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Trial Transcript, Vol. 31, Afternoon Session

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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 L. Hampton CLERK
DEPUTY

VOLUME 31

Afternoon Session

Wednesday, March 18, 1981

ORIGINAL

1 THE SPECIAL MASTER: Okay. Come to order,
2 please. Mr. White?

3 Q (By Mr. White) I hand you what's been marked for
4 identification, Mr. Billstein, as HB-29-A and ask
5 you if you can identify that?

6 A Yes, this is the investigative form notes and
7 associated planimeter sheet relative to Willow
8 Creek.

9 Q I hand you what's been marked for identification
10 as HB-16-A and ask you to identify that, please?

11 A This appears to be the planimeter sheets for the
12 Dinwoody Bench portion of the Upper Wind River Unit.
13 The numbers on the left-hand side refer to tracts
14 identified, I believe, during the week of my depo-
15 sition. I don't know whether those tracts have
16 been modified at all in the interim, but at that
17 time they matched the State tracts.

18 MR. WHITE: Your Honor, when we offer this,
19 I'll exclude those tract numbers so that we are
20 certain to have the tract numbers that we all agree
21 on.

22 Q (By Mr. White) Were there no interview forms
23 completed for the Dinwoody Bench area?

24 A That's correct. The hydrographic maps, as I pointed
25 billstein-cross-white

1 out, reflect the results of the field work, and
2 in the Wind River Federal Irrigation Project that
3 is the basis of the conclusion.

4 The interviews that were conducted with Mr.
5 Twitchell and Mr. Crook of BIA were not documented.
6 The changes were, in fact, reflected on the work
7 maps.

8 Q Mr. Billstein, I hand you what's been marked for
9 identification as HB-15-A and ask you to identify
10 that, please?

11 A This appears to be the planimeter sheets for the
12 Wind River A Canal portion of the Upper Wind Unit.
13 Again there are tract designations that you may
14 want to qualify.

15 MR. WHITE: Okay. When we offer these, Your
16 Honor, we'll not include those tract designations
17 so that we have the tract designations that the
18 parties agree upon.

19 Q (By Mr. White) Again with respect to 15-A, is it
20 true that there are no interview sheets for that
21 as well as for 16-A?

22 A That's correct. These exhibits refer to the Wind
23 River Federal Irrigation Project lands. Within
24 those boundaries there are some private irrigation

25 billstein-cross-white

1 systems. Those were broken out separate with
2 respect to the drainages that furnished them, and
3 if there were interviews associated with those
4 systems, they would be included in those respective
5 drainages.

6 Q Besides Mr. Twitchell, who else did you --

7 A It would have been Mr. Crook.

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1 MR. WHITE: Before I identify anything
2 more, Your Honor, I think I'll offer some and
3 try to clean things up.

4 (Brief pause.)

5 MR. WHITE: Your Honor, we would offer
6 Exhibit HB-1, which was identified on, I believe
7 the 9th of March, and is the table, typewritten
8 table that shows the random checks made to
9 verify the scale rectification of aerial
10 photography by Mr. Billstein's employees or
11 those working under his supervision, for the
12 purpose of showing those verification checks
13 that were made by Mr. Billstein or those working
14 under his supervision, in order to verify the
15 scale rectification done by Horizons on the
16 aerial photography which comprises Exhibit C-56
17 through C-136. That's the offer.

18 THE SPECIAL MASTER: Is that the only one
19 you're going to offer?

20 MR. WHITE: No, I'm going to go through a
21 whole bunch more, but maybe we can take them one
22 at a time.

23 THE SPECIAL MASTER: I'm willing to take
24 them and put them all in evidence if there is
25 no objection.

1 MR. WHITE: If the United States has an
2 objection we'll hear it.

3 The next one I'd like to offer is HB-3,
4 which is a certified copy of a GLO plat
5 concerning one of those areas checked according
6 to HB-1.

7 Next I'd like to offer HB-7, which comprises
8 a certified copy of the surveyor's notes
9 associated with that GLO plat.

10 Next I'd like to offer HB-8, which is the
11 sheet containing the definitions of the various
12 types of land, Types I through VI.

13 THE SPECIAL MASTER: I think that's 9,
14 Mr. White.

15 MR. WHITE: Is that 9?

16 THE SPECIAL MASTER: As a deposition exhibit.

17 MR. WHITE: It was remarked for the trial
18 and there should be another sticker in there.

19 THE SPECIAL MASTER: Oh, you got two stickers,
20 you're going by the dark one, not the light one.

21 MR. WHITE: I'm sorry.

22 THE SPECIAL MASTER: That's okay. That now
23 becomes 8.

24 MR. WHITE: Is that 8?

25 THE SPECIAL MASTER: It is now 8, okay.

1 MR. WHITE: According to our records
2 there's no --

3 THE SPECIAL MASTER: I have a little
4 problem. Mr. David M. Dornbusch's resume and
5 description of his firm is also marked -- well,
6 that's C. This is WRIR C-8?

7 MR. WHITE: That was from the earlier --

8 THE SPECIAL MASTER: So that would be the
9 other side.

10 MR. WHITE: I hope I hadn't marked that.
11 It should be a U.S. Exhibit.

12 THE SPECIAL MASTER: All right. Go ahead,
13 Mr. White.

14 MR. WHITE: According to our records, at
15 least at this time there was no HB-9 or HB-10.

16 We'd offer HB-11-A, which are the planimeter
17 sheets, interview forms, investigation notes
18 with respect to the Ray Unit.

19 HB-12-A, same thing with respect to the
20 Coolidge Unit; HB-13-A, the same thing with
21 respect to the Sub Agency; HB-14-A, there's no
22 exhibit.

23 HB-15-A, planimeter sheets for the Wind
24 River A Canal, and those are offered excluding
25 the tract numbers which are on the far left-hand

1 column in order to insure there's no mistake
2 about which tracts apply to which parcel of
3 land.

4 HB-16-A also offered to show -- which
5 contains the planimeter sheets for the Dinwoody
6 Bench area. Again, the offer excludes the
7 tract numbers in the left-hand columns.

8 HB-17-A is, comprises the interview sheets
9 and investigator's notes and planimeter sheets
10 for the Johnston Unit, we offer that.

11 18-A, same thing for the Lefthand Unit;
12 19-A, same thing for the Midvail; 20-A, LeClair-
13 Riverton. No exhibit for 21-A.

14 22-A, same thing for the East Fork of the
15 Wind; 23-A, same thing for Dinwoody Creek.

16 THE SPECIAL MASTER: The 23-A, was that?

17 MR. WHITE: Yes, sir. 24-A, same thing for
18 Dry Creek; 25-A, same thing for Bull Lake Creek;
19 26-A, same thing for Meadow Creek; 27-A, same
20 thing for Pasup, for Dry Creek; 28-A, same thing
21 for Crow Creek; 29-A, same thing for Willow
22 Creek; 30-A, same thing for Cottonwood Creek;
23 31-A, same thing for the Main Stem Big Wind;
24 32-A, same thing for Muddy Creek; 33-A, same
25 thing for Five Mile; 34-A, same thing for

1 North Fork Little Wind; 35-A, same thing for
2 South Fork Little Wind River; 36-A, same thing
3 for Main Stem Little Wind;
4 37-A, same thing for Sage Creek; 38-A,
5 same thing for Crooked Creek; 39-A, same thing
6 for Trout Creek; 40-A, same thing for Spring
7 Creek; 41-A, same thing for Big Horn Draw; 42-A,
8 same thing for Main Stem Big Horn; 43-A, same
9 thing for the North Fork of the Popo Agie; 30-A,
10 same thing for the Main Stem Popo Agie; 35-A,
11 same thing for the South Fork of Owl Creek;

12 36-A, same thing for the Main Stem of Owl
13 Creek; 47-A is the same thing for Mud Creek.

14 Exhibits HB-11-A through 47-A with the
15 exclusion of 14-A and 21-A for which there is
16 no exhibits, are offered for the purpose of
17 showing the planimeter calculations which were
18 made by HKM as well as the other information
19 contained therein upon which HKM -- or, excuse
20 me, Mr. Billstein in part based his opinion.

21 THE SPECIAL MASTER: Are there objections to
22 the admission of this evidence?

23 MR. ECHOHAWK: No, Your Honor.

24 MR. PERRY: No objection.

25 THE SPECIAL MASTER: All right. It shall be

1 that the exhibits just alluded to and specified
2 in order by Mr. White are hereby admitted into
3 evidence.

