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Trial Transcript, Vol. 34, Morning Session

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File 141
4392
Box 11

case # 4993

File # 141

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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

BEFORE: The Honorable TENO RONCALIO, Special Master
Presiding.

FILED _____
_____ 5/1 1981
Margaret V. Hampton CLERK
_____ DEPUTY

VOLUME 34

Morning Session

BE IT REMEMBERED that on this 14th day of April,
1981, at Room 302, State Capitol Building, Cheyenne, Laramie
County, Wyoming, the above-entitled matter resumed for trial
before the Honorable Teno Roncalio, Special Master, Presid-
ing, whereupon the following proceedings were had, to wit:

PROCEEDINGS:

ORIGINAL

APPEARANCES

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FOR THE STATE OF
WYOMING:

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HALL & EVANS
2900 Energy Center One Building
717 17th Street
Denver, CO 80202

BY: MR. JAMES MERRILL and
MR. MICHAEL D. WHITE,
Special Assistant Attorneys
General, and
MR. STUART RIFKIN and
MR. SCOTT KROB

FOR THE UNITED STATES
OF AMERICA:

MR. BRUCE SALZBURG
Assistant Senior Attorney General
Federal Building
Cheyenne, WY 82002

and

MS. NANCY FREUDENTHAL
Governor's Office
Capitol Building
Cheyenne, WY 82002

and

MR. JAMES CLEAR
Attorney at Law
Land and Natural Resources
Division
Department of Justice
Washington, DC 20006

and

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

APPEARANCES (CONTINUED)

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FOR THE UNITED STATES
OF AMERICA:

MR. MILES FLINT
Department of Justice
Washington, DC 20006

and

MR. JOSEPH MEMBRINO
Department of Justice
Washington, DC 20006

FOR THE ARAPAHOE
TRIBE:

WILKINSON, CRAGUN & BARKER
1735 New York Ave., N.W.
Washington, DC 20006
BY: MR. R. ANTHONY ROGERS

FOR THE SHOSHONE
TRIBE:

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

1-1 v-cb 1

2 THE SPECIAL MASTER: Ladies and gentlemen,
3 Court will come to order.

4 I believe there are some new admissions or
5 motions for admission to be made this morning. I'll
6 recognize you, Mr. Echohawk.

7 MR. ECHOHAWK: At this time we would like to
8 move the admission for the purposes of this case of Mr.
9 James Clear of the Department of Justice, Land and
10 Natural Resources Division.

11 Mr. Clear is a member in good standing of the
12 Bar of the District of Columbia. He'll be assisting us
13 throughout the rest of the case.

14 THE SPECIAL MASTER: Very good.

15 MR. WHITE: On behalf of the State of Wyoming,
16 we would be honored to join in the motion.

17 THE SPECIAL MASTER: Mr. Clear, we are happy
18 to grant your motion to the State of Wyoming for the
19 purposes of this litigation. That may be a long tenure,
20 but we hope it won't be as long as sometimes it
21 appears, so welcome.

22 MR. CLEAR: Thank you.

23 THE SPECIAL MASTER: Any further admissions
24 for the Tribal parties?

25 Mr. Rogers?

MR. ROGERS: No admissions, Your Honor. I

1 note my appearance, Tony Rogers, for the Arapahoe
2 Tribe and, of course, Mr. Perry's appearance has already
3 been entered.

4 THE SPECIAL MASTER: He has at the last set
5 of hearings.

6 Mr. White, any for Wyoming?

7 MR. WHITE: No, sir, Your Honor. We are all
8 admitted or admitted for the purposes of this case.

9 THE SPECIAL MASTER: The new Attorney General
10 is present, but probably will be taking part in
11 proceedings from time to time?

12 MR. WHITE: He'll be here tomorrow and we'll
13 introduce him to the record at that time.

14 THE SPECIAL MASTER: All right. Appearances
15 for today, Mr. Rifkin, we will begin on your side.

16 MR. WHITE: I'll just enter our appearance.
17 I'm Michael D. White on behalf of the State of Wyoming,
18 and I'm joined at counsel table by Messrs. Merrill and
19 Rifkin.

20 THE SPECIAL MASTER: The Attorney General's
21 office? Will the record show those present, please?

22 MR. SALZBURG: Bruce Salzburg, Assistant
23 Senior Attorney General.

24 MS. FREUDENTHAL: Nancy Freudenthal, the
25 Governor's office.

1 THE SPECIAL MASTER: All right. All staffers
2 of yours?

3 MR. FLINT: Miles Flint from the Department
4 of Justice.

5 THE SPECIAL MASTER: Good to see you again,
6 Mr. Flint.

7 MR. ECHOHAWK: Tom Echohawk for the United
8 States.

9 MR. CLEAR: James Clear for the United States.

10 MR. MEMBRINO: Joseph Membrino for the United
11 States.

12 MR. PERRY: Bill Perry for the Shoshone Tribe.

13 MR. ROGERS: Tony Rogers for the Arapahoe
14 Tribe.

15 THE SPECIAL MASTER: All right.

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1 THE SPECIAL MASTER: All right. I believe we
2 can begin with what motions are pending.

3 There is submitted with the Motion to Compel
4 Entry to the Reservation, which was filed by the State
5 of Wyoming on April 2, an order which carries the anno-
6 tation that it was signed March 13, 1981, and I don't
7 recall having signed any order, but if this order is
8 the order to which parties have agreed and have agreed
9 to be bound thereby, I will sign it now, and I will
10 enter it in my official order file for this case. Is
11 that --

12 MR. ECHOHAWK: That's acceptable with us.

13 MR. RIFKIN: That's fine with us also.

14 MR. ROGERS: It's acceptable to the Tribes,
15 Your Honor.

16 THE SPECIAL MASTER: All right. I will date
17 the order as of the last day of our proceedings --
18 well, I can date it today. It will still govern.

19 There was a motion for extension of time to
20 respond to Wyoming's Ninth Interrogatories and Request
21 for Production, and gather there was no objection to
22 that; is that correct?

23 MR. MERRILL: In general, the State of Wyo-
24 ming has no problem with granting the United States
25 additional time.

1 There are two areas that I would just like
2 the Court to be aware of which I think will work out
3 off the record with Mr. Echohawk. Some of the materials
4 that we have requested in that discovery relate to the
5 testimony of Dr. Mesghinna, who will appear before the
6 Court later in these proceedings, and we have an in-
7 formal understanding with Mr. Echohawk that we will be
8 getting those documents sometime substantially in
9 advance of when they would be required to be produced
10 by the ten-day rule in order to give our experts time
11 to do that analysis.

12 Secondly, the United States has indicated
13 last week that it intends to call Mr. Robert Toedter of
14 the firm of HKM to testify concerning certain depletion
15 analysis matters with respect to hydrology and also
16 with respect to drainage.

17 Later today we will notice up a deposition
18 of Mr. Toedter and also some of the matters requested
19 in that same --

20 THE SPECIAL MASTER: You will do what to a
21 deposition?

22 MR. MERRILL: We will serve notice of our
23 intent to take the deposition of Mr. Toedter in the near
24 future, and some of the materials requested therein
25 also relate to Mr. Toedter's testimony, and we will

1 granted by me.

2 I can't see how it can be held that a
3 Special Master presided with fairness and an even hand
4 to each side in a general main stream adjudication
5 when the adjudication of the private rights have take
6 the cursory inquiries they did with two hearings and
7 then a stipulation, and we now permit the State on the
8 other hand to go all the way back to 1932 to examine
9 irrigation records.

10 If that's done with every state water right,
11 this case will be good for a 20-year tour of duty and,
12 therefore, I think some balance will have to take
13 place before I would grant this type of an order to
14 produce.

15 I would be happy to hear your response to
16 that, Mr. Merrill.

17 MR. MERRILL: Your Honor, first, I would
18 point out that if the Court is inclined to enter an
19 order prohibiting all further discovery in this case,
20 the State of Wyoming will have no objection to such an
21 order.

22 THE SPECIAL MASTER: I thought such an order
23 had been made orally and is in the record of these
24 proceedings. Do you know if that's the case, Leo, that
25 I have already made an order orally that gave a time?

1 continue to negotiate and deal with Mr. Echohawk with
2 respect to those.

3 THE SPECIAL MASTER: If you need an order in
4 writing granting the extension of time, I will sign it
5 if you will propose it. If not, let the record be the
6 record that the motion is granted for the extension of
7 time.

8 I might say that if you make requests for
9 depositions or anything that is, in effect, a continu-
10 ing deposition, I will object to it and deny it because
11 we are now, finally and gratefully, in that posture of
12 this litigation that I hope means the end to depositions.

13 Now, there will have to be strong basis given
14 for anything to require an exception to that rule, and
15 that brings us on to the next document, which is the
16 State of Wyoming's Tenth Interrogatory and the Request
17 for Production to the United States.

18 I've read through this document and I find
19 matters to which I strongly object in it. I believe
20 that asking for the production of material that dealt
21 with answers given at a recent deposition on March 3,
22 1981, of a Michael Keene, which would require the pro-
23 duction of documents going back as early as 1933 and
24 1941, under the production of documents, gauging records
25 of the BIA, from 1932 up through 1944, should not be

1 I forget when the time was, in February or March of
2 this year after which there will be no further deposi-
3 tions, and I believe that's already in the case.

4 MR. MERRILL: All right, Your Honor. I would
5 simply point out that with respect to the Tenth Request
6 for Production, that is simply a memorial of items that
7 were requested during Mr. Keene's deposition before the
8 March proceedings commenced, and Mr. Echohawk requested
9 it so that he would have a written record of specific-
10 ally the items we wanted, so that it was a request of
11 production already pending. This was simply written
12 down to memorialize it in written form so he would have
13 a list to work off of.

14 THE SPECIAL MASTER: With that understanding
15 we will rule as we have on it.

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1 MR. ECHOHAWK: Your Honor, my understanding
2 was that pursuant to agreement between the United
3 States and this State that depositions would be able
4 to continue on an agreed upon basis; that we would make
5 our witnesses available for two rounds of depositions,
6 and the State would make their witnesses available
7 for two rounds of depositions. So far, we have only
8 deposed their people once and we were anticipating
9 another round of depositions.

10 THE SPECIAL MASTER: If you two have
11 stipulations and agreements which help facilitate the
12 completion of the lawsuit, they will meet with my
13 approval. If even your agreements do nothing more than
14 add to the mountains of depositions now in the lawsuit,
15 I will still object to them.

