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## Trial Transcript, Vol. 28, Morning Session

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File 135  
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Case # 4993

File # 135

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

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

Civil No. 4993

FILED

3/27

1981

*Margaret V. Hampton* CLERK  
~~.....~~ DEPUTY CLERK

VOLUME 28

Morning Session

Tuesday, March 17, 1981

**ORIGINAL**

APPEARANCES

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FOR THE STATE OF  
WYOMING:

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

FOR THE UNITED STATES  
OF AMERICA:

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

and

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

FOR THE SHOSHONE  
TRIBE:

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

FOR THE PRIVATE  
WATER HOLDERS:

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

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

3 Yes.

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

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

14 MR. MCCARTY: Thank you.

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

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

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

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

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

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

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

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

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

25 MR. WHITE: Well, Your Honor --

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

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

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

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

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

22 MS. SLEATER: Your Honor.

23 THE SPECIAL MASTER: Yes.

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

1 the hearings be held in Cheyenne.

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

8 Okay, Mr. Krob, you may continue.

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

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

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

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

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

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

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

12 THE SPECIAL MASTER: The objection is  
13 sustained.

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

25 billstein-cross-krob

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

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

11 MR. KROB: Okay.

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

5 A That's right.

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

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

11 MR. KROB: Yes, of Section 32.

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

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

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

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

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

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

25 billstein - cross - krob

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

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

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

11 However, go ahead and answer.

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

14 A Yes.

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

19 A We're not looking at permit 18414.

20 Q Excuse me. Proof 18414.

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

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

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

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

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

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

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

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

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

25 billstein ~ cross ~ krob

1 THE SPECIAL MASTER: But you are not sure?

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

4 THE SPECIAL MASTER: All right.

5 MR. KROB: One final matter, Your Honor.  
6 Yesterday -- this involved Exhibit 94, a tract in  
7 the NW 1/4 of the NW 1/4 of, I believe, Section 32.

8 THE SPECIAL MASTER: Section 32 or 34?

9 MR. KROB: Let me check.

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

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

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

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

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

25 billstein - cross - krob

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

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

9 MR. KROB: Yes, Your Honor.

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

16 THE SPECIAL MASTER: One 20?

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

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

24 THE WITNESS: Let me just --

25 billstein - cross - krob

1 THE SPECIAL MASTER: Look them over?

2 THE WITNESS: Yes.

3 THE SPECIAL MASTER: Okay.

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

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

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

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

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

1 we are concerned with.

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

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

6 THE SPECIAL MASTER: With each boundary  
7 description?

8 MR. KROB: Yes.

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

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

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

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

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

25 billstein - cross - krob

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

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

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

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

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

17 A Yes.

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

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

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

25 billstein-cross-white

1 think, Your Honor.

2 THE SPECIAL MASTER: I see.

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

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

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

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

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

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

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

20 A Most certainly. Maybe not the same percentage.

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

25 billstein-cross-white

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THE WITNESS: Would you repeat that?

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

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

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

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

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

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

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

A Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. WHITE: Thank you, Your Honor.

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

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

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

4 THE SPECIAL MASTER: In 1905?

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

15 THE SPECIAL MASTER: May I interrupt you?

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

25 billstein-cross-white

1 Mr. White,

2 MR. WHITE: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

1 that's interesting that you raised it.

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

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

14 MR. WHITE: Well, Your Honor --

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

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

19 THE SPECIAL MASTER: I know you are.

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

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

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

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

7 A Yes.

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

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

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

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

1 1940 that included these lands.

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

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

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

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

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

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

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

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

23 A. No.

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

25 billstein - cross - white

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

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

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

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

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

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

13 (Brief recess.  
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25 billstein - cross - white

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

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

8 A Yes.

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

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

25 billstein-cross-white

1 THE SPECIAL MASTER: All right.

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

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

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

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

25 billstein-cross-white

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

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

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

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

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

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

8 MS. SLEATER: Diminimus.

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

14 MR. WHITE: Well, Your Honor --

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

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

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

13 THE SPECIAL MASTER: Very good.  
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billstein-cross-white

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13071 635 8280

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

4 THE SPECIAL MASTER: Very good.

5 MR. WHITE: Off the record.

6 (Off-the-record discussion.)

7 THE SPECIAL MASTER: On the record.

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

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

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

25 billstein - cross - white

1 A. What was the first section?

2 Q. Sixteen.

3 (Brief pause.