4 MR. WHITE: I got some more, Your Honor.

5 HB --

6 THE SPECIAL MASTER: That have already been
7 identified?

8 MR. WHITE: Yes, sir.

9 THE SPECIAL MASTER: Okay.

10 MR. WHITE: We would offer HB-50-A, which
11 are the Johnston field notes; HB-55-B, which were
12 the Saunders field notes; HB -- There is no --
13 there are no exhibits 51, 52, and 53. I should
14 say, Your Honor, we are going to check the
15 transcripts to make sure we haven't dropped one.

16 HB-54 is offered. That's the 1947 irrigation
17 ditch schedule.

18 HB-55 is offered. That's the water ledger
19 for the trust acres in the LeClair-Riverton area.

20 HB-56 through 60 we have, there is no
21 exhibits, we will check those again from the
22 transcript.

23 HB-61 is offered, showing -- for the purposes
24 of showing the breakdown made by Mr. Billstein
25 among the various types of lands included on C-137.

1 I believe, Your Honor, that yesterday
2 you admitted the HB-137 -- the exhibits marked
3 HB-137-8 through 14, 16 through 28, 30 and 32
4 through 35, being the tables prepared by HKM,
5 in the table of claims by water right. As I
6 recall, those are the ones that have the permits
7 on them and breakdown of acreages by type.

8 THE SPECIAL MASTER: My notes show that,
9 but you better check the record.

10 MR. WHITE: My notes did too, but I wasn't
11 certain so I'll reoffer them now just to make
12 sure.

13 THE SPECIAL MASTER: I believe they were
14 admitted, you won't have to reoffer them, Mr.
15 White. We can make a check of the record and
16 make a double check.

17 MR. ECHOHAWK: Your Honor.

18 THE SPECIAL MASTER: Yes.

19 MR. ECHOHAWK: I believe that was an offer
20 of proof that Mr. White is making with those
21 exhibits, if I am correct.

22 THE SPECIAL MASTER: Well, the offer of
23 proof was under the draws and ravines, that it
24 didn't require exhibits there.

25 The second offer of proof -- Well, let's see.

1 We began with the 71 tracts comprising 120 acres
2 each less than two, there was nothing there.

3 The draws and ravines were an offer of proof.
4 The next cross-examination was on the 56 through
5 36, containing lands currently irrigated.

6 MR. WHITE: During the next recess, why
7 don't we check; during the next recess.

8 THE SPECIAL MASTER: I think you're getting
9 daily records, aren't you; you're getting a
10 transcript daily?

11 MR. WHITE: Yes, sir, we are. I would suggest
12 we check during the break. I am 95 percent sure,
13 but I want to make sure.

14 THE SPECIAL MASTER: Leo's keeping a list
15 of those as they're being exhibited, and a
16 tabulation of them, and I think we had those
17 admitted yesterday.

18 MR. WHITE: Leo, what's your list show?

19 MR. SALAZAR: My list shows they were
20 admitted.

21 THE SPECIAL MASTER: 137, 8, 10 and 11, are
22 those the ones?

23 MR. WHITE: I'm sorry, 137 and what else,
24 I couldn't hear the other two.

25 THE SPECIAL MASTER: 137, 8, 10 and 11.

1 MR. WHITE: I believe it began with -8
2 through 14, 16 through 28, -30 and -32 through
3 35.

4 THE SPECIAL MASTER: You better check the
5 record on those, Mr. White. I have the first
6 four of them marked.

7 Are there any more in this group, in addition
8 to those beginning with HB-50-A and -- through
9 HB-61?

10 MR. WHITE: Not so far as I know, Your Honor.
11 We're going to have to check the transcript to
12 make sure, Your Honor, but the records indicate
13 that there are not.

14 THE SPECIAL MASTER: And those are being
15 offered for what purpose?
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1 THE SPECIAL MASTER: Are they also planimeter
2 working papers of the engineering groups?

3 MR. WHITE: Yes, sir. These contain informa-
4 tion on which the -- let me specify "these":
5 HB-50-A and HB-50-B and HB-54 and HB-55 are offered
6 as information, facts and data upon which Mr.
7 Billstein based in part his opinion.

8 THE SPECIAL MASTER: 56 through 61?

9 MR. WHITE: I'm sorry. There is no --

10 THE SPECIAL MASTER: I mean 61 --

11 MR. WHITE: 61 is offered to show the break-
12 down -- that's HB-61 is offered to show the break-
13 down computed by Mr. Billstein and showing the
14 absolute amounts as well as the relative percent-
15 ages by type, by land type, of those lands included
16 within the 34,850 acres in Exhibit C-137.

17 MR. ECHOHAWK: No objection by the United
18 States.

19 THE SPECIAL MASTER: These exhibits as identi-
20 fied and enumerated by Mr. White are hereby
21 admitted into evidence.

22 (Exhibits HB-50-A, HB-50-B,
23 HB-54, HB-55 and HB-61 were
received into evidence.)

24 MR. WHITE: Then I would offer exhibits HB-2000
25 billstein-cross-white

1 through 2012, 2012-A --

2 THE SPECIAL MASTER: Have these been identified
3 yet and presented for admission?

4 MR. WHITE: Yes, sir. They were identified
5 during the afternoon of March 18 -- excuse me --
6 March 16.

7 THE SPECIAL MASTER: Do these look like what I
8 have in my hand?

9 MR. WHITE: I can check them, Your Honor.

10 THE SPECIAL MASTER: HB 2001 and two thousand
11 -- they are mixed up, but they begin with HB-2000,
12 and what --

13 MR. WHITE: I can take them --

14 THE SPECIAL MASTER: I can do that, Mr. White,
15 and save you the trouble.

16 MR. WHITE: They start with HB-2000 and go
17 through 2012 and then 2012-A and B and as you will
18 recall, those were the affidavits of ownership on
19 those two parcels.

20 THE SPECIAL MASTER: And how many in this group?

21 MR. WHITE: 2013 and 2014, for a total of --
22 there should be 17, I believe, Your Honor.

23 THE SPECIAL MASTER: We are short one.

24 MR. WHITE: If I can see them, Your Honor, and

25 billstein-cross-white

1 make sure I have them squared away. I don't want
2 you to be without one.

3 THE SPECIAL MASTER: I get 16 both times.
4 I'll hand them back to you to look for the seven-
5 teenth.

6 Have we received the copies of those in
7 evidence?

8 (Whereupon an off-the-record
discussion was held.)

9 THE SPECIAL MASTER: What date, Mr. White?

10 MR. WHITE: I have the 16th and 17th that they
11 were dealt with, Your Honor.

12 THE SPECIAL MASTER: Very good. We have found
13 them. Thank you.

14 (Whereupon an off-the-record
discussion was held.)

15
16 THE SPECIAL MASTER: Let me make a corrective
17 introduction in evidence now of HB-137, Mr. White.
18 If our colloquy regarding that exhibit on page 2676
19 of the transcript for Tuesday, March 17, does not
20 unequivocally and unambiguously admit it into
21 evidence, it is admitted now into evidence without
22 doubt.

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billstein-cross-white

1 MR. WHITE: Are those the HB-137- series?

2 THE SPECIAL MASTER: Yes.

3 MR. WHITE: Thank you.

4 THE SPECIAL MASTER: Oh Lord, I'll bet I have
5 found what you are looking for over here.

6 (Whereupon an off-the-record
discussion was held.)

7 THE SPECIAL MASTER: Mr. White, could you be
8 looking for --

9 MR. WHITE: Yes.

10 THE SPECIAL MASTER: Well, it's certainly
11 understandable how an exhibit of only two pages
12 can get lost in this mountain of paper.

13 MR. ECHOHAWK: Your Honor, before that last
14 group that we discussed, 137- such-and-such is
15 admitted, could we have a few minutes to look over
16 the transcript because I still think that it was
17 an offer of proof?

18 THE SPECIAL MASTER: You may indeed. We will
19 stand in recess for five minutes.

20 MR. ECHOHAWK: Thank you.

21 (Recess.

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25 billstein-cross-white

1 THE SPECIAL MASTER: Let's come to order.

2 MR. ECHOHAWK: Your Honor, it's my
3 understanding that Mr. White is re-offering
4 this group of exhibits, this 137-series?

