

Transcript of entire Trial, No. 95-63, 294th District Court of Van Zandt County, William B. Jones vs. Udo Birnbaum, brought by Canton Attorney Richard L. Ray. Dispute over BEAVERS, suit brought as violation of the TEXAS WATER CODE. Do a search for "beaver" -- shows up 160 TIMES, but suit was NOT over BEAVER. ALL FRAUD!

1

1 QUALIFYING THE PANEL

2 MAY 27, 1998

3 THE COURT: Ladies and gentlemen of
4 the jury, first of all, welcome to the
5 Van Zandt County courthouse. You have
6 been assembled here as a jury panel.

7 I'm going to talk to you for a few
8 minutes about your qualifications as
9 jurors, also about exemptions. When I
10 get through doing that, I'll hear
11 anything that you all have to say about
12 why you should not be required to serve.

13 I think I probably better tell you
14 who I am, because I'm probably a
15 stranger to most of you. My name is Jim
16 Zimmermann. I'm a retired Justice from
17 the Court of Appeals in Dallas. I've
18 been assigned to sit here in your county
19 this week.

20 Judge Tommy Wallace, who normally
21 sits here is holding Court over in Wood
22 County this week. That's also one of
23 the counties in which he serves. I have
24 a couple of cases over here, that I've
25 been assigned to hear. I'm taking

1 advantage of Judge Wallace being in
2 another county, to use your court house,
3 your court room and your services,
4 frankly, to hear a couple of cases that
5 are set for trial this week.

6 Now, the very first thing that I
7 need to do, is to administer to you an
8 oath. Before I do that, I want to be
9 sure -- I asked a few minutes ago, and I
10 think everybody in the back kind of
11 raised their hand if they can hear me.
12 If anybody has trouble hearing me,
13 simply raise your hand I'll tinker with
14 the PA system down here and try to turn
15 the volume up.

16 Now, you're going to be, in a few
17 minutes -- or at some time this morning,
18 asked some questions relating to jury
19 service. Let me see a show of hands --
20 How many of you have ever been on jury
21 duty before? Okay. Looks like maybe a
22 third or fourth of you.

23 Those of you that raised your hands
24 probably remember, that once you get
25 through this stage that we're in now,

1 the lawyers will appear and they will
2 commence to asking you some questions --
3 and I will ask you some questions,
4 possibly. The law contemplates that you
5 will truthfully answer those questions
6 that touch upon your qualifications as
7 jurors.

8 Over the years, in order to make
9 that more likely, the law has developed
10 an oath that I must administer to you
11 now, and that you must take in order to
12 serve as a juror. So if you would rise
13 and raise your right hand, I'll
14 administer that oath to you.

15 (WHEREUPON, the Judge swore in
16 the jury panel.)

17 THE COURT: Thank you. You may
18 take your seats. Now, the first thing I
19 want to talk to you about --

20 (WHEREUPON, a person walked
21 into the courtroom.)

22 THE COURT: Just have a seat right
23 there; would you. The first thing I
24 want to talk to you about are the
25 qualifications to be a juror.

1 The state legislature has set out
2 certain qualifying standards -- six of
3 them to be exact. The legislature, in
4 setting out those standards -- seven of
5 them actually, goes on to say, that in
6 order to serve, you must meet each and
7 every one of these standards.

8 Now I'm going to run over them
9 quickly. They're on your summons.
10 You've probably already seen them, but
11 in case you have any questions or any
12 problems with them, I'm going to go over
13 them one by one.

14 Now, make sure you understand that
15 you must meet all of these standards;
16 not just one or some of them. Now as I
17 go over these standards, if there's one
18 that you do not meet or if you have a
19 question about it, as soon as I finish
20 going over them, I'll invite you to come
21 up here and we'll talk about it and get
22 any questions you have answered.

23 The first standard says, that to
24 serve as a juror, you must be a citizen
25 of the State of Texas and a resident of

1 Van Zandt County. So if there's anybody
2 here, who does not at this moment reside
3 in Van Zandt County, Texas, then you're
4 not qualified, and you can come up here
5 in a moment or two and I'll excuse you.

6 The second one is the one that we
7 probably have the most fun with, to be
8 frank with you. It says to be qualified
9 as a juror, you must be of sound mind
10 and good moral character.

11 Now, that's really the law. I will
12 tell you right now, that we're going to
13 take your word for it. You remember
14 you're under oath. If there's any
15 question in your heart about the
16 soundness of your mind or the goodness
17 of your moral character, just come up
18 here and tell us. We won't quarrel with
19 you about it. We won't ask any
20 embarrassing questions.

21 We are recording everything that's
22 being said. The court reporter over
23 here to my right is taking down
24 everything you say. So before you come
25 up and say, "Judge, I'm not of sound

1 mind", or heaven forbid, "I have bad
2 moral character", you need to realize
3 that that's going to be memorialized and
4 perpetuated in the court reporter's
5 notes. Nonetheless, come on up if you
6 feel like you must.

7 Number three says that to serve as
8 a juror, you must be able to read and
9 write English. Now, I sit throughout
10 East Texas -- and I'm from Dallas. I
11 sit in Dallas a lot. And sometimes
12 people, when they hear that standard,
13 they say, "Well, is this part of the
14 business about having an official
15 language that creates a lot of
16 controversy in a lot of areas, and the
17 answer is no, it's not.

18 It's a simple practical problem.
19 Trials are conducted in English.
20 Documents may be presented to you that
21 will be in English. The instructions
22 that I'm going to give you, that will
23 govern your deliberations will be in
24 English. The witnesses in the main will
25 testify in English.

1 Occasionally, there may be a
2 witness that doesn't speak English. In
3 that event, there will be a translator,
4 who will translate from whatever
5 language the witness speaks to English.

6 So you must be able to read and
7 write English to function as a juror.
8 So if anybody has a problem with that,
9 come up and tell me.

10 The fourth one says, you must not
11 have served as a juror for as long as
12 six days during the preceding six months
13 in a district court or the preceding
14 three months in a county court.

15 So if you've served for six days
16 within those time periods, come up and
17 tell us. A lot of times people say,
18 "Well, how do I know a district court
19 from a county court". That's the
20 simplest question you'll face all day.

21 You look at the jury box, if there
22 are twelve seats where you were sitting,
23 you were in a district court -- juries
24 consist of twelve people.

25 If you look in the jury box when

1 you were serving, there were only six
2 seats -- only six jurors, then you were
3 in a county court. Number five and
4 number six are closely related. I'll
5 cover those together.

6 You must not have been convicted of
7 the crime of theft or any felony,
8 whether it be theft or not. And number
9 six, you must not now be under
10 indictment or other legal accusation for
11 theft or any felony.

12 So if anybody has run a foul of the
13 criminal law, you need to come up and
14 tell us about it. I may save some of
15 you a trip up here by telling you that,
16 if at some time in the past, you were
17 convicted and placed on probation --
18 adult probation, and you successfully
19 lived out the probationary period
20 without getting your probation revoked,
21 that does not disqualify you.

22 You would be disqualified while you
23 were on probation -- And if there's
24 anybody here, now, that's on adult
25 felony probation, come up and tell us.

1 But if you were on probation some period
2 of time ago, and you're no longer on
3 probation, and your probation wasn't
4 revoked, then all of your civil rights
5 are restored to you upon the completion
6 of the probationary period.

7 By civil rights, I mean among other
8 things, the right to serve on a jury,
9 the right to be licensed by the State of
10 Texas, the right to vote -- probably the
11 most important one, and various other
12 rights that are suspended while you're
13 on probation.

14 So if there's any question about
15 that, why that's the rule. If you still
16 have a question, come on up and we'll
17 talk to you.

18 The last one -- and this is the one
19 that's mentioned first in most places,
20 but I see it's last here. You must be
21 at least 18 years of age to serve. So
22 if there's anyone here that has not yet
23 reached their 18th birthday, come on up
24 and I'll excuse you. Of course, you
25 will be qualified to serve when you turn

1 18.

2 Now, is there anybody here that
3 feels that after those explanations that
4 they're disqualified, or has any
5 question about what the qualifications
6 are? If you do, come on up and I'll
7 talk to you right now. Did you have a
8 question, sir?

9 JUROR: (Inaudible response.)

10 THE COURT: Just come on up and
11 talk to Mrs. Young, if you would.

12 JUROR: I'm moving this weekend to
13 Henderson County.

14 THE COURT: I'm sorry?

15 JUROR: I'm moving.

16 THE COURT: When?

17 JUROR: We're closing our papers on
18 Friday on our new home.

19 THE COURT: Right now, where do you
20 live?

21 JUROR: Garden City, Van Zandt.

22 THE COURT: Nice to have you. Have
23 a seat. I usually remind everybody,
24 that in most counties -- and I know this
25 is probably true in Van Zandt County;

1 although, I don't know the geography as
2 well here as I do -- probably in Dallas.
3 But in most counties, there are towns,
4 cities, that are right on the county
5 line.

6 In fact, in a lot of counties the
7 county line goes right through a town or
8 a city. Sometimes people say, "Well,
9 I'm not sure whether I -- I live in
10 Grand Prairie, Texas. Half of it is in
11 Tarrant County and half of it is in
12 Dallas County", and so on.

13 So if there's anybody here that's
14 in that position, you need to come up
15 and tell us. The tie breaker on that,
16 by the way, is pretty much where you pay
17 your taxes and where you vote. If you
18 live on the county line and you vote in
19 Van Zandt County, we're glad to have you
20 and you are qualified to serve.

21 Now, so much for qualifications.
22 Let's talk a moment about exemptions.
23 First of all, what are exemptions.
24 Exemptions are an arrangement created by
25 the legislature, that says essentially

1 this: Even though you are qualified,
2 you do not have to serve if you don't
3 want to, provided you fall within one of
4 the six categories of people who are
5 exempt.

6 Now, before I go over these, I want
7 to explain to you that these exemptions,
8 like the qualifying standards, they are
9 the doings of the state legislature.

10 The state legislature, as you know,
11 meets in Austin every two years. They
12 pass laws. They change laws. They
13 create new laws. They get rid of old
14 laws that they don't like. Those of us
15 that sit as either judges or jurors, are
16 honor bound and oath bound to follow
17 those laws, including some that we may
18 not like.

19 I tell you that, because I know
20 that they're probably some of you out
21 there that think that if you've got a
22 black robe on and they call you "Judge",
23 that you can make these exemptions up as
24 you go along -- and that's not the case.

25 Some of you may come up and have a

1 reason, which I might think is a
2 perfectly good reason to excuse you, and
3 I won't be able to because the law
4 doesn't permit me. You may be irritated
5 at me -- and I hope you aren't, but you
6 may be. I thought I would tell you in
7 advance that that's just part of the
8 job.

9 There are a lot of you that
10 probably, I would agree you would be
11 better served being some place else.

12 Inevitably, there will be someone
13 here who will say, "Well, Judge, I don't
14 know how many jury trials you're going
15 to try this week", particularly since
16 it's a short week because of the
17 Memorial Day holiday, "but we've got a
18 half a courtroom full of people, surely
19 you don't need me. You've got enough
20 without me".

21 Obviously if everybody said that,
22 we probably wouldn't have anybody. But
23 more importantly, let me explain to you
24 why it's important that I follow that
25 instruction from the legislature.

1 If we keep one of you whom we
2 should excuse, or if we excuse one of
3 you whom we should keep, we conceivably
4 might have to try the case all over
5 again at some time in the future, at
6 great expense. I think you know where
7 that expense comes from. It comes out
8 of your pocket, my pocket, and everybody
9 else's pocket.

10 One of the things that the
11 legislature and the public and the
12 presiding Judge expects me to do, is to
13 try these cases correctly the first
14 time, so they don't have to be tried
15 over again. So that's why we tend to be
16 a little picky about whom we excuse.

17 Back to exemptions. What are the
18 seven categories of people who are
19 exempt? And remember now, if you have
20 an exemption, you are not disqualified.
21 If you have an exemption and you want to
22 serve, all you got to do is sit right
23 there and serve you will.

24 If you have an exemption and you
25 wish to claim the exemption, you have to

1 come up here and tell us. First
2 category of people -- or exemptions, are
3 persons who have reached their 70th
4 birthday. If you have reached your 70th
5 birthday, you are exempt. You may serve
6 if you want to. You may be excused by
7 simply coming up here and claiming your
8 exception.

9 The second category, people who
10 have legal custody of a child or
11 children under the age of 10 years, if
12 jury service by that person would result
13 in the child or children being left
14 without adequate supervision.

15 In other words, if you've got
16 children that are not yet reach their
17 10th birthday and nobody to leave them
18 with and nobody to look after them, why
19 come up and we'll excuse you.

20 Number three and four are closely
21 related. All students of public or
22 private secondary schools are exempt.
23 They can serve if they want to, or they
24 can be excused to go back and study
25 Algebra and all that other stuff that

1 they'd just assume not be bothered with.

2 Number four is related. Persons
3 enrolled and in actual attendance at an
4 institution of higher education. This
5 always creates a little interesting deal
6 from time to time. People come up and
7 say, "Well, I'd like to claim my
8 exemption under number four, higher
9 education".

10 I say, "Well, what college are you
11 attending?" A lot of times you get
12 answers like, "Well, I'm fixing to get
13 ready to start thinking about maybe
14 sometime applying to go to such and such
15 college." That won't cut it.

16 If you are enrolled in that college
17 now and attending classes, you have an
18 exception, and we'll be glad to excuse
19 you. If you're just studying on it and
20 thinking about it, stay where you are.

21 The fifth one is the one that
22 really is revealing about how our law
23 gets made. You have an exception if you
24 are an officer or an employee of the
25 Senate, the House of Representatives or

1 any department, commission, board or
2 other agency in the legislative branch
3 of state government.

4 In other words, the legislature is
5 kind of taking care of themselves and
6 people that work for them by creating an
7 exception. If you're in that category
8 and wish to claim the exemption, come on
9 up and we'll be happy to excuse you.

10 Finally, number six. You have an
11 exception if you're the primary care
12 taker of a person who is an invalid and
13 otherwise unable to care for themselves.
14 People who are those kind of caretakers
15 have an exception, and we'll be happy to
16 excuse you if you come up and tell us.

17 Now, remember, even if you have an
18 exception, you're going to have to serve
19 unless you come up and tell us.

20 Now, in a few more minutes, I'm
21 going to recess you for awhile, while I
22 take up some stuff that has to be done
23 outside of your presence. And then I'm
24 going to bring you back in and we're
25 going to select a jury later this

1 morning, for the first case that we're
2 going to try.

3 Now, you're going to have a little
4 time to think about this, but I don't
5 want to get half way through a trial and
6 look over and find somebody with their
7 hand in the air on the jury, and that
8 person says, "Judge, I've decided to
9 claim my exception". It's going to be
10 too late then.

11 I'll be happy to talk to you now.
12 You want to secure the newspaper,
13 please?

14 I'll be happy to talk to you now
15 about it, but there comes a time when if
16 you're on the jury, that it may be too
17 late.

18 Now, the summons that you got, I
19 think makes it pretty clear, that
20 business reasons, however much I may
21 agree with your feelings about it, are
22 not lawful excuses. If you have a
23 crushing business problem, the best
24 we're going to be able to do for you,
25 probably, is to reschedule your jury

1 service for a later date.

2 It's now 9:32, it looks like. And
3 unless there's some of you here that
4 have something you need to talk to me
5 about -- If there is anybody here that
6 needs to talk to me, now is the time to
7 come on up and let's visit. Because in
8 a few moments, I'm going to recess you
9 and you'll be out of here for an hour to
10 an hour and a half.

11 So is there anybody here that has
12 anything they want to talk to me about?
13 Feels they're disqualified? Has an
14 exception that they wish to claim? If
15 there are, come on up and let's talk
16 about it.

17 COURT REPORTER: State your name,
18 please.

19 MS. GILES: Rita Giles.

20 THE COURT: Yes, ma'am.

21 THE WITNESS: Yes -- The primary
22 caregiver, I am for my granddaughter.
23 They live with me. She's at home right
24 now with my husband, who I just got out
25 of the hospital -- is the reason I have

1 somebody to care for her today.

2 THE COURT: I'm going to excuse
3 her. Come on up.

4 THE WITNESS:

5 MS. S. MILLER: Sonda Miller. On
6 my summons, it had -- My name is Sonda
7 Gay, and it had Sonda Kay. I'm Sonda,
8 S-O. But it's my address, so I didn't
9 want that to cause a problem later.

10 THE COURT: I don't think that will
11 be a problem. This lady has a
12 typographical error, I think, on her
13 summons.

14 THE WITNESS: My name is Sondra,
15 S-O -- n-d-a Gay. It says --

16 MS. YOUNG-DISTRICT CLERK: We can't
17 change it, Judge. You have to change it
18 down at the County Clerk's office.

19 THE COURT: Make a note on there,
20 so that when the lawyers go over it,
21 they'll know what her name is.

22 MS. E. VINES: I'm a U.S. citizen,
23 but I'm Spanish.

24 THE COURT: I'm sorry?

25 MS. E. VINES: I'm a U.S. citizen,

1 but I'm Spanish. I understand English.
2 I speak the English, but I don't write
3 it very good without being a problem.

4 THE COURT: You read it, write it
5 and speak it? I mean, you understand it
6 and read it and speak it?

7 MS. E. VINES: But don't write it
8 very good.

9 THE COURT: Have you understood
10 everything I've said this morning?

11 THE WITNESS: Uh-huh.

12 THE COURT: Okay. I think you're
13 going to be all right. Yes, ma'am?

14 N. COLE-JUROR: Nicky Cole. I'd
15 like the claim the exception on No. 2
16 for my sone, Cameron, who's eight.
17 They're about to be out of school.

18 THE COURT: Sure, right over here.
19 This is a child under 10. Yes, ma'am?

20 L. BLEDSOE-JUROR: Will this be
21 over this week? Because Monday I have
22 commitments to elderly relatives for
23 medical.

24 THE COURT: Let me tell you two
25 things about it.

1 L. BLEDSOE-JUROR: Okay.

2 THE COURT: It better be over this
3 week, because next week I'm sitting in
4 Tyler. That's the first thing.

5 L. BLEDSOE-JUROR: Okay.

6 THE COURT: The second thing is, I
7 can't be any more explicit about it than
8 that right now, because I don't know for
9 sure which of several cases I'm going to
10 try.

11 L. BLEDSOE-JUROR: Yeah.

12 THE COURT: But when we come back
13 from the recess, if you're still on the
14 panel, which I expect you will be, then
15 we'll have it narrowed down to one
16 indication. We'll be able to tell
17 you -- and you'll have a chance to speak
18 up and raise this time issue, then.

19 L. BLEDSOE-JUROR: Yeah.

20 THE COURT: But in all probability,
21 we're going to be through this week.
22 But when we start talking to you -- when
23 the lawyers start talking to you, don't
24 hesitate to raise your hand and say,
25 "Judge Zimmermann told me to tell you

1 that I can serve this week, but I can't
2 go into next week".

3 L. BLEDSOE-JUROR: Okay. Thank
4 you.

5 THE COURT: Yes, sir?

6 T. HICKMAN-JUROR: I served on a
7 district jury in the last six months.

8 THE COURT: Did you serve six days?

9 T. HICKMAN-JUROR: I served about
10 four days, I think.

11 THE COURT: Have a seat. We're
12 glad to have you.

13 T. BRUNNER-JUROR: Your Honor, I
14 have a dairy. I work for myself. I
15 guess my cows don't understand not
16 getting milked on time. I'll be glad to
17 serve if -- I guess, you know, if it
18 won't pose a problem.

19 THE COURT: What time do you do
20 your milking?

21 T. BRUNNER-JUROR: We milk three
22 times a day, like --

23 THE COURT: Morning, noon and
24 night?

25 T. BRUNNER-JUROR: Right.

1 THE COURT: Is there anybody there
2 to handle the noon milk?

3 T. BRUNNER-JUROR: Oh, yeah. I've
4 got people working for me, but it seems
5 like nothing gets done unless I'm -- You
6 know, when I'm not there -- I'm the
7 owner of it, so...

8 THE COURT: I understand. Tell you
9 what let's do. You take a seat, and in
10 a little bit we're going to start up a
11 specific jury trial, and when we do, I
12 want you to raise this point with the
13 lawyers. They may see fit to excuse
14 you. I frankly hope they do, otherwise
15 you're going to need to stay for awhile.

16 T. BRUNNER-JUROR: Okay.

17 THE COURT: But don't hesitate to
18 raise your hand and say, "I want to tell
19 you all about my dairy operation".

20 T. BRUNNER-JUROR: Okay, thank you.

21 THE COURT: Yes, sir?

22 B. SMITH-JUROR: I've got a
23 doctor's appointment Friday morning to
24 take a stress test. I've been trying
25 for three months to get it, because I've

1 got a bad heart. It's going to be real
2 difficult for me to reschedule that
3 doctor's appointment.

4 THE COURT: What time is it?

5 B. SMITH-JUROR: 10 o'clock --
6 right in the middle.

7 THE COURT: Excuse him. Go right
8 over here and she'll help you. Yes,
9 sir?

10 E. MISTON-JUROR: In 1978, I was
11 convicted on drug charges and I have a
12 felony on me.

13 THE COURT: Step right over here,
14 if you would -- and this is number five.

15 B. SCOTT, JR-JUROR: Judge, I've
16 got poor circulation in both of my legs.
17 It hurts to do too much sitting. I
18 don't mind, if there's not going to be
19 too much sitting to serve in your court.

20 THE COURT: How long can you sit at
21 one time?

22 B. SCOTT, JR-JUROR: Without
23 getting up and moving around, 10-15
24 minutes. I wear support stockings on
25 both my legs.

1 THE COURT: What is your name?

2 B. SCOTT, JR-JUROR: Bruce Scott,
3 Jr.

4 THE COURT: Come around here,
5 Mr. Scott. I'm going to excuse him for
6 medical reasons.

7 C. GREEN-JUROR: I'm enrolled in
8 Tyler Junior College.

9 THE COURT: Show me something that
10 says that. When is the semester over?

11 THE WITNESS: Spring was over
12 last -- two weeks ago.

13 THE COURT: Well, what are you
14 doing now? This says "Spring Semester".
15 The Spring semester was over two weeks
16 ago.

17 C. GREEN-JUROR: Oh, sorry.

18 THE COURT: Have a seat. Yes,
19 ma'am?

20 L. KERR-JUROR: I didn't know how
21 long it was going to run. I'm scheduled
22 for surgery on the 9th.

23 THE COURT: 9th of June?

24 L. KERR-JUROR: Yes -- And I have
25 to pre-register on the 2nd. I didn't

1 know if it was going to be a long
2 process or -- you know.

3 THE COURT: I expect this trial
4 will be over this week.

5 L. KERR-JUROR: Okay. That will be
6 fine, then. I just wanted to make sure.

7 THE COURT: You might want to
8 mention that later. We never know
9 exactly how long its going to take.
10 I've talked to the lawyers in all the
11 different cases, and they've said to me,
12 "Judge, this thing will be over in two
13 days, three at the outside.

14 L. KERR-JUROR: Okay. That will be
15 fine.

16 THE COURT: But 30 years experience
17 tells me --

18 L. KERR-JUROR: It doesn't always
19 work.

20 THE COURT: -- it always takes
21 longer than the lawyers tells you that
22 it takes, so that's where we are.

23 L. KERR-JUROR: Okay.

24 THE COURT: Thank you, ma'am.
25 Anyone else need to visit with me?

1 MS. YOUNG-DISTRICT CLERK: This
2 gentleman needs to speak with you. He's
3 the one that came in late.

4 THE COURT: Yes, sir? Don't lean
5 on the bench. You got a shirt?

6 K. HODGE-JUROR: This is a shirt,
7 sir.

8 THE COURT: You go to church like
9 that?

10 K. HODGE-JUROR: I don't go to
11 church, sir.

12 THE COURT: If you went to church,
13 would you go to church like that?

14 K. HODGE-JUROR: No, sir.

15 THE COURT: Then you don't come to
16 court like that.

17 K. HODGE-JUROR: Sorry.

18 THE COURT: Raise your right-hand.

19 (WHEREUPON, the Judge
20 administered the oath of jurors.)

21 K. HODGE-JUROR: I swear to God.

22 THE COURT: Put your hand down.

23 How old are you?

24 K. HODGE-JUROR: 19.

25 THE COURT: Where were you this

1 morning at nine o'clock when you were
2 supposed to be here?

3 K. HODGE-JUROR: Changinging a
4 tire.

5 THE COURT: You in school?

6 K. HODGE-JUROR: No, sir. I work
7 every day.

8 THE COURT: Okay. You live in Van
9 Zandt County?

10 K. HODGE-JUROR: Yes, sir.

11 THE COURT: Did you bring your
12 summons with you?

13 K. HODGE-JUROR: That's it.

14 THE COURT: No.

15 K. HODGE-JUROR: That's it.

16 THE COURT: Oh, here. Where is the
17 other half? That will work. Did you
18 read all of these?

19 K. HODGE-JUROR: Yeah. I read all
20 of them. You just went over them. I
21 was listening

22 THE COURT: You fit into all of
23 those categories?

24 K. HODGE-JUROR: Yes, sir.

25 THE COURT: Have any exemption you

1 want to claim?

2 K. HODGE-JUROR: No, sir.

3 THE COURT: Have a seat.

4 COURT REPORTER: What was his name,
5 Judge?

6 THE COURT: What is your name?

7 K. HODGE-JUROR: Kirk Hodge.

8 COURT REPORTER: Thank you.

9 THE COURT: Ladies and gentlemen,
10 unless there's someone else that needs
11 to talk to me, I'm going to put you in
12 recess until 11 o'clock. I'd like
13 you -- You may go any where you want,
14 leave the court house, go back home, go
15 to work, go get breakfast, whatever
16 pleases you. If you'll get be back here
17 at 11 o'clock, we'll tell you what
18 happens next. Thank you, very much.

19 (WHEREUPON, a recess in the
20 Qualification Phase was had at this
21 time.)

22 HEARING ON MOTION TO APPOINT A SPECIAL PROSECUTOR

23 THE COURT: We now return to Cause
24 No. 95-63, Jones against Birnbaum. Let
25 the record show that all parties are

1 here. We now convene a hearing with
2 respect to the deposition of
3 Mr. Birnbaum and the accuracy of its
4 transcription. Both sides ready?

5 MR. BIRNBAUM: Yes, sir.

6 MR. RAY: Yes, Your Honor.

7 THE COURT: Mr. Tibideaux, in what
8 capacity do you join us at the counsel
9 table?

10 MR. TIBIDEAUX: I filed this with
11 the Court this morning.

12 THE COURT: Yeah, I have it. We'll
13 hear that in due time. But in the mean
14 time, unless you're a practicing lawyer,
15 you don't sit at the counsel table --
16 either a practicing lawyer or a party to
17 the lawsuit.

18 MR. TIBIDEAUX: No, sir. I'm just
19 a long time friend and advisor to my
20 friend. I'm injecting myself as a third
21 party into this court.

22 THE COURT: Well, that's fine.
23 Have a seat in the gallery, and when the
24 time comes to hear that motion, we'll be
25 be glad to take it up. Now is the --

1 Before we take up that hearing, let's do
2 this in reverse order. Would Madame
3 District Attorney favor me with her
4 appearance? Mr. Birnbaum, would you
5 come up here, please, sir. Have you met
6 Mr. Birnbaum?

7 MS. DIXON: Yes, sir.

8 THE COURT: You know the District
9 Attorney, I assume?

10 MR. BIRNBAUM: Professionally.

11 THE COURT: Well, I don't need to
12 introduce you all then. Now, Ms. Dixon,
13 the reason that I called you or your
14 office yesterday, Mr. Birnbaum has moved
15 the Court in various of the papers in
16 the Court -- and also by this document
17 that he prepared at my request, to
18 appoint a -- and I'm quoting, "A Special
19 Prosecutor to pursue the Defendant's
20 sworn complaints of fraud upon the Court
21 as previously plead."

22 I denied his request to appoint a
23 special prosecutor, by whatever
24 definition that term may have, for
25 reasons that I have explained to him --

1 and I suspect I don't need to explain to
2 you. I did tell him, however, that
3 there was a duly elected prosecutorial
4 authority in this county, which of
5 course is you. And that while I could
6 not order you to do anything, I could in
7 all probability secure your presence.
8 The first thing I probably ought to do
9 is thank you for being here.

10 I wanted to make you available to
11 listen to whatever Mr. Birnbaum wants to
12 tell you about -- what I assume and what
13 I presume he contends to be criminal
14 activity in your county.

15 Now, Mr. Birnbaum, this lady is the
16 District Attorney. If crimes have been
17 committed in Van Zandt County, it is her
18 legal responsibility to investigate
19 them, through the use of the Van Zandt
20 County grand jury or other law
21 enforcement investigative agencies,
22 should the evidence justify to prosecute
23 the people found or believed to be
24 involved in those crimes.

25 Now, the only question I have now

1 is, do you -- would you rather say what
2 you have to say to her now or would you
3 rather get this court reporter problem
4 squared away first? I don't know how
5 long it's going to take you.

6 MR. BIRNBAUM: Okay. My thing will
7 be very brief, okay. It will not take
8 much time. As far as the position, I
9 think before the Court -- my position
10 before the Court here, I have complaints
11 to her that are lodged.

12 My position before the Court was
13 not to get the court to prosecute, but
14 to protect me from that. I was not
15 interested in the prosecution from that.
16 That's the statement. I did not mean to
17 imply that -- I mean there's obviously
18 some connections in there. That being
19 said, that's it.

20 THE COURT: Well, it's not a matter
21 so much of --

22 MR. BIRNBAUM: The matter came up
23 in relating to the depositions and their
24 use.

25 THE COURT: Well, let me put it

1 this way. I promised you yesterday,
2 that I would produce the District
3 Attorney for --

4 MR. BIRNBAUM: Yes, sir.

5 THE COURT: -- for you to tell her
6 what you said yesterday you wanted to
7 tell her.

8 MR. BIRNBAUM: I'm prepared to do
9 that.

10 THE COURT: All I want to know
11 right now is, do you want to do that
12 first? Or do you want to do it later,
13 and take up the matter of the court
14 reporter, Ms. Pierson, first?

15 MR. BIRNBAUM: I think -- I'm not
16 saying the two -- okay. I think the
17 thing that related to this here, has
18 already been said. Everything else
19 here -- You know, I'm simply stating
20 that I have made some statements, some
21 of which appeared in this court in the
22 file, which were not necessarily
23 addressed to the Court, okay. I think
24 that matter has been addressed, already.

25 THE COURT: By that matter, you

1 mean the matter that caused me to ask
2 Ms. Dixon to come over here? I can't
3 tell when you say, "that matter", which
4 matter you mean. In other words, can I
5 excuse her now or do you need her to
6 stay?

7 MR. BIRNBAUM: I have lodged --
8 provided -- related information to her,
9 and it appears the appropriate
10 opportunity to spend a few minutes in on
11 this. It has some relevance. I request
12 you not excuse her, if that's what
13 you're asking me.

14 THE COURT: Well, okay. If she's
15 not going to be excused, what function
16 is she going to serve while she's here?
17 I mean, do you have --

18 MR. BIRNBAUM: Whatever function
19 you want.

20 THE COURT: No, no, no, no. I got
21 her here for you. As far as I'm
22 concerned, she can be excused, but you
23 indicated yesterday, that you wanted me
24 to appoint a special prosecutor and I --

25 MR. BIRNBAUM: Well -- okay.

1 THE COURT: Excuse me. If you
2 recall, I said I can't do that, but
3 there's already a prosecutor here, and I
4 will produce the prosecutor for you and
5 I've done that. If you have no further
6 need for her, then I'll excuse her.

7 MR. BIRNBAUM: This matter will not
8 take long. I require her testimony in
9 this matter.

10 THE COURT: Now, "this matter"?.

11 MR. BIRNBAUM: This matter being
12 the court reporter.

13 THE COURT: Okay. All right.
14 That's fine.

15 MR. BIRNBAUM: Okay.

16 THE COURT: That will work.

17 MR. BIRNBAUM: I'm sorry.

18 THE COURT: Is she going to be your
19 first witness?

20 MR. BIRNBAUM: No, no. My first
21 witness will be Muriel. Let me make a
22 point of apology right here. The person
23 sitting next to me is not -- that was
24 removed from the court here earlier, has
25 no association with me, whatsoever. He

1 was a person I ran into -- well, right
2 next to me. He joined us at the Jewel's
3 Cafe. He's legally blind. He can't
4 drive. And he asked us if we could give
5 him a ride, and he just happened to show
6 up with us, so let that be said.

7 MR. RAY: Judge, could I -- I'm
8 sorry.

9 THE COURT: Who are we talking
10 about?

11 MR. RAY: What are we talking
12 about, Mr. Birnbaum?

13 THE COURT: Oh, Mr. Ray, I think
14 he's talking about the man who was
15 here --

16 MR. BIRNBAUM: Yeah.

17 THE COURT: -- who was reading the
18 paper and later on --

19 MR. RAY: Had the sign on his back?

20 THE COURT: -- and had a sign on
21 his back.

22 MR. BIRNBAUM: He had no
23 association with me, whatsoever.

24 THE COURT: I didn't think that he
25 did.

1 MR. BIRNBAUM: Okay. Well,
2 apparently other people noticed it.

3 THE COURT: No -- That's perfectly
4 all right. It took me awhile to figure
5 out what you were talking about. All
6 right.

