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## Trial Transcript, Vol. 75, Morning Session

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Case # 4993

File # 182

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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

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VOLUME 75

Morning Session

Thursday, June 4, 1981

**ORIGINAL**

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APPEARANCES

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THE SPECIAL MASTER: Did George Radosevich stay or  
is he gone?

MR. WHITE: He's gone. He said he had another trial  
down South today, or else he was getting ready for one,  
I can't remember.

THE SPECIAL MASTER: Okay, Mr. White, continue.

CROSS-EXAMINATION (RESUMED)

BY MR. WHITE:

Q Mr. Vogel, you indicated previously that Cutthroat were  
a native species to the reservation, is that correct?

A That's what I've been informed of.

Q Is that the only native species to the reservation?

A That's the only native trout that I know of that -- on  
the reservation. There are other native fish species.

Q Such as Whitefish?

A Right.

Q Now, have you made any determination as to whether  
Cutthroat were native to all of the reaches shown on  
Exhibit 281?

A No, I have -- I was informed, as I said earlier, by  
Dr. Robert Behnke of Colorado State University, in his  
opinion, Colorado -- excuse me, Cutthroat were distributed  
throughout the drainage up through at lease barrier falls  
or any structure within the streams that may inhibit

vogel - cross - white



1 their upstream migration. And as far as I know, within  
2 those study reaches, there was no structures or barriers  
3 that would prevent them from getting into those reaches  
4 or inhabiting those reaches.

5 Q Do you know upon what his conclusion was based?

6 A I presume it was based on his investigation and research.

7 Q But you're unable to describe for the Court the process  
8 which he went through to reach the conclusion upon which  
9 you rely?

10 MR. MEMBRINO: Your Honor, I object. I don't think  
11 that's required.

12 THE SPECIAL MASTER: The objection is sustained.

13 MR. WHITE: Could I ask the grounds, Your Honor?  
14 I need to inquire into the basis --

15 THE SPECIAL MASTER: You were inquiring into what  
16 the man he quoted had based his professional opinion on,  
17 and that's not what this witness can testify to.

18 MR. WHITE: Let me try it another way, Your Honor.  
19 I don't mean to be contemptuous. If you find me so,  
20 let me know and I'll back off.

21 Q (By Mr. White) Mr. Vogel, do you know the process through  
22 which Mr. Behnke went in reaching the conclusion that  
23 Cutthroat were distributed throughout the entire drainage?

24 MR. MEMBRINO: Your Honor, I object. The question's  
25 vogel - cross - white



1 irrevelant.

2 THE SPECIAL MASTER: It might be, but let's see if  
3 he knows.

4 THE WITNESS: No, I don't.

5 Q. (By Mr. White) Did you -- Strike that. After Dr. Behnke  
6 indicated that Cutthroat were native to the reservation,  
7 did you show him your preference curve for him to deter-  
8 mine whether or not the preference data which you used  
9 would be applicable to the native Cutthroat?

10 A. No, I did not show him my preference curves. He indicated  
11 to me at the time, I asked him that question, if he was  
12 aware of the preferences of Rainbow Trout in general,  
13 and he said he was. We're talking about adult Rainbow  
14 Trout, and in his opinion, the Cutthroat Trout would have  
15 similar preferences. as for the Rainbow Trout, had not  
16 the Rainbow Trout been introduced and had competition  
17 with the Cutthroat Trout.

18 \* \* \* \* \*

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25 vogel - cross - white



1 Q Did you show him your rainbow trout preference curves?

2 A No. No, I haven't.

3 Q Mr. Vogel, you have indicated several times the extensive  
4 use which you made of computers in your work on the  
5 incremental methodology programs. Are you able to --  
6 strike that.

7 Do you have a copy of the program listing which you  
8 used?

9 A No, I don't.

10 MR. WHITE: Off the record, Your Honor.

11 (Off-the-record discussion.)

12 MR. WHITE: Back on the record.

13 Q (By Mr. White) Mr. Vogel, I hand you what has been marked  
14 as Plaintiff's Exhibit WRIR FISH-30.

15 THE SPECIAL MASTER: FISH-30?

16 MR. WHITE: Three zero.

17 Q (By Mr. White) And ask you whether or not that is the  
18 program which you used or the program listing within  
19 that program which you used?

20 MR. MEMBRINO: I should note that it is a 285-page  
21 document, so according to Mr. White, if there are any  
22 specific differences between what Mr. Vogel used and what  
23 Mr. White handed to Mr. Vogel, it would be very hard for  
24 the witness to make the distinction.

25 vogel-cross-white





1 THE SPECIAL MASTER: Very well.

2 MR. WHITE: That's a distinction he ought to be able  
3 to make, Your Honor.

4 A I couldn't tell. There is, like my attorney said, there's  
5 literally hundreds and hundreds of lines of programming  
6 in here and I couldn't tell if that was the same.

7 Q (By Mr. White) You don't have your program with you and  
8 you can't tell whether this is the same, is that correct?

9 A That's correct.

10 MR. WHITE: Your Honor, we would move at this time  
11 for an order asking the United States to produce the  
12 program listing which they used. Since he does --

13 THE SPECIAL MASTER: I would deny that at this time,  
14 Mr. White. This programming deals with fish preference  
15 characteristics, is that correct?

16 MR. WHITE: Well, its got the IFG -- I believe that  
17 has IFG-2, IFG-4 as well as the subroutines that are  
18 associated with those particular programs as well as  
19 those that are necessary to develop habitat curves and  
20 things like that.

21 I believe -- I would represent to the Court upon  
22 representation and belief --

23 THE SPECIAL MASTER: Yeah.

24 MR. WHITE: -- that is the complete set of programs  
25 vogel-cross-white



1 and subroutines within the Instream Flow Groups  
2 Incremental Methodology library, but I believe we are  
3 entitled to know what program he used because they do  
4 differ, from day to day in some cases. And if we are  
5 to effectively deal with this area we are entitled to  
6 know that. There has been no suggestion of confidential  
7 information or trade secrets here.

8 THE SPECIAL MASTER: Well, the question is on cross-  
9 examination, is it incumbent upon this witness to have  
10 to produce that which he used in these matters or is it  
11 incumbent upon you to show by something he testified  
12 on direct was not in keeping with his printouts. And I  
13 don't know whether the duty is on him to present it or not.  
14 I think if you've got something on a computer printout  
15 that will impeach his direct testimony or will put it into  
16 contradiction or disrepute, then I think you should bring  
17 that out yourself or bring it out in your case, one or  
18 the other.

19 MR. WHITE: Your Honor, I think that we are entitled  
20 to know what program he used.

21 THE SPECIAL MASTER: Well, he told you that.

22 MR. WHITE: He's unable --

23 THE SPECIAL MASTER: He told you that. But, now  
24 you're saying that you want him to produce the printout.

25 MR. WHITE: No, sir, he's not able to tell us what



1 program he used, and by program I'm talking about  
2 program listing.

3 THE SPECIAL MASTER: Well, he's not able to identify  
4 what you handed him on FISH-30, a 285-page document,  
5 whether or not some of the printouts, some of the lines  
6 on that document whether he relied upon or not.

7 Is that correct?

8 THE WITNESS: That's correct.

9 MR. WHITE: What I'm asking, Your Honor, is for them  
10 simply to provide us -- we'll pay the copying cost if  
11 necessary, with the program listing, the program they used.  
12 It doesn't seem like that's much to ask.

13 THE SPECIAL MASTER: Well, are you able to do that?

14 THE WITNESS: One thing, I can point out, Your Honor,  
15 I noticed here on the front page this printout is from  
16 Colorado State University. I used the computer from the  
17 U.S. Bureau of Reclamation in Denver, Colorado, so there  
18 may be discrepancies just on that basis alone.

19 THE SPECIAL MASTER: Uh-huh.

20 MR. WHITE: I think we are entitled to know, Your  
21 Honor, and that's what I'm asking is for them to provide  
22 us a copy of their listing.

23 THE SPECIAL MASTER: Why don't you prepare specifically  
24 what it is you want and identify it with particularity,  
25 and then let us know and if it's something that can be



1 complied with without any great detail, why we can see  
2 about that.

3 MR. MEMBRINO: Your Honor, Mr. White has suggested  
4 that the computer programs have changed frequently, if  
5 not daily, and I think that's an allegation that ought  
6 to be substantiated. Mr. Vogel has in the Courtroom the  
7 printouts of his work. I believe they were produced at  
8 his deposition. If Mr. White wants to work with them,  
9 perhaps he can pinpoint just precisely the time at which  
10 this work was done and he can decide which determination,  
11 which program is correct.

12 THE SPECIAL MASTER: Is that so, Mr. White? Did you  
13 have access to his printouts during his deposition or  
14 have you seen them?

15 MR. WHITE: We have the results of his computer work,  
16 what came out of the black box. We have what went into  
17 the black box. We don't have the instructions to the  
18 black box -- what to do with the input data, that is what  
19 we are asking for. We are asking for the instructions  
20 to the black box, and I think it is absolutely fundamental.  
21 If we don't get it, I'll move to strike, and I think it  
22 is an excellent, absolutely clear motion.

