

6-3-1981

## Trial Transcript, Vol. 74, Afternoon Session

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File 181  
4432  
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case # 4993

File # 181

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

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

Civil No. 4993

FILED \_\_\_\_\_

*6/23* 1981

*Margaret W. Hampton* CLERK  
DEPUTY

VOLUME 74

Afternoon Session

Wednesday, June 3, 1981

**ORIGINAL**



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THE SPECIAL MASTER: May we please come to order.

MR. MEMBRINO: Your Honor, we have viewed the slide tape presentation and the script that's labeled by the State as WRIR FISH 1-A, and are satisfied that they are the same, one and the same, and we have agreed that the slide tape presentation should be made to the Court. However, I do want to point out that the authorship of the script is apparently by a couple of people listed in the credits on page 4 -- there's no indication of their credentials, or their competency regarding the information presented in this. So, we would advise the Court to view the presentation with that in mind.

THE SPECIAL MASTER: All right. Thank you.

Please go ahead with it, if you wish to crank it up.

(At which time the film was shown in the presence of the Special Master and all counsel. The narration to the film is contained in Wyoming Exhibit WRIR FISH-1-A.

THE SPECIAL MASTER: Let the record show that the film was viewed with all present in Court to do so.



CROSS-EXAMINATION (RESUMED)

BY MR. WHITE:

Q Mr. Vogel, before we get into the details, let's handle a couple of mundane matters, to begin with.

Handing you a clean copy of the Statement of Claims in this action, let me ask you if you would turn to page 5 of that Statement of Claims.

Isn't it true that the testimony which you have given, as related to that portion of the Statement of Claims, beginning on page 5, continuing through page 9, that's encaptioned "Non-consumptive Reserved Rights Efficiencies"?

A Would you please restate the question?

Q Isn't it true that the testimony you have given during your direct is related to that portion of the Statement of Claims beginning on page 5, through page 9, which is encaptioned "Non-consumptive Reserved Rights Efficiencies"?

A That's correct.

Q Would you please get before you your report Exhibit C-280?

A Okay.

Q Isn't it true, in general, that many of the values claimed in C-280 are in excess of the values set

vogel-cross-white



1                   forth in the Statement of Claims?

2                   THE WITNESS: Please repeat that, also.

3                   THE SPECIAL MASTER: Would you read it, please?

4                   Would you read it, please?

5   (Whereupon the above question  
6   (was read back by the reporter  
7   (as follows: "Q Isn't it  
8   (true, in general, that many  
9   (of the values claimed in  
10    (C-280 are in excess of the  
11    (values set forth in the State-  
12    ment of Claims?"

13                   A. You're referring to them as a whole?

14                   Q. Yes.

15                   A. True; some are increased and some are also less, less  
16                   values.

17                   Q. Let's start with the reach that's Wind River, above  
18                   Dinwoody Creek.

19                   A. Okay.

20   \* \* \* \*

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25                   vogel-cross-white



1 Q (By Mr. White) Isn't it true that the values in C-280  
2 for August and September are 320 cfs while the statement  
3 of claim is for 264 cfs?

4 A That's correct.

5 THE SPECIAL MASTER: What page in 280 do you find  
6 that?

7 MR. WHITE: 22, Your Honor.

8 THE SPECIAL MASTER: What page?

9 MR. WHITE: 22.

10 Q (By Mr. White) Turning to Page 26 of C-280 --

11 A Excuse me, I might point out that two of those are higher  
12 and the remaining ten are lower in my report.

13 Q On Exhibit C-280, Page 26, for the reach Wind River between  
14 Dinwoody and Bull Lake Creek, isn't it true that for that  
15 reach, the values from and including May through and  
16 including November are greater than claimed in your report  
17 as set out in the statement of claim?

18 A That's true, seven of the months are greater, and five are  
19 lesser.

20 MR. MEMBRINO: Your Honor, the documents do speak for  
21 themselves.

22 THE SPECIAL MASTER: They do speak for themselves,  
23 but I don't have right to limit the cross-examination on  
24 the two documents, and if the witness -- if Mr. White were

25 vogel - cross - white



1 not asking these questions to show the difference, I'd  
2 have to because I want to know the answers.

3 Q (By Mr. White) Turning to Page 6 of --

4 THE SPECIAL MASTER: On the Dinwoody and Bull Lake  
5 Creek, about seven months are more by 20 feet per month,  
6 480 to 500; and the five other ones are less, like 201 to  
7 288 and so on?

8 MR. WHITE: Yes, sir.

9 THE SPECIAL MASTER: All right.

10 Q (By Mr. White) Turning to Page 6 of the statement of  
11 claim at Page 40 of Exhibit C-280, referring to the reach  
12 entitled, "The Wind River, Below Confluence with Little  
13 Wind River", do you find that? Isn't it true that all of  
14 the values for all twelve months for that reach are greater  
15 in your report than are set forth in the statement of claim?

16 A. That's correct.

17 Q Turning to Page 7 of the statement of claim at Page 44 of  
18 Exhibit C-280, with respect to the Wind River Canyon reach  
19 at the top of Page 7, isn't it true that all of the values  
20 contained, that are claimed in your report are greater than  
21 those set forth in the statement of claim?

22 A. That's correct.

23 MR. MEMBRINO: Would you repeat the question? Are we  
24 on Page 34?

25 vogel - cross - white





1 MR. WHITE: 44.

2 Q. (By Mr. White) Mr. Vogel, were you misled? Did I say 34?  
3 I meant 44, I should have said 44.

4 A. I was on Page 44.

5 Q. And the same page in the statement of claim, Page 7, and  
6 in Page 74 of your report, isn't it true that with respect  
7 to the East Fork reach, the values claimed in your report  
8 for the months of May, June, July, August and September  
9 are greater than those claimed?

10 A. That's correct. Five are greater and seven are lesser.

11 Q. With respect to the same page in the statement of claim,  
12 the reach Bull Lake Creek above Bull Lake and also it would  
13 be Page 81 in your report, C-280, isn't it true that the  
14 amounts claimed in your report are greater than the amounts  
15 set forth in the statement of claim for the month of February,  
16 May, June, July, August, September and October?

17 A. That's true, seven are greater, four are lesser and one  
18 remains the same.

19 THE SPECIAL MASTER: October, your report would be  
20 greater or lesser?

21 THE WITNESS: October in my report would be greater.

22 MR. WHITE: It's 83 versus 68, Your Honor, I believe.

23 THE SPECIAL MASTER: Bull Lake and below Bull Lake?

24 MR. WHITE: This is above Bull Lake.

25 vogel - cross - white



1 THE SPECIAL MASTER: I beg your pardon. I'm in the  
2 wrong part of the lake.

3 Q. (By Mr. White) Isn't it true that the values for May,  
4 June, July and August in your report are roughly three  
5 times those contained in the statement of claims?

6 A. May, June, July and what?

7 Q. August.

8 A. Yeah, that's correct.

9 THE SPECIAL MASTER: The question about Bull Lake,  
10 how can there be any control of this flow, there's no  
11 water divergent there for irrigation or for any other  
12 purpose by anybody else? Is there, from the high country  
13 to Bull Lake?

14 MR. WHITE: I don't know, Your Honor.

15 THE SPECIAL MASTER: Nature is in control, isn't it?

16 THE WITNESS: Um-hum.

17 THE SPECIAL MASTER: How can anybody give you more  
18 water than nature can give you there?

19 THE WITNESS: We're not asking for more water than  
20 nature is giving. And in no case in any portion of this  
21 are we asking for more water than nature can give us.

22 Q. (By Mr. White) Mr. Vogel, isn't it true that you're not  
23 giving -- you're not asking for more water than Mr. Keene  
24 says nature is giving?

25 vogel - cross - white



1 A. That's --

2 Q. Isn't that right?

3 A. That's correct.

4 Q. On Page 8 of the statement of claims, on Page 70 of Exhibit  
5 C-280, is --

6 A. What page are you on, on Exhibit --

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vogel - cross - white



1 MR. WHITE: 70.

2 THE WITNESS: 70? Okay.

3 MR. WHITE: I think that's the right page.

4 Q (By Mr. White) With respect to the Popo Agie below the  
5 North and Middle Forks, isn't it true that the values  
6 claimed in your report for January, February, March,  
7 April, August, September, October and December are all  
8 greater than those set forth in the Statement of Claim?

9 A That's true. I'll point out that those that are greater  
10 there's only one month where there's any significant dif-  
11 ference. The others are just a matter of a couple of  
12 c.f.s. when they are greater.

13 Q Like September for 37 c.f.s.

14 A That's correct.

15 Q Okay, Page 9 of the Statement of Claim there is a reach  
16 entitled Dinwoody Creek before Dinwoody Lakes. Isn't it  
17 true that your report contains no claimed flows for Din-  
18 woody Creek before Dinwoody Lakes, but instead claims it  
19 for Dinwoody Creek below Dinwoody Lakes?

20 A That's correct. I had that corrected in my deposition in  
21 early 1979 that that was a misprint there.

22 THE SPECIAL MASTER: Which is a misprint now?

23 THE WITNESS: The one in the Statement of Claims, it  
24 says Dinwoody Creek before Dinwoody Lakes.

25 THE SPECIAL MASTER: I didn't --  
vogel - cross - white



1 THE WITNESS: It should properly read below Dinwoody  
2 Lakes.

3 Q (By Mr. White) With respect to that portion of your re-  
4 port on Page 7 which deals with the reach of Dinwoody  
5 Creek below Dinwoody Lakes, isn't it true that the values  
6 contained in your report for January, February, March,  
7 April and December are greater than those set forth in  
8 the Statement of Claims?

9 A. Would you please repeat those months?

10 Q January, February, March, April and December.

11 A. That's true. Of those variations, the largest variation  
12 is an additional 6 c.f.s. in February.

13 MR. WHITE: At this time, Your Honor, the State would  
14 move to strike that portion of Mr. Vogel's testimony which  
15 deals with or results in claimed flows greater than those  
16 set forth in the Statement of Claim and only with respect  
17 to the excesses over those set forth in the Statement of  
18 Claim as being outside the scope of the pleadings and,  
19 therefore, irrelevant.

20 THE SPECIAL MASTER: The motion will be denied on the  
21 basis that a pleading or a claim can be aided by subsequent  
22 evidence; it can be aided by subsequent pleadings; it can  
23 be aided by the long-standing concept in fairness of law  
24 to render something balanced between the pleading and the

25 vogel - cross - white



1 evidence.

2 MR. WHITE: Excuse me one minute, Your Honor.

3 Q (By Mr. White) Mr. Vogel, on the Statement of Claim or  
4 that portion of the Statement of Claim to which your tes-  
5 timony relates, you have already indicated that that claim  
6 is for fisheries' purposes?

7 A As it reads on Page 5 of the Statement of Claims you gave  
8 me, it states it is for fisheries' purposes.

9 Q Isn't it true that a fishery is the complex of inter-  
10 actions within and between the populations of fish being  
11 harvested, the populations of fishermen and the environ-  
12 ment of each?

13 A That's the definition of fishery.

14 Q Is that the definition that is contained in Everhart's  
15 Principles of Fishery Science to which you referred during  
16 your deposition?

17 A That's correct.

18 Q Is that definition found on Page 21 of Everhart?

19 A That's correct.

20 Q Is Page 21 in Everhart, which I have handed you, accurately  
21 reproduced in the second page of Plaintiff's Exhibit WRIR  
22 Fish-2?

23 A Yes, it is.

24 MR. MEMBRINO: Your Honor, I have to note that the

25 vogel - cross - white



1 Rules of Evidence, Rule 803-18, discusses learned treatises  
2 and states that, to paraphrase that, if a learned treatise  
3 or a document similar to that is being considered by an  
4 expert, when an expert witness' attention is called to a  
5 learned treatise or a similar document, the document may  
6 be read into evidence, but the excerpt itself may not be  
7 received as an exhibit. And I notice that Mr. White is  
8 furnishing the Court with these as exhibits at this time.

9 THE SPECIAL MASTER: May I see that rule? We have  
10 violated that a couple of times if that's the case. It  
11 may not be very serious, but we have admitted excerpts  
12 into evidence, I think, all last week, as I remember.

13 MR. WHITE: I can solve the problem by putting the  
14 whole book in, if you want to, Your Honor.

15 THE SPECIAL MASTER: I guess you could.

16 MR. WHITE: If you want to have that book in your  
17 record, we can have it.

18 THE SPECIAL MASTER: Mr. Membrino, is there any  
19 serious reason why the excerpt as photostated on FISH -2  
20 could not be introduced? I mean, we don't --

21 MR. MEMBRINO: Well, we haven't had a chance to  
22 examine it yet.

23 THE SPECIAL MASTER: If you would, we would be  
24 grateful because if we get back into the hassle, if you're  
25 vogel - cross - white



1 going to put the whole book in again when it is your turn  
2 -- I'm sure you won't, but I appreciate reading the rule.

3 MR. WHITE: There's 350 pages in the book. It is  
4 the same book, I should say, that their witness referred  
5 to during his deposition.