7 HEARING ON ACCURACY OF COURT REPORTER'S
8 DEPOSITION TRANSCRIPT

9 THE COURT: We now convene the
10 hearing with respect to the accuracy of
11 the transcription of the deposition.
12 Who do you have first, Mr. Birnbaum?

13 MR. BIRNBAUM: Do I do this from
14 here -- Muriel Pierce. (sic)

15 THE COURT: Is she here?

16 MS. DAVIS-COURT COORDINATOR: Yes,
17 sir.

18 THE COURT: Ms. Pierce, (sic) come
19 on up.

20 * * *

21 MURIEL PIERSON,
22 having been first duly cautioned and sworn upon her
23 oath to tell the truth, the whole truth, and nothing
24 but the truth, testified as follows, to wit:

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EXAMINATION

* * *

BY MR. BIRNBAUM:

THE COURT: I'm Jim Zimmermann, and we talked on the phone yesterday to arrange your appearance down here this morning. I'm very grateful for your appearance on short notice. Mr. Birnbaum?

MR. BIRNBAUM: Guide me in the protocol, Your Honor, if I'm not correct.

Q. You are Muriel Pierce. Did you -- Were you asked to bring some documents with you today?

A. I'm not hearing you, I'm sorry.

THE COURT: You're welcome to come up here, if you want to.

Q. You can't hear me?

THE COURT: She was having trouble hearing you.

MR. BIRNBAUM: I know. What do I need to do with the microphones?

THE WITNESS: No, that's fine.

THE COURT: You can do it from up here, if you want.

1 MR. BIRNBAUM: All right. Thank
2 you. That's fine.

3 THE COURT: I'm never sure when
4 these microphones work or when they
5 don't.

6 MR. BIRNBAUM: Okay.

7 MR. RAY: Judge, do I have
8 permission from the Court to stand up
9 here, so I can hear Mr. Birnbaum?

10 THE COURT: Yes.

11 Q. As I understand it, there were certain
12 documents that I had requested that you bring with
13 you. Do you have them with you?

14 A. I didn't know that you requested anything,
15 but I don't have any documents with me, no.

16 THE COURT: Did you bring all of
17 the notes and all of that?

18 THE WITNESS: My notes had already
19 been destroyed when I got his green card
20 back.

21 THE COURT: Push that microphone
22 around. Do you have any --

23 Q. Show us documents.

24 THE COURT: We can't both do it,
25 Mr. Birnbaum.

1 MR. BIRNBAUM: All right.

2 THE COURT: Do you have any
3 documents relating to Mr. Birnbaum's
4 deposition, other than the transcribed
5 copy of the deposition?

6 THE WITNESS: The letter that I
7 sent with the deposition, telling him
8 to -- That may not be in there, but I
9 have a letter here.

10 THE COURT: The deposition -- Let
11 me show you what is a document that I
12 will simply mark on the front Court's
13 Exhibit No. 1 together with the date,
14 and ask you, Ms. Pierson, if you can
15 identify that exhibit?

16 (WHEREUPON, Court's Exhibit
17 No. 1 was marked for
18 identification.)

19 THE WITNESS: Yes. This is the
20 deposition that I took.

21 THE COURT: Is that Mr. Birnbaum's
22 deposition?

23 THE WITNESS: It's Mr. Birnbaum's
24 deposition.

25 THE COURT: Did you take that

1 deposition, originally?

2 THE WITNESS: Yes, sir, I did.

3 THE COURT: Did you cause that
4 transcription to be made?

5 THE WITNESS: Yes, sir.

6 THE COURT: Okay. Mr. Birnbaum, I
7 will hand you the document, which I'll
8 mark as Court's Exhibit 2.

9 (WHEREUPON, Court's Exhibit
10 No. 2 was marked for
11 identification.)

12 THE COURT: This is the document
13 that the witness brought to court. You
14 undoubtedly already have it.

15 Q. This document is already in the file. Okay.
16 Let me ask the question, do you have any of the
17 source documents, upon which this document was
18 transcribed?

19 A. No.

20 Q. Are you required to have those or what
21 happens to those?

22 A. I'm not -- Once they're transcribed, I'm not
23 required -- on depositions, I'm not required to.

24 Q. Did you have those -- Did you have those at
25 the time that you received my objection?

1 object to its entirety, the liberty as
2 taken with both the questions and
3 answers, changed the tone and tenure of
4 these proceedings. Then I can talk
5 about -- "phraseology and terminology
6 has been greatly altered".

7 I talk about -- "something has been
8 intentionally deleted from the
9 transcript and something doesn't appear.
10 I request -- something -- On January
11 21 -- on January 21, I mailed that to
12 you. I believe you thought it was the
13 total document with the Court.

14 Q. So it says that at the time that you received
15 my objection, you had not yet filed it with the
16 court; is that correct?

17 A. Not yet filed what with the court?

18 Q. This document.

19 A. No, I hadn't filed this with the Court. I
20 had to wait to get yours back to see what the
21 objections --

22 Q. Yeah -- Well, okay. Correct me if I'm wrong.
23 I returned you the document --

24 A. Yes.

25 Q. -- that you sent me for inspection, together

1 with my objection to you?

2 A. Yes -- And I made a copy of your objection,
3 typed up my certificate, and filed -- attached that
4 as you asked me to --

5 Q. That's correct.

6 A. -- to the certificate and filed it in the
7 Court.

8 Q. But I did --

9 THE COURT: Don't interrupt her,
10 now. Let her finish --

11 MR. BIRNBAUM: Sorry.

12 THE COURT: -- and I'll make her
13 let you finish.

14 Q. Okay. But I did ask you to make corrections
15 upon that which was sent to you for inspection?

16 A. No, sir. You mean on here?

17 Q. You did send the document -- Okay. You did
18 send the document to me for inspection?

19 A. Yes.

20 Q. And I so did. And I did return it to you
21 with the items --

22 A. No, sir, you didn't return any items.

23 Q. I returned it with this letter.

24 A. Well, what was to be changed?

25 Q. Okay.

1 A. I mean have I missed something here?

2 Q. Well, it clearly indicated that there were
3 some questions that I was raising about it in total,
4 which makes me -- Why the transcripts -- why the
5 source documents wouldn't be available for
6 corrections or something. The point has already
7 been made. Okay. All right.

8 With that in mind -- Okay, with that in
9 mind, I'm going to go very briefly through the
10 material informative pages. It won't take very
11 long. I'm not going to address -- The thing I
12 want to address here and question you on -- and
13 without the source documents, it appears -- I'm
14 sure that you don't remember what happened; not
15 supposed to remember as much as I remember. So
16 that being said, I'm going to try to -- I'm going
17 to try to point out a few things, which has to
18 do -- which I'm trying to prove. I'm going to ask
19 you some specifics, now.

20 There is -- Let me flip to some pages. I'm
21 going to show areas where the -- me, upon looking
22 at it from inspection -- And this is 74 someodd
23 pages, so I have no source documents wherever and
24 didn't make any, but I do have a memory. I know
25 that there are certain things that I would say or

1 definitely avoid saying. I remember certain one
2 of those. So everything I have has to be seen in
3 that context. Let me go on. Specifically --

4 THE COURT: When you start
5 referring to these -- Do you have a copy
6 before you?

7 MR. BIRNBAUM: Yeah. I'm going to
8 talk to her --

9 THE COURT: Before you ask anything
10 specifically --

11 MR. BIRNBAUM: Please state where.

12 THE COURT: The page and line.

13 MR. BIRNBAUM: Okay.

14 Q. I'm going to point out one item that I would
15 sort of expect and has no problem. I'm just going
16 to refer to it. Look on page 28.

17 A. 28 -- All right.

18 Q. That's a minor one. I'm going to give a
19 point of the sort of kind of errors that one would
20 expect.

21 A. Sir, did you not see this sheet that I put in
22 at the back for you to list any changes that you
23 had?

24 Q. I'm not complaining about this. I'm trying
25 to develop a point regarding the tone and tenor,

1 okay. All right. Just look at this. We're talking
2 about, "Why did you get the land?" "why did you move
3 there?" "When you get North, it's too cold." "When
4 you go South, it's too hot", and "When you go West,
5 it's too try." "When you go East it's salty."

6 I mean, you know -- I mean, that's the
7 normal kind of thing that might happen. That
8 doesn't bother me, okay. I mean, that's the kind of
9 transcription errors one would expect, okay. It has
10 no relevance to the thing. I have no reason to call
11 attention to it. I'm just calling attention to
12 something -- the kind of errors one would expect --

13 THE COURT: Could you go to the
14 errors that you --

15 MR. BIRNBAUM: Okay. Right --
16 okay.

17 THE COURT: -- and that way --

18 COURT REPORTER: Mr. Birnbaum, one
19 at a time, please.

20 Q. Okay. The pattern I'm going to show -- And
21 I'm going to show it in about two or three areas.
22 There is an intensive interrogation taking place,
23 regarding some word play between the parties. I'm
24 not -- I'm saying that kind of precedes it. Okay.

25 Here, for example, is one. It just kind of

1 sets the stage for this next item. There's
2 intensive -- There's an intensive interrogation in
3 here. Now we have a suit about a dam or something
4 here -- But there's an intensive interrogation in
5 here, starting on page 29. I'm going to give the
6 key point, okay. I'm not going to talk about --
7 "How you are qualified to teach in the public
8 schools", has no bearing. "How long did you
9 teach?" "Half a year." "When did after this" and
10 so forth.

11 In other words, has to do with
12 qualifications. It's a pointing out of something,
13 okay, now. That's not -- okay. That's the start
14 of an area of probing, okay -- and let me go on.
15 It's -- The probing continues on page 30. The
16 probing on the thing still goes on 31, okay. And
17 you know, talking about schools, okay -- Probing.
18 Probing regarding schools, okay. That sets the
19 context.

20 The probing still continues, and now it
21 finally comes on to some more probing about
22 home-school students at the end over here. Now,
23 I'm going to point out -- The point I'm making has
24 to do with -- There's extensive probing and
25 posturing by both parties to present things and

1 avoid being -- you know, anything that could be
2 construed as perjury. There's very careful choice
3 of words that I was trying to do in this, okay.

4 Now this goes on -- still goes on through.
5 Now we finally come home over here. Okay. It
6 comes home and finally we're talking about the
7 home-schooler. And then it comes on -- "Did they
8 just stop calling you for the home-schooling
9 or" -- No, didn't at home. I was tutoring some
10 home-schoolers.

11 Then it finally goes on and it goes on.
12 Look on page 43. Okay. Now here comes the
13 context. Look at the first question on 43.

14 A. 33?

15 Q. 43. Question -- and I'm not referring -- My
16 complaint is not about the question or the
17 representation of the question. It says, "Question:
18 I take it, though, that you would prefer to give
19 your knowledge of cows to the children, rather than
20 a teacher; wouldn't you?" Is that what you see
21 right there?

22 A. Yes.

23 Q. Okay. And the next sentence says, "That's
24 what I'm saying." I have no reason to say that.
25 You have any comment?

1 A. That's the reason you were to read this, sir,
2 so you could change what you wanted to change.

3 Q. The point I'm making -- that in the context
4 of this thing, I find so many -- I'm going to show
5 one or two more. There are -- After a probing,
6 which could be considered inappropriate; although,
7 I'm not complaining to that. There is an incorrect
8 representation, okay. I'm saying I definitely did
9 not say that -- and why that would be there. I'm
10 saying that there is --

11 THE COURT: Specifically, the page
12 and line number that you're contending
13 you did not say?

14 MR. BIRNBAUM: That is correct.

15 THE COURT: No. Tell --

16 MR. BIRNBAUM: Okay.

17 THE COURT: I want the record to
18 reflect what page and line number.

19 MR. BIRNBAUM: That is correct,
20 okay.

21 Q. Then we go on --

22 THE COURT: What is the page and
23 line number, Mr. Birnbaum?

24 MR. BIRNBAUM: 43.

25 THE COURT: Page 43 three.

1 MR. BIRNBAUM: One, two, three,
2 four -- line five.

3 THE COURT: Page 43, line five.
4 Now does that -- I mean, Ms. Pierson,
5 does that purport to be a response by
6 Mr. Birnbaum or a response in some way
7 by the lawyer asking the questions?

8 THE WITNESS: It's both
9 quesitons -- What line did you say?

10 MR. BIRNBAUM: Read the --

11 THE COURT: Line five, I think.

12 THE WITNESS: Line five is his --
13 It is supposed to be his response.

14 MR. BIRNBAUM: Okay.

15 Q. Would you please read the first question and
16 the first answer?

17 A. Are you talking about page 43 now?

18 Q. Yes.

19 A. "I take it, though, that you would prefer to
20 give your knowledge of cows to the children, rather
21 than be a teacher; wouldn't you?" Answer: "That's
22 what I'm saying. After awhile, the input that one
23 requires into a system, decreases as some sort of
24 behavior is established, but it was flexible --
25 absolutely flexible. I mean there was no obligation

1 on my part; no obligation on theirs. There was no
2 sudden initiation; no sudden stopping."

3 Q. Okay. Point made on that one.

4 COURT REPORTER: I'm sorry?

5 MR. BIRNBAUM: Point made on that
6 one. That was occurrence number one.

7 Okay.

8 Q. What are the context in here? Look on page
9 40.

10 A. Page 40?

11 Q. Uh-huh.

12 A. All right.

13 Q. Look at the marked line 14 on the left side.
14 Would you read this?

15 A. Line 14?

16 Q. Starting with line -- Line 14 as numbered in
17 the numbers on the side. I just noticed those.

18 A. "Connie Reese and Bob Reese"? Is that what
19 you're saying?

20 Q. Continue.

21 A. Line 14 -- That's the end of it.

22 Q. Okay. Let me read it for the record, then.
23 It says "Connie Reese and Bob Reese".

24 THE COURT: Are you reading line

25 14?

1 MR. BIRNBAUM: Yes, sir.

2 Q. Answer -- okay. Line 15, "Is that the Reese
3 that ran as a republican for State Senator -- or do
4 you know?" "I believe so." Correct?

5 A. That's what it says.

6 Q. Okay. All right. That's the context for the
7 next one. I'm going to read from page 43, line 25.
8 I'm going to ask you to follow. It says, "QUESTION:
9 You had an indication, and you were fearful that Bob
10 and Connie Reese might steal your hubcaps?" Answer
11 given in the deposition is me saying, "They give
12 problems."

13 That, I contend, is an absurd response as a
14 portrayal of what I have. I mean, I would have
15 taken every step not to say that, okay. In other
16 words, the point I'm making -- Here is another --
17 Here's another line of intensive investigation, as
18 to which students I was home-schooling, and then
19 quoting me as reflecting badly upon them. Point
20 two. Was that what I read in the transcript?

21 A. What you read is in the transcript, yes.

22 Q. Thank you.

23 THE COURT: I didn't get it -- page
24 43, line 25?

25 THE WITNESS: No. That's page 44,

1 line two.

2 THE COURT: I'm sorry?

3 THE WITNESS: Page 44, line two.

4 THE COURT: Page 44, line two.

5 MR. BIRNBAUM: Okay.

6 Q. I'm giving that as occurrence number two --
7 of intensive investigation regarding a point that
8 might be inappropriate, followed by totally an
9 answer that I know I did not give and would not
10 give. Okay.

11 Let me read, also, on page 44, line 8 --
12 and you follow me. "QUESTION: So what are you
13 concerned, then, about the Johnsons or the Morrow
14 kids or the Womble kids?" "ANSWER: No. I'm not
15 concerned with the Johnson or Womble kids or some
16 of the others. They had a home-school program
17 going under someone there at the church or
18 something." I'm going to ask you, did I read that
19 correctly?

20 A. Yes, you did.

21 Q. Thank you. In that particular one, I had
22 been very much aware of what the probing was, and I
23 specifically remember using the phrase "under the
24 umbrella of the Court", and made no such statement.

25 A. Well, then that was just incorrect, if you

1 made no such statements.

2 MR. BIRNBAUM: Your Honor, my point
3 is that I'm giving examples --

4 THE COURT: Hold on a second.

5 MR. BIRNBAUM: Okay.

6 THE COURT: Have you covered all of
7 the page and line numbers that you want
8 to ask this witness?

9 MR. BIRNBAUM: I have one more.

10 THE COURT: One more.

11 MR. BIRNBAUM: I may not even have
12 that.

13 Q. Okay. Look on page 48, line 21.

14 THE COURT: Page 48, line 21.

15 Q. I'm going to read what is here. I'm again
16 showing that there's some intensive interrogation
17 and sparring with words preceding this, followed by
18 an answer that I know I didn't give. It says --
19 line 21, "What dam are you talking about?" That was
20 my -- That was me, me, me -- That was my answer,
21 answering him, "What dam are you talking about"?
22 Question by the plaintiff, "What dam -- Any one,
23 any, whether they are made by beavers, whether they
24 are made by man or whether they are made by nature."

25 Then it quotes me after that as simply

1 saying, "There's Hoover Dam to produce
2 electricity." Then it says on the next page --

3 THE COURT: Page 49?

4 MR. BIRNBAUM: 49.

5 THE COURT: Line?

6 MR. BIRNBAUM: Line 1.

7 Q. "Okay. How does it produce electricity?
8 "Generates it." I'm asking you, did I read that
9 correctly?

10 A. Yes, you did.

11 Q. Okay. Let me tell you what I specifically
12 remember about that. The question on line 22, on 48
13 says -- It's more or less correct. "Any one,
14 whether made by the beavers, made by man." Then he
15 asked me -- Okay. He was asking me which one. Then
16 he -- But the thing -- You know, again, I'm doing
17 this from recollection.

18 There is a question he was asking. He was
19 asking me -- There's some indication he was asking
20 me to name "any dam". And then I had a specific
21 answer, that was only Hoover Dam. And I
22 specifically remember him asking me -- asking
23 specifically, "What's Hoover Dam for?"

24 In other words, I specifically remembered
25 this, because I was trying to be very, very

1 careful. And the things as being shown as being
2 said by the Defendant were not introduced by the
3 defendant.

4 I specifically remember the question,
5 "What's Hoover Dam for?" And me then answering,
6 "To generate electricity." I did not say that
7 "Hoover Dam to produce electricity." I do not
8 expect you to be aware or to remember that context
9 without the source documents.

10 All I'm saying, is an intensive
11 investigation -- sparring going on followed --
12 followed by an answer that I know I didn't give
13 and changed the tone of it, okay. That's the end
14 of it.

15 THE COURT: Are you through with
16 the witness?

17 MR. BIRNBAUM: I'm through with the
18 witness.

19 THE COURT: Mr. Ray?

20 MR. RAY: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. RAY:

23 Q. Ms. Pierson, I don't know if we've properly
24 identified you or not, but you are who? What's your
25 name, ma'am?

1 A. Muriel Pierson.

2 Q. Ms. Pierson, where do you reside?

3 A. Emory, Texas.

4 Q. Okay. You've previously served as the court
5 reporter for this court?

6 A. Yes, sir.

7 Q. For how many years were you the district
8 court reporter for the 294th District Court?

9 A. Nine and a half.

10 Q. What years would that have been?

11 A. What years would it have been?

12 Q. Yes, ma'am.

13 A. From September 1st, 1981 to May -- the middle
14 of May, 1991.

15 Q. Okay. And prior to that time, were you also
16 a court reporter or not?

17 A. Yes, I was.

18 Q. For how many years have you been a court
19 reporter?

20 A. 30 years.

21 Q. Are you still working as a court reporter?

22 A. Yes.

23 Q. Okay. What are you doing now, in terms of
24 your duties as a court reporter?

25 A. Just depositions.

1 Q. Just depositions. You're not specifically
2 employed by a court at this time?

3 A. No.

4 Q. Prior to coming to work for the 294th
5 District Court how were you employed?

6 A. I worked Federal Court in Dallas, and I also
7 worked County Court downstairs -- Van Zandt County,
8 and various other courts around the territory.

9 Q. Okay. You were actively employed, though,
10 during all that period of time as a court reporter?

11 A. Yes.

12 Q. Have you ever had any complications or
13 problems of this nature, in any of the
14 transcriptions of depositions that you've provided
15 to the Court?

16 A. Not that I've ever heard about.

17 Q. Okay. Now you eluded to the errata sheet, I
18 believe, which you attach to each deposition; is
19 that correct, ma'am?

20 A. (No audible response.)

21 Q. What's the purpose of the errata sheet?

22 A. So if the party whose deposition it is, finds
23 an error or wants to add or wants to delete
24 something, they put it on there. If there isn't
25 enough room on that -- there's just a short errata

1 sheet. If there are a number of other changes they
2 want to make, they can add as many sheets as they
3 want.

4 Q. Okay. When Mr. Birnbaum returned his
5 deposition to you, that you had sent to him by
6 certified mail --

7 A. Uh-huh.

8 Q. -- did he indicate on the errata sheet any
9 changes of his answers to any of the specific areas
10 of the deposition he's indicated here today?

11 A. Not one.

12 Q. Did he send to you any written communication,
13 though, when he sent it back to you?

14 A. Yes. He sent a letter saying that he
15 objected to the whole thing.

16 Q. Sent a letter saying he objected to the whole
17 thing?

18 A. Yes.

19 Q. Did you ever receive a copy of any motion he
20 filed with the Court, indicating that he was
21 objecting to the method in which the deposition was
22 taken?

23 A. No, I did not.

24 Q. Did you ever receive a subpoena from
25 Mr. Birnbaum requesting to subpoena any source tapes

1 or any actual transcription tapes that you might
2 have had as a court reporter?

3 A. Not any, no.

4 Q. So of your own volition, then, you just went
5 ahead -- you were cleaning your records, I take it;
6 is that correct?

7 A. Yes, but I did that earlier, before I'd ever
8 heard from -- Yes.

9 Q. Before you ever heard from him?

10 A. Yeah.

11 Q. Ms. Pierson, in your own opinion, as a court
12 reporter, did you prepare an accurate transcription
13 of the questions and answers that were taken at the
14 deposition?

15 A. I certainly thought I had.

16 MR. RAY: I pass the witness, Your
17 Honor.

18 THE COURT: Anything further.

19 MR. BIRNBAUM: Yes, sir.

20 REDIRECT EXAMINATION

21 BY MR. BIRNBAUM:

22 Q. I missed my main -- the main point. This had
23 to do with the deletion. It was in the middle
24 here -- page 44. I want to read, starting with line
25 15. I've read it before, but -- okay. "The

1 Johnsons have been home-schooled here -- and I don't
2 know what." That was my interpretation. "QUESTION:
3 Did you have any particular certification license or
4 authority to teach children in a home-school
5 situation from the State of Texas or any other
6 entity?" We never discussed it.

7 "QUESTION: Did you ever check on that to
8 see if you were required to have that?" Remember
9 the point I was making. There's an intensive --
10 There's a pattern of an intensive sparring and
11 probing followed by something, either -- Something
12 is not right in the representation, as my
13 recollection. Remember there are 72 pages.
14 Obviously you're not here to recollect from
15 memory. But I was asked to make my recollections
16 from memory, okay.

17 I remember, at that particular point, "Did
18 you ever have any particular certification?"
19 There was some probing regarding the mentioning of
20 some specific state statute -- and I don't see any
21 of that appearing in here. I can't testify as to
22 exactly what it was, but I know something is
23 amis -- something is being put out.

24 Particularly, in that particular case, I
25 refer to page 44, which is again a pattern -- What

1 I'm saying here, is I've brought up these other
2 items -- And I'm seeing a page, on which there is
3 a deletion in another area around there, where
4 there's something funny. There's -- Something is
5 amis on that page. Something deleted or something
6 added. I'm just -- from my recollection of what
7 happened during 74 pages of intense testimony, and
8 me recalling this from memory, and requiring me to
9 put a correction in there based on memory, sounds
10 almost like -- Well, what do I wish to have in
11 there.

12 In other words -- So, I rest on that. What
13 I was showing -- To me, there appeared to be a
14 pattern of some intensive area where I was trying
15 to avoid getting entangled in some particular
16 manner or side-stepping something -- followed by
17 something which I know I didn't see. I was
18 concerned about what other minds are in this
19 document and that's why I raised the issue.

20 THE COURT: Anything further of
21 this witness?

22 MR. BIRNBAUM: Nothing.

23 THE COURT: Do you have anything
24 further Mr. Ray?

25 MR. RAY: Judge, it might be good

1 if I asked Mrs. Pierson exactly how she
2 transcribes it once she gets the raw
3 information.

4 THE COURT: Go ahead.

5 REXCROSS EXAMINATION

6 BY MR. RAY:

7 Q. Ms. Pierson, when you prepare a deposition,
8 what do you utilize to do that?

9 A. Usually -- You mean my word processor? Is
10 that what you're talking about?

11 Q. Yes, ma'am.

12 A. Just as I started this one my word processor
13 went out and I switched to my typewriter. So I did
14 that on the typewriter.

15 Q. Okay. What information -- From what do you
16 draw your information that you type to prepare the
17 deposition?

18 A. From my notes that I've taken.

19 Q. Okay. How do you transcribe those notes in a
20 deposition? Do you use a machine or do you take it
21 by shorthand or how?

22 A. Oh, I took it by shorthand.

23 Q. Okay. You take it on a notepad, then?

24 A. Yes -- on a notepad.

25 Q. Do you use any other device to aid you?

1 A. Usually, I make a recording as a backup.

2 Q. I take it what you do then, is you take a
3 recording as a backup, and then you take your notes,
4 and from that you prepare the actual written
5 transcription of the deposition?

6 A. Yes.

7 MR. RAY: I pass the witness, Your
8 Honor.

9 THE COURT: Anything further?

10 REDIRECT EXAMINATION

11 BY MR. BIRNBAUM:

12 Q. Did you make a recording?

13 A. Yes, I did.

14 Q. Thank you. You know longer have the
15 recording?

16 A. No.

17 Q. Thank you?

18 MR. BIRNBAUM: Pass the witness.

19 THE COURT: May she be excused?

20 MR. RAY: Yes, Your Honor.

21 THE COURT: Ms. Pierson, thank you
22 so much for your appearance here on
23 short notice. We're very grateful.
24 Good to see you again. Who do we have
25 next?

1 MR. BIRNBAUM: Ms. Dixon.

2 * * *

3 LESLIE DIXON,

4 having been first duly cautioned and sworn upon her
5 oath to tell the truth, the whole truth, and nothing
6 but the truth, testified as follows, to wit:

7 * * *

8 EXAMINATION

9 * * *

10 BY MR. BIRNBAUM:

11 MR. RAY: Judge, you want us to
12 remain up here or return to the counsel
13 table? What's the Court's pleasure?

14 THE COURT: Whatever is most
15 convenient for all of you. Mr. Birnbaum
16 is welcome to sit at the table. I think
17 the last witness had trouble hearing
18 him.

19 MR. RAY: Yes, sir.

20 THE COURT: I'm not sure whether
21 your microphone was on -- And there's a
22 big amplifier down here with an imposing
23 and intimidating array of buttoms and
24 knobs, which I don't dare to touch, so
25 whatever suits you, Mr. Birnbaum.

1 You want to stay right where you
2 are; that's fine. If you want to go to
3 the table, you may have to turn the
4 volume up a little.

5 Q. State your name and position?

6 A. My name is Leslie Poyner Dixon. I'm
7 currently the elected Criminal District Attorney of
8 Van Zandt County, Texas.

9 Q. Were you called to come into this Court today
10 and by whom?

11 A. I received, originally, a telephone call from
12 Ms. Betty Davis, Court Coordinator for the 294th
13 Judicial District Court, who asked me if I could be
14 present this morning. I told her I could. I then
15 received a call from Judge Zimmermann confirming the
16 time for me to appear.

17 Q. Thank you. You heard the testimony of the
18 court reporter and my questions. You acknowledge
19 that I asked you earlier, regarding this inquiry, to
20 be present to hear the testimony of the two
21 witnesses and you did -- my questions and the
22 testimony?

23 A. I was asked to be here. I was not 100
24 percent clear in my mind the purpose of my being
25 here, but I was here, and I have heard the testimony

1 of Ms. Pierson.

2 Q. Thank you. Do you have anything that can
3 enlighten this inquiry regarding how a
4 determination, technically, investigatively or
5 whatever, could be done to determine the facts
6 regarding this matter?

7 A. A siren drove by just as you were completing
8 the question. Are you asking me if I have any
9 suggestions as to how an investigation can be
10 performed to further develop the facts regarding
11 your accusation that the transcript is not accurate?

12 Q. Specifically, any capabilities that you have
13 or somebody else has?

14 A. I'm not sure I completely understand the
15 question. But my first suggestion would be, that
16 you determine exactly what it is that you think you
17 said. You are claiming that the transcript is
18 inaccurate, but yet you have not put forth your own
19 recollection of the responses that you made. So I
20 think to further develop the facts, it would be
21 beneficial to know precisely what your position is,
22 with respect to what it was you said.

23 Q. You did listen to my objection to Muriel
24 Pierce, (sic) as given on the document, stating that
25 I did object to its totality, and I did give a

1 response of it in its totality. I read --

2 A. Yes. I'm aware of the fact that you objected
3 in its totality. I am also aware of the fact that
4 you were given an opportunity, when presented with
5 the transportation of the deposition, to object to
6 specific responses, either questions or responses,
7 that you did not feel were accurately transcribed,
8 and to put forth your own recollection of what your
9 response was.

10 When initially contacted by you, in
11 writing, one of the things that I did was to view
12 to determine if you had put forth, specifically,
13 what it was that you were objecting to or that you
14 felt was inaccurate. And if you had ever, at any
15 point and time, indicated what your response was,
16 what you believed your response to be.

17 There was nothing contained in the records
18 to show that you had done that. That basically
19 your objection was to it in its entirety and an
20 objection to the tone and tenor. And of course, I
21 have been an attorney for a number of years, and
22 have some experience in dealing with records and
23 reading transcripts, and also recognize that while
24 we are testifying, we have one sense of tone and
25 tenor. And when we read the cold record, many

1 times it is a lot different -- and the impression
2 is a lot different.

3 Q. Did you ever previously convey any of that to
4 the defendant? I mean --

5 A. To you?

6 Q. To me.

7 A. My only recollection of my discussions with
8 you regarding this situation, is a discussion
9 wherein I tried to explain to you -- because you had
10 come to my office wanting to know about a particular
11 setting. I indicated to you that it appeared to me
12 that the case was set -- and that was the civil
13 case. That regardless of what happened in the civil
14 case, and regardless of what did or did not occur in
15 a criminal investigation; these were two separate
16 things and that they were not one proceeding.

17 I also explained to you, that based on the
18 information that you had provided, I did not see
19 that a crime had occurred.

20 Q. But you did not respond to the defendant
21 regarding that particular one? I believe you did
22 not. Regarding --

23 A. I responded to you, that based upon the
24 information you had presented, I did not see that a
25 crime had been committed; nor were there specific

1 allegations which would enable us to determine if a
2 crime had been committed. Even today, you have not
3 said, "I did not say 'A', I said 'B'.

4 Q. In closing, regarding to the -- There was --
5 I believe the thing the District Attorney is
6 referring to is much later, regarding -- not this
7 specific one, but it was something in general. I
8 don't believe it was at this time. Let that stand.

9 THE COURT: Any --

10 MR. BIRNBAUM: I'm through with
11 the -- I'm through.

12 THE COURT: You're through with
13 this witness? Do you have any
14 questions?

15 MR. RAY: No questions, Your Honor.

16 THE COURT: May she be excused?

17 MR. BIRNBAUM: Yes.

18 THE COURT: Ms. Dixon, you are
19 excused -- and thank you again for your
20 appearance.

21 MR. BIRNBAUM: Let me make one
22 point and I'll sit down.

23 THE COURT: Hang on just a second.
24 Thank you, Ms. Dixon. Did you have any
25 other witnesses to call?

1 MR. BIRNBAUM: No, sir.

2 THE COURT: Okay. Do you rest on
3 this hearing, Mr. Birnbaum? You'll have
4 a chance to say what you want to say.

5 MR. BIRNBAUM: I rest on that.

6 THE COURT: All right. Do you have
7 anything Mr. Ray?

8 MR. RAY: No, Your Honor.

9 THE COURT: You rest?

10 MR. RAY: Yes.

11 THE COURT: Both sides close, in so
12 far as evidence is concerned?

13 MR. BIRNBAUM: That's right.

14 THE COURT: Argument?

15 MR. BIRNBAUM: Yes, sir. I do wish
16 to say that this proceeding in itself,
17 in light of all the other things that
18 have occurred in court, have made me
19 leery of all kinds of things. Anything
20 that I've said was with the -- the
21 recollection of my knowledge upon all of
22 those things at that time, in the
23 framework of everything else that has
24 transpired -- and I close.

25 THE COURT: Thank you, sir.

1 Mr. Ray?

2 MR. RAY: Your Honor, I think the
3 Rules -- It's Rule 207 in the Civil
4 Rules of Procedure -- specifically
5 require that a motion to suppress the
6 deposition transcript be made with
7 appropriate notice. Quite frankly, this
8 one wasn't made with notice, but I was
9 aware -- we're here today, so I'm here,
10 Judge.