23 MR. MEMBRINO: Your Honor, we are not suggesting that  
24 Mr. White has -- is not free to examine in this case --  
25 that is a government program that's available for public



1 use for him to make an inquiry into that and to consult  
2 with the University -- with the Instream Flow Group,  
3 himself about that, and I'm sure he has. I think that's  
4 where he got the copy he's presenting to Mr. Vogel. All  
5 I'm saying is that if Mr. Vogel doesn't have his program  
6 listing in the Courtroom, it's no -- it's no basis for  
7 suggesting that his testimony is somehow deficient.

8 MR. WHITE: It certainly is, Your Honor, and this is  
9 the reason why: --

10 THE SPECIAL MASTER: Well, I don't think so, Mr.  
11 White. But go ahead with your argument.

12 MR. WHITE: The reason is that by not producing,  
13 either unintentionally or intentionally the program  
14 listings, the essence of Mr. Vogel's work is shielded  
15 from cross-examination. And the reason it is shielded --

16 THE SPECIAL MASTER: I don't understand how that  
17 can conceivably be. You have had depositions with this  
18 witness --

19 MR. MEMBRINO: That's correct, Your Honor.

20 THE SPECIAL MASTER: -- you've had a clear  
21 latitude in asking him about every facet of the seven  
22 steps he takes in his work, and this business of  
23 incremental methodology and how you can now say that this  
24 man's testimony is shielded from your examination is  
25 beyond me.

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MR. WHITE: Well, let me explain.

THE SPECIAL MASTER: To comprehend.

MR. WHITE: And I'll explain that by saying that the key of Mr. Vogel's work is what happens inside the black box, inside the computer. He gathered the data which he fed into the computer, and he has --

THE SPECIAL MASTER: What you have.

MR. WHITE: Yes, and he's used data which has come out of the computer.

THE SPECIAL MASTER: Which you have.

MR. WHITE: Which I have. The question is what assumptions did he use?

THE SPECIAL MASTER: The assumptions he used must have been fed into the computer. The assumptions must have been based on --

MR. WHITE: That's right. The assumptions he used are not data, the assumptions that are fed into the computer are not data, that's the program listing we're asking for.

The instructions given to the computer on what to do with the raw data is what we're asking.--

THE SPECIAL MASTER: Well, we went through that step by step in each each of his scales, in each of his pages of his report.

MR. WHITE: Absolutely not, Your Honor.

THE SPECIAL MASTER: And everything he has fed into



1 the computer.

2 MR. WHITE: Absolutely not.

3 THE SPECIAL MASTER: And what his totals were when he  
4 came out, every bit of information that he got from each  
5 of the cross-sections on each of these exhibits that  
6 went into the computer to give him his figures on  
7 habitat and the figures that he projected, his total area,  
8 whatever the devil it's called.

9 MR. WHITE: Weighted usable area.

10 MR. MEMBRINO: Weighted usable area.

11 THE SPECIAL MASTER: His weighted usable areas in  
12 square feet from each place and what came out of the  
13 computer. And I fail to understand why you can't feel  
14 that you have full latitude to his direct testimony on  
15 questions of that kind, of what it is you're seeking. I'm  
16 trying to keep this from getting into a perpetual exercise,  
17 and I'm afraid that's what it is when I look over the  
18 rooms now, if not the buildings that we're filling  
19 with exhibits and hundreds and hundreds of printouts  
20 every day of our lives.

21 MR. MEMBRINO: Your Honor, if I may add as well,  
22 all this material that Mr. White was talking about, is  
23 inquiring of, was something that was the subject of Mr.  
24 Vogel's deposition. We shouldn't be continuing discovery  
25 two days into Mr. Vogel's testimony. We're not talking



1 about work that's occurred since --

2 THE SPECIAL MASTER: Well --

3 MR. MEMBRINO: And also, which is a most important  
4 point, this is not to say that because the program  
5 listing for this work is -- is of a public nature  
6 available to practitioners in the field, that we are  
7 in any way suggesting that the other computer program  
8 listings that we've had some controversy that we had  
9 relating to our other witnesses would be available to  
10 the State. We certainly maintain that your ruling be  
11 proprietary and should stand. But I think the point here  
12 is Mr. White has some way he wants to impeach Mr. Vogel's  
13 testimony or his work. He had the opportunity at  
14 deposition to inquire into the assumptions, Mr. Vogel  
15 has discussed all those things, and now it's up to Mr.  
16 White to --

17 MR. WHITE: Your Honor --

18 THE SPECIAL MASTER: If the State's position is,  
19 Mr. White, that the methodology is so inaccurate or so  
20 uncertain or so unreliable that it should not be given  
21 credence, that's fine, you have a right to any document  
22 you wish to assert that, but the affirmative duty is  
23 on you. That's not something to work out in any fur-  
24 ther inquiries on these printouts and computer activities  
25 that we've already pursued, and I'm going to hold that way.





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MR. WHITE: Well, Your Honor --

THE SPECIAL MASTER: And you're welcome to make your Motion to strike his testimony, on which I will rule, or make your offer of proof, either one.

MR. WHITE: Before I do that, I've got to respond to something Mr. Membrino said. I don't think it is an accurate characterization of the deposition to say that the programs, the listings with which Mr. Vogel used were covered in that deposition at all, and I just don't think that that's correct.

I will now move to strike Mr. Vogel's testimony on the grounds that -- Let me start, and strike that.

We move to strike Mr. Vogel's testimony with respect to his flow recommendations on the grounds that his flow recommendations were derived by use of several programs, that while he has disclosed the data that was fed into the computer and the results which came out of the computer, he is unable to identify the -- or to produce a listing of the program which was used to evaluate the raw data, he is unable to indicate whether or not Wyoming Exhibit FISH-30 is the program listing of the methodology which he used.

THE SPECIAL MASTER: Well, I'm -- Go ahead.

MR. WHITE: Having the input data and output data, it would be quite possible to develop a computer program,



1 but there's no assurance that that computer program would  
2 be the same that Dr. -- or Mr. Vogel used. As a result,  
3 the underlying assumption and analysis which went into  
4 Mr. Vogel's opinions are not allowed to be subject to  
5 cross-examination or careful scrutiny, and therefore we  
6 move to strike his testimony.

7 MR. MEMBRINO: Your Honor --

8 THE SPECIAL MASTER: Well, if you haven't got  
9 into them with careful scrutiny, it's your own fault,  
10 not the Court's. You had him under deposition, you've  
11 taken massive depositions, which I see on his desk, and  
12 you had the two printouts, the one you have available  
13 now with which you're working and the one which he  
14 referred to which may contain his printout that was in  
15 the office of the USGS in Denver.

16 THE WITNESS: U. S. Bureau of Reclamation.

17 THE SPECIAL MASTER: U. S. Bureau of Reclamation  
18 in Denver, so I think my ruling will stand, Mr. White.  
19 I don't know how else to really rule it.

20 MR. WHITE: I know, Your Honor, but you don't  
21 agree with me.

22 MR. MEMBRINO: Your Honor, may I make one addendum  
23 to that? Your Honor, Mr. White has repeatedly said these  
24 programs change all the time. All we have are his  
25 allegations, I don't believe there's any evidence in



1 the record to show that that's the case, and he's using  
2 that as a lynch pin of his argument here. And I think  
3 if he's going to make such allegations, he's got to  
4 provide evidence of that.

5 MR. WHITE: The only --

6 THE SPECIAL MASTER: He probably will on his case.

7 MR. WHITE: The lynch pin of the argument is the  
8 witness doesn't know what program listing he used. He  
9 doesn't have it with him.

10 MR. SACHSE: Your Honor, may it please the Court,  
11 shall we, when the Court has ruled on an issue, that  
12 we then move on to the next issue?

13 THE SPECIAL MASTER: All right. Let's do that.

14 Q (By Mr. White) Mr. Vogel, if one were to contact the  
15 Bureau of Reclamation, whose computer I believe you  
16 testified that you used in developing your analysis,  
17 and if in that contact, one were to ask for the precise  
18 program listing or the listing for the precise program  
19 which you used, specifically how would that be done?  
20 Who would you talk to and specifically what would you  
21 ask for?

22 A. First of all, I'd probably find out how to do that  
23 through the Instream Flow Group, and I believe that  
24 they would probably give me the proper people to contact  
25 vogel - cross - white



- 1 and how to go about it.
- 2 Q Well, who did you contact, who did you work with in
- 3 the Bureau?
- 4 A As far as what?
- 5 Q As far as --
- 6 A I thought you were giving me a hypothetical situation.
- 7 Q How did you identify the program that you were going
- 8 to use?
- 9 A I used the information supplied to me by personnel
- 10 Instream Flow Group, specifically Ken Bovee.
- 11 Q What information did he supply to you?
- 12 A He told me the proper command words to access the
- 13 program listings to properly run the program.
- 14 Q And what were those words?
- 15 A I'd have to look through my notes to answer that
- 16 question.

17 (Brief pause.)

18 THE SPECIAL MASTER: On Page 9 of your report,

19 I find PHABSIM. Of course, habtat, of which we're

20 familiar --

21 MR. WHITE: That's sort of the over-all name of

22 the system, Your Honor.

23 THE SPECIAL MASTER: Sort of acronyms. I wonder

24 if that's what you had in mind.

25 vogel - cross - white



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MR. WHITE: No, sir.

THE SPECIAL MASTER: CPUF, dealing more closely  
with what you had in mind?

MR. WHITE: No, sir.

(Brief pause.)