16 MR. WHITE: Your Honor, Mr. Echohawk correctly
17 reflects the agreement between the State and the United
18 States. I would like to point out for the Court, however,
19 that we are entering a period of sustained litigation.
20 The State of Wyoming had offered, by my letter to Ms.
21 Sleater of almost a month ago, to make our people
22 available during this last break of some three weeks
23 duration and to provide space for the depositions in
24 Denver. That offer was not taken up, and while we feel
25 that a deal is a deal, we feel that we have complied with

1 our portion of the deal and offered to make our people
2 available and offering space and we would object to
3 any depositions taken of our people during the time
4 set for trial. We've got no objections to depositions
5 on weekends or evenings or something like that but --

6 THE SPECIAL MASTER: I leave that to Counsel.
7 If you can pick a time where you two agree to one more
8 deposition, and ask me to defer from the time now set
9 for hearings, I will not postpone or delay the hearings.
10 We will move forward with dispatch in completion of it.
11 So I think --

12 MR. ECHOHAWK: That's fine. That wasn't our
13 intention to postpone any hearings. We were planning
14 on working it into whatever breaks we had.

15 THE SPECIAL MASTER: Very good.

16 I see a familiar face in the courtroom, so Mr.
17 Kersich, I think we are ready to resume -- or do you
18 have something before that?

19 MR. WHITE: I think we've got at least one
20 other matter, Your Honor.

21 THE SPECIAL MASTER: Well, I'll call on the
22 United States to proceed with your case.

23 MR. ECHOHAWK: I think we have one other item
24 to take up before we move on to the resumption of
25 Mr. Kersich's testimony. I think that is Wyoming's entry

1 to the Reservation.

2 THE SPECIAL MASTER: All right.

3 MR. RIFKIN: Your Honor, we have an out-
4 standing motion to compel entry onto the Reservation.
5 The parties weren't able to reach an accomodation.

6 THE SPECIAL MASTER: I thought when you
7 referred to my order here earlier, you had agreed --

8 MR. RIFKIN: There is a difference of
9 opinion as to the interpretation of some of the
10 provisions of the order.

11 THE SPECIAL MASTER: Okay, all right, I'm
12 sorry to hear that but proceed.

13 MR. RIFKIN: The position of the State of
14 Wyoming is that it has complied with every provision
15 set forth in the order that we stipulated that was
16 signed this morning. The point of contention is the
17 size or the number of tracts that we have listed, and
18 we don't feel that the order -- the State of Wyoming
19 does not feel that the order limits the number of tracts
20 that we can visit, and the State of Wyoming believes
21 that its complied with every provision such as notice.
22 We stated our intention to only visit -- on our first
23 notice, at least, we stated our intention to only visit
24 non-alloted trust lands and we provided notice to
25 Counsel for the United States and the Tribes. We feel

1 that notice to Counsel is sufficient. in that respect.
2 We think that it's quite possible that of the tracts
3 we list, we will not visit every one, but it is just
4 simply impossible to know in advance which of the
5 specific tracts we will visit until we actually go out
6 there, and we are prepared to present testimony as to
7 why that's the case, if it's necessary. We are willing
8 to call our experts onto the stand.

9 THE SPECIAL MASTER: You are unable to define,
10 prior to the entry, those specific tracts you desire
11 to examine?

12 MR. RIFKIN: Excuse me, Your Honor?

13 THE SPECIAL MASTER: Until you get on the
14 Reservation, is that what you said?

15 MR. RIFKIN: Excuse me.

16 THE SPECIAL MASTER: Read it, please.

17 (Above statement was read
18 (back by the Reporter as
19 (follows: "Q You are unable
20 (to define, prior to the
21 (entry, those specific tracts
22 (you desire to examine?"

23 MR. RIFKIN: I think we have specifically
24 described all of the tracts we wanted to examine. The
25 only problem is of the tracts that we listed, we
probably don't intend to enter each specific tract.
The problem is that in advance we just can't know which

1 of the certain percentage that we will actually visit,
2 we can't know in advance which ones we'll actually go
3 onto.

4 THE SPECIAL MASTER: Can't you live with
5 that, Mr. Echohawk?

6 MR. ECHOHAWK: Your Honor, in reviewing the
7 transcript and in looking at the order, I think it was
8 quite clear when we discussed this matter before, that
9 Wyoming was supposed to identify each and every parcel
10 by legal description that they intended to go on. I
11 think that was everybody's understanding at the time,
12 and that is what is required by Item 1 of your order,
13 that you just signed. I think that Wyoming has the
14 knowledge that is necessary to identify the tracts.

15 Mr. White, on several occasions during the
16 day that we discussed it, said that yes, as soon as I
17 find out, tie down through Mr. Billstein's testimony,
18 you know, which parcels relate to which claims, that
19 he could specify which lands he wanted to go on. I
20 think that through the stacks and stacks of depositions
21 that Wyoming has taken, through the detailed cross-
22 examination that they subjected Mr. Billstein to, I
23 think it was two weeks worth, the one week that we've had
24 so far with Mr. Kersich that Wyoming has demonstrated
25 that they have the detailed knowledge to ask about each

1 and every parcel, about what deficiency is within this
2 parcel. I think it is just a matter of Wyoming not
3 wanting to be quite as specific as they could be.

4 THE SPECIAL MASTER: I'm inclined to agree
5 with Mr. Echohawk, but you say you want to put on some
6 witness to show why you can't comply. I'll hear your
7 witness.

8 MR. RIFKIN: Okay. I would like to call Mr.
9 Sommers at this point.

10 CRAIG SOMMERS
11 was called as a witness by the State, and having been
12 first duly sworn, testified as follows, to wit:

13 MR. RIFKIN: Also I would like to inquire,
14 Your Honor, whether you have a copy of the notice that
15 we provided with the list of the specific parcels that
16 are enumerated? It is a letter --

17 THE SPECIAL MASTER: I have two attachments
18 to a letter of April 6th, are those the ones you
19 refer to?

20 MR. RIFKIN: Well, this is a letter that is
21 dated March 31, 1981.

22 THE SPECIAL MASTER: No, I do not have.

23 MR. RIFKIN: I believe that the motion of
24 April 6th contained a copy of that also.

25 THE SPECIAL MASTER: Oh, this is what he was

1 referring to. Yes, I have that.

2 MR. RIFKIN: Okay, with the attachments?

3 THE SPECIAL MASTER: Uh-huh.

4 MR. RIFKIN: The attachments to the notice
5 representing that letter specifically enumerate all
6 of the parcels. Some of the parcels appear in many
7 sections. We have listed every section that any portion
8 of a parcel appears in.

9 THE SPECIAL MASTER: Are your copies readable?
10 Mine are totally unreadable; these two.

11 MR. RIFKIN: Well, there are two attachments.
12 Attachment 1 is --

13 THE SPECIAL MASTER: Printed.

14 MR. RIFKIN: Is more legible.

15 THE SPECIAL MASTER: Uh-huh. All right.

16 DIRECT EXAMINATION

17 BY MR. RIFKIN:

18 Q Mr. Sommers, in your previous field work on the
19 Wind River Indian Reservation, did you enter onto
20 any tracts of land which you have included in the
21 first notice of entry onto the Reservation of
22 two weeks ago?

23 A No, I have not visited any of those sites on the
24 ground.

25 Q Mr. Sommers, does the helicopter overflight

1 that you participated in last week, enable you to
2 narrow down the list of parcels that you would
3 like to sample?

4 A I would say it was helpful to have taken the over-
5 flight, but the same problem exists with photo
6 interpretation; that you can't tell all of the
7 topographic variations and vegetation indicators
8 and that kind of thing, without being actually
9 on the ground.

10 Q Mr. Sommers, what were the primary factors that
11 influenced the scope of the previous investigation
12 that you've conducted on the Wind River Indian
13 Reservation?

14 A The factors, I guess, would be that we reviewed
15 the data that the U.S. has provided to us. We
16 have numerous questions where we felt we didn't
17 have sufficient data, that they did provide, in
18 order to answer all of our questions and, also,
19 during our trips last year, we were under the
20 impression, or were told that all of the work was
21 preliminary at that time.

22 Q Mr. Sommers, were you present in the courtroom
23 when Mr. Rogers stated that it's quite unusual
24 to conduct discovery during the midst of a trial?

25 A Yes, I believe I was.

1 Q Mr. Sommers, are you aware of any specific
2 instances of U.S. experts conducting discovery
3 on the Wind River Indian Reservation within the
4 last several months, and if so --

5 MR. ECHOHAWK: Objection, Your Honor.

6 THE SPECIAL MASTER: I don't think that's
7 a fair question, Mr. Rifkin.

8 MR. RIFKIN: I'm just trying to point out
9 one of the objections that the United States has
10 to the method of conducting discovery, and that
11 we should only have --

12 THE SPECIAL MASTER: The purpose for this
13 witness being on the stand is to see why he
14 can't identify with specific accuracy those
15 tracts he wanted to visit, and has to submit a
16 list of a couple of hundred of them and say we
17 have identified them, but we can't tell you which
18 eight or nine we want to visit. That's what I
19 want to hear from this witness. I could care less
20 whether he was in the courtroom when somebody else
21 said something. I want to know why he can't be
22 specific on the areas he wants to visit.

23 MR. RIFKIN: Okay.

24 THE WITNESS: The answer to that, I believe --

25 THE SPECIAL MASTER: Yes.

1 THE WITNESS: -- that the information on the
2 photographs and on the logs and the other written
3 information that's been provided, is just not
4 sufficient to totally evaluate the entire arable
5 land base.

6 THE SPECIAL MASTER: You have a problem
7 verifying the testimony regarding the total arable
8 land base?

9 THE WITNESS: That's correct.

10 THE SPECIAL MASTER: Okay, can you be specific
11 in stating what you need to do on the Reservation
12 in order to verify that?

13 THE WITNESS: I would anticipate that there
14 would be a certain amount of sampling using
15 hand-auger tools. There would also be visual
16 inspection of information on depth to barrier.

17 THE SPECIAL MASTER: How many auger drills
18 do you anticipate you should do to do a reasonable
19 job of verification, and how many holes drilled to
20 test verification of surface to barrier testimony?

21 THE WITNESS: I would say there would be an
22 unlimited amount of holes that could be drilled for
23 verification, and as far as site specific ones, I
24 can't tell you without being in the field.

25 THE SPECIAL MASTER: All right, and in that

1 case I will deny you any further admission to
2 the Reservation of any kind. If you think you've
3 got the right to go drill three or four hundred
4 holes to prove three or four hundred statements.
5 under oath, I deny that that's what this lawsuit
6 is all about, and I think that's an unreasonable
7 position and no court would grant you that type
8 of latitude in verifying sworn testimony. Now,
9 if you want to go on that Reservation and drill
10 10 or 15 holes and run a general test as reasonable
11 men can, with the limitations that the State
12 and the Government has, to do this I'll grant you
13 some type of an order permitting it.

