

1 judicial -- confuse the hell out of them. That self-help
2 in my mind is any non-judicial attempt to evict a person.

3 Because I know why you -- you guys think (INAUDIBLE) --

4 MR. VON WALD: See the --

5 THE COURT: (INAUDIBLE). I can see it, but --

6 MR. VON WALD: The problem is as far as in surrendering -- you
7 know, there's a question -- I suppose what we should do is
8 we should say did the plaintiffs use self-help or did the
9 defendants -- excuse me -- the defendants use self-help or
10 did the plaintiff voluntarily surrender. He wasn't using
11 it. You know, real estate, it's -- it's a different --

12 THE COURT: Well, we've got, "Did the Defendant Bank use
13 self-help remedies in their attempt to remove the
14 plaintiffs from the land that was subject to the lease?"
15 We don't define what that means.

16 MR. VON WALD: No. Part -- but -- but he could also -- it says
17 self-help, except that he surrenders it. You know, so
18 they can also find that he surrendered it, but he wasn't
19 on it. You see what I'm saying?

20 MR. HURLEY: Well, you've -- you've got that statute,
21 so . . .

22 MR. VON WALD: Well, it should be in there then.

23 MR. HURLEY: When you start out the statute, if it's
24 voluntarily surrendered. (INAUDIBLE).

25 THE COURT: All right. I'm going to (INAUDIBLE) instructions

1 here on self-help.

2 MR. JASPER: I was going to say, you could just define it as
3 non-judicial remedies. You know, a person can do
4 something that's absolutely legal what -- that is a
5 non-judicial remedy, and I don't know that it would still
6 be considered self-help, not by definition. I don't think
7 so.

8 MR. HURLEY: I think -- I think what the statute says, though,
9 is if somebody voluntarily gives it up (INAUDIBLE) --

10 MR. VON WALD: Yeah.

11 MR. HURLEY: -- then you don't have an issue. Or you have an
12 issue if the person remains in place, and then you've got
13 to go get a court order. You can't go and try to do
14 something on your own. Right?

15 THE COURT: I think that's right.

16 MR. VON WALD: Um-hum.

17 THE COURT: All right. I will instruct -- a person or entity
18 who engages in self-help remedies under the Tribal Code in
19 these instructions when a person or entity --

20 MR. VON WALD: Basically, forces somebody, right? Forces --

21 THE COURT: Forces the removal of a -- well -- but they don't
22 even have to lawfully be there. Forces the removal of a
23 person from the land for -- from land or premises without
24 utilizing court -- without a court order.

25 MR. HURLEY: That's good.

1 MR. VON WALD: Yeah.

2 THE COURT: That's -- however, voluntary surrender of those
3 premises --

4 MR. VON WALD: How about just -- just forget about the court
5 order. Forcibly removes somebody from the land. That's
6 what self-help is.

7 MR. JASPER: Yeah.

8 MR. HURLEY: Or causes it. Instead of forcibly, causes.

9 MR. JASPER: Well, you see when -- when the -- when they start
10 talking about it, you know, under definitions it talks
11 about unlawfully breaks open or by any other type of
12 unauthorized opening of doors, windows or other parts of
13 the house --

14 THE COURT: When you're talking about the person --

15 MR. JASPER: (INAUDIBLE).

16 THE COURT: -- the defendant --

17 MR. JASPER: Right, yeah.

18 THE COURT: You know, the defendant does all of that stuff.
19 You can bring an action to remove her.

20 MR. JASPER: But also, then it talks about by force or by
21 menaces or threats of violence --

22 THE COURT: How about --

23 MR. JASPER: -- (INAUDIBLE) nighttime. You know, all the
24 things in here talk about something forcible, I guess is
25 the way I --

1 THE COURT: Remember, those are the people that wintered the
2 land.

3 MR. JASPER: Um-hum.

4 THE COURT: How about forces the removal of a person from
5 land or premises without that person's consent.

6 MR. VON WALD: Yeah. I would say that's close.

7 THE COURT: That's basically an oxymoron, but . . . all
8 right. We'll use that as an instruction on 15. Now we
9 need one on --

10 MR. JASPER: 15 we have duty to mitigate.

11 THE COURT: Oh, we did?

12 MR. VON WALD: Yeah.

13 MR. JASPER: (INAUDIBLE) Self-help as 16.

14 MR. VON WALD: 16 then.

15 THE COURT: Okay. All right. That's 15.

16 MR. HURLEY: Do we have, "A duty to mitigate"?

17 THE COURT: Yeah, 15. (INAUDIBLE) Now we need one on
18 discrimination, and that's the one that's going to get a
19 little tough.

20 MR. JASPER: Well, has he cited any specific statute
21 (INAUDIBLE) --

22 THE COURT: That's what I was going to ask the plaintiffs.
23 What -- what's the standard here on discrimination? I
24 mean is it intentional? I mean I could -- discrimination
25 under these instructions means the defendant intentionally

1 denied a contract for deed -- or denied a right to
2 plaintiffs based upon the plaintiffs' tribal membership.
3 So is intent -- intent the standard? I think it is under
4 the law. It's not -- just because the impact is, but I
5 think there has to be some racial animose, too.

6 MR. JASPER: I -- I think you have to put illegal to it as
7 well because under the Constitution, the Constitution
8 discriminates between Indians and non-Indians mostly in
9 favor of Indians; but nonetheless, you know, it makes that
10 distinction, so I think you would have to say it's an
11 illegal act.

12 MR. HURLEY: Then you are asking the jury to be lawyers on
13 what's legal and what's illegal.

14 MR. VON WALD: Well -- but discrimination in and of itself, Jim,
15 is not illegal.

16 MR. HURLEY: Yeah.

17 MR. JASPER: No.

18 MR. HURLEY: We went through the Black Pipe State Bank case
19 with the Hodson family, and the standard there was
20 dissimilar treatment for people in similar circumstances
21 that was racially based.

22 MR. JASPER: I was going to say under South Dakota Law we talk
23 about race, sex, national origin -- what are some of the
24 others?

25 THE COURT: How about, "A person or entity engages in

1 discrimination under these instructions when that person
2 or entity denies a right or privilege to a person based
3 solely upon that person's race or tribal identity?" This
4 isn't really race discrimination. Nobody is saying the
5 Bank said, "Are you an Indian?"

6 MR. VON WALD: No.

7 MR. JASPER: No.

8 THE COURT: But they said you're subject to a different
9 jurisdiction, so --

10 MR. HURLEY: Because you're an Indian.

11 MR. JASPER: And so you (INAUDIBLE) --

12 THE COURT: Or tribal identity? Would everyone agree with
13 that?

14 MR. JASPER: That would be better, I would think, yeah. Leave
15 race out.

16 THE COURT: But I would put -- I'm going to put a person --
17 "when that person or entity intentionally denies -- denies
18 the right or privilege to a person based solely upon that
19 person's race or tribal identity. Take out "it's
20 intentional." It's got to be based solely upon race or
21 tribal identity. So the jury would have to find the only
22 reason they wouldn't give a contract for deed to Ronnie is
23 because he's a tribal member.

24 MR. JASPER: Well, but is -- the real question is: Are they
25 not giving the contract to Ronnie or to Long Corporation?

1 MR. HURLEY: The same -- the same difference.

2 MR. JASPER: Well, no, it's not. Because you also --

3 THE COURT: See, I don't know if you can discriminate against
4 a corporation. A corporation --

5 MR. JASPER: That's the point I was getting at.

6 THE COURT: -- (INAUDIBLE) have rights not to be
7 discriminated against. Does anyone have a racial
8 identity? Which I think (INAUDIBLE) --

9 MR. JASPER: (INAUDIBLE).

10 MR. HURLEY: Well, but solely owned by (INAUDIBLE) BIA
11 guarantees.

12 MR. VON WALD: However --

13 THE COURT: Yeah. But that's -- that's -- that's not even
14 racially based. That's based upon the fact the government
15 has a trust responsibility to the Indians. I think the
16 only discrimination here that could be argued is against
17 Ronnie (INAUDIBLE).

18 MR. HURLEY: And the letter is written to him, and it's based
19 on the Indian status.

20 THE COURT: A person or entity that engages in discrimination
21 with another person or entity inten- -- under these
22 instructions, I'll put.

23 MR. VON WALD: Yeah. But you see -- it says, "This is because
24 of possible jurisdictional problems if the bank ever had
25 to foreclose on this land when it is contracted or leased

1 to an Indian-owned entity."

2 MR. HURLEY: Owned by him and his wife.

3 MR. VON WALD: Well, I know. I understand that. But it's still
4 a corporation is what we're talking about.

5 MR. JASPER: You know, it's -- it's not a tribal corporation.
6 It's a corporation under the State Tribe.

7 MR. VON WALD: It's a state corporation. That's right.

8 UNIDENTIFIED: (INAUDIBLE).

9 MR. JASPER: Yeah, I understand.

10 THE COURT: It was incorporated under state law?

11 MR. JASPER: Yes.

12 MR. VON WALD: Yes.

13 MR. JASPER: Not tribal law.

14 MR. VON WALD: Yes.

15 THE COURT: It was incorporated before the Supreme Court
16 cases says that's a -- considered a non-Indian
17 (INAUDIBLE).

18 MR. JASPER: See, if they would have even incorporated under
19 the Tribe, there would be no argument. It would be an
20 Indian corporation, and I think then the identity would
21 apply. But since it's a state corporation . . .

22 THE COURT: Well, I'm looking for, "A person or entity
23 engages in discrimination under these instructions when
24 that person or entity intentionally denies a right or
25 privilege to a person based solely upon that person's race

1 or tribal identity."

2 MR. VON WALD: But there is no law -- there is no evidence, I
3 should say -- that we wouldn't sell it to Ronnie Long to
4 be frank with you. The only question was the Corporation
5 itself. We gave the Corporation the lease with option to
6 purchase.

7 MR. JASPER: Yeah. Not -- not to Ronnie Long.

8 MR. VON WALD: Not to Ronnie. We've never -- he was always
9 dealing as a state corporation. It was Indian owned, but
10 it was a state corporation.

11 THE COURT: Yeah. That does present an issue here. Can you
12 discriminate against a state corporation that's Indian
13 owned? Well, if that's the case, why didn't you just go
14 into State Court?

15 MR. HURLEY: He -- he sends the -- he sends the letter to
16 Ronnie, and he says we previously agreed to deed it back
17 and sold it back to you on a contract, and the only way
18 the Bank could sell this property back to you would be
19 this other way.

20 THE COURT: I -- I would be inclined to add to this
21 discrimination under the law can only be exercised against
22 a person, not a corporation. Because I'm not sure -- I
23 don't know of any case law that a corporation can be
24 discriminated against because of race because it doesn't
25 handle racial identity.

1 MR. HURLEY: Well, here in this case, it's pinching without a
2 difference because Ronnie and his wife are stockholders in
3 that Corporation. The letter is written to Ronnie. It
4 says we can't sell it on a contract to you. The only way
5 we can sell it to you is by going cash because of
6 jurisdictional problems. And I think the whole thrust of
7 it is that whether you're talking about Ronnie or his wife
8 or the Corporation they own, it's Indian owned.

9 THE COURT: See, and that's --

10 MR. HURLEY: Indian status.

11 THE COURT: -- that's got to be another issue on damages.
12 They're giving -- they're giving him a contract for deed.
13 It really wouldn't have made much difference.

14 MR. VON WALD: They did so on a -- on a -- on a contract for
15 deed. That's --

16 THE COURT: I guess that's another issue that the Court would
17 have to resolve (INAUDIBLE) --

18 MR. VON WALD: Well, what could the damages be, just assuming
19 that there's discrimination?

20 THE COURT: Well, you've got a ten-year contract for deed, I
21 guess.

22 MR. VON WALD: Okay. So if there was a ten-year contract for
23 deed --

24 THE COURT: You would have had longer time to pay it off.

25 MR. HURLEY: And if the CRP contract was continued, that

1 payment made the payment.

2 MR. VON WALD: Well, of course, the CRP contract expired in
3 1998.

4 MR. HURLEY: The -- they were extended all over this country.

5 THE COURT: All right. Well, I know the defendants object to
6 this, but I'm going to instruct the jury, "A person or
7 entity engages in discrimination under these instructions
8 when that person or entity intentionally denies a right or
9 privilege to a person based solely upon that person's race
10 or tribal identity." You can argue to the jury this --
11 this wasn't against a person; it was against a --

12 MR. VON WALD: But when you say, Your Honor, right or privilege,
13 what right does anybody have to buy land from me?

14 THE COURT: Under public -- under the law, a bank cannot
15 treat people differently. Say, I offer a contract for
16 deed to non-Indians but not to Indians. That violates
17 federal law.

18 MR. JASPER: And I -- I think if you delete the word "right"
19 but a privilege because in this case it's a privilege as
20 to whether or not they granted it. It's not
21 (INAUDIBLE) --

22 THE COURT: (INAUDIBLE). Denies a privilege.

23 MR. JASPER: Yeah.

24 MR. VON WALD: Yeah.

25 THE COURT: Because that's basically what discrimination --

1 MR. JASPER: Yeah.

2 MR. VON WALD: Yeah.

3 THE COURT: -- public accommodation and lending -- public
4 lending discrimination is. You don't have a right to a
5 loan.