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A To answer your question, the information I ran through the computer in 1980 the command was GET,PROCFIL/=FW-24022. That was used in the Bureau of Reclamation cyber-computer in Denver.

Q That called up the program that you used?

A Pardon?

Q That called up the program which you used?

A That's correct.

Q Did you have a copy of procedures which you used?

THE SPECIAL MASTER: A copy of what?

Q (By Mr. White) Of the procedures for use of that program upon which you relied?

A Yes.

Q Do you have that with you?

A Yes.

Q May I see it, please?

A It would be this called Procfil or a User's Guide for Utilizing the PHABSIM and then these are my notes I used.

Q Mr. Vogel, if this afternoon we were to go down to the Bureau in Denver and type in the same command, would we call up the same program, the exact same program which you used?

A I couldn't answer that.

vogel-cross-white



1 Q Mr. Vogel, I'm going to hand you back your notes and I'm  
2 going to mark very lightly in pencil on your original,  
3 and we'll make copies and you can erase the pencil:  
4 Exhibit FISH-31 and FISH-32. Would you identify those,  
5 please?

6 A Before we do that, I would like to point something out  
7 that may or may not be of concern. These notes, Your  
8 Honor, give my specific account number. There is -- we  
9 have certain account numbers that are unique to each  
10 system. They have passwords and code numbers on it.  
11 Giving this information here enables them to access my  
12 personal account. Potentially, somebody could use that  
13 account and burn up the rest of the computer money in it.

14 MR. WHITE: We've got no problem --

15 THE SPECIAL MASTER: Burn up the rest of your  
16 computer money?

17 THE WITNESS: Yeah. There's an account --

18 THE SPECIAL MASTER: I see what you mean. You mean  
19 the meter on --

20 THE WITNESS: Right.

21 MR. WHITE: I agree with Mr. Vogel, and I suggest  
22 we'll xerox these during a break and give Mr. Vogel a  
23 chance to blank out those items which he feels might  
24 compromise his funding.

25 vogel-cross-white



1 THE SPECIAL MASTER: All right. Very good.

2 THE WITNESS: Sure. That's fine.

3 A FISH-31 is a copy of my notes. It gives various commands  
4 to the computer that were relevant to my work.

5 FISH-32 is entitled Procfil -- that's spelled  
6 P-r-o-c-f-i-l: A User's Guide for Utilizing The PHABSIM.

7 THE SPECIAL MASTER: Who prepared 32?

8 THE WITNESS: Sheree. That first name is S-h-e-r-e-e,  
9 middle initial A. Last name Griffith, computer aide.

10 THE SPECIAL MASTER: And she works for whom?

11 THE WITNESS: The Cooperative Instream Flow Service  
12 group in Fort Collins, and it is dated August, 1980.

13 THE SPECIAL MASTER: Very well.

14 Please don't do that, Mr. White.

15 MR. WHITE: I'm sorry --

16 THE SPECIAL MASTER: If you would speak louder --

17 MR. WHITE: I told the witness I was going to take  
18 those to copy them and then I remembered our arrangement  
19 and I told him to keep them until we were ready to copy  
20 them. I apologize to the Court, Your Honor.

21 THE SPECIAL MASTER: All right.

22 Q (By Mr. White) Mr. Vogel, would you please get out  
23 Exhibit FISH-1-A, that's the script for the slide show.

24 A Okay.

25 vogel-cross-white





1 Q On Page 14 beginning with Slide Number 38 through Page 16  
2 through Slide 45 and I also direct your attention to  
3 what has been marked for identification as FISH-45, which  
4 is solely for illustrative purposes a facimile of  
5 Slide 45.

6 Isn't it true, as you testified in your deposition,  
7 that you made no investigation with respect to watershed  
8 equilibrium?

9 A I made no investigation to the level of degree of precision  
10 as I used the IFG incremental methodology where I  
11 actually went out and did real detailed measurement on  
12 actual velocities, Substrates, specific depths, stream-  
13 bed morphology. However, in the sense that I think I  
14 see what you're getting into in this question, is that the  
15 watershed before a study like this is conducted, one of  
16 the basic assumptions is that the researcher assumes the  
17 watershed is in equilibrium.

18 Now remember, relating this in terms to Instream  
19 flow studies using the IFG Incremental Methodology, we  
20 are speaking in terms of extreme effects on the watershed,  
21 adverse effects as they may effect the fish populations  
22 in the stream. It was not necessary for me, in my  
23 opinion, to do a high-level intensive study of the  
24 watershed, because as far as I was concerned, in the  
25 vogel-cross-white



1 study the watershed was in equilibrium as it related to  
2 the fish in the stream. In other words, there was no  
3 stream adverse effects. There wasn't any channels giving  
4 in or banks giving in or tremendous A grading of the  
5 stream bed or degrading of the stream bed. These were  
6 the factors that were important. Prior to the time I  
7 applied the methodology, I assume this was not the case.

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5-1  
MR-1

1 Q (By Mr. White) That's a significantly different answer  
2 than you gave during your deposition, isn't it?

3 A No. In my deposition I said I did not make an investi-  
4 gation as to watershed equilibrium, but I didn't make an  
5 investigation of watershed equilibrium.

6 Q Do you have a copy of your deposition? I've got one  
7 we can share with.

8 Turn to Page 46, Line 23.

9 A 46, Line 23?

10 Q Yes, sir. Isn't it true that question, that portion  
11 of the question beginning on Line 23 was, "What investi-  
12 gation did you make with respect to watershed equilibrium?"  
13 And the answer was nothing?

14 THE SPECIAL MASTER: That's precisely what he  
15 said again.

16 MR. WHITE: I don't believe so, Your Honor.

17 THE SPECIAL MASTER: That's precisely what he  
18 said again.

19 MR. MEMBRINO: Your Honor, I think it would be  
20 helpful, which is our usual problem here, a statement  
21 made out of context, if we could see --

22 THE SPECIAL MASTER: There's no problem here.

23 The question wasn't a literal answer, but it was simply  
24 substantive, precisely what he said, and he gave his

25 vogel-cross-white



1 reasons for it.

2 Q (By Mr. White) Is that the same as your answer now,  
3 you did nothing?

4 THE SPECIAL MASTER: I think you're getting  
5 argumentative, and I think you're hassling the  
6 witness, and I will not permit it. You may move  
7 on to the next issue, please, Mr. White.

8 MR. WHITE: Your Honor, may I ask the witness  
9 whether he did anything about watershed equilibrium?

10 THE SPECIAL MASTER: No, because he explained  
11 in detail what he did and what he did not do and  
12 why he did what he did and why he did not do what  
13 he did not do, that is why, Mr. White.

14 Q (By Mr. White) Isn't it true that you made no  
15 investigations with respect to the availability of  
16 food?

17 A. My answer will be similar to the previous answer.  
18 Prior to making an investigation of instream flows  
19 for fisheries, I made a detailed examination of the  
20 specific velocities, depth and substrates in the stream.  
21 It was not necessary for me to actually go in and do  
22 a detailed food habits as to what the trout are  
23 eating, what the volume of food is that they're eating,  
24 things like this. It's not necessary, in my opinion,

25 vogel-cross-white



1 to go in and make a detailed investigation of this, if  
2 I assume prior to that it's not a problem.

3 In other words, if I believe that there's no  
4 problem for fish to exist in the stream, it's not  
5 necessary for me to go in there and examine to see  
6 what they're eating, do a detailed level or a high level  
7 investigation of food habits. Just by virtue of the  
8 fact that a fish is present in a stream may be satis-  
9 factory that he wouldn't be there if he didn't have  
10 food. So I did not make a detailed investigation.

11 Q. During your deposition -- Well, strike that.

12 Isn't it true then that you assumed the availability  
13 of adequate food for the fish, having made no investi-  
14 gation of the food availability?

15 A. I guess I didn't realize that was a question.

16 THE SPECIAL MASTER: Would you read the question,  
17 please, Merissa?

18 (Thereupon, the following  
19 (question was read back as  
20 (follows: "Q. Isn't it true  
21 (then that you assumed the  
22 (availability of adequate food  
23 (for the fish, having made no  
24 (investigation of the food  
25 (availability?"

22 THE WITNESS: Yes, I assume that food was adequate,  
23 in adequate supply for the fish present, and it would  
24 not be a limiting factor to the population.

25 vogel-cross-white



1 I might just bring this up. When I was working  
2 for North Central Reservoir Investigations with the  
3 fishery biologist in South Dakota, the project leader  
4 was giving me advice on my master's thesis, on what  
5 areas I should limit my master's thesis to, and which  
6 areas I should expand on and avoid. I brought up the  
7 subject of food habits, food studies. I did some  
8 work with yellow perch, a species found in the  
9 Missouri River, and he told me, he said that, he said  
10 in many cases it's not necessary to actually go out  
11 and analyze exactly what the fish are eating, by virtue  
12 of the fact that the fish are there tells him that  
13 they're eating something, it's not limiting. So I  
14 applied it also to this.

15 I had no evidence to assume that food supply was  
16 detrimental to the fish. In other words, it was a  
17 limiting factor. So, I did not do a real detailed  
18 food habit study.

19 Q (By Mr. White) Wasn't it true that during your  
20 deposition that you indicated that you did no study  
21 at all? I refer you to Page 47, Lines 3 through 5.  
22 "Question: What investigations did you make with  
23 respect to the availability of food?"

