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Case # 4993

File # 127

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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 Hampton CLERK
DEPUTY

VOLUME 20

Tuesday, March 10, 1981

ORIGINAL

APPEARANCES

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FOR THE STATE OF
WYOMING:

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FOR THE UNITED STATES
OF AMERICA:

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MR. MICHAEL D. WHITE
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ALSO: MR. STUART RIFKIN

MS. REGINA SLEATER
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and

MR. TOM ECHOHAWK
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TRIBE:

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BY: MR. R. ANTHONY ROGERS

FOR THE SHOSHONE
TRIBE:

SONOSKY, CHAMBERS & SACHSE
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Washington, DC 20006
BY: MR. WILLIAM PERRY

FOR THE PRIVATE
WATER HOLDERS:

MR. LAWRENCE COZZENS
Attorney at Law
P.O. Box 470
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1 THE SPECIAL MASTER: Shall we begin? All
2 right, we'll resume, please.

3 MR. WHITE: Your Honor, Mr. Cozzens has
4 kindly let me interrupt his voir dire, and I want to
5 make a motion and get it out of the way so we know
6 what to do with respect to the motion. And I would
7 like to move, Your Honor, that all parties including
8 the United States be required, if they are going to
9 present evidence outside of the pleadings, to prepare
10 a written amendment of their pleadings.

11 THE SPECIAL MASTER: Their what?

12 MR. WHITE: Of the pleadings to conform to
13 the evidence they submit.

14 THE SPECIAL MASTER: Is what this evidence
15 stems from depositions that both sides have been party
16 to rather than the pleadings?

17 MR. WHITE: It may well affect the private
18 parties, Your Honor, and I would like to have a clean
19 record in this case, I know you would. I for one
20 don't want to try this case again, win, lose or draw.
21 The problem is, of course, is that the pleadings set
22 this notice to the parties as to what issues both
23 legal and factual are going to be described. I don't
24 want to reargue yesterday. I just would like to move
25 for an order directing all parties, including the

1 United States, that if they intend to offer evidence
2 on issues outside of the pleadings, that are presently
3 on file, that a written amendment to the pleadings --

4 THE SPECIAL MASTER: Be required to amend
5 the pleadings?

6 MR. WHITE: If evidence is going to be
7 submitted --

8 THE SPECIAL MASTER: Evidence to be submitted.

9 MR. WHITE: -- outside, on issues outside of
10 the pleadings as presently filed, and that the amended
11 pleadings or the amendments to the pleadings be served
12 on everybody at least 30 days prior to the time that
13 the evidence is offered or adduced.

14 The problem is, of course, as the Court
15 realizes, that all the parties, particularly the
16 private parties have the right to rely on the allegations
17 or claims contained in the pleadings, and it becomes
18 almost a due process or it does become a due process
19 issue when without notice evidence is submitted on
20 issues that are outside of the pleadings that are on
21 file.

22 THE SPECIAL MASTER: Is yesterday the first
23 day that you have sensed in this case that some
24 evidence was being presented, evidence that was outside
25 of the pleadings?

1 MR. WHITE: Yes, sir. I was a little
2 concerned when Mr. Kersich came on, but I understand
3 those will be tied in later on.

4 THE SPECIAL MASTER: I was under the
5 impression most of this material was not taking you
6 by surprise; you had exposure to it during the
7 deposition proceedings.

8 MR. WHITE: I had exposure to it last week,
9 Your Honor, and I think you'll see from the cross-
10 examination, which will probably last many days on
11 this matter, that there is no way to digest the
12 information in the amount of time we've been given.
13 We can put on evidence if you like, Your Honor, but
14 I assume that that chapter is closed.

15 THE SPECIAL MASTER: Let me ask the United
16 States and the Tribes' counsel, does Mr. White have
17 any reason to be apprehensive or to fear this matter
18 that requires a ruling on this motion?

19 MS. SLEATER: Your Honor --

20 THE SPECIAL MASTER: Requires a motion?

21 MS. SLEATER: Mr. White has deposed every
22 witness that the United States will be calling as
23 part of its direct case at this time; Mr. White or
24 one of his co-counsel. As Mr. White is well aware,
25 some of our people have not finished quite putting all

1 of the touches on their work, that's quite true. In
2 fact, I have received communication from Mr. White
3 indicating that he does not feel his people will have
4 finished their work until the night before they're
5 being put on the stand.

6 As we're all aware, this is a standard
7 procedure in court. In fact, the court does have
8 proceedings taking care of this problem.

9 First I might note the pleadings do frame
10 the issues and there are no changes in the issue
11 since the time the pleadings were filed. Now,
12 individual numbers may change. However, as Your
13 Honor is perhaps aware from his legal practice and
14 would find looking at the transcript in any trial, the
15 trial evidence never exactly conforms to the pleadings
16 that were filed some year before the trial commenced.
17 The procedure that the courts adopt for this is when
18 the evidence is over the pleadings are conformed to
19 the evidence, is what they call it. You stand up and
20 you say, Your Honor, at this time I'd like all the
21 pleadings in this case to be conformed to the
22 evidence that was presented herein, and the courts in
23 turn say, yes, granted.

24 Mr. White has not been -- will not be taken
25 by surprise by any evidence that is being put on in this

1 One of the reasons I feel my ruling is just,
2 I believe the State just this last week got permission
3 from the Tribes for a good many technicians to again
4 be on the Reservation to continue their work which
5 will help in rebuttal certainly, if not in the pre-
6 paration of your Case in Chief, certainly in rebuttal
7 that can come on at any time... You're keeping yourself
8 open to do that, so I don't want to rule that
9 pleadings can be amended. I think that there is a --
10 Regina mentioned there's an inevitable variance, that's
11 understandable in trying a lawsuit between pleadings
12 material and the evidence material as long as the
13 evidence is within the framework, what was asserted as
14 a basis for one's pleadings. And those figures are at
15 a variance, there's no question about it. They're
16 differently organized between acreage on the respective
17 stream, but I think they're not going to be that much
18 of a variance that they cannot be reconciled, certainly
19 in my work when it comes to passing judgment, as far
20 as concerning water rights.