11 It requires specificity be made
12 with exactness as to the inaccuracies
13 contained in the deposition. That is,
14 as Ms. Pierson stated, Your Honor. The
15 purpose of the errata sheet, that's
16 attached to the back of the deposition,
17 is for Mr. Birnbaum to have that
18 opportunity.

19 Instead he chose to make a globabl
20 objection and object to the entirety of
21 the deposition, and discuss it in terms
22 of tone and tenor, I think, Judge;
23 rather than say, "I said so and so
24 instead of so and so", exactly as
25 Ms. Dixon testified to.

1 So as a result, Your Honor, we
2 would oppose his motion to suppress the
3 deposition in it's entirety, which as I
4 understand as this point, Judge, he's
5 only urging to suppress it in it's
6 entirety, rather than asking that
7 certain pages or certain questions and
8 answers be deleted.

9 Judge, I have a couple of cases, if
10 the Court wants them, that pertain to
11 it. They're not exactly on point, but
12 they're the closest I've got.

13 THE COURT: All right. Gentlemen,
14 the Court finds that the Defendant's
15 deposition, which is the Court has
16 marked for identification purposes as
17 Court's Exhibit No. 1, is an accurate,
18 true and correct representation of the
19 questions and answers asked of and given
20 by the defendant on December 10th, 1997.

21 Accordingly, the Defendant's
22 objections, thereto, are overruled. And
23 the motion to suppress pursuant to Rule
24 207 is denied.

25 Now we have one other item to take

1 up. That's the motion to quash the
2 subpoena filed pro se by Mr. Tibideaux.
3 We'll take that up after about a five
4 minute recess, if you still want to
5 pursue that.

6 MR. BIRNBAUM: Thanks.

7 MR. RAY: Thank you, Judge.

8 (WHEREUPON, a recess in the
9 proceedings was had at this time.)

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R E P O R T E R ' S R E C O R D

VOLUME _____ OF _____

Trial Court Cause No. 95-63

WILLIAM B. JONES * IN THE DISTRICT COURT
VS. * VAN ZANDT COUNTY, TEXAS
UDO BIRNBAUM * 294TH JUDICIAL DISTRICT

=====

APPEARANCES:

Attorney for Plaintiff:
Richard L. Ray
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(903) 567-2051
SBOT No. _____
Attorney for: William B. Jones

Defendant Pro Se:
Udo Birnbaum
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Pro Se for: Udo Birnbaum

=====

On the 26th day of May, 1998, continuing until
the 29th day of May, the above entitled and numbered
cause came on to be heard for trial in the said
Court, Honorable James Zimmermann, Judge Presiding,
and the following proceedings were held, to wit:

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P R O C E E D I N G S

VOIR DIRE

MAY 27, 1998

THE COURT: Mr. Birnbaum, if you will please.

MR. BIRNBAUM: Yes, sir.

THE COURT: Juror number 63 is the one that I told you about.

MR. BIRNBAUM: Yes.

THE COURT: You want to agree to excuse him?

MR. BIRNBAUM: Yes, sir.

THE COURT: All right. 63 is excused.

MS. YOUNG-DISTRICT CLERK: No. 163.

THE COURT: I'm sorry.

MS. YOUNG-DISTRICT CLERK: Kirk Adam Hodge.

MR. RAY: It's 37 on the shuffle, next to the bottom.

MS. YOUNG-DISTRICT CLERK: It's 37 on the shuffle, uh-huh.

THE COURT: Right -- I'm sorry, juror number 37.

MR. BIRNBAUM: Juror number 37.

1 THE COURT: Yes.

2 MR. BIRNBAUM: And for
3 correction -- my recollection on the
4 thing, that as things work, that based
5 on the shuffle, that we will be working
6 effective for my thing, starting with
7 the ones with the shuffle, one, two,
8 three, four, five?

9 THE COURT: That's correct.

10 MR. BIRNBAUM: That is correct,
11 okay.

12 THE COURT: All right. Now, one
13 other thing, we're going to recess for
14 lunch at 12.

15 MR. BIRNBAUM: That's fine. That's
16 correct.

17 THE COURT: I'm going to permit
18 Mr. Tibideaux to stay in the courtroom
19 until we finish picking the jury, and
20 then we'll take up his motion to quash.

21 MR. BIRNBAUM: Okay. So he will be
22 removed from the courtroom during the
23 taking -- That's fine.

24 THE COURT: I want him to have a
25 seat over here --

1 MR. BIRNBAUM: That's fine.

2 THE COURT: -- rather than on the
3 front row.

4 MR. BIRNBAUM: That's fine.

5 THE COURT: We'll take up his
6 motion to quash the subpoena after
7 lunch.

8 MR. BIRNBAUM: That is fine. We're
9 sort of in a situation, by which I sort
10 of want him in the courtroom for one
11 reason, and he wants him in another one.
12 We have sort of a -- but we'll address
13 that.

14 THE COURT: We'll come to that.
15 All right. Both sides ready?

16 MR. RAY: Yes, Your Honor.

17 MR. BIRNBAUM: Yes, sir.

18 THE COURT: Ladies and gentlemen,
19 customarily, the first thing judges do
20 is introduce himself, but I've already
21 done that this morning. Now, instead of
22 being what is sometimes called the
23 general panel, you are now a jury panel
24 assigned to a specific case.

25 I'm going to introduce the parties

1 and the lawyers, and such as that to
2 you, and give you about two minutes
3 worth of what's going to happen next.
4 And then I'm going to turn you over to
5 the participants. They will talk to
6 you. We're going to recess for lunch at
7 high noon.

8 I will call your attention, by way
9 of reminding you that there were two or
10 maybe three of you this morning -- I
11 know Mr. Brunner -- Where is
12 Mr. Brunner? I remember you -- and
13 there were a couple of others of you
14 that had reasons why you wanted to be
15 excused, mostly business related. And I
16 told you this morning, to be sure and
17 remind the lawyers or tell the lawyers
18 what you told me.

19 The lawyers and the parties may
20 agree to excuse someone, whom I
21 otherwise could not excuse. So I just
22 wanted to remind you, you still have the
23 opportunity to do that. You don't have
24 to do it right now, but you do still
25 have that opportunity.

1 The case that you're here about --
2 and from your number will be selected a
3 jury of twelve -- is the case entitled
4 William B. Jones versus Udo Birnbaum.
5 William Jones is seated here. Mr. Jones
6 would you stand, please. William B.
7 Jones, ladies and gentlemen. Thank you,
8 Mr. Jones.

9 Mr. Jones is represented by
10 Counsel -- the person, Mr. Richard Ray,
11 seated at the table, now standing.
12 Thank you, Mr. Ray. The other side in
13 this lawsuit -- And I failed to mention,
14 Mr. Jones is referred to as the
15 plaintiff. He is the person who is
16 bringing the lawsuit. He's initiated
17 the lawsuit. He's represented by
18 Counsel, in the person, Mr. Ray.

19 The person on the other side of the
20 lawsuit, who is being sued, is Mr. Udo
21 Birnbaum, who's now standing at the
22 table nearest -- or farthest from the
23 window.

24 Now, Mr. Birnbaum is representing
25 himself. He is what is called a pro se

1 defendant. Meaning that he's
2 representing himself and he appears
3 without counsel -- without a lawyer.

4 The law permits Mr. Birnbaum to
5 represent himself, if he chooses to do
6 so. You need to be aware -- and I have
7 explained this to everyone else involved
8 in this lawsuit before we started, that
9 we have a couple of sets of rules that
10 are applicable. We have procedural
11 rules that are in force, that tell
12 people who are involved in lawsuits,
13 what procedures must take place, and
14 what the procedures of trying a lawsuit
15 are.

16 We also have a set of rules called
17 the Rules of Evidence. Those rules tell
18 participants in the lawsuit what can be
19 revealed to the jury and what cannot.

20 Now sometimes there are arguments
21 over those rules, particularly over the
22 Rules of Evidence. Sometimes one side
23 will say, "Judge, I've got this document
24 and I want to show it to the jury", and
25 the other side -- the other side may

1 say, "That's fine, Judge. We have no
2 objection", in which case you're going
3 to see it.

4 Other times somebody will say, "I
5 want to show this document to the
6 jury -- And this just is an example;
7 this is the jury list that I'm holding
8 up. And the other side may say, "Judge,
9 we object", and they may give me their
10 reason for objecting.

11 Part of my job is to rule on that
12 objection, and decide whether or not the
13 document or the exhibit or the
14 question -- if it's a question of a
15 witness, is allowed to be given to you.
16 I will either sustain the objection or
17 overrule the objection. Neither the
18 objections, nor my rulings are evidence.

19 When somebody objects, they're not
20 trying to hide anything. It's their way
21 of communicating to me, that they
22 believe that one of the technical rules
23 of evidence has been transgressed. My
24 ruling is my way of saying, "Yeah, I
25 agree with you", or "No, I don't".

1 Now, I'm mentioning all of this,
2 because Mr. Birnbaum is representing
3 himself. I'm reasonably certain that
4 Mr. Birnbaum is not a lawyer. I don't
5 think I've asked him that, but I see by
6 the way he's shaking his head that he's
7 agreeing with me.

8 He has the right to represent
9 himself; but in doing so, he has to
10 abide by the same set of rules that
11 Mr. Ray has to abide by.

12 I'll just tell you very frankly,
13 that can be a very difficult and
14 daunting task for someone to represent
15 themselves, when there's a lawyer on the
16 other side, and a Judge who's going to
17 rule on objections.

18 Now, I want you to know that,
19 because in the event that I make rulings
20 that seem to be adverse to Mr. Birnbaum,
21 as may very well happen, I want to be
22 sure you understand I'm not picking on
23 him. I think he understands this. He
24 and I discussed this yesterday. It's
25 difficult for him.

1 My job is to be fair to both sides,
2 and make rulings the way the law says I
3 should; but I cannot make any allowances
4 on behalf of Mr. Birnbaum for his
5 representing himself. He hasn't asked
6 for any. He's not asking for any favors
7 and that's commendable, but I wanted you
8 to understand that the rules of evidence
9 apply to both sides.

10 With that, I'm going to stop
11 talking. We used to have a saying in
12 Dallas, years ago, that we liked to tell
13 juries, "That we would all be better off
14 when preachers stopped judging and
15 judges stopped preaching".

16 I'm going to do my share and stop
17 now, and turn you over first, to
18 Mr. Ray. He's going to talk to you for
19 awhile. When he gets through, either
20 before or after lunch, Mr. Birnbaum will
21 have the opportunity to address you
22 also. Mr. Ray?

23 MR. RAY: Thank you, Your Honor.
24 Do you have a time that you'd like to
25 put on us as far as -- Not that I want

1 all day, Judge.

2 THE COURT: Well, Mr. Ray, if you
3 think for a minute, that I'm about to
4 sit up here and tell a lawyer that he's
5 got unlimited time, you're mistaken.

6 MR. RAY: I didn't think so, Judge.

7 THE COURT: I'm not going to do
8 that. Just be as brief as you can.

9 MR. RAY: I understand, Judge.

10 THE COURT: I don't want to cut you
11 off --

12 MR. RAY: Okay.

13 THE COURT: -- nor Mr. Birnbaum.

14 MR. RAY: I knew originally, you'd
15 said you'd try to break at twelve
16 o'clock. I thought you might, perhaps,
17 want both of us to be completed, if
18 possible, by twelve.

19 THE COURT: That's fine. Give it
20 your best shot.

21 VOIR DIRE

22 BY MR. RAY:

23 MR. RAY: Thank you, Judge. If it
24 please the Court and Mr. Birnbaum, my
25 name is Richard Ray. Some of you

1 probably also know me as "Ricky".
2 That's a nick-name I've had since my
3 high school days.

4 This is the opportunity where I
5 usually say, "we lawyers" get an
6 opportunity to speak to the jury panel,
7 or those of you who have now been
8 qualified to serve on the jury -- to
9 discuss with you things about your own
10 particular backgrounds, so we can form
11 our own opinion, as to whether we think
12 you would make a good witness for our
13 side or the other side -- And to ask you
14 information that probes, quite frankly,
15 into some of your own personal biases or
16 prejudices or interests, and things of
17 that nature, so that we have an opinion
18 of how we think you're going to think,
19 when you sit as a juror and hear
20 testimony.

21 Can you hear me on the back? Now
22 the good news for you folks in the back,
23 is I seriously doubt we're going to
24 reach you, in terms of picking this
25 jury. So as a result, I may not go all

1 the way back to you when I start asking
2 particular questions, in which I ask you
3 to raise your hand for a response.

4 Let me address that right now. The
5 best way I know to address that
6 particular part of what I do, is I'll
7 ask you something, and I'll ask you if
8 you've done that or have not done that
9 to raise your hand.

10 The reason I'm asking you to raise
11 your hand is so I can identify you. I
12 don't want you to blurt out your
13 response to me immediately, because it's
14 possible that you could potentially
15 prejudice the entire jury panel, and
16 create the grounds for a mistrial.

17 The best example I know of that, I
18 watched occur in this courtroom, many,
19 many years ago when I first began to
20 practice.

21 It was a criminal case. The
22 prosecutor had asked the entire panel if
23 anyone knew the defendant, who was
24 seated at the counsel table. And the
25 defendant was being prosecuted for a

1 theft involving an automobile.

2 There was a gentleman on this side
3 over here, on the front row. And
4 instead of raising his hand,
5 specifically, he just blurted out, "I
6 know him." I don't know if the
7 prosecutor didn't necessarily want to
8 try the case or not, but he said, "How
9 do you come to know him?"

10 They were both from the City of
11 Wills Point. He said, "He stole my car,
12 too." Well, immediately the defense
13 counsel moved for a mistrial. It was
14 one of the lawyers from the Wynne Firm
15 in Wills Point. Some of ya'll probably
16 remember back in the days when we had a
17 number of attorneys up there.

18 The Wynne Firm lawyer moved for a
19 mistrial and the mistrial was granted.
20 So the Judge went ahead and set a bond
21 for the defendant -- because I think he
22 was incarcerated at the time. I'm not
23 for sure, but anyway, he was out on
24 bond. And within the week, the
25 individual stole that attorney's car

1 from the parking lot at the Wynne law
2 office, supposedly.

3 So anyway, you can see the
4 importance of not just saying something
5 immediately, when I ask you, if you
6 would -- So if you would, raise your
7 hand.

8 I think the good news for you --
9 because I think there's a good
10 opportunity for us to try this case
11 quickly. I think the testimony will be
12 short, succinct and to the point,
13 hopefully.

14 One of the things you need to
15 understand, is anything I say up here is
16 not evidence. I'm a lawyer and I'm only
17 talking about the case. So remember
18 that when Mr. Birnbaum is serving in
19 that capacity, it's not evidence.

20 If I should take the witness stand
21 and testify; for instance, about
22 attorney fees, then that's when I turn
23 into a fact witness for that purpose
24 only. The same is true of Mr. Birnbaum.

25 So you'll receive the instruction

1 on the law from the Judge, and you'll
2 listen to the facts and deliberate.
3 Those facts will come to you from the
4 witness stand, and also from documentary
5 evidence that might be introduced, that
6 you will be allowed to see.

7 Now this is a civil case and not a
8 criminal case. Usually people have more
9 familiarity with criminal cases than
10 civil cases. We've beat the O.J.
11 Simpson case and these opportunities to
12 speak to the jury panel to death, now.
13 But it may be the most classic example
14 of the difference in the standards that
15 you have.

16 In other words, when O.J. was
17 prosecuted as a criminal, they were
18 looking at beyond a reasonable doubt
19 under Texas Law. In a civil proceeding,
20 you're looking at a preponderance of the
21 evidence. This is a civil proceeding.

22 The law really doesn't tell you
23 just exactly what that is. But it is a
24 slight tip of the scales, in the
25 direction of either one party or the

1 other party.

2 We are not required, as Plaintiffs,
3 to prove to you our case beyond a
4 reasonable doubt. When I say "our
5 case", I'm referring to Mr. Jones'
6 case -- and I'll talk to you about the
7 case in just a second.

8 What we have to do is by
9 preponderance of the evidence establish
10 our case, which is that slight tip of
11 the scales. So please keep that in
12 mind, when you deliberate, if you're
13 selected as a juror. I'm sure all of
14 you are holding your breath awaiting
15 that opportunity. Some of you may want
16 to and some may not.

17 My mother had never served on a
18 jury, and it was close to Christmas
19 time, and she had remarried. Her new
20 husband told her she should have the
21 wonderful opportunity of serving on a
22 jury, because I practice law and she'd
23 never really been around the system.

24 It was about -- oh, I think about
25 two or three years ago, that she decided

1 that had she had an opportunity to
2 serve -- And she had an exemption she
3 could exercise, because she was old
4 enough. She didn't do it and chose to
5 serve, and she got picked.

6 I think the trial started on
7 December 31st. (sic) I never will
8 forget going home on December the 23rd,
9 myself, from the office, and I drove by
10 to see if the jury was still in
11 deliberation, and their cars were parked
12 over here. She managed to knock down
13 her last three or four good days of
14 shopping sitting on that jury.

15 She told me afterwards, it wasn't
16 worth the experience at that particular
17 time of the year. But hopefully,
18 Christmas won't interfere with what
19 ya'll are doing, so you'll have an
20 opportunity. Maybe the fact that you're
21 here today, has at least brought us some
22 rain, because we did get one today.

23 To talk about the case -- okay.
24 I'm going to tell you what I think the
25 evidence is going to show. I think the

1 evidence is going to show -- and what
2 Mr. Jones is seeking -- is to establish
3 that Mr. Birnbaum has dammed up a
4 stream, which flows across his property
5 onto Mr. Birnbaum's property.

6 Their properties are located in the
7 southern part of the county, down
8 toward -- As a boy, I always called it
9 "Big Rock", but the Walton area.

10 Mr. Jones' property will be on the
11 western side, and Mr. Birnbaum's
12 property is on the eastern side.
13 There's a creek that flows through the
14 two properties, and the name of that
15 creek is Steve's Creek.

16 We think the evidence will show
17 that there was a dam that was
18 constructed on Mr. Birnbaum's property,
19 which backed up water, which flowed over
20 onto Mr. Jones' property, and flooded
21 his property so detrimentally, until he,
22 quite frankly, has lost the use of about
23 10 to 12 acres of land.

24 So Mr. Jones is seeking, first,
25 that a mandatory injunction be entered

1 requiring Mr. Birnbaum to remove any
2 dams that might have been erected,
3 either by his own doing or by beavers or
4 what other reason, from the Steve's
5 Creek, so it doesn't flood over onto his
6 property, meaning Mr. Jones.

7 Secondly, that a perpetual or
8 permanent injunction be issued, so that
9 Mr. Birnbaum is not allowed to erect
10 dams or any other barriers on that
11 creek, which would allow Mr. Jones'
12 property to be flooded.

13 I think the law is clear, that
14 Mr. Birnbaum can do anything he wants
15 to, so long as it only affects his
16 property; but when it starts effecting
17 Mr. Jones' property, there is the
18 distinction. In addition, Mr. Jones is
19 going to be looking for damages to the
20 property, which he has had flooded and
21 lost.

22 Now originally, this case began
23 from it's inception, around 1994 or
24 early in 1995. So we have been involved
25 in litigation for that period of time.

1 I'm anticipating that if I can
2 start with our testimony this afternoon,
3 that we can put our case on in chief --
4 and I say "in chief", meaning our
5 primary witnesses -- hopefully by five
6 o'clock today, if not sooner.

7 That's why I tell you I think it
8 will be a quick case to try. If you're
9 interested on serving on a jury, I think
10 it will be, quite frankly, an
11 interesting case to sit on, because
12 you'll have an opportunity to see
13 something that's very clearly delineated
14 issues.

15 You won't get the opportunity to
16 see the repartee between the attorneys,
17 because I'm the only one that's
18 participating in it -- and that's to my
19 advantage and disadvantage, I must
20 admit. Because there are certain things
21 I would like to be able to do, that I
22 cannot do, because Mr. Birnbaum is not
23 an attorney.

24 I'm going to talk to you, now, a
25 little bit about some specific things.

1 Is there anyone on the first row -- And
2 I'm going to delineate the first row by
3 being both left and right. That's
4 across the aisle, okay.

5 Is there anyone seated on the first
6 row that knows Mr. Birnbaum, either
7 socially, personally -- or even as a
8 business acquaintance? If you don't
9 understand a question I ask like that,
10 just raise your hand and tell me,
11 because this is more or less an informal
12 part of the proceeding when we are doing
13 this, so you can do that.

14 I go to the second row, now. Is
15 there anyone on the second row, both
16 left and right, that recognizes
17 Mr. Birnbaum in some particular way, by
18 knowing him as a social friend or
19 acquaintance -- or a relative, I should
20 have added? I take it by your silence
21 there is not.

22 I'm going to go on to the third
23 row, and I'm going to repeat that same
24 question to ya'll -- and ask if any of
25 you know Mr. Birnbaum personally, or as

1 an acquaintance or as a relative? Yes,
2 sir -- And you are?

3 R. WRIGHT-JUROR: Roy Lee Wright.

4 MR. RAY: Okay. Mr. Wright, how do
5 you come to know --

6 R. WRIGHT-JUROR: He's done
7 business at the place where I used to
8 work.

9 MR. RAY: Okay. Let me ask you to
10 do this, would you stand? Do you mind
11 standing, Mr. Wright?

12 R. WRIGHT-JUROR: Do I mind
13 standing?

14 MR. RAY: Yes, sir.

15 R. WRIGHT-JUROR: No, I don't mind.

16 MR. RAY: If you'll stand up, the
17 court reporter can take down what you're
18 saying easier.

19 R. WRIGHT-JUROR: I'm sorry.

20 MR. RAY: You and I know each
21 other, because I've seen you any number
22 of times, whenever I used to buy gas at
23 GW Oil -- And you worked there for many
24 years; is that true?

25 R. WRIGHT-JUROR: Yes, sir.

1 MR. RAY: Okay. Mr. Wright, you
2 said you knew Mr. Birnbaum, but I didn't
3 understand how you knew him.

4 R. WRIGHT-JUROR: At the station.

5 MR. RAY: At the station? Okay.
6 He would buy gas at the GW Oil
7 Company -- I think that's where you
8 worked. Do you know him in any other
9 way?

10 R. WRIGHT-JUROR: No, sir.

11 MR. RAY: Okay -- very good. Thank
12 you. I take it there's no one else on
13 that third row that knows Mr. Birnbaum
14 in any other fashion to which I
15 mentioned? Okay.

16 Now I want to ask you about some
17 other individuals, and these are
18 potential witnesses to the case. I'll
19 ask essentially the same questions, but
20 probably not in as much detail.

21 THE COURT: Mr. Ray?

22 MR. RAY: Yes, sir.

23 THE COURT: Would you forgive my
24 interruption? Mr. Birnbaum, could I see
25 each of you up here?

1 (WHEREUPON, the following is a
2 discussion held at the bench.)

3 THE COURT: Juror number 30 just
4 got back from the recess. He's out in
5 the hall. I don't know how we --

6 MS. YOUNG-DISTRICT CLERK: He's the
7 one that we wanted to see him.

8 THE COURT: It's not a "he". It's
9 number 30. It's a she.

10 MS. YOUNG-DISTRICT CLERK: I called
11 all their names out the second time. I
12 don't know.

13 MR. RAY: Well, see we only got
14 five seated on one side over there, but
15 I caught that and that's no problem --
16 but I didn't catch --

17 MS. YOUNG-DISTRICT CLERK: This one
18 right here is the one --

19 THE COURT: No, we've got that
20 taken care of. What do you want to do?
21 Do you want to just bring her in and
22 seat her?

23 MR. RAY: Judge, I'd like to go
24 ahead and excuse her, since she's missed
25 so much of my voir dire.

1 THE COURT: What's your pleasure?

2 MR. BIRNBAUM: Give me a minute to
3 think about it -- excuse her.

4 THE COURT: She's excused.

5 MS. YOUNG-DISTRICT CLERK: Which
6 one is she?

7 THE COURT: She is juror number 30,
8 Sharon Lee Perry.

9 MR. RAY: Who is sitting in number
10 30 now? The next one down, we hope. We
11 may not reach that, Judge. You want me
12 just to worry about that, if it looks
13 like we're going to get there?

14 THE COURT: Well, he's agreed to
15 excuse her; you're agreeing to excuse
16 her.

17 MR. RAY: I know, but I'm talking
18 about the one that's sitting in the 30
19 position, whether we've got a gap or
20 have we? I presume we've got a gap, but
21 I'd just leave it like that for now. If
22 there's strikes and any
23 disqualifications should occur --

24 THE COURT: Neither one of you are
25 going to be striking according to the

1 seating chart, so just go ahead and tell
2 her she's excused.

3 MR. BIRNBAUM: I don't see any
4 problem. I'm going to strike them by
5 that's him and that's his name.

6 THE COURT: Sure -- exactly.

7 MR. RAY: What I'm saying, Judge,
8 that unless we have a bunch we have to
9 excuse for cause -- I don't see us
10 getting to 30.

11 THE COURT: I don't believe we'll
12 get to that one.

13 MR. RAY: Okay.

14 THE COURT: Thank you, gentlemen.

15 MR. RAY: Thank you, Judge.

16 (WHEREUPON, the discussion at
17 the bench ended.)

18 MR. RAY: I'm going to move on to
19 the next individual. On the first row,
20 is there anyone present, that's familiar
21 with Mr. Tibideaux -- and Mr. Tibideaux
22 is seated up here to the left, so you
23 have an opportunity to see
24 Mr. Tibideaux. If you recognize
25 Mr. Tibideaux, you can then indicate it.

1 Is there anyone on the front row,
2 either left or right -- to my left or
3 right. I'm saying your right and left,
4 so I may be confusing you. Is there
5 anyone on either side of row one that
6 recognizes Mr. Tibideaux? I take it
7 from your silence, no one knows
8 Mr. Tibideaux, either as a friend or as
9 an acquaintance or as a business
10 acquaintance or as relative?

11 I'm going to ask that same question
12 of row number two, both left and right.
13 Is there anyone on row two that
14 recognizes Mr. Tibideaux? If you have a
15 doubt as to whether you do or not,
16 please let me know, okay.

17 On row three -- is there anyone on
18 row three, both left and right, that
19 recognizes Mr. Tibideaux or knows hiim
20 in any fashion? Mr. Wright, I think
21 you're the lucky man today. You're
22 going to get to do all the talking.
23 Would you stand again, and tell me how
24 you know Mr. Tibideaux?

25 R. WRIGHT-JUROR: I believe he's

1 done business with the station.

2 MR. RAY: Okay. Is that the only
3 way you know Mr. Tibideaux?

4 R. WRIGHT-JUROR: Yes, sir.

5 MR. RAY: Okay. Thank you, sir.
6 I'm going to back up again to row one,
7 and ask if there's anyone that knows
8 Mr. Doug Pool? He's not present here
9 right now. This is on row one. Yes,
10 sir? How do you know Mr. Pool?

11 WM. NEAL-JUROR: Mr. Pool is our
12 Sheriff -- I mean Chief of Police in
13 Grand Saline.

14 MR. RAY: Okay, sir.

15 WM. NEAL-JUROR: And I know him,
16 personally, you know, outside of that.

17 MR. RAY: You're Mr. Neal?

18 WM. NEAL-JUROR: Yes, sir.

19 MR. RAY: Okay. Is your
20 relationship to him -- is it a social
21 acquaintance? A friendship-acquaintance
22 or was it a business relationship?

23 WM. NEAL-JUROR: It was a
24 friendship-acquaintance, because he was
25 the Chief of Police.

1 MR. RAY: Did you ever serve on the
2 City Council or have any position with
3 the City of Grand Saline in dealing with
4 Mr. Pool?

5 WM. NEAL-JUROR: School board.

6 MR. RAY: School board. Thank you
7 for your candidness, Mr. Neal. Now I'm
8 going to move to row two. Is there
9 anyone on row two -- I'll start with my
10 left, first. Yes, ma'am? If you would
11 identify yourself, ma'am, so I can find
12 out which one --

13 E. CUMMINGS-JUROR: Esther
14 Cummings.

15 MR. RAY: You're Ms. Cummings, yes,
16 ma'am -- okay.

17 E. CUMMINGS-JUROR: Yes, sir. I
18 used to see him when I dispatched for
19 the Sheriff's office.

20 MR. RAY: Okay. I knew I
21 recognized you; I couldn't remember how.
22 No one else, I take it -- thank you,
23 ma'am. No one else on the left on row
24 two? Anyone on the right on row two
25 that knows Mr. Pool? I take it by your

1 silence there is not.

2 Is there anyone on the left, on row
3 three, that would know Mr. Doug Pool?
4 Yes, sir -- And you are Mr. Glenn
5 McNeill, I believe; is that right --
6 okay. How do you know him, Mr. McNeill?

7 G. MCNEILL-JUROR: Just through the
8 newspaper -- reporters talking to him.

9 MR. RAY: Essentially, then a
10 business acquaintance, I would say?

11 G. MCNEILL-JUROR: Yes, sir.

12 MR. RAY: Thank you, sir. Is there
13 anyone else on the left, on row three,
14 that knows Mr. Pool? Anyone on the
15 right, on row three -- on my right, on
16 row three, that knows Mr. Pool?

17 Now, I want to ask all of you -- Is
18 there anyone on any of these three rows
19 that I've asked, that is related to
20 Mr. Pool in any way? I asked you if you
21 knew him, sometimes that means you're
22 not related or you are related. I'll
23 make it a "Mother Hubbard" question.
24 Okay. I take it by your silence there
25 is not. Thank you.

1 I'm going to go back to row one,
2 and I'm going to go to the left. This
3 time the question is concerning Mr. Otis
4 Munns. Is there anyone on my left,
5 seated on row one, that knows Mr. Otis
6 Munns -- or Brother Otis Munns, he's
7 also referred to? I take it by your
8 silence there is not.

9 Anyone on row one, on my right,
10 that is acquainted with Mr. Otis Munns?
11 I take it by your silence there's not.
12 Anyone on my left, on row two, that
13 knows Brother Otis Munns? Ms. Cummings,
14 you're holding your hand up again. I
15 take it you know him in a business
16 relationship, when you were serving as
17 dispatcher?

18 E. CUMMINGS-JUROR: Yes, sir.

19 MR. RAY: Do you also know him as a
20 social acquaintance?

21 E. CUMMINGS-JUROR: We don't
22 socialize, but his wife was a relative
23 of a neighbor, that we used to have when
24 we lived out in the country.

25 MR. RAY: Okay.

1 E. CUMMINGS-JUROR: I mean --

2 MR. RAY: So you really know him in
3 a couple of different ways?

4 E. CUMMINGS-JUROR: Yes, sir.

5 MR. RAY: Okay. Is there anyone
6 seated to my right, on row two, that has
7 any familiarity with or knows Mr. Otis
8 Munns? I take it by your silence there
9 is not.

10 Is there anyone seated in row
11 three, to my left, that knows Mr. Otis
12 Munns? Mr. McNeill?

13 G. MCNEILL-JUROR: Newspaper again.

14 MR. RAY: Newspaper again --
15 essentially the same -- same contact --
16 okay. Anyone on my right, on row
17 three -- You can tell I'm winding down.
18 That happens to even lawyers, believe it
19 or not. Anyone seated on row three, on
20 my right, that knows Mr. Otis Munns in
21 any way? Mr. Wright, how do you come to
22 know Mr. Otis Munns?

23 R. WRIGHT-JUROR: I first got to
24 know him when he worked for Athens. I
25 worked there in the station.

1 MR. RAY: Okay. So you know him
2 whenever you were working at GW Oil, but
3 you also knew him prior to that? I take
4 it ya'll had a social acquaintance, and
5 then you had a business relationship,
6 after you were pumping gas and
7 everything down there at the station?

8 R. WRIGHT-JUROR: Yes, sir.

9 MR. RAY: Okay. Is there any other
10 connection with him that you had?

11 R. WRIGHT-JUROR: Sir?

12 MR. RAY: Is there any other
13 connection, other than those that you
14 had with him?

15 R. WRIGHT-JUROR: No.

16 MR. RAY: Okay. I'm going to try
17 to speed the process a little bit. I'm
18 going to ask this question to all three
19 of the front rows. Is there anyone
20 that's a member of the Zion Hill
21 Assembly of God Church seated on the
22 first three rows? Is there anyone who
23 just casually attended that particular
24 church? I take it by your silence there
25 is not.

1 Ms. Owen, I have singled you out,
2 and you're probably wondering why I
3 have, but you happen to have a Eustace
4 address. This lawsuit concerns
5 individuals who live on a Eustace
6 address. I take it that you probably
7 live in fairly close proximity to where
8 the site is -- or the location of this
9 suit has occurred.

10 Have you ever had any occasion,
11 where you've heard about this lawsuit or
12 any disagreement between either of these
13 individuals?