6 MR. VON WALD: Right.

7 THE COURT: But you certainly have a right not to be denied a
8 loan because of your race.

9 MR. JASPER: You have a right to be treated equally.

10 THE COURT: All right. So it reads, "A person or entity
11 engages in discrimination under these instructions when
12 that person or entity intentionally denies a privilege to
13 a person based solely upon that person's race or tribal
14 identity." You two object to that, right?

15 MR. VON WALD: Yeah.

16 THE COURT: Okay. For the record the defendants take
17 exception to that. What about plaintiffs?

18 MR. HURLEY: That's fine.

19 THE COURT: And we need (INAUDIBLE) --

20 MR. JASPER: And that's No. 16?

21 THE COURT: Yeah.

22 MR. HURLEY: Yeah, it is.

23 THE COURT: We're now --

24 MR. JASPER: No. 17. I'm sorry.

25 THE COURT: 17. Now the other -- self-help is 16.

1 MR. JASPER: Right. All right. What about, "There are
2 certain rules you must follow as you deliberate and return
3 your verdict." That's Dave's next instruction. I
4 think -- we don't want to overwhelm them with too many
5 more.

6 MR. VON WALD: Yeah.

7 MR. HURLEY: Right.

8 MR. JASPER: And that one requires four or more jurors.

9 THE COURT: I like this one because it really tells them what
10 they need to do. And then right under that will be the
11 interrogatories. So I'm afraid if we stick the
12 interrogatories on top, they won't even go through these
13 instructions.

14 MR. VON WALD: So this one was 18 then?

15 THE COURT: Yeah.

16 MR. VON WALD: Okay.

17 THE COURT: Any objection to 18 (INAUDIBLE)?

18 MR. VON WALD: I see that they're --

19 MR. HURLEY: (INAUDIBLE).

20 MR. VON WALD: -- verdicts for plaintiffs. Are we going to
21 have -- I see that they're (INAUDIBLE) point of views that
22 verdict entitled verdict for the plaintiffs. Are we going
23 to have one like that, then, in addition to the
24 interrogatories?

25 THE COURT: No. I think the interrogatories are sufficient.

1 MR. VON WALD: Yeah.

2 THE COURT: Shall we change -- shall we just white-out --

3 MR. VON WALD: Yeah.

4 THE COURT: -- that last paragraph?

5 MR. VON WALD: Yeah.

6 THE COURT: Do we have any whiteout, Dale?

7 THE CLERK: (INAUDIBLE).

8 MR. VON WALD: Just take your -- just cover it up with a piece
9 of paper and make a copy of it.

10 THE COURT: Okay. Why don't you just cover up that "finally"
11 and just copy it.

12 THE CLERK: Okay.

13 THE COURT: See that part right there "finally"? Just cover
14 it up (INAUDIBLE). What is this? This is 17?

15 MR. VON WALD: 18.

16 MR. JASPER: 18, yeah.

17 THE COURT: 18.

18 MR. VON WALD: 16 and 17 you've got in your machine.

19 MR. JASPER: And you've got special interrogatories.

20 THE COURT: And then we've got our special interrogatories.

21 MR. HURLEY: And then 36-01, "Any person who is entitled to
22 recover damages is entitled to recover interest thereon
23 from the day that the loss or damage occurred."

24 THE COURT: Okay. Where's that at?

25 MR. HURLEY: That's 36-01.

- 1 THE COURT: 36-01. Must be somewhere in here.
- 2 MR. JASPER: If we're going by state law, though, interest
3 doesn't accrue until such time as they become liquidated,
4 and they wouldn't be liquidated until the jury reached a
5 specific dollar amount.
- 6 THE COURT: Yeah. You're not saying there is a sum certain
7 here, right?
- 8 MR. HURLEY: No.
- 9 THE COURT: (INAUDIBLE).
- 10 MR. HURLEY: But what the law says is that if the jury decides
11 when that damage occurred -- Ronnie's testimony was
12 October 1 of each year, and he specifically went through
13 that. Then the Court takes that finding and adjusts the
14 calculations.
- 15 THE COURT: Where is this instruction at? (INAUDIBLE).
- 16 MR. HURLEY: 36-01.
- 17 THE COURT: (INAUDIBLE). Okay.
- 18 MR. HURLEY: It starts out, "Any person who is entitled to
19 recover damages."
- 20 THE COURT: "Any person who is entitled to recover damages."
21 Oh, but this is the --
- 22 MR. VON WALD: (INAUDIBLE).
- 23 THE COURT: (INAUDIBLE).
- 24 MR. HURLEY: (INAUDIBLE).
- 25 THE COURT: Would you like this marked as --

1 MR. HURLEY: No. No, no.

2 THE COURT: If they see that South Dakota, I don't like that.

3 MR. HURLEY: Oh, I see. The unmarked one?

4 THE COURT: Yeah. I don't have the unmarked one.

5 (INAUDIBLE). All right. Dale took that last part off.

6 Looks good.

7 MR. JASPER: This one on interest, what are you thinking of
8 making that?

9 MR. HURLEY: Here it is.

10 MR. JASPER: (INAUDIBLE).

11 MR. VON WALD: It says, "You must decide the amount of damages,
12 if any, the amount of damages which are subject to
13 prejudgment interest, if any." They don't even know the
14 amount.

15 MR. HURLEY: No. The Court does the calculations under the
16 statute. That's noted in the instruction.

17 MR. VON WALD: (INAUDIBLE) on the verdict.

18 THE COURT: I think this is something if they come back with
19 damages you could ask the Court to do this.

20 MR. VON WALD: Yeah.

21 THE COURT: Or -- or is that a jury question whether someone
22 is entitled to interest on it?

23 MR. HURLEY: Yeah. And -- and the South Dakota Pattern Jury
24 Committee has proposed that one, what they say in the
25 committee notes in the cites and cases for it in those

1 citations is that the jury sets the interest, the jury
2 says whether or not there's interest, and the date that
3 that's due, and then the judge does the calculations.
4 That's what the comment is here.

5 THE COURT: We need a special verdict form for that, unless
6 we change that one. We could change that in the last
7 (INAUDIBLE). I thought I did, but I guess I didn't. All
8 right. Any objection to the instruction on interest?

9 MR. JASPER: Where are you -- where are you thinking of
10 putting it?

11 THE COURT: The end.

12 MR. JASPER: You can't --

13 THE COURT: (INAUDIBLE). Well, we could put it at -- see, we
14 can make that 10A after the measure of damages. How about
15 making that 10A? Defendants agree with that?

16 MR. VON WALD: (INAUDIBLE).

17 THE COURT: All right. We'll make that 10A. Plaintiffs
18 agree?

19 MR. HURLEY: Yes.

20 MR. JASPER: In looking at your special interrogatories,
21 you're talking about plaintiffs' damages, etcetera, don't
22 we need an instruction or do we need to go into the
23 interrogatories and indicate who the damages are against,
24 because if it just comes back against the defendants --

25 THE COURT: Good question. Well, but I've got did the

1 Defendant Bank.

2 MR. JASPER: Okay.

3 THE COURT: I don't have your clients.

4 MR. JASPER: As I see it, Dave really shouldn't be assessing
5 damages against my clients.

6 THE COURT: Are we going to allow any interrogatory regarding
7 damages against your client?

8 MR. JASPER: (INAUDIBLE).

9 THE COURT: So the only interrogatory you should be
10 interested in is No. 2.

11 MR. HURLEY: Do we need this one?

12 MR. JASPER: If they can't -- if they can't assess damages
13 against my clients, then why should they be able to get a
14 judgment against my clients?

15 THE COURT: They're not.

16 MR. JASPER: All right. So if they -- if they're not going to
17 do that, then shouldn't we be dismissed probably?

18 THE COURT: I think you are an indispensable party because
19 the Bank would be subject to a possibility of double --
20 double indemnity, double liability. If they come back and
21 said, no, you can't kick the plaintiffs off, then -- then
22 they're -- they're in trouble. All right. Because
23 they've got -- because they've sold it to your clients.
24 So if I let you go now, you're not subject to the verdict
25 (INAUDIBLE).

1 MR. VON WALD: Are you saying like Interrogatory -- the Special
2 Interrogatory No. 2, if they answer yes on this, if you
3 found in Interrogatory No. 1 that the defendant
4 breached -- the Bank breached the loan agreement to the
5 plaintiffs, did that breach prevent the plaintiffs, Long
6 Family Land and Cattle Company, Inc., and Ronnie and Lila
7 Long from performing under the lease with an option to
8 purchase?

9 THE COURT: Then that --

10 MR. VON WALD: Aren't you assuming, Judge, that if they could
11 perform under the lease with option to purchase that they
12 could have gotten -- they would have gotten the money some
13 place. Say if we wouldn't have breached, aren't you
14 assuming on this Interrogatory No. 2 basically that if we
15 wouldn't -- if we wouldn't have breached, and they would
16 have gotten their money, that they could have performed?

17 THE COURT: No. I'm not assuming that. I'm asking the jury
18 was the breach or the amount of breach the reason they
19 didn't perform. You can argue --

20 MR. HURLEY: Right.

21 THE COURT: -- there could have been a breach. They still --
22 they still didn't have the money to pay off the note as
23 well as pay for the land. And then, ultimately, that's my
24 decision anyway because I'm hearing the counterclaim.
25 They can come back and say yes, that's why they didn't

1 perform, but I could still enter judgment for you on the
2 unlawful detainer action. I could find they don't have --
3 they don't have the ability to -- or I could say, okay,
4 they found you've breached. If they award damages, then
5 the damages may have to go towards payment of the --
6 towards the purchase of the land. I acknowledge these
7 cases are very difficult (INAUDIBLE) --

8 MR. VON WALD: See, what I've got -- I've got a problem with,
9 you said it goes to the purchase of the land. Then
10 basically what you are saying is that the prior deed to
11 the Bank --

12 MR. JASPER: Is invalid.

13 MR. VON WALD: -- is invalid.

14 THE COURT: No. Because their argument is if you had
15 performed under the contract, they would have been in a
16 position to purchase the land. And the two documents are
17 interrelated. Their argument is you breached. That's why
18 they didn't pay, they didn't perform under the lease with
19 option to purchase. If that's true and I find that on
20 your -- on your counterclaim, then you have no legal right
21 to evict them because you didn't allow them to perform on
22 the lease with option to purchase. I'm not saying I'm
23 going to rule that way.

24 MR. JASPER: I was going to say, that being the case, do they
25 get to stay on it forever?

1 THE COURT: No. Then I -- there is a good possibility the
2 remedy would be okay. You now -- when is the effective
3 date for them to exercise the option and buy this land?
4 Which, of course, raises a lot of the issues with regard
5 to your clients. That's why I would like to keep them in
6 here.

7 MR. JASPER: (INAUDIBLE). Right?

8 THE COURT: You know, I agree on the last instruction
9 because -- well, let me get these two instructions here to
10 say -- that Dale can copy for us.

11 MR. HURLEY: What was 8?

12 MR. JASPER: 8 was, "This is a civil case."

13 MR. HURLEY: Oh, okay.

14 THE COURT: I think I didn't change -- I didn't save the
15 change (INAUDIBLE).

16 THE CLERK: (INAUDIBLE) oh, didn't you?

17 THE COURT: You printed it out, remember, then I --

18 THE CLERK: Okay.

19 THE COURT: Let me save this.

20 MR. VON WALD: Do we have -- have we got our instructions
21 settled?

22 MR. HURLEY: "There are certain rules," what's that one?

23 MR. JASPER: Oh, No. 18.

24 MR. HURLEY: Okay.

25 THE COURT: How long do you think you, gentlemen, will take

1 in your closing arguments? 15 minutes each?

2 MR. HURLEY: (INAUDIBLE).

3 MR. JASPER: Not me.

4 THE COURT: Chuck, about 15 seconds?

5 MR. JASPER: Well, maybe -- well, maybe a little more than
6 that.

7 THE COURT: You can go up there and say, what the hell am I
8 doing here.

9 MR. JASPER: (INAUDIBLE).

10 MR. VON WALD: I might take longer than 15 minutes, Judge. You
11 know, it's one of those things where --

12 THE COURT: Yeah.

13 MR. VON WALD: -- there are a lot of exhibits.

14 THE COURT: I know.

15 MR. VON WALD: And I mean I know it's getting late.

16 THE COURT: Well, because here's another alternative. We can
17 get this submitted to the jury and tell them to report
18 back first thing in the morning and to start deliberating.
19 I'm not going to be here first thing in the morning.

20 MR. JASPER: But you would be --

21 THE COURT: I would be available.

22 MR. JASPER: -- available by cell phone or something.

23 THE COURT: If they have -- if they have a question, Dale can
24 escort them in here and call me and -- or -- I've done
25 this before. I've had the parties stipulate that the

1 verdict can be sealed, and then we would arrange a future
2 date to come and read the verdict. The problem with that
3 is if they have questions.

4 MR. VON WALD: Yeah.

5 THE COURT: So are you, gentlemen, going to be here tomorrow
6 morning?

7 MR. JASPER: I will be in trial in Rapid City.

8 MR. VON WALD: Well, it probably won't make a lot of difference
9 for you.

10 MR. JASPER: Well, yeah.

11 MR. VON WALD: I could show up on your behalf.

12 MR. JASPER: Yeah.

13 MR. VON WALD: Probably I could be here in the morning. I
14 suppose -- you know, if they're -- if they're in -- as far
15 as sealing the jury -- or sealing the verdict, I don't see
16 the reason for that really, but (INAUDIBLE).