21 Yes, Mr. Cozzens.

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1 case. He is aware of the parameters, he has deposed
2 all of our witnesses for weeks on end. They're --
3 As I said, some of the numbers may vary.

4 Now, the problem is that 30 days before
5 trial, as people are doing final checks, as you
6 know, Mr. Billstein found an error in one of his
7 tables where there was a transcription error on a
8 photograph that was an R instead of a 4. Things like
9 that happen, people redo their work in terms of
10 what's been going on to double check and triple check
11 and make changes, and I'm sure that with Mr. White's
12 great concern for the record, he would realize that
13 to prohibit the United States from making changes
14 and making amendments to its presentation would in
15 fact be error such that this case would be reversed.

16 THE SPECIAL MASTER: I don't have to hear
17 any more on this. I believe that I will not grant
18 a motion that would set up the machinery for amended
19 petitions at this stage, and the reason for this is
20 that we are -- we have scheduled now almost every
21 week of hearings and to have to do this, Mr. White,
22 in a way to permit 30 days to lapse between the time
23 that evidence could be put on would do violence to
24 our schedule and cause an inevitable delay of many
25 months if it could be complied with.

1 MR. COZZENS: Your Honor, I understand that
2 you have made your ruling, and I would just like to say
3 this for the record, for the private parties: Having
4 seen what happened here today creates a real problem
5 because we don't have --

6 THE SPECIAL MASTER: Mr. Cozzens, I don't know
7 of a day in this matter that hasn't been a real problem
8 in this case. It's been a real problem. That wasn't
9 the Indians' fault. That wasn't the United States'
10 fault. It's nobody's fault. It's as a result of --

11 MR. COZZENS: We should certainly be entitled
12 to look back at the pleadings and say, "This is what is
13 going to be tried here, and these are the issues that
14 are important to us. We are going to rely on what is
15 in file on deciding whether or not to attend these hearings
16 and whether to prepare our cases and this sort of thing,"
17 and when we come up with a totally different case being
18 presented than is set forth in the pleadings, we waste the
19 very limited budget that we have.

20 THE SPECIAL MASTER: I don't believe we have
21 a totally different case. We began this with the first
22 witness the first day who was Mr. --

23 MS. SLEATER: Harbour?

24 THE SPECIAL MASTER: Before him, and then
25 we went on to the Kersich testimony which in itself took

1 a few wild departures from what we had expected by way
2 of arable lands, and this now is a new approach -- or at
3 least a different approach to what can be called lands
4 under irrigation but not with water rights adjudicated
5 on them, I suppose would be the subheading, but certainly
6 it is not so far a departure that it should be either,
7 one, thrown out or that we require amended pleadings
8 further in the case, so I think -- I appreciate your
9 feeling on it, Mr. Cozzens, but we must move on.

10 Mr. Rogers?

11 MR. ROGERS: Your Honor, may I say two things?
12 It's not a good idea to comment after the Master has
13 ruled in your favor, but I am concerned from the
14 perspective of future appeals here for the record that
15 I would like to make a couple of statements about some
16 remarks counsel have made.

17 First of all, the opportunity for private counsel
18 to participate in depositions has been in existence
19 since depositions began. None have appeared to participate
20 in the depositions, either of State's witnesses or the
21 witnesses for the United States or the tribes, and I
22 think the Master has already covered quite well that
23 there is no obvious prejudice to the State or to the
24 private parties from the manner in which the pleadings
25 were initially framed as compared to the evidence that

1 has been adduced to date because of the participation
2 in the depositions and the lengthy other discovery that
3 has gone on.

4 The Master made one comment about the agreement
5 to further entry on the Reservation by State's experts.

6 As of this time, Your Honor, there has been no
7 consent to that by the tribes or the United States.
8 The filing was by the State last week, I believe, and
9 we only received it, I think, Thursday or Friday in our
10 offices.

11 As a matter of fact, Your Honor, we have not
12 developed our formal position yet, but I think the tribes
13 are going to take the position that they will oppose
14 that entry, and the grounds will be that State had
15 the entire summer of last year, a full growing season,
16 and all other time since then up until the time of trial
17 to do that as well as the year before that, and last
18 year was the first time that they took the opportunity
19 to go onto the Reservation.

20 I think the tribes' view is going to be, in
21 responding to this, that the only discovery that should
22 continue at this point is the deposition of witnesses
23 who, from the tribes' point of view, have not been de-
24 posed at all by the State, and an opportunity for the
25 redeposition of the State's witnesses whose work had

1 not at all been completed, had barely been started
2 when the United States deposed them earlier.

3 In other words, the only discovery that should
4 continue is those depositions and not further physical
5 examination of the Reservation.

6 THE SPECIAL MASTER: I think it is well that
7 you brought this up while Mr. White is here, and he
8 has probably had a chance to hear it for the first time.

9 MR. WHITE: That's right.

10 THE SPECIAL MASTER: We all do things at
11 our own peril in this business, and I'm glad that you
12 qualified it conditionally and said that you may do this,
13 but I would like to think you are going to keep an open
14 mind on this because the first couple of summers you
15 were too busy, as I recall -- it was before I got into
16 the case, but you were too busy with the legal principals
17 of state jurisdiction, a McCarron matter, to give much
18 thought to the nuts and bolts of trying of the case.

19 The second summer was last summer.

20 MR. ROGERS: Well, Your Honor, the State
21 has been screaming at the tribes and the United States
22 since 1977, and they have stated here in 1981 that we
23 have had four years to prepare for this case. They have
24 had four years too. The Reservation hasn't moved in
25 those four years.

1 MR. WHITE: I have got to respond, Your Honor.

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

3 MR. WHITE: And the response is that Mr. Rogers
4 has carefully and skillfully muddled the issues with
5 respect to discovery, a very able lawyer and he's done
6 an able job in what he set out to do.

7 The point is that the information such as that
8 contained on Exhibit 137 was not completed in its
9 development and not shared with the State of Wyoming
10 until last week.

11 If there are similar situations where the claims
12 differ from the pleadings, the State is similarly
13 entitled to go out and continue its discovery so as to
14 prepare its case, and if Mr. Rogers takes a position,
15 or the tribes take the position, that the State may not
16 have entry onto the Reservation, and the Court sustains
17 that position, we will come to the Court asking for an
18 order allowing us to do that if the tribes refuse.

