that I've had a chance to look at  
12 the quadrangle, we can see that the area north  
13 in Section 5 is the area in the Wind River -- I  
14 mean the State Meridian System, and that transition  
15 as you cross Owl Creek to the Wind River Meridian.  
16 Therefore we are dealing with two separate legal  
17 grid systems.

18 Q So the southern boundary of Section 5 does appear  
19 correctly as a slant?

20 A No.

21 Q No?

22 A Not at all.

23 Q Where's the southwest corner of Section 5?

24 A Section 5 runs out at Owl Creek. It intersects  
25 billstein-voir dire-white

1 Owl Creek, so therefore it conforms with the  
2 Owl Creek itself. It's not a standard square  
3 section.

4 Q So the section line runs, the south section line  
5 runs from west until it hits Owl Creek and then  
6 follows Owl Creek?

7 THE SPECIAL MASTER: I might --

8 THE WITNESS: That's correct.

9 Q (By Mr. White) Okay.

10 A Did you perform the measurement on that line?

11 Q No because I'm not sure where it ends.

12 This line right here, you want me to  
13 measure that one?

14 THE SPECIAL MASTER: Gentlemen, I'm not  
15 sure any of this has much application to either  
16 the accuracy of that exhibit or to the subject  
17 matter of the blue lands to which it was  
18 admitted or for purposes which it is to be  
19 admitted.

20 Q (By Mr. White) So that Section is 5.3, that  
21 section line which you measured is 5.3 inches  
22 long?

23 A I assume your measurement is correct. We showed  
24 5.28 or .20 inches difference.

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1 Q Did you determine where the section corners  
2 were actually located?

3 A Well, we have our own sectionizing procedures  
4 at HKM. Basically it involves linear transfer  
5 with proportional dividers. What you do is go to  
6 a set of base information such as a quadrangle  
7 and you locate a section... We can see on the  
8 quadrangle the small red criss-cross, that that  
9 is a found section as defined by the USGS.  
10 Therefore, what you do is you use a proportional  
11 divider technique to locate that sectional line  
12 from identifiable points, first of all on the  
13 quadrangle, then on the aerial photograph itself.  
14 Those points might be breaks in streams, they  
15 might be breaks in the road, and you work on both  
16 sides of the section line and find the north,  
17 south, east, west lines and iterate through a  
18 series of two or three points until you've got a  
19 line which is accurate, basically to a width of  
20 a line of 30 or 50 feet.

21 Q Isn't it true then that your section corners  
22 are based on the section corners shown in the  
23 USGS quad sheets, the one to 24,000 quad sheets  
24 and not based on any investigation as to the  
25 billstein-voir dire-white

1 actual location of those corners in the field?

2 A You don't locate -- For a survey of this nature  
3 you don't locate section corners in the field.

4 You've got an identifiable section on a USGS  
5 quad, they recognize its been found. You use  
6 physical characteristics of the area to work  
7 backwards to that section corner.

8 Q So the answer is you did not find these section  
9 corner monuments in the field; is that correct?

10 A That's correct.

11 Q Let's take a look at another one, US Exhibit C-61.  
12 Did you perform your random check on C-61?

13 A Yes.

14 Q What section line did you measure?

15 A One of the section lines associated with Section 11.  
16 If you let me refer to my basic material.

17 Q Okay.

18 THE SPECIAL MASTER: Off the record.

19 (Off-the-record discussion.)

20 THE WITNESS: That particular section line  
21 is along the southern boundary of Section 11.  
22 You want to measure that?

23 Q (By Mr. White) Well, let me ask you this, whether  
24 or not you located the western edge of that line

25 billstein-voir dire-white

1 off the USGS quad sheet?

2 A Yes, its been located.

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1 Q (By Mr. White) You say the marker itself has been  
2 located?

3 A The marker? No, we located --

4 Q You located it off the quad sheets; is that correct?

5 A That's correct.

6 Q Isn't it true that, if you know, that particular section  
7 corner has never been established?

8 THE SPECIAL MASTER: Well, assuming it has never  
9 been established and the marker has never been put in place,  
10 does that make any difference to our proceedings?

11 MR. WHITE: It makes a big difference, Your  
12 Honor, and the reason for this is that the witness testified  
13 that the areas which showed up on the two tables, Table 1  
14 and Table 2, and I think it's Exhibit 55B and 137 -- I'm  
15 not sure -- were planimetered, as the witness testified,  
16 off these photographs and if the photographs aren't accu-  
17 rately to scale, then the planimeter result is suspect, and  
18 that's what I'm trying to find from this investigation.

19 THE SPECIAL MASTER: I wouldn't say suspect, but  
20 it might have a deviation or a correction factor, as we say  
21 in aviation, but I would hardly say it's suspect.

22 MR. WHITE: Okay.

23 A (By the Witness) What appears though to have happened in  
24 this case, counselor, is, you see, there's a grid of section  
25 billstein-voir dire-white

1 lines all the way around Section 14. We find the westerly  
2 section corner, the northwesterly section corner dividing  
3 Sections 10 and 11, so approximately one, two, three, four  
4 known points were available to assist in locating this  
5 intermediate point. We've got a north-south line. We  
6 have got a east-west line.

7 Q (By Mr. White) Isn't it true that the values, acreage  
8 values, which you have assigned to the areas over-lain in  
9 blue on Exhibits 56 through 136 were developed by plan-  
10 imetering the boundaries of the areas shown on the over-  
11 lays?

12 A The planimètering took place on the boundaries defined on  
13 the hydrographic copies. The overlays were traced from  
14 the hydrographic copies and should be accurate reflections  
15 on the same area, but the actual acreages were determined  
16 from the hydrographic copies.

17 Q Do the overlays accurately reflect the boundaries shown  
18 on the hydrographic copies?

19 A We spent considerable time reviewing that. I believe they  
20 do.

21 Q What length did you determine would be established or should  
22 be assigned to the southern boundary of Section 11 on  
23 Exhibit C-61?

24 A The length is the measured length and it's 5.18 inches.

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1 Q Isn't it true that you assumed that all section lines  
2 were 5,280 feet long?

3 A No.

4 Q No? How did you determine the length of the particular  
5 section line in Section 11 which you used to check?

6 A My instructions for our people were to select sections for  
7 their particular studies or those particular section  
8 lines that we wanted to use in our scale accuracy checks  
9 from those that we felt were standard sections.

10 Now, I said no, because there are other sections that  
11 were not checked and showing up in this exhibit that  
12 certainly have more than 5,280 acres --

13 Q Feet.

14 A This particular section line, the investigator must have  
15 felt comfortable with its location using the other four  
16 points of control, so that he went ahead and took a measure-  
17 ment on it.

18 Q I hand you what has been marked for identification as HB-3.

19 THE SPECIAL MASTER: 5,280 feet.

20 MR. WHITE: You said acres.

21 THE WITNESS: I'm sorry. Feet.

22 THE SPECIAL MASTER: What is this, Mr. White?

23 MR. WHITE: I'm going to tell the witness, Your

24 Honor.

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1 Q (By Mr. White) I have handed this to you, and I'm going  
2 to tell you that it's a certified record from the Cheyenne  
3 Land Office of the Bureau of Land Management, Township 5  
4 North, 5 West, and ask you whether or not you can find the  
5 southwest corner of Section 11 on that plat?

6 A That particular corner is shown within the Wind River flood  
7 plane.

8 Q It's shown in the river, isn't it?

9 A I don't believe the river is probably at its natural stage  
10 as anything of that size, but I would guess that what they  
11 mapped here was the flood plain.

12 Q I hand you what's been marked for identification as HB-7,  
13 and tell you that is a copy of the field notes for that  
14 particular township, from the same office and ask you  
15 whether or not, based on the field notes, it appears that  
16 that section was never closed?

17 (Pause.)

18 Q (By Mr. White) Mr. Billstein, would it refresh your re-  
19 collection if I told you that the index diagram on printed  
20 page 748 gives you a key to the page upon which the surveyor's  
21 notes appear and that the number nineteen, hand written  
22 nineteen, appears in the southern boundary of Section 11?

23 A Okay. Thank you.

24 MR. PERRY: Your Honor?

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1 THE SPECIAL MASTER: Yes.

2 MR. PERRY: Your Honor, I would object to the  
3 use of this. We have no indication here that this is a  
4 certified copy or that in any other way it's been authenti-  
5 cated.

6 MR. WHITE: Well, I will make the representation  
7 to the Court that it was obtained from the BLM Office and  
8 expect the same sort of reciprocation from the tribes that  
9 I gave based on their representations.

