

1 CHEYENNE RIVER SIOUX TRIBAL COURT
2 CHEYENNE RIVER SIOUX TRIBE
3 CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT

4 * * * * *

5 LONG FAMILY LAND AND CATTLE
6 COMPANY, INC.-RONNIE AND LILA LONG,

Plaintiffs,

JURY TRIAL
R-120-99

-vs-

7 EDWARD AND MARY MACIEJEWSKI
8 and RALPH H. AND NORMA J. PESICKA,
9 and THE BANK OF HOVEN,

VOLUME III OF III
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Defendants.

10 * * * * *

11 TIME AND PLACE: DECEMBER 11, 2002
12 CHEYENNE RIVER SIOUX TRIBAL COURT
13 EAGLE BUTTE, SD 57625

14 BEFORE: HON. B. J. JONES
15 SISSETON-WAHPETON SIOUX TRIBAL COURT
16 P.O. BOX 568
17 AGENCY VILLAGE, SD 57262-0568

18 APPEARANCES: MR. JAMES P. HURLEY
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ALSO PRESENT: MR. AND MRS. RONNIE LONG - PLAINTIFFS
MR. CHUCK SIMON - EXECUTIVE VICE PRESIDENT
OF DEFENDANT BANK OF HOVEN

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1 (THE FOLLOWING PROCEEDINGS ARE A
2 CONTINUATION FROM VOLUME II OF III:

3 THE COURT: All right. We're back from the break. The
4 jurors have left the room, and I believe plaintiff rested.
5 Does the defendant have any motions to make?

6 MR. VON WALD: We do, Your Honor. We would make a motion for a
7 directed verdict on a number of accounts. Basically, what
8 it appears to me that this is simply a breach of contract
9 action --

10 THE COURT: And let's go to Count I. Fraud and deceit.

11 MR. VON WALD: Fraud and deceit, Your Honor --

12 THE COURT: What's the alleged fraud? I mean the way you've
13 got it alleged is fraud in the inducement of that deed,
14 but Ronnie Long didn't -- did not even execute a deed. So
15 what fraud are you alleging that you've shown a prima
16 facie case of?

17 MR. HURLEY: Under the statute, the -- one of the cases for
18 fraud -- prima facie fraud is making a promise with no
19 intent to perform. And where the promissor has the
20 ability to perform and does not, the case law says the
21 inference rises that there was no intent to perform. Here
22 we had the Bank promising the loans with the ability to
23 perform, simply write a check, and did not do so.

24 THE COURT: What was your proof that the Bank entered into
25 this agreement with the Longs with the intent not to

1 perform? Because that's encompassed in a breach of
2 contract. I mean under that theory every breach of
3 contract is fraud, right? Are you saying --

4 MR. HURLEY: It could also mean --

5 THE COURT: -- the fact that the new cash flows were
6 submitted in December is proof of the fraud?

7 MR. HURLEY: No.

8 THE COURT: Then what's the proof of the fraud?

9 MR. HURLEY: I believe the fraud is in the promise made with
10 no intention of performing, which as the Court said is
11 also -- well, it isn't the same exactly when you read the
12 cases through, but it's close. The breach of contract is
13 the fact that a promise was made and not performed on,
14 as -- as promised.

15 THE COURT: But if you read your count, and I realize we've
16 already dealt with this somewhat -- the fraud is your
17 allegation that the Bank got a deed to this land in the
18 estate with no intention whatsoever to perform under the
19 contract, but the deed to the -- to the Bank is totally
20 separate from this particular action. Your client didn't
21 deed this. Your client never owned this particular land.
22 Correct? So how can you state a claim for fraud that the
23 Bank defrauded him into signing a deed over when he never
24 had -- he never had the property to deed over? That's
25 my -- because that's the way you alleged this in Count I.

1 MR. HURLEY: There are two parts to the question. The first
2 is whether or not Ronnie Long had any rights to the
3 property, and that comes from the fact that his father
4 willed to him as well as his shares in the company. But
5 as to the land itself out from under the will he had the
6 right to receive the property.

7 Then this proposal is made deeding the foreclosure,
8 and that is followed through in the letters and so forth,
9 and the agreement was made to do that, where the Bank
10 received the deed. So he would have rights under the
11 contract, that for the two-year period the Bank certainly
12 was not free to sell the land. Because if he was able to
13 perform to buy it back, the land would have to be there
14 for him to buy back. So those two rights he has in the
15 land. One is the rights that he received from his father
16 under the will. He owns the land. Number two, under this
17 agreement, it was transferred to the Bank, and then arose
18 the second right, and that's a contract right to buy it
19 back.

20 THE COURT: I don't see that. In fact, I don't even see what
21 consideration he gave for this contract. He had no real
22 right to this land, and so I'm -- I'm going to dismiss
23 Count I in the Complaint, fraud and deceit.

24 Count II, that's going we're -- that's going to the
25 jury. Count III. I've got the same concern. What's

1 the -- failure of consideration was that he didn't perform
2 under the contract, right?

3 MR. HURLEY: Yes. Correct.

4 THE COURT: That's breach of contract. Isn't that
5 duplicating Count II?

6 MR. HURLEY: In that sense it is.

7 THE COURT: Okay. Well, we'll dismiss Count III.

8 MR. HURLEY: What was the Court considering as Count II, Your
9 Honor?

10 THE COURT: Count II breach of contract, that will go to the
11 jury. Count IV, contract and deed are void. All right.
12 I think that's -- we've already addressed that. I can't
13 void the deed because the State -- the Circuit Court has
14 already approved of the deed. The contract is void. I
15 think Ronnie himself said he thought it was a good
16 contract, so --

17 MR. HURLEY: Going in, yes.

18 THE COURT: Yeah. So, void, you look at going in, whether it
19 was void, and I don't see any evidence of that. So Count
20 IV will be dismissed.

21 Count V is going to the jury. I looked at the Code.
22 The Code does say you cannot use self-help in evicting.
23 And that is a constructive eviction selling the land, so
24 Count V will -- Count VII will go to the jury.

25 Count VI discrimination -- yeah, Count VI,

1 discrimination. I -- I think I'm going to let that go to
2 the jury. Primarily, because of the exhibit where the
3 Bank said we're not going to sign a contract for deed
4 because you are a tribal member subject to tribal
5 jurisdiction.

6 MR. VON WALD: I would just make a short argument, Your Honor.
7 Nevada v. Hicks I believe is -- is the Supreme Court case
8 that -- that basically said in that case it was
9 (INAUDIBLE) 1983 was the federal law that was violated.
10 Here there is a federal law that would be violated if it
11 is indeed discrimination. But that's reserved for federal
12 and state courts. That's what Nevada v. Hicks said, and
13 it -- and it said that a Tribal Court's jurisdiction is a
14 jurisdiction -- is not a general court of general
15 jurisdiction but specific statutory jurisdiction, and I
16 don't believe that that was given to Tribal Court but any
17 federal court.

18 THE COURT: So your argument is then that this Court has no
19 authority to enforce discrimination laws? And I guess the
20 discrimination law you are alleging was violated was in
21 private lending?

22 MR. HURLEY: Yes.

23 THE COURT: Which is what? It's not 1983.

24 MR. VON WALD: No. No.

25 THE COURT: Because that has stayed active. This is a

1 private --

2 MR. VON WALD: It is.

3 THE COURT: I assume there is a federal law.

4 MR. VON WALD: There is another federal law that covers that,
5 and I did not look that up. But -- but basically, Nevada
6 v. Hicks stands for the -- there is a discrimination
7 action period for the -- through federal law, period. And
8 I don't have the Code --

9 THE COURT: Is it Title 7? That's discrimination in private
10 lending.

11 MR. VON WALD: I (INAUDIBLE) think it is.

12 THE COURT: Well, I think we have authority to enforce
13 federal laws. The reason Nevada v. Hicks is because we
14 don't have jurisdiction over state actors, state entities,
15 counties entities; but the Tribe has jurisdiction over
16 private entities that engage in commerce with tribal
17 members.

18 MR. VON WALD: Okay.

19 THE COURT: So I'm going to rule that -- and primarily based
20 on that letter, the mere fact that the Bank subsequently
21 sold this land to non-Indians for a lesser -- well -- or
22 did a contract for deed with a non-Indian or sold it for
23 less per acre to the non-Indian, in my mind is a prima
24 facie evidence of discrimination. They could have been
25 situated differently than Mr. Long and his corporation,

1 but when you've got a letter from the Bank that says we --
2 we can't do a contract for deed with you --

3 MR. VON WALD: Or a lease.

4 THE COURT: -- because you're an Indian, subject to tribal
5 jurisdiction, but the Bank would do a contract for deed
6 with a non-Indian, I think that's a prima facie case.
7 That should go to the jury. So . . .

8 MR. VON WALD: And the letter did say a contract or a lease and
9 they actually did make a lease to Mr. Long. They didn't
10 make a contract for purchase, but they did make a lease.

11 THE COURT: Well, I'm talking about the letter that said the
12 contract for deed was not possible because --

13 MR. VON WALD: Yeah.

14 THE COURT: -- because of the tribal jurisdiction.

15 MR. HURLEY: I think that's Exhibit 4.

16 THE COURT: So we've got three counts that can go to the
17 jury. Bad faith. Are you making a motion to dismiss
18 that?

19 MR. VON WALD: I am, Your Honor. There again with a bad faith,
20 every contract requires good faith, and the bad faith is a
21 tort action, and a tort action is something that would --
22 would take more than what the prima facie case that the
23 plaintiff has set forth. What he is saying is basically
24 there is a breach of contract to the bad faith, and the
25 bad faith --

1 THE COURT: You know, I'm going to reserve ruling on this
2 until I hear the defendants' case because I still haven't
3 heard why the 70,000 wasn't extended. All right. Is the
4 defendant going to offer evidence it wasn't extended
5 because the guarantee wasn't raised?

6 MR. VON WALD: Well, no. The 70,000 was applied for, and we're
7 saying that we didn't apply for it the second time because
8 then we found out that the --

9 THE COURT: The cattle were dead.

10 MR. VON WALD: -- the cattle were dead and the cash flow didn't
11 work. That's what we're going to testify to.

12 THE COURT: But that didn't -- why would that relieve the
13 Bank of its duty under the contract?

14 MR. VON WALD: Well, the duty under the contract was --

15 THE COURT: Because (INAUDIBLE) --

16 MR. VON WALD: -- was to apply to the BIA, which is what we
17 did. We applied to the BIA.

18 THE COURT: But the BIA rejected it as not being the
19 appropriate method of applying.

20 MR. VON WALD: Right.

21 THE COURT: So I think that does raise an issue of bad faith,
22 but I'm going to reserve ruling on that until we hear the
23 defendants' side.

24 MR. HURLEY: And -- and just a point, if I might on that,
25 proposed jury -- jury instruction, we approached that from

1 the point of view that good faith is present in every
2 contract, and that good faith was not adhered to by the
3 Bank. And those instructions and the authority for that
4 is in our package of proposed instructions.

5 THE COURT: Okay.

6 MR. VON WALD: So your instructions aren't even instructing on a
7 tort then.

8 MR. HURLEY: No. This is a contract. We don't have a tort or
9 (INAUDIBLE) --

10 MR. VON WALD: But see, bad faith is a con- -- is a tort action.

11 MR. HURLEY: Well, I understand that. But this is -- good
12 faith -- this is a lack of good faith.

13 THE COURT: Well, unconscionable contract, though, you know
14 you look at this contract, I don't know why the Bank
15 entered -- I mean the Bank really -- what kind of
16 consideration was the Bank getting?

17 MR. VON WALD: They had nothing. They were trying to help get
18 this loan approved and going.

19 THE COURT: Basically, you were trying to get your
20 delinquency from Mr. Long?

21 MR. VON WALD: Well, no. The delinquency was guaranteed, Your
22 Honor. But what we were trying --

23 THE COURT: Oh. You were trying to get your guarantee
24 increased?

25 MR. VON WALD: Yeah. Going to try to get the guarantee

1 increased, number one. And we were going to try to go
2 rather than the \$50,000 to a \$70,000 line of credit,
3 that -- which would give him more and actually increase
4 the risk of the Bank, but the -- but the line of credit
5 then that would be 90 percent guaranteed, also.

6 THE COURT: So why is a contract unconscionable from your
7 clients' perspective?

8 MR. HURLEY: From my clients' perspective, that's the first
9 thing that hit me when Ronnie and Lila first walked in.
10 They did not understand one thing about it in terms of the
11 legal implications of this and how it was supposed to
12 work; and if the Bank failed to make the loan and failed
13 to give the loan to buy the cattle, then the Bank gets to
14 take the land and sell it to other people. And they
15 didn't understand that that would happen.

16 THE COURT: Yeah. But, Jim, everybody that goes and buys a
17 car under that theory it would be unconscionable. You
18 don't carry -- you don't take your attorney to the car
19 dealer. You sign a contract. If you don't pay it, then
20 your car is repossessed. I mean you've got to show a
21 little bit more -- unconscionable basically means that it
22 shocks the conscience. This doesn't shock my conscience,
23 so I think Count VIII should be dismissed.

24 MR. VON WALD: There's -- there's actually -- there's actually
25 an argument to be made, Your Honor, as far as lack of

1 consideration on the Bank's part for the contract.

2 THE COURT: There is. You have a counterclaim under that.

3 MR. VON WALD: I know.

4 THE COURT: That would be an absolute defense to the breach
5 of contract.

6 MR. VON WALD: Yeah. Yeah.

7 THE COURT: What consideration did Ronnie give?

8 MR. VON WALD: Yeah.

9 THE COURT: I guess what he agreed to do was voluntarily
10 leave the land after two years without you bringing an
11 eviction action, but that didn't happen. It's not in the
12 contract either. So what about permanent injunction?
13 Now, I'm really wondering Chuck's clients are still
14 involved in this?

15 MR. JASPER: Well, that's what I was about to ask. I -- I see
16 no reason why you can't dismiss my clients out totally,
17 because I don't think -- I don't think there is any
18 evidence to indicate their involvement.

19 THE COURT: Well, I guess it goes to Count IX, though,
20 because Jim, you're saying you can't enjoin the Bank from
21 taking action to evict them because their failure to
22 perform under the contract undermine their ability to --
23 to perform under the lease.

24 MR. HURLEY: Exactly. That's what we said in response to the
25 motion to dismiss, that the Bank's obligation to perform

1 was a condition precedent, and where the Bank failed to
2 perform at all and the Longs therefore could not perform,
3 actually, the two years never started and couldn't start
4 until they had the means to go forward and perform the
5 Longs' side of the claim.

6 MR. JASPER: But still --

7 MR. HURLEY: So therefore, they should not --

8 THE COURT: Yeah, see, because if I dismiss your clients and
9 then I enter some kind of injunction against the Bank,
10 that puts the Bank in a position where -- without your
11 clients subject to this judgment, they're subject to
12 conflicting obligations.

13 MR. JASPER: But there's been no evidence to show anything
14 other than my clients were bona fide purchasers for value
15 without notice.

16 THE COURT: True.

17 MR. JASPER: And, therefore --

18 MR. HURLEY: Well --

19 MR. JASPER: They had (INAUDIBLE) --

20 THE COURT: It's kind of like a quiet -- quiet title, though,
21 quiet title action where you need all of the potential
22 owners joined in the suit to fully -- I couldn't -- I
23 could not very well join the -- the Bank from dis- --
24 disposing of this land, but then there -- then your
25 clients have a suit against them.