19 It seems to me it simply compounds the error,
20 and it's just beyond the wildest imagination of anyone
21 who has participated in these adjudications that last
22 minute evidence cannot be followed up by further
23 discovery, and that's the position the State will take,
24 and I would ask that the Court direct the tribes to
25 make its response or make their response to our request

1 by the end of the week so that while this Court is in
2 session during the current two-week period, we can get
3 a hearing on the question of access of our experts to
4 the Reservation, because that is a very fundamental
5 need of the State in light of evidence such as that which
6 the United States put on through Mr. Billstein.

7 I'm not criticizing Mr. Billstein, but the
8 evidence which they put on was outside of the scope of
9 the pleadings drafted by the Department of Justice, so
10 our position will be that we are entitled to do that,
11 and we would appreciate getting an order from the Court
12 directing some response by the tribes in time to get a
13 resolution of that issue before the current two-week
14 period.

15 THE SPECIAL MASTER: I think the tribe would
16 be well-advised to give this some serious thought. We
17 have cooperated very well over a couple of years in
18 preparing evidence and depositions -- reasonably well,
19 let's put it -- but we don't need anymore locking out
20 of people from the area, I don't think, and if he will
21 give it some thought --

22 MR. ROGERS: I will state for the record
23 right now then the tribes' position, that if the
24 Court will cease the entry onto the Reservation for
25 purposes of further discovery --

1 THE SPECIAL MASTER: If the Court will cease
2 the entry --

3 MR. ROGERS: -- to limit it to the time
4 that the State has requested in its new entry request --
5 that is, from March 30 to April 30 -- if they will limit
6 it to that period, the tribes will not oppose it.

7 THE SPECIAL MASTER: Well, Mr. Rogers, how
8 could the Court limit it to that if some little item
9 may come up in May or June during irrigation season
10 and an engineer wants to make a trip up to Fort Washakie
11 to check something? Why should he be denied entry to
12 the Reservation? Doesn't that smack a little bit of
13 being arbitrary on the Court's part?

14 MR. ROGERS: This poses some inconvenience to
15 the tribes and to the United States as well because --

16 THE SPECIAL MASTER: I appreciate that.

17 MR. ROGERS: -- because we have insisted --
18 that experts from the State be accompanied by
19 representatives of the tribes or the Bureau of Indian
20 Affairs or someone from the Federal Government, and
21 it's a matter of scheduling and constantly recurring
22 events if this is going to continue on through the
23 entire course of the trial.

24 THE SPECIAL MASTER: I appreciate that.

25 MR. ROGERS: The State has, I assume,

1 realized the full extent of its need by posing the
2 request as it did, the one filed last week limiting it
3 to that 30-day period.

4 THE SPECIAL MASTER: I appreciate that,
5 Mr. Rogers, but I'm of the opinion that much of the
6 disputing -- disputatiousness, if that's a good word --
7 between Indians and non-Indians in that area has been
8 directly attributable to the fact that there's been an
9 absence of communication, common basic regard for each
10 other's existence, failure of even an invitation at
11 times to sit down and discuss a matter here or there,
12 that might have resulted in an amicable settlement in
13 many of these things.

14 I think the case of the groundwater that would
15 have set up an industrial park at the airport at
16 Riverton would have been solved if a couple Indians
17 would have been invited in to lunch with the Chamber
18 of Commerce of Riverton or with the Lions Club or
19 with somebody and would have said, "Gentlemen, we
20 think we can create some jobs here and start an industrial
21 park. We can make some jobs for Indians as well as
22 non-Indians. We ought to drill these wells, and that
23 water may be yours and it may not be yours. I don't
24 know, but we have got to consult with you," and I
25 have a suspicion that had that been done, we would never have

1 had the dispute about the airport at Riverton some four
2 years ago, and I think further that if there is ever to
3 be any cooperation for the good of everybody in this
4 area in Water Division No. 3 for the conservation of
5 its runoff water in the spring, for the hope that some
6 dams could be built for everybody's help on the bad years,
7 it's got to be done with cooperation and an interchange
8 and an exchange of people's rights of each other's lands.
9 The Hanover situation -- that's got to invite Indians in
10 to see its other ways of irrigating or crop rotation can't
11 be done, not a continual building of walls and a polarization
12 of people against people in this area, and for the
13 Indians to say, "No, nobody else on the Reservation as
14 of the end of April 30," or asking me to rule that way,
15 I'm not going to do it, Mr. Rogers.

16 I'm not being emotional. I'm not trying to be
17 anything except, I hope, fair, just and a little bit
18 visionary in this matter because this lawsuit is going
19 to live on long after all of us are dead.

20 There will be people going over this hearing and
21 going over this evidence and framing issues to apply
22 to other disputes between Indians and non-Indians in
23 the rest of America, and if we can set some good
24 directions now, we ought to be doing it.

25 MR. ROGERS: Your Honor, I will have to preserve

1 then at least the Arapahoe tribe's right. I spoke for
2 both tribes, perhaps precipitously, because Mr. Parry
3 didn't have a chance to speak for the Shoshone tribe here,
4 but I think we should withdraw further comment on it at
5 this time and frame an appropriate response.

6 My understanding of the rules though is that we
7 do have 30 days to respond and that ought not necessarily
8 be the end of this week.

9 THE SPECIAL MASTER: No, the end of next
10 week.

11 MR. WHITE: The Court can vary the time limits
12 under the rules for good cause shown --

13 MR. ROGERS: Upon request.

14 MR. WHITE: I made such a request. I think
15 the Court is well aware of the pressing nature of the
16 schedule which we are all trying to follow in this case,
17 and I would ask the Court to direct the response be made
18 in time for disposition.

19 THE SPECIAL MASTER: The response should be
20 made before a week from the coming Friday, which is
21 the last day of our current series of hearings. I
22 think that's about the 21st of March, I'm not sure.