6 THE SPECIAL MASTER: Take a few minutes to see if  
7 it's acceptable without objection.

8 (Off-the-record discussion.

9 THE SPECIAL MASTER: The alternative is that you  
10 can hand the textbook to the witness and ask him to read  
11 the very same excerpt.

12 MR. WHITE: I just thought it would be a little  
13 easier if we had the excerpt in front of us because we  
14 are going to talk about it in a little while.

15 MR. MEMBRINO: Your Honor, we will continue to main-  
16 tain our objection. The offer has been -- or the state-  
17 ment has been read, called to the witness' attention.  
18 It's been read into the record. That's what the rule  
19 permits. I don't see any other purpose of having that  
20 excerpt from the document itself admitted into evidence,  
21 especially when the rules themselves clearly state that  
22 the statement may be read into evidence but may not be  
23 received as an exhibit.

24 THE SPECIAL MASTER: Well, all that was read into  
25 evidence was the definition, a definition with which the





1 witness concurred. Now, this is a page, a short page,  
2 dealing with characteristics of fisheries, and I'm going  
3 to permit that. He may either read from or refer to  
4 Exhibit FISH -2, and I hope you will not feel too harshly  
5 about the ruling.

6 MR. WHITE: Your Honor, when FISH -2 is offered, it  
7 will be offered solely for illustrative purposes. I  
8 can't imagine there's a problem.

9 THE SPECIAL MASTER: All right, go ahead.

10 Q (By Mr. White) Isn't it true, Mr. Vogel, that the defini-  
11 tion of fisheries out of Everhart contains at least three  
12 elements: One, the population of fish being harvested;  
13 two, the populations of fisherman; and, three, the environ-  
14 ment of each?

15 A That's correct.

16 Q Now, with respect to the fisheries' claim in this action,  
17 what investigations have you made of the complex of inner-  
18 actions within and between -- Well, strike that.

19 What investigations have you made, first, with res-  
20 pect to the populations of fish being harvested?

21 A By "we", I'm assuming you're --

22 MR. WHITE: I meant by you.

23 THE WITNESS: Okay. By me?

24 Q (By Mr. White) Yes.

25 vogel - cross - white



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A. Myself personally, I have summarized Creel questionnaires sent to non-Indian anglers on the Wind River Indian Reservation from 1979 through 1981 that gave some indication of fish being harvested on the Wind River Indian Reservation.

\* \* \* \* \*



1 Q (By Mr. White) Within which of the reaches set forth,  
2 in either your report or the Statement of Claim, did  
3 those questionnaires deal?

4 A First of all, understand they were sent to the non-  
5 Indian fishermen, so that right off the bat we're  
6 limited to those streams that were strictly open to  
7 non-Indian fishing. Some of these streams are closed  
8 to non-Indian people.

9 THE SPECIAL MASTER: Mr. Vogel made the mistake  
10 of reaching into his briefcase for his work papers.

11 MR. WHITE: I think we got most of them already.

12 Q (By Mr. White) While you're getting that, Dave, are  
13 those Creel surveys you're looking at, the one you  
14 gave us during your deposition?

15 A I don't believe so.

16 MR. WHITE: Then we don't have them all, Your  
17 Honor.

18 (Brief pause.)

19 THE WITNESS: To answer your question, I have  
20 some, some information about the fishing harvested  
21 on the Wind River, Wind River Canyon, Bull Lake Creek  
22 below the Reservoir.

23 Q (By Mr. White) Dave, could you slow down a second.  
24 Could you give those potentially in order that they

25 vogel-cross-white



1 appear in the Statement of Claim?

2 A. Okay. For the Wind River, alls I have is a summary  
3 of fish caught in the entire Wind River. For Wind  
4 River Canyon, I have a summary just specifically for  
5 Wind River Canyon.

6 For east fork of the Wind River, Bull Lake  
7 Creek below Bull Lake, Bull Lake Creek above Bull  
8 Lake, Dinwoody Creek below Dinwoody Lakes -- excuse  
9 me, I'll correct that last statement. That's just  
10 for Dinwoody Creek, period. I don't have any indica-  
11 tion whether it's below or above Dinwoody Creek --  
12 Dinwoody Lake.

13 That was the information I obtained from the  
14 mailed Creel questionnaires -- excuse me, I want to  
15 correct that earlier statement. It was 1978, 1979  
16 and 1980 that we had the mailed Creel questionnaires.

17 Q May I see those documents you were referring to,  
18 please.

19 THE SPECIAL MASTER: Was there none on Bull Lake  
20 above and below?

21 THE WITNESS: Yes, there was on both of them.

22 THE SPECIAL MASTER: Mr. White, there's a state-  
23 ment in your exhibit that would bring offense to  
24 nearly every citizen of Water Division No. 3, who is

25 vogel-cross-white



1 a non-Indian. And it says that fish, of all the  
2 animals and plants in the sea, are the most important  
3 source of -- oh, I beg your pardon, I read it  
4 improperly. Just strike that, please, I thought it  
5 said, fish is the most important food source for man,  
6 I know some cowmen that would take exception to that.

7 MR. WHITE: I might have a replay with a different  
8 cast of characters than the Johnson County range  
9 would,

10 Your Honor, with permission of Court and counsel,  
11 I'm going to come back to these after I've had a chance  
12 to look at them and not take the time to look at them  
13 now.

14 Q (By Mr. White) Aside from the 1978, 1979 and 1980  
15 Creel questionnaire about which you've just testified,  
16 what other investigation did you, personally, make  
17 with respect to the populations of fish being harvested?

18 A In terms of an investigation, at the present time, I  
19 can't recall any personally made. In terms of actually  
20 observing it in the course of my field operations deal-  
21 ing with technical assistants of the Shoshone and  
22 Arapahoe Indian Tribes, I've observed fish harvesting  
23 taking place, but I didn't actually make a study to  
24 analyze it.

25 vogel-cross-white



1 Q Have you relied on any investigations made by other  
2 persons --

3 A Yes, I have.

4 Q -- of fish being harvested --

5 A Yes, I have.

6 Q -- within these reaches?

7 Would you please describe those studies?

8 A There was, I believe at least two Creel surveys conducted  
9 in the Wind River Canyon by, one was by a person hired  
10 by our office prior to the time I started work at Lander.  
11 Another was a Creel survey conducted by one of the  
12 Shoshone and Arapahoe Indian Tribes Game Warden, also  
13 in Wind River Canyon.

14 Q Any others?

15 A Well, I personally have harvested fish from Dinwoody  
16 Creek, but below Dinwoody Lakes, Bull Lake Creek above  
17 Bull Lake, Bull Lake Creek below Bull Lake and that's  
18 it. Other than that I can't recall of any.

19 Q Let's break it into two parts, first of species which  
20 you know have been harvested and then the population  
21 of those species, and I'll ask you first, based on your  
22 investigations what species do you know have been  
23 harvested on the Wind River above Dinwoody Creek, that  
24 you know as an expert? You can rely on work done by

25 vogel-cross-white



- 1 others, so long as you reasonably rely on that.
- 2 A. You don't want me to state things I've actually seen?
- 3 Q. Sure, as well as your personal observations.
- 4 A. Okay. I've seen fishermen catch cutthroat trout and  
5 I believe it was rainbow trout. In that stretch of  
6 stream you're talking about?
- 7 Q. That's Wind River above Dinwoody?
- 8 A. Correct.
- 9 Q. With respect to cutthroat and rainbow in that particular  
10 river reach, what investigations have you made which  
11 would allow you to describe the populations?
- 12 A. We haven't done -- I haven't done any to describe the  
13 populations if you're referring to total numbers or  
14 biomass.
- 15 Q. Yep. What about the identity of species harvested in  
16 the Wind River reach between Dinwoody Creek and Bull  
17 Lake, either based on your personal knowledge, or based  
18 on sources upon which you relied?
- 19 A. I don't recall any personal observations of my own, or  
20 any studies dealing with the harvesting of the fish in  
21 that stretch of stream you're talking about.
- 22 MR. MEMBRINO: Your Honor, I object to the continu-  
23 ation of this line of questioning. The direct testimony  
24 of Mr. Vogel clearly stated that fish population surveys  
25 vogel-cross-white



1 were not the purpose of his -- of his work, nor did  
2 his work require it in order to make the conclusions  
3 and recommendations he has. It's not to say that his  
4 conclusions about habitat are not related to -- to,  
5 ultimately to fish population, but I think what Mr.  
6 White is trying to do is establish that without this  
7 population analysis, the work that was done with the  
8 incremental methodology is somehow deficient; and I  
9 think there's substantial evidence that that's not the  
10 case.

11 THE SPECIAL MASTER: I don't know whether that's  
12 what Mr. White has in mind or not, but I'll overrule  
13 the objection and permit a continuation of the ques-  
14 tioning of what was done or what was not done regard-  
15 ing the information dealing with harvest, Creel  
16 surveys and such matters, although I'd ask you, Mr.  
17 White, not to make too much in the area of repetition  
18 through each area.

19 MR. WHITE: I'm trying to move through.

20 THE SPECIAL MASTER: What was done and what was  
21 your result, something of this kind.

22 MR. MEMBRINO: Our position, the position of the  
23 United States, is that information is not relevant  
24 to --

25 vogel-cross-white





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THE SPECIAL MASTER: That's understandable.

MR. MEMBRINO: To his conclusions.

THE SPECIAL MASTER: That's understandable.

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vogel-cross-white



1 Q (By Mr. White) Moving quickly, and I'll ask you,  
2 essentially, the same question with respect to dif-  
3 ferent reaches, and your answer should include  
4 personal observations, as well as facts and data upon  
5 which you may have relied: Wind River above Dinwoody  
6 Creek.

7 THE SPECIAL MASTER: On any of the reaches. On  
8 any of the reaches.

9 THE WITNESS: Okay.

10 THE SPECIAL MASTER: O, no.

11 THE WITNESS: The reason I'm referring to this,  
12 Your Honor, is he asked me these same questions in  
13 my deposition.

14 THE SPECIAL MASTER: This is a long-time joke,  
15 with Mr. White. Every time a witness picks anything  
16 up in this lawsuit, it gets xeroxed, you know.

17 MR. WHITE: I'm not going to get those xeroxed.

18 THE SPECIAL MASTER: So, you pick up a document  
19 seven inches thick.

20 MR. WHITE: I think we'll show them to Mr. Vogel  
21 again, but I'm not going to xerox them.

22 THE SPECIAL MASTER: Okay. Thank you for that  
23 assurance.

24 THE WITNESS: Excuse me. This is not the copy  
25 vogel-cross-white



14-2

1 of my deposition. I would like to obtain a copy from  
2 my attorney, though.

3 THE SPECIAL MASTER: All right. What is it,  
4 two o'clock? Let's take a -- we've been at it an  
5 hour and ten minutes. Let's take a ten-minute break.

6

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(Recess, 2:04 p.m.)

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THE SPECIAL MASTER: May we come to order, please.

Mr. White.

Q (By Mr. White) Mr. Vogel, with respect to your deposition, which you now have before you -- I believe. Do you have that deposition before you?

A. The deposition?

Q. Yes.

A. Yes.

Q. And, that's the May 19, 1980 deposition?

A. That's correct.

Q. If asked the same questions concerning the species harvested, based on your personal observations, or upon information which you have relied, as you're asked in your deposition, from pages 15 --

MR. WHITE: Excuse me a minute, Your Honor. My notes are out of order, but I think I can save us a lot of time.

Let me start again and strike the first part of the question.

Q (By Mr. White) Mr. Vogel, having your deposition of May 19th, 1980 before you, and referring to pages 12 through 33, if asked the same questions that are contained on those pages concerning the identity of species found in the various claimed reaches during

vogel-cross-white



1 your cross-examination this afternoon, would you give  
2 the same answers?

3 MR. MEMBRINO: Your Honor, I object --

4 THE SPECIAL MASTER: I was about to say pages --  
5 questions from pages 18 to 33 makes out a massive  
6 question.

7 MR. WHITE: Well, I hoped it would save time.

8 THE SPECIAL MASTER: Just a minute, please. Do  
9 you want to do this: Do you want to give the witness  
10 a few minutes, also, Mr. White, to review those pages  
11 from 18 to 33, and see if he thinks that is a fair  
12 question? You may say well, I've got about twelve or  
13 fifteen questions here that I answered and I believe  
14 I'm going to have to take them one at a time.

15 MR. WHITE: That would be fine, Your Honor and  
16 I'll give him lines and numbers. It would be line 8,  
17 page 12 --

18 THE SPECIAL MASTER: I don't know about -- yes,  
19 Mr. Membrino?

20 MR. MEMBRINO: Your Honor, I think it is more  
21 appropriate for Mr. White to reiterate the question  
22 to the witness here in the courtroom. I think it will  
23 permit a full presentation.