1 MR. HURLEY: And on the last part there, Maciejewskis were
2 without notice. We went through that on the contract for
3 deed, and the Bank did put in there that the Longs are
4 still on -- on that parcel. Number two is on the
5 self-help. The Maciejewskis did take over Parcel 1 and
6 drived the cattle off, put a fence in, caused the Longs to
7 stop putting up the hay. So I think the Maciejewskis are
8 involved in self-help, and --

9 MR. JASPER: These landowners (INAUDIBLE) --

10 THE COURT: Well, now they (INAUDIBLE) involved in self-help
11 because self-help only goes --

12 MR. JASPER: Right.

13 THE COURT: -- against the alleged owner, person.

14 MR. HURLEY: Well, at least we -- they had notice in the
15 contract for deed that the Longs were still involved and
16 occupied the land.

17 UNIDENTIFIED: Yeah.

18 THE COURT: Well, I think I'm going to leave them in for now
19 because I have the counterclaim to rule on regarding the
20 eviction. And of course, if I rule in favor of the Bank
21 on that, then that takes care of your clients' concerns.
22 If I rule against the Bank on that, the jury comes back,
23 the contract was breached, although I think your theory,
24 Jim, you've elected to go after damages.

25 MR. HURLEY: Yes.

1 THE COURT: So even if you get a recovery of damages, I
2 certainly -- I could maybe put a lien on this land in
3 behalf of your clients, but I couldn't also enjoin them
4 from evicting them and give them damages. Well, we'll
5 figure that out. My interest is we've got to get this to
6 the jury, and we've got to -- I would like to give them a
7 couple of hours to deliberate tonight, too, because I'm
8 not going to go about -- past 9 o'clock though. So in
9 summary we will dismiss Count I -- and I'm sorry. I know
10 you wanted to make some more argument, Dave, but I think I
11 can predict what you're going to argue.

12 MR. HURLEY: Count I (INAUDIBLE) --

13 THE COURT: Count I is out fraud and deceit. Count II will
14 go to the jury.

15 MR. HURLEY: Breach of contract?

16 MR. VON WALD: Yeah.

17 THE COURT: Count III will be dismissed.

18 MR. HURLEY: That was?

19 THE COURT: The failure of consideration. Count IV, contract
20 and deed are void will be dismissed. Count V, self-help
21 motion will be denied. Count VI motion will be denied.
22 Count VII bad faith I will take that under advisement.
23 Count VIII will be dismissed.

24 MR. HURLEY: That's unconscionable?

25 THE COURT: Yeah. And Count IX, I will take it under

1 advisement.

2 MR. VON WALD: At this point, Your Honor, I would move that the
3 evidence -- that the pleadings conform to the evidence.
4 Make a motion that my pleadings conform to the evidence
5 and move to amend my pleadings accordingly.

6 THE COURT: Okay. I really don't think I've read your
7 pleadings lately. Why do we need to --

8 MR. VON WALD: It was -- basically, the only thing that would be
9 changed would be the defense of lack of consideration of
10 the contract.

11 THE COURT: I don't know -- well --

12 MR. VON WALD: Maybe I can't, but that's the motion.

13 THE COURT: Maybe you should do that after your case because
14 you haven't presented that to the plaintiffs' case.

15 MR. VON WALD: Yeah. Okay.

16 THE COURT: And I'm not ruling there is no consideration on
17 the part of the plaintiff. He could say I'm going to
18 fight you on the eviction unless we enter into this. That
19 may be consideration. I don't know if that's what he
20 said.

21 MR. VON WALD: Yeah.

22 THE COURT: But. . . All right. So you've got two witnesses,
23 right?

24 MR. VON WALD: Right.

25 THE COURT: Chuck, you don't have any witnesses?

1 MR. JASPER: No.

2 THE COURT: All right. Well, let's get the jury back in here
3 and try to make some progress.

4 MR. HURLEY: What was VII? I missed that in my notes.

5 THE COURT: Count VII was self-help -- no, Count VII was bad
6 faith. I took that under advisement.

7 (JURY RETURNED TO THE COURTROOM.)

8 Okay. Welcome back, Jurors. We took care of
9 some legal matters. Tried to cull the case down for you
10 to make it a little more understandable. So -- but the
11 plaintiff rested. That means now the defendant gets to
12 present its case. So, Dave, do you want to call your
13 first witness?

14 MR. VON WALD: Defense would call Chuck Simon.

15 THE COURT: Chuck Simon. You are still under oath.

16 MR. CHARLES "CHUCK" SIMON,
17 called as a witness on behalf of the Defendant Bank, being
18 previously duly sworn upon his oath, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. VON WALD

21 Q Chuck, would you state your name, address, and occupation
22 for the record?

23 A Charles Simon, Hoven, South Dakota, banker.

24 Q How long have you been a banker?

25 A Since 1975.

1 Q And have you always worked for the Bank of Hoven?

2 A Yes.

3 Q And what's your current position at the Bank of Hoven?

4 A Executive Vice President.

5 Q And you've been the -- back in 1988 through '99, you were
6 what? What was your position then?

7 A I started off as ag representative and went to vice
8 president.

9 Q Okay. And how long have you been dealing with the Long
10 family?

11 A Since the late 1980's.

12 Q And could you explain to the jury how that loan first came
13 about with the Bank?

14 A Well, at first we -- they came over to us. They were --
15 they were banking at Dewey County Bank, and we took it
16 over from the Dewey County Bank.

17 Q And you made some small loans to begin with?

18 A Yes.

19 Q And in 1992 then, all of a sudden, the -- there was
20 another agreement entered into -- or a different pattern
21 of their borrowing; is that right?

22 A Yes.

23 Q And what happened in 1992?

24 A Well, we ended up -- the guarantee that was with Dewey
25 County Bank was assigned to us, and then we made some

1 additional guarantees.

2 Q BIA guarantees you are talking about?

3 A Yes.

4 Q And the loan on the land, was that a guaranteed loan?

5 A No.

6 Q So in addition to the guaranteed loan, they had a loan to
7 the Bank of the -- for the farm ground?

8 A Yes.

9 Q And that was about how much?

10 A (INAUDIBLE).

11 Q Okay. Then Kenneth died in July of 1995. At that time
12 what was the approximate debt that the Long Family Land
13 and Cattle Company, Inc., had with the Bank?

14 A It was right around approximately 750,000.

15 Q Okay. And some of that was guaranteed -- BIA guaranteed?

16 A Yes.

17 Q And some of it was direct loan?

18 A Yes.

19 Q And what -- what was the history that the Longs had as far
20 as borrowing was concerned? When they first started in
21 '88, they started with small loans, and then you said in
22 '92, it jumped up?

23 A Yeah. Well, the debt kept going up, and the net worth
24 kept on going down.

25 Q Okay.

1 MR. VON WALD: What exhibit number do we have, Judge?

2 THE COURT: For the defendant?

3 MR. VON WALD: Yes.

4 THE COURT: I think we left off at 10.

5 Q (BY MR. VON WALD) I hand you now what has been marked as
6 Defendant's Exhibit No. 11? Can you tell me what that is,
7 Chuck?

8 A This is a comparative statement on the financial
9 statements for Long Family Land and Cattle Company.

10 Q And it shows -- and attached to that are a number of
11 financial statements that were signed; is that correct?

12 A Yes.

13 Q And so basically they are financial statements from 1992
14 through 1996?

15 A Yes.

16 Q And could you explain to the jury looking at the -- and by
17 the way, these financial statements were all signed by
18 Ronnie Long -- Ronnie Long, right?

19 A Yes.

20 Q And could you show -- like starting in 1992, what does it
21 show as far as the total indebtedness -- total
22 liabilities, I should say, that the Long Family Land and
23 Cattle Company had?

24 A Total liabilities were \$660,280.

25 Q 660. How about the next year?

1 A 688,000.

2 Q Just round them off. Next year?

3 A 742,000.

4 Q Next year?

5 A 773,000.

6 Q The last year?

7 A 484,000.

8 Q And the last year, was that after the land was transferred
9 back?

10 A Yes.

11 Q Okay. And what does it show as far as net worth is
12 concerned starting in '92?

13 A 528,000.

14 Q So in '92 the Corporation was worth about -- over a half a
15 million dollars?

16 A Yes.

17 Q '93?

18 A 413,000.

19 Q '94?

20 A 336,000.

21 Q '95?

22 A 236,000.

23 Q In '96?

24 A 155,000.

25 Q So it went from a half a million dollars net worth in '92

1 or over a half million, and down to '96, five years later
2 it was worth about 155,000?

3 A Yes.

4 Q And one of the things that I would like to point out to
5 you, is on these financial statements I see on the bottom
6 there is a house in the country. Now that's Ronnie's
7 house, right?

8 A Yes.

9 Q And that's the 1996 financial statement?

10 A Yes.

11 Q And was that house in the country included on any of the
12 rest of them?

13 A No.

14 Q So actually, if that -- if you were comparing apples to
15 apples and that house wasn't included on there, there
16 would have been about a \$60,000 net worth in 1996 then,
17 right?

18 A Yes.

19 Q Okay.

20 MR. VON WALD: I will offer the exhibit.

21 THE COURT: Any objection to 11?

22 MR. HURLEY: No objection.

23 THE COURT: All right. It will be admitted. Jurors, you'll
24 be able to look that one over, too.

25 MR. VON WALD: I'm going to try to shorten this, Judge, and skip

1 over a bunch of stuff that I had planned on asking, so we
2 can get it to the jury.

3 THE COURT: Thank you.

4 Q (BY MR. VON WALD) How were the loans collateralized at
5 the Bank? Were they collateralized with real estate and
6 personal property?

7 A Real estate and personal property, yes.

8 Q So did Kenneth pledge all of his real estate, both the
9 house in Timber Lake and the 2230 acres of farm ground?

10 A Yes.

11 Q And he mortgaged all of that to the Bank?

12 A Yes.

13 Q And did he sign a mortgage -- did he sign a guarantee
14 guaranteeing all of the debt of the Long Family Land and
15 Cattle's --

16 A Personal guarantee, yes.

17 Q So he guaranteed the payment of all of the debt?

18 A Yes.

19 Q Then in 1995, when Kenneth died, on July 17th, I think it
20 was of 1995, was the Bank willing to go along with Long
21 Family Land and Cattle Company, Inc., continuing to loan
22 them more and more money, or what was the position of the
23 Bank at that time?

24 A In 1995 now you're saying?

25 Q Yeah. 1995 when Kenneth died. Did the -- was the Bank

1 going to continue increasing the indebtedness of the
2 Bank -- or the Long Corporation or did it -- or what?

3 A No. We were going to continue to work with them.

4 Q Were you going to try to increase the indebtedness of the
5 Long Family Corporation then? Did you want them to
6 increase the indebtedness?

7 A No, no.

8 Q Okay. You wanted to change their -- you negotiated a long
9 time from 1995 through December 5th of 1996, you
10 negotiated it a long time with the Long family and a
11 number of other people, didn't you, to try to get
12 something worked out?

13 A Yes.

14 Q And eventually, some time during the summer or fall of
15 1996, you decided and everybody decided that the land
16 should get -- that the Bank should get the land deeded to
17 them and the house in Timber Lake, right?

18 A Yes.

19 Q And everybody was happy with it at that time as far as you
20 know?

21 A Yes.

22 Q And before you had the land deeded to you -- the Bank,
23 actually the Bank entered into an option to purchase with
24 the Long family, right?

25 A Yes.

1 Q And they were given an option -- option to purchase that?
2 I think that's one of the plaintiffs' exhibits?

3 A Yes.

4 Q And they were given an option to purchase that for
5 468,000?

6 A Yes.

7 Q And that was before the land was even deeded to the Bank,
8 right?

9 A Yes.

10 Q Okay. And when the land was deeded to the Bank, obviously
11 that lowered --

12 (TESTIMONY ENDS ON DUPLICATE #7

13 TAPE #2 WITH SEVERAL MINUTES LEFT
14 BLANK ON THE TAPE).

15 (DUPLICATE #8 TAPE #1 DOES NOT
16 MATCH UP WITH THE END OF DUPLICATE
17 #7 TAPE #2 AND BEGINS IN MIDDLE OF
18 DIRECT EXAMINATION OF MR. CHARLES

19 "CHUCK" SIMON BY MR. VON WALD:)

20 Q -- when the land was deeded back to the Bank or to the
21 Bank I should say in September of 1996, that lowered the
22 indebtedness then of the Long Corporation, right?

23 A Yes.

24 Q And as a part of the lowering the indebtedness, it didn't
25 just lower the debts of the Corporation, did it?

1 A No.

2 Q Didn't it pay off some other things?

3 A Yes.

4 Q Do you know some of the things that you paid off?

5 A It would be those CRP enhancements, some taxes.

6 Q The CRP enhancements, you said?

7 A Yes.

8 Q So the Bank paid \$82,000 to the -- can you explain that to
9 the jury?

10 A Well, that was -- that was an enhancement program where
11 the State pays you so much money, and then they take over
12 the CRP payments basically. In other words, they get the
13 payments then, but they give you a lump sum amount of cash
14 to do that, and that's the first mortgage on the real
15 estate then, so we had to pay that out because that was a
16 prior lien.

17 Q Okay. So if -- prior to that being paid out, the CRP
18 payment each year went to the State of South Dakota,
19 right?

20 A Yes.

21 Q And it didn't go to the Long Corporation, right?

22 A No.

23 Q And the only way it could go to the Long Corporation is if
24 this is paid off, right?

25 A Yes.

1 Q So the Bank did that?

2 A Yes.

3 Q Okay. And there were \$23,000 worth of delinquent taxes
4 that Longs hadn't paid. The Bank paid those off, right?

5 A Yes.

6 Q And there was about \$9,000 in probate fees and some other
7 fees that the Bank had involved with attorney fees, and
8 that was a part of the lease with option to purchase that
9 those should be included, is that right?

10 A Yes.

11 Q Title search fees, title insurance? The rest of it was
12 indebtedness then that was paid off from the Bank, right?

13 A Yes.

14 Q So, in other words, this \$478,000 only paid -- is not a
15 true reflection of how much it lowered their indebtedness,
16 is it, to the Bank of Hoven?

17 A That's right.

18 Q Okay. Some of these other -- like this debt here, this
19 100,000, was owed to other people, about 100 and -- it
20 looks like 10,000 was owed to other people, right?

21 A Yes.

22 Q Okay. And so on the -- and then after -- this was on
23 December 5th, and on December 5th when the Bank paid off
24 that 82,000 to the State of South Dakota, it leased the
25 land to Long Family Land and Cattle Company, Inc., right?

1 A Yes.

2 Q And the Bank was going to receive 44,000 a year, right?

3 A Yes.

4 Q For two years?

5 A Yes.

6 Q So that would be 88,000 that it was going to receive?

7 A Yeah.

8 Q And it paid off \$82,000 in order to --

9 A Yes.

10 Q -- to do that, right?

11 A Yes.

12 Q Now that was not actually paid -- that was paid by the
13 Bank, but it was the Longs' money, right?

14 A Yes.

15 Q Okay. Okay. On December 5th, when the Bank entered into
16 a lease with option to purchase for the Longs, they
17 owned -- the Bank owned the land, right?