5 THE SPECIAL MASTER: And I have admitted
6 them into evidence, Mr. Echohawk.

7 MR. ECHOHAWK: Can I inquire from Mr. White
8 for what purposes these are being admitted for?

9 MR. WHITE: For the same purposes as I
10 said before, Your Honor, to show the -- Well,
11 let me get the transcript.

12 THE SPECIAL MASTER: These are in relation-
13 ship to permits, unadjudicated lands and the
14 planimeter.

15 MR. ECHOHAWK: You assert their admission
16 by parties; is that right?

17 MR. WHITE: No, that's one of the bases,
18 but they've already been admitted, Your Honor.

19 THE SPECIAL MASTER: Well, I know, but he
20 has a right to know for what purpose you offered
21 them, and he should be answered.

22 MR. PERRY: Your Honor, I understood that
23 you had ruled yesterday that these were inadmissible
24 on page 2669 and 2670.

25 THE SPECIAL MASTER: If I have, I've changed

1 my mind and they're admitted today. I would
2 rather err in having them join the other body
3 of exhibits that are in evidence rather than
4 err in excluding them at this point.

5 They don't all contain that much different
6 in substance based on Mr. Billstein's work
7 than the rest of the exhibits that are now in
8 evidence.

9 MR. WHITE: We have those in order now.

10 THE SPECIAL MASTER: Okay. You are now --

11 MR. ECHOHAWK: Your Honor, I still don't
12 believe I was answered as to the purpose.

13 THE SPECIAL MASTER: You were not, and you
14 have a right to, I beg your pardon.

15 MR. WHITE: Your Honor, it's the same
16 purpose I set forth when I offered them before,
17 and I can get the transcript and read it back
18 to Mr. Echohawk as well as he can.

19 MR. ECHOHAWK: My inquiry is that the sole
20 purpose they're being offered for is as to their
21 admission by an agent or employee or party with
22 respect to the issue of lands included within
23 the category of unadjudicated trust in use?

24 MR. WHITE: That's not the sole purpose, and
25 that's not even one of the purposes.

1 MR. ECHOHAWK: Your Honor, I'm reading
2 right out of the transcript, from 2676 where
3 Mr. White said he was offering them for.

4 THE SPECIAL MASTER: Mr. White said it
5 was one of the purposes. There are additional
6 reasons.

7 MR. ECHOHAWK: Could I inquire as to those
8 additional reasons then?

9 THE SPECIAL MASTER: Yes.

10 MR. WHITE: It's in the transcript, Your
11 Honor. It's offered for the purpose of showing
12 the preliminary analysis by Mr. Billstein with
13 respect to the lands included in unadjudicated
14 in use, by type, and by permit number. And also
15 for the purpose of showing those permit numbers
16 involved with the unadjudicated lands in use
17 which are described on Exhibit 137.

18 THE SPECIAL MASTER: I admit those, in
19 answer to your question, Mr. Perry, for whatever
20 purpose they may have, for whatever probative
21 value they may have. I expressed some doubt
22 as to their value yesterday, but I will not
23 exclude them from evidence.

24 MR. ECHOHAWK: For the limited purpose which
25 Mr. White has identified them?

1 THE SPECIAL MASTER: You two have had your
2 colloquy. Let me ask Mr. White. The group
3 now, the HB-2000 group that you handed me is
4 now ready to be --

5 MR. WHITE: Let me remake the offer because
6 I fouled up the numbers when I gave them before,
7 Your Honor.

8 THE SPECIAL MASTER: All right.

9 MR. WHITE: These include HB-2000 through
10 2012, 2012-A, 2013, 2013-A and 2014.

11 THE SPECIAL MASTER: Very good. Are there
12 objections to the introduction of this evidence?

13 MR. ECHOHAWK: No objections.

14 THE SPECIAL MASTER: The exhibits just
15 identified in the 2000 group by Mr. White are
16 hereby accepted in evidence, admitted into evidence.
17 Please correct me on that, are hereby admitted
18 into evidence.

19 (Whereupon Exhibits HB-2000
20 (through 2012, 2012-A, 2013,
21 (2013-A and 2014 were
(admitted into evidence.

22 Now, you have still pending HB-61 and HB-50-A
23 through 55 that have not yet been admitted.

24 MR. WHITE: I meant to offer them previously,
25 Your Honor. I now offer HB-50-A, HB-50-B, HB-54,

1 HB-55 and HB-61.

2 MR. ECHOHAWK: No objection from the
3 United States.

4 MR. PERRY: No objection.

5 THE SPECIAL MASTER: The exhibits as listed
6 are hereby admitted into evidence.

7 (Whereupon Exhibits HB-50-A,
8 (HB-50-B, HB-54, HB-55 and
9 (HB-61 were admitted into
10 evidence.)

11 I think a short colloquy on the evidence
12 just admitted is in order, Mr. White.

13 MR. WHITE: Yes, sir.

14 THE SPECIAL MASTER: I feel an over-
15 riding duty to observe for all concerned that
16 much of the evidence that you just introduced
17 into this case and that has been admitted tends
18 to verify the accuracy, the professionalism, the
19 dedication to work and the thoroughness and
20 the competence of the witness in having come to
21 the conclusion that he did, and I thought you
22 ought to know that.

23 MR. WHITE: I understand that, Your Honor.
24 I've got no complaint or raise no challenge
25 with respect to the professionalism of this
particular witness. I couldn't, I couldn't do so

1 in good faith.

2 My purpose that those exhibits are offered
3 for is to show that -- and they will be used
4 later -- to show that, some of the folks upon
5 which he relied may not have done that good a
6 job.

7 THE SPECIAL MASTER: All right. I just
8 wanted you to know what's going through my
9 weary old mind.

10 MR. WHITE: So long as you remember we'll
11 be coming back to them.

12 THE SPECIAL MASTER: Well, they're in
13 evidence, I can't do much about that. All right.

14 MR. WHITE: If I could have a minute, Your
15 Honor, I'd get some exhibits in numerical order.

16 THE SPECIAL MASTER: Take your time. We'll
17 stay in session.

18 (Brief pause.)

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THE SPECIAL MASTER: Off the record.

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(Whereupon an off-the-record discussion was held.)

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THE SPECIAL MASTER: Any time you are ready.

5

Q (By Mr. White) Mr. Billstein, I hand you what's been marked for identification as HB-137-11-A and ask you whether or not that is a tabulation checked under your supervision pursuant to the stipulation of the parties in this action?

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A. Yes, it is.

11

Q And that shows by tract number, which will be later identified on the aerial overlays, the type of lands involved therein as well as -- within each of the tracts as well as the number of acres for each of those types within each tract number, or numbered tract, I suppose?

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A. That's right. It also shows a breakout of the acres by respective photograph, 8-183, 8-185 -- we can also see that there's a breakout by individual photograph such as 8-183, 8-185, with the cumulative total coming to 154 acres, which matches the total defined on Exhibit 137.

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Q I hand you what's been marked for identification as HB-137-13-A and ask you whether or not that is the same type of tabulation for Bull Lake Creek as it

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billstein-cross-white

- 1 appears on Exhibit 137?
- 2 A. That's correct.
- 3 Q. I hand you what's been marked for identification as
- 4 HB-137-14-A and ask you whether or not that is the
- 5 same type of tabulation for Meadow Creek?
- 6 A. That's correct.
- 7 Q. I hand you what's been marked for identification as
- 8 HB-137-15-A and ask you if that is the same type of
- 9 tabulation for Dry Pasup Creek?
- 10 A. That's correct.
- 11 Q. I hand you what's been marked for identification as
- 12 HB-137-16-A and ask you if that is the same type of
- 13 tabulation for Crow Creek?
- 14 A. That's right. Please acknowledge at the bottom
- 15 that there's been some additional tract numbers
- 16 added which are above and beyond the tract numbers
- 17 that your technical people identified. These will
- 18 be delineated on the maps as a joint team effort
- 19 with your representatives as well as ours tonight.
- 20 Q. Ron, on my copy the last photo number and tract
- 21 number are illegible. Are they illegible on the
- 22 Court's copy?
- 23 A. No, I can read that to you.
- 24 Q. Would you, please?
- 25 billstein-cross-white

1 A. At the very bottom, left-hand side, 67 refers to
2 photo 10-200. Tract 16-10, acres, 3.

3 Can you read the one right above that?

4 Q I have 16-7-A right above it.

5 A. Yes.

6 Q Very good. Thank you. Mr. Billstein, I hand you
7 what's been marked for identification as HB-137-17-A
8 and ask you whether or not that is the same type of
9 tabulation but for Willow Creek?