24 THE SPECIAL MASTER: More appropriate for Mr.  
25 vogel-cross-white



1 White to do what?

2 MR. MEMBRINO: To ask the questions of the witness  
3 that he's concerned about here in the courtroom,  
4 rather than have the witness refer to his deposition.

5 THE SPECIAL MASTER: I'll sustain that.

6 MR. WHITE: That's fine. I was just trying to  
7 save time.

8 THE SPECIAL MASTER: That's better, if you refer  
9 to the deposition to modify, or alter his answers,  
10 that's a fair game.

11 MR. WHITE: All right. I hope I don't get an  
12 objection from the United States on redundancy or  
13 repetition as well.

14 Q (By Mr. White) Okay, Mr. Vogel. Do you remember  
15 the previous line of questioning, we were going reach  
16 by reach?

17 A I would like that question repeated, if I may.

18 Q Okay. I'm going to ask you about a number of reaches  
19 and the order in which they appear in the Statement  
20 of Claims. Beginning with the Wind River above Din-  
21 woody Creek and continuing on through the Statement  
22 of Claims --

23 THE SPECIAL MASTER: Well, is this with regard to  
24 Creel Survey, population control?

25 vogel-cross-white



1 MR. WHITE: The same question as before, Your  
2 Honor.

3 THE SPECIAL MASTER: Well, we thought we had asked  
4 that -- Mr. Vogel if he had made any creel surveys,  
5 or has population -- fish population work on any of  
6 the reaches, and if so, and which and what did he do.  
7 I thought that's what you were going to ask him, in  
8 order to avoid having to go from one to the other.

9 MR. WHITE: Well, I was planning to ask him about  
10 each one and ask him each one very quickly, as was  
11 done in the deposition.

12 THE SPECIAL MASTER: All right. Very well. Go  
13 ahead.

14 Q (By Mr. White) So the question, Dave, is going to be,  
15 please explain, for the benefit of the Court and the  
16 record, the species of fish which you either know of  
17 your personal knowledge, or which you believe, or  
18 formed a professional opinion on, based on facts and  
19 data available to you, which occur within each of the  
20 reaches contained in the Statement of Claim that I'm  
21 going to ask you about.

22 The first one is the Wind River above Dinwoody  
23 Creek.

24 A Okay. The species of fish was brown trout, rainbow  
25 vogel-cross-white



1 trout and cutthroat trout.

2 Q And what is the source of the information?

3 A I consulted with the project leader of the U.S. Fish  
4 and Wildlife Service at Lander, Dick Baldes, and he  
5 informed me of this and I personally saw some fisher-  
6 men angling in that area, when we were doing our  
7 instream flow study. I saw them catch cutthroat  
8 trout and rainbow trout.

9 Q In answering that question, are you simply referring  
10 to the identical question in the deposition?

11 A Yes.

12 MR. WHITE: Your Honor, could we have a brief  
13 off-the-record discussion? Because, this seems to  
14 me we can save a lot of time if we can deal with the  
15 deposition. I'm wondering if I can reach some  
16 accommodation --

17 THE SPECIAL MASTER: You and Mr. Membrino?

18 MR. WHITE: With Mr. Membrino.

19 THE SPECIAL MASTER: A stipulation would be  
20 welcome,

21 (Off-the-record discussion.)

22 Q (By Mr. White) Okay, Mr. Vogel. Between Dinwoody  
23 Creek and Bull Lake Creek,

24 A The species were brown trout and rainbow trout.

25 vogel-cross-white





1 Q And, the source?

2 A I consulted with Dick Baldes, the project leader and  
3 fisheries biologist at the U.S. Fish and Wildlife  
4 Service Office in Lander, Wyoming.

5 Q Between Bull Lake and Diversion Dam?

6 A I consulted with Dick Baldes of the Fish and Wildlife  
7 Office in Lander.

8 Q For which species?

9 A For brown trout and rainbow trout.

10 THE SPECIAL MASTER: Mr. White, there are thirteen  
11 more reaches that we're dealing with and if the purpose  
12 of your question in each is just for the answers like  
13 you have elucidated from the last two, I don't think  
14 they are necessary, nor are they particularly proper  
15 on cross-examination. But, if you have evidence you  
16 wish to -- or wish to ask questions about Creel  
17 surveys, or fish population totals in these areas, I  
18 think that has some bearing.

19 MR. WHITE: That's the next step after we  
20 identify the species, to go back and ask what you have  
21 done with respect to the population.

22 MR. MEMBRINO: Well, Your Honor, it's already  
23 been stated in Mr. Vogel's direct testimony the species  
24 of interest that he examined and made instream flow

25 vogel-cross-white



1 recommendations for.

2 THE SPECIAL MASTER: Yes.

3 MR. MEMBRINO: So I don't see why we are repeat-  
4 ing this. That's already in evidence.

5 MR. WHITE: Well, Your Honor, the reason for the  
6 inquiry is, as the Court is probably as well aware of  
7 as I am, is that this claim, Statement of Claim, is  
8 for fisheries. The definition given by this witness  
9 for fisheries includes three parts --

10 THE SPECIAL MASTER: Sure.

11 MR. WHITE: As a practical matter, what the  
12 witness has done and very capably testified to, was  
13 his work concerning optimizing the environment of  
14 fish. A portion of the third element in the definition  
15 of fisheries, I think I'm entitled on cross-examination  
16 to point out that elements that go into the determina-  
17 tion of what a fishery is are not met by Mr. Vogel's  
18 work, as capable as it may have been.

19 THE SPECIAL MASTER: What does that have to do  
20 with the type of species between the four salmonoids  
21 or trout in the area?

22 MR. WHITE: And the second purpose of the investi-  
23 gation --

24 THE SPECIAL MASTER: Yes.

25 vogel-cross-white



1 MR. WHITE: -- is to see the basis for the  
2 use of the various indicator species, which the  
3 witness used to determine the instream flow require-  
4 ments, in order to optimize habitat for each of those  
5 reaches. For example, if he should happen to have  
6 used brown trout as one of the indicator species for  
7 the reach between Dinwoody Creek and Bull Lake, for  
8 which there is no personal observations or studies,  
9 no basis upon which to say brown trout are found  
10 there, or habitat should be developed for them, then  
11 I think that's a proper area of cross-examination, as  
12 well. And, I expect we may encounter some others.

13 THE SPECIAL MASTER: Well, if you have some  
14 evidence of that, why don't you proceed directly to  
15 that reach where you have that evidence and ask him  
16 about it? Wouldn't that be a saver of time and  
17 questions?

18 MR. WHITE: It doesn't accomplish the first purpose,  
19 Your Honor, and that is to make a record that the work  
20 done by this witness, however capable it may have been,  
21 is incomplete in terms of establishing the case for a  
22 claim for fisheries. If it was a claim for optimizing  
23 fish habitat, then it might, or it might not be  
24 satisfactory or sufficient.

25 vogel-cross-white



1 THE SPECIAL MASTER: Well --

2 MR. WHITE: But, here we've got a claim for  
3 fisheries. That has a lot of ramifications.

4 THE SPECIAL MASTER: You can make that assertion  
5 and seek to prove it on your own case, but I'm not  
6 sure you can take full latitude on cross-examination  
7 to try to do that. You can examine him on the  
8 competence of his direct evidence and you can proceed  
9 with a few more questions in this regard, but I think  
10 asking that same question about all species in all  
11 thirteen reaches that are left, is a bit much and I'm  
12 not sure that it's proper.

13 MR. MEMBRINO: Your Honor, I should also point  
14 out that the statement -- the word in the Statement  
15 of Claims is "fisheries." Mr. Vogel was asked to  
16 define fisheries in his deposition and he gave the  
17 definition that he was speaking of now. It covers a  
18 broad spectrum of things, or at least the three  
19 criteria that are described and contained in the  
20 definition. Mr. Vogel has refined his task as he has  
21 expressed, what he believes is asked or required of  
22 him in formulating instream flow recommendations to  
23 the determination of habitat and in the use of the  
24 incremental methodology, to establish flow recommendations.

25 vogel-cross-white



1 From that he's testified there is a likelihood, or  
2 that he's established a probability of use of fish  
3 in that area and from there we get into management  
4 of the fishermen, to the fish and so forth and so on.  
5 But, Mr. Vogel's work is not incomplete.

6 THE SPECIAL MASTER: Mr. Membrino, I think it  
7 is necessary in order to make an intelligent and fair  
8 judgment of stream flows, instream flows for fish  
9 habitat that there be evidence dealing with fish  
10 harvesting, Creel surveys, maintenance of a popula-  
11 tion of some type, and I would like to hear evidence  
12 on this, because I think I have a duty to. I don't  
13 believe it has to go into any more other species than  
14 we've already had. If Mr. White says he has a stretch  
15 of 30 miles long where there's no adjustment for stream  
16 habitat, where fish don't even exist in the stream, or  
17 they don't live there any more, that's something to  
18 bring out. But, I don't think you have to ask ques-  
19 tions about all twelve or thirteen of the reaches to  
20 get to the one where you may have that kind of evidence.

21 MR. WHITE: Let me ask a general question, Your  
22 Honor.

23 THE SPECIAL MASTER: I don't want to sustain your  
24 objection to the whole line of questioning, but I would  
25 vogel-cross-white



1 like Mr. White to pin it down to the specific things  
2 I'm mentioning, then he can go into whatever he wants  
3 to on population and harvesting, because I think it  
4 has a bearing. The purpose of the Reservation is not  
5 to provide an increase from a normal fish situation  
6 that existed from 1868 to 1910 or so, up into an  
7 optimum situation providing for fifty times more fish-  
8 ermen than existed in the population of the Reservation  
9 in those days. And, I think that's something we have  
10 to bring into the case, too.

11 MR. MEMBRINO: Well, we are -- it is correct,  
12 Your Honor, but we are looking at the fish habitat in  
13 terms of stream resources on the Reservation and what  
14 kind of habitat can be made available. Evidence of  
15 population appearing in that habitat is -- may be  
16 relevant, but it is not -- what I'm trying to say, it  
17 is not integral to making legitimate, Mr. Vogel's  
18 making legitimate conclusions about habitat require-  
19 ments. He's already testified that population --

20 THE SPECIAL MASTER: Well, he's testified, that's  
21 true, Mr. Membrino, but he also said his investigation  
22 had nothing to do with biomass and you repeated that  
23 time and time again. So, really the total number of  
24 fish in the area is really not your concern, but to

25 vogel-cross-white



1 maintain a healthy optimum for fish propagation is  
2 your concern. But you don't get into totals or  
3 figures. We have no insight into what annual harvest  
4 is, what Creel surveys are, with the exception of the  
5 one he's mentioned on the canyon.

6 THE WITNESS: Your Honor.

7 THE SPECIAL MASTER: Yes.

8 THE WITNESS: May I make a statement for the  
9 record?

10 THE SPECIAL MASTER: Yes, I would be happy to  
11 have you do that.

12 THE WITNESS: I might shed a little bit of light  
13 on this. One of the reasons why we are not that  
14 concerned at the moment in the present day with  
15 exactly what the harvest of fish is, by each reach,  
16 is because, at the present time, water management  
17 practices may not be proper for fish populations  
18 there. One good example I can think of is the entire  
19 stretch of the Wind River from Diversion Dam down to  
20 the confluence with the Little Wind River. At the  
21 present time, the water management policies, or  
22 practices in this area, severely dewater this section  
23 of the stream. There is, in my opinion, there is not  
24 a high population of trout in this area. However,  
25 vogel-cross-white



1 that's not important for the time being, for the  
2 methodology. What we are trying to do is develop  
3 flows that would optimize the habitat, maximize the  
4 habitat and if we do that, then we would have -- I'm  
5 assuming we would have a fish population there.  
6 However, at the present time, even though I personally  
7 believe those species are present, they are depressed  
8 to very low levels because of historic low flows.

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25 vogel-cross-white





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THE SPECIAL MASTER: We will go ahead, Mr. White.

MR. WHITE: Let me ask a follow-up question on that and then we'll get back.

THE SPECIAL MASTER: All right.

Q (By Mr. White) Mr. Vogel, you indicated in your observation to the Master that the existing fish populations were or maybe significantly effected by stream depletions that occur at the present time. Have you made any inquiry as to the effect on stream populations which would result from depletions caused by the irrigation projects and plannes for the future as well as the nonproject future irrigation, which is being claimed by the United States in its action?

A The question, have I made an investigation as far as what the effects on the fish population may be?

Q You indicated your opinion as to the reason for, perhaps, for depressed populations in certain areas where there was significant depletions from the stream at the present time. I am asking you whether or not you have made any investigations or reached any conclusions or opinions concerning the effect on those same fish populations which might result from depletions caused by the consumptive use claims such as for irrigation made by the United States in this action?

A No, I personally have not made that investigation.

Q To your knowledge has anyone?

vogel - cross - white



15-2

1 A As I understand, there is a systems -- I guess it's going  
2 to be coming in later, there is a systems operation that's  
3 being developed by one of the consulting firms. I don't  
4 know to what extent they're using that though in terms of  
5 instream flows.