14 T. OWEN-JUROR: No, sir.

15 MR. RAY: How is your husband
16 employed, ma'am?

17 T. OWEN-JUROR: He's -- We own a
18 ranch.

19 MR. RAY: Okay. Whereabouts is
20 your ranch located?

21 T. OWEN-JUROR: It's off of 316,
22 2908.

23 MR. RAY: I know 2908, but I've
24 never gotten good at the County Road
25 numbers. How close are you to China

1 Grove Baptist Church?

2 T. OWEN-JUROR: We're west of that.

3 MR. RAY: Okay. About how many
4 miles, ma'am?

5 T. OWEN-JUROR: Maybe six -- seven
6 maybe.

7 MR. RAY: Okay. You have no
8 personal acquaintance and do not know
9 Mr. Birnbaum at all; is that correct?

10 T. OWEN-JUROR: Never seen any of
11 them.

12 MR. RAY: Okay -- very good. Now,
13 I'm going to ask that general question
14 to every one. I singled out Ms. Owens
15 because she, in particular, lives in
16 that area. Mr. Birdwell, I think you
17 used to live relatively close to that
18 area?

19 B. BIRDWELL-JUROR: Still do.

20 MR. RAY: And still do. Have you
21 had any occasion, where you've heard
22 anything about the controversy between
23 the two -- or heard anyone talk about
24 the incident?

25 B. BIRDWELL-JUROR: No.

1 MR. RAY: Okay. Is there anyone
2 present, in any of the front three rows,
3 that have obtained any information about
4 this case in whatever fashion?

5 I don't think this case has been in
6 the newspaper, but it's always possible
7 that people sit in coffee shops, or they
8 go to quilting clubs or things like that
9 and we often talk -- and that's fine.

10 If you have obtained any particular
11 or special knowledge concerning this
12 case, now is the time for you to raise
13 your hand and tell myself and the Court
14 that.

15 Is there anyone, in either of the
16 front three rows, that have done that or
17 that know that? I take it by your
18 silence there is not.

19 Now in the front three rows, is
20 there any of you that has a special
21 knowledge, such as having training as a
22 forest ranger, or someone who has a
23 special knowledge of beavers -- anything
24 that you think you can hold yourself out
25 to be someone who had some knowledge,

1 other than just as an ordinary hunter or
2 woodsman? Yes, sir?

3 R. CLOWER-JUROR: I do some
4 trapping on the side.

5 MR. RAY: Do you? Okay. You're
6 Mr. Clower?

7 R. CLOWER-JUROR: Right.

8 MR. RAY: Okay. When you say you
9 do some trapping on the side, I take it
10 you do it professionally?

11 R. CLOWER-JUROR: Well, yes.

12 MR. RAY: Okay, sir. I take it you
13 have another occupation -- and I didn't
14 see trapping on your occupational list,
15 when I was going through there. I take,
16 then, that you do it partially out of
17 enjoyment, also -- do you?

18 R. CLOWER-JUROR: Yes, sir. That's
19 true.

20 MR. RAY: All right. Thank you,
21 sir, for telling me that. Is there
22 anyone that has any particular
23 knowledge? Anyone else that does
24 trapping? Let me put it like that -- in
25 the front three rows? Yes, sir,

1 Mr. Brunner?

2 T. BRUNNER-JUROR: I have a creek
3 that goes through my property that gets
4 dammed up by beavers, occasionally.

5 MR. RAY: Okay, sir.

6 T. BRUNNER-JUROR: Which I think
7 this is --

8 MR. RAY: I understand. I
9 understand. Thank you. Anyone else?
10 Okay. Now, I think there was some of
11 you -- I remember Mr. Brunner, in
12 particular -- some of you really wanted
13 and had other reasons, than those that
14 the Judge could legally excuse you from
15 this proceeding -- that you wished to be
16 exempt, and you couldn't become
17 disqualified or exempt -- or rather
18 exempt from serving. I misused
19 "disqualified".

20 Is there anyone now, seated on
21 these first three rows, if you would
22 raise your hand -- that for any
23 particular reason, feels that you cannot
24 serve on this particular jury, because
25 of any reason that you may have?

1 This is opening the door to
2 everything you've got, if you want to
3 raise it, okay. Yes, ma'am?

4 O. ABRAMS-JUROR: I would just --

5 MR. RAY: Judge, you want me to
6 have her approach?

7 THE COURT: Yeah, probably would be
8 a good idea.

9 O. ABRAMS-JUROR: Approach or --

10 MR. RAY: Yes, ma'am. If you
11 would, just come forward, so
12 Mr. Birnbaum and I can approach the
13 bench with you, and you can tell the
14 Judge.

15 (WHEREUPON, the following
16 discussion was had at the bench.)

17 THE COURT: What number?

18 MR. RAY: Mr. Birnbaum?

19 MS. YOUNG-DISTRICT CLERK: What is
20 your name?

21 O. ABRAMS-JUROR: Olivia Abrams.

22 THE COURT: She's going to be about
23 25, I think -- 22.

24 MR. RAY: You're Miss --

25 O. ABRAMS-JUROR: Abrams.

1 THE COURT: Number 22.

2 O. ABRAMS-JUROR: Olivia Abrams.

3 MR. RAY: I'm sorry -- okay.

4 O. ABRAMS-JUROR: Only that since I
5 teach school, and I have done some
6 lessons on the environment -- and
7 particularly some lessons on beavers and
8 ponds, but I don't know if this is going
9 towards like an environmental issue and
10 stuff -- property issue that I, you know
11 might -- might have some feelings about
12 that already.

13 THE COURT: It may come as a shock
14 to you, but I don't know the answer to
15 that question, either. There are two
16 questions that I need to ask you.
17 You're going to hear the evidence, if
18 you're on the jury. You'll hear the
19 evidence. It will come from the witness
20 stand, under oath, either in the form of
21 verbal testimony, out of the mouth of a
22 witness, or you may see written
23 documents, that may be admitted into
24 evidence, or you may see exhibits or
25 photographs.

1 Now, the law simply wants you to
2 make the decisions in the case, based
3 exclusively on the evidence that you
4 hear here in court.

5 O. ABRAMS-JUROR: Okay.

6 THE COURT: Now, there's always a
7 danger -- and this is what they're
8 asking about. You may, in the course of
9 your teaching duties, have a textbook
10 that has something to say about an issue
11 that we have here in court.

12 You can't base your decision, even
13 in part, on what's in the textbook, for
14 example. Can you handle that? Can you
15 do that? Can you base your decision, in
16 other words, exclusively on the evidence
17 that you hear here in court?

18 O. ABRAMS-JUROR: I'm thinking. I
19 think I could, but I just have one small
20 doubt, that when I teach from a book, I
21 believe what I teach -- But I mean, I
22 could, I'm pretty sure, like you say,
23 based on strictly on evidence.

24 THE COURT: Okay. The second thing
25 and then we're going to recess for

1 lunch -- is that at the conclusion of
2 all the evidence, I'm going to give you
3 a set of written instructions contained
4 in the law. That's the law that you
5 have to follow. Frankly, I don't see
6 any much likelihood that you would have
7 a problem with that, but I wanted to ask
8 you. You know, if you're teaching
9 environmental subjects and all of that,
10 I can understand how there might very
11 well be something in your teaching that
12 runs along the same track as some of the
13 evidence.

14 Be that as it may, if I give you a
15 set of instructions about what the law
16 is, can you follow those instructions?

17 O. ABRAMS-JUROR: Yes, sir, I
18 could.

19 THE COURT: Now, I'm not going to
20 give you instructions about who to
21 believe or anything of that nature.
22 That's entirely up to you. I'll give
23 you a set -- I'll tell you what the law
24 is, and you tell everybody what the
25 facts are, and you apply my law to your

1 facts. Can you handle that?

2 O. ABRAMS-JUROR: Yes, I think so.

3 THE COURT: Sounds good to me.

4 Thank you. Ladies and gentlemen, during
5 the conversations thus far, the clock
6 crept up on me a little bit. It's a
7 moment or two after high noon. I'm
8 going to recess us for lunch until 1:15.

9 Everybody, if you would, be back
10 here. Do your best to get back into the
11 same seat that you're in now. Kind of
12 look around and figure out where you're
13 seated, because we've got you seated in
14 the same order in which your name
15 appears on the list.

16 Do not discuss the case among
17 yourselves during the lunch break.
18 Don't talk to anybody, and permit no one
19 to talk to you about the case. We'll
20 see you at 1:15. Thank you.

21 (WHEREUPON, the jury panel was
22 dismissed for the lunch hour.)

23 THE COURT: This is number 15,
24 Jerry Michael Brunner.

25 THE COURT: Let me bring both sides

1 up to speed. This morning, when I
2 qualified the entire panel, Mr. Brunner
3 told me that he would like to be excused
4 because -- Correct me, if I remember
5 wrong -- I think you're in the dairy
6 business, as I recall?

7 T. BRUNNER-JUROR: Yes, sir.

8 THE COURT: And he has people
9 that -- he needs to get the milking done
10 at kind of morning, noon and night. And
11 his experience pretty much squares with
12 mine. If the boss ain't there; the work
13 doesn't get done. Is that about what it
14 boils down to?

15 T. BRUNNER-JUROR: That's
16 correct -- yes, sir.

17 THE COURT: So he is asking to
18 be -- We're asking this morning to
19 excuse him. I told him that under the
20 law I could not, but suggested if he
21 asked you all, if you all would excuse
22 him by agreement -- which as you know,
23 you can do. Anybody have any objection
24 to excusing Mr. Brunner?

25 MR. RAY: Judge, I would like

1 Mr. Birnbaum to respond first, if he
2 will.

3 MR. BIRNBAUM: Your Honor, I would
4 like Mr. Ray to respond first.

5 THE COURT: I'll put it this way,
6 traditionally the plaintiff gets to go
7 first, Mr. Ray. So I think I'll let you
8 make the first call.

9 MR. RAY: I understand that, Judge.
10 Well, Mr. Brunner is actually a neighbor
11 of mine, Judge. I feel very badly to
12 keep him up here; although, I feel like
13 he has some unique knowledge in this
14 case -- and would probably, quite
15 frankly, be a good juror, so I'm in a
16 pickle here.

17 I really was kind of going to let
18 it be Mr. Birnbaum's call, without
19 putting it on me. I'll excuse him.
20 I'll agree to excuse him.

21 MR. BIRNBAUM: It's okay with me.

22 THE COURT: You're agreeing to
23 excuse him, too?

24 MR. BIRNBAUM: Yeah, if he agrees
25 to excuse. Yeah, I agree to excuse.

1 THE COURT: That's fine. I'm just
2 trying to get you to say it loud enough
3 for the court reporter to hear. That's
4 all -- that's fine. Well, Mr. Brunner,
5 your a lucky man -- and we'll excuse you
6 by agreement.

7 MR. RAY: You owe me one.

8 T. BRUNNER-JUROR: I'll bring you a
9 gallon of milk.

10 MR. RAY: His dairy almost backs up
11 on our place from the back side.

12 THE COURT: Juror number 15,
13 Mr. Brunner is excused by agreement.
14 1:15, gentlemen.

15 MR. RAY: 1:15, Judge?

16 THE COURT: Yes.

17 (WHEREUPON, the lunch break
18 was had at this time.)

19 THE COURT: Let the record reflect
20 this takes place outside the hearing of
21 the jury. Gentlemen, when I got back
22 from lunch, the bailiff revealed to me a
23 conversation that he had with juror
24 number 24, Mr. McNeill -- Tell them what
25 you told me.

1 BAILIFF: He said -- He stopped me
2 out here on the sidewalk, and he told me
3 that his wife was having trouble. He
4 had to get home and help her -- and he
5 probably wouldn't make it back.

6 Everybody was gone -- and you were gone,
7 Judge. I was the only one --

8 MR. RAY: I saw him talking to you
9 when I drove away. I didn't know what
10 he was talking to you about.

11 THE COURT: What's your pleasure?

12 MR. BIRNBAUM: I don't understand
13 what the question is.

14 THE COURT: What would you like to
15 do?

16 MR. BIRNBAUM: I didn't hear the
17 problem. He wasn't there? He's gone?

18 BAILIFF: His wife had a problem on
19 their farm, evidently. He had to rush
20 home to help her. He was afraid she was
21 in trouble.

22 MR. RAY: She's not in good health.

23 THE COURT: Ya'll want to go on
24 without her?

25 MR. BIRNBAUM: Ask the Plaintiff,

1 first.

2 THE COURT: He went first last
3 time.

4 MR. RAY: Judge, can I confer with
5 my client just a second?

6 THE COURT: Sure.

7 (WHEREUPON, at this time,
8 Mr. Ray conferred privately with
9 his client.)

10 MR. RAY: Judge, we'll agree that
11 he be allowed not to serve. I guess
12 that's about the only --

13 THE COURT: You're agreeing to
14 excuse her if --

15 MR. RAY: Excuse him.

16 MR. BIRNBAUM: Agreed.

17 THE COURT: Okay. Number 24 --

18 MR. RAY: I mean, I know Glenn --
19 and I know he's honest. If he said his
20 wife is sick, his wife is sick.

21 THE COURT: Number 24, juror
22 McNeill is excused by agreement.

23 MR. RAY: I would have done the
24 same thing anyway, probably, Judge. He
25 would have been a good juror.

1 THE COURT: Okay. All right.
2 Gentlemen, thank you. You may take it
3 up where you left it off.

4 CONTINUED VOIR DIRE

5 BY MR. RAY:

6 MR. RAY: You may have been in
7 hopes that that meant I was finished
8 when we broke for lunch, but
9 unfortunately you were not correct.
10 Hopefully, I won't be but a little bit
11 longer with you.

12 There is one area of concern that I
13 have, concerning the first three rows in
14 particular. Any of you have any
15 particular environmental concerns or --
16 Your Honor, could we approach the bench?

17 (WHEREUPON, the following was
18 a discussion at the bench.)

19 MR. RAY: Mr. McNeill is back, so
20 I'd like to let him serve.

21 THE COURT: Any objection to that?

22 MR. BIRNBAUM: Yeah -- objection to
23 the environmental --

24 THE COURT: No, no, no, no. The
25 juror that we just excused just walked

1 back in.

2 MR. BIRNBAUM: I didn't hear part
3 of the things, and I think --

4 THE COURT: Well, he missed one
5 sentence.

6 MR. RAY: I'll restate it.

7 THE COURT: I'm going to let him --

8 MR. RAY: I mean, Judge, he's made
9 the trip to come back.

10 MR. BIRNBAUM: Okay. I agree with
11 that.

12 THE COURT: I don't think that is
13 unreasonable. All right. Juror number
14 24 is back on the panel and will
15 continue to serve. The order excusing
16 that juror moments ago is set aside. Go
17 ahead.

18 MR. RAY: Thank you, Judge. Now,
19 I'll try to restate the question I just
20 asked and start over again and restate
21 it. I apologize for the interruption.

22 Those of you on the first three
23 rows, there may be some of you that have
24 unique, particular environmental
25 concerns. You may have a particular

1 feeling about nature and the animals in
2 it, and how things should be and that
3 sort of thing.

4 I'm not doing a real good job of
5 describing this question to you, but I
6 think you know the direction I'm going.
7 With that, I'm going to stop right
8 there. If anyone on the first row has
9 any concern about that issue -- In other
10 words, if you have a special knowledge
11 about the environment, that you think
12 would cause you not to be able to serve
13 as a juror in this case, because of what
14 we think the facts will be in the case,
15 if you would raise your hand -- first
16 row?

17 Anyone on the second row, other
18 than, I think Ms. Abrams has already
19 discussed, somewhat, this issue with the
20 Court. Other than Ms. Abrams, anyone on
21 the second row, that would have any
22 concern about those issues, such as
23 environmental concerns or something that
24 you studied or something that you've
25 read, that you think would have an

1 overwhelming amount of weight upon how
2 you would consider the case and the
3 evidence that would be presented to you?

4 I take it by your silence, there's
5 not in the second row. The third row --
6 both left and right? I take it by your
7 silence there is not.

8 Now, I come down to really the last
9 thing -- and in some ways, perhaps the
10 most important thing. I've done this in
11 other cases, because -- I don't know
12 exactly how you describe this, but I
13 think our right to counsel in this
14 country is a constitutional right, which
15 is well protected -- That lawyers, in
16 certain areas at least, have a great
17 deal of respect, and in other areas
18 perhaps have none at all.

19 Is there any one of you in the
20 panel, that for any reason, believes
21 that because of a lawyer being involved
22 in the case, that that causes the case
23 to be tainted, and that you could not
24 sit fairly in the case? And I ask that
25 question, particularly in light of the

1 fact that Mr. Birnbaum does not have an
2 attorney and Mr. Jones does -- And
3 there's the glaring difference.

4 Does that fact alone, that
5 Mr. Jones has exercised his right to
6 counsel, does that fact alone, cause you
7 not to be able to fairly consider the
8 evidence in this case and serve as a
9 juror?

10 I'll start with the row one,
11 because there may -- You may have read
12 something about the judicial system --
13 the legal system, that causes you to
14 have a great concern, about what we
15 lawyers do and the things that will be
16 performed here. So if any of you have
17 that problem, I want you to go ahead and
18 raise your hands now. Because the first
19 thing we need to do -- and I have that
20 same duty, as well as Mr. Jones and
21 Mr. Birnbaum and the Court, is to see
22 that this is a fair trial.

23 If for any reason, you believe that
24 as serving as a juror, that you could
25 not be fair because of the fact that

1 Mr. Jones has an attorney and
2 Mr. Birnbaum doesn't -- and that's my
3 question stated very succinctly to you.
4 Is there anyone on the first row that
5 has a problem with it in any way?

6 Is there anyone on the second row
7 that has a problem with that --
8 something that causes you, you think is
9 going to make it difficult for you to
10 serve as a fair and impartial juror?
11 Anyone on the third row?

12 I take it by your silence there is
13 not. I can already tell -- I don't
14 think I've been at it five minutes, but
15 we've been to lunch, and I can already
16 see some heads beginning to nod, so
17 hopefully we won't be much longer at
18 this and we can start the testimony.

19 I do appreciate your service, your
20 appearance here today. I know we tend
21 to take this for granted and look at it
22 as a chore, which it is -- but it is
23 also, probably the most important right
24 we have as Americans, is that we are
25 entitled, all of us, to a trial by a

1 jury of our peers. I firmly believe in
2 that right. Thank you for your
3 attention.

4 VOIR DIRE

5 BY MR. BIRNBAUM:

6 MR. BIRNBAUM: My name is Udo
7 Birnbaum. I'm 61 years old. I live in
8 south --

9 BAILIFF: Your Honor, they can't
10 hear him.

11 THE COURT: Mr. Birnbaum, see if
12 you can't put the microphone --

13 MR. BIRNBAUM: Oh, I wasn't even
14 using it.

15 THE COURT: Is there a clip-on?

16 BAILIFF: It's hers.

17 MR. BIRNBAUM: This is fine. Can
18 everybody hear me? I want to be heard,
19 but I don't want to scream in anybody's
20 ears, either. This is my first time --
21 you can't hear me? Who's controlling
22 this?

23 THE COURT: I've got it up here.

24 MR. BIRNBAUM: Okay. You watch the
25 audience and see if this works. One,

1 two, three, four, five, six, seven,
2 eight, nine, ten, eleven, twelve.

3 THE COURT: I think I found it.

4 MR. BIRNBAUM: Have you got it?
5 One, two, three, four, five, six, seven,
6 eight, nine, ten --

7 THE COURT: Can you hear him in the
8 back now?

9 MR. BIRNBAUM: -- twelve, thirteen,
10 fourteen, fifteen, sixteen, seventeen.
11 One, two, three, four, five, six, seven,
12 eight, nine, ten. One, two, three,
13 four, five, six, seven, eight, nine,
14 ten.

15 THE COURT: I've got it up, I think
16 as high as I can.

17 MR. BIRNBAUM: Okay. I'll be glad
18 to -- I'm just not familiar with it.

19 THE COURT: Okay.

20 MR. BIRNBAUM: I can operate like
21 this. One, two, three, four, five, six,
22 seven, eight, nine, ten. One, two three
23 four, five, six, seven, eight, nine,
24 ten. Have we got it?

25 THE COURT: Mr. Birnbaum, I've got

1 it as high as we can go. We're getting
2 that feed-back. You may just have to
3 speak a little louder.

4 MR. RAY: I didn't use it, but you
5 can.

6 MR. BIRNBAUM: Okay. Away with the
7 beast. I didn't realize you weren't
8 using it.

9 MR. RAY: We need to go ahead and
10 disconnect it so they can hear you.

11 THE COURT: You want to let him use
12 that one? This one may work better.

13 MR. BIRNBAUM: Is that all right?
14 Okay. I'll be glad to do this. As you
15 can see, I'm new at this.

16 My name is Udo Birnbaum. I'm 61
17 years old, and I live in South Van Zandt
18 County, near the China Grove
19 Community -- half of it is in China
20 Grove and in Walton. I have a farm out
21 there. I previously lived, you know,
22 long ago in the Houston area, before in
23 the Dallas area, but I've lived in Van
24 Zandt County about 18, 19 years.

25 I'm going to try to make this just

1 as short as I can. I'm going to follow
2 more on protocol, that I saw here for
3 the first time -- and more or less go
4 down the line. I'm going to make a real
5 brief statement, in general, what it is
6 that my pleading is.

7 The pleading is an answer that the
8 defendant has given, in response to the
9 petition by the plaintiff. And
10 effectively, in plain English, it ain't
11 so -- okay. I'm not going to comment on
12 it any more at this particular time.
13 But I think that's the general life of
14 everything and all these questions here
15 that I'm going to ask you.

16 So in light of that, I'm going to
17 get right down to the question excluding
18 the jurors -- or not excluding --
19 questioning the jurors.

20 Okay. I'm going to follow the
21 format here and think out loud, okay.
22 Does anybody on the first row know the
23 Plaintiff, Mr. William B. Jones -- any
24 knowledge or anything? Okay. Second
25 row? Anybody know Mr. William B. Jones?

1 Third row -- anybody know Mr. William B.
2 Jones? The rest of the rows -- Does
3 anybody know Mr. William B. Jones, the
4 Plaintiff? Thank you.

5 Has anybody heard or read or have
6 any knowledge -- I'm going to take the
7 first three rows, altogether. Mr. Ray
8 may have already asked, but I'll ask it
9 again. Anybody on the first --
10 anybody -- Has anybody heard anything
11 about this case? Thank you. I believe
12 all the answers have -- okay. All
13 right.

14 Anybody in the courtroom -- I know
15 the response I'm going to get, I
16 think -- Anybody in this courtroom know
17 Mr. Ray? Okay. You can lower your
18 hands. Okay. I'm going to have to do
19 that in more detail. Okay.

20 Anybody on the first row know
21 Mr. Ray?

22 JUROR-UNIDENTIFIED: Do you mean
23 personally or just by --

24 MR. BIRNBAUM: In any way. Do you
25 know -- anybody on the first row, do you

1 know who Mr. Ray is, other than what you
2 learned in the courthouse here today?
3 Okay. Your Honor, if I violated
4 anything here, you just let me know
5 okay? Okay. That was you, right?

6 THE COURT: Mr. Birnbaum, let me --
7 at the risk of intruding, I may save a
8 little time. Those of you that raised
9 your hand in response to the question:
10 "Do you know Mr. Ray", would you raise
11 them again? Okay.

12 Now, I'm going to ask a question of
13 you to the group. You can put your hand
14 down. Thank you, ma'am. I'm going to
15 ask a question to the group that just
16 raised their hand.

17 Now, when I get through asking the
18 question, Mr. Birnbaum may want to talk
19 to you some more and he may not. Those
20 that just raised their hand, indicating
21 that you know or know of Mr. Ray, is
22 your acquaintanceship with Mr. Ray, such
23 that would influence or impact your
24 deliberations if you were on the jury?
25 If your knowledge of Mr. Ray or your

1 acquaintanceship with Mr. Ray would have
2 an influential impact on you, if you
3 were on the jury, raise your hand.
4 Thank you.

5 MR. BIRNBAUM: Okay. All right.
6 First row, does anybody on the first row
7 know that you live close to Mr. Ray --
8 or know where he lives? Second row?
9 Third row?

10 JUROR-UNIDENTIFIED: Did you say
11 "know where he lives"?

12 MR. BIRNBAUM: Yeah -- okay. I
13 don't know -- I know you, but my brain
14 is not working -- no problem. Has
15 anybody on the first row had any
16 professional dealings with Mr. Ray? In
17 other words, if he represented -- you
18 know. Second row, has anybody had any
19 professional dealings with Mr. Ray?

20 Hold on. Let me find out -- You
21 are? State your name.

22 C. LANDRUM-JUROR: My name is
23 Charles Landrum.

24 THE COURT: Juror number 14.

25 MR. BIRNBAUM: Yes -- I found him

1 there. Okay. State the relationship
2 that you have had?

3 C. LANDRUM-JUROR: I used to be an
4 adult probation officer for this Court.
5 I supervised probationers defended by --
6 represented by Mr. Ray. I visited with
7 him in his office and had some papers
8 signed. It was all in the line of
9 business, nothing social.

10 MR. BIRNBAUM: How long did you
11 work in that capacity -- meaning, how
12 long did you work as a probation
13 officer -- This was in Van Zandt County?

14 C. LANDRUM-JUROR: I was a Van
15 Vandt County probation officer from 1984
16 to February of 1989.

17 MR. BIRNBAUM: Okay. Thank you.
18 Anybody on the third row have any
19 professional -- second row?

20 R. CLOWER-JUROR: He handled a
21 divorce case for me.

22 MR. BIRNBAUM: Okay. Let me get
23 the -- uncontested or contested?

24 R. CLOWER-JUROR: Uncontested.

25 COURT REPORTER: Mr. Birnbaum,

1 what's his name?

2 R. CLOWER-JUROR: Robert Clower.

3 THE COURT: Number 23.

4 MR. BIRNBAUM: Okay. I got that
5 wrong.

6 MR. RAY: Mr. Robert Clower, Judge.

7 MR. BIRNBAUM: I beg your pardon.
8 I've got some confusion, here. There's
9 twelve on the first row and twelve on
10 the second, you were 24. Which juror
11 are you? Which is your seat?

12 R. CLOWER-JUROR: 23, I think.

13 MR. BIRNBAUM: Thank you. You're
14 sitting on number 24, okay -- 24, okay.
15 Anybody on the third row have any
16 professional dealings with Mr. Ray?
17 State your name?

18 G. MCNEILL-JUROR: Glenn McNeill.
19 He was my lawyer at the newspaper, also
20 a renter at one time.

21 MR. BIRNBAUM: A renter?

22 G. MCNEILL-JUROR: He rented from
23 me. He's given us legal notices for the
24 paper.

25 MR. BIRNBAUM: Okay. State your

1 name.

2 G. MCNEILL-JUROR: Glenn McNeill.

3 THE COURT: He's number 24,

4 Mr. Birnbaum.

5 MR. BIRNBAUM: He's 24?

6 THE COURT: He's number 24, yes,

7 sir

8 MR. BIRNBAUM: 24 should be over

9 here.

10 THE COURT: No, 23 was the last

11 one.

12 MR. BIRNBAUM: Somebody shuffled

13 the jurors? I'm -- okay.

14 THE COURT: Juror number 15 was

15 excused, so we've got an empty seat.

16 MR. BIRNBAUM: Over here?

17 THE COURT: Wherever juror

18 number -- juror number 15 was right

19 there on the second row, third from the

20 wall.

21 MR. BIRNBAUM: I've having a mental

22 problem. I have juror number 24

23 sitting --

24 THE COURT: Well --

25 MR. RAY: Judge, if I could aid in

1 the cause here. I can't remember which
2 one of the jurors, but some of them was
3 out of order when they sat down. We've
4 got six in that row, and then he had to
5 get up and leave, so that's why there's
6 five in that row.

7 MR. BIRNBAUM: Okay. If there's
8 five in that row, why is that juror over
9 there not number 25?

10 MR. RAY: Because there was six at
11 one time before he got up, so that
12 leaves six starting the next row.

13 MS. YOUNG-DISTRICT CLERK: The
14 shuffle number.

15 MR. BIRNBAUM: I'm dealing -- I'm
16 talking with the shuffle numbers. I
17 mean, you know, I've been keeping up
18 with one through twelve and thirteen
19 through twenty-four.

20 THE COURT: Well, I'm not sure that
21 I know what the question is, but that's
22 Mr. Clower; isn't it? Mr. Clower with
23 whom you talked was number 23, and he's
24 on row two. Number 24 comes back on
25 this side, and there's a vacant seat in

1 there somewhere.

2 MR. BIRNBAUM: Right. It causes
3 problems, what I'm saying, in all the
4 things that I kept before. I think I
5 can work around it, but it causes a
6 problem -- that I was referring in the
7 inspections to the numbers and the seats
8 and so forth.

9 THE COURT: Let me suggest that if
10 that's a problem, when you talk to a
11 juror, ascertain the juror's name, and
12 then that's why we have the list with
13 everybody seated in the shuffle order.

14 MR. BIRNBAUM: I think there's no
15 problem. Okay. You are -- state your
16 name?

17 G. MCNEILL-JUROR: Glenn McNeill,
18 number 24.

19 MR. BIRNBAUM: Okay. If I remember
20 or not -- you were relating that he had
21 been a renter and something like that;
22 right?

23 G. MCNEILL-JUROR: I used him as a
24 lawyer at the newspaper.

25 MR. BIRNBAUM: Okay. Double check,

1 Clower and McNeill. That's Clower and
2 McNeill; right?

3 G. MCNEILL-JUROR: Yes, sir.

4 MR. BIRNBAUM: Thank you.
5 Sometimes the brain does funny things --
6 okay. Okay -- that's it? Anybody else
7 on row three has any professional
8 dealings with Mr. Ray, in any capacity?
9 Anybody on the other rows had any
10 dealings with Mr. Ray -- professional or
11 in any manner, professionally or
12 officially or -- okay. All right.

13 I'm going by the protocol. Is
14 anybody prejudice against a person
15 representing himself? Does that cause
16 any problem? No response. Okay. I
17 pass.

18 THE COURT: I'm sorry?

19 MR. BIRNBAUM: I'm through.

20 THE COURT: All right.

21 MR. BIRNBAUM: Unless I grossly, in
22 the haste here --

23 THE COURT: Mr. Birnbaum, if I
24 could get all the lawyers to do it as
25 briefly as you did, I would be one happy

1 Judge.

2 MR. BIRNBAUM: Well, he did part of
3 the things. I mean, all I had to do
4 is -- He did most of the work. I mean
5 the issues --

6 THE COURT: That's good.

7 MR. BIRNBAUM: Thank you.

8 THE COURT: Ladies and gentlemen --
9 Thank you, Mr. Birnbaum. Both sides
10 have now said all to you that they
11 apparently wish to say. Do any of you
12 have any questions that you wish to ask
13 of me? Okay.

14 We'll stand in recess. Will 30
15 minutes be enough time for you, Mr. Ray
16 and Mr. Birnbaum, to strike the list?

17 MR. RAY: Yes, Your Honor.

18 THE COURT: Is that plenty of time
19 for you, Mr. Birnbaum?

20 MR. BIRNBAUM: I wasn't paying
21 attention.

22 THE COURT: I'm going to recess the
23 jury while you make your strikes.

24 MR. BIRNBAUM: Yes, sir.

25 THE COURT: And I don't want to

1 give them more time than they need, but
2 I don't want them to be waiting around.
3 Can you do it in 15 minutes?

4 MR. BIRNBAUM: Yes, sir.

5 THE COURT: Is that all right with
6 you, Mr. Ray?

7 MR. RAY: Judge, I think we can
8 accomplish that.

9 THE COURT: I think we'll take a 15
10 minute recess. Be back here at two
11 o'clock straight up. I'll call the
12 names of the 12 of you that will make
13 up the jury. I'll have instructions for
14 the remainder of you.

15 (WHEREUPON, the jury exited
16 the courtroom.)

17 MR. RAY: Judge, may we utilize the
18 jury room?

19 MS. YOUNG-DISTRICT CLERK: I only
20 have three, Jerry Michael Brunner,
21 Sharon Perry and Kirk Hodge, that have
22 been excused.

23 THE COURT: Yes, ma'am. I'll get
24 to that in a second. I want to be sure
25 we're all on the same line, about where

1 the strike line is and the number of
2 strikes.

3 MR. RAY: Judge, let me get my
4 list. I didn't bring it with me.

5 THE COURT: According to my master
6 sheet here, I'm showing three people
7 have been excused: Number 15, Brunner;
8 number 30, Perry; and number 37,
9 Hodge -- allowing six strikes for each
10 side and 12 jurors, that means we need
11 24 jurors. I'm putting the strike line
12 at and including juror number 25,
13 Mislivets.

14 MR. BIRNBAUM: Yeah.

15 MR. RAY: They live in Wills Point.

16 THE COURT: The panel, for strike
17 purposes, goes through and includes
18 number 25.

19 MR. BIRNBAUM: I understand that,
20 okay. Let me paraphrase to make sure
21 that we communicated. As I understand
22 it, here of this list -- in other words,
23 the 24 jurors will bring us to juror
24 number 25 on the shuffle.