14 THE WITNESS: We tried to constrain ourselves
15 by time, which our original request in this instance,
16 was to have four days actually on the ground
17 looking at all of the units listed. We might have
18 had -- at that time we would have sampled as we
19 went, where we felt it was appropriate, but in --
20 in those four days, I would anticipate that we
21 could probably sample no more than 20 locations,
22 perhaps 30. After that review, if there were still
23 outstanding specific areas, specific parcels that
24 we had further questions, then it was our intent --

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THE SPECIAL MASTER: To ask?

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THE WITNESS: To have another notice.

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THE SPECIAL MASTER: All right, Mr. Echohawk.

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1 THE SPECIAL MASTER: All right. Mr. Echohawk,
2 why can't we draft an understanding that there be
3 permitted an entry to twenty to thirty locations taken
4 from the general list of locations on the two attach-
5 ments to the letter of March 31, and can you go through
6 here and generally identify them now and give Mr. Echo-
7 hawk some indication of where they would be as to what
8 numbers of the total you have already identified so
9 that he might identify the occupant of the land?

10 That's the problem. There is no question but
11 what the Tribes own the land in trust, but who are the
12 occupants? They want to be notified just as much as
13 the ranchers that Mr. Webster complained about at our
14 last meeting, so it's a two-way street.

15 THE WITNESS: The way we listed them, which
16 was by section, means that even if there was just a
17 tiny portion of the arable land within that section, we
18 went ahead and listed it so there would still be quite
19 a number, so there will be more than twenty sections
20 or thirty sections that would be listed.

21 I think we could do it maybe by a map delin-
22 -iation. My intention by listing the section was that
23 there may be reason to go outside of the boundary of
24 the arable land itself and look at something else in
25 close proximity to try to determine that.

1 THE SPECIAL MASTER: If you wish to try to
2 draft an order permitting and specifying by
3 particular names, say one assistant to you, would
4 that be accurate so you get away from the problems
5 that you have here of backup personnel, whatever
6 that term --

7 MR. RIFKIN: We have eliminated that problem.
8 If I might, Your Honor, the problem with
9 narrowing down the number of tracts, we can narrow
10 it down to twenty-five samples that we might want
11 to take. The problem is knowing before we actually
12 go out there exactly where the twenty-five samples
13 will come from. It's just -- we can't determine
14 in advance. We don't intend to --

15 THE SPECIAL MASTER: I fail to buy that
16 proposition that you can't determine until you get
17 there where you want to drill twenty-five holes.
18 You have got every word of the testimony of what
19 has been in the record regarding everything to
20 which the witnesses have testified and with great
21 specific detail on each of the areas.

22 Why can't you decide where you want to go for
23 twenty holes? You say, "Well, we would like to go
24 and do two and three hundred," and you say it would

25 sommers-direct-rifkin

1 be impossible to do in that time. That cannot
2 be tolerated.

3 THE WITNESS: We don't really think that that
4 was possible, but that would be my ideal of
5 verification.

6 MR. RIFKIN: My understanding, without being
7 much of a soil scientist, admittedly, is that
8 there are certain aspects of visual observation
9 that are necessary before you can just go out in
10 advance and know --

11 THE SPECIAL MASTER: Mr. Rifkin, you weren't
12 here, but the witness was. How many opportunities
13 did the United States of America have to test the
14 soil of the 9,000 owners of water rights whose
15 rights have been confirmed in this general main
16 stream allocation? Do you know? Were you at
17 Worland last summer?

18 THE WITNESS: I was not in Worland.

19 THE SPECIAL MASTER: They have had virtually
20 none. They began with two and then came a stipu-
21 lation regarding confirmation of those rights.
22 How can you have a fair and just general main stream
23 adjudication of the right to use water when you
24 insist on going in with such a minute and infinitesimal

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1 examination of every iota? As you said, before
2 you could verify testimony, you would want the
3 perfect -- and the other side getting exactly two
4 inquiries, one into a pond and one into an old
5 ditch that's been abandoned out of some 9,000
6 water rights?

7 Do you know what you are doing to your own
8 lawsuit when you insist on this sort of thing?

9 MR. RIFKIN: I think that what the State is
10 asking for is just the same opportunity that the
11 United States has to go out there and conduct the
12 same type of discovery.

13 THE SPECIAL MASTER: The United States didn't
14 have the opportunity to do this and didn't ask for
15 it, frankly, and I think if they had, it would be
16 denied or there would be a rebellion in Water
17 Division III, one or the other.

18 I'm just trying to put myself in the guise of
19 being fair, and this is shocking compared to the
20 inconvenience to the water rights owners in Water
21 Division III who are non-Indian.

22 MR. RIFKIN: I think we took into account the
23 inconvenience in the provision of the notice and
24 the fact that we are limiting ourselves to thirty

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1 days, a one-time last shot, and, additionally, we
2 have been willing to cut the thirty days down.

3 THE SPECIAL MASTER: But you are not willing
4 to cut it down to twenty shots or thirty. I
5 think you said twenty to thirty might be an adequate
6 answer to what would give you some form of a reason-
7 able verification process.

8 MR. RIFKIN: I think we would be willing to
9 cut it down to twenty-five or thirty.

10 THE SPECIAL MASTER: Mr. Echohawk, why can't
11 you say yes and enter the Reservation and do the
12 best job you can of notifying somebody at the BIA
13 or somebody at which office on the Reservation
14 where your next two or three would be and the next
15 day where the next four or five might be?

16 MR. ECHOHAWK: That's been our point since
17 this whole dispute began, that if they could be
18 specific, let us know where they are going to go,
19 then we have no problem and we don't mind them
20 going on and conducting their discovery.

21 They have thirty days, or they have, what,
22 fifteen days left of that thirty days. We think
23 they have the information that they can be specific.

24 They were out there last summer on several

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1 occasions. They took Dr. Mesghinna's irrigation
2 designs with them out in the field. They took
3 them out and marked on them within each specific
4 unit the areas that they disagreed with.

5 I find it hard to believe, Your Honor, that
6 they can't tell us specifically where they want
7 to go.

8 MR. RIFKIN: In response to Mr. Echohawk, it
9 wasn't until the January deposition of Mr.
10 Mesghinna that we became aware of some of the
11 changes and inconsistencies and such.

12 THE SPECIAL MASTER: Well, you are close
13 enough to a final entry of the Reservation to permit
14 the verification process which the witness has
15 stated can be done, and the figure was twenty to
16 thirty core holes or other drillings in the process
17 of verifying evidence so far in the case regarding
18 depths to barriers testimony and regarding other
19 facets of arability.

20 MR. PERRY: Your Honor, I would like to inquire
21 whether the State intends to enter Tribal lands
22 only or --

23 THE SPECIAL MASTER: That's already been
24 resolved and settled. You are entering only the

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1 land which you state --

2 MR. RIFKIN: The trust lands.

3 MR. ECHOHAWK: In the State's Second Request
4 they have indicated and listed a large number of
5 allotted tracts and indicated they would like to
6 go on those as soon as the Tribes provide them with
7 a list of the allottees, which is not what was
8 agreed on prior.

9 THE SPECIAL MASTER: Which is not what was
10 agreed on.

11 MR. ECHOHAWK: It appears that Wyoming does
12 intend to go on the allotted lands.

13 MR. RIFKIN: We do wish to address that issue.
14 We would like to clear up the first one first.

15 THE SPECIAL MASTER: You keep yourself off a
16 lot of lands on this first land, but I don't
17 intend to grant a second entry in the Reservation.
18 I want this to be the final entry on the Reserva-
19 tion.

20 MR. RIFKIN: What we have done is we have
21 broken down our request by study. It's not that
22 we are going to conduct separate entries. It's
23 just that our first request represented specific
24 studies that we were going to have done by certain

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1 individuals --

2 THE SPECIAL MASTER: On what lands?

3 MR. RIFKIN: Well, these are the lands that
4 we have listed on that March 31 letter, the one
5 that we have just been talking about, the soils
6 samples.

7 THE SPECIAL MASTER: And on these total
8 attachments, attachment number one and attachment
9 two?

10 MR. RIFKIN: Well, we are talking about the
11 twenty-five or thirty samples within that list.

12 THE SPECIAL MASTER: Yes. Then when those are
13 completed and that work has been done by the
14 witness and his assistants, then what else do you
15 propose on the Reservation?

16 MR. RIFKIN: That's all we propose for that
17 particular study.

18 THE SPECIAL MASTER: What else do you propose
19 on the Reservation?

20 MR. RIFKIN: Well, we propose to conduct some
21 surveying operations of the Billstein parcels that
22 Mr. Billstein testified to during our last session.

23 THE SPECIAL MASTER: What are the Billstein
24 parcels? I'm not aware that there's that type of

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1 nomenclature on the land on the Reservation.

2 MR. RIFKIN: I think there is a letter that
3 you should have a copy of. I think it's dated
4 April 6, I believe.

5 MR. ECHOHAWK: Yes.

6 MR. RIFKIN: A letter dated April 6th. We
7 have listed the lands. Basically it's a list of --

8 THE SPECIAL MASTER: When does this end,
9 gentlemen? When is all of this going to end?

10 MR. RIFKIN: Well, originally we intended that
11 it would end during the thirty days, but we are
12 going to ask for an extension of the thirty days
13 because we have been prevented -- during the first
14 two weeks of the thirty days we have been prevented
15 from entering.

16 MR. ECHOHAWK: We don't believe they have
17 been prevented. It's just the fact that they
18 haven't followed the agreed upon procedure.

19 The United States has laid out their position
20 to the State of Wyoming in the letter saying that
21 we are willing to cooperate with them so long as
22 they meet the conditions of the agreed upon order,
23 and Wyoming has not, and again when they requested
24 to go on and do their surveying, again they gave

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1 us a shotgun approach.

2 They listed a huge amount of sections, and
3 Mr. Rifkin himself said, "No, we don't intend to
4 go and survey all of them. We aren't going to
5 survey all of them, but we don't know which ones."

6 It's the same problem. We want them to be
7 specific.

8 THE SPECIAL MASTER: I find it very hard to
9 disagree with what Mr. Echohawk is saying, and I'm
10 going to sustain his objections on this procedure,
11 but if you two can get together and work out some
12 way to do some twenty or thirty holes or drillings
13 to bring about verifications, as I have stated
14 earlier, I'm going to agree to that much.

15 MR. RIFKIN: I think we are very close to an
16 agreement. I think we are willing to limit it
17 down to twenty-five or thirty.

18 I think that Mr. Echohawk would impose a burden
19 on us. He would ask us to list four or five, to
20 go out there and to see the next four or five that
21 we want to sample, and then to come back, and
22 basically it's just an extremely inefficient process.

23 THE SPECIAL MASTER: It isn't a case of in-
24 efficiency. I think it's the case that Mr. Echohawk

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1 would like to notify the parties involved with
2 each step.