6 Q Assuming that claims submitted by the United States and  
7 the Tribes in this action for consumptive use such as irri-  
8 gation were granted and exercised, isn't it true that the  
9 same type of stream depletions which have depressed the  
10 fish populations in the past would occur in the future  
11 and result in depressed fish populations in the future?

12 A I couldn't say that; I couldn't answer that question.

13 Q Mr. Vogel, with respect to -- strike that. Mr. Vogel,  
14 are there any reaches for which you had made claims in  
15 Exhibit C-280, which is your report, for which you do not  
16 have personal knowledge of the existence of the species  
17 for which you developed the flows resulting in optimum  
18 habitat?

19 A Yes, I believe there is.

20 Q Could you just quickly name those?

21 A Name what?

22 Q Could you quickly name those reaches, please.

23 A I believe we're going to end up going back through the  
24 deposition. Again, I'll have to refer to that.

25 vogel - cross - white



1 Q All I want is a list of those that you don't have, try to  
2 save some time, circumventing them one by one.

3 MR. MEMBRINO: May I interject? Earlier Mr. White  
4 asked Mr. Vogel, he said as an expert do you know, and I'm  
5 trying to understand the limit now of Mr. White's question.

6 THE SPECIAL MASTER: Would you accept an addendum or  
7 amendment, as an expert and let him go ahead and answer?

8 MR. WHITE: I was trying to avoid a compound question.  
9 I was going to ask two questions, one based on personal  
10 knowledge, and whether there were any facts that were made  
11 available to him.

12 THE SPECIAL MASTER: He may answer.

13 THE WITNESS: Okay. Do I understand then that if I  
14 refer to personal knowledge I cannot use knowledge I've  
15 obtained by consulting with other people?

16 THE SPECIAL MASTER: State what knowledge you have,  
17 whether it's your own empirical, as you described it, or  
18 whether it's from consultation with others, as you proceed  
19 through your testimony.

20 THE WITNESS: Okay. Where do you want me to begin?

21 Q (By Mr. White) Any order you want.

22 THE SPECIAL MASTER: Answer his question. The question  
23 is on those reaches where you did not, where you were not --  
24 Read the question again. Will you please, Merissa?

25 vogel - cross - white



1 (Whereupon the following question  
2 (was read back as follows: "Mr.  
3 (Vogel, are there any reaches for  
4 (which you made claims in Exhibit  
5 (C-280, which is your report, for  
6 (which you do not have personal  
7 (knowledge of the existence of the  
8 (species for which you developed  
9 (the flows resulting in optimum  
10 (habitat?"

11 THE WITNESS: I want to make sure I understand this.  
12 If somebody in our office went out and did a creel survey,  
13 they returned to the office and gave me that information,  
14 is that considered personal knowledge of myself or only  
15 on behalf of that person?

16 THE SPECIAL MASTER: How would you answer that in your  
17 professional capacity?

18 THE WITNESS: I rely very heavily on the work of tech-  
19 nicians, their going out and collecting data and I would  
20 use that information for my fishery management purposes.  
21 So, in other words, I would consider that.

22 THE SPECIAL MASTER: Based on that, will you answer  
23 Mr. White's question.

24 MR. WHITE: Your Honor, to make it clear, I'll ask  
25 him it another question based on creel surveys, if that's  
the only survey, and then I'll ask you about any other  
source.

THE WITNESS: Okay. I guess we've already said on  
vogel - cross - white



1 Wind River -- You want the ones I haven't --

2 Q (By Mr. White) Have not. That will be a shorter list,  
3 won't it?

4 A Yeah. I believe so.

5 MR. MEMBRINO: Your Honor, I think we're interested  
6 in what -- The Court is interested in what information  
7 the witness does have. Now, if he does have personal  
8 knowledge of some reaches then that's useful to the Court.  
9 If he does have some professional knowledge, than that's  
10 interesting to the Court. The problem with his question  
11 is what reaches do you not have personal knowledge of,  
12 leaves us hanging about, whether he has professional --

13 THE SPECIAL MASTER: No, the question's permissible,  
14 and if he didn't bring it up properly, the way you thought,  
15 you have a right to do so on redirect on this material.

16 What reaches then did you not have knowledge on?

17 THE WITNESS: Okay. Again I referred to my boss a lot  
18 on this. He had a lot more experience as far as the  
19 knowledge of the reservation, and I consulted with him  
20 for every one of these reaches, and with that consultation  
21 he told me what the fish species present were, and there  
22 is no reaches where I don't have that knowledge as far --  
23 because I'm relying on him as a Fishery Biologist and my --  
24 as being a Project Leader of the Fish and Wildlife Office.

25 vogel - cross - white



1 MR. WHITE: Your Honor, I think it's important to ask  
2 the question because we are back to the old opinion based  
3 on opinion problem, and I think, as a practical matter, we  
4 got no problem, there's no evidentiary problem with things  
5 that he has personal knowledge, there's probably no evi-  
6 dentiary problem based on the data that's collected by  
7 technicians that work under his supervision. There may,  
8 however, be an evidentiary problem of an opinion based on an  
9 opinion and as a result, I think we're entitled to get a  
10 breakdown of the facts and data upon which he relied in  
11 reaching the conclusions of the species that used, should  
12 be used. And it seems to me that it won't take long for  
13 him to answer the question. He's a very bright and able  
14 person, and I wish I could just ask him what he knows  
15 from his knowledge, what did he gain from creel surveys  
16 and by technicians.

17 THE SPECIAL MASTER: Ask him that.

18 MR. WHITE: And what did he obtain from other experts.

19 THE SPECIAL MASTER: All right. Ask him that three-  
20 pronged question.

21 Q (By Mr. White) First question, personal knowledge.

22 A Okay. I have personal knowledge of just the species present.

23 You want a list of species?

24 Q I'm asking you about --

25 vogel - cross - white



1 A I don't have --

2 Q About those reaches for which you do not have personal  
3 knowledge of the presence of species which you used in  
4 developing your recommended flows.

5 A Okay. I have no personal knowledge on my own part for --  
6 How do you want me to refer to those?

7 Q Why don't you just give us numbers, that will be faster.

8 A I have no personal knowledge for reach number two. I con-  
9 sulted with Richard Baldes in this reach.

10 I have no personal knowledge in reach number three.  
11 I consulted with Dick Baldes in that reach.

12 I have no personal knowledge in reach number five. I  
13 consulted with Dick Baldes in that case.

14 I have no personal knowledge in reach number six. I  
15 consulted with Dick Baldes, had the results of two creel  
16 surveys conducted by people on location and mailed creel  
17 surveys mailed to fishermen on reach number six.

18 I have no personal knowledge of Rainbow Trout in  
19 reach number seven. I have no personal knowledge in reach  
20 number ten except for Brook Trout, for the other species  
21 I don't.

22 I have no personal knowledge -- oh, also I consulted  
23 with Dick Baldes in that case.

24 Q How about for number seven, did you consult with Dick  
25 vogel - cross - white



1 Baldes there? You may have inadvertently left it out.  
2 A I don't believe -- that was one stretch on the reservation  
3 I believe he didn't have information himself. For that  
4 particular reach down to Wiggins Fork, down to Wind River.  
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vogel - cross - white





1 A Did I say Reach No. 11 yet?

2 Q No.

3 A Okay, I have no personal knowledge for Reach No. 11. I  
4 consulted with Dick Baldes. I have no personal knowledge  
5 for Reach No. 14. I consulted with Richard Baldes and  
6 Chuck Viox of the Wyoming Game and Fish office in Lander.  
7 I have no personal knowledge of rainbow trout in Crow  
8 Creek for -- for rainbow, but I do for brook trout.

9 Q What is the number of Crow Creek? I can't see it.

10 THE SPECIAL MASTER: 16.

11 THE WITNESS: Excuse me, that was Reach No. 16.

12 Q (By Mr. White) But you said you did consult with Dick  
13 Baldes there on 16?

14 A That's correct. I consulted with Dick Baldes and he in-  
15 formed me of fish species for all of the reaches except  
16 the East Fork of the Wind River.

17 Q As you went through your answers, you only indicated the  
18 two creel surveys plus the mailed survey for Reach No. 6.  
19 I believe in fairness to you you indicated that you had  
20 creel surveys for other reaches as well?

21 A Oh, excuse me, you are most certainly correct.

22 Q I have a copy of your creel surveys here.

23 Here are your originals, Dave. You can put those  
24 back in your files.

25 vogel - cross - white



1 A Okay. Again, I have information on the Wind River, but as  
2 far as identifying it to a specific reach, I don't have  
3 that for the creel surveys except in Wind River Canyon.

4 Q Hold on just a second, please. Let me give you what have  
5 been marked for identification as Plaintiff's Exhibits  
6 WRIR FISH-200 --

7 THE SPECIAL MASTER: Mr. White, look behind you.

8 MR. WHITE: I'm sorry.

9 THE SPECIAL MASTER: Look behind you.

10 (Mr. Harry Sachse at this time  
11 entered the room.

12 MR. WHITE: Uh-huh. I can start my shenanigans now.

13 Q (By Mr. White)-- 201 and 202.

14 THE SPECIAL MASTER: Mr. White.

15 MR. WHITE: Sir?

16 THE SPECIAL MASTER: Were these three exhibits  
17 Xeroxed from Mr. Vogel's files this morning?

18 MR. WHITE: Yes, sir. I'm going to ask him now:

19 Q (By Mr. White) Could you identify those three exhibits,  
20 please?

21 A These three exhibits are summarized results of the 1978, 1979,  
22 1980 mailed creel questionnaires to the non-Indian anglers on  
23 the Wind River Indian Reservation.

24 Q Are those the questionnaires which you previously described  
25 vogel - cross - white



1 and which you gave me copies of?

2 A. That's correct.

3 Q I believe you have previously indicated the reaches to  
4 which those apply, is that correct?

5 THE SPECIAL MASTER: I think so.

6 A. Yeah. The streams where they were at. There are some --  
7 I should point out, like, for example, Dinwoody Creek,  
8 when a fisherman would answer where he caught the fish,  
9 he might just say Dinwoody Creek. I don't know whether  
10 this was below Dinwoody Creek -- or below Dinwoody Lakes  
11 or above Dinwoody Lakes. The same with the East Fork of  
12 the Wind River. I don't know whether it was above Wiggins  
13 Fork or below Wiggins Fork. So it is just in that stream  
14 that they caught it; it doesn't necessarily mean the reach  
15 where we have a claim.

16 Q (By Mr. White) For the convenience of the record, could  
17 you quickly indicate the reach numbers to which those  
18 Creel surveys apply?

19 A. For the creel survey results dealing with Wind River Canyon,  
20 that would be Reach No. 6 -- we have creel survey informa-  
21 tion for the entire Wind River as a whole, not necessarily  
22 Wind River Canyon, and that may or may not comprise  
23 Reaches No. 1, 2, 3, 4 and 5. We have creel information  
24 on Reach No. 9, Bull Lake Creek below Bull Lake. We have

25 vogel - cross - white



1 information for Reach No. 8, Bull Lake Creek above Bull  
2 Lake, which may or may not deal with Reach No. 8. The  
3 majority of the fishing, I should point out, does occur  
4 within that reach. The upper portion of that boundary of  
5 Reach No. 8 is towards the mouth of a canyon and it is  
6 nearly inaccessible.

7 We have information on creel surveys for the East  
8 Fork of the Wind River, which is Reach No. 7, which may  
9 or may not include Reach No. 7.

10 THE SPECIAL MASTER: Would you point at 7, please?

11 THE WITNESS: That's this one right here.

12 THE SPECIAL MASTER: Thank you.

13 That's called the East Fork on the Wind, but it is  
14 in the furthestmost position, isn't it?

15 THE WITNESS: That's correct -- Yeah, that's correct.

16 THE SPECIAL MASTER: Why is it called the East Fork  
17 of the Wind when it is way over in the west?

18 THE WITNESS: I don't know. If anything, it looks  
19 like it should be the North Fork, doesn't it?

20 A. Have I mentioned Reach No. 15?

21 Q. (By Mr. White) No, you have not.

22 A. Okay, we have creel information for Dinwoody Creek, which  
23 is Reach No. 15, which may or may not be Dinwoody Creek  
24 below Dinwoody Lakes. It is just simply denoted Dinwoody

25 vogel - cross - white



1 Creek.

2 Excuse me, it is possible, I can't remember for cer-  
3 tain, that this reach -- it seems, to the best of my re-  
4 collection, the Indians had closed in 1980 the stretch of  
5 stream above Dinwoody Lake. So the results I have in my  
6 hand, if they are for Dinwoody Creek, it would be concerned  
7 with Dinwoody Creek below the lakes.

8 Q Okay, which exhibit is that, Dave, that you have in your  
9 hand?

10 A. Exhibit FISH-202.

11 Again, I can't recall at the moment. If I had the  
12 fishing regulations for the Reservation put out by the  
13 Indian Tribes I could answer that more correctly, but it  
14 seems to me they may have closed that area during 1980.  
15 I believe that's it.