10 A. That's correct.

11 Q I hand you what's been marked for identification as
12 HB-137-19-A and ask you if that's the same type of
13 tabulation for the Wind River, Main Stem?

14 A. There are two pages as a part of this table, and it
15 is the similar type of tabulation.

16 Q On the second page where you have Midvale written
17 next to Tract 13, 112, does it mean that it should
18 not be in the Wind River Main Stem, but should be
19 in Midvale? Do you see where I'm talking about?

20 A. Yes, I do. I'm not quite sure on that one-acre
21 tract, counselor. I would have to check that out.
22 I believe that it's accounted for in the Wind River
23 Main Stem, and it may have been a question on whether
24 it was involved in Midvale or not.

25 billstein-cross-white

1 We have three specific ditch systems that had
2 their head works torn out when the Wyoming Canal
3 was built. Their use areas are now served from
4 the Wyoming Canal, and they had been accounted for
5 in Midvale originally.

6 I'm not sure whether that one-acre is involved
7 in that tabulation or not. Perhaps we should
8 defer this particular exhibit until I have a chance
9 to talk to the people downstairs.

10 Q Let me have it back, Ron, so I don't forget to go
11 through it again.

12 A Fine.

13 MR. WHITE: Is that okay with counsel and the
14 Court if I temporarily remove this?

15 MR. ECHOHAWK: That's fine.

16 Q (By Mr. White) Ron, I hand you what's been marked
17 for identification as HB-137-23-A and ask you if
18 that's the same type of tabulation but for the South
19 Fork of the Little Wind?

20 A Yes, it is. Just acknowledge that there's been
21 some difference in tract numbers between your
22 original tract delineations, but those will be taken
23 into account at the time they are placed onto the
24 exhibits.

25 billstein-cross-white

1 Q Referring to Tract 24-1, where in the right hand
2 would the 112 acres be broken out by type? I
3 don't see enough acres on there by type to make up
4 112 for 24-1.

5 MR. WHITE: I'm sorry. I'm looking at the
6 wrong one. It's been a long day.

7 Madam Reporter, did we identify 23-A?

8 Never mind.

9 Q (By Mr. White) I hand you what's been marked for
10 identification as HB-137-24-A.

11 THE SPECIAL MASTER: Are you through with 23-A?

12 MR. WHITE: Yes.

13 Q (By Mr. White) And ask you if that's a similar
14 tabulation but for the Main Stem of the Little Wind?

15 A. We are now transitioning out of what was done last
16 night and what I had a chance to look at and what
17 was done this morning and I haven't had a chance
18 to look at.

19 Q Why don't you give it back to me, and do you have
20 copies of these, Ron, so you can check them?

21 A. Yes, they should have copies downstairs.

22 MR. ECHOHAWK: I think we have copies of most
23 of them.

24 MR. WHITE: Why don't I go ahead and give you

25 billstein-cross-white

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your copies of everything right now?

MR. ECHOHAWK: All right.

THE SPECIAL MASTER: Do you want 23 back as well as 24, or just 24, right now?

MR. WHITE: I think we started having problems with 24, Your Honor, so you can keep that copy, and if there are any changes, we'll give you an amended one.

THE SPECIAL MASTER: All right.

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MR. WHITE: Off the record for a moment,
Your Honor.

(Off-the-record discussion.)

MR. WHITE: Your Honor, could we take about
fifteen minutes so Mr. Billstein could check
the stipulated exhibits and make sure they're
all right?

THE SPECIAL MASTER: Very well, let's go
in recess for 15 minutes. We'll reconvene at
five minutes to three.

(Thereupon a 15 minute
recess was taken.)

* * * * *

1 Q (By Mr. White) Mr. Billstein, I hand you again
2 what was marked for identification as HB-137-19-A.
3 Have you now had an opportunity to check that form?

4 A Yes, I have.

5 Q Is it a similar tabulation but for the Wind River
6 Main Stem?

7 A That's right. There's one modification that we
8 found, a one-acre tract that should be assigned
9 to Midvale and circled it as Midvale.

10 What I would like to do is cross out that one-
11 acre tract shown on this table. It is not included
12 in the 487-total which matches C-137.

13 Q If you have the original there, Ron, just take
14 your pen and strike through it.

15 A I'll do it.

(Witness marked document.)

16
17 Q Do you want to strike through it on both sides?

18 A Fine. Well, there's no planimeter sheet that goes
19 with that. That's why you do have an open spot on
20 the other side.

21 Q Okay. I hand you what's been marked for identifica-
22 tion as HB-137-20-A and ask you whether that is a
23 similar tabulation but for Muddy Creek?

24 A That's correct.

25 billstein-cross-white

1 Q I hand you what's been marked for identification
2 as HB-137-22-A and ask you if that is a similar
3 tabulation for the North Fork of Little Wind?

4 A Yes, it is. You'll notice on the second page a
5 comment relative to 36 acres is now Indian fee.
6 We found 36 acres that is in fee ownership in our
7 final checking.

8 Therefore, that should reduce the total on
9 North Fork Little Wind from 1812 to 1776.

10 Q I hand you what's been marked for identification
11 as HB-137-25-A and ask you if that's a similar
12 tabulation but for Sage Creek?

13 A That's correct.

14 Q I hand you what's been marked for identification
15 as HB-137-24-A and ask you if that's a similar
16 tabulation for Main Stem Little Wind?

17 MR. WHITE: I think you already have that.

18 THE SPECIAL MASTER: Yes, I have.

19 A (By the Witness) It is a similar tabulation.
20 There are 112 acres on the planimeter sheets that
21 did not show on the totals, so this would increase
22 the total shown here for Main Stem Little Wind by
23 112 acres.

24 Q I hand you what's been marked for identification
25 billstein-cross-white

1 as HB-137-26-A and ask you if that is a similar
2 tabulation but for the Little Wind River Basin,
3 Crooked Creek?

4 A. That's correct.

5 Q. I hand you what's been marked for identification
6 as HB-137-27-A and ask you if that's a similar
7 tabulation for Trout Creek?

8 A. That's correct.

9 Q. I hand you what's been marked for identification
10 as HB-137-28-A and ask you if that's a similar
11 tabulation for Spring Creek?

12 A. That's correct.

13 Q. I hand you what's been marked for identification
14 as HB-137-29-A and ask you if that's a similar
15 tabulation but for Big Horn Draw?

16 A. That's correct.

17 Q. I hand you what's been marked for identification
18 as HB-137-30-A and ask you if that's a similar
19 tabulation but for Main Stem Big Horn River?

20 THE SPECIAL MASTER: Another one of those
21 2-acre documents, isn't it?

22 MR. WHITE: Yes, sir.

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

24 MR. WHITE: Your Honor, at this time the State

25 billstein-cross-white

1 would offer the following exhibits which are part
2 of those exhibits which will be offered under the
3 stipulation, being HB-137-11-A, -13-A, -14-A, -15-A,
4 -16-A, -17-A, -19-A, -20-A, -22-A, -23-A, -24-A,
5 -25-A, -26-A, -27-A, -28-A, -29-A, and -30-A, for
6 the purposes set forth in the stipulation which was
7 read into the record.

8 THE SPECIAL MASTER: Which is what?

9 MR. WHITE: Which has previously been read
10 into the record, Your Honor.

11 MR. PERRY: No objection.

12 MR. ECHOHAWK: No objection.

13 THE SPECIAL MASTER: Very well. The exhibits
14 just listed by Mr. White beginning with 137-11-A
15 are hereby admitted into evidence.

16 (Exhibits HB-137-11-A,
17 HB-137-13-A, HB-137-14-A,
18 HB-137-15-A, HB-137-16-A,
19 HB-137-17-A, HB-137-19-A,
20 HB-137-20-A, HB-137-22-A,
21 HB-137-23-A, HB-137-24-A,
22 HB-137-25-A, HB-137-26-A,
23 HB-137-27-A, HB-137-28-A,
24 HB-137-29-A and HB-137-30-A
25 were received into evidence.)

21 MR. RADOSEVICH: Your Honor, may I at this time
22 request the permission to cross-examine Mr. Billstein?
23 Due to a change in a deposition, I will not be able
24 to be here tomorrow or the next day. My cross will

25 billstein-cross-white

1 not take very long, and it will be exclusive of
2 the Popo Agie.