18 A Yes.

19 Q Technically, they could have -- they could have sold that
20 to anybody at that time, right?

21 A Yes.

22 Q Or leased it to anybody at that time, right?

23 A Yes.

24 Q Why did they lease it to the Longs?

25 A They wanted to give them a chance to lease it and purchase

1 it back.

2 Q Okay. So they were trying to help the Longs in their
3 financial condition?

4 A Yes.

5 Q Okay. Now, you saw the exhibit that showed the letter
6 that was sent in to the BIA on 12-12 of '97; is that
7 right?

8 A Yes.

9 Q Have you seen that?

10 A Yes.

11 Q And you did not make up that letter, right?

12 A No.

13 Q That was made up by Jim Nielsen?

14 A Yes.

15 Q Have you seen the financial -- or the cash flows that went
16 with that?

17 A Yes.

18 Q And I have shown you before the loan agreement. Now
19 everything on this letter, everything on this letter that
20 the Bank requested was almost identical with the loan
21 agreement, right, with what it agreed to do?

22 A Yes.

23 Q And on -- the only change on that would be what? As far
24 as the operating line of credit?

25 A Well, it went from 70 to 85,000.

1 Q Okay. So the Bank had agreed to --

2 A I need my glasses.

3 Q -- the Bank had agreed --

4 THE COURT: Hold on. The witness needs his glasses. The
5 bailiff is going to bring them up. Thank you, Dale.

6 THE WITNESS: Thanks.

7 Q (BY MR. VON WALD) So the Bank had agreed to loan
8 \$70,000 -- to request a loan to the BIA for \$70,000,
9 right?

10 A Yes.

11 Q And when the cash flows came in, we've seen those before
12 from the Cheyenne River Sioux Tribe Planning Office,
13 probably John Lemke?

14 A Yes.

15 Q What did it indicate on that cash flow that came in that
16 was needed for the first year?

17 A Short about 85,000.

18 Q So is that the reason that the Bank then applied for an
19 \$85,000 line of credit?

20 A Yes.

21 Q And that was -- that was to be a guaranteed line of
22 credit, wasn't it, to the BIA, right?

23 A Yes.

24 Q And that's what the loan agreement said they were going to
25 do is get that guaranteed, right?

1 A Yes.

2 Q And also in this letter it goes on to say some other
3 things, and that is about making a \$37,500 loan, right?

4 A Yes.

5 Q And that was for purchase of 110 calves, right?

6 A Yes.

7 Q The loan agreement itself you see is a little bit
8 different than that. The loan agreement, as I see it,
9 says for 37,500 for the purchase of calves, but it
10 mentions an operating line of 53,500 of which \$17,000 and
11 37,500 is going to be for that, right?

12 A Um-hum, yes.

13 Q And the loan agreement says that the sale of proceeds from
14 the wheat, millet, and 10 head of assorted yearlings will
15 be applied to that note -- that's this one right here --
16 first, with any balance to be applied to the 53,500; isn't
17 that right?

18 A Yes.

19 Q Okay. So basically, once you -- once you sold the wheat,
20 millet, and 10 head, that would have about wiped out the
21 17,000, right, or close to it?

22 A Yes.

23 Q So if you didn't have 37,5, and 17,000, that's where it
24 comes up with the 53,500?

25 A Yes.

1 Q And the letter that Jim Nielsen wrote just approaches it a
2 little different. He said here first that everything was
3 going to be sold, right? (INAUDIBLE). Right here.

4 A 41.

5 Q It said -- the agreement says it talks about it beforehand
6 and then applying the sale from the 10 head of yearlings,
7 wheat, and millet. This one says after applying the
8 sales, and that's why it's down to 41,000 rather than
9 53,5, right?

10 MR. HURLEY: Your Honor, I hate to interrupt, but counsel is
11 testifying rather than the witness, and this is direct
12 testimony.

13 THE COURT: That's true.

14 MR. VON WALD: I am.

15 THE COURT: Go ahead and ask your questions.

16 MR. VON WALD: He can explain it. I'm just trying to hurry it
17 along, but . . .

18 A One is -- one is showing, yeah, the 41,000 would be
19 (INAUDIBLE) proceeds were applied, so the amount of the
20 loan was reduced. The other one has not -- has not been
21 reduced yet from the sale of the millet and yearlings and
22 wheat I think is --

23 Q (BY MR. VON WALD) So is the request for both
24 (INAUDIBLE) --

25 A It's -- it's the same, but it's showing a little

1 difference basically because one is showing the sale and
2 one is not showing the sale of the commodities.

3 Q Okay. And I want -- the other thing I wanted to point out
4 with this loan agreement, that it says, doesn't it, that
5 if the BIA guarantees or the requests are approved, if
6 they are approved, then this other loan would be granted,
7 right?

8 A Yes.

9 Q But the other loan is actually conditioned upon these
10 requests being approved, isn't it?

11 A Yes.

12 Q Okay.

13 MR. VON WALD: I think I'm just about done, Your Honor.

14 THE COURT: Thank you.

15 Q (BY MR. VON WALD) I'm handing you now --

16 MR. VON WALD: (INAUDIBLE).

17 THE COURT: 12?

18 MR. VON WALD: Yes.

19 Q (BY MR. VON WALD) I will hand you now what has been
20 marked as Bank's damages on Exhibit 12, and ask you to
21 identify what that is?

22 A That's what we're showing rent on farmland and hay land
23 and coming up with a total value and then taking off the
24 payments that we got from the FSA office.

25 Q Okay. So for -- for 1999, as an example, how many acres

1 of farm ground are on the 960 acres that Ronnie has been
2 living on without paying any rent?

3 A On Parcel 2 it's 837 acres.

4 Q 837 acres of farm ground?

5 A Yes.

6 Q And what do you think that the fair market value of rent
7 would be for the farm ground per acre?

8 A \$22 an acre.

9 Q And how many acres of pasture or hay ground are on the
10 land that he has been using?

11 A 113 acres.

12 Q And what's the fair market value of the rent on that?

13 A \$11.

14 Q So if you calculate that out each year, what is the
15 average -- what the rent, the fair market value of the
16 rent come out to be?

17 A \$19,657.

18 Q So you are saying that if you rented that land out, you
19 would receive \$19,657 a year?

20 A Yes.

21 Q Correct?

22 A Yes.

23 Q And the Bank didn't do that, of course, because Ronnie
24 Long was on the farm, right?

25 A That's right.

1 Q And -- but we did get something, didn't we, we did get the
2 FSA payment or the government payment each year?

3 A Yes.

4 Q And for the year 1999, how much government payment did the
5 Bank receive?

6 A \$17,534.

7 Q 2000?

8 A \$10,629.

9 Q 2001?

10 A \$12,785.

11 Q And for 2002?

12 A Nothing. Zero.

13 Q Okay.

14 MR. VON WALD: I would offer the exhibit.

15 THE COURT: Any objection to 12?

16 MR. HURLEY: No objection.

17 THE COURT: All right. 12 will be admitted.

18 Q (BY MR. VON WALD) Okay. Now I want to show you
19 Plaintiff's Exhibit --

20 MR. VON WALD: (INAUDIBLE).

21 THE COURT: Which one?

22 MR. VON WALD: That would be 23, I think.

23 THE COURT: Is 23 the one we --

24 MR. VON WALD: Maybe he could just open the book here

25 (INAUDIBLE).

1 UNIDENTIFIED: (INAUDIBLE).

2 THE COURT: 23 is the one we changed so . . .

3 MR. VON WALD: I don't think that they've been changed --

4 THE COURT: Yeah, well, they've scribbled on them here. But
5 here is the originals if you want to use it. Here is the
6 originals, David. (INAUDIBLE).

7 Q (BY MR. VON WALD) Looking at Plaintiff's Exhibit 23, he's
8 got FSA payments as an example for the year 1997 -- it
9 doesn't have one for '97.

10 A No.

11 Q Go to '99. And it's got 23,000?

12 A Yes.

13 Q That is actually the amount that -- that Ed Maciejewski
14 and the Bank received that year, right?

15 A I would say yes.

16 Q From the exhibit that the plaintiffs showed. And the next
17 year, however, how much -- in our Bank's exhibit, we show
18 that we received less money the next year? Instead of
19 17,000 we received 10,000?

20 A Yes.

21 Q And in the year -- that's not reflected on there, is it?

22 A No.

23 Q That's 23,000 straight through?

24 A Straight through.

25 Q And on -- for the year 2001, the Bank's exhibit shows that

1 there is 12,000, not 23,000 that's shown in there, right?

2 A Yes.

3 Q And for the year 2002, he's got damages of 23,000, and the
4 Bank didn't receive anything, did they?

5 A That's right.

6 Q I'll keep these in order now. Have you looked at the
7 exhibit as far as the projection of yearlings for \$700?

8 A Yes.

9 Q Throughout the years, what do you think that is, high, or
10 low or ---

11 A I think -- I think it's high.

12 MR. VON WALD: And I have a -- I think no more questions.

13 THE COURT: No more?

14 MR. VON WALD: Just a second, Judge.

15 THE COURT: Oh. I thought you said no more questions.

16 MR. VON WALD: I said, "I think no more questions."

17 Q (BY MR. VON WALD) Chuck, was it the Bank's idea when they
18 were working with Ronnie Long, was it the Bank's idea to
19 try to get him off that land?

20 A No.

21 Q It was the Bank's idea to make him what, successful or
22 unsuccessful?

23 A Make him successful.

24 Q And when they make that operating line of credit for
25 \$40,595 in the spring of 1997, they knew that he had lost

1 a wad of cattle already at that time, right?

2 A Yes.

3 Q And why didn't the Bank after it was reported that Ronnie
4 lost all of his cattle --

5 THE COURT: Are we missing a juror? Oh.

6 Q (BY MR. VON WALD) Why didn't the Bank, when they knew
7 Ronnie had lost all of those cattle, make him reapply to
8 the SBA -- excuse me -- to the BIA for -- to increase the
9 guarantee to 90,000 -- 90 percent and to apply again for
10 the \$85,000 BIA guaranteed loan? Why didn't they do that
11 again?

12 A We just went ahead with it basically. We knew that he had
13 lost cattle, and we went forth with the plan anyway.

14 Q I know. But why didn't -- my question is, Chuck, and the
15 plaintiffs' counsel has, you know, pointed out that the
16 Bank never made another application. Once we got the
17 letter from February 14th from the BIA and said that our
18 application was not complete enough, did we make another
19 application for that same thing?

20 A No.

21 Q Why didn't we?

22 A We -- we knew it wasn't going to be increased so we just
23 didn't. We didn't do anything different. I guess we kept
24 it the same, so . . .

25 Q Well, when he didn't have the cattle any more to sell,

1 would that cash flow work, the \$85,000 line of credit?

2 A No, no.

3 Q That's why we had it -- that's why we were applying for
4 the line of credit, right, was because it was pursuant to
5 his cash flow?

6 A Yes.

7 Q And in his cash flow which we've looked at before -- well,
8 the jury knows it better than I do anyway I guess -- in
9 his cash flow that we've looked at before, the one that
10 required the \$85,000 line of credit?

11 A Yes.

12 Q That was submitted with the -- with an application in
13 December?

14 A Yes.

15 Q And then will you hear anything back from the BIA until
16 February?

17 A Yes.

18 Q And during that period of time, all of the cattle died --
19 well, not all of them -- but a lot of the cattle had died?

20 A Right, yes. Quite a few of them died.

21 Q And in that cash flow, of course, it's -- it's showing the
22 sale of calves; is that right? Did that cash flow show
23 the sale of calves?

24 A Yes.

25 Q And the calves that were going to be sold, the yearling

1 sales here, for 166,000, he didn't have those yearlings
2 any more, did he?

3 A That's right. He lost them -- he lost most of them during
4 the storm.

5 Q He had 25 head left, I think, right?

6 A Yes.

7 Q So this cash flow goes out the window, right?

8 A Yes.

9 Q Is that why we didn't apply for the line of credit again,
10 the 85,000?

11 A Yes.

12 Q And instead, what did we do?

13 A We approved the \$40,500 line of credit.

14 Q Okay. We approved a \$40,500 line of credit because we got
15 a cash flow from who?

16 A From the Planning Office, the Credit Office.

17 Q And that cash flow said that's what he would need to
18 operate?

19 A Yes.

20 Q And this one -- originally, this -- with the loan
21 agreement, it was for a BIA guarantee operating line of
22 credit, right?

23 A Yes.

24 Q The one we made him for \$40,595 wasn't even guaranteed by
25 the BIA, was it?

1 A That's right.

2 Q And instead what it was -- what was it?

3 A Well, it was a LIFO, last in, first out.

4 Q Okay. So as the -- last in, first out, would you explain
5 it to the jury? A last in, first out means what?

6 A It's the first -- the first loan to get paid basically
7 from the sale of commodities, grain, livestock, ahead of
8 any other loan.

9 Q Okay.

10 MR. VON WALD: I have no further questions, Your Honor.

11 THE COURT: All right. Cross-examination?

12 MR. HURLEY: No further questions, Your Honor.

13 THE COURT: No questions? Okay. Making progress. Jurors,
14 questions? I see none, so you can step down.

15 (WITNESS EXCUSED.)

16 Any other witnesses for defense?

17 MR. VON WALD: Yes, Your Honor. We would call Jim Nielsen.

18 THE COURT: Jim Nielsen. Jim, come forward. Raise your
19 right hand. Do you swear to tell the truth, the whole
20 truth, and nothing but the truth?

21 THE WITNESS: I do.

22 THE COURT: Have a seat, Jim --

23 MR. JAMES NIELSEN,
24 called as a witness on behalf of the Defendant Bank, being
25 first duly sworn upon his oath, testified as follows:

1 THE COURT: I forgot to tell Jim about that door.

2 THE WITNESS: Oh, sorry.

3 DIRECT EXAMINATION

4 BY MR. VON WALD

5 Q Jim, would you state your name and address for the record,
6 please?

7 A Jim Nielsen, Wakonda, South Dakota.

8 Q What's your occupation?

9 A Banker.

10 Q And how long have you worked in banking?

11 A 23 years.

12 Q Okay. And when did you first come to the Bank of Hoven?

13 A In August of 1996.

14 Q And so at some point you started handling the Ronnie
15 Long -- or the Long Family Land and Cattle Company, Inc.,
16 loan?

17 A I was involved in it in late October.

18 Q October of 1996?

19 A Correct.

20 Q And then you eventually left the Bank and you were -- what
21 was your position at the Bank when you were there?

22 A I was assistant vice president.

23 Q And also a loan officer?

24 A Yes.

25 Q And so you left the Bank of Hoven then when?

1 A In January of 1998.

2 Q Okay. And you left the Bank and went -- and became the
3 president of some bank?

4 A Correct.

5 Q And what --

6 A In Wakonda, First Premiere Bank in Wakonda.

7 Q Okay. And when you got there, the Bank's -- the Bank's --
8 the Longs at that time had an operating line of credit,
9 didn't they?

10 A That's correct.

11 Q How much was that line of credit?

12 A I believe it was around 50,000.

13 Q Okay. And were advances being made on that \$50,000 line
14 of credit?

15 A Yes, they were.

16 Q And I'm talking about the end of 1996?

17 A Yes.

18 Q I will show you now what is -- what is the comment sheets
19 and you may want to refer to them -- but I assume that you
20 haven't been working with this for a number of years?