24 "Answer: None."

25 vogel-cross-white



1 A. Again, --

2 THE SPECIAL MASTER: You don't have to elaborate,  
3 if that's just what you said, just say so.

4 THE WITNESS: Okay, that's it.

5 THE SPECIAL MASTER: That's fine.

6 Q. (By Mr. White) Isn't it true that you made no investi-  
7 gations with respect to water quality?

8 A. My answer is still the same. I had no reason to believe  
9 that water quality would be a factor by virtue of the  
10 fact that the fish are present, by virtue of the fact  
11 that there is no, there is no physical reason apparent  
12 in the streams to give me concern that water quality  
13 would be a factor.

14 You must understand the context of what we are  
15 dealing with here. The IFG Incremental Methodology  
16 basically asks the researcher to keep these things in  
17 mind as he's going to conduct a study and look out for  
18 warning signs in the system, look out for things that  
19 may be very serious, detrimental damage to the system.

20 If there's a tremendous bank erosion going on,  
21 if there's pollution, a tremendous amount of pollution  
22 in the stream, we're looking for severe adverse effects  
23 that may affect the fish's environment. I had no evi-  
24 dence of this on the Wind River Indian Reservation.

25 vogel-cross-white



1 Q Isn't it true that you assumed that there were no  
2 problems with water quality, having made no investigation  
3 of water quality?

4 THE SPECIAL MASTER: I think that's been asked  
5 and answered at least once, Mr. White. Same answer as  
6 with the equilibrium and with food.

7 Q (By Mr. White) Mr. Vogel, isn't it true that on the  
8 same page of your deposition, Lines 10 through 12,  
9 when asked the question: "What investigation did  
10 you make with respect to water quality?", you said,  
11 "None."?

12 A That's correct.

13 Q You spoke of watershed equilibrium. I wonder if you  
14 could give us your definition of watershed equilibrium.

15 A I'll give -- I don't know if I could give a dictionary-  
16 perfect definition of watershed.

17 Q I want your definition as an expert, not the dictionary's  
18 definition.

19 A Okay. Basically, in terms of a watershed equilibrium,  
20 as it applied to my study, watershed equilibrium would  
21 be the -- would be encompassing the total effects of the  
22 watershed of the stream environment, such that any  
23 adverse effects in the equilibrium, the watershed, if  
24 it was thrown out of, excuse me, if it was thrown out

25 vogel-cross-white





1 of the equilibrium, those effects on the fish in the  
2 environment of the fish that were present would be  
3 very apparent. There would be things such as a  
4 tremendous grading of the channel, or degrading  
5 of the channel or tremendous sediment load in the  
6 channel, anything that would, within a short period  
7 of time, would be obvious within the system.

8 Watershed equilibrium, as I understand it, is  
9 speaking in terms of equilibrium over time, over a  
10 long period of time. As it relates to the study,  
11 we're speaking in, we're not speaking in terms of  
12 geologic time, we're speaking in terms of relatively  
13 short time, historic time.

14 If this equilibrium were apparent, it would be  
15 obvious on the streams on the reservation. There  
16 would be, as I described earlier, there would be  
17 obvious effects on the environment of the fish. I  
18 realize I made this more of a drawn out statement rather  
19 than a definition, but that's the best I could do.

20 Q Well, isn't it true that there are bank stabilization  
21 efforts throughout the reservation?

22 A. In some areas there are bank stabilization efforts.

23 Q If the watershed's in equilibrium, why are those  
24 stabilization efforts in progress?

25 vogel-cross-white



1 A. Okay. Again, I refer you to the context, referring  
2 to watershed equilibrium as it relates to the study.  
3 We're not speaking in terms of some efforts by an  
4 irrigator, because the stream is -- is -- he wants  
5 to build the water supply up into his headgate. The  
6 cases I'm familiar with, this is probably the most  
7 familiar case on the reservation, is the irrigator  
8 is simply trying to get water into his irrigation  
9 headgate so he channelizes a section of the stream  
10 to make the stream go over to a certain portion, either  
11 a left bank or right bank of a stream.

12 Q. Mr. Vogel, I direct your attention to what's already  
13 been admitted as United States Exhibit C-28, and ask  
14 you whether or not you consider the effects of the  
15 mineral development suggested by that exhibit and  
16 reflected in the United States' Statement of Claim  
17 when you assumed that the watershed was in equilibrium?

18 A. No, I didn't. Again, remember the context we're  
19 talking about here. I'll refer you back to your slide  
20 show, the specific slide I believe when they started  
21 to talk about watershed equilibrium, it showed a culvert  
22 with eroded banks and tremendous sediment load, mud  
23 being thrown in the stream. This is the type of thing  
24 that we are concerned with, looking at in terms of

25 vogel-cross-white



1 watershed equilibrium as it relates to the instream  
2 flow study.

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vogel-cross-white



1 THE SPECIAL MASTER: Let me ask a question, Mr. White.  
2 Then when Mr. White brings up which is a natural  
3 and understanding doubt that arises from all of this, if  
4 on the one hand at a given time in the trial the United  
5 States says we have need for water because of mineral  
6 deposits and processing that will accompany that mineral  
7 processing, which is inevitable, and they say the water  
8 will be used and then you come along a few months later,  
9 and you say we have a situation of a fishery here, in order to  
10 maintain the fishery here, we will need so much water for  
11 this when it is obvious, and it is becoming more obvious  
12 in this case, there is an incompatibility in these two  
13 roles being fulfilled, either simultaneously or  
14 consecutively. Something has to give.

15 MR. MEMBRINO: Your Honor --

16 THE SPECIAL MASTER: Just a minute. Let me finish  
17 my observation.

18 Either the requirement for mineral deposit and  
19 processing will have to be limited and restrained or  
20 qualified by waters required for fisheries, or either the  
21 waters for fisheries will have to be qualified and  
22 limited to -- otherwise affected by the requirements for  
23 mineral deposits or the mineral processing. You can't  
24 have both.

25 Now, I think I have solved about three hours of



1 questions, Mr. White, have I not? That's what I'm --

2 MR. MEMBRINO: Your Honor, I think we can say even  
3 more.

4 THE SPECIAL MASTER: I would be happy to have you  
5 now comment.

6 MR. MEMBRINO: I think --

7 MR. WHITE: If I have the right of cross-examination,  
8 Your Honor, why I would be delighted.

9 THE SPECIAL MASTER: Go ahead.

10 MR. MEMBRINO: I'm not testifying, I'm only reporting  
11 what's already in evidence and that's Mr. Page's  
12 testimony when he testified about water availability for  
13 these mineral deposits. As I recall, he said all the  
14 mineral deposits but I believe one, and I'm not sure  
15 where that was, --

16 THE SPECIAL MASTER: Yeah.

17 MR. MEMBRINO: -- was going to be supplied by  
18 groundwater.

19 THE SPECIAL MASTER: I'm not so much concerned about  
20 the source of the mineral deposits. The Indians have,  
21 and they are going to have, continue to have an unlimited  
22 supply of groundwater and the deep water in aquifers  
23 that's there. It is on the Reservation. But what about  
24 this flow? What about the return to the surface after  
25 mineral processing and wastes? What does that do to the



1 fish and wildlife quality? That's my point. And that's  
2 not just an Indian problem, that's everybody's problem.  
3 We are polluting the fish of the earth with this problem,  
4 with toxic waste disposals, places to put the toxic waste,  
5 places -- this is the biggest, most troublesome problem  
6 in America, after inflation, and it's going to be here if  
7 not in our lifetime, pretty soon after our lifetimes. So  
8 how can you maintain the fish habitat you want in an  
9 ideal situation, the optimum to which you have testified,  
10 when you know this is going to impinge upon your area,  
11 your fisheries? That's what I would like to hear you  
12 make some comments on, if you studied it or thought it  
13 through that far. Now, if you haven't, just say so.

14 THE WITNESS: Okay, Your Honor, I have not. I'm not  
15 aware of what development they have planned for the future.  
16 That was not within my areas of expertise.

17 THE SPECIAL MASTER: Okay.

18 Q (By Mr. White) Mr. Vogel, I would direct your attention  
19 to what's already been admitted as United States Exhibit  
20 C-276 --

21 THE SPECIAL MASTER: What was that first one that  
22 you're covering up now, Jim -- Mr. Merrill?

23 MR. MERRILL: It is C-28, Your Honor.

24 MR. WHITE: I think it was admitted for illustrative

25 vogel-cross-white



1 purposes.

2 MR. MEMBRINO: Your Honor, I believe that that  
3 exhibit hasn't been offered.

4 THE SPECIAL MASTER: But has it been identified,  
5 276? Okay. Very good.

6 MR. MEMBRINO: We're not offering it now either. It  
7 is not in evidence. I'm not sure it's appropriate for  
8 it to be considered.

9 MR. WHITE: Well, I can change my question --

10 THE SPECIAL MASTER: Do you mind if he looks at it  
11 and asks a question based on it?

12 MR. MEMBRINO: I think --

13 MR. WHITE: I can change my question and solve the  
14 problem, Your Honor.

15 THE SPECIAL MASTER: I would like to say you can't,  
16 but how straight do you want to be, Mr. Membrino?

17 MR. MEMBRINO: I want him, if he's going to be  
18 asked to testify about something that's in evidence, that  
19 isn't in evidence, I think that's a serious matter. We  
20 have not offered this.