10 THE SPECIAL MASTER: I would object unless used  
11 for some other purpose than it is now, which is just to  
12 voir dire the exhibit. If it's to be used to be introduced  
13 in evidence, I would require some tracing as to its source.

14 MR. WHITE: I would say that there's a Copywork  
15 or Certification Order on the front, Your Honor, which may  
16 not be legible on your copy, but I would be glad to show it  
17 to you in the original.

18 THE SPECIAL MASTER: That's all right. I have  
19 ruled on it.

20 A (By the Witness) The note on Page 19 reflects that they did  
21 not close the corner due to physical problems in the Basin  
22 of the Wind River.

23 Again it appears this point is bisected in both  
24 directions by non-section corners. The sectionizer must

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1 have located the southwestern boundary by utilizing those  
2 points.

3 Q (By Mr. White) Isn't it true that you assumed that the  
4 actual length of that section line was 5,280 feet?

5 A In that the four corners that bisected this point measure  
6 out on the quads as two times 5,280 feet, it was probably  
7 assumed that it was a standard section.

8 Q I direct your attention to what has been marked for identi-  
9 fication as US Exhibit C-131, specifically Section 15, and  
10 you can wander up here if you would like, with the permis-  
11 sion of the Court, to see that.

12 THE SPECIAL MASTER: That's fine. What was that---  
13 C Exhibit 131?

14 MR. WHITE: C Exhibit 131, Your Honor, and I'm  
15 referring to Section 15.

16 Q (By Mr. White) Isn't it true that, as shown on Exhibit 131,  
17 Section 15 is rhombus?

18 A That's correct. Those section corners are not in a straight  
19 line.

20 Q Isn't it true that the north, south -- excuse me -- eastern  
21 boundary and the western boundary of Section 15 is approxi-  
22 mately 4900 feet long?

23 A Well, I should measure it, I suppose.

24 (Pause.

25 billstein-voir dire-white

1 A (By the Witness) That's correct.

2 Q (By Mr. White) What adjustment, if any, or what factor did  
3 you use in your planimetering with respect to the lands in  
4 and around Section 15? For example, those in Section 14.

5 A In mountainous terrain it's not unusual to have section  
6 corners which don't line up. There is a vertical displace-  
7 ment, I imagine due to rough terrain. There are going to be  
8 a few sections distributed throughout the study area base  
9 that have this problem.

10 The rectification process that we utilized was based  
11 on setting the scale on the most extensive irrigated area  
12 on each photograph, so as you get into changes in relief  
13 away from that photograph, you are undoubtedly going to get  
14 into changes in scale or distance between section corners.

15 That was the whole purpose of this random check, to  
16 show that, yes, we had variances of 96.9 percent to 103.8  
17 percent on sections such as these, and based on these random  
18 checks, that they seemed to counter-balance each other so  
19 that the total acreage that we have presented in a plain  
20 should be essentially the true acreage.

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1 Q (By Mr. White) Mr. Billstein, what adjustment  
2 did you make in your planimetering work with  
3 respect to the blue parcel in Section 14 to  
4 reflect elevated terrain?

5 A There's no adjustment in the planimeter readings.  
6 We did not go to each individual section and  
7 perform that kind of task. We're talking about  
8 10,000 or so individual planimeter readings as  
9 a part of this evidentiary material. You start  
10 changing your settings for each one of the  
11 tracts on an individual section basis and you're  
12 looking at literally additional man months of  
13 time. We felt that the random check gave us  
14 sufficient confidence with the counter-balancing  
15 affects on the photographs and it was reasonable  
16 to use a constant planimeter setting. This is  
17 an extreme case.

18 Q How did you make your -- that your random checks  
19 reflected the distribution of elevation variations  
20 based on terrain that you would encounter in your  
21 planimeter work?

22 A The instructions I gave Mr. Saunders was that he  
23 was to utilize acreage, I mean section lines in  
24 exhibits with a whole range of topographic

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1 conditions that we were to encounter on a  
2 Reservation. He was not to prejudice his  
3 readings by just utilizing the river valleys  
4 along the Big Wind or Little Wind. He was to  
5 get up into the high country, the Crow Creek  
6 area, Dry Pasup Creek area and such, and if he  
7 felt that he had established a sample that was  
8 reasonable or a reasonable cross-section of the  
9 entire study area base, then he would stop his  
10 analysis there, do his total and report to me  
11 on his conclusion.

12 His conclusion was that they counter  
13 balanced and on a total acreage basis, that it  
14 was reasonable to use a common setting.

15 Q What specific sample did he use which was  
16 similar to the situation that we described or  
17 discussed here on Exhibit 131, if you know?

18 A We have a lot of high country on this exhibit,  
19 but I don't know specifically what he would  
20 have used to approximate those conditions. But  
21 we're looking at Crow Creek, Dry Pasup Creek,  
22 Sage Creek, Trout Creek, Muddy Creek, a lot of  
23 the high mountain watersheds.

24 Q Did you personally determine that the random  
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1 sample used by Mr. Saunders accurately reflected  
2 the distribution of aerial variation throughout  
3 these photographs or did you leave that up to  
4 him?

5 A That was basically left up to him. We talked  
6 about it, I gave him instructions as to what I  
7 wanted. Again, he spent four, five years carrying  
8 out the general adjudication in the Powder River  
9 Basin for the State of Montana. He had expertise  
10 in sectionizing and evaluating acreage associated  
11 with sectionizing, certainly reasonable to let  
12 him make a sample determination for me.

13 Q Is it true that you made no personal investigation  
14 to insure that your instructions were carried  
15 out with respect to the random sampling?

16 A I simply looked at the list, saw that it contained  
17 high country lands, valley lands, intermediate  
18 terrain lands, felt it was reasonable.

19 Q Okay. Mr. Billstein, I direct your attention  
20 to the Exhibit C-64, and I'd like to ask you  
21 about the manner of calculation of the acreages  
22 shown here in blue. Are you able to tell the  
23 Court the number of acres included as currently  
24 irrigated in the parcel of land that is located

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1 in the -- roughly the SE 1/4 of the SE 1/4 of  
2 Section 30 and the NE 1/4 of the NE 1/4 of  
3 Section 31?

4 A I could go to my hydrographic copies and be able  
5 to tell Your Honor very quickly.

6 Q Okay. Please do so.

7 (Brief pause.)

8 Q How many acres is that?

9 A This is 30 acres.

10 Q In the southern end of that acreage there's a  
11 large white rectangle area to which my untrained  
12 eye would look like a building. Do you know  
13 what that is?

14 A One thing I should point out, Counselor, is  
15 that we do have a -- there's a break where this  
16 particular edging should have been cut out to  
17 reflect the farmsteads in the area. It is shown  
18 on the hydrographic copy and was not included  
19 in the planimeter tables. That white tract of  
20 land I personally don't know what it is, being  
21 the farmstead just above it, and that use area  
22 was excluded.

23 THE SPECIAL MASTER: Do you know that use  
24 area was excluded?

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1 THE WITNESS: From the planimeter readings,  
2 yes, sir, I checked it out over the weekend.

3 Q (By Mr. White) It was included in the Exhibit,  
4 64, was it not?

5 THE SPECIAL MASTER: But he just said he  
6 got it from the hydrographic map in his hand and  
7 not the exhibit.

8 MR. WHITE: What I'm trying to make, I'm  
9 not trying to trap him, I'm trying to make a  
10 point that these may not necessarily reflect what's  
11 on his hydrographic exhibit.

12 THE WITNESS: This is a two-acre tract. But  
13 my point, Your Honor, is that we've got someone  
14 who's been out in the field who's made a block  
15 around the farmstead road area. The instructions  
16 were to alleviate any physical obstacles they  
17 saw; highway, major road, canals, farmsteads.  
18 My tendency is to believe it's part of the farm  
19 system as mapped. It could be where they're  
20 storing hay, whatever, and that the individual  
21 in the field made his delineation of what the  
22 physical obstacles were and that was not one of  
23 them.

24 Q (By Mr. White) It was not?

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1 A The white area?

2 Q The white area.

3 A It was not one of them.

4 THE SPECIAL MASTER: Not one of what?

5 THE WITNESS: Was not one of the physical  
6 obstacles excluded from the acreage totals.

7 THE SPECIAL MASTER: It was not excluded?

8 THE WITNESS: It was.

9 THE SPECIAL MASTER: That's precisely why I  
10 wanted to get that straight.

11 Q (By Mr. White) So the white area was excluded.  
12 How about the roads leading into it?

13 A That's not correct. The road area was excluded,  
14 the white area was not excluded, which my point  
15 is that the areas where the roads and farmstead  
16 are located are marked out, they were excluded.  
17 The other tract that shows in white is included.