3 THE SPECIAL MASTER: Are you concluded, Mr.
4 White, for the day?

5 MR. WHITE: I can do some more after Mr.
6 Radosevich is done, Your Honor, but I have no
7 objection to his interrupting my cross.

8 MR. ECHOHAWK: I would object to Mr. Radose-
9 vich again crossing. He has already had one chance,
10 and I believe it was last week.

11 THE SPECIAL MASTER: He has, and normally I
12 would sustain the objection, but I have tried to
13 be as fair as I can, and I will overrule at this
14 time. If he lived here, I would probably sustain
15 you.

16 MR. RADOSEVICH: The nature of my cross is
17 generally to the testimony that Mr. Billstein has
18 provided simply because any of the activity below
19 land are going to be affecting the water rights of
20 my clients of both the city and other water users.

21 (FURTHER) CROSS-EXAMINATION

22 BY MR. RADOSEVICH:

23 Q So, Mr. Billstein, my understanding, as I was not
24 here during the initial part of your direct testimony,
25 billstein-cross-radosevich

1 is that you were testifying to the historic un-
 2 adjudicated irrigated acreage or acreage in use
 3 on the Wind River Reservation?

4 A. That's right.

5 Q. And your testimony is that there were 34,850 acres
 6 in use at the moment -- in 1980? I'm sorry.

7 A. Under the definition of in use that we've spoken
 8 to several times, the vast majority of that acreage
 9 was served in 1980.

10 There may be some portions of spreader dike
 11 systems that we felt that would have been irrigated
 12 over the last couple of years. There may be some
 13 fields that were in a plowed condition during 1980
 14 that we felt to be irrigated lands in the long term.

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1 Q (By Mr. Radosevich) When you refer to irrigated
2 lands, do you in fact mean irrigated or lands
3 that are receiving water and producing other
4 than what they would in a natural state?

5 MR. ECHOHAWK: Objection, Your Honor. I
6 believe we covered all this ground before.

7 MR. RADOSEVICH: Your Honor, my point is,
8 and I'd be happy to explain it, that the
9 testimony just shortly was with respect to
10 Class 5 and 6 land, is going to be included
11 within this claim, and I would like to inquire
12 into the nature as to how it came about since
13 it is a significant amount, and particularly what
14 impact it's going to have if it's granted on that
15 acreage.

16 THE SPECIAL MASTER: We've been through this
17 at some length yesterday and this morning both,
18 but I will overrule the objection and permit
19 some questioning on this. So go ahead and answer
20 it, Mr. Billstein.

21 THE WITNESS: These are lands receiving
22 water induced by the works of man. Type V lands
23 are not lands that are actively having water
24 delivered to them. They are lands that are

25 billstein-cross-radosevich

1 receiving seepage water or sub-irrigated as
2 a result of seepage water from man-made systems,
3 that people on the Reservation who own those
4 trust lands or are leasing those trust lands
5 are getting some beneficial use from.

6 The Type VI lands that you referred to
7 are in fact having water delivered to them,
8 they're under an active system.

9 Q (By Mr. Radosevich) So then, Ron, is it correct
10 to state that some of the Type V lands are
11 receiving water, not directly, but indirectly,
12 that is being delivered to adjudicated and
13 unadjudicated lands?

14 A There may be seepage from canal systems that
15 serve adjudicated lands.

16 Q Is there any of this acreage within the un-
17 adjudicated area that has extended borders, such
18 as perhaps if a farmer is receiving water and
19 he just extends his field, extends his border
20 beyond that, that is beyond an adjudicated water
21 right?

22 A That would be a Type V land. There are farmers
23 who do extend their ditches beyond their borders.
24 If it's an active system it would have been mapped

25 billstein-cross-radosevich

1 in the active typing categories.

2 Q Would that be included in one of the other
3 types of land then. --

4 A That's true.

5 Q -- if they extended the border?

6 A If they extended the border and it was on
7 trust land it would have been included.

8 Q You testified earlier that under the Baylor
9 Purvis Ditch, I believe it was called?

10 A That's right.

11 Q That there is a certain amount of acreage as
12 a result of seepage which is not into your
13 Class 5?

14 A That's right.

15 Q I'm asking your professional opinion now with
16 respect to the continued irrigation. Should
17 they either cease irrigating land in that area
18 or should they improve their irrigation practices
19 or line the canal, would those acreages still
20 be receiving seepage or be as productive as they
21 are now?

22 A You're getting in an area of agricultural
23 engineering, but as I testified this morning,
24 those lands do have laterals in them so there was

25 billstein-cross-radosevich

1 an active service at some time in the past.
2 It appeared that seepage water had allowed
3 the water table to be sufficiently high that
4 they did not have to have an active delivery
5 system to them.

6 Now, if there were certain on-farm improvements
7 it might be that they could come back and bring
8 those lands into a full production and allow
9 it to be brought up into a higher type category.

10 Q Ron, is the converse wrong, that the lands may
11 no longer be in your Class 5, but rather revert
12 completely to their natural state, is that also
13 a possibility?

14 MR. ECHOHAWK: Objection, Your Honor, it
15 calls for speculation.

16 THE SPECIAL MASTER: He may answer.

17 THE WITNESS: The only way they would not
18 be Type V's would be if they turned into boggy
19 swampy areas without any beneficial use in terms
20 of grasses and such that people would be able to
21 enjoy some benefit from.

22 Their natural state is a topic that I really
23 can't respond to as what the natural state of
24 that tract of land was before an irrigation system

25 billstein-cross-radosevich

1 was brought into the area.

2 Q (By Mr. Radosevich) Let's look at it a different
3 way, Ron. The point I'm trying to get at is
4 if Type V lands are receiving their water supply,
5 not from direct irrigation, it's a result of either
6 leakage or over application of water, leakage of
7 the system or over application on soils in
8 and around that area, if they should improve the
9 efficiency of the delivery system or cease
10 delivering to an area or improve the application
11 practices on the lands, would that in fact --
12 could that in fact eliminate totally the seepage
13 of the return flow, any type of moisture that's
14 coming onto these lands unintentionally now?

15 A It could decrease the seepage coming onto those
16 lands. The possibility, if that occurred and
17 this particular instance that we're referring to,
18 being that this was a system that had a history
19 of use and laterals within it, if that improvement
20 was made, perhaps it would then go into -- on a
21 full-service delivery mode and actually have a
22 higher water requirement system.

23 Q (By Mr. Radosevich) Ron, did any of your
24 investigations go to the source of the water
25 billstein-cross-radosevich

1 supply for these lands?

2 A For the Type V's?

3 Q No, for any of the 34,850 acres included in
4 your study.

5 A Could you explain go to the --

6 Q Go to the water supply, the source of the water
7 supply.

8 A I still don't understand the question.

9 Q Surface water, groundwater, river water. In
10 other words, the source of the water supply to
11 irrigate or to get to Class 5.

12 THE SPECIAL MASTER: You mean if it was
13 a stream did they identify the stream?

14 MR. RADOSEVICH: Yes.

15 Q (By Mr. Radosevich) Did you identify it?

16 A Yes, certainly. If you look at a standard,
17 one of our standard exhibits, you would see
18 water supply sources and a code in the respective
19 use area tract, and that code refers to a water
20 supply source.

21 Q Was there any determination of accuracy of that
22 water supply for those unadjudicated but
23 irrigated acreages?

24 MR. ECHOHAWK: Objection. We have already

25 billstein-cross-radosevich

1 covered this.

2 THE SPCEIAL MASTER: I will have to object
3 because it's beyond the scope of cross-
4 examination. It's understandable.

5 I mean I sustain the objection.

6 Q (By Mr. Radosevich) Ron, what was the total
7 acreage -- I don't have it, I have a blank here.
8 What was the total acreage in Type V?

9 THE SPECIAL MASTER: You better add it,
10 18 plus something. Do you know it by memory?

11 MR. WHITE: It's on the bottom of 61.

12 THE WITNESS: 3,973 acres.

13 THE SPECIAL MASTER: I knew that the minute
14 you said it.

15 Q (By Mr. Radosevich) And one other question with
16 respect to areas within the unadjudicated areas.
17 Were these acreages, do they include or exclude
18 roads, stack yards, homesteads?