21 A Six years.

22 Q But the loans that were made towards the end of 1996,
23 starting at about September, what was that in September?

24 A In September it appears here that he sold some yearlings.

25 Q And --

1 A Which were applied --

2 Q Go ahead.

3 A Okay. You want me to read the comment?

4 Q Go ahead.

5 A Okay. He sold 190 head of yearlings for 84,000. He paid
6 off the Herman Schumacher advance on some yearlings for
7 62,500 with Ronnie receiving 9,000 to paying miscellaneous
8 expenses.

9 Q 9.0K means 9,000?

10 A Yes.

11 Q Okay. Go ahead.

12 A He also sold 59 yearlings for \$21,962, and they used this
13 to pay bills.

14 Q Okay.

15 A And it lists some larger bills that he paid at that time.

16 Q So how much money was released to Ronnie in September of
17 1996?

18 A Approximately 30,962.

19 Q Okay. And after that time, were there other advances
20 then? That money was just released, right?

21 A Correct.

22 Q And that didn't take down his operating line of credit at
23 all, right?

24 A No.

25 Q And so after that time he still borrowed money on his

1 operating line of credit?

2 A Yes.

3 Q And just count for the jury about how many -- how many
4 advances were made on that operating line of credit?

5 A The number or the dollar amounts?

6 Q Yeah, just the number.

7 A One, two, three --

8 MR. HURLEY: What date do we have?

9 MR. VON WALD: From September starting --

10 A I'm starting -- I'm starting with 11-8-96. There was 500.
11 11-14-96, there was 704. 11-19, there was 771. It looks
12 like 11-22, there was 898. On 11-25 there was 919. On
13 12-4 there was 500. On 12-5 there was 1,010.39.

14 Q (BY MR. VON WALD) Okay.

15 A And I'm guessing maybe it maxed out there because there
16 isn't any advances (INAUDIBLE) --

17 Q Okay. So on 12-5, the operating line of credit was maxed
18 out?

19 A Yes.

20 Q And there was \$1,000 released on 12-5?

21 A There was an advance on 12-5.

22 Q Advance, okay. And were you a part of the agreement?

23 And, of course, your name appears there, so you must have
24 been on the 12-5 loan agreement?

25 A Yes.

1 Q You were there?

2 A Yes.

3 Q And you were there and signed the agreement?

4 A Yes.

5 Q And -- and did you then send the letter in -- are you the
6 person who sent the letter into the -- to the BIA?

7 A Yes.

8 Q Okay. And when you sent that letter in, did that conform
9 to what the agreement was as far as you were concerned?

10 A To the best of my knowledge, that was what was required --

11 Q How about --

12 A -- of the request.

13 Q How about the 85,000 compared to the 70,000?

14 A The cash flow projections had been changed that we
15 received from the Credit Office over here which indicated
16 he needed an \$85,000 line of credit through the first
17 year.

18 Q Okay.

19 A So that's why that number was changed.

20 Q Okay. And so you sent all of the documents -- what
21 documentation did you send into the BIA?

22 A We sent the cover letter -- is that the cover letter
23 that's up?

24 MR. HURLEY: I don't believe that is, is it?

25 THE WITNESS: That's the loan agreement.

1 MR. HURLEY: That's the loan agreement.

2 A We sent the cover letter, we sent the financial statement.
3 I believe it was dated December 5th. I would need to
4 look. And the cash flows that were submitted to us for a
5 three-year period.

6 Q (BY MR. VON WALD) Okay. And -- and were there some notes
7 of John Lemke's that were a part of that, do you know?
8 Let's see. Do we have in --

9 THE COURT: What are you looking for, Dave?

10 MR. VON WALD: I'm not sure which exhibit it is, if it was the
11 (INAUDIBLE).

12 Q (BY MR. VON WALD) Look at Exhibit No. 8, if you would,
13 please, Jim.

14 A In here?

15 Q Yes.

16 A Okay.

17 Q Yours doesn't have it all (INAUDIBLE).

18 THE COURT: This is the only correct version of 8.

19 Q (BY MR. VON WALD) Then look at No. 8 in this one, I
20 guess. There are some notes of John Lemke's, also?

21 A That is correct.

22 Q And all of those documents were sent to the BIA then,
23 right?

24 A Yes.

25 Q And -- and you didn't hear anything back from the BIA for

1 quite some period of time?

2 A We didn't hear anything back until I got a phone call from
3 Stacey Johnston. I believe it was around February 3rd.
4 To the best of my recollection, I placed a call -- one or
5 two calls to Stacey to ask the status of it, and so I
6 placed a call on February 3rd or Stacey called me in
7 response to that.

8 Q You talked to him -- you talked to him sometime around
9 February 3rd, and -- and the letter of February 14th,
10 that's the date it said that you talked to him; isn't that
11 right?

12 A Correct.

13 Q Okay. And at that time did he tell you, he needed any
14 more documentation?

15 MR. HURLEY: I'm going to object. It's calling for hearsay.
16 Stacey Johnston isn't here to testify.

17 Q (BY MR. VON WALD) At that time didn't he tell you --

18 THE COURT: Hold -- hold on. It's not being offered for the
19 truth of the assertion, just his statement made to him, so
20 it's overruled.

21 Q (BY MR. VON WALD) At that time did he ask you for any
22 more documentation on the file?

23 A In the phone call?

24 Q Yes.

25 A No.

1 Q Was that ever discussed?

2 A Not that I recall.

3 Q Okay. And then there were -- there were -- after you --
4 and then did you receive a telephone call sometime from
5 Ronnie Long?

6 A Yes.

7 Q And what do the comment sheets note that -- the date that
8 you received that call?

9 A Ronnie called on February 13th, and indicated that he had
10 150 cows and 25 calves still alive.

11 Q So what did you do then?

12 A Well, at that point in time obviously his financial
13 statement, you know, condition, had changed greatly, so
14 obviously we couldn't continue with that existing
15 application since the cash flows nor the financial
16 statement were accurate.

17 Q Okay. And so what did you do then, Jim?

18 A We discussed it and -- and decided to make him an
19 additional loan of 40,500 based on the projections that
20 were put together with the livestock that was still
21 remaining in the operation that was submitted from the
22 Credit Office.

23 Q Okay. That's the cash flow you're talking about?

24 A Correct.

25 Q That shows \$40,595?

1 A Right.

2 Q And you made him an operating loan then for that amount?

3 A Yes.

4 Q And -- and when you made that operating loan for that
5 amount, did you pay off some previous advances that you
6 had made to Ronnie?

7 A Yes. My recollection is we paid off the \$17,000 note --

8 Q That was for (INAUDIBLE) --

9 A -- for advance for leases.

10 Q For the leases (INAUDIBLE) --

11 A The \$5,000 loan that we had established for him in January
12 of '96, and the \$2250 --

13 Q '97 or '96?

14 A '97.

15 Q Okay.

16 A And the \$2250 loan that we had done for him.

17 Q Okay. So those were paid off then when you gave him the
18 new loan?

19 A Rolled -- rolled into the 40,000.

20 Q Okay. And that new loan was April 1st of '97?

21 A Correct.

22 Q And were the loans restructured from the BIA then, the big
23 loan for about 420,000, was that restructured?

24 A Yes. A request was made to restructure the large note and
25 I believe the smaller note.

1 Q And that was done?

2 A Yes.

3 Q And so when were the payments due on all three of these
4 notes, do you recall?

5 A I think it was December of '97.

6 Q Well, I could show you the exhibits, I guess. It would be
7 the easiest way to . . .

8 A The \$40,595 was due on 11-1-97.

9 Q All three of those notes were due 11-1-97, weren't they?

10 A Correct.

11 Q Okay. And during the time -- do you remember that winter,
12 Jim?

13 A Yes.

14 Q What was it like?

15 A It was probably the worst winter I've ever seen.

16 Q Did the Bank have a lot of West River customers at the
17 time?

18 A Yes.

19 Q And did a lot of them lose cattle?

20 A Some of them did, some of them didn't. It varied in
21 degree with the amount. I don't think there was anybody
22 that didn't get by without losing some.

23 Q Everybody lost some; some were worse than others?

24 A Correct.

25 Q And do you ever recall Ronnie ever coming into you and

1 telling you or calling you and telling you that he needed
2 money to move his hay?

3 A No.

4 Q Did he ever do that?

5 A No.

6 Q If he would have done that and told you that he needed
7 money to move the hay, what would you have done?

8 A We would have taken it to the loan committee.

9 Q And why would you have done that?

10 A Because all loans needed to be approved with the loan
11 committee.

12 Q Okay. And if you would have known as a banker -- if you
13 would have known as a banker that his cattle were going to
14 die because he couldn't get hay to them, what would you
15 have done?

16 A We would have certainly done everything we could to make
17 that advance in order to -- to protect the collateral or,
18 you know, the value on that livestock not to die.

19 Q Okay. And actually, under the BIA guaranteed loan, you
20 knew that you were authorized to do that, right?

21 A Yes.

22 Q Okay. And they would have been guaranteed also by the
23 BIA?

24 A I believe up to a certain dollar amount.

25 Q Okay. And so then I'm going to hand you --

1 MR. VON WALD: (INAUDIBLE).

2 THE COURT: Do you have 23 down there? I think it's the one
3 on the bottom right.

4 THE WITNESS: Here?

5 THE COURT: Yeah. Oh, no. That's not it. Well, we'll
6 figure it out.

7 THE WITNESS: (INAUDIBLE).

8 THE COURT: You can have that back. (INAUDIBLE). I want to
9 make sure that we don't get completely out of order.

10 Q (BY MR. VON WALD) I hand you a letter which has been
11 marked as --

12 MR. VON WALD: Defendant's 13?

13 THE COURT: Correct.

14 Q (BY MR. VON WALD) -- and ask you to identify that, if you
15 would, please?

16 A That was a letter that was sent to Long Land and Cattle
17 Company on August 5th, 1997, by Chuck Simon alluding to
18 the Livestock Indemnification Program.

19 Q Okay.

20 MR. VON WALD: Offer the exhibit.

21 THE COURT: Any objection?

22 MR. HURLEY: No objection.

23 THE COURT: All right. 13 will be admitted.

24 Q (BY MR. VON WALD) And what does that letter request?

25 A "This letter is being sent to Bank of Hoven ag credit

1 borrowers who may receive assistance from this LIP fund to
2 address your responsibility for reimbursement of lost
3 assets mortgaged to the Bank of Hoven. You are familiar
4 with the recording and accounting to the Bank of Hoven for
5 death losses and sales of livestock that were mortgaged to
6 the Bank of Hoven."

7 Q Okay.

8 A So basically, it requests that they report to the Bank of
9 Hoven.

10 Q Did Ronnie Long ever report to the Bank of Hoven that he
11 got any proceeds from that?

12 A No.

13 Q Did he ever bring any proceeds in from the LIP program?

14 A No.

15 Q And how much did he receive?

16 A \$48,870.11.

17 Q Okay. I'm going to hand you another letter which has been
18 marked as Defendant's Exhibit 8, and I ask you to identify
19 it. It's already into evidence. What is that, Jim?

20 A It's a letter to Russell McClure, Superintendent, BIA,
21 indicating that the Long Family Cattle Company guaranteed
22 loans are delinquent the 11th month of '97 payments and
23 that was dated December 8th, 1997.

24 Q Okay. And was that sent by you?

25 A Yes.

1 Q And was it sent -- a carbon copy was sent to Ronnie Long?

2 A Yes.

3 Q Okay. And actually, there is a return receipt where he
4 received that?

5 A Yes.

6 Q And as a part of that letter, what did you ask him to do?

7 A Well, without reading the whole letter and refreshing my
8 memory on it, we asked him to bring the -- bring the loans
9 current.

10 Q Okay. And he had some money -- that letter indicates he
11 had some money in his pocket or maybe not in his pocket or
12 in the bank or wherever?

13 A He should have had some money from pasture rent. I
14 believe the dollar amount is about 13,000 and --

15 Q And some LIP proceeds?

16 A And some from the LIP proceeds, that's correct.

17 Q Okay. And did he bring any of that money in?

18 A No.

19 Q All right. Did he ever make a payment on those -- on the
20 large note for \$420,000?

21 A No.

22 Q And when he did bring money in on November 12th, he paid
23 off the \$40,595 note, right?

24 A I believe that would be correct. I would have to look at
25 the comment sheet.

1 Q Okay. Here are the three notes. You can look at the back
2 of those, and they would show if they were paid.

3 A Okay. Are you just referring to the 40,000?

4 Q The 40,000 -- 400 -- the --

5 MR. HURLEY: This one right here.

6 Q (BY MR. VON WALD) -- the 40,595 he paid off?

7 A Yes. On 11-13.

8 Q Okay. And the \$420,000 note no payment was made on that
9 at all, was there?

10 A I don't think so, no.

11 Q Okay. And a small interest payment was made on the
12 \$17,000 note?

13 A I believe it was, yes. For \$580.22.

14 Q And that's it?

15 A Correct.

16 Q And you told him that if he didn't bring the money in, in
17 the letter there to pay that, what were you going to do?

18 A We would need to turn in a loss claim to the BIA.

19 Q And is that, in fact, what you did then?

20 A Yes.

21 Q And so you would have left in January, you said, of '98?

22 A Early January of '98.

23 Q That would have been one of the last things that you would
24 have done at the Bank -- well, not the last things -- but
25 one of the last loans?

1 A Yes.

2 Q And I don't think I have any more questions. Oh, did you
3 fill out the laim -- go ahead. The laim -- the claim to
4 the BIA, the loss claim?

5 A I don't recall.

6 Q Okay.

7 MR. VON WALD: I have no further questions.

8 THE COURT: Jim, questions?

9 MR. HURLEY: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. HURLEY

12 Q It's true, is it not, Mr. Nielsen, that November 1997 was
13 the first default that the Bank had claimed on the Longs?

14 A To the best of my knowledge, yes. You're talking about
15 the time frame while I was there?

16 Q Yes.

17 A Okay. Yes.

18 Q And we're talking about a time frame when you were there
19 that apparently cattle market -- cattle markets, cattle
20 prices had sunk to quite a low level?

21 A Correct.

22 Q We're seeing calf prices here at a low level, aren't we?

23 A In that time frame?

24 Q Yes.

25 A Yes.

1 Q Difficult to make ends meet?

2 A I think that would be an accurate statement.

3 Q Now, in November and December, Ronnie Long asked for
4 \$2,000 money to pay a premium for insurance to cover
5 cattle loss in the winter. Do you remember that?

6 A I'm sorry. I do not.

7 Q Okay. About Christmas -- about Christmastime, 1996, he
8 and John Lemke called requesting an emergency loan to take
9 care of the cattle, move the hay to the cattle. Do you
10 recall that?

11 A No, sir; I do not.

12 Q And, of course, after the loss of cattle that the Longs
13 suffered, January and February of 1997, you would expect
14 that times would be difficult for the Longs to produce any
15 money, correct?

16 A I think that would be an accurate statement, yes.

17 Q And the last money loaned to the Longs was April, 1997,
18 correct?

19 A Correct.

20 Q You and counsel were speaking about Exhibit 8, which is
21 your December 12th letter, and we've had considerable
22 conversation here with various witnesses about the cash
23 flows attached, the three-page cash flows attached?