3 Am I correct or incorrect with that?

4 MR. ECHOHAWK: We need to check and make sure
5 that those are, in fact, privately owned trust
6 lands so we can let the Tribe know. If there are
7 any individuals occupying those, we can let them
8 know.

9 Furthermore, we want to know specifically.
10 We don't want them going and wandering --

11 THE SPECIAL MASTER: Can you notify them of
12 six or eight at a time?

13 THE WITNESS: I wouldn't want to make a number
14 of trips to fly up to Riverton.

15 THE SPECIAL MASTER: Does it depend on what
16 you find in doing your work on the first four or
17 five?

18 THE WITNESS: If I knew a specific area I
19 wanted to go to and on the road there I saw some-
20 thing within the arable land that I wanted to put
21 a shovel to and look at, would I be prevented from
22 doing that?

23 THE SPECIAL MASTER: Do you have to see the
24 ground to know what you want to put a shovel to,

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1 or does the testimony of the witnesses and Mr.
2 Billstein the last two weeks on cross-examination
3 tell you where the ground is? Both?

4 THE WITNESS: I think we can narrow it down
5 by the testimony and the information that's been
6 provided, but when you are on the ground, I know
7 in the first trip we went out there, things became
8 apparent while we were driving there that weren't
9 apparent from the photographs or the logs.

10 MR. ECHOHAWK: We might point out also that
11 they just finished a detailed helicopter survey
12 out there, and there was some indication that even
13 the helicopters set down on the road.

14 MR. RIFKIN: That's not true.

15 THE SPECIAL MASTER: Whether it's true or
16 not, I don't think it's very relevant.

17 MR. ECHOHAWK: But I think they have conducted
18 a very detailed aerial survey from helicopters.

19 THE SPECIAL MASTER: If you are pretty close
20 to working something out, work it out, but you
21 are testing my patience.

22 MR. ECHOHAWK: If Mr. Sommers wants to delin-
23 iate twenty separate tracts, we have no problem
24 with that.

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1 THE SPECIAL MASTER: He said he can't right
2 now, but I think you can begin somewhere with the
3 first five, six or seven, in that general area,
4 and after those are through, the remainder you can
5 certainly designate, so I think the witness has
6 said he can pretty much proceed on that basis,
7 Mr. Rifkin.

8 MR. RIFKIN: Part of the problem that causes
9 is the difficulty of fitting this within the 30-
10 day period if we are not able to list them all
11 originally and it requires several different trips.

12 THE SPECIAL MASTER: I don't understand how
13 you two can agree to an order on these procedures
14 and then find so much to disagree about after the
15 order has been agreed upon.

16 MR. RIFKIN: The order on its face, provision
17 number one, doesn't limit the number of tracts.

18 MR. ECHOHAWK: It says to identify each parcel
19 or tract by writing.

20 THE SPECIAL MASTER: It does say you identify
21 each one.

22 MR. RIFKIN: It's just a question of --

23 THE SPECIAL MASTER: But you have eighty
24 percent more than you need, so by confusion you

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1 have obfuscated the issue. You have made it so
2 cloudy that it can't be seen.

3 He can't identify the issues because you have
4 given him ninety percent more of them than you
5 are going to visit. That's not compliance.

6 MR. RIFKIN: If that's the position of the
7 counsel for the United States --

8 THE SPECIAL MASTER: That's the position of
9 the Master in the lawsuit. You have given him a
10 list here and said, "We can't tell you which ones,
11 but we are going to go to some of these," and then
12 you give him a whopping list of how many thousand
13 acres? I can appreciate their objection.

14 MR. RIFKIN: Would there be a problem if we
15 simply hired enough people and went in to every
16 tract?

17 THE SPECIAL MASTER: I suspect that there
18 would be. I'm trying to get your cross-examination
19 verification completed. That's all I'm trying to
20 do.

21 My inclination is to deny anything and every-
22 thing you want because I think you have gone so
23 far in cross-examination that you have tested the
24 patience of the Court and exhausted the resources

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1 of all parties involved except yourself, but I'm
2 restraining myself in that regard in giving you
3 a chance to verify the cross-examination evidence
4 in this case, and that's what the witness would
5 like to do and have a chance to do and not be able
6 to do it with one hundred percent thoroughness.
7 I'm limiting him to somewhere around twenty or
8 thirty samples there to test the matter in the
9 record.

10 Now, let's begin and do it the way we have
11 got it pretty much outlined here.

12 MR. RIFKIN: If I could just receive some
13 clarification, if we are able to narrow this down
14 to a list of twenty-five or a list of thirty, is
15 that going to preclude us from going back a second
16 time while Mr. Sommers or another person is out
17 there if he sees a tract that he wants to sample
18 at that time?

19 THE SPECIAL MASTER: Yes, it will, because
20 if it's going to give you a chance to go back,
21 then you are not limited to twenty or thirty. You
22 end up with fifty or sixty, and the limitation is
23 one required by reason and time and by the neces-
24 sity of completing this lawsuit, and I'm really

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1 rather startled and surprised that you can't
2 appreciate that.

3 MR. RIFKIN: Oh, I can appreciate that.

4 THE SPECIAL MASTER: All right.

5 MR. RIFKIN: At this time I just have a few
6 general questions I would like to ask just for
7 the record that I neglected to ask Mr. Sommers,
8 general background.

9 Q (By Mr. Rifkin) Will you please state your name
10 and address for the record?

11 A. Craig Hill Sommers.

12 MR. ECHOHAWK: We will stipulate to Mr.
13 Sommers' name and address and so forth.

14 MR. RIFKIN: Some other questions also.

15 Q (By Mr. Rifkin) Mr. Sommers, what is your profes-
16 sional position?

17 A. I'm director of Soils Division for Mine Reclamation
18 Consultants.

19 Q Could you please enumerate the responsibility as
20 a consultant to the State in this particular law-
21 suit?

22 A. To review and verify the arable land bases for
23 the various study areas, to participate in analysis
24 of testimony in the case.

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1 MR. RIFKIN: Thank you. At this time, Your
2 Honor, I'd like to raise a problem that we have
3 that we haven't been able to work out with our
4 Second Request.

5 THE SPECIAL MASTER: Have you been excused?
6 Who excused you? Please sit down. I'll excuse
7 you when you are through, Mr. Sommers.

8 MR. RIFKIN: We would like to raise the issue
9 that Mr. Echohawk touched upon, and that is entry
10 onto allotted portions of the Reservation. In
11 our Second Request --

12 THE SPECIAL MASTER: Let me ask the witness
13 a few questions then before we are through.

14 Mr. Sommers, how long have you been employed
15 in the work you are doing?

16 THE WITNESS: By the firm or in soils work
17 in general?

18 THE SPECIAL MASTER: By the firm first.

19 THE WITNESS: It will be two years this summer.

20 THE SPECIAL MASTER: And by the State of
21 Wyoming?

22 THE WITNESS: About -- since August of '80.

23 THE SPECIAL MASTER: Has your work ever
24 carried you into an examination of the acreage

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1 described upon the water right issue by the State
 2 Engineer's office to other water right owners in
 3 Water Division No. 13 or water users in
 4 Water Division No. 13?

5 THE WITNESS: No, it has not.

6 THE SPECIAL MASTER: Do you know of anyone who
 7 has worked in that capacity in the State Engineer's
 8 office verifying acreage in State water rights?

9 THE WITNESS: No, I do not.

10 THE SPECIAL MASTER: Okay. Did you have any
 11 further questions of this witness?

12 MR. ROGERS: Your Honor, I would like to
 13 clarify one question. Did the witness testify
 14 that he had been working on the case for the State
 15 of Wyoming since August of 1980?

16 THE WITNESS: Yes.

17 MR. ROGERS: Were you not present at depositions
 18 conducted by Mr. White on witnesses for the United
 19 States in at least April and May of 1980?

20 THE WITNESS: No, I was not.

21

22

23

24

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* * * * *

1 THE SPECIAL MASTER: All right, thank you,
2 you're excused, Mr. Sommers.

3 All right.

4 MR. RIFKIN: Your Honor, our second request
5 covers surveying of the tracts that are listed in the
6 Billstein photographs, that we examined in some detail
7 the last few weeks of the trial.

8 THE SPECIAL MASTER: To which he testified
9 that had been done with a --

10 MR. RIFKIN: A planimeter.

11 MR. WHITE: A planimeter.

12 MR. RIFKIN: Right. We would like to go out
13 there and survey some of the tracts to compare them
14 with the results, and to verify some of the section
15 corners. The areas that we have listed -- it is also
16 a somewhat broad list, one of the reasons for that
17 being that some of the parcels on the photographs
18 appear in many different sections. And, we have listed
19 every single portion of every section that appears.
20 In addition, it is necessary for us to get onto those
21 lands just to cross other lands, just to gain access
22 to the other parcels and we have listed all of those.

23 The State of Wyoming has never conducted any
24 surveying on these particular parcels in the past, and
25 in fact --

1 THE SPECIAL MASTER: Well, the United States
2 has never conducted any surveying of the other water
3 rights either, Mr. Rifkin. Why should I grant your
4 request?

5 MR. RIFKIN: Well, because I think it complies
6 with the terms of the order, and I think that we were
7 granted 30 days to do just this --

8 MR. PERRY: Your Honor, I don't think the
9 order contemplated the State's experts wandering at will
10 throughout all of the tracts, and a large portion of
11 the claim. I would further point out that on the order
12 which you just signed, also requires the consent of
13 allottees for going on any individual trust tract and
14 that is not what Mr. Rifkin's letter of April 6th
15 calls for.

16 THE SPECIAL MASTER: Mr. Rifkin, where in
17 the letter is the language that asserts that you have
18 a right to go on the Reservation and do the surveying.

19 MR. RIFKIN: I believe we served two lists,
20 one list is a list --

21 THE SPECIAL MASTER: No, what language in the
22 order do you use to support your contention that the
23 State has a right to enter the Reservation for surveying?

24 You know, we have handled I think, better
25 than 75 photographs, maps, hydrographs, criss-crossing

1 hydrographs, back to maps, checking area to area,
2 parcel to parcel for better than 14 days in court and
3 I'm just not sure that it is necessary to verify that
4 description or acreage that you have to do any surveying
5 on the Reservation. Especially do I think it would be
6 unfair and an improper act in light of the fact that
7 the United States of America has not asked for, nor
8 intends to survey one acre of several hundred thousand
9 acres in Water Division 3 or which there are other water
10 rights --

11 MR. RIFKIN: I believe there are two points
12 on the order that support our position. The first is
13 that the State consultants may enter by helicopter
14 over-flight or otherwise. The second is provision 3,
15 which basically states that we have to specify the
16 purpose for entry. It doesn't state which purposes
17 are allowed and which ones are not. I think that we
18 didn't have the tracts laid out in the photographs before
19 Mr. Billstein's deposition last month, we weren't aware
20 of problems on those. Basically, we had no way to be
21 aware of problems on the tracts that were listed. We
22 have some strong suspicion that there are some problems
23 and this is the only way we can verify it.