18 Q What was the tract in white?

19 A I don't know.

20 Q Over in the West 1/2 of Section 30 there is  
21 another tract of land that's located apparently  
22 in the West 1/2 of the SW 1/4. How many acres  
23 did you list for that tract of land?

24 A Approximately 30 acres.

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1 Q And you see the large white areas, to the  
2 uninitiated eye would look like a stack yard.

3 A Like a stockyard?

4 Q A stack yard.

5 A There's a white area there.

6 Q Was that included or excluded?

7 A That was included.

8 Q What was the basis for its inclusion, based on  
9 your personal field inspection of these areas?

10 A I did not do a personal field inspection of  
11 this area.

12 Q That was something I wasn't sure about. In your  
13 direct examination did you or did you not personally  
14 visit each of these areas?

15 A The private ditch systems, not the Wind River  
16 Federal Irrigation Project.

17 Q You also visited the LeClair Project, did you not?

18 A That's right.

19 Q So what was the basis for your opinion that that  
20 white area had been historically irrigated?

21 A Let me dig out a few more sources.

22 (Brief pause.)

23 A I'm looking at a map which is the official  
24 assessment records of the Wind River Federal

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1 Irrigation Project.

2 THE SPECIAL MASTER: Can you tell from your  
3 document about how many acres that first white  
4 improvement may have covered or how many acres  
5 of stack field may have been required?

6 THE WITNESS: We're talking a couple, two  
7 to three acres.

8 THE SPECIAL MASTER: Each?

9 THE WITNESS: Each. What this map shows is  
10 that that tract of land referred to as stack  
11 field by Counsel is in fact presently assessable  
12 land. The particular photo that I have in my  
13 hand does not show a stack field, that this may  
14 be a short term type of improvement or there  
15 could be a variety of reasons for the location  
16 of that. The problem you get with looking at  
17 pictorial coverage, Your Honor, is that it only  
18 gives you a view of what is taking place at that  
19 particular point in time. That's where the  
20 field work and the interviews with the ditchriders  
21 and such other people come in.

22 Q (By Mr. White) Now, isn't it true, Mr. Billstein,  
23 that on the assessment record you showed me,  
24 your assessment photograph, the area that I've

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1 described as the stack yard is excluded, the  
2 Roman Numeral III?

3 A No, that's an edge, Counsellor. That would just  
4 be this very inside edge associated with a little  
5 access road that comes in there. The rest of  
6 that extends down into the major assessable field.  
7 These people are paying money to get water  
8 delivered to that.

9 Q What's the date of this particular photograph  
10 that you're referring to?

11 A This is approximately a '54 photograph, but the  
12 office of Bureau of Indian Affairs feels that  
13 it's an accurate representation of the  
14 assessability conditions on the project at this  
15 time and when our people met with them, including  
16 myself in June of 1979, they pointed out to us  
17 any changes they had in their assessment records  
18 that were different than on their respective  
19 maps.

20 They have large scale, approximately twice  
21 this size, eight inch to the mile maps and have  
22 the same type of information, so we could easily  
23 cross check.

24 THE SPECIAL MASTER: When you refer to  
25 billstein-voir dire-white

1 assessment records, they are assessment records,  
2 records of assessment taken from the office of  
3 the Bureau of Indian Affairs at Fort Washakie?

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

5 Q (By Mr.. White) Mr. Billstein, over in the --  
6 running along the common boundary of Sections  
7 34 and 3, on Exhibit 64, do you find a long sort  
8 of arrowhead shaped tract that must have about 40  
9 acres in it or so?

10 A I see the tract you're referring to.

11 (Brief pause.)

12 Q Can you find that on your hydrographic aerial  
13 photograph?

14 A Yes.

15 Q How many acres does that include?

16 A Approximately 39 acres.

17 Q Isn't it true that on the underlying photograph  
18 for Exhibit C-64 that's covered with trees?

19 A No.

20 Q What are those objects that are on the underlying  
21 photograph if they're not trees?

22 A Well, we can see some very good looking laterals  
23 through the upper tract into the road.

24 Q What are the objects on there that are small

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1 circular dark objects?

2 A Well, I have a clearer print, and it's just  
3 relative to the darkness of vegetation, could  
4 be they have some, a little bit of hummocky  
5 land, so --

6 THE SPECIAL MASTER: A little bit of what  
7 kind of land?

8 THE WITNESS: Hummocky, rolling.

9 THE SPECIAL MASTER: How do you spell it?

10 THE WITNESS: H-U-M-M-O-C-K-Y. Let me check  
11 the assessment records on that tract. My work  
12 map shows that it's all presently assessable.  
13 Let me confirm that with the maps.

14 (Brief pause.)

15 THE WITNESS: That tract is shown as one  
16 that is presently assessable, people are paying  
17 operation and maintenance on it to have water  
18 delivered to it.

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25 billstein-voir dire-white

1 Q (By Mr. White) Well, then, what are those objects on  
2 the photograph, if the photograph is an accurate repre-  
3 sentation?

4 MR. ECHOHAWK: Your Honor, I believe he's already  
5 explained that.

6 THE SPECIAL MASTER: I would concur in that.  
7 Mr. White, why don't we take a little break? We would all  
8 welcome it for ten minutes, ten to fifteen-minute recess.

9 (Thereupon a recess was taken.

10 THE SPECIAL MASTER: All right. We are back on  
11 the record. Mr. White?

12 MR. WHITE: I think we have got a pending question.  
13 Well, let's go to the next parcel.

14 Q (By Mr. White) I direct your attention to a parcel in  
15 blue. It appears to be in the southwest of the northwest  
16 of Section 3 on Exhibit C-64, and ask you the basis upon  
17 which you determined that that, what I guess is about 30  
18 acres, was irrigated?

19 (Pause.

20 MR. PERRY: Excuse me, Your Honor. Could I suggest  
21 that we put the exhibits on the easel?

22 THE SPECIAL MASTER: Well, we were going to do that  
23 an hour ago, but --

24 MR. WHITE: That's the last parcel I'm going to

25 billstein-voir dire-white



1 ask about, Your Honor.

2 THE SPECIAL MASTER: Why don't we lift the one  
3 and --

4 MR. WHITE: This will fit over it, I think.

5 MR. PERRY: Thank you.

6 THE SPECIAL MASTER: If we had our own courtroom,  
7 we would have pointers and easels and lights and things  
8 like this, but this lawsuit is wherever we find a courtroom  
9 available.

10 THE WITNESS: Okay. I'm ready.

11 A (By the Witness) This particular tract is served by lateral  
12 32-A from the Wind River A Canal, direct service. It is  
13 shown to be assessable under the official records.

14 My field people did visit the area and confirmed that  
15 that use was taking place as --

16 Q (By Mr. White) Take a look at Exhibit 64, Mr. Billstein,  
17 and isn't it true that there are either ravines or streams  
18 with very heavy vegetation running through that parcel?

19 A There's an intermixture of heavy vegetation with lighter  
20 colored vegetation as shown on the base photo. Again, that  
21 could be accounted for from a number of reasons.

22 Q Well, not how it could be, but what was the basis for your  
23 opinion in light of that stratification or the verification  
24 in vegetation on the photograph?

25 billstein-voir dire-white



1 A My opinion was based on the fact that, first of all, my  
2 field people visited the area and mapped it such.

3 Secondly, that we have a direct lateral to the  
4 exact tract that we are evaluating.

5 And, thirdly, that it shows on the official assessment  
6 maps that it's receiving water and paying O and M charges  
7 on the land.

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1 Q (By Mr. White) Did you include the entire acreage  
 2 within the boundaries shown as being currently  
 3 irrigated?

4 A Yes, we did. That entire area is paying O and M  
 5 costs.

6 Q So your opinion is that the entire area is  
 7 currently irrigated?

8 A That's correct.

9 THE SPECIAL MASTER: And the entire area of  
 10 acreage would be included in your acreage total  
 11 for that exhibit?

12 THE WITNESS: That's correct.

13 THE SPECIAL MASTER: The 1,700 and some  
 14 acres, 1,712 acres? That's right, I'm pretty sure  
 15 that's right.

16 THE WITNESS: Whatever the acreage is  
 17 associated with "9" 159.

18 Q When your people went out to the field and  
 19 looked at those areas, did they type the areas  
 20 or did they treat them as all one type of  
 21 irrigation?