17 THE COURT: Like I say, what we could do is have them report
18 first thing in the morning to deliberate. I will be
19 available by phone. If they come on back with a verdict,
20 Dale will call me up, get me on speaker phone.

21 MR. VON WALD: Yeah.

22 THE COURT: We'll accept the verdict. And if there is any
23 questions about it --

24 MR. HURLEY: (INAUDIBLE).

25 THE COURT: -- any motions would have to be filed in

1 writing, along with proposed final judgments. We could do
2 it that way.

3 MR. JASPER: It's either that or you could ask them if they
4 want to deliberate yet tonight. My guess is it's --

5 THE COURT: They may want to. I don't know.

6 MR. JASPER: Okay.

7 THE COURT: But I -- you know, I've got a trial starting at 8
8 in the morning in Ft. Yates, and it's --

9 MR. VON WALD: Yeah.

10 THE COURT: If we get out of here at 11, that's 12. I would
11 get up to Mobridge at 1:30 in the morning. That's not
12 looking good for tomorrow.

13 MR. JASPER: And I have a trial starting at 8 in the morning.
14 It's three hours to drive.

15 THE COURT: Yeah. So you -- you would be pulling in at 2 in
16 the morning.

17 MR. JASPER: Yeah. I will be leaving as soon as I can.

18 THE COURT: I'll ask the jury. I have no problem hanging
19 around.

20 MR. VON WALD: You could leave as far as when the jury retires.
21 (INAUDIBLE).

22 MR. JASPER: That's what I plan to do, yeah.

23 MR. VON WALD: And for that matter -- well, let's see. The
24 Judge probably couldn't take off because he's going --
25 unless he had a cell phone or something. But that's --

1 between here and Mobridge, you never know if you're going
2 to get reception.

3 MR. JASPER: I was going to say that I can give you my cell
4 phone number.

5 MR. VON WALD: Yeah.

6 MR. JASPER: Yeah. It depends on which way I go, whether I
7 have cell coverage all the way or I don't.

8 MR. VON WALD: I know.

9 MR. JASPER: If I take 212, I don't. If I go the other way, I
10 do most of the way on 34. Jim probably (INAUDIBLE).

11 MR. HURLEY: (INAUDIBLE).

12 MR. JASPER: (INAUDIBLE).

13 THE COURT: All right. Let's -- (INAUDIBLE).

14 MR. JASPER: (INAUDIBLE). Is there five special
15 interrogatories?

16 MR. VON WALD: Six.

17 MR. JASPER: Six.

18 THE COURT: I'm trying to change six, yeah. (INAUDIBLE).
19 They can deliberate -- is there a deliberation room over
20 there?

21 THE CLERK: Yeah. In the courtroom.

22 THE COURT: They can use the whole courtroom?

23 THE CLERK: (INAUDIBLE).

24 THE COURT: All right. I need the Long instructions and the
25 Long case two, page six. Long instructions, Long case

1 two, page six.

2 (INAUDIBLE DISCUSSION ON TAPE WITH
3 SHUFFLING OF PAPERS AND PAUSES OF
4 NO DISCUSSION).

5 THE COURT: Would you check, Dave, and make sure the exhibits
6 are all there? I'll -- I'll check.

7 MR. VON WALD: I didn't make sure that all of the plaintiffs'
8 exhibits (INAUDIBLE) changes.

9 THE COURT: I will make sure (INAUDIBLE). We've got 1, 2, 3,
10 4, 5, 6, 7, 8, 9 -- all right. I believe 10 was entered
11 for plaintiffs. Now 27 never came in, right?

12 MR. VON WALD: What was 27?

13 THE COURT: That was the one about --

14 MR. HURLEY: Correct.

15 THE COURT: -- loans from the BIA. I'm going to take this
16 out then.

17 MR. HURLEY: Right.

18 MR. VON WALD: And then there was another one --

19 THE COURT: And then also this one didn't come in. It was
20 stipulated to about them being non-Indians. So we wound
21 up with 20 -- you know, I'm not so sure 25 came in. Did
22 it?

23 MR. HURLEY: (INAUDIBLE).

24 MR. VON WALD: That was this one.

25 MR. HURLEY: Yeah. That was the farm program payments and --

- 1 THE COURT: That came in?
- 2 MR. HURLEY: Yes. And it was also the other one.
- 3 THE COURT: 24.
- 4 MR. HURLEY: (INAUDIBLE).
- 5 MR. JASPER: I never saw 24 or 25 in my notes.
- 6 MR. HURLEY: Yeah. It's -- mine are from ASA.
- 7 THE COURT: No. 25 is a calculation.
- 8 MR. HURLEY: There is a (INAUDIBLE).
- 9 MR. VON WALD: Yeah, but 24 I've never seen before, Your Honor.
- 10 THE COURT: Notes and computations, that wasn't offered.
- 11 MR. VON WALD: No. No.
- 12 THE COURT: So --
- 13 MR. HURLEY: Wasn't that offered?
- 14 THE COURT: -- take that out.
- 15 MR. HURLEY: But there is one that was an ASA letter with 1999
- 16 stuff on it. Here it is right here.
- 17 THE COURT: 23 I think it was.
- 18 MR. HURLEY: Or was it 23A?
- 19 THE COURT: Yeah, that's 23A. But where is 23 at? Didn't a
- 20 witness -- wasn't a witness referring to that one?
- 21 MR. HURLEY: That was --
- 22 MR. JASPER: 23 was the claim for damages.
- 23 MR. HURLEY: That was the damages.
- 24 THE COURT: Yeah, I know. But where is it?
- 25 MR. HURLEY: That's the one we had retyped and faxed back.

1 THE COURT: I know. But wasn't the witness looking at it?
2 MR. JASPER: Oh.
3 MR. HURLEY: (INAUDIBLE).
4 MR. VON WALD: (INAUDIBLE) instructions.
5 MR. HURLEY: (INAUDIBLE). Here it is right here.
6 THE COURT: There it is. That's 23. But 23A was this
7 letter.
8 MR. HURLEY: Yeah.
9 THE COURT: If you look in here, it's actually the original
10 (INAUDIBLE). See, I was trying to keep -- I was trying to
11 keep these separate until we got them admitted, but I
12 (INAUDIBLE).
13 MR. VON WALD: Yeah, 23A --
14 MR. HURLEY: Oh, you did pick it up.
15 THE COURT: (INAUDIBLE).
16 MR. VON WALD: -- I think that was admitted.
17 THE COURT: It was.
18 MR. HURLEY: (INAUDIBLE).
19 MR. VON WALD: (INAUDIBLE).
20 THE COURT: So that's 23 and 23A.
21 MR. HURLEY: Yes.
22 THE COURT: All right. Again, I wish I had a hole punch.
23 MR. HURLEY: Yeah.
24 THE COURT: We'll get Dale to get us a hole punch. So the
25 rest of them appear to be in order.

- 1 MR. VON WALD: What was 24? What did you have for --
- 2 THE COURT: 24 -- there is no 24.
- 3 MR. HURLEY: No.
- 4 THE COURT: 25 is this one, right? I'm not sure that came
5 in.
- 6 MR. VON WALD: That one was never in.
- 7 THE COURT: 25 --
- 8 MR. HURLEY: No. That -- that 23A took the place of that.
- 9 THE COURT: All right. We'll take 25 out.
- 10 MR. HURLEY: Well, no. This one was the -- was based on 23A.
- 11 THE COURT: So we don't really need it.
- 12 MR. VON WALD: It was the letter that was in there, but this was
13 offered afterwards -- or never offered.
- 14 MR. JASPER: Never offered.
- 15 MR. VON WALD: Never offered.
- 16 THE COURT: And then your 10 became 5A?
- 17 MR. JASPER: Right.
- 18 THE COURT: So -- which I guess we assume there is a 5.
19 There is no 5. Do you have a 5?
- 20 MR. VON WALD: We substituted that.
- 21 MR. JASPER: 5 was the option.
- 22 MR. HURLEY: Option, yeah. It's an August option. And it
23 was --
- 24 MR. VON WALD: Option to purchase?
- 25 MR. HURLEY: Yeah, the August one.

1 MR. JASPER: Yeah.

2 MR. HURLEY: It was submitted later.

3 THE COURT: The what?

4 MR. HURLEY: The August one.

5 THE COURT: Was that admitted?

6 MR. VON WALD: Yeah.

7 MR. HURLEY: Okay. That's the August one.

8 MR. VON WALD: It was stipulated to. So that --

9 MR. HURLEY: Dennis Jensen signed it.

10 THE COURT: Oh, option agreement to purchase real estate?

11 MR. VON WALD: Yeah.

12 MR. HURLEY: Yeah.

13 THE COURT: All right. We'll put that in then. Put that in.

14 Dale, do we have a three-hole punch?

15 THE CLERK: I can get for you from my supervisor.

16 THE COURT: We don't -- I mean we don't absolutely need it,

17 but it would be --

18 THE CLERK: (INAUDIBLE).

19 THE COURT: Okay. 23A is in, 23 is in. (INAUDIBLE)

20 plaintiffs' trial exhibits. All right. Defendants are in

21 order, so I'm just going to stick them in the back.

22 You've got 12. And then let's look at what Dale did for

23 us here. All right. Here's the instruction on self-help.

24 Do you want to give one of these to Jim?

25 MR. VON WALD: Yeah.

- 1 THE COURT: That's the one you objected to.
- 2 MR. VON WALD: Here's the one on self-help.
- 3 THE COURT: And here's discrimination.
- 4 MR. VON WALD: Discrimination.
- 5 MR. JASPER: Is that the one we objected to?
- 6 MR. VON WALD: Yeah. 16 and 17. Self-help is 16.
- 7 MR. JASPER: Yeah.
- 8 THE COURT: And then here is the substitute of Interrogatory
9 No. 6.
- 10 MR. JASPER: This says four or more have to agree.
- 11 THE COURT: Oh, geez. What?
- 12 MR. JASPER: Oh, I'm -- no.
- 13 THE COURT: No. I just added the part, "If you answer no to
14 1, 3, 4, and 5, you should stop here and not award
15 damages."
- 16 MR. JASPER: Oh, we substituted that one?
- 17 THE COURT: No. I just changed 6.
- 18 MR. JASPER: Okay.
- 19 MR. VON WALD: "If you answer Nos. 1, 2 -- 1, 3, 4, 5."
- 20 MR. JASPER: Oh, oh, I'm sorry. Interrogatory No. 6.
- 21 THE COURT: Oh, I'm sorry.
- 22 MR. JASPER: Okay. I thought you meant instructions. Okay.
23 I'm sorry.
- 24 THE COURT: Boy, it's going to be a -- the janitor is going
25 to shoot me. It's a mess up here, Dale.

1 MR. HURLEY: The one you just -- the one that was just
2 mentioned there, "If you answered no to Nos. 1, 3, 4, and
3 5," what number is that one?

4 THE COURT: 6.

5 MR. HURLEY: Okay.

6 THE COURT: I just added -- did you get a copy of it?

7 MR. HURLEY: Yes. Thank you.

8 THE COURT: Okay.

9 (INAUDIBLE DISCUSSION ON TAPE).

10 (END OF DUPLICATE #9 TAPE #1).

11 (THE FOLLOWING PROCEEDINGS TOOK

12 PLACE ON DUPLICATE #9 TAPE #2).

13 THE COURT: All right. I think I've got it all figured out
14 here.

15 MR. HURLEY: So I've got (INAUDIBLE) is 19, two is 20, three
16 is 21?

17 THE COURT: Well, I don't have them numbered.

18 MR. HURLEY: Okay.

19 MR. JASPER: Yeah. Three is 21.

20 MR. HURLEY: Four is 22, five is 23, six is 24.

21 MR. VON WALD: Yeah.

22 THE COURT: So are we ready for -- do you want me to read the
23 instructions first and then closing, right? Okay. I
24 think we're about ready to roll here. We're not going to
25 allow those blowups to go back there because they've got

1 the originals.