25 THE COURT: And will include

1 number --

2 MR. BIRNBAUM: Will include number
3 25.

4 THE COURT: That's right.

5 MR. BIRNBAUM: From which we have
6 the peremptory strikes of six each, so
7 supposedly that will leave 12. I will
8 probably not call any for cause. I have
9 no reason to call any or whether there
10 should have been at this time, I have no
11 intent to call any at that point. Okay.
12 That leaves 12 jurors; right?

13 THE COURT: Yeah, that's correct.
14 Now let me ask the clerk, how do
15 ya'll -- How do you want the list
16 physically struck? Do you want just
17 to --

18 MS. YOUNG-DISTRICT CLERK: When
19 they strike their list, draw a line
20 through it and put "strike one". Your
21 next one, put "strike two".

22 MR. RAY: I don't think I've ever
23 written "strike one" and "strike two".

24 MS. YOUNG-DISTRICT CLERK: You
25 know -- And then sign their names and

1 put "strike list for Plaintiff" or
2 "strike list for Defendant".

3 THE COURT: Do you have a form for
4 that?

5 MS. YOUNG-DISTRICT CLERK: I've
6 given it to them. This is the one I
7 filed for the record.

8 MR. RAY: She gave us a clean one,
9 Judge, to utilize. She gave us two, so
10 I scratch all over one, and then strike
11 on this one and give it to her.

12 MS. YOUNG-DISTRICT CLERK: When
13 they turn them into me, I mark them on
14 my list, and then I highlight the first
15 twelve that's not struck and that's the
16 jury.

17 MR. BIRNBAUM: Okay. Like you
18 said, I can scratch around on this all I
19 want to and --

20 THE COURT: You've got a clean one.

21 MR. BIRNBAUM: You will provide me
22 one --

23 MS. YOUNG-DISTRICT CLERK: I gave
24 you two.

25 MR. BIRNBAUM: Okay. There are

1 two.

2 MS. YOUNG-DISTRICT CLERK: One to
3 use to --

4 MR. BIRNBAUM: Yes.

5 MR. RAY: Judge, I don't know if
6 I'm going to make it in 15 minutes.

7 THE COURT: I know. Give it your
8 best shot. Do you understand,
9 Mr. Birnbaum, how the clerk wants it
10 done?

11 MR. BIRNBAUM: Yes. The format is
12 on that blank form -- well, I will take
13 the blank form --

14 THE COURT: On the clean one.

15 MR. BIRNBAUM: On the clean one --
16 uncluttered up. I will write "strike
17 one". Any particular area you want me
18 to write it?

19 THE COURT: The main thing is draw
20 a line through the name.

21 MS. YOUNG-DISTRICT CLERK: Draw a
22 line through the name and write out here
23 to the right, then, they usually put
24 "strike one". If they come down here,
25 "strike two" and so on. When you get

1 through, hand it to me and I'll -- this
2 is mine.

3 MR. BIRNBAUM: I'm sorry.

4 THE COURT: Okay. We're going to
5 have to hurry to make two o'clock, so
6 give it your best shot.

7 (WHEREUPON, a recess was taken
8 at this time.)

9 THE COURT: Ladies and gentlemen
10 because of the little glitch we had in
11 the seating arrangement, I'm going to
12 ask Mr. Birnbaum to call some names of a
13 few of you. When he calls your name, if
14 you would stand, so he can make certain
15 that he's -- that you're the person he
16 thinks you are. If I've got that right,
17 go ahead, Mr. Birnbaum.

18 MR. BIRNBAUM: Okay. I'm not
19 necessarily -- I'm not trying to give
20 away my hand, so I may call somebody
21 here I have absolutely no interest in,
22 okay. Staats, Jimmy? There's no --
23 Thank you. McCauley? Neal? Okay.
24 Cummings, Esther? Landrum? Okay.
25 Davis, Sue? Clower, Robert? Robert

1 Clower?

2 THE COURT: Over here to the right.

3 MR. BIRNBAUM: Thank you. That's
4 what I was trying to make sure. Okay.
5 Spencer? Thank you. McNeill? Thank
6 you. Vines? Thank you. I'm through.

7 THE COURT: All right. The clerk
8 will call the names of the twelve of you
9 that will make up the jury. As your
10 name is called, if you would come up and
11 take a seat in the jury box. You don't
12 have to occupy the same seat all the
13 time. You'll be in and out of that box
14 from time to time. But for the moment,
15 if you'll fill this end up first, it
16 will probably save some wear and tear on
17 shins and insteps.

18 One other thing, as you enter the
19 jury box, Ms. Davis, the Court
20 coordinator, has got a one-page set of
21 instructions for you. This is not the
22 charge that I talked to you about.
23 These are just some standard
24 instructions on how to conduct yourself
25 if you're on the jury.

1 She's going to give each one of you
2 a copy of it. You can read it and it's
3 yours to keep. You can take it home and
4 read it and whatever. Call the role,
5 Ms. Young.

6 MS. YOUNG-DISTRICT CLERK: Jimmy
7 Staats, Terry Owen, Yvonne McCauley,
8 Rosie Richardson, Emma Vines, Dewey
9 Willingham, Bobby Bridwell, Esther
10 Cummings, Pamela Robertson, John Prater,
11 Billy Spencer and Amy Mislivets.

12 THE COURT: I think we're missing
13 somebody -- No, here we are. We've got
14 them all.

15 MS. YOUNG-DISTRICT CLERK: I called
16 twelve.

17 THE COURT: You've got twelve. I
18 just miscounted. Mr. Birnbaum -- any
19 objections or exceptions, from either
20 side, as to the examination, impanelling
21 of the jury?

22 MR. RAY: None from the Plaintiff,
23 Your Honor.

24 MR. BIRNBAUM: None here.

25 THE COURT: Very well. Now ladies

1 and gentlemen, those of you that remain
2 in the gallery, I can tell by the smiles
3 on some of your faces, that you know
4 what's coming. I have several things to
5 say to you.

6 Number one, you're discharged.
7 That means you're no longer a jury
8 panel, when I uttered that word. You're
9 now just some Van Zandt County citizens
10 that happen to be seated in a courtroom.

11 Number two, you're excused. That
12 means that when you leave here in a few
13 moments, which you will, that you don't
14 have to come back down here to serve as
15 a juror again on the summons that
16 brought you down here this time.

17 Some of you may never get another
18 summons. It's all done by computer.
19 Others of you may have a surprise in
20 your mailbox when you get home, but
21 nonetheless you're excused for this
22 time.

23 Thirdly, the instructions that I
24 gave you before, about not discussing
25 the case, no longer apply. You can talk

1 to anybody you want to, except these
2 twelve people over here. Some of you,
3 there may be friends of yours on this
4 jury, or you may have gotten acquainted
5 while you were down here. You cannot --
6 and I'm going to give them the same
7 instructions, obviously -- talk with the
8 jury about the case, but anybody else
9 you want to talk to, you're free to do
10 so -- and that includes your family or
11 anyone else.

12 Finally -- and I say this on behalf
13 of Judge Tommy Wallace, for whom I am
14 sitting. He's, as I told you earlier,
15 over in Quitman on another case. On my
16 own behalf, really, is thank you. Thank
17 you for being here. Thank you for doing
18 your duty. Above all, thank you for
19 being so very patient with all of us.
20 If you weren't that patient, the job can
21 get to be very, very difficult. You
22 were patient and you were very gracious.

23 I'm an outsider in your county, and
24 you've made my job very easy -- and I
25 thank you for it. You're excused.

1 Those of you that want to stay and watch
2 the trial are free to do so.

3 If you would, on the way out, be as
4 quite as you can, so I can swear the
5 jury. Would you rise and raise your
6 right hand and be sworn.

7 (WHEREUPON, the 12 selected
8 jurors were given the oath by the
9 Judge.)

10 THE COURT: Ladies and gentlemen,
11 the door to your left, my right, is the
12 door to the jury room. I'm telling you
13 this now for fear that I might forget it
14 later.

15 When we recess for the day, I'm
16 going to recess you into the jury room.
17 Ms. Davis, the Court coordinator, will
18 be there with her yellow legal pad to
19 get your name and your phone number, and
20 whatever other information she needs for
21 use in case there is some kind of an
22 emergency -- I don't expect there to be
23 one, but sure as we don't get the phone
24 number to call, there will be. That's
25 the way we'll do that. Anything else

1 before we have opening statements?

2 MR. RAY: Your Honor, we have two
3 witnesses in the hall, that probably
4 need to be instructed.

5 THE COURT: All right. Let all the
6 witnesses that are present come around
7 and be sworn.

8 MR. RAY: Judge, I'll step out in
9 the hall and get our two.

10 MS. DAVIS-COURT COORDINATOR: There
11 are some down in my office, too.

12 MR. RAY: Your Honor, there's a
13 possibility we'll have another witness,
14 but he's not here -- and I don't
15 anticipate that I'd reach him today.

16 THE COURT: All right.

17 MR. RAY: But as soon as I know I'm
18 calling him and he's available, well,
19 then --

20 THE COURT: All right -- or if he
21 shows up, call it to my attention, and
22 I'll place him under the rule.

23 THE COURT: Retire the jury for a
24 moment.

25 MR. BIRNBAUM: Going to do that

1 first?

2 THE COURT: I forgot to do it.

3 (WHEREUPON, the jury exited
4 the courtroom.)

5 MR. BIRNBAUM: The other thing,
6 also had to do with a little bit -- I
7 believe I understand that the protocol
8 on the introduction and the other
9 things, all I have to do is follow him.
10 I think I understand it, except in the
11 closing end of it.

12 I don't know what instructions you
13 normally give to the jury, in terms of
14 what's going to happen over here. If
15 you do, that kind of stuff -- would also
16 sort of double check my understanding of
17 the procedure. I think I understand all
18 of it, except part of the closing thing.

19 THE COURT: You mean the closing
20 argument?

21 MR. BIRNBAUM: Well, the -- I have
22 kind of a list -- You want me to just
23 hit that right now? It's real short.

24 THE COURT: I'm not even sure what
25 page you're on right now. Tell me --

1 Help me understand what you're trying to
2 get to.

3 MR. BIRNBAUM: Okay. What I
4 understand -- okay. He introduces his
5 evidence, real short. He sort of says
6 what he's going to do -- you know, what
7 his claim is -- you know, what the
8 nature is, what he intends to prove, and
9 what he expects to get. Then after
10 that, I can do -- or he'll present his
11 evidence, and then I'll sort of do the
12 same thing.

13 THE COURT: Hang on just a second.
14 See if that will help you.

15 (WHEREUPON, the Judge handed
16 Mr. Birnbaum a sheet of paper.)

17 MR. BIRNBAUM: I think I'm past
18 that stage.

19 MR. RAY: Judge, I might need that.

20 MR. BIRNBAUM: Okay -- I understand
21 it here. Plaintiff, it's his nature --
22 prove what he intends to prove from
23 something in his evidence. The
24 defendant will probably, then, after
25 that, do the same thing -- the nature of

1 the cause to prove and relief -- okay.

2 Then what will happen is -- then
3 I'll introduce my evidence. Then there
4 will be some rebutting regarding
5 evidence; is that correct?

6 Rebutting evidence, you bring your
7 witnesses back -- How do you rebut the
8 evidence -- with witnesses; right?

9 THE COURT: Well, I mean, why don't
10 you let me take it from the top, because
11 I don't want anything I say to be taken
12 out of context.

13 MR. BIRNBAUM: Right.

14 THE COURT: The next thing that is
15 going to happen is I'll swear the
16 witnesses.

17 MR. BIRNBAUM: Uh-huh.

18 THE COURT: Then Mr. Ray, if he
19 wishes to, will make an opening
20 statement. I assume you're going to
21 make a short opening.

22 MR. RAY: I probably won't, Judge.

23 THE COURT: Okay. I believe if you
24 don't, he can't.

25 MR. RAY: That's right.

1 THE COURT: If he is not going to
2 make an opening statement, then the next
3 thing that will happen is he will call
4 his witnesses and put on his evidence.

5 MR. BIRNBAUM: Okay. He will put
6 on his evidence.

7 THE COURT: He will put on his
8 evidence. And then he's going to say,
9 "Your Honor, the Plaintiff rests". When
10 he says, "The Plaintiff rests", I'm
11 going to say, "What says the Defendant?"

12 MR. BIRNBAUM: Uh-huh.

13 THE COURT: That's the signal for
14 you to call whatever witnesses -- put on
15 whatever evidence.

16 MR. BIRNBAUM: But no statement?

17 THE COURT: No statement. You
18 can't make a statement unless he makes
19 one. If he decides to make one, then
20 you can either make one now or later.
21 If he chooses not to make one, then you
22 can't make one.

23 MR. BIRNBAUM: Okay.

24 THE COURT: Now, when you put on
25 your evidence -- when you're done

1 putting on your evidence, you're going
2 to say, "Judge, the Defendant rests.
3 And when you say that, if Mr. Ray has
4 some additional evidence -- rebuttal
5 evidence, he can put it on then.

6 MR. BIRNBAUM: But rebuttal
7 evidence is the introduction of --

8 THE COURT: No -- now wait a
9 minute. Let me finish. I'll come back
10 to that. When he is through with his
11 rebuttle evidence, then you can put on
12 rebuttal evidence.

13 MR. BIRNBAUM: Uh-huh.

14 THE COURT: If he has no rebuttal
15 evidence, then we're done. In other
16 words, there's nothing for you to rebutt
17 because he didn't put on any.

18 Now, your question about what is
19 rebuttal evidence. The law doesn't
20 require you to put on rebuttal evidence.
21 It gives you the opportunity to -- And
22 there's no way that I can tell you, you
23 know, how to do that or whether to do
24 it. I mean that's -- But you have an
25 opportunity to call witnesses in

1 rebuttal. In other words, call
2 witnesses to rebut or refute anything
3 that the plaintiff has put into
4 evidence. He has the same option, if he
5 wants to.

6 MR. BIRNBAUM: Okay. If he doesn't
7 make an opening statement, I can't make
8 an opening statement?

9 THE COURT: That's correct.

10 MR. BIRNBAUM: If he doesn't
11 present any evidence, can I present
12 evidence?

13 THE COURT: Well, let me put it
14 this way.

15 MR. BIRNBAUM: We have a dilemma,
16 Your Honor.

17 THE COURT: We don't have a
18 dilemma. I'm telling you -- trust me,
19 we don't have a dilemma.

20 MR. RAY: Case dismissed.

21 THE COURT: If Mr. Ray doesn't put
22 on any evidence, I'll tell you what to
23 do next.

24 MR. BIRNBAUM: You see the point
25 I'm making?

1 THE COURT: Not exactly, but -- no.
2 Anything else?

3 MR. BIRNBAUM: Okay -- Yes. Okay.
4 You're rebutting -- okay. Rebuttal --
5 whether he rebuts -- Right. Rebuttal
6 is stopped when he stops rebuttal, okay.

7 Then after that, the charge is
8 read. The charge is read; right?

9 THE COURT: When both sides are
10 closed.

11 MR. BIRNBAUM: That is called
12 closed -- okay.

13 THE COURT: When both sides have
14 closed, then we'll read the charge.

15 MR. BIRNBAUM: Okay. And the
16 charge is something that we --

17 THE COURT: It's in writing. I'll
18 prepare it or you all can prepare it.

19 MR. BIRNBAUM: Right.

20 THE COURT: But you will be given a
21 copy of it before it's read.

22 MR. BIRNBAUM: Right.

23 THE COURT: And you can make any
24 comments or objections that you want to
25 about it.

1 MR. BIRNBAUM: Okay. All right.
2 But again, regarding -- Okay. Then
3 after that, after the charge is read
4 then there's the argument.

5 THE COURT: That's true. He gets
6 to go first and last.

7 MR. BIRNBAUM: I understand that.

8 THE COURT: And you're in the
9 middle.

10 MR. BIRNBAUM: Okay. But if he --
11 You assured me he's going to argue;
12 right -- so that I can argue?

13 THE COURT: Well, let me put it
14 this way. I think you're entitled to
15 argue whether he argues or not.

16 MR. RAY: I agree, Judge.

17 THE COURT: But I don't think
18 there's going to be much likelihood that
19 he's not going to argue.

20 MR. BIRNBAUM: Okay.

21 MR. RAY: I had that come up one
22 time, Judge, in trial when I was sitting
23 as a Judge. That exactly happened --
24 and what you've said is exactly how I
25 ruled.

1 THE COURT: The rule on argument is
2 not the same as the rule on opening
3 statements -- is what I'm telling you.

4 MR. BIRNBAUM: All right.
5 Effectively, that the arguments -- one
6 is -- the counter argument only to those
7 points, I think, and when it quits --
8 No.

9 THE COURT: Don't make it more
10 complicated than it is.

11 MR. BIRNBAUM: Okay. Thank you.

12 THE COURT: He's going to make an
13 opening argument, I can promise you.

14 MR. BIRNBAUM: Okay.

15 THE COURT: And the only rule you
16 need to remember about argument is, you
17 must confine your argument to the
18 evidence --

19 MR. BIRNBAUM: That is correct.

20 THE COURT: -- or to reasonable
21 deductions and logical inferences that
22 might be drawn from the evidence.

23 MR. BIRNBAUM: Also to the other
24 point of argument? Meaning he argues a
25 point -- I can argue against that?

1 THE COURT: Sure.

2 MR. BIRNBAUM: Right, right --
3 okay. Am I restricted to arguing
4 against it in a particular way, other
5 than pertaining to the evidence, or can
6 I argue it regarding the argument?

7 THE COURT: I'm not sure that I can
8 answer that. I'll put it this way. You
9 can argue against it by citing evidence,
10 that you presented, that you contend is
11 in opposition to that. That's one way
12 to do it.

13 MR. BIRNBAUM: Okay.

14 THE COURT: Second way to do it is,
15 is you can draw reasonable deductions
16 and logical inferences from your
17 evidence or his evidence or both.

18 MR. BIRNBAUM: Okay, okay.

19 THE COURT: Now, the big thing you
20 need to worry about -- And I'm telling
21 you this, not because I want to help you
22 try your case -- I don't want to do that
23 with either one of you, but it's
24 important to understand what I'm about
25 to say next.

1 Most people -- And it's true of a
2 lot of lawyers. It's true of almost
3 everybody that appears pro se. When
4 they stand up in front of a jury, they
5 kind of forget the rules and they start
6 testifying. They start saying what
7 their personal opinion is. You can't do
8 that on argument.

9 If you do that, you may get away
10 with it for awhile, because Mr. Ray may
11 say, "Well, I like what he says and I
12 don't object to it --

13 MR. BIRNBAUM: Uh-huh.

14 THE COURT: -- and if I don't
15 object to it, I get to answer it".

16 MR. BIRNBAUM: Right.

17 THE COURT: So both of you need to
18 be careful and confine your remarks to
19 the evidence, reasonable deduction of
20 logical inferences drawn therefrom. If
21 you start testifying, then you're
22 subject to an objection -- I mean, he is
23 too.

24 MR. BIRNBAUM: Yeah, yeah.

25 THE COURT: Anything else?

1 MR. BIRNBAUM: Yes. However, in my
2 case, I can also testify?

3 THE COURT: You can testify, but
4 when you testify -- you can't testify
5 during the argument. When you
6 testify --

7 MR. BIRNBAUM: That's right.

8 THE COURT: You get on the stand --

9 MR. BIRNBAUM: Yeah, right.

10 THE COURT: -- and take the oath
11 and you're subject --

12 MR. BIRNBAUM: Yeah -- right,
13 right. I can take the oath during the
14 introduction of the evidence.

15 THE COURT: Evidence -- sure.

16 MR. BIRNBAUM: Thank you.

17 THE COURT: Anything else?

18 MR. BIRNBAUM: Yes -- okay. Then
19 after the argument, that is --

20 THE COURT: When both sides are
21 through arguing, we retire the jury and
22 they consider their verdict.

23 MR. BIRNBAUM: Based on the --
24 Well, the verdict on the charges read?

25 THE COURT: Exactly.

1 MR. BIRNBAUM: Right -- okay.

2 Thank you.

3 THE COURT: Is that squared away?

4 MR. BIRNBAUM: Yes.

5 THE COURT: Do you have any
6 difficulty with anything I expressed?

7 MR. RAY: No, Judge, I don't. I am
8 intending to be a witness, myself, also
9 on attorney fees. I thought I would
10 advise you of that. I don't know if you
11 want to give me an oath or how you want
12 to handle that.

13 THE COURT: You want to waive the
14 oath on -- He's an officer of the Court.
15 You can waive the oath or I'll administer
16 the oath.

17 MR. RAY: Or I'll take the oath
18 whenever I testify.

19 THE COURT: Let's just take it now.

20 MR. BIRNBAUM: Make the oath.

21 (WHEREUPON, Mr. Ray was given
22 the oath by the Judge.)

23 THE COURT: Now, let me -- Are you
24 going to testify?

25 MR. BIRNBAUM: Yes.

1 THE COURT: All right. Let
2 everybody who's going to testify stand
3 up and raise your right hand and I'll
4 administer the oath to you.

5 (WHEREUPON, the Judge
6 administered the oath to all
7 witnesses present.)

8 THE COURT: All right.

9 MR. RAY: Judge, Mr. Tibideaux
10 didn't stand, but we haven't taken up
11 his motion to quash, either.

12 THE COURT: That's true. We're
13 getting ready to do that. Are you going
14 to invoke the Rule?

15 MR. RAY: Invoke the rule, Your
16 Honor

17 THE COURT: All right. The Rule
18 has been invoked. What that means,
19 gentlemen -- and in an abundance of
20 precaution, I'm including Mr. Tibideaux
21 in this. From this moment on -- Who's
22 going to be the first witness, Mr. Ray?

23 MR. RAY: Mr. Jones will be the
24 first witness, Your Honor.

25 THE COURT: Mr. Jones -- Oh, your

1 client. I'm sorry, I was looking over
2 here.

3 MR. RAY: Judge, I'm sorry. I
4 stood here and looked at him and didn't
5 see him standing.

6 THE COURT: You were not sworn?

7 MR. JONES: No, sir.

8 (WHEREUPON, the Judge
9 administered the oath to Mr.
10 Jones.)

11 THE COURT: Okay. Now the five of
12 you that are standing, if ya'll would
13 wait out in the hall, we will call you
14 in turn. The Rule has been invoked.
15 That means that from this moment on, you
16 must not be in the courtroom while the
17 trial is in progress.

18 Number two, you must not discuss
19 your knowledge of the case with each
20 other, or with anyone who may have been
21 a witness or who may become a witness.
22 So the obvious purpose of that, is so
23 that you don't get together and
24 dove-tail your testimony.

25 So for those purposes, you may

1 remain out in the hall -- and we'll call
2 you in turn and get you excused as
3 quickly as we can. Thank you.

4 MR. RAY: Judge, I have one request
5 for Mr. Phillips. He is engaged in
6 helping setup the First Monday grounds
7 for First Monday, which is just a short
8 distance away. I don't anticipate
9 needing his testimony for probably -- at
10 least a two-hour period, based on what
11 I'm going to put on to start with.

12 Would it be possible for him to
13 leave, and say check back about four, to
14 four-thirty, somewhere in there?

15 THE COURT: Check back at four.

16 MR. RAY: Thank you, Judge.

17 THE COURT: Let the record reflect
18 this all takes place outside the
19 presence and hearing of the jury, which
20 have been retired. Let the record
21 further reflect, the jury has been
22 sworn.

23 We now come, outside the presence
24 of the jury, to a certain Motion to
25 Quash a Subpoena filed pro se, by a

1 witness who has been subpoenaed,
2 Mr. Lewis Tibideaux.

3 MOTION TO QUASH SUBPOENA

4 THE COURT: Mr. Tibideaux, you
5 going to present this motion yourself or
6 is Mr. Birnbaum going to present it?

7 MR. TIBIDEAUX: I have really --
8 I'd like to make an explanation, sir. I
9 have no animosity towards Mr. Ray. I
10 have no information that would either
11 hurt or help anyone, other than my
12 friend, who has been burdened by this --
13 and I've been a bar of inspiration,
14 maybe.

15 I don't know anything that I could
16 harm him or harm anybody with any of my
17 testimony. I can't see why I couldn't
18 help my friend out.

19 THE COURT: Tell me when you're
20 through.

21 MR. TIBIDEAUX: I'm presenting this
22 petition.

23 THE COURT: All right. Do you have
24 anything else you want to present to me
25 on this motion?

1 MR. TIBIDEAUX: Yes.

2 THE COURT: Go ahead.

3 MR. TIBIDEAUX: Well, I may have
4 not fully understood, because I have a
5 severe hearing problem. I haven't
6 understood half of what went on today,
7 anyway. But if I be -- or allowed to
8 remain, it wouldn't hurt anybody.
9 Whatever you think is honorable.

10 THE COURT: Well, okay. Let me
11 explain --

12 MR. BIRNBAUM: May I approach the
13 bench? Defendant's motions attempts to
14 show that he has been -- his
15 relationship with the Defendant and also
16 the role as -- I don't know what the
17 exact wording is in there.

18 THE COURT: The wording is
19 "long-time mutual counsel."

20 MR. BIRNBAUM: As has been observed
21 in the courtroom a long time ago. In
22 support of that motion, I submit that
23 fact -- that he has been in that
24 relationship for some time, and that is
25 the essential nature of the motion --

1 not the motion, the appearance.

2 THE COURT: Well, it says, "Motion
3 to Quash", so I assume that we're
4 talking about the same thing?

5 MR. BIRNBAUM: Uh-Huh.

6 THE COURT: All right. Let me
7 explain to you what the deal is. First
8 of all, Mr. Tibideaux, it has been
9 apparent to me by observation -- Are you
10 able to hear me okay?

11 MR. TIBIDEAUX: Yes, sir.

12 THE COURT: It's been apparent to
13 me by observation today, yesterday and
14 on some previous settings of the case,
15 when the case has come up, that you are
16 just exactly what your motion says you
17 are. That you're a long-time counsel
18 and confidant and advisor and such as
19 that. I understand that.

20 Mr. Tibideaux -- I mean -- I'm
21 sorry, Mr. Birnbaum has made that point,
22 and you have made that point here in
23 your motion to quash the subpoena. I
24 have two concerns. I'm going to take
25 the time to explain this to you, because

1 there's two things that are important in
2 this whole procedure.

3 One is that the Court be fair. The
4 second is that the Court appear to be
5 fair -- No -- That it's evident that the
6 Court is fair. Now, being fair doesn't
7 mean that you're entitled to have every
8 ruling in your favor.

9 Ordinarily, courts very rarely
10 explain why they do what they do. But
11 in the interest of the appearance of
12 fairness, I'm going to explain to you --
13 and to Mr. Birnbaum, what I'm going to
14 do and why I'm doing it.

15 The law does not allow a non-lawyer
16 to give advice -- legal advice to a
17 person who's engaged in the litigation.
18 That's the first thing that concerns me
19 a little bit. But I'm also aware, that
20 I probably don't have any way of
21 stopping you from doing that, because
22 we're going to recess sometime today.
23 We're not going to work around the
24 clock. We're all going to leave here --
25 and you and Mr. Birnbaum are going to

1 leave and be together and -- You know,
2 nobody is going to follow you around to
3 see whether or not you've followed my
4 instructions.

5 Now, the other law that I want to
6 make you aware of, is that each side has
7 a right to subpoena whomever they want
8 to. They don't have to explain to me
9 why --

10 MR. TIBIDEAUX: I'm aware of that.

11 THE COURT: -- that they subpoena
12 someone. Sometimes they do it for
13 strategic reasons, tactical reasons.
14 Sometimes they subpoena people thinking
15 they may call them and don't call them.
16 Other times they subpoena people, and
17 the evidence creates a need to call that
18 person as a witness -- and they do call
19 them.

20 It's a long-standing, time-honored
21 rule, that absent some kind of showing
22 of some outrageous harm, a person's
23 subpoena will not be quashed. I've
24 quashed two subpoenas in this case. I
25 did that on the basis of specific rules

1 of law that govern those subpoenas.

2 I'm going to deny your motion to
3 quash the subpoena. I'm going to put
4 you under the rule, as I did the people
5 that I just swore -- Just a minute. And
6 when both sides have rested and closed,
7 I'll excuse you from the Rule, along
8 with everybody else, and you can come
9 back in the courtroom and be here as a
10 spectator when the arguments are made.
11 The plaintiff has a right to have you
12 under subpoena if he wants to.

13 Now, you're going to be
14 instructed -- In fact, you're under the
15 Rule, and you're going to be instructed
16 not to discuss this case with any other
17 witness. Now, you have no objection, if
18 I waive it as to Mr. Birnbaum; do you?

19 MR. RAY: I have no objection to
20 that, Your Honor.

21 THE COURT: Now, I'm going to make
22 an exception, and tell you that when you
23 and Mr. Birnbaum are alone, you all can
24 can talk about the case all you want to.
25 It is not for me to tell Mr. Birnbaum

1 from whom he should or should not take
2 advice.

3 That's not -- I'm going to let you
4 speak, just relax a minute. But it's
5 important that you and Mr. Birnbaum not
6 discuss the case in the presence of
7 other witnesses. Do you see what I'm
8 saying? Can you hear me all right?

9 MR. TIBIDEAUX: Yes, sir. Yes,
10 sir.

11 THE COURT: Any problem with what
12 I've just said?

13 MR. TIBIDEAUX: I have no
14 problem -- just I disagree with it, but
15 I have no problems with it.

16 THE COURT: Well, you have every
17 right in the world to disagree with it.
18 My only concern is will you obey those
19 instructions?

20 MR. TIBIDEAUX: You have my word.

21 THE COURT: That's all I want.
22 That's all I want. You strike me as
23 being a man, if he gives his word, will
24 abide by it.

25 MR. TIBIDEAUX: I will die by it,

1 if necessary.

2 THE COURT: That's all I want. Now
3 you wanted to be heard?

4 MR. BIRNBAUM: Yes.

5 THE COURT: Both of you do.

6 MR. BIRNBAUM: Regarding your
7 ruling.

8 THE COURT: Yeah.

9 MR. BIRNBAUM: The fear defendant
10 had regarding the motion -- regarding
11 the subpoena as a witness, that the
12 ultimate intent of such, was to place
13 the witness under the Rule to remove him
14 in his role as counsel.

15 Now, this motion could not address
16 this at that time, because no specific
17 attempt had been made to place him under
18 the Rule. Now that he is -- In other
19 words, an attempt is being made or a
20 ruling has been made, that he be under
21 the -- that he be under the Rule without
22 the input of the defendant regarding
23 thereto.

24 Therefore, I bring a motion -- You
25 know, an objection to the placing him

1 under the Rule, on the grounds that he
2 is essential. This is an argument, that
3 I could not have made, before the
4 attempt to make the ruling regarding
5 placing him under the rule. In other
6 words, there was --

7 THE COURT: That's all right. I'm
8 letting you make the argument now, so
9 you haven't lost anything by not having
10 made it earlier -- it wouldn't seem to
11 me.

12 MR. TIBIDEAUX: Haven't gained
13 nothing, either.

14 THE COURT: Did you want to be
15 heard? You were raising your hand,
16 so...

17 MR. BIRNBAUM: My point is that
18 according to a Rule regarding placing
19 witnesses under the Rule, I think some
20 Rule, number three -- is the last one on
21 it. That a party essential to this
22 thing shall not be placed under the
23 Rule, so...

24 THE COURT: If you show me where
25 Mr. Tibideaux is a party to this

1 lawsuit, I'll excuse him from the
2 Rule -- but he's not a party. In fact,
3 he, and you in his pleading, all
4 indicate that he is counsel.

5 MR. BIRNBAUM: Right, right, right.

6 THE COURT: If you will produce in
7 his behalf, a bar card showing that he's
8 licensed to practice law, I'll let him
9 come in and be a counsel. But he is not
10 authorized -- In fact, I'm not
11 absolutely positive, but he may be
12 committing a crime, Mr. Birnbaum, by
13 giving you legal counsel.

14 Now, there is a law in this state
15 against someone practicing law without a
16 license.

17 MR. BIRNBAUM: Okay. The
18 definition -- I mean this man is
19 obviously not practicing law, because I
20 don't heed his advice.

21 THE COURT: Because what?

22 MR. BIRNBAUM: Because I definitely
23 don't heed his advice. I use him as a
24 devil's advocate.

25 THE COURT: Well, I'm --

1 MR. BIRNBAUM: Never mind.

2 THE COURT: -- I'm not getting into
3 what you do with a man whom you
4 described as counsel, who described
5 himself as counsel. I'm not interested
6 in trying to ferment prosecution of him.

7 What I'm telling you is, is that
8 there is a law that makes it a crime to
9 do what Mr. Tibideaux may very well have
10 been doing.

11 I'm not present when he does it and
12 don't want to be. But there is a law
13 against him acting as a lawyer, whether
14 you take his advice or not. But the
15 minute you say that you don't heed his
16 advice, you pretty well acknowledge to
17 me that he's giving you advice -- and
18 therein, I suspect lies the crime.

19 Now let me go a step further. I
20 want the record to reflect, that I have
21 denied the Motion to Quash
22 Mr. Tibideaux's subpoena. Number two,
23 that I've placed Mr. Tibideaux under the
24 Rule. Number three, that Mr. Birnbaum
25 has objected to that, which objection I

1 overruled -- And number four, that
2 although Mr. Birnbaum didn't express
3 what I'm about to say, I want the record
4 to reflect his exception to my ruling.