19 MR. ECHOHAWK: Objection, Your Honor. We
20 covered this area before.

21 THE SPECIAL MASTER: We have indeed covered
22 it before, but I'm going to ask you not to make
23 the objection because Mr. Radosevich wasn't here
24 when he heard it and it can be answered quite

25 billstein-cross-radosevich

1 quickly with a general statement.

2 THE WITNESS: We took means to eliminate
3 any physical obstacle that we felt that was
4 within mapping accuracy.

5 Q (By Mr. Radosevich) To exclude these areas?

6 A We tried to exclude those areas.

7 Q Does this -- Was it correct that among the
8 areas that -- during the past cross-examination
9 by Mr. White, that there was -- there was some
10 overlap between or some discrepancy between the
11 excluded areas and the areas that should have
12 been excluded?

13 THE SPECIAL MASTER: And the what?

14 MR. RADOSEVICH: And the areas that should
15 have been excluded.

16 MR. ECHOHAWK: Could I have the question
17 read back, please?

18 THE SPECIAL MASTER: Could you read the
19 question back, please.

20 (Thereupon the following
21 (question was read back as
22 (follows: "Q Does this --
23 (Was it correct that among the
24 (areas that -- during the
25 (past cross-examination by
(Mr. White, that there was --
(there was some overlap between
(or some discrepancy between
(the excluded areas and the
(areas that should have been
(excluded?"

billstein-cross-radosevich

1 THE SPECIAL MASTER: Can you try to restate
2 that, George?

3 Q (By Mr. Radosevich) Was there a -- aside from
4 the testimony that you provided on a number of
5 acres during your study, during the past few
6 days, a discrepancy between that amount and the
7 amount that has been corrected to exclude
8 perhaps some of these, farm yards, canals, stock
9 yards? I was under the impression that we had
10 a --

11 (Brief pause.)

12 MR. RADOSEVICH: I got clarified exactly
13 what it was. I was under the impression --

14 Q (By Mr. Radosevich) Is it true, Ron, that under
15 cross-examination by Mr. White there was some
16 areas to be excluded from the areas you've
17 testified, the 34,850?

18 A I believe we found some isolated housing and
19 some small roads that were criss-crossing
20 through some use areas. My point at that
21 particular time was the width of a pen on the
22 hydrographic copy is about 30 feet in width,
23 and you get into something of that order of
24 magnitude and it wasn't of significance, covered

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1 up about a pen width.

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1 Q (By Mr. Radosevich) Well --

2 A Any major physical obstacle, we made a major effort
3 to try to exclude.

4 Q Again, for clarification for my purposes, am I
5 correct in assuming, or is it, in fact, true that
6 no economic study has been made as to the beneficial
7 use on this Class V and Class VI land?

8 MS. SLEATER: Your Honor, I would object to
9 this question insofar as we went over this as part
10 of the opening days of Mr. White's cross-examination
11 when this witness clearly indicated that he perform-
12 ed no economic analysis.

13 THE SPECIAL MASTER: Well, all he has to do
14 is say it again now. I know it's duplicative, but
15 he can certainly answer it quite readily.

16 A (By the Witness) There was no economic analysis.

17 MR. RADOSEVICH: I have no further questions.

18 THE SPECIAL MASTER: On your questions before
19 the end, you wanted to know about discrepancies,
20 and then you asked about ditches and construction
21 material.

22 Did your question go to the possible inclusion
23 of lands on which there was appropriated water
24 also or overlapped into the lands that were --

25 billstein-cross-radosevich

1 MR. RADOSEVICH: Yes.

2 THE SPECIAL MASTER: Did you want an answer
3 on that?

4 MR. RADOSEVICH: Yes.

5 THE SPECIAL MASTER: I thought you did, and
6 that's why I brought it up, and maybe Mr. Billstein
7 wants to add a little bit to his answer to you.

8 MR. RADOSEVICH: Yes, I did. Thank you.

9 A. (By the Witness) Speaking in the area of lands
10 which have an adjudicated right, we found that
11 there were some minor overlaps of acreage and are
12 in the process of documenting those overlaps and
13 will resubmit modifications tomorrow.

14 Q (By Mr. Radosevich) Okay. Those overlaps, Ron,
15 were between unadjudicated and adjudicated or un-
16 adjudicated or land not covered by a permit?

17 A. I'm speaking only of overlaps of adjudicated acres
18 with unadjudicated in-use designated lands.

19 Q There was no overlap between unadjudicated acres
20 and land not having any permit whatsoever, outside
21 the boundary of a permit?

22 MS. SLEATER: Your Honor, I would like to
23 object to this.

24 THE SPECIAL MASTER: That will be sustained
25 billstein-cross-radosevich

1 because that's not relevant whether there's a
2 permit on it.

3 MR. RADOSEVICH: I'm sorry, Your Honor, but
4 I thought there was a discrepancy with respect to
5 also unadjudicated -- the total acreage as being
6 some land outside of the permitted areas that have
7 a permit on it. There was none; is that right?

8 MS. SLEATER: Your Honor, he just --

9 MR. RADOSEVICH: That's all.

10 THE SPECIAL MASTER: Okay. Mr. White?

11 Just one-half minute.

12 (Whereupon an off-the-record
13 discussion was held.)

14 MR. WHITE: Your Honor, it would be my intent
15 at this time to proceed back to the very detailed
16 cross-examination with respect to those areas
17 which appear to be light colored or dry on the
18 Exhibits 56 through 156, those areas that appear
19 from the photographs to be covered by trees or brush,
20 and those areas which appear to include roads,
21 those areas which appear to include buildings or
22 other structures, those areas which appear to include
23 drain ditches and canals, those areas which appear
24 to include stack yards or haystacks, and those areas

25 billstein-cross-radosevich

1 which appear to include -- this is all within the
2 blue areas designated on those exhibits -- stock
3 ponds and reservoirs.

4 If you want me to go ahead and deal with those,
5 I would be delighted to take them individually.

6 My suspicion, however, is that you are not
7 going to let me do it, and if you are going to
8 require me to make an offer of proof, I might as
9 well line it up and do it now.

10 THE SPECIAL MASTER: Mr. White, let me think
11 about that for one minute. I don't want to exclude
12 anything that properly belongs in the cross-
13 examination, but neither do I want to hear the same
14 general type of material that is already in the
15 record and that has recurred several times already
16 in the record.

17 MR. WHITE: That's why I brought it up, Your
18 Honor.

19 THE SPECIAL MASTER: And I think we probably
20 agree that there has been a good bit of this in the
21 record already and at what point do we have a
22 sufficiency so we can say enough is enough?

23 Now, make your offer of proof for the balance.
24 We have been into draws and ravines sufficient.

25 We have been into haystacks, I thought sufficient.

1 We saw one or two and described them, but if you
2 have some evidence of haystack inclusion that
3 should be excluded that mounts up to 20 or 30
4 acres, I suppose you have the right to assert it,
5 so maybe if you could go through that batch of work
6 before you and take, for example, the 20 or 30
7 percent most important, because if you have got
8 them that involve an acre or a half an acre or
9 acre and a half, I would not permit them in.

10 We have a 2-million-acre Reservation, reduced
11 to something less than a hundred thousand acres
12 of irrigation. Now we are looking at something
13 that can be called in use or historic and we are
14 down to 34,000, and we have chipped off a few hundred
15 here and there on that, and maybe a few thousand,
16 depending on my decision on it, and to listen to
17 evidence now -- you know, we have been through like
18 seventeen examples of less than an acre and a half
19 to an acre -- how many acres do you think are involved
20 in everything you have referred to there? Thirty
21 acres? Twenty-five?

22 MR. WHITE: I have got to say initially, Your
23 Honor, it's going to be a small acreage by small
24 acreage, sometimes less than --

25 THE SPECIAL MASTER: In one instance we found

1 in the records so far that after all of the study
2 was made the in-use application of land to Class
3 IV, I think, was ten acres. You came back in your
4 offer of proof to show there was nineteen acres
5 of ravines in that area.

6 Now, if the type of evidence you have is a
7 continuation of that sort of thing, it's not really
8 worth putting in the record.

9 MR. WHITE: Let me explain that, Your Honor,
10 because I think it's a very important thing to
11 recognize about Mr. Billstein's testimony. The
12 evidence adduced through Mr. Billstein, as you know,
13 the State has asserted, is outside of those issues,
14 the factual issues, fairly raised by the pleadings.