16 Q Okay. The last one you gave us was 15 then?

17 A. That's correct.

18 Q Okay. Now, with respect to the species identified in each  
19 of those reaches, would you please describe for the bene-  
20 fit of the Court and the record any determinations or in-  
21 vestigations of the populations of those fish or those  
22 species in terms of at least the following factors:  
23 Numbers, biomass, size and percent of harvest?

24 THE SPECIAL MASTER: And what was the last one?

25 vogel - cross - white



1 MR. WHITE: Percent of harvest.

2 A Does that intend to be either/or or all-inclusive?

3 MR. WHITE: All-inclusive as well as any other factors  
4 which you may have investigated in any --

5 THE SPECIAL MASTER: All-inclusive or any totals or  
6 combinations thereof.

7 MR. WHITE: Yes.

8 THE WITNESS: Oh, okay.

9 Q (By Mr. White) If you made no investigation with respect  
10 to numbers, just say, "I made none."

11 A Okay, for Reach No. 4 we electrofished the rainbow trout  
12 in the area within that reach.

13 For Reach No. 6 we had two creel surveys that told  
14 the species and numbers. There were two surveys that were  
15 conducted by either the technician or the game warden  
16 actually on location. In addition, we had the mailed survey  
17 that gives an indication of total trout caught by the  
18 fishermen returning the questionnaires and how long it took  
19 them to catch it. In other words, it is a catch-per-unit  
20 summary.

21 For Reach No. 9 we have in our office files at the  
22 Fish and Wildlife office in Lander, we have sodium cyanide  
23 sampling of Bull Lake Creek below Bull Lake.

24 THE SPECIAL MASTER: Sodium cyanide sampling?

25 vogel - cross - white



1 THE WITNESS: Yes, it is a chemical used to stun the  
2 fish. It is considered a poison, but it is on a temporary  
3 basis. It enables the fishery biologist --

4 THE SPECIAL MASTER: To count?

5 THE WITNESS: To count them, number them, weigh them,  
6 things like that.

7 I believe that information is in the form of numbers,  
8 size, biomass.

9 In Reach No. 12 we have information relating to the  
10 fish populations in that area and we have that information  
11 in the form of size and biomass and numbers and species  
12 composition. This was an area that wasn't specifically  
13 on the Little Wind River itself. It was in the other side  
14 of a headgate immediately off the Reservation. I believe  
15 it was in about September 30th of 1980 they shut down the  
16 headgate. Our office was charged with the responsibility  
17 of evaluating fish losses into irrigation canals on the  
18 Reservation. This was one of the areas we sampled. As  
19 it turns out, you might be interested, we estimated approxi-  
20 mately 6,000 fish in the pool immediately behind the head-  
21 gate. The majority of these were what we call rough fish,  
22 things such as carp, suckers and things such as this. But  
23 we had a considerable number of trout present also. At  
24 least several dozen trout.

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There is information on Reach No. 14. It is electro-fishing information conducted by the Wyoming Game and Fish Department, and I believe that's by species composition numbers, and I don't know whether it deals with size or not. There's also information available on Reach No. 13 in the form of electrofishing also conducted by the Wyoming Game and Fish Department in Lander. That information is in the form of species composition, numbers, and, again, I don't know whether they included size.

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1 A. (Continued) We have information on Crow Creek,  
2 reach number sixteen. I believe that information  
3 is electrofishing information. I believe that's in  
4 the form of numbers, species, composition and size.  
5 Q With respect to reaches four, six, nine, twelve,  
6 thirteen, fourteen and sixteen, which you've just  
7 referred to, have you made any determination with  
8 respect to the fish population by species, the biomass  
9 numbers of those populations and the percent of harvest  
10 of those species, or any other descriptive aspect of  
11 the population?

12 A. No. I don't believe -- I believe in reach number  
13 sixteen there was some population estimation done by  
14 a segment of stream up in Crow Creek. As far as I  
15 know, that's the only place in the Reservation where  
16 we actually tried to predict what the population may  
17 be in that particular stream.

18 Q Which stream was that, Dave, I'm sorry?

19 A. Sixteen.

20 THE SPECIAL MASTER: Crow Creek.

21 Q (By Mr. White) Do you know the results of that  
22 estimation of Crow Creek?

23 A. I'll refer to some of my notes.

24 (Brief pause.)

25 vogel-cross-white



1 THE SPECIAL MASTER: It can't be very significant  
2 with a small stream, anyway, with two to three cubic  
3 foot requirements, so we're really kind of held up on  
4 a little diminimous (phon.) here.

5 THE WITNESS: Your Honor, I have the information  
6 of -- in electrofishing in Crow Creek, and they've  
7 done -- this was done before I was employed, and it  
8 was done in 1973. And they generated population  
9 estimates for the different size ranges of both brook  
10 trout and rainbow trout in that area, and the popula-  
11 tion estimates are given, but I'm trying to figure  
12 out how large an area they're given for, because some  
13 of the numbers are fairly substantial. For example,  
14 on the length class of brook trout, from two inches  
15 to 2.9 inches, they estimated 1,184, and I'm trying  
16 to figure out how large of a stretch of stream they're  
17 talking about.

18 THE SPECIAL MASTER: But, in any event, that would  
19 be work of another predecessor, would it not?

20 THE WITNESS: That's correct.

21 (Brief pause.)

22 THE WITNESS: As best as I can determine from  
23 this information, a population estimate for .64 miles  
24 of stream in stream reach number sixteen was, and I'll

25 vogel-cross-white



1 give this by length class, brook trout first: 1,184  
2 fish from 2 to 2.9 inches, 190 brook trout from 3 to  
3 3.9 inches, 25 brook trout from 4 to 4.9 inches, 67  
4 brook trout from 5 to 5.9 inches, 100 brook trout  
5 from 6 to 6.9 inches, 148 brook trout from 7 to 7.9  
6 inches, 396 brook trout from 8 to 8.9 inches, 106  
7 brook trout from 9 to 9.9 inches, and 25 brook trout  
8 from 10 to 10.9 inches.

9 And for rainbow trout there's a population  
10 estimate of 10 rainbow trout from 4 to 4.9 inches,  
11 3 rainbow trout from 6 to 6.9 inches, 3 rainbow trout  
12 from 7 to 7.9 inches, 36 rainbow trout from 8 to 8.9  
13 inches, 50 rainbow trout from 9 to 9.9 inches, and  
14 20 rainbow trout from 10 to 10.9 inches. That's it.

15 MR. MEMBRINO: Could you repeat what the length  
16 of stream was?

17 THE WITNESS: It was .64 miles.

18 Q (By Mr. White) With the exception of reach number  
19 sixteen, which you have just -- for which you've  
20 just described the population projections, or esti-  
21 mates, with the exception of that, is it fair to say  
22 that since you have made no determination of present  
23 population in those other reaches, you are unable to  
24 indicate the increase in fish population, which would

25 vogel-cross-white



1 result from the flows which you have recommended?  
2 A. Again, remember I've stated several times already my  
3 flow recommendations were not intended to model fish  
4 populations, so it would be purely speculative on my  
5 behalf to try to make such an assumption, or such a  
6 prediction.

7 Q. Now, let's turn to the second element of the defini-  
8 tion of fisheries, and that's the population of  
9 fishermen.

10 MR. WHITE: Do you want to take a break, Your  
11 Honor?

12 THE SPECIAL MASTER: It's up to you.

13 MR. WHITE: I could use one.

14 THE SPECIAL MASTER : Why don't we break for  
15 ten minutes. All right.

16 (Thereupon a ten minute recess  
17 ( was taken.

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THE SPECIAL MASTER: Okay, Mr. White.

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Q (By Mr. White) Mr. Vogel, let me ask you a quick question about C-281 while it's in mind: How did you come to select the reaches which you did select to make claims for? In other words, there are some pretty significant gaps in the blue areas, such as below Crow Creek, down here in the Little Wind, or the Popo Agie; why did you omit those and just generally, how did you pick the areas that are shown in blue on 281?

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A Well, as I stated earlier, we picked those areas, as far as their potential importance for fishery resources and the impact that may be caused on them by existing or future water development.

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Q Which future water developments did you have in mind?

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A Just about any type of future water development that may impact the fish.

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19

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Q Did you specifically consider the water development envisioned by the other claims of the United States in this action?

21

A No, I didn't.

22

23

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Q With respect to the stream reaches that are numbered in the legend of Exhibit C-281, did you make any determination of the population of fishermen for those

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1 stream reaches, including the total numbers of  
2 fishermen and the fishermen days and catch per unit  
3 of effort, as well as any other characteristics of  
4 the population of fishermen, which you found to be  
5 appropriate?

6 A. The only information I have dealing with the population  
7 of fishermen would be the mailed Creel questionnaires  
8 in 1978, 1979 and 1980. 1978 there was 976 seasonal  
9 licenses sold; 464 7-day licenses sold; 722 1- or  
10 2-day permits sold. And in 1979 there were 771  
11 seasonal licenses sold; 429 7-day licenses sold; 162  
12 3-day permits sold; 289 2-day permits sold; 747 1-day  
13 permits sold. And in 1980 there were 871 seasonal  
14 licenses sold; 451 7-day licenses sold; 90 3-day  
15 licenses sold; 327 2-day licenses sold; and 1,039  
16 1-day licenses sold. The information we received  
17 from them gave an indication of the numbers, the  
18 number of hours those fishermen actually returning  
19 the questionnaires, which would be a percentage of the  
20 numbers I just read; that their total hours fishing  
21 in a particular reach of streams, such as the ones  
22 you mentioned earlier, for Wind River Canyon and the  
23 total fish they caught, within that time period. For  
24 example, in 1978, of those fishermen returning

25 vogel-cross-white



1 questionnaires, they spent 1,217 hours fishing there  
2 for a total catch of 453 trout.

3 In 1979, out of those fishermen returning  
4 questionnaires, they spent 320 hours fishing to catch  
5 a total of 40 trout.

6 In 1980, of those fishermen returning questionnaires

7 --

8 THE SPECIAL MASTER: Gosh! That's one fish for  
9 every 12 hours of fishing.

10 A. -- they fished 704 hours to catch 216 fish.

11 THE SPECIAL MASTER: That's more like it. So,  
12 the information we have would be in the form, as we  
13 have stated on the Creel questionnaires.

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MR. MEMBRINO: Is that information you just gave, just so I understand, on the Wind River Canyon?

THE WITNESS: Yes, I just used that.

Q (By Mr. White) Aside from the values which you've shared with us, or which may appear in the exhibits 200, 201, 202, that's FISH-200, 201 and 202, have you developed any estimates of fishermen population for the reaches covered by the legend to Exhibit C-281?

A. With the exception I just said in --

Q Yeah.

A. Yes. There is information that continued. Just using Bull Lake Creek below the river, that would be stream reach number nine, and in 1978, of those fishermen returning the questionnaires, they fished 352 hours to catch a total trout, a total number of trout, of 264.

For 1979, in that stretch of stream labeled nine, those fishermen returning the questionnaires that year fished a total of 200 hours catching 94 trout.

In the 1980, of those fishermen returning the questionnaires, they fished 124 hours, catching a total of 107 trout. As I said earlier, Your Honor, this is one of the more productive streams on the vogel-cross-white





1 Reservation, and it does result in a higher catch per  
2 unit hour fishing by the fishermen than most of the  
3 other streams on the Reservation.

4 THE SPECIAL MASTER: Miss Reporter, would you  
5 please take the name of that stream out of the record.

6 THE WITNESS: Excuse me, there is information to  
7 other stream reaches in the same format, but I couldn't  
8 pin them down as to whether they were in those exact  
9 streams mentioned. For example, the one I referred  
10 to earlier, Bull Lake Creek above Bull Lake, reach  
11 number eight, I indicated, in my opinion, the majority  
12 of the fishing occurs here, but it's possible more  
13 fishing could occur above that. But I can't say with  
14 a hundred percent certainty that all the fishing  
15 reported to the Creel questionnaires was specifically  
16 within reach number eight.

17 Q (By Mr. White) These Creel questionnaires were sent  
18 out to those persons receiving licenses, you say, or  
19 permits?

20 A That's correct.

21 Q Are those permits issued by the Tribes?

22 A That's correct.

23 Q Are those permits issued to -- what kinds of people  
24 have to get permits?

25 vogel-cross-white



1 A. It's non-enrolled Indians in general -- excuse me,  
2 that's the wrong statement. It's non-enrolled members  
3 of the Shoshone and Arapahoe Tribes.

4 Q Well, what about non-Indians, would they get a permit,  
5 too?

6 A. Correct, a non-Indian, the majority of them comprise  
7 the non-Indian. There is a smaller percentage who  
8 may be Indian, but they may be enrolled to other  
9 Tribes outside the Reservation, or they may be the  
10 wife or the children of an enrolled member, but the  
11 wife or children may not necessarily be enrolled.  
12 But, they're a small fraction of the total of license  
13 sales.