2 MR. VON WALD: Yeah.

3 MR. HURLEY: Did the Court allocate the time for each side? I
4 missed that.

5 THE COURT: No. I would really like if you guys could finish
6 each in 20 minutes. What are you thinking? Two hours?

7 MR. HURLEY: No. No, no. No. If I do that --

8 THE COURT: How about a half an hour each side?

9 MR. VON WALD: Give me a warning when I get towards ten minutes.

10 MR. HURLEY: Rebuttal? Plaintiffs --

11 THE COURT: I will give you ten minutes rebuttal.

12 MR. HURLEY: Okay.

13 MR. VON WALD: 20 minutes and 10?

14 THE COURT: Well, let's give him 10. He's got -- we'll give
15 him 30, and then you 30, and then we'll give him 10.

16 MR. VON WALD: Shouldn't we have the same --

17 THE COURT: Okay. We'll --

18 MR. VON WALD: Give him 20 and then 10 for rebuttal.

19 THE COURT: Give him 25, 30, 5.

20 MR. VON WALD: Pardon me?

21 THE COURT: 25, 30, 5.

22 MR. VON WALD: Thank you.

23 MR. JASPER: How do we split ours?

24 MR. VON WALD: Pardon me?

25 MR. JASPER: How do we split ours?

1 THE COURT: 29 minutes, 30 seconds, 30 seconds. Are you --
2 do you want to make a closing?

3 MR. JASPER: Whatever I say would be brief. I would be more
4 than happy --

5 THE COURT: You have 30, so . . .

6 MR. JASPER: Pardon?

7 THE COURT: You can have 30 minutes.

8 MR. JASPER: I don't need 30 minutes.

9 THE COURT: Well --

10 MR. JASPER: I don't want to bore them to tears.

11 THE COURT: Well, we'll give you 30. You don't have to use
12 it all.

13 MR. VON WALD: Would you notify me, Judge, when you get -- when
14 I get about ten minutes left?

15 THE COURT: You know, I don't have a watch. Dale, can you
16 time these guys?

17 THE CLERK: Yeah.

18 MR. JASPER: (INAUDIBLE).

19 THE CLERK: (INAUDIBLE).

20 THE COURT: Use that back clock (INAUDIBLE).

21 THE CLERK: Okay.

22 THE COURT: (INAUDIBLE). I think we're ready to get the
23 jurors back in here, aren't we?

24 MR. VON WALD: Yes.

25 (JURY BROUGHT BACK INTO THE

1 COURTROOM.)

2 THE COURT: Hold on. I need Instruction 16 and 17, the ones
3 that I did. Somebody (INAUDIBLE). Are these yours?

4 MR. VON WALD: Yeah.

5 THE COURT: Go ahead and be seated, Jurors. Let me talk to
6 you a moment. I'm going to read some law to you. And
7 these gentlemen are going to get to make closing
8 arguments. That's probably going to bring us up to 8:30.
9 Do you want to start deliberating tonight or do you want
10 to go home and sleep and come back the first thing in the
11 morning? Do you want to give it a shot tonight?

12 A JUROR: I'm going to -- my children's Christmas program
13 is tomorrow.

14 THE COURT: So you are saying you want to try tonight then?

15 A JUROR: (INAUDIBLE).

16 THE COURT: Okay. By the way, for our alternate, you're
17 going to deliberate, too.

18 MR. BENDIGO: Okay.

19 THE COURT: Because we've got -- they both agreed. We'll
20 have seven. That way we won't come back with three-three
21 verdicts. So everyone agree to try to give it a shot
22 tonight?

23 A JUROR: Yes.

24 THE COURT: Okay. All right. Well, we're -- back on the
25 record, Matter of Long Family Land and Cattle Company

1 versus Bank of Hoven. Both sides have rested. Jurors,
2 it's my duty now to read you the instructions. You'll be
3 able to take these with you into the deliberation room,
4 but this is the law. I tell you the law you apply to the
5 case, and then each side gets to make a closing argument
6 to you. When you go back to deliberate, Jurors, we've
7 tried to help you out by giving you six questions, and
8 we're going to ask that you answer. And they're called
9 Interrogatories. So you're going to get these, also.
10 These are the six questions we're asking you to answer for
11 us in this case. I'm going to read these instructions to
12 you.

13 Instruction 1. Both sides having rested, it is now
14 the duty of the Court to give you the instructions that
15 are to guide and govern you in arriving at a verdict. The
16 law -- the law that applies to this case is contained in
17 these instructions, and it is your duty to follow them.
18 You must consider these instructions as a whole and not
19 single out one instruction and disregard others. The
20 order in which the instructions are given has no -- has no
21 significance as to their relative importance.

22 By the language of these instructions, the Court does
23 not intend to imply what any of the disputed facts in the
24 case are, or what your verdict in this case should be.

25 Each of you must faithfully perform your duties as

1 jurors. You must carefully and honestly consider this
2 case with due regard for the rights and interests of the
3 parties. Neither sympathy nor prejudice should influence
4 you. Your verdict must be based on the evidence and not
5 upon speculation, guess, or conjecture.

6 Instruction 2. It is your duty as a juror to
7 determine the facts, and you must do this from the
8 evidence that has been produced here in open court. This
9 consists of the testimony of the witnesses and the
10 exhibits which have been received. The evidence -- this
11 evidence is governed by various rules of law. Under these
12 rules, it is my duty as judge to rule on the admissibility
13 of the evidence from time to time. You must not concern
14 yourselves with the reasons for these rulings, and you
15 must not consider any exhibit which was not received in
16 evidence or any testimony which has been ordered stricken.
17 Such things you must put out of your mind.

18 You must not consider anything you may have heard or
19 read about this case other than the evidence which has
20 been properly admitted herein.

21 Instruction 3. The attorneys for the respective
22 parties will present to you their arguments of the case
23 for your assistance in coming to a decision. The order of
24 their appearance and the length of the time of their
25 arguments is regulated by the Court. While the final

1 argument of counsel is intended to help you in
2 understanding the evidence and applying the law as set
3 forth in these instructions, their remarks are not
4 evidence. Any argument or any statement or any remark of
5 counsel which has no basis in the evidence should be
6 disregarded by you. However, an admission of fact by an
7 attorney for a party is binding on that party.

8 Instruction 4. If you should determine that the
9 plaintiff should recover a verdict, you should not return
10 what is known as a quotient verdict in this case. By a
11 quotient verdict is meant one which is reached pursuant to
12 a prior agreement made by all the jurors to add up to the
13 amount which each of the several jurors would award and
14 divide such sum by the number of jurors and treat the
15 quotient or result of such division as the amount of the
16 verdict to be returned by the jury.

17 If you find the issues in fact -- in favor of the
18 plaintiff, the verdict you are to return must be for such
19 an amount as four or more of you agree upon as the proper
20 amount in this case. A verdict reached by adding the
21 amounts suggested by the several jurors and then dividing
22 in the manner that I have indicated would not be a
23 judgment of the individual jurors. Such a method is
24 likely to produce a verdict at variance with the sound
25 judgment of each member of the jury. The rights of the

1 parties to a suit should never be finally determined in
2 this manner. It is for you to determine by the use of
3 your best judgment the verdict which you should return in
4 this case without resort to chance or the method above
5 indicated.

6 Instruction 5. In weighing the evidence in this
7 case, you have a right to consider the common knowledge
8 possessed by all of you, together with the ordinary
9 experiences and observations in your daily affairs of
10 life.

11 Instruction 6. The instructions which the Court
12 originally gave you, you were advised of when the same
13 four or more of your members have agreed upon the right of
14 the plaintiff to recover damages and upon the amount of
15 the damages allowed, if any, or when four or more of your
16 members have agreed that plaintiff should not be allowed
17 any damages, that will be the verdict of the jury. In
18 your deliberations you should examine the questions
19 submitted with a proper regard and consideration for the
20 opinions of each other. You should listen to each
21 other's arguments with an open mind, and you should make
22 every reasonable effort to reach a verdict.

23 Instruction 7. You are the sole judges of all facts
24 and credibility of the witnesses. In deciding what
25 testimony to believe, you may consider: 1, the witnesses'

1 ability and opportunity to observe; 2, their intelligence;
2 3, their memories; 4, their manner while testifying; 5,
3 whether they said or did something different at an earlier
4 time; 6, their qualifications and experience; 7, any
5 apparent interest, bias, or prejudice they may have; and
6 8, the reasonableness of their testimony in light of all
7 of the evidence in the case.

8 Instruction 8. This is a civil case brought by Long
9 Family Land and Cattle Company, Inc., and Ronnie and Lila
10 Long who are considered plaintiffs. Plaintiffs' claims
11 are against the Bank of Hoven, who is a defendant. Also
12 named as defendants in this case are Edward and Mary
13 Maciejewski, and Ralph and Norma Pesicka.

14 The plaintiffs allege that the Defendant Bank
15 breached written agreements entered into by the Longs and
16 the Bank. Plaintiffs allege that on December 5, 1996, the
17 Longs and the Bank entered into a loan agreement and a
18 lease with option to purchase. The Longs -- the Longs
19 claim that the Bank agreed to make loans to the Longs in
20 the loan agreement and lease 2230 acres of land to the
21 Longs two years with an option to buy the land from the
22 Bank for an agreed price.

23 The Longs claim that the Bank breached the agreements
24 and acted in bad faith. The Bank denies that it breached
25 any agreement or that it acted in bad faith.

1 The Longs claim that the breach of agreement by the
2 Bank caused them to sustain damages. The Bank denies that
3 it caused any damage and that plaintiff failed to act with
4 reasonable diligence to minimize existing damages and
5 prevent future damages.

6 Instruction 9. You may have heard the terms "direct
7 evidence" and "circumstantial evidence." Direct evidence
8 is the testimony of a person who asserts or claims to have
9 actual knowledge of a fact, such as -- such as an
10 eyewitness. Circumstantial evidence is proof of a chain
11 of facts and circumstances indicating the existence of a
12 fact.

13 The law makes no distinction between direct and
14 circumstantial evidence. The jury must simply determine
15 the facts from the greater convincing force of all of the
16 evidence in the case, both direct and circumstantial.

17 Instruction 10. The measure of damages for a breach
18 of contract is the amount which will compensate the
19 aggrieved party for all detriment legally and proximately
20 caused by the breach, or which, in the ordinary course of
21 things, would be likely to result from the breach.

22 No damages can be recovered for a breach of contract
23 which are not clearly ascertainable in both their nature
24 and their origin.

25 Instruction 10A. Any person who is entitled to

1 recover damages is -- is entitled to recover interest
2 thereon from the day that the loss or damage occurred
3 except: 1, during the period of time, the person liable
4 for the damages was prevented by law, or an act of the
5 person entitled to recover the damages from paying the
6 damages; or 2, interest is not recoverable on damages
7 which will occur in the future, punitive damages, or
8 intangible damages such as pain and suffering, emotional
9 distress, loss of consortium, injury to credit, reputation
10 or financial standing, loss of enjoyment of life, or loss
11 of society and companionship.

12 You must decide: 1, the amount of damages, if any;
13 and 2, the amount of damages which are subject to
14 prejudgment interest, if any; and 3, the date or dates on
15 which the damages occurred.

16 If you return a verdict for the plaintiff, you must
17 indicate on the verdict form whether you find plaintiff is
18 entitled to prejudgment interest, and if so, the amount of
19 damages upon which such interest is granted and the
20 beginning date of such interest. Based upon your
21 findings, the Court will calculate the amount of interest
22 the plaintiff -- the plaintiff is entitled to recover.

23 Instruction 11. Every contract -- every contract
24 contains an implied covenant of good faith and fair
25 dealing which allows an aggrieved party to sue for breach

1 of contract when the other contracting party, by its lack
2 of good faith, limited or completely prevented the
3 aggrieved party from receiving the reasonably expected
4 benefits of the contract.

5 Instruction 11A. "Good faith" is defined as honesty
6 in fact in the conduct or transaction concerned.

7 The meaning of good faith varies with the type of
8 contract involved. The implied covenant of good faith
9 must arise from the language used in the contract or it
10 must be indispensable to carry out the intention of the
11 parties to the contract.

12 A lack of good faith in performance of a contract may
13 be identified by, among others, the following conduct:
14 The evasion of the spirit of the contract, abuse of power
15 to determine compliance, or interference with or failure
16 to cooperate with the other parties' performance.

17 The intention of the parties may be established by
18 the custom and usage in that trade or business.

19 Instruction 12. A contract is an agreement to do or
20 not to do a certain thing.

21 The essential elements to the existence of a contract
22 are: 1, parties capable of contracting; 2, their consent;
23 3, a lawful object; and 4, sufficient cause or
24 consideration.

25 A contract is either express or implied.

1 An express contract is one, the terms of which are
2 stated in words.

3 An implied contract is one, the existence and terms
4 of which are manifested by conduct.

5 Instruction 13. The execution of a written contract
6 supersedes all previous or contemporaneous oral
7 negotiations or stipulations concerning its matter.

8 Instruction 14. An express contract is an actual
9 agreement of the parties which is created by distinct and
10 explicit language at the time of making the contract. An
11 express contract may be created orally or in writing.

12 Instruction 15. In determining the amount of money,
13 if any, which will reasonably compensate the plaintiffs,
14 you are instructed that a person whose business is damaged
15 must exercise reasonable diligence and effort to minimize
16 existing damages and to prevent further damages.

17 Plaintiffs cannot recover money for damage to their
18 business which could have been avoided by such exercise of
19 reasonable diligence and effort.

20 Instruction 16. A person or entity engages in
21 self-help remedies under the Tribal Code and these
22 instructions when that person or entity forces the removal
23 of a person from land or premises without that person's
24 consent.

25 Instruction 17. A person or entity engages in

1 discrimination under these instructions when that person
2 or entity intentionally denies a privilege to a person
3 based solely upon that person's race or tribal identity.

4 Instruction 18. There are certain rules that you
5 must follow as you deliberate and return your verdict. I
6 will list those rules for you now.

7 First, when you go to the jury room, you must select
8 one of your jurors as a foreperson. That person will
9 preside over your discussions and speak for the jury here
10 in court.