22 A They evaluated the areas by type.

23 Q I hand you what's been marked as HB-8, and ask  
 24 you if that sets forth the types which your

25 billstein-voir dire-white

1 field investigators assigned to the lands which  
2 they visited?

3 A That's correct.

4 Q Directing your attention to Exhibit 137, can  
5 you tell us on that exhibit how many of the  
6 34,850 acres are Type VI lands, lands irrigated  
7 sporadically or very irregularly?

8 A I have a series of summary tables. I would  
9 have to assess those summary tables to get that  
10 information. In this particular instance, it's  
11 not important. What we're doing here is mapping  
12 the land that is receiving water, and my  
13 conclusions are relative to the acreage that's  
14 receiving water.

15 THE SPECIAL MASTER: Yes, but I believe his  
16 question was important or I would not have  
17 permitted it to be asked, and I think it is  
18 important what percentage of 34,850 would you put  
19 in Type VI, was it?

20 MR. WHITE: Yes, sir.

21 THE SPECIAL MASTER: Classification, or do  
22 you know? If you don't, just say I don't know.  
23 If that was not a part of your work, then just  
24 say so.

25 billstein-voir dire-white

1 THE WITNESS: For this program it was not  
2 a part of my work.

3 Q (By Mr. White) Is it true that the 34,850 acres  
4 included Type VII, idle lands?

5 A That's incorrect.

6 Q Does it exclude Type VII?

7 A Yes.

8 Q Does it include Type VIII and Type IX which are  
9 not on Exhibit HB-8?

10 A It does not include -- Well, I guess on Types  
11 VIII and IX haven't been introduced so --

12 Q Okay. Is it true then with respect to Types I, II,  
13 III, IV, VI -- excuse me, V and VI off of HB-8,  
14 you're unable to tell the Court the breakdown  
15 between those types of the 34,850 acres?

16 A I have a summary table that the information is  
17 contained in. If it was meaningful to the Court,  
18 it's very important to you, I can spend the  
19 night or sometime this week and we could develop  
20 that information.

21 MR. WHITE: Well, Your Honor, at some point  
22 we're going to come to the water requirement for  
23 those acres which will be very significant  
24 depending on what type they're in, and I think

25 billstein-voir dire-white

1 it would be an appropriate area in which to have  
2 some evidence.

3 THE SPECIAL MASTER: I think so too. Mr.  
4 Billstein, I'm not trying to badger you, and  
5 we're not trying to make this a daily ordeal of  
6 witnesses, but this is the first witness that  
7 hasn't been sick on the stand and I commend you  
8 for that. And I don't want to get you sick, it's  
9 been a long day on the stand and if you're getting  
10 tired say so. I don't want to have people  
11 dragging around like poor Mr. Kersich for the  
12 last three or four days or the poor fellow with  
13 his throat, Mr. Page, the time before. But I  
14 do think it's important to get some understanding  
15 of this acreage because it's vital to know if  
16 this is all Type V and Type VI, that's one very  
17 important fact, and if it generally falls in a  
18 particular percentage of category, that ought to  
19 be in evidence, and if you don't present it, I'm  
20 going to ask you when I call you as my witness  
21 when we get through.

22 THE WITNESS: Could I make a couple of  
23 comments?

24 THE SPECIAL MASTER: Sure.

25 billstein-voir dire-white



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2 some evidence.

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9 been a long day on the stand and if you're getting  
10 tired say so. I don't want to have people  
11 dragging around like poor Mr. Kersich for the  
12 last three or four days or the poor fellow with  
13 his throat, Mr. Page, the time before. But I  
14 do think it's important to get some understanding  
15 of this acreage because it's vital to know if  
16 this is all Type V and Type VI, that's one very  
17 important fact, and if it generally falls in a  
18 particular percentage of category, that ought to  
19 be in evidence, and if you don't present it, I'm  
20 going to ask you when I call you as my witness  
21 when we get through.

22 THE WITNESS: Could I make a couple of  
23 comments?

24 THE SPECIAL MASTER: Sure.

25 billstein-voir dire-white

**REFILM**

1 THE WITNESS: The typing that shows up on  
2 our hydrographic copies reflect the current  
3 condition of the land base. That's not to imply  
4 that certain lands that are in IV or VI with  
5 the proper amendments could not be brought back  
6 into full service irrigation.

7 THE SPECIAL MASTER: Okay. That's what I  
8 wanted to know. What you're saying is a Type III  
9 meadow irrigation, when you look at this this  
10 year it could possibly be a Class 1 irrigable  
11 land if the test that follow in the testing to  
12 see if it has drainage and other requirements and  
13 sandy loam would justify it, is that what you're  
14 saying, is that you got type meaning one thing,  
15 that's totally distinguished from class of land  
16 for irrigation meaning another, and one is apples  
17 and the other is oranges, is that what you are  
18 saying?

19 THE WITNESS: They're not exclusively  
20 apples and oranges, Your Honor. What I'm saying  
21 to you is that in many instances, say in the  
22 Type IV lands there's a physical reason that  
23 these lands are not receiving full irrigation.

24 For example, a ditch system may be a foot or two  
25 billstein-voir dire-white

1 above the elevation of a stream bank because  
2 you had a flood or high water, made a downcut.  
3 Therefore, for this particular season that we  
4 did our field work, they only got partial service  
5 water for that year. But with the proper  
6 improvements, say you come in and put in a  
7 diversion dam or you just use a tarp to check the  
8 water, it may then be possible to bring this  
9 tract of land back into a full service category,  
10 a Type I or II. So what I don't want to do is  
11 imply water duty relative to acres, relative to  
12 my conclusions. That is for others to imply.

13 THE SPECIAL MASTER: I appreciate that  
14 answer, and I think Mr. White does too.

15 MR. WHITE: I do, Your Honor, but at some  
16 time somebody's going to have to explain what  
17 the duty of water is for these lands and without  
18 the foundation or the percentage of which type  
19 they fall into, they're not going to be able to  
20 do that.

21 THE SPECIAL MASTER: That fortunately is not  
22 my problem.

23 MR. WHITE: Okay.

24 THE SPECIAL MASTER: It may be others problems --  
25 billstein-voir dire-white

1 MR. WHITE: So why don't we put a bookmark  
2 there and remember it when we get to that point.

3 Q (By Mr. White) Mr. Billstein, I hand you a  
4 copy of pages 1, 2, 3, and 15 out of the Statement  
5 of Claims in this action.

6 THE SPECIAL MASTER: How are you identifying  
7 the document?

8 MR. WHITE: I'm not identifying it, it's just  
9 a copy. I've given a copy to Counsel. It's a  
10 Statement of Claim.

11 THE SPECIAL MASER: You've reduced it down  
12 actually in size.

13 Off the record, please.

14 (off-the-record discussion.

15 THE SPECIAL MASTER: Okay, back on the  
16 record. Mr. White.

17 Q (By Mr. White) Directing your attention to  
18 Exhibit 137 and to the Statement of Claims, page 1,  
19 can you tell the Court the number of acres on  
20 Exhibit 137 which are included within the 11,230  
21 acres of historic PIA for the Wind River on  
22 the Statement of Claim?

23 A The Statement of Claims was based on earlier work,  
24 some performed by HKM and some performed by the  
25 billstein-voir dire-white

1 Bureau of Indian Affairs. That work has since  
2 been modified to reflect the current conclusions  
3 which are entirely HKM's. And I don't have a  
4 tract by tract comparison of what the earlier  
5 claims are versus what these claims are.

6 Q Can you tell us the number of acres from 137,  
7 Exhibit C-137 which are included within the 5,042  
8 acres for Dinwoody Creek?

9 A Same response.

10 Q How about for Bull Lake Creek, which has 29 acres?  
11 Is it true for all of these that you cannot  
12 correlate Exhibit 137 to the Statement of Claim?

13 A We're talking about use areas, the use areas  
14 can be correlated, but in terms of an actual  
15 tract by tract analysis, it was not important to  
16 me that I do that. My job was to develop  
17 conclusions based on the 1980 field season.  
18 These conclusions are presented and it's referenced  
19 to the earlier Statement of Claim, was not a  
20 prerequisite that I make an analysis of that  
21 relationship.

22 Q Are there any acres on Exhibit C-137 for Crooked  
23 Trout Creek?

24 A Crooked Creek and Trout Creek have since been  
25 billstein-voir dire-white



1 broken up into two separate use areas.