24 MR. ECHOHAWK: Your Honor, again, if they
25 want to be specific and detail exactly which section lines

1 they would like to survey or whatever, the United
2 States would have no objection so long as --

3 THE SPECIAL MASTER: Again, I can't help but
4 agree with Tom and that observation if you go over the
5 hydrographs, and you're talking about an awful lot of
6 parcels of land, and you state where you believe that
7 total acreage for a given parcel or tract may be in
8 error, and you would like to do a verification surveying
9 on the ground of that area and list those again, you
10 can have 15 or 20 examples to verify generally the --

11 MR. RIFKIN: Your Honor, I think -- excuse me.

12 THE SPECIAL MASTER: The acreage totals of
13 each of those tracts or plats that were in evidence
14 by the witnesses.

15 MR. RIFKIN: I think that we could limit it
16 to 20 or 25 tracts. In order to limit ourselves to 20
17 or 25 tracts the way that we have listed the areas, 20
18 or 25 tracts will require a list of a lot of sections
19 because some of it --

20 THE SPECIAL MASTER: I don't buy that. I
21 reject that.

22 MR. ECHOHAWK: Your Honor, perhaps a more
23 efficient way, each and every one of Mr. Billstein's
24 parcels has a tract number on it, if they want to specify,
25 you know, 25 tract numbers --

1 MR. RIFKIN: We could do that.

2 THE SPECIAL MASTER: That is exactly what
3 I've asked you to do.

4 MR. ECHOHAWK: They could do that.

5 MR. RIFKIN: And we would need acreages to
6 those tracts.

7 THE SPECIAL MASTER: Naturally you have to get
8 to them, that's understood.

9 MR. ECHOHAWK: The problem we have to deal
10 with on generally Mr. Billstein's lands, a lot of
11 those are allotted lands and we've go to get to the
12 notice and consent question.

13 THE SPECIAL MASTER: I appreciate that. Don't
14 you, Mr. Rifkin?

15 MR. RIFKIN: Yes, I understand that.

16 THE SPECIAL MASTER: It is the other side of
17 the problem that we'll be facing in a few months
18 with ranchers all along the Shoshone National Forest,
19 all along the streams that drain off the west to the
20 east in that portion of the Water Division 3, when it
21 comes to the problems on BLM land and forest --

22 MR. RIFKIN: The problem that we have to
23 the notice is just, first of all, difficulty in
24 determining who the allottees are --

25 THE SPECIAL MASTER: You don't have to determine

1 that if you notified description of the land to Mr.
2 Echohawk, he makes the decision. He would find out
3 who they are, I believe.

4 MR. RIFKIN: We'll be glad to do that. In
5 fact, the United States takes the position that is
6 not sufficient, that we have to receive the individual
7 permission of allottees by our own initiative.

8 MR. ECHOHAWK: Your Honor, I would like to,
9 you know, to point again to the order where Item 2,
10 which requires the State to identify the legal owner
11 and any beneficial owner. I would also like to point
12 to the transcript pages 2286, 2293 and 2298, where Mr.
13 White first said that they wouldn't go on the lands
14 at all, and I believe also Mr. White, at page 2362,
15 states that the State would agree to notify the
16 individuals --

17 MR. RIFKIN: Your Honor --

18 MR. WHITE: Let me say something about that,
19 Your Honor.

20 THE SPECIAL MASTER: Yes.

21 MR. WHITE: Since that discussion, which
22 Mr. Echohawk has correctly characterized, we have been
23 advised during a deposition by Mr. Rogers, that the
24 situation has changed. The representation that was
25 made previously during the time of the transcript. Mr.

1 Mr. Echohawk is referring to, was made upon the basis
2 of representations by Counsel for the Tribes that
3 they represented only the Tribes and not the Tribal
4 members. Now, that representation has changed
5 during depositions and if, in fact, these new re-
6 presentations are correct, that the individuals are
7 represented by the Tribal Counsel, under the rules
8 we need not notify their clients directly. Notifying
9 them directly, the counsel for these people is
10 absolutely sufficient and for that reason, the change
11 in circumstances is a change in the nature of the
12 representation by the Tribal Counsel and, I believe,
13 under the rules, obviates the requirement for individual
14 notification but can be satisfied by notification of
15 Mr. Rogers or Mr. Sachse's firm.

16 MR. ROGERS: Your Honor, I can save Mr. White
17 some breath. I don't know what he's talking about. We
18 have not changed our position, we are not representing
19 any Tribal members, I don't know what he's referring to.

20 MR. MERRILL: Your Honor, that's a remarkable
21 disclosure in light of the fact that in Washington D.C.
22 last Wednesday, I sought, during the deposition of
23 Mr. Higgenon, notes from interviews of individual
24 Tribal members during which Tribal Counsel were present,
25 I was denied access to those notes on the grounds that

1 they constituted attorney work product, and also
2 additionally on the grounds that they were covered by
3 the attorney/client privilege. And, I would say, that
4 is an admission by Mr. Rogers, that he does in fact,
5 represent the individual allottees on the Reservation.
6 We've got to know one way or the other.

7 MR.. ROGERS: Nothing I said there is
8 inconsistent, Your Honor. We are -- the deposition
9 of Mr. Higgenon relates to the presentation of a
10 portion of the Tribes' claim. That is, reserved water
11 rights are measured as a part of Tribal water rights
12 by the water requirements of individual Indians who
13 own both allotted land and who own fee land. The issue
14 of Mr. Higgenon dealing with, and we were dealing
15 with in that deposition, is those Indians who own fee
16 land. The fact that it is a work product exception to
17 the discovery, has nothing to do with representing the
18 individuals. The attorney/client privilege referred to
19 in that objection, was that it was attorney/client
20 privilege between the attorneys and the Tribes and it is
21 information developed by the attorneys in representing
22 the Tribes. We are not representing the individuals.
23 They are free, they have always been free to retain their
24 own attorneys or go pro se. Our contract is exclusively
25 with the, in my case, the Arapahoe Tribe and in Mr. Sachse's

1 case, the Shoshone Tribe.

2 THE SPECIAL MASTER: I will permit and sign
3 an order giving the State of Wyoming the opportunity
4 to verify surveying on 20 to 30 tracts on the
5 Reservation, and I will ask the State of Wyoming to use
6 every decent available resource at its disposal to
7 notify the occupant of those tracts as well as the
8 Tribal attorneys, of their progress on the Reservation.

9 MR. RIFKIN: If I might suggest something --

10 THE SPECIAL MASTER: And I hope this will
11 be the end of this type of exacerbating problem in
12 this lawsuit.

13 MR. RIFKIN: We talked a few weeks ago.
14 about the way Mr. Billstein was notifying allottees,
15 and we would be glad to follow the exact same
16 procedure, if that's satisfactory.

17 THE SPECIAL MASTER: Mr. Echohawk.

18 MR. ECHOHAWK: I believe, in going back
19 through this, the last time we went through a repeat
20 of this whole thing, and I think that the bottom line
21 was that the State has requested, and I think they are
22 currently being supplied with all of the title
23 documents, that the BIA has for the Reservation. The
24 State has also been given --

25 THE SPECIAL MASTER: What does the title

1 document have to do, does the title document describe
2 by metes and bounds, or by surveying the tracts of --

3 MR. ECHOHAWK: It discloses who the owners
4 are, and in addition, they have been supplied a list
5 of names and addresses of all of the individuals.

6 THE SPECIAL MASTER: All right.

7 MR. ECHOHAWK: So I think, Your Honor, that
8 it is only fair to the individual Indians that live
9 on those parcels, that the State notifies them and
10 also gets their consent. The United States or the
11 Tribes can't consent for them.

12 THE SPECIAL MASTER: In lieu of what Mr.
13 White said on the record, which was earlier, and in
14 lieu of the fact that your exchanges during the
15 deposition last week may have given him a right to
16 feel no longer bound by that statement. I know that
17 if he's got the information available, and you can
18 notify them, so certainly do it with all magnanimity
19 and in the spirit of cooperation of the State.

20 MR. WHITE: I have to say, Your Honor, that
21 the record should reflect that the title documents
22 referred to have not yet all been received by the
23 State, nor do they allow the easy identification of
24 the present owners that was suggested by Counsel. I've
25 had the misfortune to have to read through some of these,

1 and I can speak for them personally.

2 THE SPECIAL MASTER: If we can keep in mind
3 what the purpose for this exercise is, it is a
4 verification procedure for evidence of other witnesses
5 and, I think, if we keep that in mind we can move on
6 continuing this case and don't get hung up on this,
7 or we could be another year verifying materials of
8 the massive volume of work that went into a description
9 of the various classifications of land on the
10 Reservation and types of --

11 MR. RIFKIN: I think we need to clarify one
12 more thing in that Mr. Echohawk's position is, that
13 we don't just have to notify these people, we have to
14 receive their affirmative permission in that. A lot
15 of times the title on these allotments is divided
16 and there are many owners, and he would put the burden
17 on us of receiving a majority permission.

18 THE SPECIAL MASTER: You begin and you do it
19 the best you can and these things may very well take
20 care of themselves. There are two ways you can go on
21 a man's property, you can bull your way on or you can
22 honkey your way into it, or you can be a gentleman and
23 make a request and the landowner can react the same.
24 He can be honkeyish about it, or he can say, you know,
25 finish up your work. I can't see that any man would have

1 any real objection about surveying his property when
2 he knows that it's involved in a lawsuit. and --
3 drilling may be a little different problem, you may
4 have a little different problem when you ask, I'm
5 going to drill a hole six feet into this field --

6 MR. WHITE: Since you're pointing to me,
7 Your Honor --

8 THE SPECIAL MASTER: No --

9 MR. WHITE: I would like to say I'm not
10 going to do the drilling, but on the other hand, if
11 water rights are being claimed for lands, it seems to
12 me that the law is fairly clear that that land either
13 has to be available for inspection, or the rights
14 can no longer be claimed and that's all we're asking
15 for.

16 THE SPECIAL MASTER: That is a true statement
17 and it is true in this entire litigation and it is
18 true involving all people who have a right to use water
19 in Water Division 3.

20 MR. WHITE: I think that's right Your Honor,
21 but to use one of your favorites, I think we ought to
22 cross that bridge when we get to it and not anticipate
23 problems that are not yet before the Court.

24 THE SPECIAL MASTER: We are not anticipating,
25 we are just trying to work some degree of harmony into

1 what would be almost irreconcilable positions that
2 are raised occasionally in this litigation.