15 The witness said he could not relate Exhibit
16 137 to the values of the statement of claims or
17 even the sources in the statement of claims. As a
18 result --

19 THE SPECIAL MASTER: Now, you are getting
20 terribly argumentative. You are talking about a
21 legal issue that has little to do with my ten acres
22 and nineteen acres in ravines.

23 MR. WHITE: Instead, Mr. Billstein had Exhibit
24 137, which broke acres into use areas. Through
25 pretty extended effort, the experts for the State

1 of Wyoming tried to determine which acreage --
2 which parcels went into each use area.

3 It will be clear as we go through these
4 various exhibits that come in by stipulation that
5 our experts, being fresh to the project, did not
6 put all parcels in the right use area.

7 What happened was that more land was included
8 in that particular use area based on our initial
9 estimate or initial allocation than initially was
10 allocated by the time Ron said, "No, you have got
11 some parcels in the wrong use areas. Those acres
12 are still good acres."

13 The problem is that based on our first cut
14 of this evidence, they were assigned to the wrong
15 area, and that's the problem you run into when you
16 have new evidence coming in, so I don't think that
17 that particular instance should reflect unfavorably
18 on the State or its experts.

19 THE SPECIAL MASTER: It doesn't, but it does
20 reflect -- it does reveal the complexities of our
21 subject matter, and it reveals the impossibility
22 of avoiding these minute, not insignificant -- a
23 foot of ground can be very significant sometimes,
24 but relatively insignificant portions and items
25 that I think in the interest of progress itself,

1 we have to kind of skip over.

2 Now, back to the material in front of you.

3 If the totals on each of the items in front of
4 you are something less than 30 acres, I would ask
5 that you not proceed with evidence and make an
6 offer of proof and get them into the record in
7 your offer of proof.

8 MR. WHITE: Okay, Your Honor. The stock ponds
9 and reservoirs total nine acres. There's not one
10 that's more than at most a few acres.

11 The haystacks and stack yards total 22 acres,
12 again lots of little bitty parcels.

13 THE SPECIAL MASTER: Yes, but, Mr. White, in
14 all candor, can't a haystack get moved around from
15 year to year on an irrigated parcel?

16 MR. WHITE: Sure, it might be. If it's moved,
17 it's probably moved to some other location on that
18 irrigated parcel.

19 I know that you don't like this hedgerow-to-
20 hedgerow approach to the litigation --

21 THE SPECIAL MASTER: It isn't that I don't like
22 it. I'm just trying to be reasonable on it. I
23 think that it is almost too much.

24 MR. WHITE: Well, the point I'm trying to make,
25 Your Honor, is I would like to go ahead -- or this

1 is what I would be doing for the rest of the
2 afternoon, and if you don't want me to do it, just
3 rule that way and I'll make my offer of proof.

4 THE SPECIAL MASTER: All right. I will rule
5 that the evidence of the two items you have just
6 mentioned are unnecessarily minute and not necessary
7 to a relevant finding of right to use water and,
8 therefore, I would ask that you make your offer of
9 proof.

10 MR. WHITE: Your Honor, I meant to indicate
11 that there were other areas besides the haystacks
12 and stack yards and stock ponds. They similarly,
13 with the exception of tree and brush cover or dry
14 high ground, generally the Type IV that we talked
15 about before, are also quite small.

16 Would you direct me to make an offer of proof
17 on those also?

18 THE SPECIAL MASTER: I would, and I have a
19 suspicion if I were in your shoes and you were in
20 mine, you would make the same ruling.

21 MR. WHITE: I think it would all come out in
22 the wash.

23 THE SPECIAL MASTER: I think you said it, it
24 would all come out in the wash.

25 MR. ECHOHAWK: Your Honor, before Mr. White

1 proceeds, may I suggest that he possibly make his
2 offer of proof in writing to be submitted tomorrow
3 or some other time and move on with the other areas
4 of cross-examination, or if he is finished, then
5 perhaps we can let Mr. Billstein go home.

6 THE SPECIAL MASTER: Very well. I'll do what-
7 ever is -- would you rather dictate it to somebody
8 and hand it to me tomorrow?

9 MR. WHITE: No, sir, I would like to get it in
10 the record, and it's one of those rare occasions
11 where the party making the offer has the option
12 of making the decision as to what form it is in.

13 THE SPECIAL MASTER: All right. Let him
14 finish and get it in the record and be done.

15 MR. WHITE: Your Honor, if allowed to inquire
16 of Mr. Billstein, the State would show through
17 cross-examination of Mr. Billstein that approximately
18 nine acres of the total acreage shown on Exhibit
19 137 --

20 THE SPECIAL MASTER: I'm constrained to let
21 me ask you to interrupt. If I were to change my
22 mind and let you make your showing of proof of what
23 you wanted to do and you did and two months from
24 now the United States and the Tribes said, "In
25 view of the hand of fairness in this litigation,

1 we are going to -- say that a date turned out to
2 be something more than 1868 so it discombobulated
3 the stipulation and in records we are going to go
4 back and knock out every barn and every road and
5 every pond and every haystack and every ditch and
6 every profile and every program on every foot of
7 every bit of non-Indian land around Thermopolis,
8 Worland, Hyattville, Basin, Greybull, Lovell, Cody,
9 up to Yellowtail Dam -- what would my ruling have
10 to be, Mr. White, if asked that?

11 MR. WHITE: Let me talk about that, Your Honor.
12 I know you have been interested in that, and I am
13 glad you finally asked me because I want to talk
14 about that for a length of time.

15 What we are dealing with are two distinct
16 water rights, reserved rights and appropriated
17 water rights under State law.

18 THE SPECIAL MASTER: That has nothing to do
19 with the facts before us. These are facts of
20 irrigating ground, not whenth [sic] comes the right
21 to get the water.

22
23 * * * * *

24

25

1 MR. WHITE: But the state law that's
2 applicable to these appropriative rights is
3 quite different than the federal case law
4 that's applicable to the reserved rights, and
5 under the state law it's applicable to appropriative
6 rights. Just because one year somebody has a
7 haystack or doesn't irrigate all of his land
8 or may rotate his land or doesn't make a profit
9 off of his land for awhile and so he backs off
10 or does any number of things which result in
11 less than the full amount of adjudicated lands
12 being irrigated in one year, just because he
13 does that --

14 THE SPECIAL MASTER: You think --

15 MR. WHITE: -- doesn't mean. --

16 THE SPECIAL MASTER: Does an Indian not
17 have the same right to miss a year and go into
18 fallow one year if he wishes? You mean because
19 of the nature of his water is a different hand
20 down from above, that he doesn't have the
21 same rights as other users downstream?

22 MR. WHITE: Exactly.

23 THE SPECIAL MASTER: You do?

24 MR. WHITE: Exactly.

25 THE SPECIAL MASTER: I believe that's the

1 most shocking, improbable thing to ask a court
2 to believe I've ever heard in my 65 years on
3 earth and almost 40 years in the law.

4 MR. WHITE: I say that not because it's
5 an Indian, because this Court knows I'm part
6 Indian myself.

7 THE SPECIAL MASTER: You're saying a
8 Doctrine of Reserved Right. I know what you're
9 saying.

10 MR. WHITE: I don't want you to think I was
11 saying that --

12 THE SPECIAL MASTER: But how can you say
13 that about two human beings? I'm supposed to
14 judge the right to the uses of water in Water
15 Division No. 3, and you're telling me that there's
16 two different ways to use it. If your rights
17 are reserved doctrine, we're going to measure
18 where you put your outhouse, in effect, practically,
19 but if you have a Certificate of Appropriation
20 and it's been adjudicated, you can put your
21 outhouse where you want to and your barn and
22 your yard and you can do all kinds of things.

23 MR. WHITE: I'm not saying that, Your
24 Honor. I'm saying there are two different
25 standards which determine what the water rights

1 are for reserved rights and for appropriative
2 rights. And I am not at all leary of this
3 Court, the United States or the Tribes coming
4 after whatever appropriative rights they want
5 to come after so long as the standards which
6 are applicable to appropriative rights under
7 state law are applied. It's not a problem.

8 THE SPECIAL MASTER: Mr. White, I'm not
9 aware that the Indians have come after anybody's
10 appropriative rights. They mind their own
11 business and the State brought a lawsuit, and
12 it's a lawsuit looking for a general mainstream
13 adjudication for the right to use water. The
14 Indians have nothing to do with this.