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1 A. (Continuing) They were combined for the Statement  
2 of Claims, it appears.

3 Q. (By Mr. White) Well, I see 69 acres for Crooked  
4 Creek and 228 acres for Trout Creek on 137; is that  
5 correct?

6 A. That's right.

7 Q. In the Statement of Claims there's a total of 692  
8 acres, is that correct, on Page 2?

9 A. Yes.

10 Q. Do the acres assigned to Crooked Creek and Trout  
11 Creek on 137 fall within or without, or do you know,  
12 the 692 acres on the Statement of Claims?

13 A. The acres in the Statement of Claims would have  
14 reflected lands in current use as well as those  
15 lands which were in idle status that were judged  
16 to be irrigable at that particular point in time  
17 in the study.

18 What I'm presenting here relative to my con-  
19 clusions is land in current use outside of adjudi-  
20 cated areas. And, naturally, there would be a dif-  
21 ference between the two.

22 I would assume that most of these acres were  
23 included in the initial Statement of Claims.

24 Q. I'd like you to assume that there are -- let's take  
25 billstein - voir dire - white

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a figure -- 2,000 -- you are not stuck with the number -- but just assume that there are 2,000 acres of adjudicated current use or historic lands within the Wind River portion of the Statement of Claims.

How do you find out whether or not there are, for purposes of the question, ninety-one hundred, two hundred thirty acres in the Wind River on Exhibit 137, or can you?

A. There is not a direct correlation. We are dealing with tracts of land that were developed in two different time frames eighteen months apart.

MR. WHITE: Your Honor, the State of Wyoming objects to Exhibit 55-B, 56 through 136, 137, and I'll hold my objection because I have got some more voir dire on 138, Your Honor, on the basis that at best they can be described as illustrative with the aerial photography and, most significantly, the lands which Mr. Billstein has described in his own words may or may not bear any relationship to the acres claimed in the Statement of Claims.

It's the Statement of Claims that creates the issues to be tried by this case; and if the Statement of Claims is going to be amended at this late date

billstein - voir dire - white

1 to read in somewhat the same format as Exhibit 137,  
2 the State of Wyoming certainly objects.

3 In general then, Your Honor, we object on the  
4 basis of the general accuracy of the exhibits and,  
5 most importantly, on the question of relevancy to  
6 this adjudication.

7 This adjudication is for the purpose of adjudi-  
8 cating the claims that are set out in Pages 1, 2, 3  
9 and 15, among others, made by the United States, and  
10 even their own witness cannot establish the correla-  
11 tion between the values shown on Exhibit 137 and all  
12 the related exhibits to the Statement of Claims that  
13 this lawsuit is about.

14 And if it's different, we're entitled to know  
15 it, and we are also entitled to a continuance to  
16 make a thorough investigation of these claims as  
17 opposed to the claims, the unamended claims, which  
18 now exist. So our objection goes to relevancy and  
19 accuracy, Your Honor.

20 THE SPECIAL MASTER: I would like very, very  
21 much to sustain your objection to every one of these  
22 exhibits, but if I did, I think I would be committing  
23 an irrevocable, fatal error to whatever the report of  
24 this hearing would be.

25 I believe it's sufficiently met the test to be

1 admitted -- you can flaunt me on it in good humor --  
 2 you are admitting it for whatever purpose it may  
 3 have.

4 It may be, indeed, filled with inaccuracies  
 5 which cripple its purpose. Some of these may be of  
 6 virtually little probative value, but if that's the  
 7 case that the United States wishes to present in  
 8 its role for the Tribes, I think it should be admit-  
 9 ted, although we will all have something further to  
 10 say about that further in the trial.

11 MR. WHITE: I would hope that -- I'm sorry,  
 12 Your Honor.

13 THE SPECIAL MASTER: With those observations  
 14 regarding these exhibits, I'm going to admit them  
 15 into evidence at this time.

16 MR. WHITE: Well, I think Mr. --

17 THE SPECIAL MASTER: Subject to further voir  
 18 dire of the exhibits. I thought you were working  
 19 together.

20 Mr. Cozzens, will you have additional voir  
 21 dire?

22 MR. COZZENS: I just have a few questions.

23 MR. WHITE: Before Mr. Cozzens steps up to  
 24 bat, I wonder if we could get a clarification about  
 25 the claims that the United States is adjudicating



1 in this case.

2 Are they the claims that are set out in part  
3 on Exhibit 137, or are they the claims in the ori-  
4 ginal Statement of Claims? And I think the State  
5 of Wyoming is entitled to some sort of response on  
6 that issue.

7 THE SPECIAL MASTER: Ms. Sleater, would you  
8 like to address that inquiry?

9 MS. SLEATER: Yes, Your Honor.

10 THE SPECIAL MASTER: I had a suspicion you  
11 did. If you would like to approach the podium --

12 MS. SLEATER: I would like to restate, and  
13 we have restated in each week in the hearings and  
14 which we initially stated last April, which is:  
15 The work being done by the United States was not  
16 completed at the time the Statement of Claims was  
17 filed.

18 We tried to give a full and accurate statement  
19 as of that time. We made mention to the Court on  
20 March 15 and again on April 29 of the fact that  
21 there would be further amendments as the studies  
22 went on.

23 The State of Wyoming has been kept fully  
24 abreast of this through extensive discovery, which  
25 discovery was going on as late as this past Friday.

1 Now, some work is still ongoing, and I note  
2 from communications with Mr. White that the State  
3 has not yet finished their work either.

4 We are trying to the extent possible to make  
5 Wyoming aware of our claims as they go on. The  
6 claims by the United States on behalf of the  
7 Shoshone and Arapahoe Tribes are the claims being  
8 put forward in this action through the testimony  
9 being presented.

10 It consists of numerous factors, undeveloped  
11 lands, which have three basic components: the soils  
12 component, as testified by Mr. Kersich; an engineer-  
13 ing component; and an economic component.

14 The historic lands, which consist of the lands  
15 that were subject to State adjudication as set forth  
16 in my motion this morning, the lands in use as set  
17 forth by Mr. Billstein, and lands which are idle,  
18 are what are called Type 7 lands, which will be sub-  
19 ject to further testimony by Mr. Waples and by Dr.  
20 Mesghinna and by Mr. Dornbusch, who are engineers  
21 and economists respectively.

22 The whole series of the claims, the fisheries  
23 claims, all the claims for the Tribes are undergoing  
24 constant review and analysis. We are doing our best  
25 to make the State of Wyoming aware of this information

1 when we get it. There is nothing more we can do.

2 I feel that in a case of this magnitude where  
3 it was clear at the time the statement was filed  
4 that it was not the final word, that all that can  
5 be done is to make the conclusions available when  
6 they are made.

7 THE SPECIAL MASTER: I would like to use a  
8 few minutes now for a general discussion that may  
9 be, I hope, of some merit and value to all of us in  
10 our work.

11 The Statement of Claims contains footnotes  
12 that drew my attention at the time and have on  
13 several instances in studying this since then.

14 The third page of the Statement of Claims  
15 carries a footnote regarding the second column  
16 which is the acre-feet totals that historic water  
17 requirements consume the direct flow, hydrologic  
18 potential of those creeks and that; therefore, a  
19 claim is made for the noted water requirement or  
20 for all of the direct flow of a creek, whichever  
21 controls.

22 Doesn't that statement require far greater  
23 demand for water than is either encompassed in the  
24 Winters Doctrine or in the state appropriation or  
25 any other facet that I know of? Wherein does the

1 law grant the obligation to dry up a stream in  
2 order to give additional acreage for flow?

3 Now, I would like to have somebody address  
4 that a little bit or give me the benefit -- maybe  
5 we are six months ahead of ourselves, but that  
6 isn't all the way out of the way either.

7 Yes, Mr. Rogers? Whoever drafted that I  
8 would like to hear from.

9 MR. ROGERS: Well, I didn't draft that, so --

10 MS. SLEATER: I'm afraid I'm responsible for  
11 the Statement of Claims, Your Honor.

12 That footnote relates to certain specific  
13 creeks -- Milk Creek, Sage Creek, Willow Creek --  
14 enumerated therein.

15 I might add that insofar as that footnote is  
16 concerned, it may or may not --

17 THE SPECIAL MASTER: It applies to eleven  
18 streams.

19 MS. SLEATER: There might be some modification  
20 to the streams which are of concern. These are  
21 basically intermittent or small flow streams on  
22 the Reservation where there has been in the past  
23 irrigation and to some extent -- I'm not a witness,  
24 so I'm not going to tell you the extent right now --  
25 ongoing irrigation to date.