14 Q So what we're talking about then is those persons,  
15 Indian or non-Indian, who are not enrolled in either  
16 of the two Tribes to get a license or permit; is that  
17 correct?

18 A. Right.

19 THE SPECIAL MASTER: I knew that in the State of  
20 Washington, general stream adjudications and trouble  
21 between Indian and non-Indian were causing massive  
22 burdens over fishing, but I didn't think we were going  
23 to take up this much of the case way up in the mountains  
24 in the central part of Wyoming, but here it is. It's

25 vogel-cross-white



1 getting more and more complex.

2 Q (By Mr. White) Based on the basic data, which you have  
3 shared with us, for a couple of those reaches, have  
4 you made any determination of the total population  
5 of fishermen in terms of numbers of fishermen, total  
6 fishermen days and catch per unit of effort for those  
7 total number of fishermen, for any of the reaches  
8 listed in the legend of Exhibit C-281?

9 A. No.

10 THE SPECIAL MASTER: Do you have any statistics  
11 whatsoever on the number of Indians who fish the  
12 respective stream reaches?

13 THE WITNESS: No, not as far as specific stream  
14 reaches, we don't.

15 Q (By Mr. White) Let's turn to the third element of  
16 the definition, the environment of each, "each" being  
17 fish harvested and fishermen. With the exception of  
18 the use of incremental methodology about you testified  
19 on direct examination, what investigations, if any,  
20 did you make into the environment of the fish being  
21 harvested, or the fishermen?

22 A. The only investigation I made was, stated was the  
23 physical stream environment for the fish, as far as  
24 any type of -- any environment outside of that

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physical environment dealing with the velocity present  
 in the stream, the depths, the subtraits, I made no  
 investigation.

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1 Q (By Mr. White) The definition also refers to the collec-  
2 tion of interactions within and between populations of  
3 fish, populations of fishermen. Did you make any investi-  
4 gation with respect to that collection of interactions,  
5 aside from that which you have already described?

6 A I was going to say the interactions that we have looked at  
7 are the creel questionnaires and the fact that the inter-  
8 action of the fishermen actually catching the fish, har-  
9 vesting the fish; other than that, I have made no inves-  
10 tigation.

11 Q With respect to the incremental methodology which you used  
12 in determining the flows claimed in Exhibit C-280, did you  
13 personally make any effort to verify the computer's pre-  
14 dictions?

15 A I personally calibrated the computer model as it related to  
16 any data, if that's what you're referring to.

17 Q Did you compute by hand, such as other witnesses in this  
18 action have testified to, the calculations conducted by  
19 the computer for a sample, a set of information to deter-  
20 mine that the calculations accomplished by the computer  
21 are, in fact, correct?

22 A I might point out, if I did so, it would probably take a  
23 considerable amount of time to do such calculations. It  
24 is for this reason why we rely on the computer. That is

25 vogel - cross - white



1 the whole purpose of using the computer, to reduce the  
2 calculation time. So I did not believe that was neces-  
3 sary.

4 Q As I understand the use of the computer, which you des-  
5 cribed, by supplying the computer with various data,  
6 specifically substrate type, velocity and depth, you are  
7 given a resulting weighted usable habitat, is that gener-  
8 ally correct?

9 A Yes, it is. Correctly stated, it is weighted usable area  
10 which we use as habitat.

11 Q I'm sorry, weighted usable area of habitat, is that right?

12 (Witness nodding head affirmatively.)

13 Q For any of the values of depth, velocity and substrate  
14 type which you gave to the computer, did you make any  
15 personal determination or physical determination in the  
16 stream that the amount of habitat produced by the com-  
17 puter, or indicated by the computer, was actually in  
18 existence in the stream at those values of depth, velocity  
19 and substrate type?

20 A At what flows?

21 Q At what what?

22 A At what flows? You left me hanging there. At the flows  
23 that we have in our report?

24 Q At any flow.

25 vogel - cross - white



1 A. Okay. You remember, the whole purpose of using this incre-  
2 mental methodology was to measure the habitat at flows that  
3 we did not actually see or measure. The idea is to either  
4 extrapolate or interpolate a flow that we have not seen.  
5 So, in that respect, I have not.

6 Q. Let's talk about the flows which you did measure as  
7 opposed to the flows that you did not measure, the pre-  
8 dicted flows. At any of those flows based on the data  
9 which you collected for depth, velocity and substrate type,  
10 did you make a physical examination of the habitat available  
11 in order to compare that with the habitat calculated by the  
12 computer?

13 A. I believe you're asking me the same question over again  
14 that you asked before. That is, have I carried those cal-  
15 culations through by hand?

16 Q. No, I'm not.

17 THE SPECIAL MASTER: No, physical. He wants to know  
18 what empirical observations you made that went into the  
19 computation of weighted usable area to give a location.  
20 Isn't that what you want to know?

21 MR. WHITE: I meant to ask a different question. It  
22 is clearly confusing, so I'll take another crack at it.

23 THE SPECIAL MASTER: Let's take another crack at it  
24 then because we each interpreted it differently.

25 vogel - cross - white



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MR. WHITE: Okay.

Q (By Mr. White) Isn't it true that at certain measured flows which you measured the three flows on Exhibit 283 or the water levels on 283, you made determinations of depth, velocity and substrate type?

A. That's correct.

Q And isn't it true that providing that data to the computer, the computer developed habitat that existed at the time of that flow and those measurements of velocity, depth and substrate type?

A. That's true.

Q Did you verify the results of the computer for any of the measured flows as well as the measured data which you made by determining in the field that the habitat computed by the computer after you fed it the raw data actually matched the habitat that existed in the stream?

A. In terms of physical habitat, the results of our first calibration run with those were the same results. In other words, we went out and we physically measured the velocity, depth and substrate. Those are the physical parameters that were present when we actually did our measurement and we did our calibration. That was the results. I mean, that was what we observed at the time we were in the field.

vogel - cross - white





1 Q Let's see if I can make it more concrete, and it may be a  
2 foolish question, but let me try again.

3 Based on Exhibit 284 --

4 THE SPECIAL MASTER: A little louder, Mr. White.

5 Q (By Mr. White) Based on Exhibit C-284, it would appear  
6 that you made measurements with respect to velocity,  
7 depth and substrate type estimations as well as flows at  
8 some points, three points, between 200 c.f.s. and 1300  
9 c.f.s., is that correct?

10 A No. In this particular reach it was between 200 c.f.s.  
11 and the highest measured flow in this case was like, I  
12 believe, 1800 and some c.f.s.

13 Q So it was out here someplace (indicating)?

14 A Right.

15 Q But you actually made measurements of the flow as well as  
16 those three factors?

17 A That's correct.

18 Q Now, what was the lowest measurement in terms of flow or  
19 lowest flow level at which you made those measurements?

20 THE SPECIAL MASTER: I think he answered that yester-  
21 day, too.

22 A You want to know my lowest measured --

23 Q (By Mr. White) Let's assume it was 300 c.f.s. --

24 A Okay.

25 vogel - cross - white



1 Q -- to make it easier.

2 At 300 c.f.s., according to Exhibit C-284, it would  
3 indicate that there are roughly 48,000 square feet of  
4 weighted usable area of habitat, is that correct?

5 A That's correct, for adult rainbow trout.

6 Q Right. Did you make any investigation in the field to  
7 determine that at 300 c.f.s. flow there was actually  
8 48,000 square feet of habitat?

9 A I believe I get -- I understand what you're getting at. I  
10 did not go through each one of those cells and tape it off  
11 and measure it. I did not do that by hand, in other words.  
12 That's why I'm using the computer is to do that for me.

13 Q Right. But the result is that even for 300 c.f.s., which  
14 we were assuming is one of your measured flows, you don't  
15 know whether or not the curve is correct, do you?

16 A I believe it's correct in the terms of the amount of  
17 weighted usable area.

18 Q To know that for sure, wouldn't you have to go out and  
19 measure it, the weighted usable area or the number of  
20 square feet?

21 THE SPECIAL MASTER: I would only observe, Mr. White,  
22 if I added up on a computer, that I had \$40 in my pocket  
23 and \$10 that I got from somebody who paid me, it makes \$50.  
24 And you said to me that isn't a fact, you better get out

25 vogel - cross - white



1 those ten \$1 bills, that's -- I don't buy that. That's  
2 what he's using the computer for. Now, he can't go out  
3 and he cannot -- it is physically impossible to verify  
4 weighted usable area without 1,000 scuba divers and ten  
5 years to do it in.

6 MR. WHITE: That's exactly the problem with the  
7 methodology, Your Honor.

8 THE SPECIAL MASTER: I know it.

9 MR. WHITE: Exactly the problem with the methodology.  
10 There is no way to verify the results. Totally unverified.

11 THE SPECIAL MASTER: The people who make Wangs and  
12 IBMs in the fifty United States, companies in that busi-  
13 ness, now would take exception with you by saying that if  
14 the input is accurate, what is returned to you will be ac-  
15 curate.

16 MR. WHITE: That assumes that what's in that little  
17 black box is accurate, Your Honor.

18 THE SPECIAL MASTER: No, it assumes what's fed into  
19 the black box is appropriate and accurate.

20 MR. MEMBRINO: Your Honor --

21 MR. WHITE: Let's assume that you have a black box --

22 THE SPECIAL MASTER: The -- What am I saying, the  
23 little things that are manufactured now even in Nebraska --  
24 well, the machinery is accurate. It's been proven so.

25 vogel - cross - white



1 If it's fed in properly, it would be spit out properly.

2 So, say, the --

3 MR. WHITE: Well, let's say, Your Honor, you have a  
4 little black box and which you feed the information in that  
5 you've got \$10 from A, \$40 from B and you just want to  
6 check it to see if the little black box is correct --

7 MR. MEMBRINO: Your Honor --

8 MR. WHITE: --and ask the black box how much money  
9 do you have; If the black box tells you \$51 --

10 MR. MEMBRINO: Your Honor --

11 MR. WHITE: Let me finish, please.

12 If the black box tells you \$51, you know there is a  
13 small problem here. There's been no check to see whether  
14 or not the black box tells you if it's \$50. If it's \$51,  
15 \$40 or \$60, and that's the whole point of verification --

16 THE SPECIAL MASTER: Well, you have a right to verify  
17 the accuracy of the software that went into the programming  
18 and computer inputs; but to question the accuracy of the  
19 computer is beyond the purview of this lawsuit. Frankly,  
20 every bank in America today has tens of thousands of ac-  
21 counts with millions of transactions every day, and it's  
22 long since been established that it is -- if properly fed  
23 in, the total will be accurate. Once in a blue moon, you  
24 may find a chip that's eroded, and that's why you have

25 vogel - cross - white



1 people who work in computer renovations and computer in-  
2 puts and changing stations and this sort of thing - when  
3 there is a fault or a malfunction. But, essentially, I  
4 don't think -- essentially, if you're going to question  
5 his totals, I guess you'd better do it on your own case and  
6 not on his cross-examination. But he said he relies upon  
7 the accuracy of the computer in a field that's brand new  
8 that has no history whatever in coming to the total. It  
9 is a virtually new science, is it not, that you're in?

10 THE WITNESS: Uh-huh.

11 THE SPECIAL MASTER: In instream flow --

12 MR. MEMBRINO: Your Honor --

13 THE SPECIAL MASTER: -- gauging.

14 MR. MEMBRINO: Mr. Vogel has relied on the computer  
15 programming of the IFG Incremental Methodology after  
16 examining it as a professional and consulting with people  
17 to see which is an appropriate way to go about this. Now,  
18 the real question here, if there is a question about the  
19 methodology, Mr. White can put on the witness to attack  
20 the methodology. If Mr. White wants to criticize the in-  
21 put, he's free to examine Mr. Vogel in as much detail as  
22 he pleases to see whether or not he did --

23 THE SPECIAL MASTER: I'll hold you to that in about  
24 an hour from now when I figure he's had enough and I'm

25 vogel - cross - white



1            trying to cut him off. You're going to say he has a right  
2            to examine as much as he pleases. He has a right to make  
3            a reasonable examination, and that's true, and he's doing  
4            it.

5            Go ahead, Mr. White.

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- 1 Q (By Mr. White) Mr. Vogel, I hand you, again, the  
2 text entitled Principles of Fishery Science by Ever-  
3 hart and Youngs. Have you seen that text before?  
4 A I have seen the 1975 edition. This edition was  
5 published in 1981.  
6 Q Do you know whether or not that text is a text which  
7 is commonly used by persons in your area of expertise?  
8 A It's -- I would say that it is one of many such  
9 books in fishery science that is commonly referred to.  
10 Q Would you please review that text and tell the Master  
11 and indicate, for the record, where in that text  
12 there is any description of, or endorsement of, the  
13 incremental methodology?

14 THE SPECIAL MASTER: I can't permit that question,  
15 Mr. White. That is a 300-page book and he's not about  
16 to start reviewing it in answer to your question. If  
17 you have something in that book to pin him down on,  
18 you ask it specifically to the page and sentence and  
19 the paragraph.