21 THE SPECIAL MASTER: All right. Do you want C-276  
22 pulled from the easel?

23 MR. MEMBRINO: If we could know what Mr. White's  
24 question is first --

25 vogel-cross-white



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THE SPECIAL MASTER: Let's take a ten-minute break  
and you find out.

Let us take a ten-minute break and you find out.

(Recess, 10:14.)

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1 THE SPECIAL MASTER: Shall we resume? Mr. White.

2 MR. WHITE: Your Honor, Mr. Membrino suggested that  
3 Exhibit C-276, the U.S. exhibit had never been in  
4 evidence; he's right, and I was wrong. I apologize to  
5 the Court and Counsel.

6 THE SPECIAL MASTER: Direct that to him, not to me.

7 MR. WHITE: The fact of the matter, however, it was  
8 used during Mr. Stetson's direct examination on Page 5224  
9 of the transcript, lines 15 through 18. Jim Clear said,  
10 "Your Honor, I have marked for identification U.S.  
11 Exhibit C-276, which we will use for illustrative purposes  
12 during the course of Mr. Stetson's testimony." And I  
13 apologize, I thought it had been admitted for illustrative  
14 purposes, but since it was used during Mr. Stetson's  
15 testimony, I'm going to ask the next question.

16 Q (By Mr. White) Mr. Vogel, I'd like you to assume that  
17 the areas in black on U.S. Exhibit C-276 amount to  
18 approximately 55,000 acres and require, of irrigated  
19 land, and irrigated diversion requirements, of approximately  
20 216,000 acre-feet.

21 THE SPECIAL MASTER: Annually?

22 MR. WHITE: Excuse me?

23 THE SPECIAL MASTER: Annually?

24 MR. WHITE: Annually.

25 vogel-cross-white



1 Q (By Mr. White) And I'd like you to further assume that  
2 those are historically irrigated lands, and ask you  
3 whether or not you took into consideration the diversion  
4 requirements for the historically irrigated lands when  
5 you adjusted your flow recommendations downward so as to  
6 not exceed natural or native flow?

7 THE SPECIAL MASTER: Native flow?

8 MR. WHITE: The Keene flow, let's call it the  
9 Keene flow or virgin flow.

10 THE WITNESS: Would you rephrase the question about  
11 adjusting my estimates downward? I lost you there.

12 Q (By Mr. White) Well, let's back up. Isn't it true that  
13 you reduced your optimum flow recommendations in some  
14 cases in order to redirect the unavailability of water,  
15 of enough water to meet the total optimum or flow for  
16 optimum habitat which you had derived?

17 A It's just a very simple point. We wanted to make sure we  
18 weren't asking for water that wasn't available in the  
19 stream.

20 Q Now, in determining the amount of water which was  
21 available, do you know whether that amount includes or  
22 excludes the amount of water that other United States  
23 witnesses have testified is required to be diverted for  
24 the service of historic lands?

25 vogel-cross-white



1 A I've done no work dealing with the supply of water for  
2 irrigation, things like this.

3 Q Isn't it true then that if the diversion requirements  
4 for historic lands were not subtracted from the virgin  
5 flow figures, which you used or the native flow figures  
6 natural, I guess that's the word you use, if those  
7 historic diversion figures were not subtracted from the  
8 virgin flow figures, that your instream flow recommendations  
9 are higher in some cases --

10 MR. MEMBRINO: Your Honor --

11 Q (By Mr. White) -- than the amount of water -- maybe I  
12 could finish my question -- than the amount of water  
13 available after diversions had been made for the benefit  
14 of those historic lands?

15 MR. SACHSE: Your Honor, I object. I've been  
16 listening to Mr. White use the term "Historic lands", and  
17 I'm aware of the rather technical definition that's been  
18 given to historic lands in this case, in that it sometimes  
19 refers to lands actually in irrigation, sometimes refers  
20 to lands that have been irrigated at some time and could  
21 be irrigated again. And Mr. Vogel has testified that he's  
22 been dealing with current situation in the streams.

23 I think for his question, for the answer to the  
24 question to have any meaning, that Mr. White had best make  
25 vogel-cross-white



1 clear to Mr. Vogel what he means when he says historic  
2 lands. Is he referring to the water being diverted right  
3 now to take care of the irrigation on the streams so that  
4 it forms part of what could be called the equilibrium of  
5 the present moment or is he talking about something to  
6 be done in the future?

7 MR. WHITE: It's a fair objection.

8 THE SPECIAL MASTER: Let me hear the question again.

9 What did you say, Mr. White?

10 MR. WHITE: It's a fair objection, Your Honor. I'll  
11 rephrase the question.

12 THE SPECIAL MASTER: I know it is, and I'm almost  
13 afraid to --

14 MR. WHITE: Because I can take it bit by bit without  
15 any problem.

16 THE SPECIAL MASTER: Why don't you do that then, save  
17 having to reread it, and then also you prefaced your  
18 questioning, you're asking for these assumptions to be  
19 made, which would remove some of your objections. It's  
20 based on assumptions, and he said, no, he did not take  
21 them into consideration. If he didn't take them into  
22 consideration, any facet of irrigation waters I doubt he  
23 took into consideration any facet of their releases back  
24 into the main stream.

25 vogel-cross-white



1                   Go ahead and take it again step by step, if you  
2                   can.

3           Q    (By Mr. White) Mr. Vogel, I'd like you to assume that  
4                   the areas blackened on Exhibit C-276 contain, but are not  
5                   limited to, what Mr. Billstein testified to were 34,427  
6                   acres of lands presently in use, unadjudicated lands in  
7                   use, and for which Mr. Stetson testified a diversion  
8                   requirement of 22,915 acre-feet would be required. In  
9                   making that assumption, I ask you whether or not you  
10                  reduced the recommended instream flows in order to insure  
11                  that those unadjudicated lands presently in use continue  
12                  to receive water diverted from the streams?

13           A    I did not reduce the figures for the reasons you described.

14           Q    I'd like you to assume that the United States has  
15                  asserted there is 17,411 acres of adjudicated lands, which  
16                  would require diversion of 97,404 acres pursuant to  
17                  Mr. Stetson's testimony, to serve them. Making those  
18                  assumptions, or based on those assumptions, have you  
19                  reduced the amounts of your recommended instream flows in  
20                  order to insure that diversions may be made in the amounts  
21                  to which Mr. Stetson testified in order to serve those  
22                  adjudicated lands?

23           A    I did not reduce my recommended flows for the reasons  
24                  you described.

25                  vogel-cross-white



1 Q Would the same answers -- or would you give the same  
2 answers if I asked you the same question about what are  
3 known as Type 7 lands, lands previously irrigated and now  
4 idle?

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- 1 Q Or do you want to have a full question?
- 2 THE SPECIAL MASTER: No, I think he understands.
- 3 A Yeah. No, I did not adjust my figures to take into  
4 account those.
- 5 Q (By Mr. White) Mr. Vogel, I would like you to assume that  
6 there has been previous testimony in this case by Dr.  
7 Mesghinna as to certain future projects which have or  
8 will have, according to Dr. Mesghinna, 53,760 acres of  
9 irrigated land requiring 209,372 acre-feet of diversions  
10 to serve them. Making that assumption, have you reduced --
- 11 THE SPECIAL MASTER: Same question.
- 12 Q (By Mr. White) -- have you reduced your instream flow  
13 recommendation by an amount which ensures that the diver-  
14 sions for those future projects may be made?
- 15 A No, I have no idea what the effects on my recommendations  
16 would be with those future developments.
- 17 Q Now, let's go back to watershed equilibrium for a moment,  
18 and let me ask you whether you took into consideration  
19 the irrigation activities on either the historic lands  
20 we have referred to or the future projects that I have  
21 previously referred to in determining whether or not the  
22 watershed was or will be in equilibrium?
- 23 A As I stated earlier, as far as it related to my study, I  
24 considered the watershed in equilibrium in relation to  
25 vogel - cross - white



1 what the fish was -- the fish environment in the stream at  
2 the present time -- at the present time, meaning within  
3 the last several years. I did not take into consideration  
4 future development. That's far beyond my capacity to know  
5 what would be development on the Reservation.

6 Q Mr. Vogel, in developing your recommended flows, what  
7 species preference values did you use; in general, where  
8 did they come from?

9 A Oh, they came from the Instream Flow Group's Fishfil,  
10 that's spelled F-i-s-h-f-i-l, program part of the PHABSIM  
11 developed from the Incremental Methodology.

12 Q And that was rainbows, browns and brookies?

13 A Right. And I believe there was at least one case I used  
14 cutthroat also.

15 Q With respect to rainbow habitat preference information, you  
16 used, isn't it true that none of that habitat preference  
17 information was developed in either Wyoming or the Wind  
18 River Basin?

19 MR. WHITE: I think I've got what you're looking for.  
20 Let me have a little pause here, Your Honor, and I'll --

21 Q In order to assist you in the answer to that question,  
22 Dave, I hand you what has been marked for identification  
23 as Plaintiff's Exhibit FISH-4 and ask you if you can  
24 identify that, and use it to answer the question?