1                   What was meant by the footnote, if I can --  
2                   I was trying to -- to the extent that land was  
3                   being irrigated, we are claiming the land that  
4                   was being irrigated.

5                   Now, if it so happens that in any given year  
6                   there's less water in the creek than the amount of  
7                   land that is normally irrigated, we were claiming  
8                   the amount of water it was necessary for the irriga-  
9                   tion up to the limits of the stream.

10                  If there was less water there, obviously we  
11                  could not have full irrigation that year.

12                  I should point out that for the legal basis  
13                  of this the Winters' case itself was a case that  
14                  was dealing with the flow of the Milk River in Mon-  
15                  tana, and in that particular case, one of the origi-  
16                  nal findings of the Court, if you dig way, way back  
17                  into it, was that all the flow was set aside for the  
18                  Indians.

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1 THE SPECIAL MASTER: Yes, but the Indians  
2 got half of what was requested in that, and I  
3 raise that again, Mr. Rogers, because we crossed  
4 this bridge about a year ago, and one of the  
5 reasons for that was that there was not more  
6 necessary, and in this particular footnote on  
7 the streams, if the function of a fair and total  
8 good life for the Tribes is the use of 12 or 1,500  
9 acres on Muddy Creek and yet you show 3,630 acres  
10 on it with 14,000 acre-feet per year, and that  
11 stream can't possibly support it, there has to  
12 be some application of equity there just as there  
13 is on a stream where they allow an appropriation  
14 to the downstream users, somebody's got to get  
15 cut off.

16 MS. SLEATER: Your Honor, if I can address  
17 this. In the Winters' Case I think a careful  
18 reading of what went on at the lower court will  
19 indicate the fact that the claim, while it was  
20 originally for 10,000 acres, was in fact amended  
21 and evidence was put on for 5,900 acres. Similar  
22 to what is happening in this case, which was an  
23 original statement was filed and now we've,  
24 through additional study, there's some amendment

25 billstein-voir dire-white

1 necessary -- I don't want to mislead you to  
2 thinking we've cut back on our claim here, but --

3 THE SPECIAL MASTER: Maybe it would be a  
4 good idea to give some thought to cut back where  
5 there is clearly equity, good management, land  
6 management and maybe even conscience would justify  
7 some cutbacks, they ought to be in order soon.

8 MS. SLEATER: When you hear the testimony  
9 from our engineers who are going to be talking  
10 about water duty, and from our final witness who  
11 is in fact a water master in numerous irrigation  
12 districts, you will see that the United States  
13 has assessed numerous factors and only claiming  
14 that amount of water that's necessary to irrigate  
15 the land that is irrigable.

16 THE SPECIAL MASTER: Well, I hope you're  
17 right. It wasn't so much this Statement of Claims  
18 as it was the Indian claims that came in a month  
19 or two after that really shook me because you  
20 asked about twice this much, as I remember.

21 MR. ROGERS: Your Honor, we were in a  
22 position at that time of not having a full study  
23 done on everything that the Indians entitlement  
24 warranted, and as a matter of fact, you can

25 billstein-voir dire-white

1 appreciate we are still in the midst of that  
2 final preparation now, so to some extent the  
3 claimed statements filed in 19 whatever they were,  
4 '80, are being changed as a result of this work,  
5 just as the government has said.

6 The alarm about the fact that some of the  
7 Indian demands may in fact or some of their  
8 rights under the Winters' Doctrine may dry up  
9 streams, may or may not be a total picture on all  
10 of these streams to which footnote 5 applied in  
11 the Government's Statement of Claim, but it may  
12 in fact turn out that some of them will be dried  
13 up and, if in fact the Indians can show the  
14 entitlement with irrigable acreage or otherwise  
15 to that water with an 1868 priority date, then  
16 under the law so it will have to be.

17 THE SPECIAL MASTER: I want you, Mr. Rogers --

18 MR. ROGERS: We could not know at this point --

19 THE SPECIAL MASTER: I'd like you, Mr.

20 Rogers, to start thinking about this as a point  
21 to what you just said. If the evidence in this  
22 case sustains a finding that the deep groundwaters,  
23 not the Wind River alluvium, not the Wind River  
24 aquifer of the alluvium, but the deeper aquifers

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1 carry with them the right unrestricted and  
 2 unrestrained of total usage to the Indians on  
 3 this entire Reservation, that somewhere in our  
 4 law of this land and in the history of the  
 5 Indian people themselves, there's an awful strong  
 6 morality that says you don't dry up a stream  
 7 on the surface when you can get the water from  
 8 it down below. You don't do this to the fish, to  
 9 the people, to the people downstream and to  
 10 yourselves. And if you have an unrestrained right  
 11 to all the deep water you want, you should be  
 12 perscribed or restrained or constrained from  
 13 drying up surface streams when there are other  
 14 sources of water.

15 MR. ROGERS: Your Honor, I don't think it's  
 16 the water law in Wyoming or any other western  
 17 state, however, that a senior user is required  
 18 to go to more expensive means of groundwater  
 19 irrigation or groundwater use in order to keep  
 20 junior users on surface streams.

21 THE SPECIAL MASTER: He may not have to if  
 22 he needs that. In this case he would not be  
 23 ordered to, I don't think, if he would need that  
 24 water for his livelihood or in some way, but where

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1 is the doctrine that says that you have the  
2 absolute right to more water than is necessary  
3 for a livelihood? Total usage of all the water  
4 you want, you see, for irrigating even acreage  
5 that has to have a proof that it's engineeringly  
6 feasible, that it is economically feasible or  
7 that it's necessary to your livelihood.

8 MR. ROGERS: Your Honor, there are a number  
9 of points to respond to in your statement, I  
10 hope I can remember all of them.

11 In the first place, the test of what the  
12 Indian reserve water rights is is not what meets  
13 their livelihood. The test is to -- sufficient  
14 water was reserved to the Indian Reservation to  
15 meet the purpose for which the Reservation was  
16 established.

17 THE SPECIAL MASTER: Which was a success of  
18 their livelihood in the arts of civilization.

19 MR. ROGERS: And that is not as the State  
20 would have you necessarily restricted to the  
21 barest means of subsistence and the most  
22 fundamental irrigation and farming practice that  
23 existed in 1868 or 1607 or whatever.

24 THE SPECIAL MASTER: I agree with you and --  
25 billstein-voir dire-white



1 MR. ROGERS: Another point is that there is  
2 no part or test yet recognized in law that I  
3 am aware of, including the Arizona versus  
4 California Decision, that requires any economic  
5 feasibility test.

6 Now, we are going to be hearing some of that  
7 evidence in this case, and one of the points of  
8 departure between the Tribes and the United  
9 States has to do with just that point, and how  
10 much economic feasibility must be considered to  
11 satisfy the legal test.

12 THE SPECIAL MASTER: If you ladies and  
13 gentlemen would like a ruling on that, I'd be  
14 glad to grant one. I might save you all a lot  
15 of trouble.

16 MR. ROGERS: I think you should hear what  
17 the evidence is. You've heard some argument  
18 about it up to this point, but I think the Tribes  
19 are prepared to present testimony from experts  
20 about economic feasibility issues, and I think it  
21 would be only appropriate to wait until that time  
22 for any ruling on that question.

23 But basically the United States is proceeding  
24 on an economic feasibility basis anyway, even for  
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1 the claimed statement it has presented. So  
2 you're going to get it in this case.

3 The Tribes' position will simply be that  
4 that economic feasibility process used here is  
5 too stringent. I think those are the main points  
6 in your question, but we're not out to cut off  
7 people, we're out to establish our rights which  
8 the State forced upon us by this litigation, and  
9 this is, as Your Honor has given some indication  
10 without formally ruling on it, probably the only  
11 day in Court we're going to get on what the  
12 Indian right is. We have no choice therefore but  
13 to go ahead and claim as much as foreseeable can  
14 be claimed under what we read as the Winters'  
15 Doctrine.

16 THE SPECIAL MASTER: All right. I want to  
17 thank you all for giving me a chance to discuss  
18 a little bit of this because I think it keeps us  
19 in mind one of the goals, what this lawsuit is  
20 really all about. Too, again a little consideration  
21 of what we might think about that could possibly  
22 bring us together on some basis of agreement  
23 once in awhile and not have this head to head  
24 dispute on every exhibit and title in this lawsuit

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1 that goes on week after week, month after month.  
2 But we have done little agreeing lately un-  
3 fortunately.