20 MR. MEMBRINO: Your Honor, the definition of  
21 incremental methodology --

22 MR. WHITE: Your Honor, the --

23 MR. MEMBRINO: -- does not stand or fall on  
24 whether or not that text book approves of it.

25 vogel-cross-white



1 THE SPECIAL MASTER: I understand your case.  
2 I didn't even wait for you to raise the objection.  
3 The question is impermissible.

4 MR. WHITE: On what ground, Your Honor? I'm  
5 not sure.

6 THE SPECIAL MASTER: On the grounds that you  
7 have the right to cross-examine this witness on his  
8 direct testimony and by handing him one of the twenty  
9 text books of his science and asking for him to go  
10 through it constitutes an unreasonable burden upon  
11 his expertise in time and position; it constitutes a  
12 needless consumption of time and a repetition of  
13 unnecessarily burdensome process and I won't permit it.

14 Do you want some more?

15 MR. WHITE: I've got grounds enough.

16 THE SPECIAL MASTER: I got those from you.

17 MR. WHITE: Let me make an offer of proof on that,  
18 Your Honor.

19 THE SPECIAL MASTER: All right.

20 MR. WHITE: The State would offer to prove that  
21 if allowed, or if Mr. Vogel were allowed to respond  
22 to the question, he would indicate that nowhere in the  
23 Everhart text is there any mention of, let alone an  
24 endorsement of, or approval of, the incremental

25 vogel-cross-white





1 methodology.

2 Q (By Mr. White) The next question, Mr. Vogel; Can  
3 you describe for the benefit of the Court, or counsel,  
4 or the record, any standard accepted, or generally  
5 accepted treatise aside from governmental publications  
6 which endorses or approves of the incremental method-  
7 ology as an appropriate means toward determining in-  
8 stream flows?

9 A I would like to point out that it is a new method.  
10 It's been developed within the last, say, five years.  
11 So, to answer your question, to give a correct  
12 answer to it, I would have to review all the text  
13 books of current nature. I couldn't answer that, in  
14 other words. It may be referred to in text books by  
15 now, I'm not sure.

16 MR. WHITE: Your Honor, I know there's another  
17 matter. That's the publication of Mr. Radosevich's  
18 notice that he would like to come before you. The  
19 next area I have to go in, it will probably be two or  
20 three hours in length.

21 THE SPECIAL MASTER: Do you want to take it  
22 tomorrow morning?

23 MR. WHITE: Then I would suggest that this might  
24 be a good time to break and perhaps start a little

25 vogel-cross-white



1 early in the morning.

2 THE SPECIAL MASTER: All right. Let's do that.  
3 And, Mr. Radosevich, -- Gentlemen, have you agreed  
4 on something that is acceptable to both sides as a  
5 notice?

6 MR. RADOSEVICH: No, Your Honor. In fact, we  
7 have not agreed.

8 THE SPECIAL MASTER: Have you tried to, gentlemen?

9 MR. RADOSEVICH: Yes, Your Honor, we have tried  
10 to agree to whether there should be a notice and what  
11 its contents should be this morning. What was agreed  
12 was that we could not agree that, first of all, a  
13 notice should be issued. So, therefore, this item  
14 would have to be presented to you to decide if, first  
15 of all, a notice should be published.

16 And then, if you so decide we would work on the  
17 content of it. And that is the state we are at at  
18 this point in time. And, much of what I would have  
19 to say is to reiterate what I had already pointed out  
20 in terms of the motion.

21 I would like to go into it in just a little bit  
22 more detail, as to why I do think a notice should be  
23 published. And, first of all, I feel strongly that  
24 it is a -- at this particular point in time, it is an  
25 vogel-cross-white



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22 more detail, as to why I do think a notice should be  
23 published. And, first of all, I feel strongly that  
24 it is a -- at this particular point in time, it is an  
25 vogel-cross-white



1 opportunity --

2 THE SPECIAL MASTER: Hold it there. Hold it,  
3 please.

4 (Off the record discussion, at  
5 (which time the witness was  
6 (dismissed.

6 THE SPECIAL MASTER: Go ahead, Mr. Radosevich.

7 MR. RADOSEVICH: Yes, Your Honor. I feel quite  
8 strongly that it is an appropriate time to publish a  
9 notice to at least inform certain parties that if  
10 they were under the impression that their water rights  
11 are being taken care of, or their interests are being  
12 taken care of by any of the litigants in this lawsuit,  
13 that perhaps they are mistaken. Perhaps it should  
14 have been something that a notice might have been  
15 published earlier. But, the fact of the matter that  
16 it was not, I don't think that negates the fact that  
17 this isn't an opportune time now.

18 The issue is a very complex one, as far as  
19 whether a notice is published that states who the  
20 Federal Government represents, who the attorneys for  
21 the Tribes represent, and what the interests of the  
22 State are. I don't believe that gets to any of the  
23 legal issues of this particular case. I think it is  
24 a matter of informing these parties that had they not  
25 taken stock in the fact that their water rights may



1 be affected by this litigation, they can still, and  
2 I believe they still could have the opportunity,  
3 particularly since this is a very significant impact  
4 on them, if their water rights -- they being on the  
5 Reservation and being fee simple landholders, if in  
6 fact their water rights do not follow the priority  
7 right on the Reservation.

8 We are talking partly -- it is not an insignifi-  
9 cant number of acres involved. I think we are talking  
10 about a very significant acreage. There's approximately,  
11 according to testimony that I've heard here during the  
12 course of the trial, and gathered from the various  
13 people here, we're talking about approximately 85,000  
14 acres of historically fee and trust lands being  
15 irrigated, of which 40,000, approximately, is trust  
16 land; 45,000 is fee land. Currently irrigated, there's  
17 approximately 73,000 fee and trust lands, of which  
18 that's broken up into 31,000 trust and 42,000 fee.

19 It appears, by looking at the map, that a little  
20 more than half of that is fee-held land by non-Indian  
21 landholders. They are the ones --

22 THE SPECIAL MASTER: It is my impression, Mr.  
23 Radosevich, there is not one square foot of fee-held  
24 land by non-Indians in the claims of the United States  
25 or of the Tribes.



1 Am I in error, Mr. Echohawk?

2 MR. ECHOHAWK: That's true, with regard to the  
3 United States. Our claim deals with the trust lands.

4 THE SPECIAL MASTER: That's what I believe is  
5 true with regard to the United States.

6 MR. SACHSE: That's correct, in regard to the  
7 Tribes.

8 THE SPECIAL MASTER: So, Mr. Radosevich, what  
9 you're saying is not true.

10 MR. SACHSE: What the Tribes claim is for trust  
11 land and also for fee lands owned by tribal members,  
12 or direct descendants of the Tribe.

13 THE SPECIAL MASTER: Tribal members, or direct  
14 descendants of the Tribes.

15 MR. RADOSEVICH: That's right. And approximately  
16 more than half of that is land held by fee simple  
17 landholders of non-Indian --

18 THE SPECIAL MASTER: How can it be held by non-  
19 Indians? He just got through saying the figures you  
20 take from the Statement of Claims are figures of the  
21 Tribe's position, the United States as Trustee for  
22 the Tribes, or the tribal members for themselves, or  
23 for members of the Tribes sitting on tribal land.

24 MR. SACHSE: What I'm saying is of the fee-held  
25 land, that is currently being irrigated --



1 THE SPECIAL MASTER: Fee-held land is held by  
2 tribal members.

3 MR. RADOSEVICH: No, fee-held land is not being  
4 held by tribal members, it is more than half of the  
5 total irrigated, currently irrigated land. So we are  
6 talking somewhere in the neighborhood of 42,000 acres  
7 of fee-held land, of which about half of it is held  
8 by non-Indian landowners.

9 THE SPECIAL MASTER: But, there's no claim being  
10 asserted by that by anybody --

11 MR. RADOSEVICH: Exactly. And the reason, Your  
12 Honor, I'm bringing this up is that the impression  
13 has been given to me by a number of people who have  
14 inquired that because this lawsuit is covering the  
15 Wind River Indian Reservation and because the land  
16 lies within the Wind River Indian Reservation, and  
17 their land at one time was part of the Reservation,  
18 that their claims, at least the water rights, will be  
19 associated with that land, will possibly date back to  
20 1868. Now we know that this was an issue that, of  
21 course, went all the way to the 9th Circuit --

22 THE SPECIAL MASTER: Isn't most of the land you're  
23 referring to a part of an irrigation district, most of  
24 it on the Riverton-Midvale --

25 MR. RADOSEVICH: Outside the irrigation -- outside



1 of the Midvale Irrigation District -- I believe  
2 there was an exhibit that was prepared for the Court  
3 and entered by the Tribes, marked Exhibit M-1 --

4 THE SPECIAL MASTER: Uh-huh.

5 MR. RADOSEVICH: Which clearly indicates the  
6 fee-held land. Now, this does not indicate, or does  
7 not distinguish between that fee-held land of Indians  
8 and non-Indians.

9 THE SPECIAL MASTER: Right.

10 MR. RADOSEVICH: However, approximately, at least  
11 from the figures that have been given, approximately  
12 half of that land is held by non-Indians. The fact  
13 of the matter being true --

14 THE SPECIAL MASTER: That just can't be so.  
15 This map shows a map of the areas for which a claim  
16 is made for water under Reserved Doctrine for the  
17 Tribes and for Indians who live on the land, whether  
18 tribal -- whether they are --

19 MR. RADOSEVICH: Fee-held lands.

20 THE SPECIAL MASTER: If it is fee-held land, it  
21 is held by the Indians in fee, as a result of an  
22 allotment or a conveyance from the Tribe.

23 MR. SACHSE: Could I try to clarify that?

24 MR. RADOSEVICH: Yes. I was --

25 MR. SACHSE: In connection with this exhibit,





1 just take a minute, the lands that are shown as fee --

2 THE SPECIAL MASTER: What color are they?

3 MR. RADOSEVICH: Red.

4 MR. SACHSE: Red. The fee lands on the Reserva-  
5 tion on this map are not distinguished. Red is not  
6 distinguished as to whether they are owned by Indians  
7 or not. Now, in the Tribe's claim and when the Tribes  
8 get around to putting on their case, we will make a  
9 claim for water rights for the fee lands owned by  
10 Indians and a few direct descendants of Indians.

11 THE SPECIAL MASTER: All right.

12 MR. SACHSE: I don't have in my head right now  
13 the exact number of acres that that is, but I suspect  
14 it's about half of the fee lands outside of the River-  
15 ton Reclamation District.

16 THE SPECIAL MASTER: Doesn't virtually every non-  
17 Indian living on fee land that you're referring to  
18 hold his water and take his water by virtue of a State  
19 adjudicated, or confirmed water right, most of them  
20 dating about to 1905, '06, '07, '08?

21 MR. RADOSEVICH: Your Honor, yes. This is why  
22 the real question arises. Of course it was decided  
23 in Walton that, in fact, the non-Indian fee held  
24 lands was not covered by the Reservation -- by the  
25 Reserved Right. But that was decided, that was



1 affirmed in August of 1980, a fairly recent  
2 decision by these standards.

3 My point being that a good many of these people  
4 are under the impression by virtue of the fact that  
5 their land is within the Reservation, that they don't  
6 have to worry one bit about their land being covered --

7 THE SPECIAL MASTER: I can't imagine that. I  
8 can't imagine them taking such a position, of course.

9 MR. RADOSEVICH: This is where the inquiry comes  
10 into, is in fact the Federal Government representing  
11 their land in terms of this suit, the rights to their  
12 land?

13 I venture to say that a good many of them who  
14 are landowners, whose neighbors may need water out of  
15 the same canal, are landholders that are non-Indians,  
16 and their neighbor would be an Indian that their land  
17 would continue to be watered if, in fact, their  
18 neighbor was receiving water, if this case goes  
19 through and, in fact, if the Reserved Rights date back  
20 to 1868. He may have a 1905 water right of a neighbor  
21 and he won't continue with it --

22 THE SPECIAL MASTER: How can a fee holder there  
23 who took -- who bought his place and took a water  
24 right and has a dated 1906 water right, possibly have  
25 a basis for feeling that because of a general



1 adjudication of every right and he happens to have  
2 some fee land in the middle of the Reservation, he's  
3 going to draw an 1868 right? By what rationale?

4 MR. RADOSEVICH: By the rationale I would say  
5 they are interpreting, because the land at one time  
6 was Reservation, because it is within the boundaries,  
7 that's what it is. There is where I see the notice  
8 would at least provide a clarification on that issue,  
9 particularly to the fee-holders.

10  
11 \* \* \* \*



1 MR. RADOSEVICH: (Continued) I think there's been,  
2 of course, in addition to that there's been some discussion.

3 THE SPECIAL MASTER: Mr. Radosevich, I really believe  
4 the petition request for notice, is about a year and a half  
5 late.