24 A Yes.

25 Q Did you work with John Lemke in preparing those cash

1 flows?

2 A Did I prepare them?

3 Q Yes.

4 A No, I did not.

5 Q Did you work with him on that?

6 A I think he probably submitted them to him. I probably
7 looked them over, maybe made some comments.

8 Q Because we see some changes here and there, and they may
9 have been your participation in those cash flows?

10 A They may or may not. I couldn't speak to whether they
11 would be.

12 Q And the same thing about the financial statement attached
13 to your letter, did you participate in preparing that?

14 A No. You are talking about the one dated December 9th,
15 1996?

16 Q Yes.

17 A No.

18 Q Do you know the origin of that document?

19 A The document would have come from the Credit Office here.

20 Q Okay. It's not something that was prepared at the Bank?

21 A No.

22 Q And you were aware, were you not, that the Longs were
23 having problems moving the hay to their cattle in the
24 winter quarters, which was their Indian range unit?

25 A When you say they were having problems?

1 Q Moving their hay to the cattle that needed the hay?

2 A Meaning they couldn't get it from point A to point B?

3 Q Yes.

4 A I would assume that that could be a possibility given the
5 winter. Whether I had personal knowledge that they had --
6 couldn't get the hay moved to them?

7 Q Yes.

8 A No.

9 Q Okay. And you were not aware that they had requested
10 money to do that? Was that your testimony?

11 A My testimony was there was never any direct request to my
12 knowledge specifically to move hay to the cattle.

13 Q Okay.

14 A We approved -- we approved a loan in January of 1997 for
15 \$5,000.

16 Q And we've gone through that with other witnesses. But --
17 but my question is: To your knowledge, you -- you weren't
18 aware of anything about that?

19 A No.

20 Q Okay.

21 MR. HURLEY: No further questions.

22 THE COURT: Chuck, questions? No?

23 MR. JASPER: No questions.

24 THE COURT: Any redirect?

25 MR. VON WALD: Just a little.

REDIRECT EXAMINATION

BY MR. VON WALD

1

2

3 Q You heard plaintiffs' counsel mention about a telephone
4 call that you hadn't heard -- that you didn't recall
5 around Christmas of 1996; is that right?

6 A Yes.

7 Q Okay. Now, had you -- it is marked as Plaintiff's Exhibit
8 13, which is a letter from Ronnie Long, did he send that?
9 That's to you, right?

10 A That is correct.

11 Q Okay. You probably haven't read that letter for a while.
12 But if you look at that letter, doesn't it say, "December
13 13th, 1996, it started to blizzard for five days"?
14 Just -- just read a little bit of that letter to the jury
15 starting right there.

16 A On December 13th -- do you want me to explain what the
17 letter was about?

18 Q Yeah. What is the letter about?

19 A He apparently gave us a chronological order of what had
20 happened from December 5th on and alluding to probably
21 primarily the cattle losses and getting trucks lined up.

22 Q Okay.

23 A So now I will read the part that you're alluding here.
24 "December 13th, 1996, it started to blizzard for five days
25 through December 18th, 1996. Everything that was opened

1 up on December 13th blew shut and roads were completely
2 brocked."

3 Q Blocked.

4 A Continue on?

5 Q Yes.

6 A "From this point on when the county roads did get opened
7 and it was possible to get in with a tractor, as I had
8 left my tractor at Doc Pesicka's --"

9 Q Pesicka's.

10 A -- Pesicka's." Excuse me. " -- we fed. When we couldn't
11 get in with the tractor, we took snowmobiles in and caked
12 the cows."

13 Q Okay. The next paragraph?

14 A "It was impossible to get the cattle out. If we could
15 have gotten them out, it was possible to get them back --
16 if we could have gotten them out, it was impossible to get
17 them back to the Headquarters due to the roads not being
18 open enough for semitractor-trailers until January 29th,
19 1997."

20 Q Okay. Okay. So basically, what he is saying is that from
21 December 13th until January 29th, 1997, there wasn't any
22 way that you were going to get a semi in there and out of
23 there, right?

24 A That would be correct.

25 Q So even if you had money, you couldn't do it?

1 A That would be correct.

2 MR. VON WALD: No further questions.

3 THE COURT: Recross?

4 MR. HURLEY: Yes, Your Honor.

5 RECROSS-EXAMINATION

6 BY MR. HURLEY

7 Q What were those dates that you mentioned?

8 MR. VON WALD: Do you want the letter again?

9 THE WITNESS: Yes.

10 A December 13th, 1996.

11 Q (BY MR. HURLEY) Until?

12 A Until December 18th, 1996.

13 Q Okay.

14 MR. VON WALD: When were the roads first opened?

15 THE WITNESS: Let's see here. You are speaking of prior to
16 that?

17 MR. VON WALD: No. He says it started blizzarding December --

18 MR. HURLEY: Well, wait a minute. I was questioning, and I
19 just had one question.

20 MR. VON WALD: I'm sorry. I'm sorry.

21 Q (BY MR. HURLEY) And what time period you gave for the
22 roads being closed and impassable?

23 A Let me read this section again, then.

24 THE COURT: You don't have to read it. I think the relevant
25 paragraph is December 13th.

1 THE WITNESS: Through the 18th?

2 MR. VON WALD: No. December 13th --

3 MR. HURLEY: Well, wait a minute, Counsel. The witness needs
4 to answer.

5 THE COURT: The question again is what?

6 THE WITNESS: December 13th --

7 MR. VON WALD: When the roads were closed, is that your
8 question?

9 THE COURT: Ask it again, Jim, because I'm a little confused.

10 MR. HURLEY: Okay.

11 Q (BY MR. HURLEY) At the end of your testimony, you gave a
12 time frame to date, to date when the roads were closed,
13 and I missed that. What were those dates?

14 A "December 13th, 1996, it started to blizzard for five days
15 through December 18th, 1996."

16 Q Okay. Thank you. In that same letter, as long as you
17 have it there, page -- well, let's see -- you went through
18 most of that. Let me ask you this: Is there anything in
19 this letter of Ronnie Long's that you didn't believe or
20 you don't think is true? And you read on through the
21 chronology. You have no reason to disbelieve what Ronnie
22 wrote, right?

23 A No, I have no reason to disbelieve it.

24 Q Okay. Take a look at page two, third paragraph. And
25 Ronnie wrote to you, "In the result of not having the

1 Kenneth Long Estate settled and operating money not
2 available --" "not" is in capital letters -- "the hay and
3 the cattle were never removed. Also, the cattle never got
4 insured, which the blanket insurance would have cost
5 approximately \$2,000 covering the cattle plus. The
6 insurance was brought to everyone's attention the first
7 part of December." Did you know anything about that prior
8 to this letter coming?

9 A I do not recall.

10 MR. HURLEY: No further questions.

11 THE COURT: All right. Jurors, any questions? Okay.

12 MR. VON WALD: I have one question on redirect -- recross --
13 redirect.

14 THE COURT: I believe this would be re-redirect. I don't
15 know. We can't allow --

16 MR. VON WALD: Well, see I -- he's my witness that he just
17 crossed.

18 THE COURT: I thought this was the second time -- this was
19 his recross. So -- wasn't it?

20 MR. HURLEY: I thought it was.

21 THE COURT: Yeah, it was. No. Yeah, Chuck, do you know?

22 MR. JASPER: I really only had one question.

23 THE COURT: Well, okay. You do get -- I guess you would have
24 a recross, although you never crossed. But I guess you
25 can still get recross.

1 MR. JASPER: I -- I just had one question. All right.

2 RE-CROSS-EXAMINATION

3 BY MR. JASPER

4 Q I thought you said, sir, December 13th to some time in
5 January basically the roads were impassable. What was
6 that date in January?

7 A I'm going to read the thing again because I'm not exactly
8 sure what you are alluding to. "December 13th, 1996, it
9 started to blizzard for five days through December 18th,
10 1996. Everything was opened on December 13th -- on the
11 13th of December blew shut and county roads were
12 completely blocked.

13 "From this point on, when the county roads did get
14 opened, and it was possible to get in with a tractor (as I
15 had left my tractor at Doc's -- whatever that name is --)
16 we fed. When we couldn't get in with the tractor, we took
17 snowmobiles in and caked the cows. It was impossible to
18 get the cattle out. If we could have gotten them out, it
19 was impossible to get them back to the Headquarters due to
20 the county roads not being wide enough for
21 semitractor-trailers until January 29th, 1997."

22 Q Okay.

23 A "This is when Mike Peterson widened our road."

24 THE COURT: All right. I don't think you get re-redirect
25 because that was his recross. We can't go on forever.

1 The jurors don't have any questions. So the witness can
2 step down.

3 (WITNESS EXCUSED.)

4 Anything else from the defendant?

5 MR. VON WALD: That's it, Your Honor.

6 THE COURT: Okay. Do you have any rebuttal?

7 MR. HURLEY: One second, Your Honor.

8 THE COURT: Because -- Jurors, the food is coming at 6. So
9 if we could get some business done before 6, let's try.
10 We're -- we're getting to the end, though, which is good.
11 But --

12 MR. HURLEY: Nothing further.

13 THE COURT: Nothing, okay. Well, we have to settle
14 instructions. So, Jurors, why don't you -- maybe, Dale --
15 Do you think the food might be here, Dale?

16 THE CLERK: I could check.

17 THE COURT: Jurors, you need step out just a moment. We'll
18 get you back in here. What's going to happen is we're
19 going to have closing argument. I'm going to read jury
20 instructions, and you're going to deliberate, so we could
21 get you deliberating tonight. So that's good. So we'll
22 give you a break.

23 (JURORS LEFT THE COURTROOM.)

24 All right. I don't know. Did Dale shut that
25 tape off? Is it still moving a little?

1 MR. VON WALD: I don't know.

2 THE COURT: All right. Well, let's resolve some issues here.

3 I left open the question of whether bad faith should go to
4 the jury. I'm going to rule that there is -- well, I
5 don't know, you were going -- you were going to make some
6 argument on that with regard to whether it was a tort
7 or --

8 UNIDENTIFIED: (INAUDIBLE).

9 MR. VON WALD: Your Honor, bad faith is basically -- what our
10 court systems have done, at least in South Dakota, is that
11 a bad faith, when it has to do with a contract, it's
12 either a tort or it's a contract. A tort action is one
13 thing where it usually requires a fraud and deceit and the
14 rest of the stuff that goes with it. That's a bad faith
15 tort.

16 THE COURT: Okay.

17 MR. VON WALD: And the contract action -- every contract
18 requires good faith in the dealings, see, so they're close
19 together. In that one they call it bad faith, but it's
20 bad faith in tort where you tortiously were deceitful and
21 so forth. That doesn't apply here.

22 THE COURT: Okay. Now, you're not alleging that, right?

23 MR. VON WALD: No.

24 THE COURT: The only bad faith I see here would be whether
25 the Bank acted in bad faith in attempting to get the

1 increase in the BIA guarantee. Because it's a little bit
2 like if we contracted that I would mow your loan but part
3 of the agreement is you would come and pick me up and give
4 me a ride over to your house and you don't show up, that's
5 bad faith. I couldn't perform because you didn't do
6 what -- so I see -- my inclination is to rule that that
7 should be submitted to the jury whether there was bad
8 faith and the attempts to obtain the BIA guarantee. I
9 don't see any other bad faith though unless you argue
10 there is some other kind of bad faith in this.

11 And by the way, I've got some interrogatories that I
12 threw together while you guys were doing your work.

13 MR. VON WALD: You also --

14 (END OF DUPLICATE #8 TAPE #1).

15 (DUPLICATE #8 TAPE #2 DOES NOT

16 MATCH UP WITH THE END OF DUPLICATE

17 #8 TAPE #1 AND BEGINS AS FOLLOWS:)

18 THE COURT: It just says encompassed in breach of contract
19 except whether the Bank made a good faith effort to get
20 the guarantee increased, because I think that there is an
21 issue -- a jury issue on that.

22 MR. VON WALD: Are you saying, Judge, that you think it might be
23 a bad faith, that the Bank attempted to get an increase in
24 the guaranteed amount?

25 THE COURT: No. Whether the Bank acted in good faith in

1 making an attempt to do that.

2 MR. VON WALD: Oh, I get you. Yeah. I see what you are saying.

3 THE COURT: I'm not saying the Bank never intended to do
4 that.

5 MR. VON WALD: Um-hum.

6 THE COURT: But did the Bank act in bad faith when it applied
7 to the Bureau for that -- because my understanding is
8 that's the whole reason the Bank decided you're not
9 getting the 70,000. We didn't get the increase, plus, you
10 know, you also had the loss of livestock. I realize that
11 but --

12 MR. VON WALD: Yeah.

13 THE COURT: I mean even if there is a loss of livestock, if
14 the BIA had approved of an increase to 90 percent, the
15 Bank still would have had to perform under the contract.
16 You would agree with that, right?

17 MR. VON WALD: Yes. If the Bank -- if the BIA -- actually, what
18 I really believe to be the case, Your Honor, is that once
19 there is a change in circumstances, it's a different ball
20 game.

21 THE COURT: But that's not reflected in the contract. I mean
22 you're saying impossibility of performance. They could no
23 longer perform because they lost the cattle.

24 MR. VON WALD: Yeah.

25 THE COURT: Well, I know that. But that's --

1 MR. VON WALD: Well --

2 THE COURT: That's --

3 MR. VON WALD: But what I'm -- in the first place, I think that
4 the loan agreement was something that -- that the Longs
5 gave actually no consideration for, number one. But,
6 number two, even with that in mind, every contract there
7 are assumptions of fact -- or fact type of things, and the
8 facts in this case are that the Longs had the financial
9 wherewithal to pay for the \$80,000 line of credit or
10 \$85,000 line of credit. Once they lost all of their --
11 their cattle -- and there is also an assumption on the
12 Longs' part that they continue to have 85 -- or that
13 number of cattle. See --

14 THE COURT: Yeah. But I think that's a jury issue, because
15 if you had submitted -- they're claiming if you had
16 submitted it appropriately on December 12th, they would
17 have gotten the 70,000, they wouldn't have had the loss of
18 livestock.

19 MR. VON WALD: (INAUDIBLE).

20 THE COURT: Now, that's a jury question.

21 MR. VON WALD: (INAUDIBLE).

22 THE COURT: Do we have some jury instructions that you two
23 have agreed to? Are we going to have to go through each
24 one of them?

25 MR. HURLEY: I think all of mine are standards except --

1 MR. VON WALD: Yeah, except.

2 MR. HURLEY: -- except there are -- and I can show which ones
3 they are.

4 THE COURT: Well, let's look at these interrogatories I came
5 up with because we've got to give some direction to the
6 jury. So my ruling is the bad faith will not be
7 dismissed, nor will the request for injunctive relief in
8 Count -- Count IX.

9 MR. VON WALD: I've just got a question with the jury on
10 injunctive relief, that's something for the Court to
11 decide, not the jury. That's a -- that's a --

12 THE COURT: That's actually --

13 MR. VON WALD: -- equitable action.

14 THE COURT: -- an equitable action. Our Code doesn't really
15 say only actions of law go to the jury.

16 MR. JASPER: You can do it as an advisory.

17 THE COURT: That's why if you look at Interrogatory No. 2, I
18 mean I'm asking the jury if they found the Bank breached
19 the contract of the loan agreement, did that breach
20 prevent the plaintiffs from performing under the lease.
21 That sounded like an advisory -- request for an advisory
22 verdict. I'm ultimately going to rule on whether they get
23 to stay there or whether they have to leave, but the whole
24 argument of the plaintiffs is we couldn't exercise our
25 option because you breached the contract. We didn't get

1 the money. I would like to know if the jury believes
2 that.