4 Go ahead, Mr. White.

5 MR. WHITE: Your Honor, I was going to  
6 reserve my voir dire of 138, which is the report,  
7 and let Mr. Cozzens conduct his voir dire on  
8 the others.

9 THE SPECIAL MASTER: All right. I'll  
10 withhold admitting them for both of you then  
11 and you can continue with what you've got. You  
12 want to go on to 138, a separate exhibit?

13 MR. WHITE: That's the report, Your Honor.

14 THE SPECIAL MASTER: All right, I see.

15 Mr. Cozzens, why don't you take and make --

16 MR. WHITE: Before Mr. Cozzens does that,  
17 Your Honor, I would like to make a record on the  
18 difference between Exhibit 137 and the Statement  
19 of Claim, and simply would like to do that by  
20 moving to strike -- I know what your ruling is  
21 going to be -- moving to strike any evidence  
22 which would be all the evidence induced by Mr.  
23 Billstein because the United States has not been  
24 able to tie his evidence, his conclusions into  
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1 the Statement of Claim. The Statement of Claim  
2 is what creates the issues that this lawsuit's  
3 about, and it's a very late date to amend the  
4 Statement of Claims. I assume the United States  
5 must because there's no correlation between the  
6 evidence and the Statement of Claim. If that is  
7 in fact what the United States intends to do, I  
8 will represent to the Court that the State of  
9 Wyoming received the detailed information, which  
10 is shown on the Exhibit 137 as well as all but  
11 maybe ten of these other overlays, there were  
12 about 70 of them, only last week. This lawsuit's  
13 been going on for over four years, and the  
14 Statement of Claims has been filed for -- filed for  
15 almost a year. And the State would request an  
16 extension for an amount of time required to  
17 analyze the claims as represented by Mr. Billstein's  
18 conclusions as they depart from the Statement of  
19 Claim that we've been operating under for four  
20 years.

21 THE SPECIAL MASTER: All right, Mr. White.

22 Why you're correct in your judgment on how I  
23 will rule on this. Two, I will not grant an  
24 extension to the State of Wyoming or to the United

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1 States or to the Tribes or to defendants or to  
2 anybody else in this lawsuit from here on out.  
3 We're on our way with it. I regret if you  
4 don't have as much time as you'd like, but I've  
5 seen some of these exhibits around the Federal  
6 Courthouse for at least a month.

7 MR. WHITE: There is some dispute about when  
8 they were delivered, Your Honor, but giving  
9 everybody the benefit of the doubt, they were  
10 delivered last month, that's 70 of the 80 of them.

11 MS. SLEATER: Your Honor, to clear up the  
12 record, numerous of these exhibits I can't  
13 represent that they were all there, but on  
14 January 16th they were available in the Federal  
15 Courthouse, and there were experts from the  
16 State of Wyoming reviewing them then.

17 THE SPECIAL MASTER: I hold a continuing  
18 hope that one of these hearings, one of these  
19 days you two will be in agreement on one particular  
20 matter when evidence comes in.

21 MR. WHITE: You'd like to take some evidence  
22 on that, I'd be glad to put it on.

23 THE SPECIAL MASTER: I don't want to do that,  
24 and I appreciate your feeling on it because

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1 there is a lot of material there, but my rulings  
2 are made and I make them with a deep conviction  
3 that they are the right decisions.

4 MR. WHITE: I hope you show the same usual  
5 understanding when we take some time to go  
6 through this.

7 THE SPECIAL MASTER: You remind me of that  
8 when any further delay is requested.

9 MR. WHITE: We're going to have to go through  
10 them in detail, Your Honor.

11 THE SPECIAL MASTER: I appreciate that, and  
12 I've tried to be quite granting. I recognize  
13 their importance and I'll give you all the time  
14 you need. The one that probably can't understand  
15 my patience is Mr. Millstein, he's probably  
16 unhappy.

17 Okay, Mr. Cozzens.

18 VOIR DIRE EXAMINATION

19 BY MR. COZZENS:

20 Q Mr. Billstein, are you an expert on stereoscope  
21 analysis?

22 A No, I'm not.

23 Q Have you ever done a significant number of  
24 stereoscope analysis?

25 billstein-voir dire-cozzens

1 A I've used the stereoscope, but never carried  
2 out a major portion of a project with it, in  
3 that I have specialists under my supervision  
4 that were hired to do that task.

5 Q Are you the one that hires those specialists?

6 A Yes.

7 Q Are you the one that determines their qualifications?

8 A That's about a right statement, yes.

9 Q What kind of controls or checks do you have to  
10 determine if they're properly conducting the  
11 stereoscope analysis?

12 A First of all, we've got good stereoscopic  
13 equipment. It's a Letts moving tract stereoscope  
14 with a three time magnifier. In terms of  
15 equipment we have no problems.

16 In terms of the individual and their  
17 expertise, as part of the interview we receive  
18 references and check the references as to the  
19 type of work that they've done before, and also  
20 I use my limited experience in stereoscopic  
21 work to ask the necessary questions. When I'm  
22 satisfied that this individual understands and  
23 can understand the program and can far exceed  
24 my capabilities, then that's a prerequisite for

25 billstein-voir dire-cozzens

1 utilizing it.

2 Q Is it fair to say then that once you make your  
3 own personal determination that whomever it is  
4 that you've hired to do a stereoscope analysis  
5 is qualified to do that, that you're basically  
6 unable to follow up and make sure that he's not  
7 making a mistake here and there?

8 A I can't say that I check every use area that he  
9 evaluates. The reason that you hire specialists  
10 is for speed and accuracy. Those of us who are,  
11 don't utilize the stereoscope extensively in our  
12 work program are awkwardly slow. You can utilize  
13 the stereoscope and such as I have, and my  
14 background in utilizing it, in working with some-  
15 one like Mr. Saunders allows me to confirm that  
16 he is carrying out the program properly.

17 Q Okay. Specifically then what did you do in that  
18 preparation of these exhibits that confirmed in  
19 your mind that Mr. Saunders had properly done  
20 the stereoscope analysis?

21 A We took a look at the certain ditch systems, we  
22 set up the photographs and tracked them. He  
23 asked me to take a look at them, I reviewed some  
24 of the ditch systems and we discussed what we saw

25 billstein-voir dire-cozzens

1 and the conclusions that he was making from  
2 them.

3 Q But you did testify you're not an expert in that  
4 area, so it's not -- you wouldn't necessarily  
5 have picked up an error in his procedure; is  
6 that correct?

7 A Not unless it was an obvious one.

8 Q And so basically what you're saying is the  
9 stereoscope analysis that was done here, and to  
10 the extent that it led to all of these exhibits,  
11 was done by Mr. Saunders, and he's the one that  
12 can speak to that?

13 A He's an expert in that field.

14 Q And you can't speak to that, is that fair?

15 A Only that I've got limited stereoscopic experience  
16 and --

17 Q And you relied on Mr. Saunders?

18 A That's right.

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billstein-voir dire-cozzens

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1 Q (By Mr. Cozzens) What precisely did your people  
2 do when they went out and did the field studies?

3 A. Okay. The day before the people broke out their  
4 flight strips and went over the office analysis  
5 or the stereoscopic analysis. They obtained a  
6 familiarity with the systems that they were going  
7 to evaluate the next day.

8 This is very critical so that when they are  
9 out in the field, they do have an understanding of  
10 the service concept and again how the use areas were  
11 defined, less waste in the office.

12 Their first procedure when they entered the  
13 field was to inspect the primary service facilities.  
14 They are talking about the diversion works and the  
15 major canal systems.

16 As we talked about before earlier in the testi-  
17 mony, this was necessary so that they could evaluate  
18 whether the ditch systems were, in fact -- whether  
19 the diversions were operable; and once they had that  
20 concept in mind, they could go back and take a look at  
21 the land use and evaluate whether, in fact, that  
22 physical system could have served that land use.

23 They reviewed the land use versus the boundaries  
24 that were established in the office and confirmed,

25 billstein - voir dire - cozzens



1 verified or modified.

2 Q What types of evaluations did they have to make?

3 I mean, specifically they had to make some judg-

4 ments at some point, didn't they?

5 A That's correct.

6 Q And what types of judgments did they have to make?

7 A Basically, the service boundaries of the use areas.

8 Q And did you give them criteria to make those judg-

9 ments?

10 A They had the land use typing criteria plus they had

11 the criteria of relating the physical system itself

12 to the use area and make a determination if, in

13 fact, that physical system was, in fact, serving

14 that use area.