5 Now, in the event there's an appeal
6 in this case, Mr. Birnbaum, the Court of
7 Appeals will have this entire matter
8 before them. If they agree with you,
9 you're in good shape.

10 MR. BIRNBAUM: I can abide by that.

11 THE COURT: That's fair enough.

12 MR. BIRNBAUM: My understanding is,
13 that during the -- when the evidence and
14 the rebuttal of the evidence -- In other
15 words, after the evidence is completed,
16 at that point, he is --

17 THE COURT: When both sides
18 close --

19 MR. BIRNBAUM: When both sides
20 close --

21 THE COURT: -- then all the
22 witnesses will be excused in general and
23 excused from the rule. They may come
24 into the courtroom and be spectators and
25 listen to the argument.

1 MR. BIRNBAUM: Listen to the
2 argument -- Thank you.

3 THE COURT: That's fair enough.

4 MR. RAY: Judge, Mr. Tibideaux was
5 never sworn.

6 THE COURT: That's true. Well, I
7 just got tired of swearing people. I
8 had to swear your client. I had to
9 swear those five. I had to swear -- I
10 think Mr. Birnbaum, so we'll get him
11 sworn -- but he's under the Rule.

12 MR. RAY: That's fine. As long as
13 he's advised and under the Rule, that's
14 the main thing I'm concerned about.

15 (WHEREUPON, Voir Dire was
16 concluded.)

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R E P O R T E R ' S R E C O R D

VOLUME _____ OF _____

Trial Court Cause No. 95-63

WILLIAM B. JONES * IN THE DISTRICT COURT
VS. * VAN ZANDT COUNTY, TEXAS
UDO BIRNBAUM * 294TH JUDICIAL DISTRICT

=====

APPEARANCES:

Attorney for Plaintiff:
Richard L. Ray
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(903) 567-2051
SBOT No. _____
Attorney for: William B. Jones

Defendant Pro Se:
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Pro Se for: Udo Birnbaum

=====

On the 26th day of May, 1998, continuing until
the 29th day of May, the above entitled and numbered
cause came on to be heard for trial in the said
Court, Honorable James Zimmermann, Judge Presiding,
and the following proceedings were held, to wit:

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P R O C E E D I N G S

TRIAL ON THE MERITS

MAY 28, 1998

THE COURT: All right. Let's bring the jury in and we'll hear the first witness. All right. Who do we have first, Mr. Ray?

MR. RAY: Your Honor, I call Mr. William B. Jones as the first witness.

THE COURT: The record will show him to be sworn.

* * *

WILLIAM B. JONES,
having been first duly cautioned and sworn upon his oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to wit:

* * *

DIRECT EXAMINATION

* * *

BY MR. RAY:

MR. RAY: Judge, give me just a moment to get a little bit organized. May I proceed, Your Honor?

THE COURT: Yes, sir.

1 Q. Mr. Jones, if you would, please state your
2 full name?

3 A. William Blake Jones.

4 Q. What is your address, Mr. Jones?

5 A. Route 1, Box 355, Eustace, Texas 75714.

6 Q. Now, you indicated you live on a Eustace
7 route, but are you located in Van Zandt County?

8 A. Yes. It's in Van Zandt County.

9 Q. If my understanding is correct, Eustace --
10 parts of it and it, itself, is located in Henderson
11 County?

12 A. Pardon?

13 Q. Eustace --

14 A. Yes, it is.

15 Q. But you live on a rural route?

16 A. A rural route -- Uh-huh.

17 Q. How long have you resided at that location,
18 Mr. Jones?

19 A. I moved there full time in '83. I purchased
20 the property in '72, and since have been there on
21 the weekends, up until '83 or '84, when I retired.

22 Q. Okay. You've indicated you retired, if you
23 would, are you retired from one occupation or more
24 than one occupation?

25 A. More than one.

1 Q. Okay, sir. If you would, tell the jury what
2 kinds of jobs you had in the past from which you're
3 retired?

4 A. I went into the Army when I was 18 and
5 retired in 1964 -- 24 years in the Army.

6 Q. Okay, sir. What was your rank when you
7 retired?

8 A. I retired as a Major.

9 Q. All right, sir. Did you serve in any wars
10 while you were in the service?

11 A. Sure did. World War II and Korean War.

12 Q. Were you in a combat range?

13 A. Yes, sir.

14 Q. What combat range?

15 A. I was in the infantry during World War II,
16 but I was in the Signal Corp during the Korean War.

17 Q. Okay, sir. You then indicated you also
18 apparently worked at another occupation, besides
19 being in the military?

20 A. Yes.

21 Q. What did you do after you retired from the
22 military?

23 A. When I first retired, I moved to Albuquerque,
24 New Mexico, and I opened a pet shop. I had it for
25 about six years, and sold it, and moved back to

1 Dallas, really, then -- and started to work for --
2 then, a bank at Harry Hines and Mocking Bird.

3 Q. What was the name of that bank, sir?

4 A. I'm trying to think of it right now. I
5 retired -- It was Texas American Bank, but it was an
6 exchange bank, when I went to work for them, that
7 was in the Braniff Building -- Frito-Lay Building,
8 there.

9 Q. All right, sir. You say you're retired from
10 Texas American?

11 A. Right.

12 Q. How many years did you work for that banking
13 entity, despite changing banks?

14 A. 14 years.

15 Q. What was your position there with the bank?

16 A. I was vice president.

17 Q. Do you recall what year you retired?

18 A. Yeah, '84.

19 Q. And that's when you moved to Van Zandt
20 County?

21 A. Yes, sir.

22 Q. Now, if you would, describe to the jury the
23 property on which you live in Van Zandt County,
24 concerning it's size and what you use it for?

25 A. Well, it's approximately 40 acres. I was

1 raising cattle. I did have some catfish tanks on
2 it. I raised some quails and pheasants for awhile.
3 I got to where I was a little too old to handle all
4 of that, so I cut down a little bit.

5 Q. Okay, sir. How many acres is located on your
6 property?

7 A. Sir?

8 Q. How many acres is in your property?

9 A. 36.

10 MR. RAY: May I approach the
11 witness, Your Honor?

12 THE COURT: Yes.

13 MR. RAY: Would you mark this as
14 Plaintiff's Exhibit 1.

15 (WHEREUPON, P-1 was marked for
16 identification.)

17 Q. Mr. Jones, I'm going to hand you a document,
18 and ask you if you can identify that?

19 A. Yes, sir. That's my deed, I guess.

20 Q. That's to the real property that you live on
21 now?

22 A. That's the property that I live on now.

23 Q. Okay, sir. What that, in fact is, is I think
24 it's the release of the final note payment on your
25 deed; is it not?

1 A. Pardon?

2 Q. It's the release on the final note payment on
3 your deed?

4 A. Yes -- Uh-huh.

5 Q. Does the description on that release indicate
6 fully the property that you own?

7 A. Yes, sir.

8 Q. Is that property located here in Van Zandt
9 County?

10 A. Yes, sir.

11 Q. Okay.

12 MR. RAY: Your Honor, we would
13 tender Plaintiff's Exhibit 1.

14 THE COURT: Any objection to that?

15 MR. BIRNBAUM: I beg your pardon?

16 THE COURT: He's offered
17 Plaintiff's Exhibit 1; do you have any
18 objection to it?

19 MR. BIRNBAUM: No.

20 THE COURT: It's admitted.

21 (WHEREUPON, P-1 was admitted.)

22 MR. RAY: Thank you, Your Honor.

23 Q. Mr. Jones, is your property situated, such
24 that you have a boundary line adjoining
25 Mr. Birnbaum?

1 A. I do.

2 Q. What direction are you located from
3 Mr. Birnbaum's property?

4 A. I'm west of his property -- Just a portion of
5 my property adjoins his. From the south, it adjoins
6 another person's property.

7 Q. Okay, sir. I take it you probably adjoin a
8 number of different property owners --

9 A. Yes, sir.

10 Q. -- from your own tract, but to the immediate
11 east, is that where Mr. Birnbaum's property is
12 located?

13 A. Right.

14 Q. About how long a section of fence do you
15 have, that's a common fence between yourself and
16 Mr. Birnbaum?

17 A. I'm just guessing, when I say four or five
18 hundred feet.

19 Q. Okay, sir. Is there a stream or a creek,
20 that flows through your property onto Mr. Birnbaum's
21 property?

22 A. One runs through my property to his property.

23 Q. Does that stream have a name?

24 A. I believe it's Steve's Creek.

25 Q. Steve's Creek. To give the jury kind of an

1 idea of what kind of a creek this is -- Is this a
2 creek that flows continually?

3 A. No, sir. In the dry weather season, it dries
4 up, except down close to his property line. I have
5 a spring-fed creek that comes into Steve's Creek,
6 which it flows down into his property, which flows
7 all the time.

8 Q. Okay, sir.

9 A. It never dries up.

10 Q. Have you and Mr. Birnbaum been adjoining
11 property owners, since the time you purchased the
12 property or do you know?

13 A. No. He didn't own it when I bought my
14 property. I'm not sure, but I think he bought it
15 from the man that owns it. But at the time he had
16 it leased to the neighbor there --

17 Q. Approximately how many years have you known
18 Mr. Birnbaum as an adjoining landowner?

19 A. Oh, I guess about '84 -- '85, since then I've
20 known him.

21 Q. Have you and Mr. Birnbaum essentially gotten
22 along as neighbors up until October of 1994?

23 A. Have we not gotten along?

24 Q. Have you gotten along? Had you had any
25 problems with each other?

1 A. Haven't had any dealings with him, except a
2 little, initially, when he first built his house
3 there -- then it stopped.

4 Q. Okay, sir. I think you've already testified,
5 but let me make sure that the jury understands this.
6 You have a home located on your acreage; don't you?

7 A. Right.

8 Q. Okay. I think you have in your hand --

9 MR. RAY: Judge, may I approach the
10 witness?

11 THE COURT: Yes.

12 Q. I think you have in your hand Plaintiff's
13 Exhibit 1. Before you completely roll it up and
14 destroy it, Mr. Jones, I'm going to get it out of
15 your hands, if that's all right.

16 A. Okay.

17 MR. RAY: Judge, I don't see any
18 need to pass this around to the jury,
19 but whenever the jury should want to
20 look at it, it's certainly available.

21 THE COURT: You have permission to
22 publish it.

23 MR. RAY: Judge, I think I'll just
24 go ahead and let them have an
25 opportunity to look at it, so they can

1 see -- in case any of them want to see
2 that he has the title to the property.

3 Q. On that property, you have a home located; is
4 that correct?

5 A. Yes, sir.

6 Q. Okay. Are you married or do you reside there
7 alone?

8 A. I'm divorced.

9 Q. Okay, sir. Do you have any animals on the
10 property at this time?

11 A. Oh, yes, sir. Two spoiled -- one cat and one
12 dog.

13 Q. Okay.

14 A. I had some cattle, but I've sold them so that
15 I can --

16 Q. When did you sell your last cattle, sir?

17 A. Last fall.

18 Q. Which would have been 1997?

19 A. Right.

20 Q. Okay. Now, let me back up again to my
21 original question to you. You and Mr. Birnbaum
22 hadn't had any disagreements or difficulties with
23 each other, prior to October of 1994; had you?

24 A. No.

25 Q. What transpired in October of 1994?

1 A. On approximately the 7th of October, I'm down
2 at the back part of my property, and the water is
3 all over the place. So I called a neighbor,
4 Mr. Leos, to come down and go over it with me, which
5 he did. We found it very -- water was coming out
6 all over the place. We walked down to another man's
7 property, and then back up the creek and saw a dam
8 there.

9 Q. How close was that dam located to the
10 property line?

11 A. Oh, I'd say 50 yards.

12 Q. I'm talking to the property line -- the
13 boundary line that separates you and Mr. Birnbaum?

14 A. Right. It was on his property, but about 50
15 yards from my property.

16 Q. Could you describe the dam to the jury,
17 please?

18 A. Well, it was a beaver dam. You could tell by
19 the chipped wood. They built up a little bank from
20 the edge of the dam, so they can keep the water
21 level up.

22 Q. Could you determine the height of the dam?

23 A. Well, standing back behind the dam, you know,
24 not the water side, but the dry side, it looked like
25 about five feet.

1 Q. Okay, sir. How long was the dam?

2 A. It was probably 75 feet.

3 Q. Was the dam retaining any water?

4 A. Yes, sir.

5 Q. I guess the best way for you to describe how
6 much water was being retained, would be in terms of
7 acres. Could you make that determination at that
8 time?

9 A. Well, at that time, it's probably four or
10 five acres that it was covering, and about -- oh,
11 six or seven inches in depth -- Now that's in
12 October.

13 Q. Is this in October of 1994?

14 A. '94.

15 Q. Okay. Now let me stop you there for the
16 moment. I believe your testimony is, that the dam
17 was located approximately 75 feet or something like
18 that -- or 75 yards from the property line; is that
19 true?

20 A. About 50, I'd say. I would say --

21 Q. Is it 50 yards or feet, Mr. Jones?

22 A. Pardon?

23 Q. 50 yards or feet?

24 A. Yards, yards.

25 Q. Okay. You indicated that it impounded about

1 four to five acres of water. How many of those
2 acres were acres on your property side, if any at
3 all?

4 A. I didn't hear all of it.

5 Q. How many of those acres, of the four or five
6 acres that was impounded in water, how many of those
7 acres were located in your property?

8 A. Four to five acres is what I'm saying. Now
9 his property, I don't know how many acres it come
10 to, but it was almost like a lake area in that part.

11 Q. Okay. Is Mr. Birnbaum's property down-stream
12 or up-stream from yours?

13 A. He's down-stream.

14 Q. Okay. So in other words, the water backed up
15 then onto your property?

16 A. That is true.

17 Q. After you found the location of the dam, what
18 action did you take then, sir?

19 A. Well, the next day, on the 8th of October, I
20 called Mr. Birnbaum and explained to him that the
21 beavers had damed up -- and the water was backing
22 up. I asked him if I had -- could get his
23 permission to go in there and hire a professional to
24 go in there and blow the dam and trap the beavers
25 out.

1 Q. Okay, sir. Did you and Mr. Birnbaum discuss
2 that by telephone?

3 A. That first time we did, yes.

4 Q. Okay, sir. Without telling me exactly what
5 Mr. Birnbaum said, himself, what was the results of
6 the conversation and the next step that you took?

7 A. Well, he said, "Let me think about it". I
8 said, "Fine". So I hung up. And -- Oh, about the
9 14th of October he called me. He says, "I'm going
10 to come over and look at that. Let's go down there
11 and look at that". I said, "fine".

12 A. Okay. Let me stop you there, because you
13 don't get to testify in the narrative form,
14 Mr. Jones; okay?

15 A. Okay.

16 Q. Let me ask the questions; all right?

17 A. Fine.

18 Q. Now, he indicated he was going to come see
19 you on the 14th?

20 A. Yes, sir.

21 Q. Did anything transpire, after he called you
22 to indicate that he was going to come see you, did
23 anything else happen until he did?

24 A. He come down to see me.

25 Q. Okay, sir. When did he come?

1 A. Right immediately after he talked to me on
2 the phone.

3 Q. Okay, sir. What did you and Mr. Birnbaum
4 physically do at that time?

5 A. We walked down there and went back to where
6 the dam was. We had to go through Mr. Birnbaum's
7 place to get to it, because there was so much water
8 there.

9 Q. How much water was the dam holding at that
10 time on October 14th -- in terms of acres?

11 A. I don't know.

12 Q. Well, had it receded any at that time?

13 A. Oh, no.

14 Q. Or had it enlarged?

15 A. Enlarged, yeah -- keeps enlarging everyday.

16 Q. When you and Mr. Birnbaum went down and
17 looked at the dam, did the two of you agree upon any
18 plan to resolve the problem of the dam?

19 A. Yeah. He said, "Leave it alone. Don't do
20 anything with it".

21 Q. What was your response?

22 A. I said, "Well, you know, I've got do
23 something. This water is not good".

24 Q. Now, where your home is located,
25 Mr. Birnbaum -- or Mr. Jones, I'm sorry? Where your

1 home is located, can you see the water that backed
2 up from the dam?

3 A. Yeah -- yes, sir.

4 Q. Is it easily visible?

5 A. Yeah. I'm on the hill and this is down-hill.

6 Q. What occurred next, after Mr. Birnbaum told
7 you he wanted to leave the dam there? What did you
8 do next?

9 A. Well, we came up to the house, where his car
10 was, and talked a little bit there. And he got very
11 upset, because I called those beavers "rodents". I
12 said, "Well" -- He says, again, "I'll let you know".
13 So I said, "Well, don't wait too long. I've got to
14 do something".

15 Q. Okay. When did you hear from Mr. Birnbaum
16 again?

17 A. I didn't.

18 Q. What next step did you take, then?

19 A. I came to Mr. Ray.

20 Q. Did you instruct me to send some letters for
21 you?

22 A. Yes, sir.

23 Q. Do you recall the date that you had me send
24 the letters?

25 A. Well, I think the first one was in November

1 and you gave him 30 days to reply.

2 MR. RAY: Your Honor, if I might
3 have a moment. May I approach the
4 witness, Your Honor?

5 THE COURT: Yes.

6 (WHEREUPON, Deposition Exhibit
7 No. P-2 was marked for
8 identification.)

9 Q. Mr. Jones, I'm going to hand to you what has
10 been marked as Plaintiff's Exhibit 2. I'll ask you
11 if you can identify that as being the letter to
12 which you referred?

13 A. Yes, sir. That's the letter to Mr. Birnbaum
14 on December the 7th, 1994.

15 Q. In your own terms, what is that letter
16 requesting?

17 A. Requesting that we resolve the matter of the
18 build-up of water.

19 Q. Okay, sir.

20 MR. RAY: Judge, I don't have a
21 copy of this to leave with the Court or
22 with Mr. Birnbaum, but at this time, I
23 would offer that letter into evidence.
24 I'd like to publish it to the jury, Your
25 Honor.

1 THE COURT: Show it to --

2 MR. RAY: I will Your Honor.

3 THE COURT: -- the defendant. Any
4 objection to that?

5 MR. BIRNBAUM: No.

6 THE COURT: It's admitted.

7 MR. RAY: Thank you, Your Honor.

8 (WHEREUPON, P-2 was admitted
9 into evidence.)

10 Q. Do you recall what response you received from
11 Mr. Birnbaum, from the letter I sent to him,
12 Mr. Jones?

13 A. Yes, sir.

14 Q. What was that response?

15 A. It was very confusing to me. It seemed like
16 he was getting on your case pretty good, rather than
17 mine.

18 Q. Did you personally receive any response from
19 him?

20 A. No, sir.

21 Q. In other words, the only response you
22 received came through my office?

23 A. Right.

24 Q. Did you instruct me to respond to that
25 letter?

1 A. Well, our agreement, when we first talked
2 about letters, is sending two letters giving him 30
3 days each -- then it was 60 days, you know, a total
4 of 60 days.

5 Q. Okay, sir.

6 MR. RAY: Your Honor, may I
7 approach the witness?

8 THE COURT: Yes.

9 (WHEREUPON, Deposition Exhibit
10 Nos. P-3 and P-4 were marked for
11 identification.)

12 Q. I'm going to hand you two items here.

13 A. Yes, sir.

14 Q. Mr. Jones, first of all, would you identify
15 that letter?

16 A. This is the letter to Mr. Ray, December the
17 26th.

18 Q. Is that Mr. Birnbaum's response to --

19 A. Right.

20 Q. -- our original letter to resolve the
21 problem?

22 A. Yes, sir.

23 Q. Okay, sir. I'm going to hand you what's been
24 marked as Plaintiff's Exhibit 4. Is that your
25 second later that you instructed me to write to

1 Mr. Birnbaum --

2 A. That is.

3 Q. -- responding?

4 A. It is.

5 Q. Okay.

6 A. You asked him to respond to it within 10 days
7 on this.

8 MR. RAY: Judge, you want me to
9 tender these to Mr. Birnbaum, since I
10 don't have copies to offer him?

11 THE COURT: Please.

12 THE COURT: Your Honor, I tender
13 these two letters to the Court.

14 THE COURT: Any objection,
15 Mr. Birnbaum?

16 MR. BIRNBAUM: No, sir.

17 THE COURT: Plaintiff's 3 and 4 are
18 admitted.

19 (WHEREUPON, P-3 and P-4 were
20 admitted.)

21 MR. RAY: Your Honor, I'd like to
22 go ahead and publish those to the jury,
23 if it's acceptable?

24 THE COURT: Yes.

25 (WHEREUPON, Deposition Exhibit

1 No. P-5 was marked for
2 identification.)

3 MR. RAY: Your Honor, may I
4 approach the witness, again?

5 THE COURT: Yes, sir.

6 Q. Mr. Jones, I'm going to hand you what's been
7 marked as Plaintiff's Exhibit 5. Can you identify
8 that letter?

9 A. This is a reply from Mr. Birnbaum to you.

10 Q. What's the date of the letter?

11 A. The date is January the 11th, 1995.

12 Q. Okay. Did suit follow shortly after that
13 letter?

14 A. Yes, sir.

15 Q. Okay.

16 MR. RAY: Your Honor, plaintiff
17 also tenders Exhibit 5.

18 THE COURT: Any objection to 5?

19 MR. BIRNBAUM: (No audible
20 response.)

21 THE COURT: Five is admitted. Hold
22 on a second -- "Yes" you do have an
23 objection or -- you nodded when I
24 asked --

25 MR. BIRNBAUM: What was the

1 question?

2 THE COURT: Do you have an
3 objection to Plaintiff's Exhibit 5?

4 MR. BIRNBAUM: No.

5 THE COURT: You need to vocalize
6 it, so the court reporter can hear you.

7 (WHEREUPON, P-5 was admitted.)

8 MR. RAY: Your Honor, may I publish
9 this letter?

10 THE COURT: Yes, sir.

11 Q. So the upshot of those efforts, Mr. Jones, is
12 that --

13 A. Pardon?

14 Q. Was the upshot of those efforts that suit was
15 filed?

16 A. Suit was filed -- Yes, sir.

17 Q. Okay, sir. That would have been sometime in
18 early 1995?

19 A. Right.

20 Q. That's the lawsuit that we're here on today?

21 A. That's why we're here today.

22 Q. Okay, sir. Did you also take some
23 photographs --

24 A. I sure did.

25 Q. -- of the property?

1 (WHEREUPON, Deposition Exhibit
2 Nos. P6-A thru P6-G were marked for
3 identification.)

4 MR. RAY: May I approach the
5 witness, Your Honor?

6 THE COURT: Sure.

7 Q. Mr. Jones, I'm going to hand to you seven
8 photographs. First of all, I want you to look at
9 all seven of those photographs, and tell me whether
10 those photographs accurately depict the scene as you
11 recall it?

12 A. Yes, sir.

13 Q. And you can identify the scene; can't you?

14 A. Yes, sir. That's my property.

15 Q. Do you know who took those photographs?

16 A. I took the photographs.

17 Q. Okay, sir.

18 MR. BIRNBAUM: Are these going to
19 be marked as exhibits?

20 MR. RAY: I'm fixing to offer them.

21 THE COURT: They're exhibits
22 numbered --

23 MR. RAY: They're exhibits numbered
24 6-A through 6-G, Your Honor. They
25 concern photographs taken on the date of

1 December 17th, 1994, as indicated on the
2 photographs. We would over those into
3 evidence.

4 THE COURT: 6-A through 6-G?

5 MR. RAY: Yes, sir.

6 THE COURT: Any objections to those
7 exhibits?

8 MR. BIRNBAUM: Point, can I also
9 offer those -- I just want to be sure we
10 can refer to those again, specifically.

11 THE COURT: If they're in evidence,
12 they can be --

13 MR. RAY: They're in evidence for
14 both sides, Mr. Birnbaum.

15 THE COURT: If they're in evidence,
16 they're in evidence for all purposes and
17 may be referred to by either side. Let
18 me take a look at them when you're
19 finished -- No. Go ahead -- when you're
20 finished.

21 THE COURT: You have no objection
22 to them?

23 MR. BIRNBAUM: No, sir.

24 THE COURT: 6-A through 6-G are
25 admitted.

1 MR. RAY: Thank you, Your Honor.

2 (WHEREUPON, P6-A thru P6-G
3 were admitted.)

4 THE COURT: That's not a very good
5 paper clip. It's the only one I've got
6 up here, so if that helps you.

7 MR. RAY: Thank you, Judge. Judge
8 if it's permissible, I'd like to
9 approach Mr. Jones to go over these
10 photographs with him, individually.

11 THE COURT: Sure.

12 Q. Mr. Jones, I'm handing to you what's been
13 marked as Plaintiff's Exhibit 6-A.

14 A. Yes.

15 Q. If you would, describe what you see in that
16 photograph?

17 A. That's part of Steve's Creek there.

18 Q. Can you determine the creek channel from that
19 photograph?

20 A. Yes. It goes right back into there. That's
21 Udo's property back into there -- and mine is on
22 into here.

23 Q. Okay, sir. Now "back there" and "over there"
24 doesn't translate too well for the jury.

25 A. That goes east -- That goes east. That's the

1 flow of the creek.

2 Q. The creek flows east?

3 A. Right.

4 Q. Okay. And from this photograph, you can see
5 Mr. Birnbaum's property in the background of the
6 photograph?

7 A. Right.

8 Q. And that's your property that's shows in the
9 foreground --

10 A. That's right. I'm standing on my property.

11 MR. RAY: May I publish these
12 photographs to the jury one at a time?

13 THE COURT: Yes.

14 MR. BIRNBAUM: Yes -- Oh, you're
15 asking the Judge?

16 MR. RAY: I'm asking the Judge.

17 Q. I'm handing to you now what is marked as
18 Plaintiff's 6-B. If you would, describe what is
19 shown in that photograph, Mr. Jones?

20 A. That's my property there. That's showing
21 back west of my property.

22 Q. Okay, sir. That's looking in the opposite
23 direction, in other words -- 6-A?

24 A. Yes.

25 Q. There's a good bit of water that's showing in

1 the photograph; is that correct?

2 A. That's right.

3 Q. Is that the impoundment of the water area
4 that you mentioned?

5 A. Yes.

6 Q. What's the greatest amount of acreage that's
7 been recovered by water, as a result of the
8 impoundment of water from the dam?

9 A. I'd say 10 to 12 acres.

10 Q. What's consistently the usual amount of
11 acreage?

12 A. That's covered?

13 Q. Yes, sir.

14 A. From day-one to the time that we took the
15 pictures, I would say that that's a good 10 acres
16 there.

17 Q. Okay, sir. All right.

18 A. Now further along we go --

19 Q. What did you utilize that property for before
20 it was flooded?

21 A. Pasture.

22 Q. Were you running cattle at that time?

23 A. Yes, sir.

24 Q. How many heads of cattle were you running?

25 A. I think about 25.

1 Q. I'm going to hand to you what's been marked
2 as Plaintiff's 6-C. If you would, describe what
3 that photograph indicates?

4 A. Well, in the foreground is my property. You
5 can see the fence line back here.

6 Q. In the very back of the photograph?

7 A. Yeah. That's Mr. Udo's -- Udo's property
8 over there.

9 Q. Where the tree line is?

10 A. Yeah. Well, his goes from the fence line,
11 even, back to the tree line.

12 Q. Okay, sir.

13 A. You can see most of the fence is knocked down
14 because of a --

15 Q. When you say, "the fence is knocked down",
16 why is the fence knocked down?

17 A. Well, it has been washed down -- washed out.

18 Q. Okay. Were there posts left standing?

19 A. Yes -- some.

20 Q. How much of the post protruded above the
21 waterline?

22 A. I'd say about yeah big.

23 Q. You're holding your hands --

24 A. About a foot --

25 Q. Okay.

1 A. -- or more.

2 Q. I'll hand to you what's been marked as
3 Plaintiff's Exhibit 6-D.

4 A. Uh-huh.

5 Q. Can you identify that photograph and tell me
6 what's in it?

7 A. Yes. This is Steve's Creek here -- and this
8 is on my property.

9 Q. All these pictures are taken on your
10 property; right?

11 A. Right. I never got on his property to take a
12 picture, no.

13 Q. Okay, sir.

14 A. That's almost the same picture that you
15 showed me a minute ago.

16 Q. Okay. That's another view of the acreage
17 that was --

18 A. Right.

19 Q. -- that was under water?

20 A. Right.

21 Q. Okay. That's Plaintiff's 6-D?

22 A. Right.

23 Q. Now this is Plaintiff's 6-F.

24 A. In fact, those two trees are still standing
25 down there. They're dead.

1 Q. What does that show, though?

2 A. That's my pasture that was washed out.

3 Q. This is the washed-out pasture?

4 A. Yeah.

5 Q. And has puddles standing in it?

6 A. Yeah -- still standing in it.

7 Q. What does photograph 6-G show?

8 A. That's just more of the same. That's all my
9 property up in there.

10 Q. That has standing water on it?

11 A. Yes, sir.

12 Q. Now, Mr. Jones, after we filed the lawsuit,
13 did the problem abate or alleviate itself at all?

14 A. Yes, sir. It immediately cleared up --
15 Steve's Creek.

16 Q. Do you have any reason to know why?

17 A. No, sir. I was not told why. I never knew
18 why. In fact, I talked to you on the phone about
19 that time, and suggested that we keep the lawsuit in
20 force, because we didn't want it to be repeated.

21 Q. I understand, sir. Are you seeking, in this
22 lawsuit, permanent or perpetual injunction to enjoin
23 Mr. Birnbaum from allowing dams or building dams on
24 his property to flood your property?

25 A. Yes, sir. That's the only way we can do it.

1 Q. Is that why you're determined to still
2 continue with the lawsuit, even after the problem
3 alleviated itself?

4 A. That's right. If you don't eliminate the
5 beavers, it's just going to cause it again. We got
6 some more pictures later where it did occur again.

7 (WHEREUPON, Deposition Exhibit
8 Nos. 7-A thru 7-D were marked for
9 identification.)

10 MR. RAY: My I approach the
11 witness, Your Honor?

12 THE COURT: Yes, sir.

13 Q. Mr. Jones, I'm going to hand you four
14 photographs, which are marked Plaintiff's 7-A, B, C
15 and D. I'm going to ask you, if you can identify
16 those photographs, and if those photographs
17 accurately depict the scene as you recall it?

18 A. Yes, sir.

19 Q. Look at all four of them.

20 A. Yes, sir. This is looking over --

21 Q. Before you testify about the photographs --

22 A. Okay.

23 Q. -- who took the photographs?

24 A. I did.

25 Q. It's indicated that you took these

1 photographs January 22nd, 1997; is that correct?

2 A. That's correct.

3 Q. You had taken the photographs on that date,
4 then?

5 A. Sir?

6 Q. You did take the photographs on that date,
7 January 22nd, 1997?

8 A. Yes, sir.

9 Q. Okay.

10 MR. RAY: Judge, Plaintiff would
11 offer these photographs marked 7-A, B, C
12 and D.

13 THE COURT: Any objection to 7-A
14 through D?

15 MR. BIRNBAUM: No objection.

16 THE COURT: They're admitted.

17 MR. RAY: Thank you, Your Honor.

18 (WHEREUPON, P-A thru P-D were
19 admitted.)

20 MR. RAY: May I approach the
21 witness again for testimony?

22 THE COURT: Yes, sir.

23 Q. Okay. Mr. Jones, I'm going to hand to you
24 what's been marked as Plaintiff's Exhibit A. If you
25 would, describe what that photograph shows.

1 A. This is the fence that's crossing Steve's
2 Creek. Now over on the east side of it is
3 Mr. Birnbaum's place -- on this side is mine. As
4 you can see, the water is building up back in here
5 to a pretty good amount.

6 Q. Okay. This water building up on the other
7 side of the fence --

8 A. Right.

9 Q. -- that's the purpose for this photograph?

10 A. Right.

11 Q. So in other words, the problem is beginning
12 again?

13 A. That's right. It's starting again.

14 Q. All right. I'm going to hand you what's
15 marked as Plaintiff's Exhibit 7-B. What is that?

16 A. This is Steve's Creek. You see it's coming
17 out of this bank.

18 Q. Where is it coming out of this bank in this
19 photograph?

20 A. On both sides. The creek is running this
21 a-way, and you can see it coming out here and over
22 on that side.

23 Q. Okay. This is located on your property?

24 A. That's on my property.

25 Q. Is there any overflow brush or trash or

1 anything shown in that photograph?

2 A. Yes, sure is -- a bunch of it, there and
3 there, across this a-way.

4 Q. I'm going to hand you what's been marked as
5 Plaintiff's Exhibit 7-C. Can you tell me what that
6 photograph indicates?

7 A. Well, beavers make a run, where they carry
8 their logs, from where they cut them down to the
9 place they're building the dam or to their hut.
10 This is showing some of the slews of runs that they
11 make and the damage that they do to property.

12 Q. This is your property?

13 A. That's my property there.

14 Q. In Plaintiff's Exhibit 7-C?

15 A. Right.

16 Q. And that's showing one of the slews or slides
17 where --

18 A. Right. In other words, they'll cut a tree
19 down, and then they'll float it back to where they
20 want to take it.