11 Second, in order to reach a verdict in this case,
12 four or more jurors must agree with that verdict. It is
13 your duty to discuss this case with one another in the
14 jury room. Each of you must make your own conscientious
15 decision, but only after you have considered all of the
16 evidence, discussed it fully with your fellow jurors, and
17 listened to the views of your fellow jurors. Do not be
18 afraid to change your opinions if the discussion persuades
19 you that you should. But do not come to a decision simply
20 because other jurors think it is right, or simply to reach
21 a verdict. Remember at all times that you are not
22 partisans, you are judges of the facts. Your sole
23 interest is to seek the truth from the evidence in the
24 case.

25 Third, if you need to communicate with me during your

1 deliberations, you may send a note through Dale, the court
2 reporter, signed by one or more jurors. I will respond as
3 soon as possible either in writing or in open court.

4 Remember that you should not tell anyone, including me,
5 how your vote stands numerically or otherwise, until after
6 you have reached a verdict and reported the same into
7 court.

8 Fourth, your verdict must be based solely on the
9 evidence and on the law which I have given to you in these
10 instructions. You will be provided with a copy of these
11 instructions, which you will return into court with your
12 verdict and the exhibits in this case. Nothing I have
13 said or done is intended to suggest what your verdict
14 should be. That is entirely for you to decide.

15 And as I indicated, Jurors, there are six what we
16 call Interrogatories. These are questions that I'm asking
17 you to answer, and I'm going to read these to you. You
18 are going to take these with you.

19 Special Interrogatory 1 to Jury. Did the Defendant
20 Bank breach the December 5, 1996 loan agreement, Exhibit
21 6, between the Long Family -- Long Family Land and Cattle
22 Company, Inc., and the Bank of Hoven? Yes or no. Then
23 you need to put the number of jurors voting yes, the
24 number voting no. And then your foreperson signs the
25 verdict -- or the interrogatory.

1 Interrogatory 2. If you found in Interrogatory 1
2 that the Defendant Bank breached the loan agreement to the
3 plaintiffs, did that breach prevent the Plaintiffs Long
4 Family Land and Cattle and Ronnie and Lila Long from
5 performing under the lease with an option to purchase?
6 Same thing. Yes, you put the number. No, put the number.
7 Your foreperson signs.

8 Interrogatory 3 to the Jury. Did the Defendant Bank
9 use self-help remedies in an attempt to remove the
10 plaintiffs from the land that was subject to the lease
11 with an option to purchase? Yes, no, numbers, foreperson.

12 Interrogatory 4. Did the Defendant Bank
13 discriminate against the plaintiffs based upon their
14 status as a tribally owned corporation and tribal members
15 in the lease with option to purchase? Yes, no,
16 foreperson.

17 Interrogatory 5. Did the Defendant Bank act in bad
18 faith when it attempted to gain the increased guarantee
19 from the Bureau of Indian Affairs as referenced in the
20 loan agreement dated December 5, 1996? Yes or no.
21 Foreperson.

22 Interrogatory 6. If you answered no to Numbers 1, 3,
23 4, or 5 you should stop here and not award damages. If
24 you answered yes to Numbers 1, 3, 4, or 5 what amount of
25 damages should be awarded to the plaintiffs? It has a

1 monetary amount there, and then agree and disagree, number
2 for the jurors. And then the question: Should interest
3 be added to the judgment? And then yes or no.

4 Foreperson.

5 All right. Plaintiffs will make their closing
6 argument to the jury.

7 MR. HURLEY: May we approach, Your Honor, with a question?

8 THE COURT: Sure. Dave?

9 (INAUDIBLE, WHISPERED DISCUSSION
10 WAS HAD OUT OF THE HEARING OF THE
11 TAPE RECORDER.)

12 MR. HURLEY: Good evening, ladies and gentlemen of the jury.

13 All of us here want to sincerely thank for your time and
14 attention, and those of us who speak to juries on occasion
15 would agree that you were -- you have been very attentive
16 and oftentimes ahead of the lawyers in -- in seeing where
17 the exhibits are and what the answer is to the issue at
18 hand. And it's late in the evening, and all of us and
19 especially Ronnie and Lila Long sincerely appreciate the
20 job you've done here. Without your good work, of course,
21 our system of justice would not operate at all.

22 This is plaintiffs' opportunity to speak to you on
23 the issues as we see them and to try to draw together the
24 facts here and make some sense out of the facts that
25 happened between these two parties.

1 As you can tell from the evidence, quite a few things
2 happened, and it got to be quite complicated, and I would
3 like to make a couple of comments here to try to sort that
4 out.

5 As the Court has instructed, of course, what I say is
6 not evidence and what Mr. Von Wald says is not evidence.
7 This is our chance to argue to you from the evidence and
8 to persuade you one way or another.

9 Plaintiffs' first issue is breach of contract. And
10 I'm sure by now you are quite familiar with the basic
11 agreement where the Bank received a deed to 23 -- 2230
12 acres and then made certain other agreements, which were
13 all part and parcel to the same agreement, and I'm sure
14 you are quite familiar by now with the loan agreement.

15 And, of course, as you heard the testimony, the deed
16 went to the Bank. Certain credits were allowed, and there
17 were other agreements. As -- as part of that, though,
18 it -- (INAUDIBLE) go on further. And this is the first
19 one that we need to talk about. The Bank of Hoven will
20 request from the BIA to increase the guarantees to 90
21 percent, to reschedule note 98181 over 20 years with
22 annual payment from crop and yearling sales. The Bank of
23 Hoven will also request a 90 percent BIA guarantee on the
24 70,000 annual operating note.

25 As you remember from the testimony in a farm and

1 ranch situation, especially in these times that they were
2 going through, in -- in '96, '97, and the previous years
3 actually, '94, '95, cattle prices were very, very low.
4 Those of you who are familiar with those markets, you
5 could tell from the cash flows, the calves' low price,
6 cows' low price, and so very, very key to continuing in
7 business as the operating loan.

8 So as in every contract, there is something for the
9 Bank, and there was something for the Longs. Right here,
10 this 70,000 annual operating loan was crucial to the
11 Longs. And you heard Dennis Huber say that and you heard
12 Ronnie Long say that, anybody that's had experience with
13 farm and ranch. Chuck Simon said that with many years of
14 experience as a banker, that this operating loan is
15 critical. Without it, you're going to fail.

16 And so there it is, right there. The Bank agreed
17 that the Bank will request from the BIA a 90 percent
18 guarantee, and the Bank of Hoven will also request a 90
19 percent guarantee on the 70,000 annual operating loan.

20 We saw in the evidence -- and you'll have to rely on
21 your own memory -- but in the evidence there was an
22 attempt made by the Bank in Exhibit 12. Let me pull it
23 out for you. You know better than I do, Exhibit 8,
24 December 12th. And December 5th, of course, was the date
25 of the loan agreement and the lease with option to

1 purchase were entered into.

2 About some seven days later, the Bank writes a
3 letter, and the total request for the guarantee to be
4 increased to 90 percent is right here in the last
5 paragraph, that we submit should have been a more complete
6 application. Maybe it will work, maybe not, in a couple
7 of sentences -- one sentence actually.

8 And then we see the letter back from the BIA, and the
9 BIA says -- and you'll have to rely on your memory -- but
10 you'll want to look at that letter when you look through
11 the exhibits. And the BIA says that that is not a
12 complete application. And at that point, February 14th,
13 1997, a letter from the BIA, Plaintiffs' Exhibit 11, and
14 apparently in the first paragraph you will see it recaps a
15 conversation with Stacey Johnston. It's a conversation on
16 February 3 responding to the December 12th letter. And
17 the BIA says that Stacey Johnston informed you that this
18 request requires a more complete application, modification
19 criteria is outlined in your loan guarantee agreement
20 (INAUDIBLE) and the statute CFR 103.21. In the last
21 paragraph, we will not act on your requests until we
22 receive a complete application.

23 And then what happened? Absolutely nothing. The
24 Bank never again attempted to follow-up or make any kind
25 of effort to request from the BIA approval of this \$70,000

1 operating loan. Realizing as we all do, that without that
2 operating loan, this whole plan will fail. The purpose of
3 the plan, as we've heard from several different people on
4 the witness stand, was to reduce the debt of the Longs,
5 see that they get an operating loan, and if they make it
6 through the first year and pay it down \$1.00 annually,
7 then they can borrow that much again the second year if
8 they need it, and move through two years and be able to
9 buy their land back.

10 In the last paragraph, another important point. This
11 is the contract that the Bank agreed that it's going to
12 make a loan to the Longs of 53,5. 37,5 of that will be
13 used to purchase 110 calves. And you've heard enough
14 about cash flows that you're probably sick of hearing
15 about them. But in a cash flow -- and you've heard
16 testimony to this effect -- they -- they raise about 270
17 calves. Another 110 bought as calves, light calves, get
18 them bought right. They've got a lot of rough feed.
19 They've got grass for the summer, grow them up. And Chuck
20 Simon and others agreed that oftentimes that does work in
21 this country. It's an opportunity for them to increase
22 their ranch income. And you heard Chuck Simon agree that
23 the Bank never made the \$70,000 annual operating loan,
24 never made the \$37,500 cattle purchase loan. That's the
25 breach of contract.

1 Of course, the Bank says, well, we couldn't make the
2 \$70,000 annual operating loan because the BIA never agreed
3 to increase the guarantee to 90 percent. And we say you
4 didn't make a very good effort. You can pick up a phone.
5 You can send a fax. You can go over to their office and
6 visit the BIA officer. What is it that you don't like
7 about this? You were present late October by speaker
8 phone. Stacey Johnston was representing the BIA.
9 Everybody that was there all agreed to it, and said let's
10 go forward. And yet when this letter comes out, it didn't
11 happen. It didn't happen. Very, very critical. We think
12 the breach happened very early on in this process,
13 insuring the Longs' failure under this entire plan.

14 You will recall the cash flows prepared by Dennis
15 Huber. The Longs needed \$40,000 the 1st of November. Why
16 is that? Because you're getting cattle ready for winter.
17 Dennis Huber says he likes to put it on the front end, so
18 you can get your work out of the way. It was supposed to
19 be there in November. The meeting was late October.
20 Everybody agreed. It took until December 5 to get the
21 documents put together. The documents were signed
22 December 5. Ronnie Long testified -- and you'll have to
23 rely on your memory -- but December 5, okay. We're still
24 within the window of time. I will sign the documents. I
25 will get my operating money. I will get everything in

1 shape for winter. Did that happen? No. The 40,000 loan
2 was never made. If that is zero, then everything else
3 changes.

4 In addition, purchasing 110 head of calves didn't
5 happen. So again, there comes this bottom line which is
6 very important to try to make this work so the Longs can
7 buy their land back. Of course, you have to have an
8 operating line of credit. On the testimony in this case,
9 anybody who said otherwise wouldn't be honest. You have
10 to have it. It's key. Number two, you had to have an
11 extra 110 calves to increase your income.

12 Then you go onto Year 2. Of course, without the line
13 of credit from Year 1, without the extra calves, there is
14 no hope of making this project work.

15 That is breach of contract, and we submit to you that
16 it -- the terms on Exhibit 6, which is the loan agreement
17 which we are looking at here, and then also Exhibit 7,
18 which is the, you will recall, the lease with option to
19 purchase. The lease with option to purchase, of course,
20 has the goal posts, I guess you could say, if we were
21 talking football. Because when you get to the end of this
22 thing, there was an option in the lease. There was an
23 option to purchase. And you might recall that the Longs
24 were working towards and everybody was working towards
25 (INAUDIBLE) having the Longs be in a position where they

1 could exercise this option and buy their land back.

2 There was some -- some important credits in there
3 where we -- we would reduce their price so they could buy
4 it back. The key though -- and you heard various people
5 testify about this -- is that on these cash flows, this
6 system or this plan was put in place, this contract.
7 These agreements had to work well enough so that they had
8 a cash down payment and that they could interest the Bank
9 to come in with them and make a loan. And you heard
10 Dennis Huber say that, yes, this was built that way. Yes,
11 this would work. But if you take out the operating line
12 of credit, you take out the extra cattle, no, it isn't
13 going to work.

14 We would submit to you and what's in evidence on this
15 case on breach of contract to make it very clear, there is
16 no question, I asked Chuck Simon, was the \$70,000
17 operating loan ever made? No. We loaned some money. And
18 you will see in the exhibit books here what that was
19 loaned for and why.

20 Ronnie Long said it was under a controlled account,
21 and money was allowed for very specific purposes. He did
22 not have the discretion to take any money and do something
23 with it, like hire hay movers at 12,000 and upward to take
24 the hay over to the cattle. He -- he was very limited on
25 the controlled account basis, and on that basis he had to

1 have the operating line of credit above and beyond the
2 money he was working with. And we would submit to you
3 that breach of contract on this point was very, very
4 clear.

5 On the second point it's also clear. Chuck Simon
6 agreed with me, no, that loan was never made; and
7 therefore, the Longs could not buy the cattle and increase
8 their income and buy their land back. For that, under the
9 Court's instructions, if you find that the Bank has
10 breached this contract, and we would submit to you that
11 the Longs are entitled to damages.

12 And you will see in Exhibit 23, and you heard Ronnie
13 Long testify to the damages that he claims, then the
14 reason why. Because the contract was breached and because
15 he didn't have operating money to run his place like he
16 saw fit, his cattle were some 20 miles -- 18 miles from
17 the feed, where the feed was baled and put up. It had to
18 be hauled down to the breaks in the winter (INAUDIBLE)
19 couldn't get it done. He brought it up; he mentioned it;
20 he requested it.