3 MR. VON WALD: Yeah.

4 THE COURT: The jury can say, well, they breached; but they
5 still wouldn't have been able to purchase the land, so
6 that would help me out. But anybody have a problem with
7 Interrogatory No. 1?

8 MR. HURLEY: No problem.

9 THE COURT: All right. Plaintiff doesn't. How about
10 defendant?

11 MR. JASPER: I don't.

12 MR. VON WALD: I don't either.

13 THE COURT: You don't have a problem. All right.

14 Interrogatory No. 1 will be given to the jury. How about
15 Interrogatory No. 2. And this really pertains to the last
16 count.

17 MR. JASPER: The question you're not asking for is how they
18 voted on that in terms of numbers. Is there a specific
19 reason?

20 THE COURT: Which one?

21 MR. JASPER: No. 2. You do on No. 1. You want to know --

22 THE COURT: No. No. 2 has yes and no.

23 MR. JASPER: Yeah. But you don't have the number of jurors
24 voting.

25 MR. VON WALD: It just does on the first one and (INAUDIBLE) --

1 THE COURT: Because that's assuming --

2 MR. VON WALD: Yeah.

3 THE COURT: -- they've learned their lesson from (INAUDIBLE).

4 MR. VON WALD: Yeah.

5 MR. JASPER: Okay.

6 THE COURT: Yeah. Maybe I should put that in there. We've
7 got some smart jurors though. I'll tell them to vote --
8 which is interesting if we get three-three votes, I think
9 that's going to be a mistrial on that issue.

10 MR. HURLEY: It's a hung jury.

11 THE COURT: Exactly. Because I can't enter judgment for the
12 defendant on a three-three because they didn't return a
13 verdict for the plaintiff, so I'm hoping -- unless you
14 will both want to agree to let all seven of them
15 deliberate. We -- we can assure we're not going to get
16 anything -- any three-three.

17 MR. VON WALD: It would be better than doing the trial again.

18 MR. JASPER: Yeah.

19 THE COURT: Because I think the Code says the parties can
20 stipulate to more than six.

21 MR. VON WALD: That's what it does say.

22 MR. JASPER: Yeah, it does.

23 THE COURT: Plus, juror seven is actually a rancher himself.
24 I mean he may bring some common sense to this. Do the
25 parties stipulate that all seven can deliberate?

1 MR. HURLEY: I agree with David. It would be better than
2 doing it over again.

3 MR. VON WALD: I would stipulate to it.

4 THE COURT: You stipulate to it?

5 MR. HURLEY: Yes, sir.

6 THE COURT: Chuck?

7 MR. JASPER: Yup.

8 THE COURT: Dave?

9 MR. VON WALD: (INAUDIBLE).

10 THE COURT: All right. All parties stipulate all seven
11 jurors can deliberate.

12 MR. HURLEY: And vote?

13 THE COURT: And vote.

14 MR. HURLEY: It would be four to three.

15 THE COURT: We're not going to have anything on hung jury on
16 that. So Interrogatory No. 2, does everyone agree with
17 that?

18 MR. HURLEY: Plaintiff agrees.

19 THE COURT: How about defendants?

20 MR. VON WALD: I will agree.

21 MR. JASPER: No problem.

22 THE COURT: All right. How about Interrogatory No. 3?

23 MR. JASPER: I really don't think so. I don't think that's
24 appropriate. I mean the main issue is the fact that, you
25 know, they didn't get the Court's permission, etcetera,

1 etcetera, but they owned the property. They could do with
2 it as they dang well please.

3 THE COURT: Well, the reason I proposed that was if you look
4 at our Section 10-2-1 of the Code, actions to recover
5 possession of real property, it's really a forcible entry
6 and detainer action. It says except in a case where
7 personal possession voluntarily surrenders such possession
8 to another claim in a paramount right self-help remedies
9 to secure possession are forbidden except as otherwise
10 provided herein. And they go on to talk about a forcible
11 entry and detainer action.

12 MR. JASPER: Right. But in there the only time they talk
13 about any damages is if it is forcible detainer by -- in
14 this case, it would be the Longs.

15 THE COURT: That -- that is an issue. What -- the damages is
16 going to be tough because there is no statutory damages
17 here.

18 MR. VON WALD: That's (INAUDIBLE).

19 MR. JASPER: Yeah. That's (INAUDIBLE).

20 THE COURT: But see, there is in his exhibit there is loss of
21 use of land. I guess that -- the jury will have to
22 determine if that's -- they're entitled to damages in
23 there. If they come back --

24 MR. JASPER: I -- Judge, I have to disagree with you,
25 but . . .

1 MR. VON WALD: Yeah, I disagree myself.

2 THE COURT: Well, what would you propose the instruction
3 would be on -- the interrogatory would be on that? You're
4 saying that you don't think the plaintiff made a prima
5 facie case of self-help remedies?

6 MR. JASPER: Well, the statute doesn't provide any punishment,
7 if you will, for doing self-help. It says you're not
8 supposed to, but nowhere in the -- in the Code does it say
9 here's the ramifications of doing it.

10 THE COURT: But there is nothing in here about breach of
11 contract damages either. That would be a causation issue,
12 right, whether plaintiff -- plaintiff has shown that he
13 was damaged by the selling of the land to your client. I
14 mean if you want to offer an alternative, I will certainly
15 consider it, but --

16 MR. JASPER: I can't at this point.

17 MR. VON WALD: I would just as soon, Your Honor, that it would
18 not even be put to the jury as far as that particular
19 issue as far as self-help -- the self-help is concerned.

20 THE COURT: They made a case of it. If you -- it would be
21 basically equivalent to a landlord leasing property to
22 another party while there was already a tenant in there
23 and allowing that new tenant to come in and remove the
24 other. Right? That's what happened here. Before they
25 terminated the lease hold interest of the plaintiffs --

1 MR. VON WALD: I think their action should be a forcible entry
2 and detainer action, and there isn't such a thing as an
3 action for self-help. You see what I'm saying is that --
4 that what their pleadings should be if they think they
5 were wrongfully ejected from that land and that they
6 should have been entitled to that land, what their
7 pleadings should be is what the damages -- what -- that
8 they were a forcible entry and detainer. We were
9 wrongfully on the land and that because we were wrongfully
10 on the land, that because of that, it would cause; but the
11 self-help itself isn't the appropriate cause of action at
12 all. Self-help -- the Code definitely says that self-help
13 is not allowed.

14 THE COURT: It's not allowed to evict someone from premises.

15 MR. VON WALD: I understand that. That's right. Self-help is
16 not allowed. But the Code says that -- it goes on to say
17 that if -- if you are, you know, wrongfully kept off of
18 the land --

19 THE COURT: Well --

20 MR. VON WALD: -- that you have to file a forcible entry and
21 detainer action.

22 THE COURT: Well, no. It actually says you can't use
23 self-help. The party claiming the right to possession
24 should bring a forcible entry and detainer action instead
25 of using self-help.

1 MR. VON WALD: Right.

2 THE COURT: That's the way I read it.

3 MR. VON WALD: Right.

4 MR. JASPER: (INAUDIBLE).

5 THE COURT: It's a little bit like, you know, self-help
6 repossession of a car. That's not permitted under the
7 law.

8 MR. JASPER: Well, I guess I --

9 THE COURT: Unfortunately though, most statutes provide for
10 some calculation of damages. That does work tremendously.
11 If the jury comes back on that one issue, we don't give
12 them guidance as to how to calculate damages on that.

13 MR. JASPER: Well, if you look at 10-2-7 subsection 3, it says
14 at trial the finder of fact, whether the jury or the judge
15 without a jury, shall also assess damages caused to the
16 plaintiff by the forcible entry or forcible or unlawful
17 detainer including damage for waste by the defendant
18 during the tenancy if proved and shall also find the
19 amount of rent due if such is in issue. You know, here we
20 have the plaintiff and defendant in -- in an action
21 (INAUDIBLE) reversed, but the way I read that it would
22 allow damages for the Bank against the Longs but not
23 the -- not the (INAUDIBLE).

24 THE COURT: Well, we had need a jury instruction on it. If
25 you find defendant used self-help repossession remedies,

1 you shall calculate damages as follows: The plaintiffs'
2 loss or inability to use the land minus whatever benefit
3 they got from using the other one. Because I know what
4 you're saying, I agree with what you're saying. But the
5 way this Code is written the plaintiffs made out a case of
6 self-help violation of this statute. So we need a good
7 instruction on how to calculate damages. But I -- I don't
8 have -- I don't see any legal way I can dismiss that. I
9 think plaintiff has (INAUDIBLE) --

10 MR. VON WALD: You know, the problem that I see with that,
11 Judge, say that we did use self-help, and he was evicted
12 from the land, but we were entitled to the land anyway.
13 You see what I'm saying?

14 MR. JASPER: And then there is no damages.

15 MR. VON WALD: So then there are no damages.

16 THE COURT: Let's get an -- let's get an appropriate
17 instruction to the jury on how to calculate damages. I
18 mean it may be a situation where you get -- you get a
19 verdict, but you get \$1.00 nominal damages.

20 MR. JASPER: Well -- but I think the way the Code reads or at
21 least it appears to me is as Dave was saying if, in fact,
22 you are entitled to possession and you wrongfully evict
23 the person --

24 THE COURT: Well --

25 MR. JASPER: -- and ultimately, it's decided that they didn't

1 have a right to be there, there isn't by definition
2 damages.

3 THE COURT: No. No, I disagree with that. Because in
4 essence you could -- if you were -- you could say, well,
5 I -- I used self-help, but I'm entitled to. So that would
6 defeat the whole purpose of the law. You would say, well,
7 yeah, I was entitled to get the land back. Well, you --
8 and I don't understand what happened. You filed a notice
9 to quit in the court. Why did it just stall there? There
10 was never an action to evict them?

11 MR. VON WALD: There was an action started in state court.

12 THE COURT: There was? What happened with that?

13 MR. VON WALD: Well, eventually -- and he -- he answered in
14 that. I was going to try to take depositions on that.
15 Ronnie Long would not even come to the depositions because
16 of the fact that it was in state court. He said state
17 court didn't --

18 UNIDENTIFIED: (INAUDIBLE).

19 MR. VON WALD: -- didn't have jurisdiction. So that's the
20 problem that you get into.

21 THE COURT: You could have brought it in this Court.

22 MR. VON WALD: Well (INAUDIBLE) --

23 UNIDENTIFIED: (INAUDIBLE).

24 THE COURT: (INAUDIBLE) you've brought in now is a
25 counterclaim.

1 MR. VON WALD: And in the meantime -- meantime, they made a --
2 an amended complaint and sued us and then I
3 counterclaimed. That's what happened, yeah. Yeah.

4 MR. JASPER: This is (INAUDIBLE) jurisdiction on that issue.

5 MR. VON WALD: Yeah.

6 MR. HURLEY: Well, I think three fits pretty well. At trial
7 the finder of fact, whether jury or judge without a jury,
8 shall also assess damages caused to the plaintiff by the
9 forcible entry or forcible allowable detainer including
10 damage for waste, etcetera. If proved, shall also
11 etcetera.

12 MR. JASPER: That's what it says, but here the plaintiffs and
13 the defendant (INAUDIBLE) --

14 MR. VON WALD: That's forcible entry.

15 THE COURT: Well, will the parties stipulate if the jury
16 comes back for the plaintiffs on that, that the Court
17 would assess damages? We could just remove that. Because
18 I -- I guess I'm asking you, Jim.

19 MR. VON WALD: You know, here's the scenario that I wonder
20 about, Judge. Self-help is not to be used. Obviously,
21 the intent of that statute was to keep the peace here, so
22 that --

23 MR. HURLEY: Yes.

24 MR. VON WALD: You know, so that the peace was not disturbed.
25 Okay. And -- but if the jury comes back and they -- if

1 they come back, and they say the Bank didn't breach the
2 agreement, and Ronnie Long actually was on the land, and
3 he shouldn't have been on the land, but the Bank used
4 self-help, then -- then it's like one offsets the other?
5 And all of a sudden Ronnie Long can get damages from the
6 Bank?

7 THE COURT: You could be totally in the right; but if you use
8 the inappropriate remedy to exercise your rights, that's
9 illegal.

10 MR. HURLEY: And that's what (INAUDIBLE) --

11 MR. VON WALD: I know it's -- but what I'm --

12 THE COURT: I agree with you completely. They could come
13 back and say the Bank did everything right except they
14 shouldn't have sold it before they got a court order.

15 MR. JASPER: Well --

16 THE COURT: That's why I'm suggesting the Court then should
17 decide the damages.

18 MR. JASPER: Well, I guess if -- if we can't read this section
19 of the Code as a whole, which is actually to recover
20 possession of real property, that's what this is under.
21 10-2-1 prohibits self-help remedies. Then 10-2-2 defines
22 what forcible entry is. That isn't appropriate in this
23 case because, you know, we can't say that Ronnie Long
24 forcibly entered here, so that doesn't (INAUDIBLE) --

25 THE COURT: It's a forcible detainer.

1 MR. JASPER: Well, it's not a forcible --

2 THE COURT: He was legally there, and he refused to leave.

3 MR. JASPER: No. It's unlawful detainer which would be under
4 10-2-4 rather than 10-2-3, which is forcible detainer.

5 Okay. Because it says a person commits an unlawful
6 detainer if being a tenant of real property (INAUDIBLE) --

7 THE COURT: That's what -- you could have brought an action
8 alleging he was an unlawful detainer.

9 MR. JASPER: And that's what your counterclaim is.

10 MR. VON WALD: That's what our counterclaim is, yeah.

11 UNIDENTIFIED: (INAUDIBLE).

12 THE COURT: Yeah. Just go ahead and let them start eating.

13 MR. VON WALD: That's what our counterclaim was, Judge. Yeah.
14 But they on the other hand did not have a cause of action
15 for unlawful detainer or forcible detainer on the Bank's
16 part.

17 THE COURT: Now, wait a minute.

18 MR. VON WALD: I know.

19 THE COURT: Their claim of action saying by selling the land
20 that's a constructive -- that's a constructive eviction.

21 MR. JASPER: But the Code doesn't provide anywhere for
22 punishment for --

23 MR. VON WALD: Self-help.

24 MR. JASPER: -- (INAUDIBLE).

25 THE COURT: (INAUDIBLE).

1 MR. JASPER: It just says (INAUDIBLE) --

2 THE COURT: There can't be a law that makes something legal
3 and then say, well, I violated the law, but the Code
4 doesn't say what I got to pay for violating. I could rule
5 then -- all right. I could rule that's an absolute
6 defense to your unlawful entry and detainer. You can't
7 force them off because you legally (INAUDIBLE). You don't
8 want me to rule that way.

9 MR. JASPER: No.

10 THE COURT: So we've got to have some measure of damages.

11 MR. VON WALD: Well, I would be in favor of the Court deciding
12 the damages because I'm thinking I don't know what in the
13 world the jury would -- how they could ever figure
14 anything like that out.