23 MR. ROGERS: Our response by the 21st of
24 March?

25 MR. WHITE: That's not the 21st, Your Honor.

1 THE SPECIAL MASTER: The 20th?

2 MR. WHITE: The 20th is Friday, so it should
3 be by the 19th.

4 THE SPECIAL MASTER: Make it Thursday, the
5 19th, in the event we have a short Friday session that
6 week. At least the State will know, and I hope in
7 leaving this subject matter that -- and I see that
8 some of the tribal officials are here -- that I hope
9 you gentlemen and your attorneys, all of you at this
10 table, will give some real serious thought to -- you
11 can set some guidelines on it saying after the end
12 of April if there's going to be anybody on, give us a
13 week or two weeks' notice, or let the people at BIA
14 know who are going accompany them.

15 We don't want to have any harrassment or difficulty,
16 but there may not be any need for the State after
17 April 30, I don't know, but I don't want to preclude
18 the fact that a visit or two may be necessary, and
19 I think it would be altogether appropriate for them
20 to have permission if they ask it.

21 Okay, Mr. Cozzens?

22 MR. WHITE: One more housekeeping item,
23 Your Honor: Mr. Rogers pointed out to me yesterday
24 that I failed to advise the Court on the record whether
25 or not I still had a conflict for the week of the

1 23rd.

2 I need at this time to advise the Court that I do.
3 What was originally a pre-trial conference has, by
4 direction of the Court, become a settlement conference,
5 and I do have a conflict for that period.

6 I understand the private counsel have arranged
7 to have representatives here during that period, and
8 the State will take responsibility for contacting those
9 representatives of which its aware to tell them that
10 we would not have hearings during that week of the
11 23rd.

12 THE SPECIAL MASTER: Very well. That's no
13 problem, and we thank you for letting us know now.

14 Mr. Cozzens?

15 MR. COZZENS: Thank you. Just so I'm sure --

16 THE SPECIAL MASTER: Let me have a half
17 minute for one more housekeeping matter before we
18 proceed.

19 (Off-the-record.

20 MR. COZZENS: Am I clear that there are no
21 hearings March 23?

22 THE SPECIAL MASTER: There will be no
23 hearings the week of Monday, March 23.

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VOIR DIRE EXAMINATION (RESUMED)

BY MR. COZZENS:

Q. Mr. Billstein, I believe we left off with questions about the follow-up from the interviews of the owners of the land on the Reservation. I asked you if you knew of first-hand knowledge that there was a follow-up after every interview, and can you answer that question again, please?

A. There were very few instances where there were any differences in the interviews between the mapping and what the local farmer/ranchers felt was currently being served.

Where there were differences, people were instructed by me to go to the field. We reviewed any changes in the office afterwards.

From that standpoint it's my conclusion that they were followed up.

* * * * *

billstein - voir dire - cozzens

3-1 mr-cb

1 Q (By Mr. Cozzens) (Continued). That's based upon
2 the fact that you told them to do that?

3 A And we discussed it on their return.

4 Q And you assumed that in the interium they did
5 what you asked them to do?

6 A That's borrect.

7 Q Thank you. Then you testified that you took
8 a three-day tour of the Reservation personally; --

9 A That's correct.

10 Q -- is that correct?

11 On direct examination I thought you said that
12 you saw every site. On Mr. White's voir dire I
13 thought you said you didn't see every site.
14 Would you just tell me what you saw and what you
15 didn't see.

16 A Certainly. I took a three-day helicopter tour,
17 roughly eight to nine hours a day in a helicopter
18 and visited each site in the non-project land
19 base as well as the lands in the LeClair Irrigation
20 District that were identified as currently in use.

21 Q What percentage then of the 35,000, approximate
22 35,000 acres did you actually visit?

23 A Approximately 25 percent.

24 Q In the course of those three-days, did you ever

25 billstein-voir dire-cozzens

1 see anything in an area that was supposed to be
2 in current use that didn't look to you as if it
3 was in current use?

4 A Yes.

5 Q What did you do about that?

6 A We threw them out.

7 Q Can you tell me approximately how many acres that
8 was?

9 A There was about 100 acres that were thrown out.

10 Q Is this in the course-- Was your inspection done
11 after your subordinates had accomplished all that
12 you had instructed them to do?

13 A I had conducted office reviews as they were
14 compiling their information. The -- once there
15 final mapping was done we then went down to the
16 field to look at those lands. The reason why I
17 didn't get into the Wind River Federal Irrigation
18 Project in 1981 was because the time I spent
19 there in 1979 with the ditchriders, going over
20 that first land use exercise that Mr. Waples
21 undertook, which he updated in 1980. I was
22 familiar with the procedures that were undertaken
23 in terms of the review by the ditchriders and
24 also was informed by Mr. Waples that there were
25 billstein-voir dire-cozzens

1 very little changes between the two sets of
2 mapping, between '78 and '80, therefore, the
3 necessity of looking at every one of those tracts
4 did not appear reasonable.

5 Q My question was did your inspection tour take
6 place after your subordinates had completed that
7 which they were supposed to do?

8 A Yes.

9 Q And during the course of that and looking at
10 approximately one quarter of those acres you
11 found 100 acres that you had to personally make
12 changes to?

13 A It was a matter of judgment, and my judgment
14 was that they should be changed.

15 Q Did you ever have any discussions with your
16 subordinates during that inspection tour, where
17 they convinced you that certain land should be
18 treated as being currently irrigated even though
19 you had questions about that?

20 MR. ROGERS: Your Honor, I object to this
21 line of questioning. It's cross-examination and
22 not voir dire of the exhibits.

23 MR. COZZENS: Your Honor,--

24 THE SPECIAL MASTER: I'll overrule the

25 billstein-voir dire-cozzens

1 objection, but it's getting close.

2 MR. COZZENS: I'm trying to establish the
3 extent to which the foundation can be laid by
4 this witness and what he did and what his
5 subordinates did is important.

6 MR. ROGERS: But not, Your Honor, to the
7 introduction of the exhibits.

8 THE SPECIAL MASTER: Overruled.

9 THE WITNESS: I can't recall that they ever
10 totally overruled any of my decisions.

11 Q (By Mr. Cozzens) Well, my question perhaps was
12 misphrased. What I meant to get at is was when
13 you were actually inspecting, looking, did you
14 say, Boy, this doesn't look to me as if it's
15 being currently in use, and they gave you their
16 judgment that this was and so you left it?