21 Chuck Simon said yes; we knew we had a problem with
22 that. And yet, the \$70,000 operating money was not there
23 to work with to get the job done, and that is part of the
24 breach of contract. It's part of this story. And the
25 cattle did not have the feed they needed.

1 You heard the testimony. It got cold in January --
2 mid-January, deep snow, cold winds. If the cattle would
3 have had the feed down in the gullies of the breaks in the
4 timber, they would have stayed there. They would have had
5 something in their stomachs, and they would have stayed
6 there and stayed warm and survived as (INAUDIBLE).

7 When they had no feed, became weak, they came up out
8 of the draws to the flat country, and then they were in
9 trouble. The wind chill, the weather got them. And we
10 submit that that's a direct result -- direct result from
11 failure to have enough money to operate this ranch the way
12 it should be operated. And it's a direct result of the
13 Bank of Hoven not diligently making the request, getting
14 on the phone, driving over there saying what is wrong with
15 our application. In late October you all agreed. So
16 let's get our ducks in an order, and let's not be held up
17 with bureaucracy. Put your stamp on there. We'll make
18 the loan. Everybody will get going. It didn't happen.
19 The letter came back, said you needed a more complete
20 application. None was ever made. Now the 37,5, that's a
21 direct loan. That doesn't even depend on BIA approval.
22 You can make the loan and go forward.

23 In addition, we heard testimony that in that letter
24 from the BIA they authorized the Bank to make an emergency
25 loan. Just write a check \$42,000, take care of the

1 problem, automatically guaranteed by the United States
2 through the BIA. It didn't happen. So the breach
3 happened early on and the breach of the annual operating
4 loan, lack of purchasing the cattle caused the entire
5 failure of this system that was put together.

6 Our second cause of action is bad faith, good faith.

7 THE COURT: Five minutes, Counsel.

8 MR. HURLEY: Thank you. The Court has instructed that every
9 contract has a provision of good faith and bad faith in
10 it, and we ask you to pay special attention to the
11 instruction of the Court in defining what good and bad
12 faith is. It's very helpful in defining -- in defining
13 that particular concept.

14 For example, good faith is designed -- is defined as
15 honesty in fact in the conduct or transaction concerned.
16 The implied covenant of good faith must arise from the
17 language in the contract or it must be indispensable to
18 carry out the intention of the parties. And we ask you to
19 look at that.

20 In other words, if the Bank acted in such a way as to
21 deny the Longs the benefit of the contract, which we
22 submit it did, then that is not good faith. That's bad
23 faith. We submit that the Bank did not make a good faith
24 effort to obtain the BIA guarantee. Therefore, the Longs
25 didn't get the 70,000 operating loan because the Bank did

1 not get the BIA guarantee on the 70,000 operating loan.

2 We also have a claim for self-help. We claim that
3 the Longs were damaged by the Bank selling the land to the
4 Maciejewskis and the Pesickas, and therefore the Longs
5 lost the use of that land. You will remember the Pesickas
6 bought 320 acres of grass. The Longs could have used
7 that. And you will recall that the Bank sold 960 acres to
8 the Maciejewskis and the Longs could have used that.

9 In this plan they were -- they were intending on
10 using it. Part of their plan they needed that for
11 producing feed for their cattle, cash grain, FSA payment
12 (INAUDIBLE). When you look at Exhibit 23, you will see
13 that Ronnie Long has set out the value of the land that he
14 was denied the use of. And when you go through Exhibit
15 23, you will see that he has put a value on that, and we
16 would ask you to take a look at that.

17 (END OF DUPLICATE #9 TAPE #2).

18 (THE FOLLOWING PROCEEDINGS TOOK
19 PLACE ON DUPLICATE #10 TAPE #1:)

20 We also have a claim for discrimination, and as you
21 have picked up from the testimony, the discussion between
22 the Longs and the Bank started out -- and you will see in
23 Exhibit 4 where Chuck Simon is writing to Ronnie Long and
24 says that we started out talking about this where the land
25 base would be deeded and sold back to you on a contract.

1 The contract is very favorable.

2 That's like the Bank did for Maciejewskis. You don't
3 have to go out and find a loan. The Bank, as a seller,
4 just says we'll finance you. And we'll give you ten
5 years. Your annual payment -- for example, Maciejewskis'
6 annual payment on Parcel 1 was 23,000. Well, the FSA
7 payment was 23,000. So you've got a payment on all of
8 the -- all of the 1905 acres was 23,000. And that
9 payment, if Ronnie Long could have bought it, that 23,000
10 would have paid half of the payment.

11 And you will recall from the contract for deed that
12 the Bank gave the Maciejewskis, it was about 23,000 annual
13 payment on Parcel 1, and 23 on Parcel 2. If the CRP had
14 been continued, you will recall that payment was 44,000.
15 The CRP would have paid the payment on both Parcel 1 and
16 Parcel 2 under the contract for deed.

17 But why wasn't Ronnie Long offered a contract for
18 deed? The Bank goes on to explain, says that they've
19 talked to their lawyer, and they feel there would be some
20 possible jurisdictional problems if the Bank ever had to
21 foreclose on this land, and that's because this is an
22 Indian-owned entity on the reservation.

23 The essence of discrimination is that every one of us
24 who are United States citizens, regardless of race, color,
25 or creed, have a right to be treated fairly. And all

1 things considered equally, the right to be treated
2 equally. And to not be discriminated against solely on
3 the basis of race. Here in this letter the Bank says that
4 we're originally talk about taking the deed from you; and,
5 Ronnie, we would sell it back to you on a contract. And
6 then in the next paragraph it says that after talking with
7 the lawyer, the only way that we can sell the property
8 back to you would be if you would find financing elsewhere
9 and would pay it in a lump sum.

10 That we submit is discrimination. And when you think
11 your way through this and you look at the special
12 interrogatories, there is one on breach of contract. Did
13 the Defendant Bank breach the loan agreement?

14 THE COURT: Time, Counselor. It's time.

15 MR. HURLEY: Thank you.

16 THE COURT: All right.

17 MR. HURLEY: At the close the -- the Court perhaps would give
18 me a few minutes to close up, you know (INAUDIBLE) --

19 THE COURT: You have five minutes for rebuttal.

20 MR. HURLEY: Pardon me?

21 THE COURT: Remember, you have five minutes for rebuttal.

22 MR. HURLEY: Oh, yes. Thank you.

23 THE COURT: Counsel for the Bank?

24 MR. VON WALD: Thank you, ladies and gentlemen, for sitting
25 through this whole thing. It's taken a lot of time out of

1 your daily life of sitting here until it's 9 o'clock at
2 night my time, 8 o'clock your time. So I'm sure it's not
3 going to be easy for you to listen, but we do appreciate
4 you being attentive. You're probably one of the most
5 attentive juries, at least in my case, that I've ever
6 seen. I've never seen a case before where jurors would
7 tell me what -- what exhibit I'm looking for, but it seems
8 like you guys were able to do that, so I commend you for
9 that.

10 Again, like Mr. Hurley said, my comments here are
11 arguments and intended to give you an idea of what we
12 think our side of the case shows. So if what I say is --
13 my recollection is different than what the evidence is
14 that came in, you should rely upon your evidence -- your
15 recollection, not mine. So I'm sure neither Mr. Hurley
16 nor myself will try to mislead you, and I want to
17 preface -- preface a little argument for that.

18 This case, ladies and gentlemen, we feel is a case
19 that basically -- and -- and it's too bad that it
20 happened -- but it's a case that frequently happens when
21 the first generation is out there farming, and it seems
22 like they're doing fairly well or they're in some other
23 business. All of a sudden they take a second generation
24 in there with them and all of a sudden with two families
25 in the operation, somewhere or another it seems like it

1 starts. And I don't know why that happens, but it
2 frequently does. It doesn't always happen, but it seems
3 like that's what must have happened here.

4 In this particular case you saw the -- the evidence
5 that the Long Corporation had a net worth of a half a
6 million dollars -- over half a million dollars in 1992
7 when Kenneth was still living. But that net worth had
8 gone down and down and down. Eventually, by 199 -- I
9 think it was 1996 when they sent in the request for the
10 BIA guarantee loans the net worth was down to \$155,000.
11 And if you look at the financial statement, that included
12 Ronnie Long's home on there for the first time, so the net
13 worth -- the net worth of the corporation had really
14 dwindled fast.

15 If you look at that same comparative statement that
16 the Bank had, the net worth went down and the borrowing
17 went up. They just kept borrowing more and more money,
18 and what happens is it's a vicious cycle. The more you
19 borrow, the more interest you pay. The more interest you
20 pay, the tougher it is to make it work. That's basically
21 what happened in this case.

22 But at any rate, going back to 1995, when Kenneth
23 died, the Bank was no longer willing to go on the hook for
24 more money basically. They wanted Long Family Land and
25 Cattle Company, Inc., to lower their debt. They couldn't

1 figure out how to do that. They tried to get loans
2 with -- other loans with like the SBA or looked for other
3 sources for financing, and it didn't work.

4 So eventually, they all came to the conclusion that,
5 okay, let's deed the land back to the Bank from the
6 Long -- from the Kenneth Long Estate, and the Kenneth Long
7 Estate did that. Paulette Long, Kenneth's spouse, deeded
8 it to the Bank, and then the credit was given for the
9 478,000, the land and the house in Timber Lake.

10 But after that happened -- actually, before that
11 happened, the Bank gave Long Family Land and Cattle
12 Company, Inc., an option to buy that land. So they tried
13 to work with the Longs yet. It's not like they're trying
14 to steal the land. They're trying to get a program going
15 so the Longs can make money.

16 So they gave them an option to purchase the land, one
17 more option. And then, eventually, that still wasn't
18 going to make them money because they had to be able to
19 come up with something to buy the land so they entered
20 into a lease with an option to purchase, and they
21 negotiated for a long time before this lease with option
22 to purchase. And the reason they negotiated for a long
23 time was because the number of possibilities existed as to
24 whether or not they would come up with the right cash
25 flows and so forth.

1 So at a meeting where Dennis Huber was there, they
2 did come up with a (INAUDIBLE) cash flow, and that cash
3 flow I think is Exhibit 8A. As you will recall, 8A --
4 it's page two -- but 8A as you will recall was rejected by
5 the Bank. Three, two. It was rejected by the Bank. At
6 the meeting when they -- when you see cash flows like
7 this, that was the meeting that you remember that I'm
8 at -- when you see cash flows like this, you just assume
9 everything is the way it should be. But when you sit and
10 have an opportunity to sit back and look at those cash
11 flows, that's when we found out that there was some
12 problems with this cash flow. Actually, it wasn't me that
13 found out. It would have been the Bank.

14 But that's when they found out that the \$62,500,
15 that's additional money, that wasn't proposed at all at
16 the meeting. The \$100,000 it was proposed to borrow. But
17 that made this sum of \$62,500. So this at the end of the
18 year, Year 1, this would have been \$102,000 under this
19 cash flow. Well, that wouldn't be too bad.

20 The problem is that he sold all of his cattle out,
21 all of his yearlings and all of his calves the very first
22 year. But by doing that, you see, his calves were to
23 bring 89,000. So had he not sold those calves the first
24 year and continued with the program to keep them over
25 until they were yearlings, if he would have done that,

1 then he wouldn't have had this \$89,000 down. So this cash
2 flow just plain didn't work.

3 And then like I told you, the second cash flow -- and
4 I'm sure that -- that none of these mistakes that were
5 made are intentional on anybody's part. I'm not saying
6 that Huber or whoever did the cash flow for him, did this
7 intentionally to make it look good. I'm sure they didn't.
8 It was just a mistake.

9 But whatever the reason was, there was a mistake
10 made. You see where the 360 head of yearlings, now it
11 would be 110 of those that would have been bought. But
12 the other ones would have been calves that were supposed
13 to be for the 1996 calf crop -- that would be 19 --
14 1997 -- 1997 calf crop was the other ones. These were
15 already sold. So there lies the problem. And the bottom
16 line here is it just didn't work out right because they
17 are selling the same calves twice. Okay. So that one was
18 rejected.

19 Once that one was rejected -- and this I think is a
20 fairly important point -- but as to the damages that --
21 that are being asked for -- once that one was rejected, a
22 second cash flow was given to the Bank, and this one was
23 sent to the Bank, December 11th, just a day before the
24 letter was sent out to the BIA to get the \$85,000 BIA
25 guaranteed loan; and if the 90 percent increase had gone

1 the other way and the note had been rescheduled, this was
2 received by the Bank then on December 11th.

3 You will see this cash flow here requires \$85,000
4 rather than 70,000 like the loan agreement said. You see
5 there is a minus \$85,000 here. Now Mr. Huber said that he
6 put it up here first, and when he did that, if you take
7 the \$85,000 operating line and put it at the beginning
8 cash up here, then you wouldn't end up with a minus down
9 here, of course, but it's just a matter where you put it
10 on. It really does the same thing. The \$85,000 operating
11 cash is always up front.

12 So I mean, you don't give somebody a line of credit,
13 ask them to operate for nothing for the whole year, and
14 then give them 85,000 debt at the end of the year. That's
15 not how it works. You give it to them up front as soon as
16 they would have gotten it.