15 MR. JASPER: I would stipulate to that.

16 THE COURT: How about you, Jim, without the change of the
17 last interrogatory --

18 MR. HURLEY: Well, I'm a firm believer in juries.

19 THE COURT: Well, I am, too.

20 MR. HURLEY: They seem to be able to wrestle with these things
21 and come back --

22 THE COURT: I've -- I've presided over trials, and I thought
23 the jury is never going to figure this out, and they come
24 back with one -- some of the most common sense
25 resolutions.

1 MR. HURLEY: (INAUDIBLE).

2 THE COURT: Your -- your remedy then would be to say to the
3 Court, you know, that -- that dam- -- that verdict or that
4 judgment of damages is excessive under the law, and -- and
5 -- you know, and I will exercise sound discretion in
6 looking at that. Because if they come back, no, no, no,
7 on everything except self-help and return \$1.2 million,
8 that doesn't make any sense. You know, at the most I
9 could see them coming back with, okay, what kind of income
10 did they lose for not having access to -- what is it,
11 Tract 1?

12 MR. HURLEY: Tract 1. (INAUDIBLE).

13 THE COURT: And they got, what, 25,000 a year or something.

14 MR. HURLEY: Yeah.

15 THE COURT: I don't know. If they come back with 1.2 million
16 on that, that doesn't conform to the evidence.

17 MR. HURLEY: But we can argue that.

18 MR. VON WALD: Yeah.

19 MR. HURLEY: You know, that will be -- that will be exactly my
20 argument is we put down what that was worth. That's our
21 loss of use. It's right in Exhibit 23. If you rule for
22 us --

23 MR. JASPER: (INAUDIBLE).

24 MR. HURLEY: -- rule for us, there it is. But I have faith
25 in the jury. Sometimes as a plaintiff's lawyer I don't

1 like it, but . . .

2 THE COURT: So I'm going to -- well, I don't know how we got
3 to --

4 MR. VON WALD: We're on interrogatory No. 3 first.

5 THE COURT: We agreed to 1 and 2. All right.

6 UNIDENTIFIED: (INAUDIBLE).

7 THE COURT: 3 you two object.

8 MR. VON WALD: 3 I will object. And I think for sure whether --
9 when -- when it says did the Defendant Bank attempt to use
10 self-help, it should be used.

11 THE COURT: All right. I agree with that. I agree. Did the
12 Defendant Bank use --

13 MR. JASPER: (INAUDIBLE) just say, did the Defendant Bank use
14 self-help --

15 MR. VON WALD: Self-help.

16 MR. HURLEY: In an attempt.

17 MR. JASPER: -- in an attempt to remove.

18 THE COURT: Well, I'm going exactly by what the Code says.
19 Self-help remedies --

20 UNIDENTIFIED: (INAUDIBLE).

21 THE COURT: "Did the Defendant Bank use self-help remedies in
22 an attempt to remove the plaintiffs from the land that was
23 subject to the lease with an option to purchase?"

24 MR. HURLEY: Fine.

25 MR. JASPER: Self-help by definition is (INAUDIBLE). So it's

1 redundant.

2 MR. VON WALD: Yeah. Yeah.

3 THE COURT: Tell it to the Tribal Council.

4 MR. JASPER: It's like the person that wrote the memo about
5 being excessively verbose.

6 THE COURT: Well, you could be excessively other things. But
7 this is the statute (INAUDIBLE).

8 MR. JASPER: Yeah. But excessively verbose is by definition.

9 THE COURT: True.

10 MR. VON WALD: Verbose is excessive. Yeah.

11 MR. JASPER: Yeah.

12 THE COURT: Well, that's like saying you're a verbose lawyer,
13 right?

14 MR. VON WALD: Yeah. It's an oxymoron, I guess.

15 THE COURT: So we're going -- we're going to renumber 3
16 subject that I note that the defendants object to it.

17 MR. VON WALD: Okay.

18 MR. JASPER: Okay.

19 THE COURT: But I am going to take out "attempt."

20 MR. JASPER: It makes it somewhat more palatable, right?

21 THE COURT: What about 4?

22 MR. VON WALD: There again, I will object just based on --

23 THE COURT: Your argument is --

24 MR. VON WALD: My argument that --

25 THE COURT: -- that it's not appropriate for this Court to --

1 MR. VON WALD: -- it is not appropriate for this Court.

2 THE COURT: And, Chuck, you object?

3 MR. JASPER: I guess I would object to principle, but I don't
4 see where it affects my clients one way or the other.

5 THE COURT: All right. What about plaintiffs?

6 MR. HURLEY: That's fine.

7 MR. JASPER: (INAUDIBLE).

8 THE COURT: How about No. 5?

9 MR. VON WALD: I think it's -- with your reasoning, Judge, I
10 think it's worded properly.

11 MR. HURLEY: Yeah.

12 MR. VON WALD: There again, to me bad faith is -- should be
13 dismissed, but I will object just on that basis.

14 THE COURT: All right. So it's objected to for the record
15 and, Chuck?

16 MR. JASPER: No position.

17 THE COURT: Jim?

18 MR. HURLEY: Good.

19 THE COURT: You agree to it. Now, I think Interrogatory 6
20 should be changed to reflect, if you answered no to Number
21 1, 3, 4, and 5, damages should not be awarded. Or do you
22 think it's sufficient there?

23 MR. HURLEY: Well, I think it's good, Judge, and then it
24 eliminates cumulative.

25 THE COURT: See, that's why I didn't want damages part of

1 each one of the counts, so you can come back -- if you do
2 that, then you're going to get duplicative damages. If --
3 this way, they have to figure it out.

4 MR. VON WALD: Somehow or another, they should be told that if
5 you answer no to all of Numbers 1, 3, 4, and 5 --

6 THE COURT: I agree.

7 MR. VON WALD: -- no damages should be awarded.

8 THE COURT: All right. I'll put that in there. Do you agree
9 with that, Jim?

10 MR. HURLEY: Yes.

11 THE COURT: (INAUDIBLE).

12 MR. HURLEY: Yeah.

13 THE COURT: All right. Now, how about the other
14 instructions? You two have not sat -- three, have not sat
15 down and decided or agreed to those?

16 MR. VON WALD: Pardon me?

17 THE COURT: The other instructions, the jury instructions.

18 MR. VON WALD: I've just got the absolute general ones that I --
19 did you look at mine? I didn't look at the yours -- the
20 rest of yours, Jim, but . . .

21 THE COURT: Did you -- was -- were yours -- okay.

22 MR. VON WALD: Probably the first one, the general --

23 THE COURT: Were you looking at yours? Let's -- let's go on
24 the plaintiffs. Oh, geez. Do you have a clean of this or
25 is it just that (INAUDIBLE)?

1 MR. HURLEY: Yes -- no. I have all of it.

2 THE COURT: Do you have plaintiffs' proposed, starting with
3 "Both sides having rested"?

4 MR. VON WALD: Yeah -- well, no.

5 MR. HURLEY: I have a whole set of both.

6 THE COURT: All right. Then you won't have any objection to
7 plaintiffs' proposed No. 1, "Both sides having rested"?

8 MR. VON WALD: I don't have a problem with that.

9 MR. JASPER: Isn't that his or (INAUDIBLE)?

10 MR. VON WALD: That's mine.

11 MR. JASPER: (INAUDIBLE).

12 MR. HURLEY: May I step out and get that, Your Honor?

13 THE COURT: Go ahead.

14 MR. VON WALD: Plaintiff has submitted the same one.

15 MR. JASPER: Yeah, they're the same one. I see no problem
16 with that.

17 MR. VON WALD: Those are preliminaries.

18 MR. JASPER: They look the same.

19 MR. VON WALD: Are you going to give these instructions to the
20 jury, then, to take them into the jury room?

21 THE COURT: Yeah.

22 MR. VON WALD: So then I would just as soon you wouldn't have
23 "Proposed Plaintiffs."

24 THE COURT: No, no. These are going in clean.

25 MR. JASPER: (INAUDIBLE) as clean.

1 THE COURT: But I can't find my disk now. You gave it back
2 to me, didn't you?

3 THE CLERK: (INAUDIBLE).

4 THE COURT: You gave it back to me, Dale. What did I do with
5 it? Here it is. I found it.

6 THE CLERK: (INAUDIBLE).

7 THE COURT: All right. I'm going to change that last one.

8 MR. JASPER: (INAUDIBLE).

9 MR. VON WALD: You mean (INAUDIBLE).

10 THE COURT: Yeah. (INAUDIBLE).

11 THE CLERK: Yeah.

12 MR. JASPER: I see you brought a stapler today, huh?

13 THE COURT: Yup.

14 MR. VON WALD: That's usually when you don't need them.

15 MR. JASPER: Yeah. Mine is in my briefcase all the time,
16 so . . . It even makes it in and out of our security in
17 the courthouse.

18 MR. VON WALD: It does, huh?

19 MR. JASPER: Yeah. At the -- what I will call the (INAUDIBLE)
20 where you don't have to go through all that nonsense.

21 MR. VON WALD: Um-hum. In the county courthouse?

22 MR. JASPER: Yeah.

23 MR. VON WALD: Is that right?

24 MR. JASPER: Oh, yeah.

25 MR. VON WALD: I see the federal -- most of the federal

1 buildings are like that, but . . .

2 MR. JASPER: Yeah. And then -- when they're voting -- they
3 have our voting, one precinct votes in the courthouse.
4 They cordon off a special area so that people go in -- can
5 go in and vote and not have to go through the damn
6 security routine. To get your license plates and all
7 that, you've got to go through it.

8 MR. VON WALD: Is that right?

9 MR. JASPER: Um-hum.

10 THE COURT: Can you print off page six of this, Dale?

11 THE CLERK: (INAUDIBLE).

12 THE COURT: Yes. Yeah, two copies. Page six and two copies.

13 MR. JASPER: (INAUDIBLE). So are we or aren't we officers of
14 the Court? We should be exempt from all that.

15 MR. VON WALD: Um-hum.

16 THE COURT: (INAUDIBLE).

17 MR. JASPER: Our security routine. You can't --

18 THE COURT: The judges have probably scared them off with
19 their lawyers.

20 MR. VON WALD: Or vice versa.

21 MR. JASPER: Some of the judges think it's about as Mickey
22 Mouse as I do. (INAUDIBLE).

23 THE COURT: I don't know. I knew a judge up in Grand Forks,
24 Judge Jahnke. Doing just a typical child support case one
25 day. Guy pulls out a gun, shoots him in the chest.

1 MR. JASPER: At the (INAUDIBLE) County Courthouse, I can't
2 even take this in.

3 THE COURT: You can't?

4 MR. JASPER: It's a dangerous weapon.

5 THE COURT: Yeah. They're a little extreme there. I tried
6 to bring my key -- I had a key chain, and they wouldn't
7 let me bring it in because it had a little jagged edge on
8 it.

9 MR. JASPER: (INAUDIBLE). I can see with (INAUDIBLE) I could
10 do a lot of damage.

11 (INAUDIBLE DISCUSSION ON TAPE WITH
12 SHUFFLING OF PAPERS AND OVERLAPPING
13 OF INDECIPHERABLE SPEAKERS.)

14 MR. HURLEY: These are copies.

15 MR. VON WALD: Here's (INAUDIBLE).

16 THE COURT: Right over here, I think.

17 MR. HURLEY: These -- these are the original, a whole set with
18 certain citations.

19 THE COURT: They've still got "plaintiffs' proposed" on them.
20 Oh, great. You've got the originals right there.

21 MR. HURLEY: Right.

22 THE COURT: I'm not going to this "suggested by South Dakota
23 Civil Pattern Jury Instruction Committee."

24 MR. HURLEY: Just tear them up as you please. Here's a
25 (INAUDIBLE).

1 MR. VON WALD: (INAUDIBLE). Okay. 10 is the only one we're
2 missing, and I don't know where the heck that is or what
3 it is, I guess.

4 MR. JASPER: 10? Isn't 10 the one that is the duplicate of 5?
5 THE COURT: Yeah. See, 10 is 5A.

6 THE CLERK: There's nothing here.

7 THE COURT: (INAUDIBLE).
8 THE CLERK: (INAUDIBLE).
9 THE COURT: (INAUDIBLE).
10 THE CLERK: (INAUDIBLE).
11 THE COURT: See, I remember now. Look -- if you look at 5A,
12 it's that same as 10. Remember you added --

13 MR. JASPER: (INAUDIBLE) 5A.

14 THE COURT: 5A only had that first page, and you wanted the
15 second page? That was your 10. We just replaced that
16 with 5A.

17 MR. HURLEY: There is nothing on the (INAUDIBLE)?
18 THE COURT: No. I'm going to (INAUDIBLE).
19 MR. HURLEY: Oh.

20 MR. VON WALD: I think we have two Exhibit 8's. (INAUDIBLE).
21 THE COURT: I didn't see this (INAUDIBLE). You're right.

22 MR. JASPER: Yeah. That's fine. Let's see. Your 10 is his
23 5A.

24 THE COURT: (INAUDIBLE). Oh, it's right there. The Long
25 case. You didn't see that on there?

1 THE CLERK: No. The only thing that came up on there is
2 (INAUDIBLE).

3 THE COURT: (INAUDIBLE). Did you use a different computer?

4 THE CLERK: (INAUDIBLE).

5 THE COURT: Maybe you've got to scroll down a little bit.

6 THE CLERK: Oh, okay.

7 THE COURT: Because it says Long case.

8 THE CLERK: Yeah.

9 THE COURT: Let's see what we've got here. Is the tape still
10 on?

11 THE CLERK: Yes.

12 THE COURT: Oh, good. Why don't we go with these
13 instructions then. And we've got defendants and
14 plaintiffs. All right. Let's start with, "This case is
15 presented to the jury." Oh, no. That's --

16 MR. VON WALD: No.

17 THE COURT: -- an opening. (INAUDIBLE).

18 MR. VON WALD: Both sides.

19 THE COURT: "Both sides having rested."

20 MR. VON WALD: Yeah.

21 THE COURT: Should we use that as our first one?

22 MR. VON WALD: Yeah.

23 MR. JASPER: Yeah.

24 MR. HURLEY: That's standard.

25 THE COURT: All right. No objection to number -- I will mark

1 that as 1. No objection to that one.

2 MR. VON WALD: Okay.

3 THE COURT: How about, "It is your duty as a jury to
4 determine the facts"? Any objection to that?

5 MR. VON WALD: No.

6 THE COURT: Jim? Well, you offered it, so . . .

7 MR. HURLEY: Let's see.

8 MR. VON WALD: The attorneys --

9 THE COURT: We started with "Both sides having rested."

10 MR. HURLEY: Okay.

11 THE COURT: That will be Instruction No. 1.

12 MR. HURLEY: Do we need (INAUDIBLE) that says evidence?

13 THE COURT: (INAUDIBLE).

14 MR. VON WALD: (INAUDIBLE)?

15 MR. HURLEY: It's just (INAUDIBLE) --

16 THE COURT: (INAUDIBLE).

17 MR. HURLEY: Yeah. It says -- well, it just tells them about
18 evidence. I don't know if we need it, but "evidence
19 includes testimony of witnesses (INAUDIBLE)."