17 A Well, the procedure was let's go over this tract
18 of land. If there was a question, what did you
19 guys see during your field season versus what
20 did I see there. We then talked about the tract
21 and I made my decision based on what I saw and
22 what their note -- their previous notes and
23 their previous visitations reflected in their
24 minds.

25 billstein-voir dire-cozzens

1 Q Approximately how many man-hours were there
2 involved total that you can give me an
3 approximate, in the entire project that led to
4 Exhibits 55 through 137?

5 (Brief pause.)

6 A Okay. In the initial establishment of the
7 study areas there was approximately six man
8 months. This is roughly delineation of the
9 water rights of records, mapping them,
10 establishing possible service areas, nothing
11 totally technical, simply a review of water
12 rights; plotting the potential use areas, going
13 through reports of record, plotting additional
14 ditch systems on and surveying irrigated land,
15 inventories to again locate possible service
16 areas. That was approximately six man months.

17 It was approximately five man months of
18 field work -- That's erroneous, that's three
19 man months of field work. This also would include
20 the stereoscopic analysis that went into it,
21 so I'll call that a pre-field work portion of
22 the three months segment. And from after the
23 field work was completed, the review and
24 finalization process had another three to four

25 billstein-voir dire-cozzens

1 man months.

2 Q The three man months of field work, how much
3 of that did you actually do?

4 A During that particular segment, which occurred
5 from August through October, I was on the
6 Reservation approximately two days.

7 MR. COZZENS: Your Honor, at this point,
8 the private individuals would join in with
9 Mr. White in his objection to these exhibits.
10 In addition, we would offer further objections
11 on the grounds that there has been no proper
12 foundation to these exhibits. I believe it's
13 apparent from his testimony that Mr. Saunders,
14 and Mr. Waples and Mr. Johnston are the experts,
15 he believes them to be the proper people that
16 might be available to lay the foundation but
17 he's testified that they did things that he has
18 no expertise in, that they were the ones making
19 the judgment, that he, at best, visited only
20 25 percent of the sites that he would now include
21 in those exhibits. And based upon that, we
22 object to the introduction of these exhibits.

23 THE SPECIAL MASTER: The objections are
24 overruled.

25 billstein-voir dire-cozzens

1 MR. WHITE: Your Honor, I want to, for
2 purposes of the record, join in the objection
3 on behalf of the State of Wyoming, and to
4 observe that Mr. Saunders is available, I believe
5 he's in the Courtroom, certainly he would be
6 available for direct examination.

7 THE SPECIAL MASTER: The objection's
8 overruled, and the Court will rule now on the
9 admission of the exhibits as numbered in your
10 request last night, and they are hereby admitted
11 into evidence, but I have some questions I want
12 to ask about them.

13 (Thereupon the exhibits
14 (marked as United States'
15 (Exhibits WRIR C-55 through
16 (C-137 were received in
17 (evidence.

18 EXAMINATION

19 BY THE SPECIAL MASTER:

20 Q The types bothered me last night and I read a
21 little bit about them, the types of lands and
22 your reasons for having these hydrology studies
23 for which your types were prepared. Of your
24 total 34,850 acres, about how many -- Do you know
25 about how many acres are lands that are irrigated
sporatically or irregularly by conventional

billstein-examination-the special master

1 system, lands that are a poor quality and
2 require a high level of irrigation management?

3 A I don't have that figure at hand, Your Honor.

4 Q Can you find that figure?

5 A I could search that figure.

6 Q Well, I should like you to find that figure.

7 Another way of stating my question is what is
8 the percentage or total of Type VI lands?

9 A I can't give you an actual figure, but I know
10 that's less than a couple hundred acres.

11 Q Well, I would like to know how you arrive at
12 the fact that it's that kind of a figure and
13 how you reached it, the figure that's it's less
14 than a couple hundred out of 34,850.

15 A I will consult my summary tables and be able to
16 advise you on that.

17 Q I would also like to -- The difference between
18 I, II and III is one thing, you have a meadow
19 irrigation one year that goes into intensive
20 crop the next year, so I can appreciate why the
21 distinctions can't be very much, But I think
22 IV, V, VI figures I ought to know a little bit
23 more about.

24 THE SPECIAL MASTER: Okay.

25 billstein-examination-the special master

1 MR. WHITE: Your Honor, I believe I have
2 voir dire on C-138 that we reserved.

3 THE SPECIAL MASTER: Yes, you were going to
4 take that separately, that's not in yet. My
5 motion only went to 137.

6 MR. WHITE: I should say, Your Honor, that
7 the State has no objection to, I believe it's
8 139, Mr. Billstein's resume, but I can't speak
9 for the private parties. And when I get done with
10 this, Mr. Cozzens will have thought about it.

11 MR. COZZENS: I will state right now we have
12 no objection to that exhibit.

13 THE SPECIAL MASTER: While we're at it, let's
14 admit, Exhibit WRIR C-139 is also admitted into
15 evidence.

16 (Thereupon United States'
17 (Exhibit WRIR C139 was
(received in evidence.

18 VOIR DIRE EXAMINATION

19 BY MR. WHITE:

20 Q Mr. Billstein, does Exhibit C-138 accurately
21 describe the study to which you've testified
22 as well as its results?

23 A To the best of my knowledge, yes.

24 Q Isn't it true, however, that portions of
25 billstein-voir dire-white

1 Exhibit C-138, your report, referred to
2 activities which were not part of the study
3 that specifically led you to the information
4 summarized on Exhibit C-137?

5 A I need better specificity, Counsel.

6 Q We'll have to do it sentence by sentence then.
7 First page, 1, under, where it says Lands in
8 Irrigable Status, about halfway down the paragraph
9 is a sentence that reads: "The arable determinations
10 for this land base were established by HKM
11 Associates in 1980 soils field program." What
12 soils work did you do in conjunction with the
13 roughly 35,000 acres on Exhibit C-137?

14 A None.

15 Q So that sentence doesn't apply, does it, to the
16 work done leading up to Exhibit 137?

17 A That sentence is in there because the study area
18 developed in the historic lands program was
19 utilized to define the idle lands that were to
20 undergo these arable land investigations. From
21 that standpoint these arable land investigations
22 were noted as being a spinoff of my particular
23 study area.