17 If they would have handed that in on December 12th,
18 like they did, and it ended up getting approved rather
19 rapidly, they might have had it like in a couple weeks.
20 But the money would have been there for the operating.

21 The problem is -- the other thing I was going to
22 point out here, is you see that even with this cash flow,
23 if they had received 85,000, rather than 70,000, if they
24 received that, the bottom line at the end of the year is
25 still only \$28,000 cash extra that they would have had, if

1 they could live by this cash flow.

2 The second year, it's 57,000. So it increases some,
3 but it doesn't increase a whole lot. You know, just think
4 about it, ladies and gentlemen, just think about it. How
5 many of you people can put 30,000 bucks away in one year?
6 Now that's not easy to do. I will guarantee you, I've
7 never done that in my life, and I would guess that most
8 people don't.

9 So in order to have -- continually have more and more
10 and more money at the end, it comes slow. It doesn't come
11 150 to \$200,000 (INAUDIBLE). It just doesn't happen.

12 (INAUDIBLE) if they keep increasing and hopefully that's
13 what would have happened here, the third year you are up
14 to 90,000.

15 So after three years it shows that he would have --
16 if he would have gotten this \$85,000 operating line, if
17 the cattle wouldn't have died, if everything would have
18 worked just like he wanted it, he would have been \$90,000
19 ahead. Now that would have been going in the direction
20 for his net worth. That would have been what the lenders
21 it would need in order to lend him money to buy the land.

22 The problem that we ran into here, ladies and
23 gentlemen, is simply this: We had the worst winter on
24 record, and the worst winter on record is what the problem
25 is. This was the winter of '96, '97. Snow was three,

1 four foot deep. Wind chills were 90 -- were 60 to
2 90 degrees below zero.

3 The letter that Ronnie wrote the Bank dated -- dated
4 January 5th -- excuse me -- February 18th. That letter
5 that he wrote to the Bank told them just exactly what
6 happened, told them how bad the winter was, told them that
7 on the 13th of December he had the lots all cleaned out.
8 He was going to take the yearlings in. He hadn't even
9 weaned them from the calves yet -- or the cows. So they
10 were last year's calves. He was going to take those
11 yearlings off and move them back to the farm.

12 The problem is -- and he had -- he had trucks lined
13 up for it -- the problem was the weather just absolutely
14 didn't cooperate. The weather didn't cooperate. It
15 wasn't because he didn't have the money. The weather
16 didn't cooperate. He had the trucks. Then -- and he --
17 and it went from the 13th through the 18th, the blizzard.
18 And he said in that letter, as you read it, he lost very
19 few cattle then. The problem -- then after that, until
20 the 29th of January, which is a long time, a month and ten
21 days. He couldn't even get in and out -- he could get in
22 and out on occasion to feed them. But the roads were
23 never wide enough so that could you get a semi trailer
24 down there to haul those calves out. It was too late to
25 get feed in, and you couldn't get the calves out. You

1 were just stuck. Had the feed been there beforehand, it
2 might have made a little difference; but if you can't get
3 out to there to feed the feed, to feed the cattle, they
4 still have a very strong possibility that they are going
5 to die.

6 And remember, ladies and gentlemen, the testimony
7 that all kinds of people -- I mean all kinds of people
8 that winter lost cattle. It wasn't just Ronnie Long. I'm
9 not blaming Ronnie Long for being a poor operator out
10 there. It's just circumstances that happened. It wasn't
11 necessarily his fault, but it certainly isn't the Bank's
12 fault. Because the Bank -- he's trying to say -- and I
13 don't believe -- that the Bank would not give him money to
14 haul feed out there, if they knew he needed feed out
15 there. That's absurd.

16 You see, the collateral that was out there, they were
17 his calves, but they were the Bank's collateral. They
18 got -- they've got an interest in those cattle just as
19 much as he does.

20 Actually, the fact of the matter is, they loaned him
21 \$16,000 for leases. Do you remember the leases that he
22 had in December? Now that's 16,000 that they're going to
23 use for next summer. They loaned that to him with no
24 problem. Probably as soon as he asked for it, he assumed
25 he would lose the tribal leases, but they didn't. So they

1 loaned it to him.

2 He -- he told them he needed some operating money.
3 They gave him \$5,000. And then they gave him \$2,250 to
4 get -- for a snowmobile, so he could get out there. The
5 problem was, it didn't make any difference by this time
6 how much money you gave him. You can't get out there.
7 You can't move the cattle out. And you can't move the hay
8 to them. It's too late for that.

9 The biggest thing is, I think, is in September -- in
10 September he had \$30,000 to pay bills with. Now, he could
11 have chosen to pay back bills. As a matter of fact, you
12 look on here, I think there is an accountant bill for 2 or
13 \$3,000. Well, I don't know if that accountant would have
14 waited or not; but if you went to that accountant and said
15 I'll get you the money as soon as we -- I get my new
16 operating line, I will bet he would have waited. I doubt
17 that he would have sued him. He just had done his tax
18 return.

19 You know, the fact of the matter is, he had money
20 that was released that he could have used to move the hay.
21 So it really wasn't because of the fact that he didn't
22 have money.

23 If you look at the comment sheets, there were
24 actually advances on loans all the way through November,
25 and the last one was in December. So there were 3 or

1 \$4,000 on his operating line that he had that was
2 released. So it's a certain thing, that it was the Bank's
3 fault and they wouldn't give him money to move the hay if
4 they would have known that he needed to move the hay.

5 You see, it's his operation out there. As the Bank,
6 we're a hundred miles away. We really don't know if he's
7 got the hay with the cattle or if he doesn't. We don't --
8 we really don't know that. But if he calls us then, if he
9 tells us I've got to have money to get the hay, for crying
10 out loud, it's our cattle, just like his calves
11 (INAUDIBLE). So it's a certain thing that the Bank would
12 have given him money had he asked for it.

13 And, of course, the fact of the matter is, like I
14 say, it probably doesn't make -- it wouldn't have made any
15 difference if there had been hay out there or not. He had
16 lost a sizable number. I don't know how many, but he had
17 lost a sizable number. But that's what caused these
18 problems. That's what caused the problem.

19 You see the Bank requested -- the agreement that
20 Mr. Hurley is talking about, the Bank requested -- they
21 did everything that they said they were going to, plus
22 more. They said they were only going to request a \$70,000
23 line of credit, but they requested an \$85,000 line of
24 credit. They did that. They sent that in December 12th.
25 Okay.

1 You also heard Mr. Huber say that frequently people
2 in the BIA office, they've got too much to do. There's
3 just too much work for them, and they don't get things
4 done. So he would come and help them out on occasion.

5 I don't know why it was, I don't know why it was that
6 the BIA took from December 12th, all the way up to
7 February 14th, before they responded. I don't know why --
8 but I will guarantee you this for sure, that by
9 February 14th, if we look at Ronnie's letter that he wrote
10 to the Bank, by February 14th, his cattle were already
11 dead. They were dead.

12 Now, I don't think -- like I told you before, I don't
13 think even if he had had that operating line right away,
14 it would have made any difference because this wasn't
15 until the 12th of December that they sent it in. The 13th
16 of December, remember, the 13th of December is when he got
17 the big blizzard. So I don't think it would have really
18 made any difference if the BIA would have worked -- would
19 have acted on this that much faster anyway. From the 13th
20 of December on, he was in trouble. If he didn't have the
21 cattle out by then, he was in trouble.

22 So then when he calls in on February 13th -- the Bank
23 gets a response to this letter on February 14th -- when he
24 calls in on February 13th and tells the Bank that he no
25 longer has 305 head of cows out there any more. He no

1 longer has 260 head of yearlings out there any more. He's
2 got 25 yearlings, and he's got 150 cows. I mean his
3 financial condition changed drastically.

4 Mr. Hurley asked why didn't they pick up the phone
5 and try to get another -- to pick up the phone or a fax
6 and say, geez, we should have that line of credit. Well,
7 wait a minute. Wait a minute. Did he think for a second
8 that the BIA was going to take the -- the cash flows that
9 were sent along -- along with this, you know, the cash
10 flows that I showed you where it showed that he needed
11 \$85,000 worth of cash operating line. And when they
12 needed the \$85,000 worth of cash, it was also projected in
13 there that he was going to be selling these 260 head that
14 he had out there, this 225, that's the only way that cash
15 flow worked is if he had those cattle to sell. Well, once
16 he didn't have them to sell, obviously that cash flow was
17 not going to work any more.

18 So even after that -- and as far as increasing this
19 to 90 percent, increasing it to 90 percent, yeah, well,
20 that didn't happen, but the Bank did reschedule those
21 loans. Those loans were rescheduled. They rescheduled
22 them at the Bank's risk. They were only covered by
23 84 percent rather than 90. So the Bank is the only one
24 that lost anything there. When these things went sour,
25 the Bank is the only one that lost anything. Had it got

1 up to 90, they would have lost less. But they are the
2 only ones that had something to gain by this 90 percent or
3 84 percent increase.

4 And as far as -- I mean like I told you, as far as
5 the \$85,000 line of credit, there is no way that that's
6 going to work any more. The BIA is not going to go along
7 with it. No lender would. I don't just say the BIA. You
8 just have to show a cash flow, and that is going to work
9 before any lender will loan you the money.

10 The -- but what the Bank did do is then they got
11 together with Ronnie and they called him and said, Ronnie,
12 what are we going to do. They still had Ronnie in mind
13 yet. So they get together, and they come up with a cash
14 flow balance of 40,595.

15 Now these figures I know are boring. I know they
16 are. And I don't know how to make them any more
17 interesting, but -- and I know it's late. But they came
18 up with \$40,595. Okay. And that was the cash flow that
19 the -- again that the --

20 (TAPE HAD AN APPROXIMATE
21 EIGHT-SECOND BLANK SPOT AND
22 CONTINUED AS FOLLOWS:)

23 Mr. Hurley is right; you need an operating line. He
24 had that.

25 Well, what else did he have in there? He had, in

1 addition to that operating line, 48,000 from the LIP
2 program, from the government for part of calves that --
3 cows that he lost. Okay. So 40,000 plus 48,000. He had
4 \$85,000 in operating that year. 85,000. Granted, some of
5 it wasn't until August from that -- the LIP program. I
6 understand that. But during the year, he still had
7 85,000.

8 The problem was, the problem was that he couldn't
9 work up to that \$40,595 cash flow anyway. Even though he
10 was given another 48,000 from the government, which they
11 didn't expect, he still didn't have the money when it came
12 November 1st for those notes. He didn't have the money to
13 pay them.

14 So why he didn't -- what he did with the money, I
15 don't know. But my point is that cash flows are only as
16 good as the person who uses them. You can -- anybody can
17 make out a budget; but if you can't live within your
18 budget, the budget isn't going to work.

19 And in this case, the budget, that was paying off the
20 land, didn't work. It was projected that it would, but it
21 didn't. These cash flows depended on a lot of history,
22 depended on what the price is going to be. They depended
23 on what the price -- what the costs are. You know, I
24 mean, there are a lot of variables.

25 I'm not saying it's Ronnie's fault that he couldn't

1 live up to it, but he couldn't. It's a problem the Bank
2 was trying to work with. And when it came to the point
3 when he had \$19,000 from the LIP program yet and \$13,000
4 from the -- where he changed his program to lease his land
5 out, when he had that money left and he wouldn't bring it
6 in to make a payment on the BIA guaranteed note, basically
7 when the lender -- the borrower-lender relationship just
8 disappeared.

9 THE COURT: Five minutes, Counsel.

10 MR. VON WALD: Okay. Then let's go to the damages a little bit
11 more -- I'm getting a lot longer than I thought. Let's go
12 to the damages a little bit. The damages that he alleges
13 are, you know, almost absurd. You see from the first five
14 years or six years of his tax returns, if you look at
15 those, he lost money each and every year. Now I
16 guarantee, granted some of it was depreciation in there,
17 so it wasn't -- it wasn't always out-of-pocket loss; but
18 if you look at it real close, there were losses. There is
19 nothing -- but yet, he is trying to tell you, ladies and
20 gentlemen, that for the next seven years if the Bank would
21 have given him the \$70,000 loan, if they would have been
22 given him the 35,000 to buy 110 head, that then he would
23 be -- then he would have gained 1.2 million.

24 Now, look at the whole history here. He lost about
25 \$400,000 in six or seven years, and now he is trying to

1 make you believe that he would have made 1.2 million in
2 five or six years. You know, \$1.2 million, ladies and
3 gentlemen, is a lot of money. I mean that's a lot of
4 money. That's more money than most of us in our lifetimes
5 will make, and we're not going to make it in five years.
6 The damages that he has alleged are astronomical, and I
7 think unreasonable.

8 The last thing that I want to say is basically we
9 wouldn't be here, I don't think, if we wouldn't have had
10 the bad winter of '96, '97. We would have sold Ronnie the
11 land back. We would have sold Long Family Land and Cattle
12 Company, Inc., the land. That's what would have happened,
13 I think, except for the winter -- when the winter killed
14 the cattle, his financial condition changed drastically,
15 and he was no longer able to make money.

16 And that's why we're here today, ladies and
17 gentlemen, and that's not -- not because of the Bank, but
18 it's because of the weather or -- and not getting to the
19 hay on time, but circumstances. But it wasn't because of
20 the Bank breaching any agreement.