20 THE COURT: Well, let's put it in (INAUDIBLE).

21 MR. HURLEY: That's one that's usually in there.

22 THE COURT: All right. So we put that in after --

23 MR. VON WALD: Which -- which one (INAUDIBLE)?

24 THE COURT: (INAUDIBLE). It says, "Evidence includes
25 testimony of" -- I think it's actually a preliminary

1 instruction. See -- because it refers to "may see or hear
2 certain things during the trial."

3 MR. HURLEY: Okay.

4 MR. VON WALD: That's a preliminary, yeah, I think.

5 THE COURT: I wonder if that is captured later on. Maybe
6 (INAUDIBLE).

7 MR. HURLEY: Yes. It's 15 in the index. 21-02. Evidence --
8 direct and circumstantial.

9 THE COURT: Okay.

10 MR. HURLEY: (INAUDIBLE).

11 THE COURT: Well, we've already got it. So --

12 MR. HURLEY: (INAUDIBLE).

13 THE COURT: So instruction 3, attorneys -- no. No. "The
14 attorneys for the respective parties will present to you
15 their arguments." You guys -- you guys want to argue
16 first, and then I give the instructions or me give the
17 instructions --

18 MR. VON WALD: Just give the instructions and then --

19 THE COURT: And then you'll argue.

20 MR. VON WALD: I think it's easiest.

21 THE COURT: That's the way I usually do it. All right. So
22 that will be 3, "The attorneys will present arguments."
23 How about 4, "If you should determine"?

24 MR. JASPER: Is that the quotient verdict?

25 MR. VON WALD: Yeah.

- 1 THE COURT: What the hell is a quotient verdict?
- 2 MR. VON WALD: That's where they add --
- 3 THE COURT: Oh.
- 4 MR. VON WALD: -- add the sums.
- 5 MR. JASPER: Add the sums.
- 6 MR. VON WALD: -- add the sums together and average it. One
7 guy comes up with 15,000, one guy with 100,000, so they
8 just average it together.
- 9 THE COURT: Okay. All right. So everybody agrees we should
10 read that one?
- 11 MR. VON WALD: I guess, yeah.
- 12 THE COURT: That will be 4.
- 13 MR. JASPER: (INAUDIBLE).
- 14 THE COURT: "Common knowledge."
- 15 MR. HURLEY: Standard.
- 16 MR. JASPER: Where's that one?
- 17 MR. VON WALD: "You have a right to consider the common
18 knowledge possessed by all of you."
- 19 MR. JASPER: Oh, okay.
- 20 THE COURT: 5. This next one could be confusing. Do we have
21 an instruction later on, on majority vote? Shall we put
22 "four of your members have agreed"?
- 23 MR. HURLEY: Yeah, I think so.
- 24 MR. VON WALD: (INAUDIBLE).
- 25 THE COURT: If we put "four" in there, will everyone agree to

1 that?

2 MR. JASPER: Yeah.

3 MR. VON WALD: Yeah.

4 THE COURT: All right. We'll put "four" in there, and that
5 will be Instruction No. 6.

6 MR. VON WALD: Four -- I wonder if you should put "four or
7 more."

8 THE COURT: Yeah, I guess. Let's put "four or more."

9 MR. JASPER: The first time they vote and they have seven, and
10 they keep voting until they have four. (INAUDIBLE).

11 THE COURT: Instruction 7, that's pretty standard.

12 MR. JASPER: That's, "You are the sole judges"?

13 MR. VON WALD: Yeah.

14 MR. HURLEY: Correct.

15 THE COURT: All right. Instruction 8 is the claim -- is,
16 "The plaintiffs claim." See, and that -- that -- that
17 sort of misstates some of the facts because it says they
18 obtained a deed to Longs' 2,230 acres. I don't think this
19 acreage was ever in the name of the Corporation, was it?

20 MR. VON WALD: No.

21 MR. JASPER: Right.

22 MR. HURLEY: Well, Longs referred to (INAUDIBLE) --

23 MR. JASPER: I think that's more appropriate as argument
24 rather than in the instructions.

25 THE COURT: Do you have one on --

1 MR. VON WALD: I did have some.

2 THE COURT: -- on summarizing the case there, Dave?

3 MR. VON WALD: Yeah.

4 THE COURT: Let's see what Dave's got.

5 MR. VON WALD: The very first one (INAUDIBLE). "This is a civil
6 case brought by Long Family Land and Cattle Company,
7 Inc., and Ronnie and Lila Long who are considered
8 plaintiffs. Plaintiffs alleged that the Defendant Bank
9 breached written agreements entered into by the Longs and
10 the Bank. Plaintiffs allege that on December 5, 1996, the
11 Longs and the Bank entered into a loan agreement and lease
12 with option to purchase."

13 THE COURT: I think I like that a little bit better.

14 MR. VON WALD: (INAUDIBLE).

15 THE COURT: See what he is referring to, Jim?

16 MR. HURLEY: No. I haven't see it yet.

17 MR. VON WALD: That's fine. I (INAUDIBLE).

18 THE COURT: He's got a little summary of the -- of your case
19 that refers to breach of contract and bad faith. That
20 would be his first instruction. I'm inclined to use that
21 as Instruction 8 instead of yours. Yours is making
22 reference to things I threw out. This didn't print out
23 what I added.

24 THE CLERK: Did you delete it? Did you save it?

25 THE COURT: What's going on with that? I thought I did. Any

1 objection to Dave's number one as Instruction No. 8? Let
2 Jim take a look at it.

3 MR. HURLEY: (INAUDIBLE).

4 THE COURT: It doesn't include the self-help and the --

5 MR. HURLEY: No.

6 THE COURT: -- and the discrimination, but the
7 interrogatories do, so. . . Yours has stuff -- I would
8 rather have -- so I'm going to mark that as instruction --
9 what number was that -- Instruction 8. That's Dave's one
10 will be Instruction 8. No objection, Jim?

11 MR. HURLEY: No, that's fine.

12 THE COURT: All right. So we're not going to use your
13 Instruction 8. All right. Now, what about this -- is
14 this the burden of proof? Now -- see, now we've got --
15 see, I think this next instruction you have is encompassed
16 by the interrogatories. In civil actions you are asking
17 all of these questions. We don't need that, do we?

18 MR. HURLEY: (INAUDIBLE).

19 MR. VON WALD: (INAUDIBLE).

20 MR. JASPER: (INAUDIBLE).

21 THE COURT: All right. How about direct evidence and
22 circumstantial evidence? And that's Jim's next
23 instruction. Shall we read that to them? We had some
24 circumstantial. That will be No. 9.

25 MR. JASPER: I don't have a problem with that. Do you, Dave?

1 THE COURT: Jim, No. 9?

2 MR. HURLEY: Yes.

3 MR. VON WALD: That's fine.

4 THE COURT: That will be No. 9. How about this next one?

5 MR. VON WALD: You've got that insert thing there.

6 THE COURT: Did you lose your -- damages there. Okay.

7 MR. VON WALD: "Which have a basis in the evidence."

8 THE COURT: Do you have a causation instruction?

9 MR. HURLEY: This is the standard.

10 THE COURT: Yeah. But see, it says, "Insert here the
11 elements of damage."

12 MR. VON WALD: "Insert here the elements of damage --"

13 MR. HURLEY: Oh, I see.

14 MR. VON WALD: "-- which have a basis in the evidence."

15 THE COURT: Let's see what you've got, Dave.

16 MR. VON WALD: Let's see. I've got, "The measure of damages for
17 breach of contract (INAUDIBLE)."

18 THE COURT: Where is that at?

19 MR. VON WALD: It's 47-03 is what I got.

20 MR. HURLEY: We have that one, too.

21 THE COURT: Where do you see that? Measure --

22 MR. VON WALD: Do you have that one, Jim?

23 THE COURT: Oh, here it is. Shall we put that in, the
24 measure of damages? I like that. It's really short. Put
25 that in as No. 10?

1 MR. VON WALD: Let's see. He's got one there, too, you're
2 talking about?

3 MR. HURLEY: It's 47-03 in my set.

4 MR. VON WALD: 47-03. Yeah, that's what I got, too.

5 THE COURT: What is it called, David, measure of damages?

6 MR. HURLEY: Yeah.

7 THE COURT: Shall we read -- shall we read that as No. 10?

8 Agreed by everyone?

9 MR. JASPER: Yeah.

10 MR. VON WALD: Yeah.

11 THE COURT: All right. That will be 10. The fraud, we don't

12 read that. All right. How about this, "Every contract

13 contains an implied covenant of good faith"?

14 MR. HURLEY: (INAUDIBLE).

15 MR. VON WALD: Oh, I'm getting these mixed up here now.

16 (INAUDIBLE).

17 MR. HURLEY: (INAUDIBLE). 47-17.

18 MR. JASPER: I know -- you've got it too, Dave, I know.

19 MR. HURLEY: That's a standard.

20 MR. VON WALD: Now what --

21 MR. JASPER: Right there. (INAUDIBLE).

22 MR. VON WALD: What was the first words of it, "Every contract"?

23 MR. HURLEY: 47-17.

24 MR. VON WALD: Okay. That's 11.

25 MR. HURLEY: No.

1 MR. VON WALD: (INAUDIBLE).

2 THE COURT: Maybe we should go to Dave's and throw some in
3 about contract though. Do we have a definition of breach
4 of contract?

5 MR. VON WALD: I do in there, yeah.

6 THE COURT: Where is it?

7 MR. VON WALD: Oh, let's see here. Maybe I don't either.

8 THE COURT: I don't know if we need to define contract.

9 MR. HURLEY: I have one that -- 47-01-1.

10 MR. JASPER: Yeah. Dave's got that one, too.

11 MR. HURLEY: "A contract is an agreement to do or not to do a
12 certain thing. The essential elements are: A contract is
13 either express or implied."

14 THE COURT: Oh, you want to add that one?

15 MR. HURLEY: It defines a contract.

16 MR. VON WALD: It probably isn't necessary, but whatever. Do
17 you want to add it?

18 MR. HURLEY: It's a standard, I guess.

19 MR. VON WALD: All right.

20 THE COURT: We'll add that. We'll make that number --

21 MR. VON WALD: 12.

22 THE COURT: 11.

23 MR. VON WALD: Well, no. We had "Every contract" is 11, Judge.

24 THE COURT: Okay. We'll put that in there, 11. And then
25 we'll put No. 12 is "A contract --"

1 MR. VON WALD: "-- is an agreement," yeah.

2 THE COURT: All right. I'm thinking we need the one about if
3 there's oral discussions before the contract. Because I'm
4 thinking there may be a little confusion --

5 MR. VON WALD: Yeah.

6 THE COURT: -- about their (INAUDIBLE). I think you got on
7 that, don't you? How about, "The execution of a written
8 contract supersedes all previous and contemporaneous."

9 MR. VON WALD: "The execution of a written contract "-- yeah.
10 Yeah.

11 THE COURT: Let's put that in there. You got -- do you see
12 that, Jim?

13 MR. VON WALD: It's No. 13.

14 THE COURT: That would be 13. It starts out, "The execution
15 of a written contract."

16 MR. VON WALD: 47-04.

17 MR. HURLEY: Yes.

18 THE COURT: We're going to add that. That's going to be
19 No. 13.

20 MR. HURLEY: Okay.

21 THE COURT: Do we need that, "An express contract"?

22 MR. VON WALD: That one doesn't hurt anything.

23 THE COURT: Put that one in there. That will be No. 14.
24 We've already got the good faith in there.

25 MR. HURLEY: Which one did you (INAUDIBLE)?

- 1 THE COURT: We --
- 2 MR. HURLEY: Well, we don't have any --
- 3 MR. JASPER: Good faith (INAUDIBLE).
- 4 THE COURT: I know we need to define it.
- 5 MR. HURLEY: Yeah.
- 6 MR. JASPER: Only by definition (INAUDIBLE).
- 7 THE COURT: (INAUDIBLE) out of order.
- 8 MR. HURLEY: That should go in right after 11.
- 9 THE COURT: We got them out of order a little bit here.
- 10 MR. HURLEY: You can make it 11A.
- 11 THE COURT: This should be -- let's make it 11A. "Good faith
12 is defined as honesty in fact." Do you see that?
- 13 MR. JASPER: Yeah.
- 14 THE COURT: All right. That's going to be 11A.
- 15 MR. JASPER: (INAUDIBLE). Since you defined express contract,
16 do you have to have one for implied, also?
- 17 THE COURT: I don't think we have an implied contract issue.
- 18 MR. VON WALD: I don't think so.
- 19 MR. JASPER: I don't think you do, but --
- 20 MR. VON WALD: No.
- 21 MR. JASPER: -- that's why I was asking.
- 22 MR. HURLEY: Well, except for good and bad faith, but we've
23 dealt with that.
- 24 MR. VON WALD: Yeah.
- 25 THE COURT: We need a proximate cause.

1 MR. JASPER: Um-hum. Dave has got 15-01 (A).

2 THE COURT: Yeah. "When the expression proximate" -- well,
3 where the hell is that (INAUDIBLE)? Let me look at
4 something here. Shall we make, "The expression of
5 proximate cause is used" 10A? You talk about measure of
6 damages.

7 MR. JASPER: (INAUDIBLE).

8 THE COURT: Don't need anything about intervening cause or --

9 MR. JASPER: I don't see a need for that.

10 THE COURT: -- an act of God?

11 MR. JASPER: I don't see it.

12 THE COURT: Okay. Do we even need a proximate cause? We got
13 this 10. I like that. "In the ordinary course of things,
14 would be likely to result from a breach. No damages can
15 be recovered for a breach of contract which are not
16 clearly ascertainable." I think that's basically
17 proximate cause.

18 MR. HURLEY: Yeah, it is.

19 THE COURT: I don't think we need that.

20 MR. HURLEY: So leave that be.

21 MR. VON WALD: Leave 10A out?

22 THE COURT: Yeah, leave 10A out. Okay. I do think that we
23 need the duty to mitigate damages, though.

24 MR. VON WALD: Yeah.

25 THE COURT: Shall we put that in as 15? "In determining the

1 amount of money which will reasonably compensate the
2 plaintiffs, you are instructed that a person whose
3 business is damaged must exercise reasonable diligence."

4 MR. JASPER: Yeah. Okay.

5 THE COURT: Use that as 15?

6 MR. VON WALD: "In determining the amount of dam- -- of money"?

7 THE COURT: Yeah.

8 MR. JASPER: Yeah.

9 THE COURT: The one you've got, Jim, as 15. Do you see that?

10 MR. HURLEY: I'm still looking.

11 THE COURT: We don't have any instruction on self-help
12 remedies and discrimination. So are we just going to come
13 up with something ourself?

14 MR. VON WALD: (INAUDIBLE).

15 THE COURT: Do you have something on those counts, Jim?

16 MR. HURLEY: (INAUDIBLE).

17 (END OF DUPLICATE #8 TAPE #2).

18 (DUPLICATE #9 TAPE #1 DOES NOT

19 MATCH UP WITH THE END OF DUPLICATE

20 #8 TAPE #2 AND BEGINS AS FOLLOWS:)

21 THE COURT: Yeah. We got that. That's No. 10.

22 MR. HURLEY: (INAUDIBLE).

23 MR. JASPER: (INAUDIBLE). And self-help is not defined. It
24 says self-help remedies (INAUDIBLE).

25 THE COURT: Well, we could define it as self-help means extra