15 MR..WHITE: If --

16 THE SPECIAL MASTER: And nor did the
17 forest..

18 MR. WHITE: If anybody wants to challenge
19 those appropriative rights, Your Honor, we have
20 no problem with it so long as the appropriative --
21 appropriate state law is applied to it. And I'm
22 just saying there are two different sets of law,
23 one for reserved rights made by the federal
24 courts, in some cases the state courts, and one
25 for appropriative rights that have been made

1 by the Wyoming Legislature and Wyoming Courts.

2 THE SPECIAL MASTER; I believe our
3 discussion has added some light to this subject
4 matter, and it's probably not the last mainstream
5 adjudication in the Rocky Mountain West, so go
6 ahead with the offer of proof.

7 MR. WHITE: Okay. I'm not sure where I was
8 so perhaps I could start again.

9 THE SPECIAL MASTER: All right.

10 MR. WHITE: Your Honor, if the State of
11 Wyoming was allowed to inquire of Mr. Billstein
12 on cross-examination, he would demonstrate that
13 of the 34,850 acres shown on Exhibit 137,
14 approximately 9 acres are acres which are
15 occupied by stock ponds for reservoir. He would
16 also indicate that approximately 22 acres are
17 occupied by haystacks or stack yards.

18 Parenthetically, Your Honor, I'd give the use
19 area breakdown, but I'm afraid we have not
20 correlated our use areas under the stipulation.

21 He would also testify that approximately
22 24 acres are covered by drain ditches or canals.

23 THE SPECIAL MASTER: In addition to the 90
24 acres yesterday?

25 MR. WHITE: Those were draws and ravines

1 yesterday, Your Honor.

2 He would also testify that approximately
3 37 acres are covered by buildings and farm
4 units; also testify that approximately 13 acres
5 are covered by roads; also testify that approximately,
6 small scattered tracts totaling approximately
7 272 acres are covered by trees and brush. And
8 if allowed to continue my examination with respect
9 to those lands which appear very light colored
10 and do not appear to be irrigated on Exhibits 36
11 through 156, his testimony would show an
12 accumulative amount of 6,073 acres of high --
13 of dry ground that were not in irrigation or
14 under irrigation at the time those photographs
15 were taken.

16 THE SPECIAL MASTER: You have every right
17 to proceed with those photograph areas if you
18 think they were dry.

19 MR. WHITE: I'm sorry, I thought I couldn't
20 go back into those.

21 THE SPECIAL MASTER: Those have nothing to
22 do with what we're talking about now.

23 MR. WHITE: I withdraw that portion of my
24 offer of proof.

25 THE SPECIAL MASTER: You were in some of

1 those. If you have 6,000 acres you think are
2 not irrigable, you show them. You started to
3 do that, and he went through a half dozen
4 tracts, and we can draw our conclusions when
5 it's decided.

6 MR. WHITE: Your Honor, --

7 MR. ECHOHAWK: Your Honor --

8 THE SPECIAL MASTER: Just a minute. Go
9 ahead, Mr. Perry.

10 MR. PERRY: I believe that the Court's been
11 more than patient with Mr. White going into the
12 6,000 acres he's referring to; if I understand
13 correctly, are predominately the Type IV's and
14 this was the entire line of questioning for
15 hours and hours that he went into a number of
16 these. We objected on a number of occasions and
17 The Master was more than patient with Mr. White
18 allowing him to show light-colored parcels
19 contrasting with dark-colored parcels, so I think
20 we really are getting back exactly into the exact
21 line of questioning that --

22 THE SPECIAL MASTER: Well, let's see if we do.
23 Right now we're saying he doesn't.

24 I'm not excluding in my ruling his right to
25

1 go into an examination of any areas that are
2 classified, any of these classifications which
3 he feels have no right to be classified. Now,
4 he has stated that these five categories that
5 he's mentioned, I have properly ruled, I think
6 properly ruled, needn't be and shouldn't be
7 in evidence, but if he has another category like
8 those of those several days that we spent on
9 Monday and Tuesday regarding areas that appear
10 lighter than other areas, he's welcomed to
11 proceed with them. We may see. Maybe we can
12 proceed with about five or six more and I'll
13 rule on it again that it is sufficient, but I
14 certainly don't mean to exclude those because
15 those are entitled to be looked at. But I don't
16 want to look at 13 acres of roads bordering 34,000
17 acres of irrigated land because I think it's
18 diminimus. And I don't want to look at 37
19 acres of buildings and yards, farm yards in
20 35,000 acres of irrigated land because I think
21 it's diminimus.

22 MR. WHITE: I understand. Your Honor, I
23 wonder if we could take a short recess so I
24 could ask the Reporter to read back that offer
25 of proof and make sure I get the correct numbers.

1 I'm not sure that I did.

2 THE SPECIAL MASTER: Well, I took them
3 down; you can take either one you want. Do
4 you want Merissa to reread them, she'd be
5 happy to.

6 We're going to quit here at four o'clock,
7 we're all pretty tired. It's been a long,
8 tough week and we'll put in a good long day
9 tomorrow, and that gives you about an hour for
10 your work, if that's agreeable with you.

11 Can you read that, Merissa?

12 She'll read it to you, if you wish.

13 (Off the record while
14 (Reporter reread back the
(offer of proof to Mr. White.

15 MR. WHITE: Maybe if we're going to break
16 at four this would be the time to do it.

17 THE SPECIAL MASTER: All right. We stand
18 in recess until tomorrow, and I hope all of you
19 really cooperate and we'll finish up tomorrow
20 night. I'm ready to go until six o'clock if
21 you want so we don't have to go into Friday.

22 MR. DONNELL: What time tomorrow, Your
23 Honor?

24 THE SPECIAL MASTER: 9:15.

25 MR. WHITE: Is there any chance that we could

1 start a little bit earlier, Your Honor?

2 THE SPECIAL MASTER: Sandy, I can appreciate
3 that kind of a question. You know, I'm ready
4 for 9:15 Monday, but I'm told 10:00 is more
5 convenient so we wait until 10:00. I'm ready
6 for 9:15 the other day and we get 10:00. Today
7 I say we can go at 9:15 and you say can we have
8 it a little earlier, say 8:30 or something.

9 MR. WHITE: I was just trying to say I'm
10 sure we would try to get Ron off the stand and
11 we want him to get home as soon as he can. If
12 he gets out of here 6:30 it might be a little
13 difficult.

14 THE SPECIAL MASTER: What time do you want
15 to start?

16 MR. ECHOHAWK: Your Honor, I would prefer,
17 if possible, even going on tonight and starting,
18 say at eight o'clock tomorrow morning. It appears
19 Mr. White's fairly close to being done.

20 THE SPECIAL MASTER: Do you have something
21 you can do in this case in the next hour?

22 MR. WHITE: No. Well, I can take a few
23 minutes and get some of these exhibits together
24 and go through those light areas, Your Honor.
25 The problem is that we also have to get under the

1 stipulation, we have to finish the rest of the
2 tabulation sheets and mark each parcel on those
3 maps. There's no way in the world we'll get
4 that done --

5 THE SPECIAL MASTER: All right. Let's do
6 it, let's meet at 8:30 in the morning.

7 MR. WHITE: All right.

8 THE SPECIAL MASTER: We'll meet at 8:30
9 rather than 9:15.

10 (Thereupon the hearing
11 (was recessed at 3:50 p.m.)

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REPORTERS' CERTIFICATE

State of Wyoming)
:
County of Laramie)

We, Merissa Racine and Viola J. Lundberg, Registered Professional Reporters and Notaries Public, hereby certify that the facts as stated in the caption hereof are true; that we did at the time, date and place, as set forth, report the proceedings had before the Honorable Teno Roncalio, Special Master Presiding, in stenotype; that the foregoing pages, numbered 2683-2805, inclusive, constitute a true, correct and complete transcript of our stenographic notes as reduced to typewritten form under our direction.

We further certify that we are not agents, attorneys or counsel for any of the parties hereto, nor are we interested in the outcome thereof.

Dated this 18th day of March, 1981.

Merissa Racine
MERISSA RACINE
Registered Professional Reporter

Viola J. Lundberg
VIOLA J. LUNDBERG
Registered Professional Reporter

MERISSA RACINE - NOTARY PUBLIC
COUNTY OF LARAMIE STATE OF WYOMING
My Commission Expires Mar. 10, 1984