25 vogel - cross - white





1 A This is an instream flow -- excuse me, this is Instream  
2 Flow Information Paper No. 4, entitled "Probability of Use  
3 Criteria for the Family Salmonidae", written by the Co-  
4 operative Instream Flow Service Group in Fort Collins,  
5 Colorado.

6 Q By use of Exhibit FISH-4, are you able to determine by  
7 referring to Page 35, as well as the references, the  
8 source of the habitat preference data which you used?

9 A Yes, I believe I can.

10 Q Isn't it true that the values for the velocities, depth  
11 and substrate which you used for rainbow adults is based  
12 on unpublished data from Oregon and unpublished data from  
13 Washington?

14 A That's correct.

15 Q Isn't it true that by referring to Page 57 of Exhibit  
16 FISH-4, as well as the references, the data or habitat --  
17 excuse me, the species preference data which you used for  
18 brown trout adults is unpublished data from Idaho and  
19 Utah?

20 A That's true. And I would add one more to your list.

21 Q Okay.

22 A It's some information that was developed by the project  
23 leader or my boss at the Lander U.S. Fish and Wildlife  
24 Service Station.

25 vogel - cross - white



- 1 Q But not in the Wind River Basin, is that correct?
- 2 A That's correct.
- 3 Q Isn't it true by reference to Page 68 of Exhibit FISH-4,  
4 as well as the references in that exhibit, that the species  
5 preference data which you used for brook trout were derived  
6 from Idaho and Colorado?
- 7 A I believe that's correct.
- 8 Q Isn't it true that by reference to Page 24 of Exhibit FISH-  
9 4, the species preference data which you used for cut-  
10 throat adults came from Oregon?
- 11 A Yes.
- 12 Q Isn't it true that the Instream Flow Group evaluates the  
13 quality of the data that you used and isn't it true that  
14 the Instream Flow Group or IFG evaluations run from  
15 excellent down through good, fair and reconnaissance grade?
- 16 A That's correct.
- 17 Q Isn't it true that none of the data which you used was  
18 evaluated as excellent?
- 19 A No, that's not true.
- 20 Q Okay, which ones were evaluated as excellent?
- 21 A Brown trout adults, the evaluations for their preference  
22 for substrate.
- 23 Q You are right. I apologize.
- 24 Isn't it true that, with that exception, none of them  
25 vogel - cross - white



1 were classified as being excellent?

2 A. Yes.

3 Q. Isn't it true that the remainder of the brown trout data  
4 upon which you relied was classified as being good?

5 A. Yes.

6 Q. Isn't it true that both the rainbow and cutthroat data  
7 that you relied upon was classified or evaluated as being  
8 of fair quality?

9 A. Yes.

10 Q. And isn't it true that the brook trout information upon  
11 which you relied was classified as being reconnaissance  
12 grade?

13 A. Yes.

14 Q. Mr. Vogel, did you -- excuse me. Isn't it true that you  
15 did not use temperature as a variable along with the  
16 velocity, depth and substrate in your analysis?

17 A. That's correct. I would like to say though I thought you  
18 were going to continue the same line of questioning on  
19 these curves. I would like to point out in that my study,  
20 rainbow trout and brown trout were the two species upon  
21 which I based my recommendations. You mentioned the use  
22 of cutthroat trout and brook trout. I simply examined  
23 them for use in the study. I didn't necessarily base my  
24 recommendations on their curves.

25 vogel - cross - white



1 Q Okay.

2 A I'll further point out that the IFG in so rating these

3 curves is doing so to call attention to the investigator

4 that excellent is based on the absolute best available

5 data. Good in their rating is -- it is good data, it is

6 powerful data. It can be used. If it's fair, that's an

7 indication to the researcher to research. He should

8 examine his curves and make sure it applies to his

9 situation. It doesn't necessarily mean it is bad data.

10 I did so by consultation with my boss, the Fish and Wild-

11 life management biologist in Lander. And, in his opinion,

12 these curves for rainbow trout and brown trout were per-

13 fectly applicable to the reaches that we used with the

14 exception of the Big Wind River. Now, the IFG also makes

15 the stipulation that if the investigator has reason to

16 believe that his preference curves that he wants to use

17 in analyzing his data may be different, he should make an

18 adjustment to those curves to reflect that difference.

19 I did so for the -- those curves of the Big Wind River.

20 Q Isn't it true that the Instream Flow Group does not sup-

21 port the data that's contained in fishfil that you used?

22 A Does not support in which way?

23

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vogel - cross - white



1 Q (By Mr. White) Well, isn't it true that when you used  
2 FISHFIL, you were required, or understood, at least,  
3 that the instream flow group curves are based upon data  
4 obtained from the literature and various other sources  
5 and thus are not supported by the Instream Flow Group?

6 A. What you're referring to is the -- they tell the  
7 investigators, as I've previously stated, not to accept  
8 the curves basically as gospel, he should be aware of  
9 the fact how these curves were developed and if they  
10 applied to this situation. It would be hard for any-  
11 body to lay out the facts and say this is the way  
12 nature exists, and we know that a hundred percent  
13 positively.

14 They're simply passing on to the investigator  
15 and saying be aware of these curves. This information  
16 is available for your use, but prior to your use, make  
17 sure it applies in your situation.

18 Q When you determined that these curves applied in your  
19 situation, what sort of investigation or study did you  
20 do, such as that which was described in the slide show,  
21 to insure that these curves or species preference infor-  
22 mation were applicable to the various claim reaches  
23 upon which you testified?

24 A. I relied on the opinions of other personnel in my field  
25 vogel-cross-white



1 such as -- more specifically, my project or the project  
2 leader at Lander, my boss, Dick Baldes.

3 I also got the opinion from Ken Bovee, who helped  
4 develop these curves. In his opinion -- he's also a  
5 Wyoming native in that area. In his opinion the only  
6 curves that may have been of concern are the cutthroat  
7 trout in that area. As far as rainbows and browns and  
8 in some of the tributaries in the Big Wind, I also  
9 thought they would be satisfactory.

10 Q Do you know what investigations Mr. Baldes made in  
11 determining whether or not the preference information  
12 in FISHFILE or FISHFIL was applicable to the Wind  
13 River or any of the reaches which you have studied?

14 A No.

15 Q Are you sure that Mr. Bovee is a Wyoming native?

16 A I believe he's lived in Wyoming for a substantial  
17 number of years.

18 Q He's not from Montana?

19 A He lived in Montana at one time. I understand he went  
20 to school there. I believe his parents or mother and  
21 father still have a farm up by Cody.

22 Q Well, let's go to temperature, where we are headed.

23 Is it true that you didn't use temperature as  
24 a variable in your study?

25 vogel-cross-white



1 THE SPECIAL MASTER: He's answered that.

2 MR. WHITE: I'm sorry, I didn't realize he'd  
3 answered that.

4 Q (By Mr. White) Would you turn to Page 7 of your report,  
5 Exhibit C-280.

6  
7 A. Okay.

8 Q You show no temperature preference curve there for rainbow  
9 adults; is that correct?

10 A. That's correct.

11 Q And you indicate that the source of Page 7 is Bovee, 1978?

12 A. That's correct.

13 Q Isn't Bovee, 1978 also what's been identified as Plaintiff's  
14 Exhibit FISH-4?

15 A. Yes.

16 Q Would you please turn to Page 37 of FISH-4?

17 A. Okay.

18 Q Isn't it true that the page from FISH-4 for which the  
19 velocity, depth and substrate graphs appear, your Page  
20 7 in your report, actually has four graphs including  
21 temperature?

22 A. That's correct.

23 Q If you had species preference data for temperature, why  
24 didn't you use it?

25 A. First of all, at the time of the study, I did not  
vogel-cross-white



1 believe temperature would be a limiting factor to the  
2 trout on the reservation. As you're aware, the tribu-  
3 taries and Wind River itself lie in the valley of the  
4 foothills of two mountain ranges. Those species are  
5 presently existing there now, and I didn't believe it  
6 would be a concern.

7 Q Isn't it a fair assumption that temperatures over  
8 roughly eighty degrees are not, or water temperatures  
9 over eighty degrees are not particular hospitable for  
10 the trout species which you've investigated?

11 A. Yes.

12 Q Did you do any temperature sampling particularly in  
13 the lower reaches of the Wind above Boysen to determine  
14 actual water temperature?

15 (Brief pause.)

16 MR. MEMBRINO: Your Honor, may I object to the  
17 question, in that Mr. White's description of the Wind  
18 River above Boysen River --

19 THE SPECIAL MASTER: Boysen Reservoir.

20 MR. MEMBRINO: -- Boysen Reservoir is an awfully  
21 long stretch, the sum of which was shown on Exhibit  
22 281 as being within the study conducted by Mr. Vogel.

23 THE SPECIAL MASTER: Yes, you may object, but no,  
24 I wouldn't sustain it because I think he can qualify

25 vogel-cross-white





1 what he's going to answer. If he's going to talk about  
2 the stretch that's shown back to the back water of  
3 the dam, fine. If he's going up, he's going to  
4 qualify whether he's going up to the Popo Agie or  
5 the Little Wind, what he's going to do, if he used  
6 temperature, if that's his question.

7 THE WITNESS: No, I did not use temperature.

8 Q (By Mr. White) You did not sample temperature?

9 A Did not sample temperature.

10 Q Do you know what happens to the temperature of water  
11 in the stream when the amount of that stream's flow  
12 is reduced by diversions, say for irrigation purposes?