3 All right, that should wind up your --

4 MR. RIFKIN: Fine.

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1 MR. RIFKIN: Just one final point --

2 THE SPECIAL MASTER: You have had a final
3 point now for the last forty-five minutes. Go ahead, Mr.
4 Rifkin.

5 MR. RIFKIN: We have one problem in that if we
6 have the burden of receiving the permission and determin-
7 ing the title, I don't think there's any way we can ac-
8 complish it within the time period contemplated in the
9 Order, and I don't think we contemplated having to bear
10 that burden.

11 THE SPECIAL MASTER: Were some of my actions
12 or when granting delays that were requested responsible
13 for the fact that you sort of lost a couple weeks?

14 MR. WHITE: I couldn't understand what you
15 said, Your Honor. The door shut.

16 THE SPECIAL MASTER: What are the reasons that
17 you lost the 30 days that were heretofore stipulated?

18 MR. RIFKIN: The fact that we had the motion
19 outstanding and weren't able to hear it until today, and
20 that's approximately --

21 THE SPECIAL MASTER: That being the case, why
22 don't we tack 15 days onto it? That isn't so much of a
23 burden, is it, to you people at this point?

24 If not, show it to be. Not having heard, I will
25 grant 15 more days.

1 I kind of ran that by pretty fast.

2 MR. ECHOHAWK: So it would expire May 15?

3 THE SPECIAL MASTER: That 15 days added to the
4 end of April would be May 15.

5 MR. RIFKIN: All right.

6 THE SPECIAL MASTER: Provided that is your last.

7 MR. ROGERS: We don't have any problems with
8 that, but I do think the record should reflect that it is
9 not our blame that --

10 THE SPECIAL MASTER: No, no, I ordered -- let
11 the record show that I ordered it with objections to the
12 contrary notwithstanding and being overruled. All right.

13 MR. WHITE: I think we are about ready to go
14 to Mr. Kersich, but we need to pull some exhibits out of
15 the exhibit room.

16 THE SPECIAL MASTER: Do you want to take five
17 minutes to do that?

18 MR. WHITE: I think it will take ten or
19 fifteen minutes.

20 THE SPECIAL MASTER: All right. We will be
21 in recess until 10:30.

22 (Whereupon a recess was taken.)

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1 THE SPECIAL MASTER: Are you ready to
2 proceed, Mr. White?

3 MR. WHITE: The witness needs his book,
4 Your Honor, and as I understand, it is downstairs and
5 on the way up, is that right, Al?

6 THE SPECIAL MASTER: Do we have some
7 questions here? Can we begin with any questions at
8 all or do we need that book?

9 MR. WHITE: Why don't I start and ramble
10 along and when I come up short, maybe you can give
11 me a minute.

12 Before I start with Mr. Kersich, I just
13 wanted to hand out a copy of an opinion, Montana
14 versus the United States that was decided last month,
15 March 24th in the United States Supreme Court. It
16 deals with the issue, among others, of title to the
17 bed of the Big Horn River and the banks of the Big
18 Horn River in the Crow Reservation in Montana.

19 We will supplement our response to include
20 a discussion of how that case applies to the present
21 litigation, and I hand it out simply so that folks
22 will be on notice that we are going to talk about it
23 and have enough time to take a look at it.

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CROSS-EXAMINATION (RESUMED)

1
2 BY MR. WHITE:

3 Q Mr. Kersich --

4 THE SPECIAL MASTER: I'm sorry. I probably
5 should have waited for -- no, I was going to say,
6 Mr. White, that Mr. Rogers should have been here
7 and I'm sorry, it was my fault but I'm sure that
8 the other Counsel would have given him a copy of
9 it.

10 (Off-the-record discussion.)

11 MR. WHITE: Can we go ahead without Tony?

12 Mr. Kersich, we're glad to have you back.

13 How are you feeling today?

14 THE WITNESS: Good.

15 MR. WHITE: Good.

16 Q (By Mr. White) I direct your attention --

17 THE SPECIAL MASTER: I should say, you are
18 the same Mr. Kersich whose testimony was postponed
19 at your last appearance here about a month ago,
20 and you are continuing and you have been sworn.

21 THE WITNESS: Yes, sir.

22 THE SPECIAL MASTER: All right. Please
23 proceed.

24 Q (By Mr. White) Mr. Kersich, I direct your attention
25 kersich-cross-white

1 to what has been admitted as U.S. Exhibit WRIR
2 C-52, and specifically the legend in the lower
3 right-hand corner, and more specifically the
4 acreage values shown in that legend, and I would
5 ask you with respect to all exhibits similiar
6 to C-52, if it is true that you obtained these
7 acreage figures by planimentering photography,
8 rather than by planimentering the areas shown on
9 the exhibits themselves?

10 A Yes.

11 Q Is it true that the photography which you
12 planimetered is contained in the workbook that
13 is before you?

14 A This is a -- the actual photographs that were
15 planimetered are not in this workbook, no.

16 Q What photographs were planimetered then?

17 A Copies of those photographs, they are 1969
18 photographs, that were obtained from, I believe
19 it's the ASCS and copies which have been given
20 to you. Those were the photographs that were used
21 for the -- they are a mockup of photos that we
22 obtained for use to work on this project.

23 Q We received three different sets of soils photo-
24 graphy, do you recall which set was the subject of

25 kersich-cross-white

1 your planimeter analysis?

2 A Well, the majority of the figures, I think, came
3 from the first set and there may have been some
4 changes when some boundaries were changed in the
5 interim. I can't, at this time, explain where
6 those boundaries are.

7 Q Could you describe the process in general, and
8 then we'll get into the specifics of how that
9 planimetering took place?

10 A Basically the photos were developed into a township-
11 size photograph, and the areas had been inscribed
12 on them either in the field -- yes, in the field,
13 that were of interest. In other words, they were
14 the arable land areas.

15 Q Your study areas?

16 A Yes -- no, not the study areas. I'm talking about
17 the results of the study.

18 Q Okay.

19 A And then those were planimetered in the office.

20 Q The photograph that was planimetered then was
21 received from ASCS and not from horizons, is
22 that correct?

23 A On the '69 photos, that is correct.

24 Q So, the photography that you planimetered is not
25 kersich-cross-white

1 the same photography or type of photography, that
2 was planimetered for Mr. Billstein's work on
3 historic -- excuse me, arable or -- strike that.

4 Are you familiar with Mr. Billstein's work
5 with respect to the unadjudicated lands?

6 A Somewhat, yes.

7 Q And the photography which you planimetered is not
8 the same photography or the same type of photo-
9 graphy, which was planimetered in the course of
10 Mr. Billstein's work, is that correct?

11 A That's correct, sir.

12 Q What is the scale of photography which you
13 planimetered?

14 A I believe it is four inches to the mile.

15 Q Would you please describe the processes used to
16 scale rectify the photography which you did
17 planimeter?

18 A We didn't scale rectify them because they came
19 from ASCS scale rectified.

20 Q Now, the photography you received from ASCS was
21 photography that covered the same type of area,
22 or the same size of area, as was covered in the
23 horizons' photography, or were those smaller areas
24 on the ASCS photography?

25 kersich-cross-white

1 A I don't understand your question.

2 THE SPECIAL MASTER: I don't either, Mr.
3 White.

4 Q (By Mr. White) How large were the ASCS
5 photographs that you received and from which you
6 did you planimeter work?

7 THE SPECIAL MASTER: What do you mean, how
8 large a photograph was it, outside dimensions?

9 MR. WHITE: Sure.

10 THE SPECIAL MASTER: Of each photograph?

11 MR. WHITE: Yes.

12 Q (By Mr. White) Assuming they were roughly a
13 square, what was the length of the side of the
14 photograph?

15 A I can't remember whether they were nine by nines,
16 or twelve by twelves. They were one or the other..

17 Q So you, essentially, took smaller photographs and
18 made a mosaic of them?

19 A That's correct.

20 Q How did you scale rectify, if you did, the
21 resulting mosaic?

22 THE SPECIAL MASTER: I think he answered that
23 question.

24 MR. WHITE: I don't believe he did, Your Honor.

25 kersich-cross-white

1 He testified that he received what they thought
2 were scale rectified small photographs from ASCS,
3 and then put the smaller photographs into
4 mosaics, and I'm asking how he --

5 THE SPECIAL MASTER: Mr. Kersich, didn't
6 you just say you did not scale rectify them
7 because they had already been scale rectified
8 by the ASCS?

9 A The individual photos had been scale rectified.

10 Q (By Mr. White) Had they?

11 A Had they?

12 Q Did they?

13 A No.

14 Q Did you?

15 A We checked them for scale, yes. I had Mr. Ralph --
16 excuse me.

17 MR. WHITE: Saunders?

18 THE WITNESS: Saunders --

19 THE SPECIAL MASTER: Let's not get started
20 off with confusion this morning on this subject
21 matter. When you gave the area figures of Class II
22 lands on the exhibit before you, C-52, did you do
23 it from the results of mosaic photographs?

24 THE WITNESS: Yes. Yes, sir, we did.

25 kersich-cross-white

1 THE SPECIAL MASTER: Well, then, you did
2 not do it from the photographs that had been
3 supplied to you that had already been scale
4 rectified.

5 THE WITNESS: No, we used the scale rectified
6 photographs. We made a mosaic on them, and in
7 most instances the parcel that you're working with
8 was right on one photograph, you understand? See?
9 And we built a mosaic then out of the different
10 photographs taking out the appropriate --

11 THE SPECIAL MASTER: Well, now, what photo-
12 graphs did -- had been scale rectified and which
13 had not been scale rectified?

14 THE WITNESS: The small ones that we get
15 from ASCS, sir.

16 THE SPECIAL MASTER: They were the nine by
17 nines or twelve by twelves?

18 THE WITNESS: That's right, uh-huh.

19 THE SPECIAL MASTER: Which ones were not
20 scale rectified?

21 THE WITNESS: Well, I believe Mr. White was
22 referring to the composite mosaic that we made up
23 of all photographs. Now, that in itself was
24 checked for scale, in other words, after we put

25 kersich-cross-white

1 this mosaic together, we still checked to see
2 that when you measured between two points that it
3 was the proper measurement.

4 THE SPECIAL MASTER: All right. Go ahead,
5 Mr. White.

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1 THE SPECIAL MASTER: All right, go ahead, Mr.
2 White.

3 Q (By Mr. White) Are the photographs which you have
4 before you in your workbook copies of the mosaics
5 which you have described?

6 A. Yes, they are.

7 Q. Were the boundaries which you measured from the
8 mosaics or, excuse me, the areas which you've measured
9 within certain boundaries on the mosaics -- Strike the
10 question. I'm sorry.

11 Were the boundaries shown on the mosaics trans-
12 ferred to the photography that you have before you
13 by hand or by photographic means?