21 Q. Okay, sir. I hand to you what's marked as
22 Plaintiff's Exhibit 7-D. If you would, identify
23 what's in that photograph?

24 A. This is still on my property -- right close
25 to Mr. Birnbaum's place. His is right over on the

1 other side of this tree -- and the water is coming
2 out onto the banks there.

3 Q. Okay. So have you had an additional build-up
4 or impoundment of water again, since it alleviated
5 itself right after the suit was filed?

6 A. Well, that time -- And then there was one
7 other time that didn't -- It got up part way and
8 then it disappeared. I don't know how or why.

9 Q. Has your property been flooded again, though,
10 since then?

11 A. No, sir.

12 Q. What happened to the property that was
13 flooded?

14 A. What happened to it?

15 Q. Yes, sir. What's it's condition now?

16 A. Poor condition.

17 Q. What was its condition prior to the flooding?

18 A. It was good pasture land. It was -- I had
19 Coastal Bermuda in there. It was a very good
20 pasture -- with only having 30 some odd acres, 10
21 acres is a big cut out of my pasture ability.

22 Q. What happened to the Coastal Bermuda that was
23 underneath the water?

24 A. It's ruined. It's not even there any more.

25 Q. Do you have any kind of sod down there at

1 this time or is it weeds?

2 A. Well, its weeds, mostly -- and little trees,
3 you know, Willow trees and stuff coming up. When
4 it's a lot of weather, Willow trees come up like
5 mad.

6 Q. In your opinion, what was the value of that
7 10 acres of property, prior to it being flooded, per
8 acre?

9 A. I would say 10 thousand.

10 Q. How much per acre?

11 A. About a thousand an acre.

12 Q. Okay, sir. What's it's value now?

13 A. Pardon?

14 Q. What's it's value now?

15 A. I'd have to spend 10 thousand to get it fixed
16 to sell it.

17 Q. So how much do you think your loss on that
18 acreage was?

19 A. I'd say 10 thousand.

20 Q. Did you ever discuss with anyone, going on to
21 the property and removing the beavers?

22 A. Yes, sir.

23 Q. Who?

24 A. Mr. Steve Epperson, who is a professional
25 trapper.

1 Q. Okay, sir. When did you talk to
2 Mr. Epperson?

3 A. I talked to him between the time I called
4 Mr. Birnbaum on -- I called him on the 8th of
5 October. I think it was about the 9th or 10th of
6 October, that Steve came over and we went back and
7 looked at that property.

8 Q. Okay, sir. You and Mr. Epperson went over
9 there and looked at it?

10 A. Pardon?

11 Q. You and Mr. Epperson went over there and
12 looked at it?

13 A. Right.

14 Q. This is before you met with Mr. Birnbaum on
15 October 14th?

16 A. That's right.

17 Q. Did you make any plans with Mr. Epperson to
18 relieve the problem?

19 A. Well, Mr. Epperson said that he couldn't do
20 it, unless he had a release from Mr. Birnbaum. He
21 left with me a little release form to get him to
22 sign.

23 Q. Okay, sir. Did you present that release form
24 to Mr. Birnbaum, to allow Mr. Epperson to go in
25 there and remove the beavers?

1 A. He wouldn't accept it.

2 Q. Did you present it to him?

3 A. No, I didn't.

4 Q. Did you discuss it with him?

5 A. Yes.

6 Q. Did you show him the release form?

7 A. I don't think I did.

8 Q. Did you talk to Mr. Birnbaum about
9 Mr. Epperson?

10 A. Sure did.

11 Q. What did you tell Mr. Birnbaum concerning
12 Mr. Epperson?

13 A. Well, I was telling him -- Oh, about six
14 months before, I had a beaver dam on my property.
15 Mr. Epperson came and took care of it for me. That
16 he -- He first goes in and traps them, and then he
17 blows the dam and the lodge -- and that draws the
18 water off pretty fast.

19 Q. So did he clear your property up?

20 A. Yes, he did.

21 Q. Do you know whether you eradicated all the
22 beaver or whether some of them went down-stream?

23 A. No, I didn't. He got 11 of them when he
24 trapped them, but there's probably 50 more in that
25 stream. The stream that goes up north of his

1 house -- on his property crosses 1256 and they've
2 got a dam right there by a bridge there at 1256.

3 Q. Is that located also on Mr. Birnbaum's
4 property?

5 A. No, sir. That's the State Highway
6 Department.

7 Q. Okay. Mr. Jones, is your unhappiness with
8 this turn of events because the original beaver dam
9 occurred?

10 A. Because of the original?

11 Q. Yes or -- Listen to me -- because it can't be
12 relieved and solved later?

13 A. That's my biggest concern -- is that these be
14 erradicated, so we can live in peace without them.

15 Q. Is it your understanding from Mr. Birnbaum,
16 that it's not his intention to disturb the beaver at
17 all?

18 A. That's right. That is right.

19 Q. So as a result, you'll continue to have this
20 flooding on your property?

21 A. Unless we go in there and trap them out.

22 Q. Did you offer to pay for the cost?

23 A. I sure did.

24 Q. What was Mr. Birnbaum's response?

25 A. He wouldn't even answer. He said, "Leave the

1 dam alone".

2 Q. In what condition is Mr. Birnbaum's property,
3 as you view it from your property site?

4 A. Well, he's got that portion fenced off. It's
5 all woods and brush and stuff. Now, his property on
6 up where he runs his cattle and so forth, is in good
7 shape -- but that doesn't adjoin my property. It's
8 only woods and brush that joins mine on out to the
9 next road across.

10 Q. Okay, sir.

11 MR. RAY: I pass the witness, Your
12 Honor.

13 THE COURT: Mr. Birnbaum?

14 MR. BIRNBAUM: May I approach the
15 bench?

16 (WHEREUPON, the following
17 discussions were held at the
18 bench.)

19 MR. BIRNBAUM: About procedure --
20 reserving the right to recall, up to
21 what point does that extend? In other
22 words, hypothetically, I asked him some
23 questions and want to reserve the right
24 to cross-examine him later.

25 THE COURT: You can do that any

1 time before both sides close.

2 MR. BIRNBAUM: So there is not a
3 certain number of appearances of him --
4 that means that when the -- in
5 presenting the evidence -- In other
6 words, have him come back to testify
7 regarding to some other evidence that
8 the jury has heard; is that correct?
9 Can I present evidence that --

10 THE COURT: You can cross-examine
11 him now --

12 MR. BIRNBAUM: Yes.

13 THE COURT: -- or you can reserve
14 cross-examination until some later time,
15 which would be when you're putting your
16 evidence on.

17 MR. BIRNBAUM: Right.

18 THE COURT: In other words, you
19 can't --

20 MR. BIRNBAUM: That is correct.

21 THE COURT: You can't intrude
22 into --

23 MR. BIRNBAUM: His evidence.

24 THE COURT: Yeah.

25 MR. BIRNBAUM: Okay -- right,

1 right. But when I present my evidence,
2 in that particular time -- okay. And in
3 presenting my evidence, I can rely on
4 the exhibits before the Court; is that
5 correct?

6 THE COURT: Well, I'm not sure I
7 understand what you're --

8 MR. BIRNBAUM: Can I call for his
9 exhibits?

10 THE COURT: The exhibits that have
11 been introduced into evidence?

12 MR. BIRNBAUM: Yeah.

13 THE COURT: They're in evidence.

14 MR. BIRNBAUM: They can be shown to
15 the jury again when I examine my
16 witnesses?

17 THE COURT: Certainly.

18 MR. BIRNBAUM: Certainly -- Okay.

19 THE COURT: If you want to
20 cross-examine him now you may do so.

21 MR. BIRNBAUM: Or some.

22 THE COURT: Or if you want to wait
23 until later to cross-examine him, you
24 may do that. Now what I don't want, I
25 don't want him on the stand and then

1 recalled, and then -- I don't want to
2 have him on and off the stand five or
3 six times.

4 MR. BIRNBAUM: No, sir.

5 THE COURT: But if you want to wait
6 and cross-examine him later during your
7 turn, you're welcome to do that.

8 MR. BIRNBAUM: Okay. If I can make
9 a few cross-examinations and reserve the
10 right to cross-examine later -- or does
11 it all have to be at one time?

12 THE COURT: No. You can recall him
13 later.

14 MR. BIRNBAUM: What I intend to do
15 is cross-examine on a few things --

16 THE COURT: You don't need to tell
17 me what you want to do.

18 MR. BIRNBAUM: Thank you.

19 CROSS EXAMINATION

20 BY MR. BIRNBAUM:

21 Q. Mr. Jones, do you have water problems now?

22 A. What did you say?

23 Q. Mr. Jones, do you have water problems now?

24 A. No, not now.

25 Q. Mr. Jones, since what time have you not had

1 water problems?

2 A. What time have I what?

3 Q. Since what time --

4 A. You have to speak up. I can't hear you. You
5 can come around over here, I guess.

6 MR. RAY: Judge, maybe I should
7 lodge my normal objection at this point.
8 I request that counsel remain at counsel
9 table, except from permission of the
10 Court to approach the witness.

11 THE COURT: Well, that is the
12 rule -- And customarily, Mr. Birnbaum,
13 you examine and cross-examine witnesses
14 from the counsel table, but given the
15 fact that the witness has a hearing
16 problem and you have a very soft
17 voice --

18 MR. BIRNBAUM: I can speak louder.

19 THE COURT: In that event, you can
20 take your seat and raise your voice. If
21 you need to be near the witness, so that
22 you can be heard, just ask me, I'll
23 permit you to do that. Right there is
24 fine. Just keep your voice up to where
25 Mr. Jones can hear you.

1 MR. BIRNBAUM: Okay.

2 MR. RAY: Your Honor, we have no
3 objection to that.

4 THE COURT: That's fine.

5 Q. Mr. Jones, can you hear you?

6 A. Yeah, I can hear you.

7 Q. Mr. Jones, do you have water problems now?

8 A. No. I do not have water problems now.

9 Q. Mr. Jones, when did you first not have water
10 problems, again?

11 A. Well, there had been three different times
12 that we had water problems. Now the last time was
13 about a year ago. It didn't come up high. It
14 didn't come up as high as it did the previous two
15 times.

16 Q. Now when you say "water problems", are you
17 complaining about flooding?

18 A. Yes -- yes. I'm not complaining about the
19 creek, because the creek goes up and down, you
20 know -- but flooding is what I was talking about.

21 Q. Mr. Jones, are you surprised to see flooding
22 in Steve's Creek?

23 A. I am when it's a spring-fed creek coming into
24 it.

25 Q. Okay. Thank you.

1 MR. BIRNBAUM: Your Honor, pardon
2 the inconvenience. I'm having problems
3 with Plaintiff's answers to
4 interrogatories, because the answers are
5 not tied to the questions -- and I've
6 got to flip back and forth to get it,
7 but let me --

8 Q. Mr. Jones, did I ever -- Did I ever do
9 anything to help you solve or mitigate any of your
10 water problems?

11 A. Not that I know of.

12 Q. In other words, I never assisted you in any
13 way?

14 A. Never -- as far as I know.

15 Q. Okay. I never assisted you in any way?

16 A. No.

17 Q. Did I ever -- Okay. Did you take any actions
18 to resolve water problems?

19 A. Physically, I did not, because you told me
20 not to -- and it was on your property. I could not
21 trespass on your property and do anything.

22 Q. Mr. Jones, did you ever do anything to
23 mitigate water problems on your property?

24 A. I couldn't. It was coming from your
25 property. That's what this is all about.

1 MR. BIRNBAUM: Your Honor, I would
2 like a question to refer to Exhibit 6-A
3 and 6-G -- and have the witness testify
4 thereto.

5 THE COURT: Those are the pictures,
6 I believe.

7 MR. RAY: I'm going to go ahead and
8 separate them, if that's permissible --
9 so he'll have them all.

10 Q. Mr. Jones, is that the previous exhibit?

11 A. Yes, sir.

12 Q. Okay. And you testified that -- Read the
13 date that's on the back of this.

14 A. December the 17th, 1994.

15 Q. Were you having water problems at that time?

16 A. Yes.

17 Q. Mr. Jones, where is the water?

18 A. Here's your water.

19 Q. Okay.

20 A. Right there.

21 Q. Okay. You can have it. Mr. Jones, does the
22 creek flow from your side to mine or from my side to
23 yours?

24 A. It flows from my side to your side.

25 Q. Totally; right?

1 A. Well, it can't back up, no, sir.

2 Q. Okay. So the only way water can get to your
3 side for it to back up -- but it does not normally
4 flow from my side to yours?

5 A. That's right. It doesn't normally flow from
6 your side -- east to west. It flows west to east.

7 Q. Okay. Mr. Jones, you testified that my land
8 is wooded in that area; is that correct?

9 A. Right.

10 Q. Okay. The water flows from your side to my
11 side; is that correct?

12 A. That is correct.

13 Q. Okay. Okay -- And my side is wooded?

14 A. What does that got to do with it?

15 Q. Mr. Jones, do you see a lot of sand and other
16 things on this exhibit?

17 A. That's on my land.

18 Q. That's what I'm saying.

19 A. I'm not saying mine is wooded -- certainly
20 it's sand.

21 Q. Mr. Jones, you agree my land is wooded?

22 A. That portion of it that joins me is, yes.

23 Q. Your land is?

24 A. Well, it's got some woods on it.

25 Q. Okay. But the water only flows from your

1 side to mine?

2 A. Yeah.

3 Q. Is that correct?

4 A. The normal flow of water goes from my side to
5 your side.

6 Q. Does water ever flow from my side to yours?

7 A. Well, it backs up if it's dammed up down
8 there.

9 Q. Okay. In other words, you're saying that
10 water can back up from my side to yours, but it
11 cannot actively flow like a creek flows? The creek
12 flows in the other direction; right?

13 A. That's right.

14 Q. Do you see some whitish-sand in there,
15 Mr. Jones?

16 A. What does that have to do with this? It's
17 dirt. I don't know whether it's sand or not.

18 Q. Well, what is it, Mr. Jones?

19 A. Well, it's dirt.

20 Q. They're your pictures, Mr. Jones.

21 A. There's some sand right at the creek -- Along
22 the banks of the creek there's sand, but then
23 further back it's dirt.

24 Q. Okay.

25 A. Some of it is --

1 Q. Mr. Jones, where did the sand come from?

2 A. Well, it washes down from the creek, but if
3 we get a big rain, it floods down the creek.

4 Q. Does it wash from my side to yours or your
5 side to mine?

6 A. How many times do I have to answer it? It
7 flows from my side to your side.

8 Q. If the water flows from your side to my side,
9 Mr. Jones, how can the sand wash from my side to
10 yours?

11 A. I didn't say the sand washed from your side
12 to mine. I didn't say anything about sand washing
13 down from your side to my side -- I'm talking about
14 water.

15 Q. I was addressing the matter of the sand.
16 Where did the sand come from, Mr. Jones?

17 A. Where did the sand come from? I guess God
18 made it. I don't know.

19 Q. No -- Where did that sand in there come from?

20 A. There's been sand there from -- every since
21 I've been around the place.

22 Q. Have you taken any action -- Have you taken
23 any action on your property, to resolve any water
24 problems, by the time these pictures were taken?

25 A. No.

1 Q. Mr. Jones, did you ever have a bulldozer on
2 your property?

3 A. Several other times.

4 Q. Was that before this or after this?

5 A. After. It couldn't go on there now with it
6 there, because it's so wet -- they'd stick. There
7 was a bulldozer on there when we discovered that dam
8 was backing up, and they got stuck and had to get
9 somebody to pull them out.

10 Q. Okay. Come back to the question. Do you
11 have water problems now?

12 A. No.

13 THE COURT: You've asked that.

14 Q. Okay. Did I ever assist you in solving your
15 water problems?

16 A. You solved nothing. You never assisted
17 nothing, zero.

18 Q. But you have no water problems now?

19 A. I don't know whether you assisted or not.
20 Now, if you did something, I don't know that, you
21 know. You don't tell anybody that you did anything;
22 did you? Did you call and tell me that you had
23 solved the problem?

24 Q. I contend the witness of your own problem.

25 A. Oh, come on now.

1 Q. Okay. You said that it was good pasture land
2 prior to flooding?

3 A. Sure was.

4 Q. Good pasture land prior to flooding?

5 A. Sure was.

6 (WHEREUPON, someone walked

7 into the courtroom.)

8 THE COURT: Mr. Ray? Not a
9 witness?

10 MR. RAY: No, Your Honor.

11 Unfortunately, that's just another
12 lawyer.

13 Q. Mr. Jones, on the date the suit was filed --
14 Do you remember the date that the suit was filed?

15 A. Not really.

16 Q. Approximately.

17 A. No, not even approximately.

18 Q. Was it before this or after this?

19 A. It was after.

20 Q. Okay.

21 A. I believe the suit was filed in February, if
22 I'm not mistaken. I don't remember what day it was.

23 Q. Okay. Mr. Jones, you stated that you had
24 not -- You stated that at this time, at this date,
25 you had not done anything to -- done anything major

1 on your land to address water problems?

2 A. What could I do? You told me to leave the
3 dam alone.

4 Q. Mr. Jones, I'm asking you, had you done
5 anything to resolve -- relevel water problems prior
6 to this?

7 A. You mean before this --

8 Q. Before these pictures.

9 A. No. What could I do? I'd done nothing, no.
10 I did nothing.

11 Q. Mr. Jones, you said you got somebody in there
12 to blow some sort of something up. I remember --

13 A. Pardon?

14 Q. I remember hearing the words to blow
15 something up in there.

16 A. Oh, I had beaver problems, myself -- And that
17 was long before this, though.

18 Q. But you did blow the beaver dam up -- or
19 somebody did?

20 A. Yes. I said right here, that he went in and
21 trapped them out, and he blew the dam and the
22 lodges.

23 Q. Mr. Jones, where was the lodge?

24 A. It was on Stephen's Creek. It was -- oh,
25 probably about 50 yards from your property -- up

1 west.

2 Q. The lodge was on your property; right?

3 A. At that time, yes.

4 Q. Okay.

5 THE COURT: Let me interrupt you
6 just a moment, Mr. Birnbaum. I want to
7 get one thing clear --

8 MR. BIRNBAUM: Yes, sir.

9 THE COURT: -- so the jury doesn't
10 get confused, because I'm right on the
11 verge of it, myself. The dam that you
12 just testified about having blown up,
13 that's not the same dam that we're --

14 MR. BIRNBAUM: No, sir.

15 THE COURT: -- down here to
16 litigate about?

17 MR. BIRNBAUM: No, sir. It sure
18 isn't it.

19 THE COURT: Okay. I just want to
20 be -- I didn't think that it was.

21 MR. JONES: It was on my property
22 line.

23 THE COURT: I understand. I just
24 want to be sure that the jury didn't get
25 too confused. Go ahead.

1 BY MR. BIRNBAUM:

2 Q. Okay. But there had been a dam on your
3 property, which was a beaver dam, which you had
4 blown up?

5 A. And had beavers trapped.

6 Q. But it had already been blown up; right?

7 A. Yeah.

8 Q. Okay. When you blew it up, was there water
9 behind it at that time?

10 A. Yeah.

11 Q. Where did all the water go, Mr. Jones?

12 A. Down-stream.

13 Q. On my property; right?

14 A. Yeah -- Through your property, on through it
15 and through somebody else's, too.

16 Q. Did it go through any of your property?

17 A. Some of it did, yeah.

18 Q. Did it leave any sand on your property?

19 A. No -- no more than a heavy rain does.

20 MR. BIRNBAUM: I pass and reserve
21 the right to recall the witness.

22 MR. RAY: Judge, I have just a few
23 more questions.

24 REDIRECT EXAMINATION

25 BY MR. RAY:

1 Q. Mr. Jones, some creeks are not well-defined
2 creek beds. How would you describe Steve's Creek as
3 it crosses your property? Does it have a
4 well-defined channel or not?

5 A. Yes, very wide. In fact, on a normal flow of
6 the stream, it's probably four or five foot higher
7 than the water is in it.

8 Q. In other words, the bed is about a four or
9 five foot depth as it runs through?

10 A. Right, right.

11 Q. Okay. Did the overflow water, that came from
12 Mr. Birnbaum's side of the property, cause you
13 irreparable injury, and since that you don't have
14 anything that you can do to stop it or control it?

15 A. No, sir. I couldn't stop it or control it.

16 Q. Did you and I enter into an attorney fee
17 agreement for my representation on this case?

18 A. Sure did.

19 Q. And do you recall the hourly rate we agreed
20 to?

21 A. Yes, sir.

22 Q. How much was that, sir?

23 A. \$125.00 an hour.

24 Q. Okay, sir. And you've already paid me a
25 substantial amount of money; haven't you?

1 A. I paid you \$7,500.00 plus \$600 for the
2 deposition.

3 Q. Okay, sir.

4 A. So that's 8,100.

5 Q. And that's what you paid me thus far to cover
6 my services?

7 A. Right -- probably more as this drags on.

8 Q. Are you asking in damages, to the damage to
9 your property, of 10 thousand dollars?

10 A. Yes, sir.

11 MR. RAY: I pass the witness, Your
12 Honor.

13 THE COURT: We'll take a short
14 recess. Let the jury get up and shuffle
15 about. We'll resume in 15 minutes.

16 THE COURT: The next witness will
17 be Ignacio Leos?

18 MR. RAY: Leos -- yes, sir.

19 THE COURT: I think he's out in the
20 hall. All right. Go and get him.

21 * * *

22 IGNACIO LEOS,
23 having been first duly cautioned and sworn upon his
24 oath to tell the truth, the whole truth, and nothing
25 but the truth, testified as follows, to wit:

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* * *

EXAMINATION

* * *

BY MR. RAY:

THE COURT: Mr. Leos, you were sworn earlier; were you not?

THE WITNESS: Yes, I was.

THE COURT: Have a seat right there, please, sir. Hold on a second, Mr. Ray.

THE COURT: Go ahead.

MR. RAY: Thank you, Your Honor.

Q. Mr. Leos, would you please state your full name?

A. Ignatio Leos.

Q. For purposes of the Court record, would you spell your first name?

A. I-g-n-a-c-i-o.

Q. And your last name?

A. L-e-o-s.

Q. L-e-o-s. Where do you reside, Mr. Leos?

A. I reside at Route 1, Box 353, Eustace. It is next door to Mr. Jones.

Q. You say you're an adjoining neighbor or land owner to Mr. Jones?

1 A. Yes.

2 Q. About how far away is your home from his
3 home?

4 A. I would say two -- two and a half city
5 blocks.

6 Q. Okay. But ya'll don't live in the city; do
7 you?

8 A. No, sir -- no. The distance, the distance.

9 Q. There's nothing in between your house and his
10 house; is there?

11 A. Right.

12 Q. Except for fence and land; right?

13 A. Right.

14 Q. Okay. How many acres do you own adjoining
15 Mr. Jones?

16 A. Thirty-six.

17 Q. Okay. And ya'll are in a rural area; are you
18 not?

19 A. Yes, we are.

20 Q. Do you have any animals that you keep?

21 A. Yes, I do.

22 Q. What?

23 A. I've got cows and one horse.

24 Q. Which direction are you from Mr. Jones'
25 property?

1 A. I'm south of Mr. Jones.

2 Q. Does Steve's Creek flow through your
3 property?

4 A. Yes, sir.

5 Q. Do you have a spring that feeds Steve's Creek
6 that flows through your property?

7 A. Yes, sir, I do.

8 Q. Have you had any difficulty with overflow as
9 a result of the damming up somewhere along Steve's
10 Creek?

11 A. Yes, I did.

12 Q. In what way?

13 A. Well, I noticed that my water was spreading
14 out to the sides -- and I didn't know what was the
15 problem. So I hired a back hoe to come dig all
16 my -- and make my creek deeper, but didn't help it
17 any.

18 Q. Okay, sir. Now let me see if I understand
19 what you said, first. You said the water was
20 spreading out to the sides; is that correct?

21 A. Yes, sir -- running over the banks.

22 Q. Running over its banks. I take it, then, it
23 was flooding out of the banks?

24 A. Yes.

25 Q. Did you attribute this to rainfall?

1 A. Well, I didn't know what was the problem with
2 it.

3 Q. Did you have any rainfall when that occurred?

4 A. No, I didn't.

5 Q. So it's my understanding you dug out the
6 creek bed?

7 A. Yes, I did.

8 Q. You still had the overflow problem
9 afterwards?

10 A. Yes, sir.

11 Q. Okay. Did you ever discuss the overflow
12 problem with Mr. Jones?

13 A. We did later on.

14 Q. Do you recall when?

15 A. Well, I believe he came to me and he -- he
16 wanted me to come over to check his problem, and
17 that's when I found out that the -- it was dammed up
18 down below further below him.

19 Q. Okay, sir. Did you ever see the dam in
20 question?

21 A. Yes, I did.

22 Q. Would that have been in October of 1994?

23 A. Yes, sir.

24 Q. What was the condition of Mr. Jones' property
25 when you went down to look at the dam?

1 A. Well, I was checking around and I had water
2 to about my knees.

3 Q. Was this on Mr. Jones' property?

4 A. Yes, sir.

5 Q. Do you have an idea of how many acres of
6 Mr. Jones' property was covered with water?

7 A. I would say 12, 15.

8 Q. Okay, sir. Did you go physically onto the
9 adjoining property owner's land where the dam was
10 located?

11 A. Yes, sir.

12 Q. Do you know who owned that property?

13 A. Yes, sir.

14 Q. Is that Mr. Birnbaum, who's seated here in
15 the courtroom today?

16 A. Yes, sir.

17 Q. Did you know Mr. Birnbaum at that time?

18 A. Yes, I did.

19 Q. Have you ever discussed this problem with
20 Mr. Birnbaum?

21 A. No, sir.

22 Q. Do you recall about how far the dam was
23 located from Mr. Jones' and Mr. Birnbaum's property
24 line -- what distance?

25 A. I would say 150 feet.

1 Q. Okay, sir.

2 MR. RAY: May I approach the
3 witness, Your Honor?

4 THE COURT: Yes.

5 (WHEREUPON, Deposition Exhibit
6 No. P-8 was marked for
7 identification.)

8 Q. Mr. Leos, can you identify that photograph or
9 does it accurately depict the scene as you recall
10 it?

11 A. Yes, sir, it is. That's me on the front.

12 Q. That's you on the front of the photograph, so
13 obviously you did not take this picture. Who took
14 this picture?

15 A. Mr. Jones.

16 Q. Okay. On the reverse side of this
17 photograph, it indicates September 7th, 1996?

18 A. Yes, sir.

19 Q. Okay.

20 THE COURT: What's that number
21 again, Mr. Ray?

22 MR. RAY: Exhibit 8-A, Judge --
23 Plaintiff's 8, Judge, just Plaintiff's
24 8.

25 THE COURT: Plaintiff's 8A?

1 MR. RAY: No, sir. It's just
2 Plaintiff's 8.

3 THE COURT: Plaintiff's 8. Any
4 objection to Plaintiff's 8,
5 Mr. Birnbaum?

6 MR. BIRNBAUM: No objection, Your
7 Honor.

8 THE COURT: Plaintiff's 8 is
9 admitted.

10 (WHEREUPON, P-8 was admitted)

11 MR. RAY: Thank you, Your Honor.

12 MR. BIRNBAUM: No objection.

13 Q. Mr. Leos, this picture indicates that it was
14 taken, I take it, on the date that's written on the
15 back?

16 A. Yes.

17 Q. That's September 7th, 1996?

18 A. Yes, sir.

19 Q. Now, that's sometime later than the October
20 1994 date, you testified to about the overflow?

21 A. Yes, sir.

22 Q. What was the purpose of this picture and what
23 does it show?

24 A. Well, it's still -- When we went back to
25 check the problem and we still -- You can see where

1 the water, how high it is, and it's standing all
2 over in the field.

3 Q. Okay, sir. Is this on Mr. Jones' property or
4 on your property?

5 A. That's on Mr. Jones' property.

6 Q. Okay, sir.

7 MR. RAY: May I publish this to the
8 jury, Your Honor?

9 THE COURT: Yes, sir.

10 (WHEREUPON, P-8 was published
11 to the jury at this time.)

12 MR. RAY: Pass the witness, Your
13 Honor.

14 THE COURT: Mr. Birnbaum?

15 CROSS EXAMINATION

16 BY MR. BIRNBAUM:

17 Q. Ben -- or Mr. Leos, can you hear me?

18 A. Yes, sir.

19 Q. I didn't ask all the things as to which
20 damage you were testifying to just then. Where
21 was --

22 MR. RAY: Your Honor, I can't hear
23 Mr. Birnbaum.

24 MR. JONES: I can't either.

25 Q. Okay. What dam were you testifying to before

1 you got to that picture?

2 A. Dam?

3 Q. I believe you were testifying about some dam.

4 A. Well, at one time, I crossed the fence and
5 went over to your property, and saw where it was
6 dammed up.

7 Q. Okay. What did you see?

8 A. I saw where it was dammed up with beavers.

9 Q. Was that before you talked to Mr. Jones or
10 after you talked to Mr. Jones?

11 A. That's when I went down with Mr. Jones.

12 Q. So you talked to Mr. Jones before you came
13 down to my property?

14 A. Yes.

15 Q. Did you talk to me before you came down to my
16 property?

17 A. No, sir.

18 Q. Okay. You said you had some water problems
19 on your land; is that right?

20 A. Yes, sir.

21 Q. Okay. Would you describe the water problems
22 that you had, again?

23 A. Well, I got a live-spring creek on my
24 property. Water never stops. And what happened
25 with the water, was being slowed down, to where it

1 starts spreading all over my property. But I -- At
2 the time, I didn't know that there was a problem, so
3 I had a contractor come and dig my spring creek
4 deeper.

5 Q. Did that solve the problem?

6 A. No, sir.

7 Q. Did you think it was going to solve your
8 problem?

9 A. Certainly, yes, sir.

10 Q. Did you expect?

11 A. Yes, sir.

12 Q. Why do you think it did not do that?

13 A. Because I didn't know it was a problem down
14 below.

15 Q. Mr. Leos, it appears that when one has a
16 water problem -- where there is water, and that the
17 problem is always down below. You stated you had no
18 knowledge it was down below; would you explain that?

19 A. I didn't -- Well, I just told you. I thought
20 maybe the water was coming down too fast --

21 Q. Okay.

22 A. -- and that's what I thought the problem was.

23 Q. Okay. The area in which you claim to have
24 problems, how far is that -- the most remote corner
25 part of that, how far is it away from Mr. Jones'

1 property line?

2 A. It joins Mr. Jones' property line.

3 Q. Okay. So you're having problems on your
4 property at the place that it is with Mr. Jones?

5 A. Yes.

6 Q. Did you ever ask Mr. Jones to take any action
7 regarding to that problem?

8 A. No, sir.

9 Q. Where do you think the problem was?

10 A. I thought it was on my property.

11 Q. But you just told me, when you dug it out,
12 the problem was still there. Did you tell Mr. Jones
13 you still had a problem?

14 A. I did after he came over and said he had
15 problems down there, but I didn't never question it.
16 If I had known, I wouldn't have spent all that money
17 on it.

18 Q. Well, so you said you had a problem; right?

19 A. Yes, sir.

20 Q. Okay. Where do you think the problem lies?

21 A. Well, I found out later, it's lying on
22 further down where the beavers had that water dammed
23 up.

24 Q. Where did you think -- Where, at that time,
25 did you think the water problem was?

1 A. I thought it was on my property.

2 Q. Well, after you found out it was not on your
3 property, where did you think after that, that the
4 problem was?

5 A. I later found out that the problem was on
6 your property.

7 Q. So you thought it was on my property?

8 A. No, sir.

9 Q. You just told me you found out later that it
10 was on my property?

11 A. Later -- Yes, sir.

12 Q. Well, where down-stream from -- You just told
13 me you still had a problem; right?

14 A. I still -- yes.

15 Q. Okay. If you had a problem, it was
16 down-stream from you -- and you told me you had no
17 reason to believe it was on my property, so it had
18 to be -- you must have thought it was on whose
19 property? Where did you think the problem was?

20 A. It was on your property.

21 Q. No. I'm not asking you that. You're saying
22 you're still having the problem on your side -- on
23 your property, and you said that you had no
24 indication that it was on my property. Okay.

25 Here's Mr. Jones, here's your property up-stream --

1 You're up-stream from Mr. Jones; right?

2 A. Yes, sir.

3 Q. You're up-stream from Mr. Jones. Here you
4 are up here. Mr. Jones is here, and I'm down here?

5 A. Uh-huh.

6 Q. And you're having a water problem up here,
7 and you didn't think it was on my property; where
8 did you think the problem was?

9 A. I didn't think or anything was the problem --
10 I thought the problem was on my property.

11 Q. You didn't think. Can you tell me -- You are
12 totally up-stream from Mr. Jones; right -- on that
13 creek?

14 A. Yes, I am.

15 Q. Okay. And Mr. Jones is totally up-stream of
16 me?

17 A. Yeah.

18 Q. Is that correct?

19 A. I would assume so, yeah.

20 Q. Do you have any reason to believe it's not
21 so?

22 A. No.

23 Q. Mr. Jones claims that I'm causing water to
24 back up on him, so you'd have to assume that you
25 believed that I'm totally down-stream from

1 Mr. Jones; right?

2 A. Yes, you are.

3 Q. Okay. So I'm totally down-stream from
4 Mr. Jones; okay?

5 A. All right.

6 Q. All right. Take the premise, that I'm
7 totally down-stream from Mr. Jones. Here's
8 Mr. Jones and here are you. You are at the top of
9 the hill and you are having water problems; okay.
10 You don't think -- You don't believe it's me down
11 here. Where did you think the problem was after
12 that?