13 A It depends on the quantity, time of year, time of day,  
14 things such as this.

15 Q But it may well affect the temperature; isn't that correct?

16 A Yes, it could affect temperature.

17 Q Do you know if there's any effect on temperature of  
18 the water in the stream by return flows from irrigated  
19 land?

20 A I've done no studies dealing with that.

21 Q Do you know that as a general matter or you've just  
22 done no studies?

23 A I've never --

24 Q You don't know.

25 vogel-cross-white



1 A. -- done studies relating to that subject.

2 Q. Then it must be true that you've made no analysis of the  
3 effect on temperature on the historic and future irri-  
4 gation development which we've previously discussed?

5 A. That's correct.

6 MR. WHITE: Excuse me for a minute, Your Honor,  
7 I'm looking for my next --

8 THE SPECIAL MASTER: All right.

9 (Brief pause.

10 THE SPECIAL MASTER: Shall we go on through, ladies  
11 and gentlemen, till about 11:45 and then quit without a  
12 break? Anybody want a break?

13 Okay, let's go through.

14 MR. WHITE: That's fine with me, Your Honor.

15 (Brief pause.

16 Q. (By Mr. White) Mr. Vogel, how many of your claim reaches  
17 were analyzed by the use of IFG-2? I don't need the names,  
18 I just need the number, and I believe it's ten.

19 A. I'll double check that.

20 Q. Maybe it's eleven.

21 THE SPECIAL MASTER: Ten out of sixteen, total?

22 MR. WHITE: Maybe it's eleven. I've just quickly  
23 looked through.

24 THE WITNESS: I used IFG-2 on eleven reaches.

25 vogel-cross-white



1 Q (By Mr. White) Would you turn to Page 22 of Exhibit  
2 FISH-1A, which is the script of the slide show.

3 A. Okay.

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1 Q And I refer you to the narrative beside slide Number 70  
2 which reads: "The IFG-2 version of the water surface  
3 profile subprogram can be used with very limited data  
4 for reconnaissance or area wide planning studies". Do you  
5 see that there?

6 A Yes.

7 Q Isn't it true then that the program or methodology which  
8 you used for 11 of your 16 claim reaches can be used not  
9 for the type of purposes associated with IFG-4 but for  
10 reconnaissance and area wide planning purposes or studies?

11 A First of all, I have to know who wrote that statement.  
12 I looked at who wrote the script on this and it was --  
13 it said the script writing directed and edited by Jeannine  
14 Kline and Barry Koob, K-o-o-b. I'm not aware of who  
15 these people are. I don't know, it is one single  
16 statement. To give a proper answer to that I would have  
17 to know more about what it is referring to.

18 Q It is true, however, that you are an employee of the  
19 Fish and Wildlife Service of the U.S. Department of  
20 Interior, isn't it?

21 A That's correct.

22 Q And isn't it true that this document was published by  
23 that agency?

24 A Yes.

25 vogel-cross-white



1 Q And isn't it true that this document is a Guide to the  
2 Use and Operation of the Incremental Approach to the  
3 Study of Instream Flows?

4 A Please restate that.

5 Q Isn't it true that this document is a Guide to the Use and  
6 Operation -- well, of an 18-minute slide-tape overview of  
7 the Instream Flow Incremental Methodology?

8 A Yes, it is simply that, a guide to the use of an 18-minute  
9 overview of the Instream Flow Incremental Methodology.

10 Q Do you know why your agency would publish a document that  
11 indicates that IFG-2 is used for reconnaissance or area wide  
12 planning studies if that were not in fact true?

13 A Again, that's a limited statement. I would have to know  
14 more about the context it's used in.

15 Q Do you know, or are you aware of any other documentary  
16 sources discussing IFG-2, which indicates that it may be  
17 used, reliably used for more detailed purposes aside from  
18 reconnaissance or area wide planning studies?

19 A I was trained and taught through the personnel of the  
20 Instream Flow Group in Fort Collins, who developed the  
21 Incremental Methodology, that it could be used for  
22 situations such as I have used it on the Reservation.

23 THE SPECIAL MASTER: Mr. White.

24 MR. WHITE: Yes, sir.

25 vogel-cross-white



1 THE SPECIAL MASTER: Does this statement carry an  
2 ambivalence in it? I read and what I read is "The IFG-2  
3 version of the water surface profile program can be used  
4 with very limited field data for reconnaissance or area  
5 wide planning."

6 MR. WHITE: Uh-huh.

7 THE SPECIAL MASTER: It doesn't limit its use to  
8 those two things only.

9 MR. WHITE: It doesn't expand it either.

10 THE SPECIAL MASTER: No, it doesn't. But, I was  
11 wanting to make sure we were reading what we were reading.

12 Q (By Mr. White) Mr. Vogel, when did you take the course  
13 from the Instream Flow Group?

14 A Which course?

15 Q The course to which you just referred?

16 A I took two courses. The formal courses were taught in  
17 approximately March of 1979 and October of 1979, I believe.

18 Q Isn't it true that the document which has been marked  
19 FISH-1-A is dated September, 1980?

20 A Yes.

21 MR. WHITE: Seeing the exhibit, Your Honor, you may  
22 very well guess what the next few moments will be about.

23 Q (By Mr. White) Mr. Vogel, I direct your attention to  
24 what's been marked for identification as Plaintiff's

25 vogel-cross-white



1 Exhibit WRIR FISH-M-1-A, which is an acetate overlay --

2 THE SPECIAL MASTER: Oh, oh.

3 Q (By Mr. White) -- of what has been admitted as Tribes'  
4 Exhibit M-1 and, I first ask you whether or not the  
5 annotations on the overlay illustrate, it may not be  
6 precisely correct, but generally illustrate the claim  
7 reaches, the numbers of those reaches and the study areas  
8 or study stretches, which are also reflected on what has  
9 been admitted as U.S. Exhibit C-281?

10 MR. WHITE: I'm sorry. I was trying to let him see  
11 both of them, Your Honor.

12 Excuse me. Dave, let me move this for a second to  
13 make it a little steadier, if I don't break the Master's  
14 tripod.

15 A Okay. What was the question again?

16 Q (By Mr. White) Does the acetate overlay, which has been  
17 marked as FISH-M-1-A, generally illustrate the reaches,  
18 numbers and study sites shown on what has been admitted  
19 for illustrative purposes as U.S. Exhibit C-281?

20 A Yes, I believe it does.

21 Q Mr. Vogel, was it your intention to develop flow  
22 recommendations for the benefit of trust lands within  
23 the Indian Reservation?

24 A I'm not sure I understand your question.

25 vogel-cross-white



1 Q Do you know what the term trust land means?

2 A No.

3 THE SPECIAL MASTER: I'm surprised I allowed the  
4 question, but go ahead.

5 MR. WHITE: I am too. Especially when you looked  
6 around like that.

7 A No. Would you please explain to me what trust lands are?

8 THE SPECIAL MASTER: All right. He needn't do that.  
9 Just go ahead and ask the question without throwing a  
10 curve.

11 MR. WHITE: I didn't mean to throw a curve, Your  
12 Honor.

13 THE SPECIAL MASTER: I know that.

14 Q (By Mr. White) Let's try it a different way: Did you  
15 intend to develop instream flow recommendations for the  
16 benefit of privately owned fee lands within the exterior  
17 boundaries of the Wind River Indian Reservation?

18 MR. SACHSE: I object to the question, Your Honor,  
19 on the grounds that the witness --

20 THE SPECIAL MASTER: Objection sustained. You  
21 may ask him what was the purpose of his work. I'm not  
22 aware that developing and requiring a minimum flow was  
23 accomplished for any particular land pattern or identity  
24 of land, or anything to do with land. If it did, then

25 vogel-cross-white





1 the witness may say so.

2 MR. WHITE: It has a lot to do with the admissibility  
3 of evidence though, Your Honor.

4 THE SPECIAL MASTER: I know. You can bring out what  
5 you wish, Mr. White. I think I touched on this myself  
6 yesterday with the fee ownership touching the banks of  
7 these areas, the fee lands within the Reservation, the  
8 uses to be put by people on the fisheries. So go ahead.

9 Q (By Mr. White) Isn't it true that in approximately the  
10 middle of Reach No. 7, if, assuming that red land on  
11 Exhibit M-1 is private land, that roughly two or more  
12 river miles of that stretch have on one side, lands  
13 outside of the Indian Reservation, and on the other side,  
14 fee or privately owned lands?

15 MR. SACHSE: I object --

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

17 THE SPECIAL MASTER: Now, we are in chorus and in  
18 unison.

19 MR. SACHSE: -- to this question on the basis that  
20 the witness has already testified that both his expertise  
21 and the purpose of his study was to make recommendations  
22 about how much water should be in which streams, to have  
23 reasonably better or optimum fish life. It has nothing  
24 to do with the ownership of land. The fish swims the same

25 vogel-cross-white



1 way whether fee land adjacent to it belongs to an  
2 Indian or a non-Indian or the United States.