15 Q When you said the land use type, are we talking

16 about the exhibit where you went through six dif-

17 ferent land use classifications?

18 A That's right.

19 Q And you prepared that, is that correct?

20 A That was a set of data that was prepared primarily

21 for the hydrology studies that were going to be

22 undertaken.

23 It was necessary for us to have a concept on

24 the level of depletion associated with each tract

25 billstein - voir dire - cozzens

1 of land. The area that we're discussing now or  
2 testifying to is basically a land base claim  
3 delineation.

4 The reason that the typing was carried out  
5 was to assist the hydrology study from the depletion  
6 analysis standpoint.

7 Q I'll be honest with you and tell you I'm not sure  
8 I understand your response. My question is: Did  
9 you prepare these classifications?

10 A Okay. In response to the question, those land use  
11 typings were prepared by a team, specifically Mr.  
12 Waples, Mr. Toedter and myself.

13 Mr. Toedter was directly involved in the com-  
14 pletion study, so he had the primary input.

15 I was just there to review the approach and  
16 see if it was reasonable.

17 Q Are these classifications something that are new  
18 to you in your field of expertise? Is this the  
19 first time you have seen these classifications?

20 A No, they are classifications that were used pri-  
21 marily in the SCS irrigated lands inventory work.  
22 They are a common way of delineating lands so that  
23 respective consumptive use and depletions can be  
24 estimated, and these results are inputted into

25 billstein - voir dire - cozzens

1 hydrology studies so that you could get an accurate  
2 representation of natural flows above and beyond  
3 this level of depletion that we have identified.

4 Q Does your area of expertise then enable you to go  
5 out to anybody's ranch and classify that ranch into  
6 these different types of classifications?

7 A I'm familiar with the land use typings.

8 Q Is that part of your area of expertise? Are you  
9 an expert in that area?

10 A I'm not an expert in that area.

11 Q Who is?

12 A Our water rights specialist and soils scientists  
13 who have an agricultural background and have done  
14 a lot of land use analyses would qualify, in my  
15 opinion, as experts.

16 Q Specifically relating to the people who went out  
17 and did the field studies that led to these exhi-  
18 bits, would you identify the ones who are expert  
19 in that area?

20 A All three of them would be qualified as experts,  
21 in my opinion.

22 Mr. Saunders did that as part of the Powder  
23 River Study for four years. He was responsible and  
24 in charge for preparing the technical information

25 billstein - voir dire - cozzens

1 that was going into that adjudication.

2 Mr. Johnston was his party chief that per-  
3 formed the field studies and made recommendations  
4 on the claims, the same adjudication.

5 And Mr. Waples has had extensive experience  
6 in irrigation typing and land use analysis.

7 Q So in this classification process we're really  
8 doing the same thing that we did in the stereo-  
9 scopic process, and what you are telling me is that  
10 you hire people that you consider to be expert and  
11 then you left it up to them; is that correct?

12 A A water resource planner --

13 Q Excuse me. Can you just answer the question? I  
14 don't mean to cut you too short, but I think you  
15 can answer this yes or no; and if it's no, we can  
16 go further.

17 A I don't believe it's a yes-or-no question.

18 Q Is it correct that you don't have any expertise  
19 in the area of classifying these lands to the dif-  
20 ferent classes?

21 THE SPECIAL MASTER: Types or classes, because --

22 MR. COZZENS: Types.

23 THE SPECIAL MASTER: Classes 1, 2, 3, 4 and  
24 types are a matter of --

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1 MR. COZZENS: Let me make it clear.

2 Q (By Mr. Cozzens) I'm speaking about the types  
3 that are set forth in what has been marked as  
4 Exhibit HB-8, previously used here, and I believe  
5 you told me that you weren't an expert and that  
6 that wasn't part of your expertise?

7 A. That's right.

8 Q And then you told me that the three people that  
9 did that you considered to be experts?

10 A. Yes.

11 Q And if you are not an expert, didn't you just have  
12 to rely on their expertise?

13 A. I have some experience in the area. A water resource  
14 planner goes out and gets together an investigative  
15 team of technical specialists. These people perform  
16 certain tasks that are essential to the overall plan.

17 This is a standard approach for any water re-  
18 source engineer. You do not have to do every single  
19 technical item yourself. This is basically the pro-  
20 cedure that I undertook.

21 I interviewed these people. I committed them  
22 to tasks that I felt they were experts in and have  
23 some experience in the area, and in my review process  
24 feel comfortable with their results, and as a water

25 billstein - voir dire - cozzens



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resource planner, I'm satisfied that I can make  
the proper conclusions.

Q I'm not questioning whether you followed correct  
procedure. My question is specifically: You had  
to rely on their expertise in this area; is that  
not correct?

A. That's correct.

\* \* \* \* \*

1 Q The next step I believe you testified to was the same  
2 three individuals then would discuss with various land-  
3 owners; is that correct?

4 A There was an interview phase.

5 Q And was every landowner interviewed?

6 A Every landowner was contacted. Not every landowner was  
7 interviewed.

8 Q Do you have an idea of how many, what percentage of the  
9 landowners were interviewed?

10 A It would be less than half.

11 Q You testified previously on direct examination about at  
12 least one instance where what the landowner told you and  
13 what you personally observed in the field were not  
14 the same thing.

15 Was that the only instance of that happening?

16 A There were numerous occasions during the interview phase  
17 when the landowner would dictate to our field personnel  
18 that such and such was the case. Before our people accepted  
19 those conclusions, they were to do follow-up work.

20 The particular instance that I became involved in was  
21 one that I caught, and it was an oversight in the follow-up  
22 work from our field program.

23 Q You said that the interviewers were to do follow-up work.  
24 Do you know firsthand whether they did?

25 billstein-voir dire-cozzens

- 1 A There were several occasions where I was involved in  
2 discussions where we did not accept the interviewer's  
3 recommendation.
- 4 Q I'm not real sure how you answered my question. Is the  
5 answer then yes on these several occasions? There was  
6 follow-up work done?
- 7 A To the best of my knowledge, they followed up in all cases.
- 8 Q Now, when you say, "To the best of your knowledge," does  
9 that say to me that you are not aware that they could not  
10 do that? Is that really what you are telling me?
- 11 THE SPECIAL MASTER: I think that's a little bit  
12 argumentative. To the best of his knowledge and based on  
13 his knowledge.
- 14 MR. COZZENS: I certainly wouldn't speak to the  
15 Court about this objection, so maybe I will rephrase the  
16 question.
- 17 THE SPECIAL MASTER: It is getting to be a late  
18 hour and he's been through this for quite a while. It's  
19 five o'clock. Will you be with us tomorrow?
- 20 MR. COZZENS: That would be fine.
- 21 THE SPECIAL MASTER: Why don't we do that? We  
22 will stand in adjournment until 9:15 in the morning.
- 23 Yes, Regina?
- 24 MS. SLEATER: I just wanted to say one thing  
25 billstein-voir dire-cozzens

1 for the record, which I think I had said for the record  
2 before, and previously we advised the State of Wyoming,  
3 but I wanted to make absolutely sure that this is on the  
4 record, that the United States pursuant to an agreement  
5 we have had with the Attorney General of the State of  
6 Wyoming, reviews official filings of documents, whether  
7 discovery documents or other documents, as filing with the  
8 U. S. Attorney's Office in Cheyenne, to my attention, and  
9 I just wanted to make the record absolutely clear on this,  
10 that if documents and information are not received in this  
11 office up here, it's not official filing on the United  
12 States for purposes of this lawsuit.

13 THE SPECIAL MASTER: Okay.

14 MR. WHITE: Well, I suppose the record can speak  
15 for itself, but I have got my curiosity up, Your Honor.  
16 I'm kind of wondering what documents Ms. Sleater is worried  
17 about.

18 THE SPECIAL MASTER: Why don't you two talk about  
19 it after we adjourn?

20 MS. SLEATER: I just want to make sure that there  
21 aren't any documents that I'm worried about.

22 MR. WHITE: Well, lots of people have entered their  
23 appearance on behalf of the United States, and I suppose we  
24 can serve any or all of those. We will make an attempt to

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serve everybody we can.

THE SPECIAL MASTER: I appreciate that. I guess what Ms. Sleater is saying is that, number one, it should be to the United States of America, not to the tribes.

MS. SLEATER: Yes, this is for the United States.

THE SPECIAL MASTER: All right. We are in adjournment until 9:15 in the morning.

{ Thereupon the hearing recessed  
{ at 5:03 p.m.

\* \* \* \* \*



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