14 A. Photographic means.

15 Q. So the photographs you have before you then are a
16 photographic copy of the mosaics and the annotations
17 which you placed on those mosaics; is that correct?

18 A. They are a photographic copy and reduction.

19 Q. And reduction. You indicated that you checked the
20 scale of the mosaics by measuring particular dis-
21 tances. Could you point out one or two of those
22 particular occasions?

23 A. I indicated I had Mr. Saunders do that.

24 Q. Well, which ones did he measure, if you know?

25 kersich - cross - white

1 A Just offhand, I can't tell you, but I did receive a
2 memo from him on it which indicated that they were
3 within around a half a percent.

4 Q Do you have a copy of that memo?

5 A I don't have it here, no.

6 Q Do you have it here in town with you?

7 A I'd have to look. I don't know, sir, right now.

8 Q Would you please check, and if you have it, maybe
9 tomorrow morning I could take a look at it, please?

10 A Very good.

11 Q At the end of your last testimony --

12 A May I just have a minute to make a note of that?

13 Q You bet.

14 At the conclusion of your testimony before it
15 was continued until today, you finally allowed us
16 to copy the photography which you had before you,
17 and I would ask you at this time if you would please
18 turn to the photography which you have for Township
19 5 North, 1 East, and 5 North, 2 East?

20 A Okay.

21 Q Would you compare the western edge of 5 North, 2
22 East with the eastern edge of 5 North, 1 East?

23 A Okay.

24 Q Isn't it true that the section lines at the edge of
25 kersick - cross - white

1 those two photographs do not match or line up?

2 A. That could be, yes.

3 Q. Isn't it true that they are off in some cases as
4 much as 3/8 of an inch?

5 A. That I can't tell you without measuring.

6 Q. Well, without taking the time to measure it right
7 now, isn't it true that there are several parcels
8 of land which you have defined as arable which ex-
9 tend across and lie within both of those townships?

10 A. Yes.

11 Q. How then were you able to make an accurate determina-
12 tion by planimeter of the acreage within those par-
13 cels when the section lines themselves do not match
14 up?

15 A. The parcel lines should match up though.

16 Q. Well, right in the center of that common border do
17 you find a parcel of roughly 106 acres classified
18 2. gravity, .1 sprinkler in Section 19, 5 North,
19 2 East, and extending into the section immediately
20 to the west in 5 North, 1 East?

21 MR. ECHOHAWK: Your Honor, I think it would be
22 appropriate if we looked at the exhibits from which
23 the planimeter readings were taken. Mr. Kersich
24 didn't planimeter off of the sheets that he has in

25 kersich - cross - white

1 his workbook. The appropriate sheets to look at it
2 would be the actual photographs that the readings
3 were taken from. They may or may not make a differ-
4 ence.

5 THE SPECIAL MASTER: He may work with whatever
6 he wishes. It is material in his work papers.

7 THE WITNESS: I think I would like to do that.

8 THE SPECIAL MASTER: You may leave the witness
9 stand and find the list, or if we can help you with
10 them, we will, to save you a little bit --

11 (Off-the-record discussion.)

12 Q (By Mr. White) Al, do you mind if I look over your
13 shoulder and see what you are doing here?

14 A. I don't mind.

15 MR. ECHOHAWK: What's the acreage in that
16 tract?

17 MR. WHITE: I thought it was 106. My copy
18 was not very distinct.

19 THE WITNESS: Part of the problem is we have
20 had two or three layers of tape onto these, and the
21 section lines as such we weren't really too con-
22 cerned about. The parcels we are in trying to
23 get the proper acres to the parcel. These are
24 all in one ownership.

25 kersich - cross - white

1 Q (By Mr. White) Mr. Kersich, don't the divergence
2 of the section lines indicate a change in scale
3 from one photograph to another?

4 A I don't know that offhand.

5 Q Well, if you know, how was the divergence of section
6 lines taken into consideration in the checking of
7 the scale of the photographs upon which you based
8 your acreage determinations?

9 A I think I just stated the section lines really -- I
10 didn't pay too much attention to those because we
11 were not dealing with separate ownerships here. We
12 were dealing with one ownership. So the land mass
13 is primarily the item that we were concerned with
14 from an acreage standpoint.

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1 Q Okay. I'm not interested in ownership determinations.
2 I'm interested in scale of those photographs.

3 Where those two photographs meet, or any two
4 photographs meet, where there are diverging section
5 lines, how did you determine that the scale of the
6 two photographs were the same even though the
7 section lines didn't match up?

8 A. By checking the photographs.

9 Q. Now, "by checking the photographs," are you refer-
10 ring to the work that Mr. Saunders did?

11 A. Yes.

12 MR. WHITE: Your Honor, I would like to
13 continue this area of inquiry until I have a chance
14 to look at Mr. Saunders' memo and I'll move into
15 another one if that will be all right.

16 THE SPECIAL MASTER: Approved.

17 MR. WHITE: It will take me just a minute to
18 switch notes.

19 Q (By Mr. White) Mr. Kersich, directing your attention
20 to what's been admitted as C-45, US Exhibit WRIR
21 C-45, and referring in general to similar exhibits
22 which are maps showing different colors for different
23 classes of lands which you determined to be arable,
24 would you please describe the process by which you

25 kersich-cross-white

1 transferred the boundaries of these areas which
2 you determined to be arable from your mosaic to
3 the exhibit?

4 A. To this exhibit here, C-45?

5 Q. Well, in general, any of these types of exhibits.
6 How did you make the transfer of boundaries and
7 class -- I'll amend the question to include and
8 class identifications from your mosaic photographs
9 to the exhibits themselves, the exhibit maps?

10 A. Overlays were made at a certain scale and then
11 shot down to the scale that was used here and then
12 transferred to these exhibits.

13 Q. Would you please turn to your workbook photograph
14 of the mosaic photograph of Township 4 North, 2
15 east?

16 THE SPECIAL MASTER: Two East or 3 East?

17 MR. WHITE: Two East, Your Honor.

18 Q. (By Mr. White) And I direct your attention to an
19 area that is roughly in the center of Section 19.
20 Do you see that in exhibit C-45, classified Class I,
21 or yellow?

22 A. Yes, right here, sir.

23 Q. Now, with respect to the thirty or so acres that
24 extend to the East with a line roughly north and

25 kersich-cross-white

1 south through the center of that Section 19,
2 isn't it true that that land shown in yellow to
3 the east of that north-south line does not appear
4 on your mosaic photographs as being classified
5 1 Sprinkler?

6 A. May I look at the large photographs also?

7 Q. Sure. Look at anything you would like.

8 A. Okay. Would you -- let's see. We are talking
9 about this area right -- Section 19, you said,
10 right in here (indicating)? Okay. This is
11 Section 7, and this is Section 18, and this would
12 be Section 19 (indicating).

13 Q. Let me amend the question to suggest that the area
14 which I've shown you on my copy, and it really
15 runs east to the South line through the center of
16 the section, but to the East of the north-south
17 line through -- going down the East edge of the
18 Northeast of the -- excuse me -- the Northeast of
19 the Southeast and the Southeast of the Northeast
20 quarter of that section.

21 A. Well, this is Section 19 and --

22 THE SPECIAL MASTER: You are going to have to
23 speak up and look toward the Reporter, Al, and the
24 subject matter is quite clearly the N 1/2 of

25 kersich-cross-white

1 Section 19. The section is divided by boundaries
2 on this exhibit, and Mr. White's question deals
3 with a little tip of hatched yellow area in the
4 N 1/2 of Section 19.

5 Q (By Mr. White) And that little tip runs roughly
6 to the East of the line it would bisect north-
7 south the NW 1/4 of that Section.

8 A. I guess that's the problem I'm having because we
9 have Class 1 Sprinkler going down on this mid-
10 line -- let's call it the study boundary line.

11 Q (By Mr. White) Okay.

12 A. To Section 19, and it appears on this aerial
13 photograph which we have been working from as
14 Class 2 in there with some Class 4 here and
15 some Class 6 here (indicating).

16 THE SPECIAL MASTER: I'm going to ask, if we
17 can, Mr. White, if you stay at the podium, and
18 you try and work in front of the desk if you are
19 going to stand up, and that way we can all see
20 what you are working with and the reporter can
21 hear you.

22 MR. WHITE: I apologize. I was having dif-
23 ficulty.

24 Q (By Mr. White) Were you on Section 19 or 20 on
25 kersich-cross-white

1 this?

2 THE SPECIAL MASTER: On which?

3 MR. WHITE: On the map that he's holding in
4 his hand. I couldn't tell. I just got a brief
5 glance.

6 A. This is Section 6. This would be Section 7. This
7 would be Section 18 (indicating).

8 Q (By Mr. White) Okay.

9 A. This would be Section 19 (indicating).

10 THE SPECIAL MASTER: Which one are you in?

11 THE WITNESS: I'm in Section 19.

12 Q (By Mr. White) Could I see your photograph?

13 A. Certainly.

14 Q Mr. Kersich, referring to the large mosaic photo-
15 graph --

16 MR. WHITE: Your Honor, could I approach the
17 witness and point to it?

18 THE SPECIAL MASTER: That's all right. Do
19 you want to identify it?

20 MR. WHITE: Township 4 North, 2 East.

21 THE SPECIAL MASTER: From his work papers?

22 MR. WHITE: That you had with your collection
23 of work papers.

24 Q (By Mr. White) Isn't it true that the area we've
25 kersich-cross-white

1 referred to in Section 19 is classified six on
2 your work photograph?

3 A. It appears that someone classified that portion
4 there as six, yes sir.

5 Q. Shown as Class I on Exhibit C-45, is that correct?

6 A. That's correct.

7 THE SPECIAL MASTER: Mr. White, do you want
8 to make a showing of how many acres that may be
9 involved and the difference between what he class-
10 ified in Class I and what is Class VI in the --

11 MR. WHITE: In that particular one, Your
12 Honor, I didn't planimeter it, but my guess was
13 it was 25 or 30 acres, and I would ask the witness
14 if he could make a determination based on his
15 photography of how much land is shown as Class I
16 in the N 1/2 of Section 19, Township 4 North, 2
17 East, on Exhibit C-45 as Class I which is shown as
18 Class VI on his mosaic photographs that comprise
19 part of his work papers.

20 A. I don't know how many acres would be on the photo,
21 but I would point out that the tabs will probably
22 show that land was not included as arable land in
23 the figures that are in the lower right-hand
24 corner.

25 kersich-cross-white

1 Q (By Mr. White) Mr. Kersich, you have testified
2 that you took the mosaic photographs?

3 A Yes.

4 Q And photographically prepared an overlay which was
5 reduced down to the size shown on Exhibit C-45;
6 is that correct?