24 Q But the investigations made were not necessary,
25 billstein-voir dire-white

1 were they, to develop the information on
2 Exhibit 137?

3 A That's right.

4 Q How about the next sentence, the conclusions
5 concerning irrigability were developed by
6 Stetson and Dornbusch? Were those conclusions
7 used by you in developing the information
8 summarized in Exhibit 137?

9 A No.

10 Q Were the historic irrigable claims referred to
11 in the next sentence which are to be presented
12 in a separate report, the basis of the information
13 which appears in Exhibit C-137?

14 MR. ROGERS: Your Honor, this line of
15 questioning is a little ridiculous. It's self
16 evident. The report says it's a separate report,
17 of course it's not part of this report. This
18 is -- This is examination that drags on and that's
19 unnecessary court time.

20 THE SPECIAL MASTER: I will agree the
21 historic irrigable claims will be put under a
22 separate report and that that is redundant and
23 not necessary, but I don't agree that the line
24 of questioning is ridiculous. So we will --

25 billstein-voir dire-white

1 MS. SLEATER: Your Honor, if I could also
2 object to this line of questioning insofar as
3 Mr. White so far appears to be voir diring
4 Exhibit 137 and not the report which was introduced.

5 THE SPECIAL MASTER: Let's work into what
6 he's got in mind.

7 MS. SLEATER: Your Honor, I'd just like to
8 point out the report was introduced as a summary
9 of all of Mr. Billstein's testimony and not of
10 any particular exhibit in and of itself.

11 THE SPECIAL MASTER: All right. Proceed,
12 Mr. White.

13 Q (By Mr. White) Mr. Billstein --

14 THE SPECIAL MASTER: If you can avoid the
15 obvious I'll be grateful to you.

16 MR. WHITE: I need to get some foundation
17 to say certain portions of the report need to be
18 stricken if it's supposed to represent his work
19 that's reflected here, but I'll work back into it.

20 THE SPECIAL MASTER: If you have in mind
21 certain items in 138 which should be stricken,
22 you can proceed directly to them.

23 MR. WHITE: That's what I was trying to do,
24 Your Honor.

25 billstein-voir dire-white

1 THE SPECIAL MASTER: Well, these introductory
 2 remarks are remarks, they can hardly be considered
 3 almost part of an evidentiary document. They're
 4 purely introductory remarks. You don't expect
 5 me to put a great deal of weight into them, the
 6 introductory remarks, do you?

7 MR. WHITE: No, I expect them to be stricken.

8 MR. ROGERS: Certainly --

9 THE SPECIAL MASTER: I'm not going to strike
 10 any of the introduction in here.

11 MR. ROGERS: Your Honor, certainly a witness
 12 is entitled, in writing a report, to put in, in
 13 the framework, where in the work that comprises
 14 the part of the report he's done. It fits into
 15 the entire scheme of the expert's work on the
 16 case.

17 MR. WHITE: Let's wait just a minute, Your
 18 Honor.

19 THE SPECIAL MASTER: Proceed, Mr. White.

20 MR. WHITE: The point to be made here is the
 21 Tribes would like this report to come in without
 22 any foundation. We're entitled to inquire as
 23 to whether there's foundation. The witness has
 24 not testified as to these matters. Mr. Billstein --

25 billstein-voir dire-white

1 THE SPECIAL MASTER: The foundation for
2 138 has been in existence for better than two
3 days and 30 other documents. It contains at
4 least four other exhibits included in it. The
5 tables from page 10 to the end of the book are
6 just duplicative of other exhibits so it isn't
7 all that strange.

8 MR. WHITE: I'm not going to go into page 10
9 and thereafter.

10 THE SPECIAL MASTER: You're to page 1 of the
11 introduction, let's proceed through the document
12 and see if we can find what might be improper.

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1 Q (By Mr. White) Mr. Billstein, is Exhibit C-137 a
 2 slightly different rendition but identical in
 3 all significant respects to Table 1 on page 10
 4 of the Exhibit C-138?

5 I should state that I believe it is. I'm
 6 not trying to trap you on that.

7 A Yes.

8 Q Does Exhibit 137 or Table 1 include lands in
 9 irrigable status?

10 A No.

11 Q Isn't it true that the entire paragraph, the
 12 third paragraph captioned, "Land in Irrigable
 13 Status," on page 1 does not apply to the
 14 summary table, Exhibit C-137?

15 A Could I have the question read back, please?

16 MR. WHITE: I'll try it again.

17 THE SPECIAL MASTER: Have the question read
 18 back, please.

19 (Thereupon the last question
 20 was read back as follows:
 21 "Q Isn't it true that the
 22 (entire paragraph, the third
 23 paragraph captioned, "Land
 24 (in Irrigable Status," on
 25 (page 1 does not apply to the
 (summary table, Exhibit C-137?")

24 MR. ECHOHAWK: Once again, Your Honor, the
 25 billstein - voir dire - white

1 last sentence in there --

2 THE SPECIAL MASTER: Please let me read it,
3 Tom, and put a little thinking onto the question.

4 (Brief pause.

5 THE SPECIAL MASTER: Can you answer that,
6 Mr. --

7 THE WITNESS: Yes, I can, Your Honor.
8 The lands referred to in that third paragraph
9 are not a part of 137 or Table 1.

10 THE SPECIAL MASTER: Isn't that what your
11 sentence in the paragraph says?

12 THE WITNESS: Exactly.

13 THE SPECIAL MASTER: Okay.

14 Q (By Mr. White) On page 2 do you find the
15 discussion of soils?

16 A Yes, I do.

17 Q Is the work that's described -- or was any soils
18 work done as a basis for the acreage shown on
19 Exhibit C-137?

20 A Not as a basis for the claim, no.

21 Q Would that also be true of paragraph 2 on page
22 8?

23 A That's correct. Again, it refers to this separate
24 report, just trying to establish a reasonable method
25 billstein - voir dire - white

1 of procedure for the entire historic lands
2 program so that the Special Master would have
3 that available to him.