4 (Off-the-record discussion.

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

7 (Off-the-record discussion.

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

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

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

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

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

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

24 THE SPECIAL MASTER: As a what land?

25 billstein - cross - white

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

2 THE SPECIAL MASTER: Land?

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

7 THE SPECIAL MASTER: I see.

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

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

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

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

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

25 billstein - cross - white

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

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billstein - cross - white

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

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

6 THE SPECIAL MASTER: Which tells you what?

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

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

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

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

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

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

25 billstein-cross-white

1 crop growth?

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

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

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

25 billstein-cross-white

1 records, basically would confirm that.

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

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

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

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

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

20 THE SPECIAL MASTER: Yes, you may indeed.

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

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

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

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

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

25 billstein-cross-white

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

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

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

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

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

20 (Brief interruption.)

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

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

24 THE WITNESS: I should correct something

25 billstein-cross-white

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

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

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

18 MS. SLEATER: Your Honor --

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

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

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

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

8 THE SPECIAL MASTER: I think you are.

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

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

13 THE SPECIAL MASTER: He may answer.

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

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

25 billstein - cross - white

1 His answer was yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 billstein - cross - white

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

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

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

17 MS. SLEATER: No, Your Honor.

18 MR. ECHOHAWK: No.

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

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

25 billstein - cross - white

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

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

7 All right. Go ahead, Mr. White.

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

10 THE SPECIAL MASTER: All right.

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

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

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

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

18 (Off-the-record discussion)

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

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

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

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

4 A Right here (indicating).

5 Q What is that?

6 A That's a dike.

7 Q Okay.

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

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

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

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

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

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

22

23

24

\* \* \* \* \*

25 billstein - cross - white

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

1 road; is that correct?

2 A Right. That acreage would have been insignificant.

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

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

8 THE SPECIAL MASTER: Yes.

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

12 A I see it.

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

16 A No.

17 Q How do you know that?

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

25 billstein-cross-white

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

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

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

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

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

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

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

24 \* \* \* \* \*

25 billstein-cross-white

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

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

8 THE SPECIAL MASTER: You may state it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 THE SPECIAL MASTER: Yes.

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

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

3 THE SPECIAL MASTER: Very good.

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

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

13 A. Yes.

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

18 A. Yes.

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

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

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

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

4 THE SPECIAL MASTER: I see.

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

6 THE SPECIAL MASTER: I see.

7 (Off-the-record discussion.)

8 THE WITNESS: Okay.

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

11 A. Yes.

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

15 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

25 billstein - cross - white

1 from the south into the lower areas.

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

4 A That's right.

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

7 A During 1980 I was not in the field.

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

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

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

17 Q What was the date of that?

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

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

21 THE SPECIAL MASTER: What are you looking at?

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

1 background information.

2 THE WITNESS: 8719.

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

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

7 Let me check on the background information.

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

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

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

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

19 A. Certainly.

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

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

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

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

9 A. In 1980?

10 Q. Yes.

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

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

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

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investigators took, their impression of the  
vegetation in the area, as well as my impression  
of when I later visited the tracts.

\* \* \* \* \*

billstein - cross - white

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

4 A That's right.

5 Q Even farther beyond the irrigation season, --

6 A That's right.

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

8 A That's right.

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

12 THE SPECIAL MASTER: All right.

13 (Brief pause.

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

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

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

1 one reason I suggested it.

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

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

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

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

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

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

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

1 about getting these tracts and the identification.

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

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

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

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

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

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

20 THE SPECIAL MASTER: Whichever.

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

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

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

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

3 A Yes.

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

8 A Yes.

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

11 (Brief pause.)

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

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

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

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

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

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

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

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

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

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

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

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

18 A No.

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

21 A No.

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

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

3 A Just the review process that was undertaken.

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

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

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

25 billstein-cross-white

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

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

11 A This is what we furnished the Court.

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

15 A Yes.

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

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

21 (Brief pause.

22 \* \* \* \* \*

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25 billstein-cross-white

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

2 A Right.

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

6 A I see darker areas that reflect irrigation.

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

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

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

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

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

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

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

7 THE SPECIAL MASTER: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 billstein-cross-white

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

3 THE SPECIAL MASTER: Okay. Mr. White?

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

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

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

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

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

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

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

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

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

17 I did not visit that tract myself personally.

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

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

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

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

end

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