21 I told you at the beginning of this opening statement
22 that you people are the ones that have the power -- you
23 do -- you have the power to look at the evidence and look
24 at the law and make the right decision. That's your
25 responsibility. I'm glad it's yours. You can do it. And

1 I appreciate your -- your time. I pray that you return a
2 verdict for the Bank and against the plaintiff. Thank
3 you.

4 THE COURT: Thank you, Counselor. Chuck, I will give you a
5 few minutes.

6 MR. JASPER: If it please the Court and counsel, ladies and
7 gentlemen, when I talked to you the first time, I said I
8 was going to keep my comments brief. I think I lived up
9 to that. I'm going to reiterate. I'm going to keep my
10 comments brief. I think both Mr. Hurley -- excuse me --
11 and Mr. Von Wald did an excellent job presenting their
12 clients' case.

13 As I told you initially, I'm somewhat of a
14 (INAUDIBLE) player in this, as have been the Pesickas, and
15 the Maciejewskis, but I wanted to cover a couple of the
16 things though first.

17 I don't know if any of you have ever been on a jury
18 before. I'm guessing neither of the other attorneys here
19 in this courtroom have been on a jury. I have. It's been
20 20-some years ago. I sat on a jury. My first thought was
21 they sent us into the jury room was this is what we've got
22 to work with. These are the instructions and what we
23 heard. But you know, once we got into the jury room and
24 started putting our heads together, it started making
25 sense. Yes, we can do this. And I guess I'm telling you

1 folks that, as encouragement, so that you don't get
2 discouraged, because I can see where it would be very,
3 very easy to get discouraged in this case because the
4 numbers can bog you down. Well, don't let the numbers
5 necessarily bog you down.

6 One of the instructions talks about you folks have
7 the right to use your common sense. Well, we have seven
8 people here, seven people representing I would say a
9 fairly broad spectrum from your Tribe. You know, I think
10 one of you is a rancher, and I'm not sure what all of the
11 others are. But that's what -- because you have common
12 sense of seven people here to sit down and decide what is
13 right, what is the right thing to do in this specific
14 case. And I guess on behalf of the Pesickas and
15 Maciejewskis I'm thanking you folks right now for living
16 up to your responsibilities. Not just as citizens, but
17 also as tribal members because that's what you're doing
18 here. You're upholding what is right, what is the law, at
19 least the law that is set by your Tribe, saying this is
20 how we handle these types of situations.

21 Now, if I can, I just want to summarize a little bit
22 what I recall from the evidence. Mr. Long died in I think
23 1995, and it appears to me that the testimony was from
24 that point on all of these people were working together
25 trying to make this thing go.

1 Well, neither the Pesickas or -- the Pesickas or the
2 Maciejewskis were involved in that, and so, you know, they
3 weren't involved in any of these negotiations, so that
4 they really had no way of knowing whether things worked or
5 didn't work. But I think they would -- if they were here,
6 they would say we wished the best to Mr. Long and
7 everybody else that this thing would work out.

8 But also, as we know, these discussions ended up in
9 an agreement on or about December 5th of 1998 -- I'm
10 sorry, 1996, which granted a two-year option, and then
11 there was the possibility of extending that two years for
12 60 days.

13 Well, I think, if you remember from the evidence, the
14 two years were just about up when Mr. Long asked for an
15 extension of 60 days, that was denied. But if we look at
16 the time frame even after that 60 days had occurred,
17 that's when the Pesickas bought a portion of the property,
18 and that's also some time even later yet when the
19 Maciejewskis bought a portion of the property.

20 Now we can sit and play Monday morning quarterback,
21 saying, you know, he should have done this, he should have
22 done that. I'm not going to get into that. You're all
23 smart enough to know that the conditions changed, and
24 consequently the economics of people change, and the whole
25 economy changes as -- as two years or more goes by, the --

1 excuse me -- the national rate on what interest is being
2 charged, it goes up and it goes down from day-to-day.
3 Right now, luckily, we're in an era where interest rates
4 are low. Maybe this time next year they will be high.
5 Who knows? I don't. But you can't look at that and say
6 that's discrimination, as a Monday morning quarterback.

7 But also keep in mind once again Maciejewskis and
8 Pesickas, they weren't in -- directly involved in that.
9 After this lease expired and even after the 60 days
10 expired, the Bank owned this property free and clear.
11 Same, as I'm sure some of you folks owned property free
12 and clear. It may be a car, a trailer house, land, or
13 what have you. It doesn't matter. You can do with it as
14 you want.

15 And then I, same as you, have the right to buy
16 something from someone. And that's what happened here.
17 The Bank owned property. They sold it to the Pesickas and
18 to the Maciejewskis. Same as you and I could have bought
19 this property.

20 And consequently, I would urge you to find, there
21 really was no bad faith, you know, improper dealings or
22 any of that in this case. This is a pure and simple case
23 from my perspective of mother nature at her worst. Some
24 of you may have even suffered losses from that. I don't
25 know. I was in and out of this area back in 1996, '97. I

1 know what it was like to see snow drifts higher than the
2 ceiling, and I'm sure each and every one of you remember
3 that. So, folks, I would ask you to keep that in mind.

4 And with that, I thank you for your attention.

5 THE COURT: Thank you, Chuck. All right. Jim, you've got
6 five minutes of rebuttal.

7 MR. HURLEY: Thank you, Your Honor. As you know, in this case
8 as jurors, you have an important job to do. This is your
9 opportunity as one of us as citizens to do justice and to
10 do the right thing. If you believe from the facts that
11 this case, as I do, that a serious injustice has been
12 done, then you have the power and the obligation to make
13 the decision that will help right that injustice and to
14 help put right the harm that has been done.

15 Here in this agreement, as a result of this
16 agreement, the Longs have lost almost everything they've
17 worked two generations to accomplish, the land and the
18 cattle. And for that, they have brought this lawsuit and
19 this cause of action. And they are requesting if you find
20 for them in one of their causes of action and under the
21 instructions of the Court, they are asking you to award
22 damages to them in the amount of their losses.

23 If you will look at Exhibit 23 and you look to see
24 whether or not you think those are reasonable damages that
25 were sustained, they come to a big number, \$1,236,792.

1 But that, as you see when you look through that, those are
2 the cattle that were lost, that was the loss of the use of
3 the land that was sold, and they were denied the use of.
4 And in order to put this matter right, they need an award
5 of damages so they can get put back in the position that
6 they were before this happened to them so they can get
7 land back, they can get cattle back, and they can continue
8 on as productive members of this community.

9 Thank you for your attention. And the Longs pray for
10 a judgment in their favor and in the amount of the -- of
11 the damages that they have set out in Exhibit 23. Thank
12 you.

13 THE COURT: All right. Thank you. Now, it's your time to go
14 to work, Jurors. Again, you're going to have the
15 exhibits. You are going to have the jury instructions and
16 your six questions that you need to answer.

17 Dale, will take you -- where is the deliberation
18 room, Dale?

19 THE CLERK: (INAUDIBLE).

20 THE COURT: Okay. She'll take you to the break room. There
21 is water in there. You guys, if you have to go to the
22 rest room before you start, please feel free. And do your
23 best tonight to deliberate to try to reach a verdict
24 tonight.

25 THE CLERK: (INAUDIBLE).

1 THE COURT: Yeah. Go ahead.

2 (JURY EXCUSED).

3 Court is back in session. It's now 10:30 p.m.
4 And it's my understanding, has the jury reached a verdict
5 on all of the interrogatories? All right. And, Rhonda?
6 Rhonda, you are the foreperson. And those verdicts were
7 handed to the court reporter. All right. We'll take a
8 look at them here. (PAUSE). All right. They appear to
9 be in order. I'm going to give you, Dale, and I will have
10 you read them into the record, starting with Special
11 Interrogatory No. 1.

12 THE CLERK: Do I read the whole thing or just --

13 THE COURT: Yeah. Just read the question and then . . .

14 THE CLERK: "Did the Defendant Bank breach the December 5,
15 1996, loan agreement (Plaintiff's Exhibit 6) between the
16 Long Family and Cattle Company and the Bank of Hoven?"
17 Yes, seven voted. And no, zero.

18 "If you found -- "

19 THE COURT: Okay. Hold on. Did either counsel want the
20 jurors polled on that Interrogatory?

21 MR. VON WALD: No.

22 MR. HURLEY: No, Your Honor.

23 THE COURT: All right. Next.

24 THE CLERK: "If you found in Interrogatory 1 that the
25 Defendant Bank breached the loan agreement to the

1 plaintiffs, did that breach prevent the Plaintiffs Long
2 Family Land and Cattle and Ronnie and Lila Long from
3 performing under the lease with an option to purchase?"

4 Yes, seven voting. And no, zero.

5 THE COURT: Do either counsel want the jurors polled on that?

6 MR. HURLEY: No, Your Honor.

7 THE COURT: Dave?

8 MR. VON WALD: No.

9 THE CLERK: "Did the Defendant Bank use -- use self-help
10 remedies in an attempt to remove the plaintiffs from the
11 land that was subject to the lease with an option to
12 purchase?" Zero voted yes. And no, seven.

13 THE COURT: Do either counsel want the jurors polled on that?

14 MR. HURLEY: No, Your Honor.

15 THE COURT: Dave?

16 MR. VON WALD: No, Your Honor.

17 THE COURT: All right.

18 THE CLERK: "Did the Defendant Bank intentionally
19 discriminate against the Plaintiffs Ronnie and Lila Long
20 based solely upon their status as Indians or tribal
21 members in the lease with option to purchase?" Seven
22 voting yes. Zero, no.

23 THE COURT: Either counsel want the jurors polled on that?

24 MR. HURLEY: No, Your Honor.

25 MR. VON WALD: No.

1 THE COURT: All right. Next.

2 THE CLERK: "Did the Defendant Bank act in bad faith when it
3 attempted to gain the increased guarantee from the Bureau
4 of Indian Affairs as referenced in the loan agreement
5 dated December 5, 1996?" Seven voted yes. Zero, no.

6 THE COURT: Do either counsel want the jurors polled on that?

7 MR. HURLEY: No, Your Honor.

8 MR. VON WALD: No.

9 THE COURT: "If you answered no to Numbers 1, 3, 4, and 5,
10 you should stop here and not award damages. If you
11 answered yes to Numbers 1, 3, 4, or 5, what amount of
12 damages should be awarded to the plaintiffs?" They have
13 \$750,000, seven agreed yes, and zero disagreed.

14 "Should interest be added to the judgment?" Seven
15 voted yes. And no, zero.

16 THE COURT: Do either counsel want the jurors polled on that?

17 MR. HURLEY: No, Your Honor.

18 MR. VON WALD: No.

19 THE COURT: All right. Okay. I will order those verdicts to
20 be recorded. And, Jurors, we certainly -- you worked late
21 into the night. We appreciate your patience. We
22 appreciate your attendance. I am now going to discharge
23 you, Jurors. You can go home, relax, take it easy.

24 (JURY EXCUSED).

25 All right. Why don't we give a deadline that you

1 can file any motions in writing since the hour is so late.

2 MR. VON WALD: Okay.

3 THE COURT: Would seven days -- I assume defendants may file.

4 You are probably not going to file anything.

5 MR. HURLEY: No. I'm not going to be home for seven days.

6 I've got three other matters coming up that are out of the

7 office. Is seven days enough for you?

8 MR. VON WALD: Well, if you are not going to be there anyhow,

9 might as well wait ten days then to --

10 THE COURT: Ten days.

11 MR. HURLEY: That would be good.

12 THE COURT: Ten days for defendant to file any motions. I'm

13 going to take the counterclaim under advisement, but I

14 will await the filing of your motions before I rule on

15 that also. All right. Pending the filing of motions,

16 then the status quo will remain in place.

17 MR. VON WALD: Okay. Thank you, Your Honor.

18 THE COURT: All right.

19 MR. HURLEY: Thank you, Your Honor.

20 THE COURT: Court will be adjourned.

21 (END OF DUPLICATE #10 TAPE #1.)

22 (END OF JURY TRIAL.)

23 # # # #

24

25

1 STATE OF SOUTH DAKOTA

SS

CERTIFICATE


2 COUNTY OF WALWORTH

3 * * * * *

4 I, Cheryl A. Hook, one of the Official Court Reporters
 5 within and for the State of South Dakota, Registered Merit
 6 Reporter, and Notary Public hereby certify that the above and
 7 foregoing transcript is the true, full, and complete proceedings
 8 recorded on audio cassette tape and has been transcribed to the
 9 best of my ability of the above-entitled case held December 6 and
 10 11, 2002, in the Cheyenne Sioux Tribal Court, at Eagle Butte,
 11 South Dakota, consisting of pages 1 through 628, inclusive.

12 I further certify that I am not a relative or employee or
 13 attorney or counsel of any of the parties hereto, nor a relative
 14 or employee of such attorney or counsel; nor do I have any
 15 interest in the outcome or events of the action.

16 IN TESTIMONY WHEREOF, I have hereto set my hand and official
 17 seal this 21st day of November, 2003, at Selby, South Dakota.

18
 19 
 20 Cheryl A. Hook, RMR
 Court Reporter and Notary
 P.O. Box 328
 Selby, SD 57472-0328
 Phone: (605) 649-7628
 My Commission Expires 3-1-2008

21
 22
 23
 24 True & Correct Copy
 25 OF ORIGINAL.