4 MR. WHITE: Your Honor, the State would
5 object to those portions of C-138 to which the
6 witness has not testified as far as direct and
7 which do not form the basis of his opinion which
8 was given to the Court.

9 If the matters which I have described are
10 left in, it would appear that we have the right
11 of cross-examination with respect to those matters,
12 and I'm not sure that's what is intended by counsel
13 for the United States or the Court, so I would
14 at this time object to the admission of Exhibit
15 C-138 until the matters contained therein are
16 restricted to those things which describe the
17 efforts made or the facts and data relied on by
18 Mr. Billstein in arriving at the opinion which is
19 summarized in table 1 of the report and also on
20 Exhibit C-137.

21 MR. COZZENS: I would join in that objection,
22 Your Honor.

23 MR. ECHOHAWK: Your Honor, Mr. Billstein's
24 testimony laid the foundation for the overall
25 billstein - voir dire - white

1 historic lands program. He mentioned how the
2 various parts of the program fit in, one of which
3 was a soils study that was done by HKM to be
4 addressed later on by an additional witness.

5 He laid the foundation for the overall
6 program, and that's what is set forth for the
7 convenience of the Court in this Exhibit. There's
8 nothing -- there's no detail that specifically
9 says the conclusions as to those particular
10 portions would be set forth in another report.

11 I can't see that they are entitled to any
12 cross-examination on that basis alone other than
13 if they want to explore how the program is set
14 up, but this report specifically says, and Mr.
15 Billstein specifically said in his testimony
16 that those matters would be addressed at a later
17 time.

18 MR. WHITE: Well, Your Honor, if they open it
19 up in the report and you admit it, we are
20 entitled to cross-examine on it.

21 MR. ECHOHAWK: Only as to the structure of
22 the program, Your Honor.

23 MR. WHITE: Well, if you overrule my objection,
24 we will have to deal with their objections at
25 billstein - voir dire - white

1 the time it comes up, but I think it's fair to
2 say, Your Honor, that we intend to fully explore
3 those areas which are opened up either by direct
4 evidence or by implication or inference in the
5 report.

6 THE SPECIAL MASTER: The objection's
7 overruled. The document WRIR C-138 is admitted
8 into evidence.

9 Mr. Echohawk?

10 MR. ROGERS: Would the Master also rule on
11 this point on Mr. White's contention that he's
12 entitled to cross-examine on this? Of course,
13 we will have to hear that --

14 THE SPECIAL MASTER: We will see what he
15 intends to do at the time of cross.

16 MR. WHITE: We will be here for at least
17 another week, Your Honor.

18 MR. ROGERS: I'm talking about another week
19 beyond that. It's simply a reference was made
20 to the other subjects. Mr. Billstein offered
21 no opinion on them or detail, as Mr. Echohawk said.

22 It's like saying the report is about soil and
23 water and the witness happens to mention in his
24 report the word sky. Is Mr. White entitled to
25 billstein - voir dire - white

1 examine on the concept of sky?

2 THE SPECIAL MASTER: I find that we are
3 coming into an interesting practice in this hearing
4 of arguing after the fact. A motion was made, and
5 we go into a philosophical discussion as if we
6 are doing a textbook for a law school or something.

7 Maybe we can cut that out and save a few
8 weeks.

9 Mr. Echohawk?

10 MR. ECHOHAWK: Do I understand that all of
11 the Exhibits that have been offered have been
12 admitted into evidence?

13 THE SPECIAL MASTER: Well, let's review
14 exactly, but I think the record will show that
15 with the exception of those that you withdrew,
16 which were several, the very, very first one,
17 as I recall, Exhibit 55 --

18 MR. ECHOHAWK: I think I just withdrew 55A.

19 THE SPECIAL MASTER: What did you do with --
20 well, the offer was made that 55A and -- did you
21 withdraw 55A?

22 MR. ECHOHAWK: I withdrew 55A and offered
23 55B.

24 THE SPECIAL MASTER: 55B, 56, 57, 58, each
25 numbered through 136 and 137 and 138, and the

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biographical -- and 139 are now in evidence.

MR. ECHOHAWK: And do I understand also Exhibit 55, which was the study area map --

THE SPECIAL MASTER: That was the very, very first one, contained in the pocket of 138. Yes, that was admitted too.

MR. ECHOHAWK: Okay.

THE SPECIAL MASTER: So it's all in evidence.

* * * * *

1

DIRECT EXAMINATION (CONTINUED)

2

BY MR. ECHOHAWK:

3

Q. Mr. Billstein, I direct you to what has been

4

entered into evidence as Exhibit C-55. I

5

direct your attention to the legend at the bottom

6

of the exhibit, the third column on the most right

7

hand column entitled "Water Supply Sources." Do

8

you see that?

9

A. Yes, I do.

10

Q. I notice in the water supply sources under, I

11

think it's item A and item C, that you have

12

several sources listed under those, say for

13

example, under A you have Dinwoody and Dry

14

Creek, and under C you have Dinwoody and Dry

15

Creek and Wind River. Would you please explain

16

how one parcel could have supply sources of

17

three different sources?

18

A. Yes, I can. The column under water supply

19

sources was established for ease of reference

20

to the Court so that they could relate a

21

tract of land to a water supply source. Within

22

the Wind River Federal Irrigation Project, which

23

we identified here as FIP boundary, we see the

24

billstein - direct continued - echohawk

25

1 Dry Creek Canal portion of the Dinwoody bench
2 area of the Upper Wind unit as well as the Wind
3 River A canal portion of the Upper Wind unit.

4 The Wind River Federal Irrigation Project
5 is a complicated system in that it utilizes
6 numerous sources in terms of conveying water
7 from one ditch system to another, what we would
8 call comingling of sources of water or the
9 utilization of two or more sources of water in
10 one conveyance, one ditch system.

11 In this particular case, what we have is
12 a diversion up above from Dinwoody Creek that
13 comes across by means of Dinwoody Canal to the
14 Dry Creek bench portion of the Upper Wind Unit.
15 The Dinwoody Creek Canal dumps into Dry Creek.
16 It then becomes a part of Dry Creek and it's later
17 diverted approximately a mile downstream. So
18 what you have there is the opportunity to utilize
19 the direct water supply sources of Dry Creek plus
20 the supplement waters that are being brought over
21 from Dinwoody Creek. Therefore, any tract of land
22 identified in blue as unadjudicated land in use
23 had the opportunity to receive water from either
24 one of those sources or both or comingling of those
25 billstein - direct continued - echohawk

1 sources. That is why we have a reference of
2 this nature.