6 MR. RADOSEVICH: Perhaps. That's right, Your Honor,  
7 perhaps it is, but what I'm saying, I think at this  
8 particular --

9 THE SPECIAL MASTER: And as it comes at this time,  
10 all it can do is shake up everybody else in Water Division  
11 Number Three. If this notice appears in Lander, to the  
12 people living on the reservation who are not Indian and  
13 holders of State Water Rights, what is it to say doesn't  
14 shake up everybody on Owl Creek back up to Thermopolis  
15 on Greybull River and on the -- and every portion of Water  
16 Division Three.

17 MR. RADOSEVICH: I think it will be directly oriented  
18 toward --

19 THE SPECIAL MASTER: It will stir up another bunch --

20 MR. RADOSEVICH: -- the land owners.

21 THE SPECIAL MASTER: -- of letters, get myself accused  
22 of having generated fees for many lawyers, which I've been  
23 charged with that in this matter.

24 So I'm not too sure --

25 MR. RADOSEVICH: I'm looking to a standpoint in the



1 future, if they do have a right and fail to assert it  
2 now because they're under the impression that their land  
3 is within the reservation so therefore their water right  
4 will date back, even though they have a certificated or  
5 State Water Right, if they're under that impression and  
6 continue on until after the lawsuit, I think that's where  
7 the problem lies, and I think it could be clarified very  
8 simply if the parties can state who they represent. I  
9 see no -- I personally think it will clarify issues in  
10 their mind, and that's primarily why I bring it up because  
11 the question has been raised in a number of occasions.

12 So, Your Honor, Mr. Membrino has -- Anyway, this is  
13 the reason I feel it should be -- feel the Court is the  
14 appropriate, either through the Special Master or through  
15 Judge Joffe, to issue a notice that in fact --

16 THE SPECIAL MASTER: Is your notice still in the same  
17 form when submitted to the Court when --

18 MR. RADOSEVICH: No, Your Honor. The change would  
19 be by -- The State of Wyoming has clarified, or to change  
20 according to the discussion we had yesterday in this form.

21 THE SPECIAL MASTER: Have the Tribes seen this too?

22 MR. RADOSEVICH: Yes, Your Honor, they saw it this  
23 morning, I believe.

24 Did you see the copy?

25 MR. MEMBRINO: No, I never got a copy.



1 MR. RADOSEVICH: Did you have a copy?

2 MR. WHITE: I don't know where they are.

3 MR. SACHSE: I'd like to see a copy too.

4 THE SPECIAL MASTER: Well, I have no objection to  
5 this being released to the newspapers by the attorneys  
6 for the State of Wyoming, Attorney General's office, and  
7 it's really no concern of mine.

8 MR. WHITE: Your Honor, on behalf of the State, we  
9 have no objection to this type of notice. I think that  
10 Mr. Radosevich has fairly characterized perhaps some con-  
11 fusion that exists in the minds of those fee holders with-  
12 in the exterior boundaries of the reservation who are not  
13 Indian. I don't think it's necessarily a jurisdictional  
14 defect at this stage of the proceedings.

15 THE SPECIAL MASTER: I'm glad to hear that because  
16 yesterday I thought there was some mention that it might  
17 be.

18 MR. WHITE: It may well affect -- I think the effect  
19 it will have, Your Honor, of these people perhaps not being  
20 involved, will come down the line when we cease amendments  
21 to pleadings and things like that.

22 I think it solves the problem in the future, I think  
23 it's a nice tidying up from the State's standpoint, so  
24 there are people who are misadvised, and I'm not sug-  
25 gesting the Federal government or the Tribes have misadvised



1 anyone. It's clear that many of the folks are under the  
2 wrong impression, but I don't know who caused that im-  
3 pression. I don't mean to point fingers.

4 I think it's clearly within the Court's jurisdiction  
5 to do it, and if you wish to do so by exercising your  
6 powers, we have no objection, Your Honor.

7 THE SPECIAL MASTER: We remember distinctly going  
8 through this problem and matter before ending up with a  
9 long language, a big notice and running it in the form  
10 of full-page advertisements in about every daily --  
11 every newspaper, daily or weekly in the Big Horn Basin.

12 We think that served its purpose and served it well.  
13 That appeared in Thermopolis, from those on the top part  
14 of the reservation, and Riverton and in Lander, and it  
15 brought -- and it served its purpose very well, I believe.  
16 And my question, my only concern now is why should another  
17 notice be ready now, and, of course, your answer, well,  
18 now we're in the middle of the guts of the lawsuit, the  
19 heart of it is the reservation, and we're still afraid  
20 there's still a few fee holders in there, that they just  
21 don't understand that they should go see a lawyer or should  
22 go see someone to defend themselves, and I'm not sure I  
23 agree with those two conclusions.

24 One, I think that the interest of every fee holder  
25 with a State Water Permit within the reservation boundaries



1 is being competently and adequately defended now. So I  
2 don't see any reason for notice therefore.

3 Two, if I thought there were jurisdictional defects  
4 which could render an attack on what -- what do you call  
5 it when it comes out of the --

6 MR. WHITE: Decree.

7 THE SPECIAL MASTER: Render the decree subject to --

8 MR. MEMBRINO: Collateral.

9 THE SPECIAL MASTER: Other than a collateral attack,  
10 then I would be even less concerned because it's not the --  
11 The matter of service was not my doing. That was a matter  
12 of the State of Wyoming and the State Legislature, and it  
13 was complied with by special statute, plus the advertisements  
14 we ran to try and show it.

15 All right, Mr. Membrino, I'd like to hear what you've  
16 got to say on this.

17 MR. MEMBRINO: Your Honor, I agree with what you  
18 stated the law as. The State Legislature has passed leg-  
19 islation on how notice should be served on people in an ad-  
20 judication of this sort. It was the State's determination  
21 to bring this lawsuit, they employed the methods set out  
22 in the statute. If the notice has been inadequate, that  
23 is a problem of due process. It has to be raised by a  
24 claimant who feels he has not been given sufficient notice  
25 in order to present his claim. So I think what is remarkable





1 here is that we don't have a claimant in any courtroom  
2 saying that. We have an attorney who represents one of the  
3 parties in the case, he's really not speaking on behalf  
4 of Lander, he's representing, I think, what is in fact  
5 hearsay. Someone has mentioned to him that maybe his claim  
6 isn't being represented by the United States.

7 I think if someone has raised that kind of question,  
8 that person should go and see a lawyer and make his claim  
9 through a lawyer.

10 We should also note that there's a stipulation in  
11 this case that the United States and the parties, other  
12 parties have agreed that there will not be an attack on  
13 the certificated rights until these reserved rights have  
14 been determined. Now, I think what we are talking about  
15 here though is someone who is not, who may be a certifi-  
16 cated right holder, a non-Indian who is thinking about  
17 claiming some even greater privilege, some benefits under  
18 the reserved right.

19 THE SPECIAL MASTER: By virtue of the fact that he's  
20 sitting in the reservation.

21 MR. MEMBRINO: If that person wishes to stake out  
22 that kind of a claim, he has the affirmative responsibility  
23 to come forward and make it.

24 THE SPECIAL MASTER: You two, you two gentlemen were  
25 unable to come to some agreement on simple language so



1 stating?

2 MR. MEMBRINO: Your Honor, we cannot agree that it  
3 is the responsibility of this Court to define the nature  
4 of the different party's representation. If a party wants  
5 to publish a notice on its own, it can do so, but we would  
6 strongly resist the State, Attorney General publishing  
7 anything that attempted to characterize what the United  
8 State's position was. We would also say that the State  
9 is at great risk in trying to interpret what is at stake  
10 in this case by amplifying other than the notice requirements  
11 of the State Legislature.

12 It's a serious issue, but we don't have a party in  
13 here who is claiming lack of notice, and certainly all the  
14 requirements, as far as we can tell, have been met thus  
15 far, so we cannot agree, in short, to any kind of ancillary  
16 notice to that which has already been published by the  
17 State of Wyoming in initiating this case. And the parties,  
18 if individuals are concerned about it, they have been served  
19 with notice under the law. They're responsible for making  
20 their claim, pro se or through an attorney.

21 MR. RADOSEVICH: Your Honor, I'd just like to say  
22 what Mr. Membrino is saying, as far as the legal issues,  
23 by informing the individuals who are land owners on the  
24 Wind River in the reservation, who is being represented  
25 and who is not, is certainly not deciding any legal issues.



1 I think that's an over-statement by Mr. Membrino on that  
2 point. The fact that only as of August of 1980 was there  
3 really much, was there a decision on the fact, on Indian  
4 fee landholders not being included in a reserved rights  
5 claim, I think is a very good indication of how complex this  
6 issue is. And we, as lawyers and people working with it,  
7 can appreciate many of these complex issues. A lot of these  
8 individuals out there as landowners, as irrigators or  
9 store operators or whatever they may be doing, certainly  
10 will not follow these aspects and are leaving an awful  
11 lot in the hands of, particularly taxpayer's money being  
12 served in court here by the Federal government, the State --  
13 the State or the Federal government.

14 MR. SACHSE: May I make the Tribe's position clear  
15 on this?

16 THE SPECIAL MASTER: Mr. Sachse.

17 MR. SACHSE: On October 10th, 1980 the Tribes pub-  
18 lished in the Riverton Ranger and again on October 17th,  
19 24th and 31st, 1980, a notice stating precisely what the  
20 Tribal position was. I won't reread the notice. The essence  
21 of the notice though is that the Tribe is making a claim  
22 of a water right with a priority date of July 3, 1868  
23 for all lands within the reservation held in trust for the  
24 Tribes and for allottees are held in fee by individual  
25 Indians who are either members of the Tribes or direct



1 descendants of Tribal members. These rights are set forth  
2 in the name of the Tribes as part of the Tribal water  
3 right with the individual Indian who owns the property,  
4 having a right to share in the use of Tribal water right.

5 Now, I think that's a very clear statement of the  
6 Tribal position. The only other thing I have to say is  
7 that the Court is, of course, free to make any notice that  
8 it wants to, but the Tribes do not voluntarily join in  
9 or stipulate to the proposed notice by Mr. Radosevich.  
10 In the first place, we think that the case is too far  
11 along for another notice to be issued; that if the -- if  
12 the notice to the parties in this case has been insufficient,  
13 nothing that can be done now will correct it.

14 Secondly, we think the notices are clear, and thirdly,  
15 that it will cause more trouble than it will save.

16 And fourthly, that if the Court itself were to issue  
17 the notice as opposed to a party, the State could issue  
18 notice just as the Tribes did or the Federal government  
19 could issue, but if the Court itself issues a notice, then  
20 the Court makes itself responsible for the exact position's  
21 everyone's taking, and could find itself in trouble doing  
22 so.

23 THE SPECIAL MASTER: Mr. Radosevich, I'm ready to  
24 rule on your request for hearing, and I'm constrained to  
25 say that I have to come down on the side of the arts that



1           auger and advise me not to approve a notice. I said yes-  
2           terday and I still stand by it, if the State of Wyoming  
3           and the United States and the Tribes could agree on some-  
4           thing specifically locked in with fine tuning to the owners,  
5           non-Indian owners of fee land within the boundaries of the  
6           reservation, there has been some questions whether you  
7           folks, some of you feel you have a right that might be  
8           inherited under your water rights with an 1868 date, this  
9           is to advise you that we, the Tribes or we, the United  
10          States or we, the Wyoming are not so sure you're going to  
11          get this.

12                 Your case is being, in our opinion, adequately defended,  
13          people who have rights, water rights and so on and so on  
14          and so on, and we will continue our lawsuit.

15                 Now, as I say, I will sign something like that, but  
16          if you three can't agree, how on earth can you expect me  
17          to draft it, how on earth can you expect me to draft it.  
18          So I am going to respectfully traverse your request, as  
19          was said in the old common law, for the notice.

20                 That isn't to say if you find some people who are  
21          really genuinely concerned about this, and you want them  
22          to write a letter to me, I might answer the letters with  
23          copies to counsel or bring the letter up here and say what  
24          I intend to answer them and let them know.

25                 MR. RADOSEVICH: Okay.



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(Off-the-record discussion.

THE SPECIAL MASTER: We'll resume at 9:15.

(Proceedings recessed at 4:20 p.m.

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1 REPORTERS' CERTIFICATE


2 State of Wyoming )  
3 County of Laramie ) : SS

4 We, Lamont Miller and Merissa Racine, Registered  
5 Professional Reporters and Notaries Public in and for the  
6 First Judicial District, State of Wyoming, hereby certify that  
7 the facts as stated in the caption hereof are true; that we  
8 did at the time, date and place, as set forth, report the  
9 proceedings had before the Honorable Teno Roncalio, Special  
10 Master Presiding, in stenotype that the foregoing pages,  
11 numbered 6510-6694, inclusive, constitute a true, correct and  
12 complete transcript of our stenographic notes as reduced to  
13 typewritten form under our direction.

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

17 Dated this 3rd day of June, 1981.

18   
19 LAMONT MILLER  
20 Registered Professional  
21 Reporter

18   
19 MERISSA RACINE  
20 Registered Professional  
21 Reporter