3 MR. WHITE: Let me respond, if I might, Your Honor.

4 THE SPECIAL MASTER: I'll sustain it.

5 Go ahead, Mr. White.

6 MR. WHITE: It has everything to do with it, because  
7 what's happening here is: Let's take Reach No. 7,  
8 for example. Right in the middle of it and again up at  
9 the top for about another mile and a half of stream, there  
10 is private land or nontrust land on both sides of the bank.  
11 And what's being asserted here is an instream flow for  
12 a reach, the majority of which is bounded on both sides  
13 by other than trust lands. Less than half of it --

14 THE SPECIAL MASTER: That's right, Mr. White, and  
15 that's why I asked my questions yesterday. I'll take  
16 judicial notice of that. But, it is also why I asked  
17 questions really about: Is the duty really on the Tribes  
18 to assure that there is a minimum -- an optimum stream  
19 flow for fisheries? Is it the duty of the State of  
20 Wyoming? Can we be turning this around and arguing the  
21 other side of this same point: Is the duty on the United  
22 States or is the duty on all of us to make sure that there  
23 is an optimum flow there? And I don't think we can  
24 separate our respective interests in seeing that the fish  
25 vogel-cross-white



1 life of that Reservation be maintained, and it is a duty  
2 not -- just on all of us. So, I don't know. I can't  
3 really believe you wanted to strike any of his testimony  
4 based upon the fact there is that fee land there. But  
5 you may want to impose the duty upon others to make sure  
6 that flow is there.

7 MR. WHITE: But, Your Honor --

8 MR. SACHSE: Your Honor; --

9 MR. WHITE: Let me complete my statement --

10 THE SPECIAL MASTER: Let him complete his statement  
11 then, Mr. Sachse --

12 MR. SACHSE: I thought you already sustained the  
13 objection?

14 THE SPECIAL MASTER: I have sustained the objection,  
15 but let him make his offer of proof. That's what he  
16 wanted to do.

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1 MR. WHITE: Well, I want to continue with my  
2 explanation, Your Honor, and the explanation is that  
3 in stretch Number 7. for example, the claim is being made  
4 for over half of stretch Number 7, not for the benefit  
5 of trust lands, but for the benefit of fee lands. Now,  
6 this is --

7 THE SPECIAL MASTER: Mr. White, it's not for the  
8 benefit of any land, it's for the benefit of people.

9 MR. WHITE: Let me continue.

10 THE SPECIAL MASTER: Who's to fish and know the  
11 joy of fishing, the quality of life which we're losing  
12 in America. That's what it's for. I don't care who  
13 owns the land on either side.

14 MR. MEMBRINO: Furthermore --

15 MR. WHITE: Let me ask you this: If you own a large  
16 block of land under Number 7 --

17 THE SPECIAL MASTER: Which I wish I did.

18 MR. WHITE: We all do. And if you had an irrigation  
19 water right under state law for that land with a 1910  
20 priority date, and if an in-stream flow is imposed on the  
21 water, on the stream going by your land with an 1868  
22 priority date, then your perception might be a little bit  
23 different simply because in order to maintain that stream  
24 flow which the United States is asking you to decree for  
25 the stream that goes past your land, in order to maintain



1 that flow, you may not -- will not be able to divert in  
2 priority. And that's the point of this general area of  
3 inquiry, is that the United States is here claiming in-  
4 stream flows for areas or stretches of river which they  
5 have no trust ownership of, they're imposing an instream  
6 flow on people who do not appear nor consent to the  
7 imposition of that instream flow.

8 THE SPECIAL MASTER: All right.

9 MR. WHITE: And as a result I think it's perfectly  
10 appropriate.

11 THE SPECIAL MASTER: Mr. White, you can make that  
12 objection to the claim when your case comes up and your  
13 segment of the case deals with fisheries. I think you  
14 pursued this with this witness on his direct case and the  
15 evidence.

16 MR. WHITE: Your Honor, I'd like to make an offer of  
17 proof.

18 THE SPECIAL MASTER: All right, please do. I want  
19 you to do so, but you, before you do, I want to state  
20 that the owners of the fee land, whether they're Indian  
21 or nonIndian --

22 MR. MEMBRINO: Your Honor --

23 THE SPECIAL MASTER: -- must recognize that main-  
24 tenance of a fish habitat that may border their land, shall  
25 have a value that may be far in excess to them of the value



1 of a short water year every eight or ten years, because  
2 the 1910 right might have to have some diminution in  
3 order to sustain a fish life on the banks of their  
4 property. I'm not sure they're being damaged at all. I  
5 think you balance in some equities --

6 MR. WHITE: I hope you'd reserve ruling on that.

7 THE SPECIAL MASTER: -- on the land, but we'll get  
8 to that when you bring your case on.

9 MR. WHITE: I hope you reserve on the question of  
10 impact, Your Honor, because --

11 THE SPECIAL MASTER: That comes later in the case.

12 Mr. Membrino.

13 MR. MEMBRINO: I'd like to understand a little bit  
14 more clearly the grounds on -- My point is this --

15 THE SPECIAL MASTER: You want to wait for the offer  
16 of proof to hear what he has to say before you make that?

17 MR. MEMBRINO: I would like to get it in before the  
18 offer of proof.

19 THE SPECIAL MASTER: All right, go ahead.

20 MR. MEMBRINO: First of all, Mr. White seems to be  
21 arguing under some fierce riparian right related to water  
22 which is novel in the State of Wyoming.

23 Second, what we're talking about is a tribal resource  
24 which we believe is entitled to a water right for its  
25 maintenance. That is a fishery resource within the



1 boundaries of the Reservation, and it's irrelevant --  
2 it's irrelevant to know whether or not the land is  
3 abutted by private or other land. This is a Reservation,  
4 this is an Indian Reservation, the Reservation of fish  
5 resource has not been alienated, not been affected by any  
6 legislation or any other act of Congress that we know of,  
7 so Mr. White's inquiry in this regard is irrelevant for  
8 that reason.

9 THE SPECIAL MASTER: Make your offer, Mr. White.

10 MR. WHITE: Thank you, Your Honor. Your Honor, if  
11 allowed to continue with the inquiry begun with Mr. Vogel,  
12 the State would develop the following evidence as  
13 testified to by -- or as would be testified to by Mr.  
14 Vogel: That within the claim reaches shown by Numbers 1  
15 through 16, I believe, on Exhibit, U.S..C-281, there are  
16 a total of over 42 miles, river miles of claim reaches  
17 which have nontrust land, be it fee or government owned  
18 or outside the Reservation, on both sides of the stream.  
19 With respect to Reach Number 1, two and a half miles;  
20 Number 2, 4.4 miles; Number 3, 2.5 miles; Number 4, 4.8  
21 miles; Number 5, 3.3. miles; Number 6, a quarter of a mile;  
22 seven --

23 THE SPECIAL MASTER: A mile?

24 MR. WHITE: Three miles, 3.1 miles; 8, none; 9, 1.5  
25 miles; 10, 1.6 miles; 11, none; 12, 4.6 miles; 13, 9 miles;



1 14, 4.4. miles; 15, a quarter of a mile and 16, none.

2 That concludes the offer of proof, and I might also --  
3 Well, we'll address those in our brief, Your Honor.

4 Could I have just a moment to find my next area?

5 THE SPECIAL MASTER: You bet.

6 (Brief pause.

7 THE SPECIAL MASTER: This is an excellent  
8 observation Mr. Salazar has made. Read it in the record  
9 just the way you asked it to me, Mr. Salazar.

10 MR. SALAZAR: My query was if the State contends  
11 that it does not represent the private landowners in this  
12 case and if this line of questioning only concerns cases  
13 where privately held land or nontrust lands abutts the  
14 river, does the State even have standing to raise that  
15 argument unless they can prove that they own that land?

16 MR. WHITE: Of course it has standing, it has  
17 standing to attack any aspect of the federal claim, that's  
18 the very nature of a general adjudication. Everybody  
19 gets in there, interesse, as the Courts say, and battles  
20 it out. The only -- There's only one rule of standing  
21 in a general adjudication where you have priorities  
22 involved, appropriative rights, and that is a question  
23 of relative priorities in a general adjudication where  
24 the senior most or the priority being sought is the --  
25 purported to be the most senior priority of the stream,





1 everybody has a standing. And finally, it's not the  
2 burden of the State of Wyoming to show whether or not  
3 the claims of the United States can be supported, it's  
4 the burden of the United States to show that their claims  
5 are appropriate. And simply because, because of that,  
6 the State is entitled to raise any issue which affects  
7 the validity or the prima facie nature of the United  
8 States' claim. If the United States came into this  
9 adjudication totally unopposed, I mean there wasn't a sole  
10 here to oppose them, then these very questions would be  
11 appropriate to be asked by the Court, and if the Court  
12 can ask them, so can any other party to a general  
13 adjudication.

14 THE SPECIAL MASTER: Mr. White, I think your having  
15 touched this subject matter this morning sustains my  
16 ruling last night to Mr. Radosevich; there is no need for  
17 any published notices no place to nobody owning land --  
18 pardon my English, let's clean that up. There is no  
19 need for any notice in the newspaper around the  
20 Reservation to alert fee owners of land within the  
21 Reservation that their rights aren't being pursued in  
22 this litigation, and on that little self-flattering --  
23 on that note, let's just end up and go to lunch and be  
24 back at one thirty.

25 MR. WHITE: Okay, Your Honor.



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(Thereupon a lunch recess  
 (was taken at 11:30 a.m.  
 (and the proceedings  
 (reconvened at 1:30 p.m.

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