7 A Yes.

8 Q That boundary on Exhibit C-45 does not, however,
9 reflect the boundary on your work photograph?

10 A That would be correct.

11 THE SPECIAL MASTER: Is it possible that the
12 boundaries shown on Exhibit C-45 are based on
13 different photography than that which you have
14 before you?

15 A Not to my knowledge.

16 Q What is the explanation for the discrepancy in that
17 particular area?

18 A In the process of drafting the overlay they may
19 have included that small portion which was broken
20 out as Six because of size and shape on sprinkler,
21 but what I'm saying is that it may not have any
22 effect at all on the totals of acreage.

23 Q Do you know that, or is that conjecture on your
24 part at this point?

25 kersich-cross-white

1 A. Well, I see that that total acreage has been
2 decreased from what is shown for gravity and what
3 is shown for sprinkler. The sprinkler is less
4 than the gravity, and I would have to check the
5 tabulation sheets, but that may rectify the problem
6 from an acreage standpoint.

7 Q. Would you please describe the quality control
8 process which was followed in ascertaining that,
9 as you've testified, Exhibit C-45 is true and
10 accurate?

11 A. These maps have undergone numerous checking by
12 various individuals in my office. They have been
13 spot checked by myself. Some discrepancies have
14 been discovered during the checking process and
15 changes were made.

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1 Q That was with respect to the overlays upon which
2 exhibits like C-45 were based?

3 A That's correct.

4 Q As well as the exhibits themselves?

5 A Yes.

6 Q How would you determine based on your, what you
7 referred to, tabulation sheets --

8 A Yes.

9 Q -- whether or not the lands, which we have been
10 discussing in the North 1/2 of Section 19, were
11 included within the totals shown in the legend
12 of Exhibit C-45 for Class I lands?

13 A I would go back and take a look if -- see what
14 totals were put into the tabs, if there was a
15 question in my mind that then I could replanimeter
16 the areas, and check the 1,298 acres to see
17 which portions had been excluded, or what that
18 1,298 described or covered.

19 Q Would that be true with respect to any other
20 differences between the areas shown on Exhibit
21 C-45 and similar exhibits?

22 A That's the way I would do it.

23 Q And the boundaries of arable lands determined by
24 you as shown on your mosaic photographs --

25 kersich-cross-white

1 A Excuse me. I didn't mean to interrupt.

2 MR. WHITE: That's all right. I do it all
3 the time myself. No apology is required.

4 A No, that's the way I would do it, yes.

5 MR. WHITE: Okay.

6 Your Honor, I would like to ask the witness
7 to check on a number of areas where we have
8 discovered such discrepancies and we would probably
9 save a substantial amount of time in Court to do
10 so. And I can give the witness a Xerox copy of
11 my cross-examination notes which list those areas.

12 Would that be all right with Counsel?

13 MR. ECHOHAWK: When do you want him to check
14 them? I don't understand.

15 MR. WHITE: Well --

16 THE SPECIAL MASTER: He could check them
17 during breaks in the session, do you mean, and
18 report back to you on them?

19 MR. WHITE: That way we don't have to go
20 through them one by one, because I've got a couple
21 of pages of those kind of discrepancies and if
22 he can do it based on the tabulations to which
23 he's referred --

24 THE SPECIAL MASTER: Can he do it while you

25 kersich-cross-white

1 move on to other phases of your cross-examination
2 or is that in toto your cross-examination?

3 MR. WHITE: No, I've got some more phases.

4 THE SPECIAL MASTER: Why don't we give that
5 to him and maybe you can -- I don't know when it
6 can be done.

7 MR. ECHOHAWK: The question is, you know, we
8 may be working during the evenings on another item.

9 THE SPECIAL MASTER: Well --

10 MR. ECHOHAWK: You know, well, it appears --
11 that's tying up Mr. Kersich's out of court time.

12 THE SPECIAL MASTER: I believe that it serves
13 a good purpose to do this. He may not be able to
14 find much time, but I believe he would ultimately
15 be able to if sometimes, perhaps, after -- well,
16 let's see, is Mr. Kersich the only witness we have
17 for all of this week and all of next week?

18 MR. WHITE: No, sir, I don't believe so.

19 MR. ECHOHAWK: That depends on how long Mr.
20 Kersich is on cross-examination.

21 MR. WHITE: I anticipated being done with
22 Mr. Kersich by tomorrow evening.

23 THE SPECIAL MASTER: All right then, why
24 don't you give those -- unless I hear objection,

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1 give that list to Mr. Kersich and this might
2 alleviate many days in court that we went through
3 in the Billstein process.

4 MR. ECHOHAWK: Your Honor, I would object
5 to this, first, because it is not clear what Mr.
6 Kersich is supposed to do out of court, if Mr.
7 White is going to finish tomorrow afternoon, that
8 means the United States must begin its redirect
9 examination and by listing two sheets of parcels
10 that we're supposed to go check the acreages on,
11 Mr. Kersich's out of court time is somewhat tied
12 up.

13 MR. WHITE: Well, let's do it one by one
14 then, Your Honor.

15 THE SPECIAL MASTER: Well, this is a list of
16 particular areas where there is a discrepancy of
17 acreages that was classified in one exhibit in one
18 way, but with the mosaics would appear would have
19 another classification before the totals were put
20 onto the exhibits. I think it is a fair inquiry.

21 MR. ECHOHAWK: I think it is a fair inquiry.
22 I think that maybe we should just go ahead and
23 go through them in court one by one, and let Mr.
24 Kersich -- you know, a fair sample of them, and let

25 kersich-cross-white

1 Mr. Kersich --

2 MR. WHITE: We're not talking about a fair
3 sample, Your Honor. These exhibits were offered
4 and admitted for the truth of their contents,
5 and in later years, after this litigation is all
6 over, people are going to say the Master found
7 that those were true and correct, and we think that
8 they ought to be true and correct. So, I think --

9 THE SPECIAL MASTER: Do you have the total
10 acreage involved in the lists you have there?

11 MR. WHITE: If you can give me just a minute,
12 I'll add it up, Your Honor.

13 THE SPECIAL MASTER: All right.

14 MR. WHITE: It is not very much.

15 THE SPECIAL MASTER: I was going to say if
16 it is not very much, we may be able to come to
17 some stipulation.

18 No man's work is totally perfect and no
19 human being, being engineer, lawyer, judge or
20 saint can comply with classifying 34,000 acres of
21 potentially arable lands and not miss a few
22 hundred acres here and then. So, maybe we can
23 come to something to make an admission of some
24 adjustment in your work, and proceed to the next

25 kersich-cross-white

1 subject matter.

2 (Brief pause.

3 MR. WHITE: It will take me just a moment,
4 Your Honor.

5 THE SPECIAL MASTER: Take what time you need.

6 (Brief pause.

7 MR. WHITE: I've got them, Your Honor.

8 THE SPECIAL MASTER: All right. On the
9 record.

10 MR. WHITE: Your Honor, the areas that I
11 would inquire to would aggregate as follows: 97
12 acres in North Crowheart, sprinkler; 241 acres
13 North Crowheart, gravity; 276 acres in South
14 Crowheart, sprinkler; --

15 MR. FLINT: Just a minute, could you go a
16 little slower with those?

17 MR. WHITE: Yeah. Start out in North
18 Crowheart sprinkler, 97 acres; North Crowheart
19 gravity, 241 acres; South Crowheart sprinkler,
20 276 acres; Big Horn Flats, 26 -- excuse me, Big
21 Horn Flats, sprinkler, 26 acres; Arapahoe, gravity,
22 52 acres, Riverton East, sprinkler, 5 acres;
23 Riverton East, gravity, 86 acres; and I will run a
24 total of all of those, Your Honor.

25 kersich-cross-white

1 We would be delighted if we could deal with
2 them by stipulation.

3 THE SPECIAL MASTER: Do you get 783?

4 MR. WHITE: I'm bailed out. My mathematical
5 computations are not my strong point. I thought
6 I would use my calculator if it's all right with
7 the Court.

8 I got 783, Your Honor.

9 I'll run it again.

10 THE SPECIAL MASTER: God, don't do it again,
11 we agree.

12 MR. WHITE: Oh, I'm sorry, I thought you
13 said 786.

14 THE SPECIAL MASTER: No, no.

15 MR. WHITE: I would like to inquire of the
16 United States then, at this time, Your Honor,
17 whether we could stipulate to the reduction in
18 those acreages, in the amounts which I have just
19 read into the record?

20 MR. ECHOHAWK: Your Honor, the United States
21 might after some look at these, we might
22 stipulate but we just can't do it blindly.

23 THE SPECIAL MASTER: Well, let's take into
24 consideration now that on totals of 84,469, I think

25 kersich-cross-white

1 your stipulation of differences of human work
2 is almost an admittable, understandable matter,
3 and if you will be kind enough to look at it,
4 I'll be grateful to you.

5 MR. WHITE: Your Honor, I'll give to the
6 United States copies of my notes as well as
7 maps which are annotated, the small versions
8 which are annotated and ask then if they could
9 make a review of those. We can get back to it
10 later on --

11 THE SPECIAL MASTER: Very good.

12 MR. WHITE: -- on Mr. Kersich's cross-
13 examination.

14 THE SPECIAL MASTER: Very good.

15 MR. WHITE: May I have a minute?

16 THE SPECIAL MASTER: I appreciate the offer,
17 and I hope you will give it your consideration,
18 and if it is proper within your client's interest
19 to do so, I think it sure would be moving the
20 case ahead and we'll go onto the next phase.

21 Now, it is fifteen to twelve. Do you want to
22 take a break for lunch until 1:30 as usual?

23 I would like to adjourn a little early this
24 afternoon, gentlemen, so if you want to make it

25 kersich-cross-white

1 one o'clock --

2 MR. WHITE: I would rather make it 1:30.

3 I have some personal commitments to take care of
4 during the noon hour.

5 MR. ECHOHAWK: Could I inquire as to
6 exactly what the point is that he has with the
7 discrepancies?

8 THE SPECIAL MASTER: He would like you to
9 admit that is a discrepancy that involves the
10 proper inclusion of 783 acres total in arable
11 lands.

12 MR. WHITE: And I would add to that, I have
13 shown the discrepancies visually on copies of
14 maps out of the back of the report from -- in
15 red, and if we can get some agreement as to how --
16 whether or not those changes should or should not
17 be made, I would appreciate it because I'm not
18 squabbling with the general concept of the exhibit.
19 I just want to make sure it is right for posterity.
20 So I will hand them, not only the maps, but a
21 description of each parcel, parcel number for that
22 and the approximate number of acres, and ask them
23 if they would give that their consideration.

24 THE SPECIAL MASTER: Please do that.

25 kersich-cross-white

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All right, we'll adjourn until 1:30 and we'll be breaking up at around 4:15 this afternoon or 4:30.

Okay, you can leave things in the room.

(Recessed 11:45 a.m. to 1:30 p.m.)

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