3 In the Wind River A canal, for instance,
4 we see a tract C. Again it is a tract that is
5 identified as unadjudicated land in use.

6 The project operational personnel makes
7 decisions during a course of an irrigation season
8 in terms of using water that's diverted directly
9 from the Wind River or dropping water down from
10 Dinwoody Creek by means of Dry Creek, all the way
11 down to the location on Dry Creek where the Wind
12 River Canal enters Dry Creek. We have the same
13 type of situation down below for this lower canal
14 as we did for up above.

15 The main canal system for the Wind River
16 supplies use along the way, enters Dry Creek,
17 becomes part of Dry Creek then is diverted below,
18 therefore, it has the opportunity to use water
19 from all three of the sources, Dinwoody, Dry
20 Creek and Wind River. And it is a part of the
21 function of the Irrigation Department to establish
22 the relationship between those three sources
23 in any given month of the year or any given
24 irrigation schedule of the year as to how

25 billstein - direct continued - echohawk

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they're applied to the tract of land.

THE SPECIAL MASTER: Are there -- May I ask a question? Are there also adjudicated lands in there with rights that were granted by the State Engineer to enjoy their delivery of water by the same facilities and conveyance means?

THE WITNESS: There are no adjudicated lands on this particular tract. There are some adjudicated lands on the Wind River Federal Irrigation Project. Your Honor, those lands were tied to the original permits which are in reference to, say, the Dry Creek Canal portion of the Dinwoody bench, and, yes, they, if they're being served as part of the Dry Creek Canal portion of the Dinwoody bench, they do enjoy at the present time the opportunity to receive water from all these sources. The original permit would have tied it through Dry Creek as supply source.

* * * * *

billstein - direct - echohawk

1 MR. ECHOHAWK: Your Honor, that concludes
2 the direct examination of the United States.

3 THE SPECIAL MASTER: Mr. White.

4 MR. WHITE: Your Honor, Mr. Cozzens has
5 allowed me to step in before the private counsel to
6 again renew our request for a continuance to conduct
7 the cross-examination of Mr. Billstein, and I
8 suggest to the Court that it will save a great amount
9 of the Court's time if we do so. There's boxes full
10 of backup data which have gone into Mr. Billstein's
11 work. Through no fault of Mr. Billstein's, the
12 backup data was made available to the State in part
13 on Friday, another box full today and there's more
14 to come. And I'm suggesting, Your Honor, that if
15 we have a continuance for the cross-examination, the
16 cross-examination will go much faster. In other
17 words, then our own people can take a look at each
18 of these individual parcels and make sure they tie
19 into the summary report, 137. If not, the cross-
20 examination has to be pretty detailed.

21 THE SPECIAL MASTER: You'd like to begin
22 your cross-examination when?

23 MR. WHITE: On Monday if we could, if we
24 could have the rest of this week. He's got twelve
25 man months, and if we could have a week to get

1 started --

2 THE SPECIAL MASTER: Do you have anything
3 to put on that we could continue with, other portions
4 of your case, Regina?

5 MS. SLEATER: Your Honor, we were planning
6 to finish up with Mr. Billstein once we put him on
7 the stand. As a matter of fact, I think the record
8 should reflect this much, that this information was
9 given to the State in January through the deposition
10 of Mr. Waples. Mr. Billstein was available for
11 deposition at that time and the State opted not to
12 depose him, but wait until later. Three days of
13 depositions went on last week, and I personally think
14 that although it might facilitate Mr. White's cross-
15 examination -- having seen a sample of his cross-
16 examination with the witness that he did have time to
17 prepare, I doubt the savings of time will be all
18 that great, and I think we ought to get it over.

19 THE SPECIAL MASTER: I will not grant the
20 week's delay or postpone them. I will grant the
21 rest of today, and we could resume in the morning at
22 9:15.

23 I would state that you have the right after
24 the March 23rd week recess to recall Mr. Billstein
25 and continue your cross at that time, which is just

1 trying to give you a fair consideration.

2 MR. WHITE: I think that's more than fair.

3 THE SPECIAL MASTER: So let's, if that's
4 the case, we will -- Yes, Regina.

5 MS. SLEATER: I would like a clarification
6 of that. As I understand it, Mr. White will begin
7 his cross-examination and continue it through, and
8 if he is not finished when we take the break, then
9 Mr. Billstein will be back after the break?

10 THE SPECIAL MASTER: That is right. Is that
11 understandable? We will recess the proceedings today,
12 give you a chance to gather your work and resume your
13 cross-examination tomorrow morning at 9:15. You're
14 available, I hope later on today for sessions, if
15 need be, to maybe again try to cooperate and work this
16 out so there may not be too much cross necessary.

17 MR. WHITE: I'd like to state for the record
18 that HKM, Mr. Billstein and Mr. Echohawk have been
19 very cooperative in getting us the information as it
20 was available, that Mr. Billstein's employees have
21 gone above and beyond what would normally be required
22 in time available to get us the information.

23 The point is, through no fault of anybody,
24 the information is just getting here now, and it's
25 one of those things where the finger can't be pointed

1 at anyone.

2 THE SPECIAL MASTER: I thank you for saying
3 so. If we can show a little appreciation from time
4 to time that helps too in this business.

5 Who is your next witness?

6 MS. SLEATER: Your Honor, we were planning
7 to put on Mr. Kersich when Mr. Billstein was finished
8 with his cross-examination.

9 THE SPECIAL MASTER: Does anybody know how
10 Mr. Kersich is getting along down in Arizona versus
11 California today? Will he be available today?

12 MR. ECHOHAWK: I'll check and see.

13 THE SPECIAL MASTER: Why don't you. We may
14 use the rest of the day to good purpose, so if you
15 will do that.

16 So, we will stand in recess until tomorrow
17 morning at 9:15.

18 (Thereupon the proceedings
19 were recessed at 10:15 a.m.)

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