13 A. I just said I thought the problem was on my
14 property.

15 Q. Well, you just told us that you thought the
16 problem was initially on your property, and then you
17 dug it out and you found out the problem was not on
18 your property. Where did you think the problem was
19 after that -- or you weren't concerned about the
20 problem?

21 A. Well, if I weren't concerned, I wouldn't have
22 dug it.

23 Q. No, sir. That's not what I'm saying. Let me
24 correct you.

25 A. Can you just ask a direct question, where I

1 can understand what you're trying to say?

2 Q. Okay. When was the first time that you had a
3 water problem?

4 A. Sometime in --

5 THE COURT: Mr. Birnbaum, would you
6 let me ask a question and maybe I can --

7 MR. BIRNBAUM: Yes, sir.

8 THE COURT: Mr. Leos, after you
9 decided that the problem was not on your
10 land, where did you think the problem
11 was?

12 THE WITNESS: Well, at that time,
13 that's when Mr. Jones came and got me,
14 and we went to check his property and
15 found out what the problem was.

16 THE COURT: Okay.

17 THE WITNESS: I didn't think
18 anything -- that it was further down or
19 anything. I didn't have no idea.

20 THE COURT: All right. So after
21 you learned that the problem was not on
22 your property, you and Mr. Jones checked
23 Mr. Jones' property or Mr. Birnbaum's
24 property?

25 THE WITNESS: Both.

1 THE COURT: Both -- okay. Go
2 ahead.

3 MR. BIRNBAUM: Okay.

4 BY MR. BIRNBAUM:

5 Q. All right. First -- The first time that you
6 state that you had this problem; when was this,
7 approximately?

8 A. About the same time.

9 Q. As what?

10 A. October.

11 Q. Okay. You decided you had a problem, okay.
12 Okay. Now, what was the first thing that -- What
13 was it that you did -- Did you decide that you
14 needed to do something about this problem?

15 A. In October.

16 Q. You decided you had a problem and you needed
17 to do something about this problem; is that correct?

18 A. That's correct.

19 Q. Okay. Did you do something about this
20 problem?

21 A. Yes, sir.

22 Q. What was that, again?

23 A. I hired a man to come and dig up my --

24 Q. Okay -- all right. Okay. Now, after you dug
25 it out now, did that solve your problem?

1 A. No, sir.

2 Q. Okay. So after that, you still thought you
3 had a problem; right -- there was still a problem?

4 A. There was still a problem, yes.

5 Q. Okay -- all right. You thought there was a
6 problem -- you had a problem, you took action, but
7 after that you still had the problem; right?

8 A. Right.

9 Q. Okay. Okay. Now what did you do about the
10 problem that was still remaining?

11 A. I didn't do anything.

12 Q. Were you still concerned about it?

13 A. Was I concerned about it?

14 Q. Yes.

15 A. Yes, I was concerned about it.

16 Q. How concerned were you about it? Were you
17 concerned enough to do something about it?

18 A. I did not know that the problem was further
19 down, until Mr. Jones came over and asked me to go
20 down there and check to see where the problem was.
21 That's when I find out that there was a problem down
22 below.

23 Q. So it was Mr. Jones that told you that your
24 problem was down on my property?

25 A. We didn't discuss that.

1 Q. What did you discuss?

2 A. We just went to check where the problem was.

3 Q. And you -- Okay. All right. So you found
4 out where you thought the problem was, okay -- which
5 you claim was on my property; right?

6 A. Right.

7 Q. Okay. All right. Well, what action did you
8 take after that?

9 A. I didn't take no action on it.

10 Q. Well, did you still think it was a problem?

11 A. Yes. I knew it was a problem.

12 Q. Well, was it a big enough problem to do
13 something about?

14 A. Mr. Jones was going to take care of that.

15 Q. Oh, you were going to watch Mr. B. --
16 Mr. Jones? You were going to let Mr. Jones take
17 care of your problem?

18 A. It wasn't my problem any more. It was on his
19 property.

20 Q. I thought you just said you had water on your
21 property?

22 A. I did, but I couldn't do nothing to my
23 property, so it was Mr. Jones'.

24 Q. But you just said that you thought that the
25 problem you had was a result -- that the source of

1 your problem was on my property; is that correct?

2 A. That's correct.

3 Q. Did you ever tell me that?

4 A. No, sir.

5 Q. Why not?

6 A. Because it was up to Mr. Jones to.

7 Q. To tell me?

8 A. To tell you.

9 Q. Do you still have water problems now?

10 A. I haven't been down to the creek, so I don't
11 know.

12 Q. How often do you go down to the creek?

13 A. I don't hardly go down any more. I got
14 bursitis real bad, and I can't do too much walking.

15 Q. But you do believe -- But you do believe --
16 Do you still have a problem now?

17 A. Did I solve the problem?

18 Q. Do you still have the problem now, that's
19 caused --

20 A. I don't know that I do.

21 Q. Now, you mentioned somewhere talking about
22 the dam, I didn't catch your wording -- something
23 about something was 150 feet from something; what
24 were you referring to?

25 A. There was a beaver dam.

1 Q. The beaver dam on my property?

2 A. Yes, sir.

3 Q. Okay. But you did go on my property?

4 A. Yes, sir, I did.

5 Q. Did you go on my property with my permission?

6 A. No, sir.

7 Q. Are you testifying regarding the dam on my
8 property?

9 A. I'm sorry?

10 Q. Are you testifying regarding the dam on my
11 property, that you went on without my permission?

12 A. Yes, sir.

13 MR. BIRNBAUM: I'm just relating to
14 the facts. There's no implication
15 intended as to the relations between the
16 neighbors and other things, okay. Okay.
17 May I have that Exhibit P-8 presented
18 back to the witness? Who has got it?

19 Q. This is the exhibit that you're talking
20 about?

21 A. No, sir.

22 Q. Okay -- right. No, no -- okay. Now, does
23 this exhibit here, P-8, what, what -- That was a
24 picture taken of you by Mr. Jones?

25 A. Right.

1 Q. Okay. What was this picture intended to
2 portray?

3 A. It was indicating how high the water is on a
4 creek, and it was standing all over the property.

5 Q. How high the water was?

6 A. Right.

7 Q. How high it was above what?

8 A. Above the bottom of the creek.

9 Q. Are you surprised to see water in a creek?

10 A. Yes, sir.

11 Q. Thank you. I would like to present -- Okay.
12 This is -- I'm not familiar with the area, but this
13 is Steve's Creek?

14 A. I don't know what the name of that creek is.

15 Q. Okay. This is on your property or Mr. Jones'
16 property?

17 A. Mr. Jones' property.

18 THE COURT: Is that Exhibit P-8?

19 MR. BIRNBAUM: P-8.

20 Q. Okay. Now, how far is this creek right here
21 from my property line -- the area where you're at,
22 approximately how far are you from my property line?

23 A. Right in front of me, it goes into your
24 property.

25 Q. So you're standing right in front of where

1 this creek goes onto my property; is that correct?

2 A. No, sir.

3 Q. How far is it?

4 A. It's close.

5 Q. How close?

6 A. I'd say six foot.

7 Q. That's close, okay. I was talking within a
8 couple of hundred feet, okay. This is essentially
9 where the water goes onto my property?

10 A. Yes, sir.

11 Q. And you're looking at this picture and
12 describing this creek, as this portraying a problem;
13 is that correct?

14 A. I don't know what you mean by "portraying".

15 Q. Well, you just told me that this --

16 A. I don't understand what the word means.

17 Q. "Portraying" means showing, that it indicates
18 that it -- You're saying that you're showing me a
19 problem; right? That this picture shows a problem?

20 A. What I'm saying is that's how high the water
21 was.

22 Q. Well, was that a problem?

23 A. Yeah, it was a problem.

24 Q. Okay. You're stating, that the problem
25 you're showing was how high this water was; right?

1 A. Right.

2 Q. Okay. Mr. Jones -- Mr. Leos, do you -- okay.
3 The creek we're talking about, where does it flow to
4 as it flows through my property? Are you familiar
5 with -- You know where I live?

6 A. Yes, sir.

7 Q. Do you know the big hill down there -- the
8 Bobumble hill down there? (Phonetically spelled.)

9 A. Yes, sir.

10 Q. Is that the same creek?

11 A. That's the same creek.

12 Q. Okay. Have you ever been down there?

13 A. Yes, sir.

14 Q. Is there a bridge down there?

15 A. Yes, sir -- You talking about your road?

16 Q. Yes, sir.

17 A. Yes, sir, there is.

18 Q. Okay. We're talking about the same creek,
19 about -- It goes about 17 hundred feet across my
20 property; right?

21 A. I don't have no idea.

22 Q. Roughly -- okay. There's a bridge there
23 Mister --

24 A. Yes, sir.

25 Q. Okay -- all right. Have you ever seen water

1 at that creek? Have you ever seen water at that
2 bridge on my road?

3 A. Yes, sir.

4 Q. Okay. In other words, you contend that the
5 water that you have right here, that is being shown
6 right here, that this creek, essentially, flows
7 through my property and comes out and goes on
8 down-stream from there; is that correct?

9 A. Would you repeat that again?

10 Q. In other words, that this creek enters my
11 property in the area of -- Well, it enters my
12 property, approximately this place -- This is on
13 Mr. Jones' property.

14 A. Uh-huh.

15 Q. And it goes through my property -- flows
16 through it, and goes under that bridge down there;
17 right?

18 A. Yes, sir. The creek goes through your
19 property, yes.

20 Q. Yes -- And it does go through that bridge
21 down there; right?

22 A. It continues going on through, yes.

23 Q. Would you say approximately how high that
24 bridge down there is? The height of the bridge and
25 the road.

1 A. I would have no idea.

2 Q. Okay. Would you recognize that bridge if you
3 saw a picture of it -- or that say that it looked
4 kind of like it?

5 A. I would say --

6 Q. Okay.

7 THE COURT: Have it marked,
8 first -- just ask Ms. Bragg. Is that
9 your first exhibit?

10 MR. BIRNBAUM: That's my first
11 exhibit.

12 THE COURT: Mark that one D-1.

13 (WHEREUPON, Deposition Exhibit
14 No. D-1 was marked for
15 identification.)

16 THE COURT: For the record,
17 Mr. Leos, Mr. Birnbaum has handed you an
18 exhibit, that's been marked for
19 identification purposes as Defendant's
20 Exhibit 1.

21 THE WITNESS: I would say that that
22 is the bridge.

23 COURT REPORTER: I'm sorry?

24 THE WITNESS: I would say that
25 that is the bridge going through that

1 road.

2 Q. Okay. Looking at the picture over there, do
3 you see water and some sand in the bottom of that?

4 MR. RAY: Your Honor, I object to
5 the witness testifying about what the
6 photograph depicts until it's offered
7 into evidence.

8 THE COURT: I'll sustain it.

9 THE WITNESS: Do I answer?

10 THE COURT: No. Let Mr. Birnbaum
11 rephrase his question.

12 MR. BIRNBAUM: I enter this --
13 What?

14 THE COURT: You offer it into --
15 Let me take a look at it and see. Do
16 you want to offer it into evidence?

17 MR. BIRNBAUM: Yes, sir.

18 MR. RAY: Let me take a quick look
19 at that, Judge.

20 THE COURT: Any objection?

21 MR. RAY: No objection, Judge.

22 THE COURT: Defendant's 1 is
23 admitted into evidence.

24 (WHEREUPON, D-1 was admitted
25 into evidence at this time.)

1 THE COURT: Go ahead, Mr. Birnbaum.

2 Q. Okay. How far -- Looking at that picture,
3 I'm not looking for exact numbers -- How far do you
4 think that that water is from the top of that
5 bridge, just roughly?

6 A. I would say nine feet.

7 Q. Okay. I have both of these pictures, the
8 same creek -- some distance apart, but across my
9 property. We can see that that -- And looking at
10 Exhibit P-8 and D-1, how would you indicate how one
11 had more or less water problems than the other one?

12 A. It's very simple, sir. You can see sand over
13 here where the water probably is not over four
14 inches of water, here. And you're looking at this
15 and it's probably four feet of water.

16 Q. Thank you.

17 MR. BIRNBAUM: I'd like to pass
18 this around.

19 THE COURT: Sure. You may publish
20 it to the jury.

21 (WHEREUPON, D-1 was published
22 to the jury at this time.)

23 Q. Do you intend to do anything else? You said
24 you do not have -- you do not know if you have any
25 water problems; is that correct?

1 A. Well, you asking me what I want to do about
2 my property?

3 Q. No. I'm asking you -- I'm asking you do
4 you -- Do you think you still have water problems
5 now?

6 A. Yes, sir.

7 Q. How do you know?

8 A. Because it probably hasn't been corrected
9 down below.

10 Q. Are you still concerned about it?

11 A. Yes, sir.

12 Q. What do you intend to do about it?

13 A. I don't know. I haven't even thought about
14 it, because if Mr. Jones and you get together and
15 get this corrected, then I won't have no problem.

16 Q. But you never talked to me about any of these
17 problems you had?

18 A. No, sir.

19 Q. Thank you.

20 MR. BIRNBAUM: Request the
21 witness -- Reserve the right to -- and
22 so forth.

23 MR. RAY: Your Honor --

24 THE COURT: Do you have anything
25 further?

1 MR. RAY: Your Honor, I might have
2 just a little, but one of the jurors
3 needs to ask a question.

4 B. BIRDWELL-JUROR: We're looking
5 at these pictures, that were published
6 to us, and we would like to know the
7 date that's on the other picture -- if
8 they were taken at the same time. Can
9 we ask that?

10 THE COURT: Just keep looking at
11 the pictures. I'll tell you, judges get
12 nervous when jurors start asking
13 questions.

14 B. BIRDWELL-JUROR: I'm sorry.

15 THE COURT: But I'll see what I can
16 do to help you. For the record, is it
17 Defendant's Exhibit 1 that you want
18 the --

19 MR. RAY: Judge, I'd even thought
20 about covering that with Mr. Leos.
21 Mr. Leos can't determine that, either.
22 However, I presume Mr. Birnbaum can,
23 when I call him as a witness, which I
24 may call --

25 THE COURT: Mr. Birnbaum will be

1 testifying and somebody will ask him
2 that question. So we'll get that for
3 you. Do you have anything further?

4 MR. BIRNBAUM: No, sir.

5 THE COURT: Do you have anything
6 further of this witness?

7 MR. RAY: Your Honor, just a couple
8 of questions -- if I could have the
9 pictures back from the jury. After the
10 jury has already got it and they've got
11 problems with it, I'm going to make it
12 worse.

13 REDIRECT EXAMINATION

14 BY MR RAY:

15 Q. Mr. Leos, this picture, which is Plaintiff's
16 8; okay? It has the date of September 7th, 1996,
17 was taken on Mr. Jones' property, and shows the
18 depth and the fullness of the creek. I think you
19 testified to Mr. Birnbaum, that there was, you
20 thought, probably four foot of water?

21 A. Yes, sir.

22 Q. Okay. Now the bridge that you testified to,
23 which is depicted in Defendant's Exhibit 1, which
24 shows the water running under the bridge -- and the
25 bridge, I think you testified that the water going

1 under the bridge there was about four inches; is
2 that correct?

3 A. That's correct.

4 Q. Now this bridge is substantially down-stream
5 from Plaintiff's Exhibit 8; is that true?

6 A. That's true.

7 Q. Okay. Now obviously, you don't know when
8 this picture was taken. You only identified it,
9 because you know it accurately depicts the bridge;
10 is that correct?

11 A. Yes, sir.

12 Q. Okay.

13 MR. RAY: Pass the witness, Your
14 Honor.

15 THE COURT: Anything further of
16 this witness?

17 MR. BIRNBAUM: Nothing.

18 THE COURT: All right. May he be
19 excused?

20 MR. RAY: Yes, Your Honor.

21 MR. BIRNBAUM: I did reserve the
22 right to call him back later on after my
23 evidence.

24 THE COURT: Well --

25 MR. BIRNBAUM: Withdraw the

1 question.

2 THE COURT: I'm sorry, I didn't
3 understand?

4 MR. BIRNBAUM: I withdraw the
5 question.

6 THE COURT: What question? May he
7 be excused?

8 MR. BIRNBAUM: No.

9 THE COURT: If you have more
10 questions, I want to give you a chance
11 to ask them.

12 MR. BIRNBAUM: No, sir.

13 THE COURT: See, when you reserve
14 the right to recall Mr. Jones, that's
15 not a problem, because he's a party and
16 he's going to be here anyway, but --

17 MR. BIRNBAUM: I meant Mr. Leos, if
18 I said Jones --

19 THE COURT: No, no. I said
20 Jones -- but I hate to keep Mr. Leos
21 here. I'm prepared to excuse him today.
22 Do you know when you want him back? I
23 mean, I just hate to keep witnesses
24 waiting.

25 MR. BIRNBAUM: No. I do not need

1 Mr. Leos any more.

2 THE COURT: Oh, okay.

3 MR. BIRNBAUM: He may be excused.

4 THE COURT: Okay. That's fine.

5 Thank you, Mr. Leos. I'll tell you
6 what, do you have a phone number or some
7 place where you can be reached?

8 MR. LEOS-WITNESS: Yes, sir.

9 THE COURT: Let Ms. Davis, right
10 behind you, have the phone number. If
11 it turns out that he is needed, we'll
12 make an effort to get him back for you.

13 MR. RAY: Judge, could I ask
14 Mr. Leos a couple of more questions? I
15 hate to do that to you, just as you're
16 letting him leave -- and then I will be
17 done with him. But I want to make it
18 positively clear my line of questioning
19 to the jury. I'm afraid I probably
20 didn't follow up with the last question,
21 which they needed.

22 THE COURT: Go ahead. Two more
23 questions.

24 MR. RAY: Two more, Judge. Could I
25 see the photographs, if you don't mind,

1 and I'll let you have them back.

2 CONTINUED REDIRECT EXAMINATION

3 BY MR. RAY:

4 Q. Mr. Leos, you told me that the picture that
5 showed the bridge, was on the other end of
6 Mr. Birnbaum's property?

7 A. Yes, sir. This is the road -- his road.

8 Q. Okay. Where you were standing on Plaintiff's
9 8, was at the opposite end of Mr. Jones' property?

10 A. That's correct.

11 Q. Okay. Do you draw the conclusion that four
12 inches of water running under the bridge, at the
13 farther eastern side of Mr. Birnbaum's property, and
14 the four foot of water in the stream bed that's
15 depicted in Plaintiff's 8, indicates that there's
16 something damming up the water in between?

17 A. That is correct.

18 Q. Okay.

19 MR. RAY: I apologize, Your Honor.

20 MR. BIRNBAUM: Your Honor?

21 THE COURT: That's all right.

22 Since he asked some more questions, you
23 can ask some more questions. I'm
24 calling your attention to the fact that
25 it's now 12 minutes to five.

1 MR. BIRNBAUM: I now reserve the
2 right to recall the witness.

3 THE COURT: Thank you, Mr. Leos.
4 When do you want him recalled?

5 MR. BIRNBAUM: I would like to make
6 it convenient to the witness, that he
7 doesn't have to be around. I don't know
8 exactly how to do that.

9 THE COURT: I know how to do that.
10 I may know how to do that. We have his
11 number?

12 MS. DAVIS-COURT COORDINATOR: Yes,
13 sir.

14 THE COURT: Mr. Leos, will you be
15 at this number tomorrow?

16 MR. LEOS-WITNESS: I'll be there,
17 but I'll be outside.

18 THE COURT: Will there be someone
19 at that number that can come and get
20 you?

21 MR. LEOS-WITNESS: Just me and my
22 wife, so sometimes she goes off. I can
23 make it a point to go in the house on
24 the hour.

25 THE COURT: I'll tell you what

1 let's do, how many more witnesses do you
2 have, Mr. Ray?

3 MR. RAY: Your Honor, I've got
4 Mr. Phillips today. I intend to testify
5 concerning attorney fees. I've got to
6 make a decision on Mr. Epperson. I
7 don't know whether I'll call him or not.
8 I might possibly call Mr. Birnbaum as an
9 adverse witness at the conclusion of all
10 my witnesses, but that wouldn't be a
11 chief witness.

12 THE COURT: Well, am I safe in
13 letting Mr. Leos go, at least until one
14 o'clock tomorrow?

15 MR. RAY: Judge, I don't have any
16 problem with that. I do anticipate,
17 though, that my witnesses are not going
18 to take that long. I really thought we
19 would get done with Mr. Phillips today.

20 THE COURT: Mr. Birnbaum, if I let
21 him go until one o'clock tomorrow, and
22 Mr. Ray finishes up prior to that, do
23 you have other witnesses that you can
24 call while we get --

25 MR. BIRNBAUM: Yes, sir.

1 THE COURT: All right. Let's just
2 do this, if you will be back here
3 tomorrow at one o'clock, I think that
4 will work out. We may steal a little
5 bit of your time, but I'll make it as
6 little as I possibly can. We'll see you
7 tomorrow, here in court, at one o'clock.
8 You got a short one?

9 MR. RAY: Judge, I thought Mr. Leos
10 was short, so I don't want to mislead
11 the Court. I'm fairly certain that
12 probably Mr. Phillips' testimony, based
13 on how Mr. Leos went, will probably take
14 about that length of time. He's not
15 going to be a lengthy witness, but I
16 very likely will take -- with cross
17 examination -- some time.

18 THE COURT: Well, let's put him on.
19 We're going to recess sometime between
20 five and five-fifteen or when you are
21 finished.

22 MR. RAY: That's fine, Judge. I
23 mean I'm happy to proceed, Judge.

24 THE COURT: What's his name?

25 MR. RAY: Mr. Phillips.

1 THE COURT: Bring Mr. Phillips in.
2 Mr. Ray, is it okay to release the
3 balance of your witnesses until in the
4 morning, other than Mr. Phillips?

5 MR. RAY: I'm sorry, Your Honor,
6 Mr. Jones was speaking to me.

7 THE COURT: Can we release all your
8 witnesses until in the morning at 0.900,
9 except Mr. Phillips?

10 MR. RAY: Yes, Your Honor. I don't
11 think we have any more even sitting out
12 there, Judge.

13 THE COURT: Okay.

14 * * *

15 ROY PHILLIPS,
16 having been first duly cautioned and sworn upon his
17 oath to tell the truth, the whole truth, and nothing
18 but the truth, testified as follows, to wit:

19 THE COURT: Mr. Phillips, you were
20 sworn earlier; were you not?

21 MR. PHILLIPS-WITNESS: Yes, sir.

22 THE COURT: Have a seat right here,
23 please, sir.

24 MR. RAY: Judge, I think there's a
25 number of witnesses out there, but

1 they're all Mr. Birnbaum's witnesses.
2 Mr. Johnson and Mr. Munn are there
3 and --

4 THE COURT: Mr. Birnbaum, if you
5 would like, you are free to excuse your
6 witnesses until in the morning at nine
7 o'clock, because this is going to be the
8 last witness that we hear this
9 afternoon. So if you want to do that,
10 tell the bailiff and he will tell them
11 to be back here in the morning at nine
12 oak. Go ahead, Mr. Ray.

13 MR. RAY: Thank you, Your Honor.

14 * * *

15 DIRECT EXAMINATION

16 BY MR. RAY:

17 Q. Mr. Phillips, would you please state your
18 full name?

19 A. Roy Phillips.

20 Q. Mr. Phillips, where do you reside?

21 A. Route 1, Box 345 in Eustace.

22 Q. How far do you live from where Mr. Jones
23 lives?

24 A. My property -- I live across the street. I
25 have 40 acres that adjoins him and Mr. Birnbaum.

1 Q. Okay. Are you to the north or south of
2 Mr. Birnbaum?

3 A. I am to the west.

4 Q. West -- okay. Well, as Mr. Jones' property
5 sits, do you not own the property that's
6 directly north of him -- that joins Mr. Birnbaum?

7 A. Yes -- No.

8 Q. All right.

9 A. I'm directly north of Jones.

10 Q. Okay.

11 A. I'm directly west of Mr. Birnbaum.

12 Q. Okay. That's what I understood by looking at
13 it, okay. Now, have you ever had any occasions,
14 where you had the opportunity to see any beaver dams
15 or any dams on Mr. Birnbaum's property?

16 A. If that's the Birnbaum property, I'm not
17 really sure who owns that property.

18 Q. Okay. Where was the beaver dam located as
19 you would identify it?

20 A. That would have been due east of Mr. Jones'
21 place -- just across his fence.

22 Q. Okay. Do you know the name of the creek on
23 which it was located?

24 A. I think its Stephens Creek, but I'm not
25 really sure of that either.

1 Q. Okay, sir. You how close was it to
2 Mr. Jones' property line?

3 A. The first beaver pond or the -- There was
4 three that I've seen at different times, but they
5 kind of get --

6 Q. Okay. Then tell me how close the closest
7 beaver dam is to Mr. Jones' property line, that
8 joins Mr. Birnbaum or that joins this other
9 property?

10 A. Probably 150, 200 yards.

11 Q. Okay, sir. How many years have you lived in
12 this location?

13 A. Five years.

14 Q. All right. So I take it, you're fairly
15 familiar with a lot of the property around there;
16 are you not?

17 A. Yes.

18 Q. Do you hunt a good-great deal?

19 A. I don't of late. I used to, I don't lately.

20 Q. Okay, sir. Did you ever have an opportunity
21 to go coon hunting?

22 A. Yes.

23 Q. Was that the occasion on which you happen to
24 see this beaver dam?

25 A. That was one of the occasions -- the first

1 occasion that I've seen them.

2 Q. Okay, sir. The beaver dam is located the
3 closest to Mr. Jones' property -- I think you
4 referred to it as Steven's Creek. Would it also be
5 Steve's Creek?

6 A. Same creek line, yes.

7 Q. Okay. Now, was that beaver dam damming up
8 any water?

9 A. Yes, sir.

10 Q. How much?

11 A. The closest one just -- Well, it's just a
12 beaver bind. It just keeps backing up. I don't
13 know what you're asking about as to how much water.

14 Q. Did it back up water onto Mr. Jones'
15 property?

16 A. Yes -- all three of them did.

17 Q. All three of them did?

18 A. Well, they kind of went from a major one --
19 the big one, and then it went to the next one and
20 then it went to the smaller one.

21 Q. Okay.

22 A. It just kind of --

23 Q. Okay.

24 A. -- being built, that didn't back up any more
25 thereafter.

1 Q. So actually, were they in a line so to speak?

2 A. Yeah -- on the creek, yeah. You've got the
3 major one, that was the big one. And then there was
4 another one, and then there was another one after
5 that, that was just being built.

6 Q. Okay. Did you ever have any occasions to see
7 how much the water was backed onto Mr. Jones'
8 property?

9 A. Yes. Because that's adjoining my property --
10 about twelve acres, I would guess.

11 Q. Okay, sir. Had you ever had any occasion to
12 be on Mr. Jones' property and see the overflow from
13 his side of the fence?

14 A. Yes.

15 Q. When was that?

16 A. Was this before -- You're asking before the
17 water was lowered into the dam or after it was over
18 or both times?

19 Q. Yes, sir.

20 A. That was just before he blew the dam --
21 sometime before. I'm not really sure when he blew
22 it.

23 Q. I'm talking about after he blew his dam --
24 after Mr. Jones blew his dam.

25 A. Oh, yeah. I remember when he had a hole back

1 in his property a couple of times.

2 Q. Was there 10 or 12 acres of Mr. Jones'
3 property flooded after he had blown the beaver dam
4 on his property?

5 A. No. The water drained all the way out.

6 Q. Did it later overflow onto Mr. Jones'
7 property?

8 A. Yes.

9 Q. I'm talking about the later occurrence, when
10 you witnessed the beaver dam over on Mr. Birnbaum's
11 property over -- or on the property that joins
12 Mr. Jones' to the east. I don't think you
13 identified the property owner.

14 A. No. I'm not really sure.

15 Q. Okay. How much acreage was flooded, when you
16 saw it on that date -- when you indicated that there
17 were about three dams in there and one was a major
18 one?

19 A. Okay. After it he had blown it, it all came
20 back again. It just flooded the whole place again.

21 Q. His whole place flooded all over again?

22 A. Yeah.

23 Q. Okay. So was it 10 to 12 acres, essentially,
24 is your estimation?

25 A. Yes.

1 Q. Did you ever have any opportunity to go duck
2 hunting or anything like that on it?

3 A. Not on his property. My property adjoined
4 it. I have a little creekbed going down through
5 there -- me and the neighbor, standing under the
6 creekbed, because the ducks come right over and we
7 duck hunt on that side.

8 Q. Okay.

9 A. And then they fall either on my side or just
10 on his side.

11 Q. All right. Now when you first saw that
12 property, and you saw the water flooded, did you
13 think that was a lake of some sort?

14 A. That's what I thought it was. I thought it
15 was a man-made lake.

16 Q. When was the first time you saw the damage on
17 this property, which is directly to the east of
18 Mr. Jones -- the beaver damages?

19 A. That was probably six or seven months after I
20 lived there. I went -- a neighbor wanted to go coon
21 hunting, so I never been coon hunting, so I said,
22 "Yeah, I'll go". I like hunting, so I'll go. We
23 went. That night we went from one property to
24 another property to another property. The next
25 thing I know, we're wading in water -- It's getting

1 deeper and deeper, and the next thing, we had to
2 stomp, because -- Well, we come up on top of the
3 beaver damn, and waded down on the other side to get
4 down to my property.

5 Q. Had you ever seen any beaver dams before,
6 sir?

7 A. Oh, yeah -- quite a few of them.

8 Q. Where?

9 A. In Georgia. I was a Ranger down there for
10 ten years. There's a lot of beaver dams down there
11 and we're always having to tear them down.

12 Q. When you say "a Ranger", are you referring to
13 being a U.S. Army Ranger --

14 A. Yes, sir.

15 Q. -- as opposed to a Forest Ranger?

16 A. U.S. Army Ranger.

17 Q. Okay, sir. I take it, then, you were in the
18 military?

19 A. Yes, sir.

20 Q. Now, if I understand your testimony
21 correctly, you've indicated that you probably saw
22 the dams about four and a half years ago, if you
23 moved here five years ago; is that right?

24 A. Somewhere along in there, yes.

25 Q. Okay. Approximately? Did you ever discuss

1 those dams with Mr. Jones?

2 A. Not at that time. I didn't know there was --
3 I didn't really know there was a problem with it. I
4 didn't talk to him there, no. He asked me later if
5 I had seen the dams, and I told him yes, I'd seen
6 them.

7 Q. Okay. Were you aware in October of 1994,
8 that Mr. Jones and Mr. Birnbaum were having some
9 difficulty over trying to resolve what to do with
10 the water problem?

11 A. No. I don't believe so.

12 Q. Did you ever have any occasions where you
13 actually met Mr. Birnbaum, and he discussed with you
14 the beaver dams?

15 A. Yes, but I don't remember what year that
16 really was. That's when I found out they were
17 actually having a problem with the beaver dams.

18 Q. Okay. What did Mr. Birnbaum say to you?

19 A. If I can remember about what he said, he
20 stopped on the side of the road -- I bought the
21 property sometime after that, across the road. I
22 didn't own it in '94. I bought it -- I think two
23 years afterwards.

24 He had stopped and told me that the
25 property between us, he didn't want that cleared,

1 because it was kind of brushy. He likes it kind
2 of natural. So as long as the cows weren't
3 getting out, it didn't bother me either. But he
4 said that him and Mr. Jones were having a problem
5 with the flooding of the property back and forth.
6 He said that Mr. Jones had wanted to blow them up
7 or have them trapped up -- and called his beavers
8 rodents. That was about the only conversation we
9 had about the beavers. That's the first time that
10 I knew they were really having a problem.

11 Q. Did Mr. Birnbaum express to you some
12 unhappiness with the beavers being called rodents?

13 A. He wasn't very happy about that.

14 Q. Is your impression of Mr. Birnbaum, based on
15 your experience in dealing with the property line
16 that you have with him -- with his comments about
17 the beavers, that he's what you would call a
18 naturalist?

19 A. I think he is, yes.

20 Q. He wants it to stay just exactly like it is?

21 A. I believe so.

22 Q. Would you say he's somewhat extreme in his
23 views?

24 A. Oh, I wouldn't call it extreme.

25 MR. BIRNBAUM: Object.

1 THE COURT: I'm sorry?

2 MR. BIRNBAUM: Can I object? He's
3 asking Defendant's -- witness's
4 opinions; is that correct?

5 MR. RAY: I'll withdraw the
6 question, Your Honor.

7 THE COURT: Go ahead.

8 MR. BIRNBAUM: Your Honor,
9 sometimes -- like on some of these
10 things, I don't know what procedural
11 things to address some of these
12 things -- but, you know. You know, I
13 kind of look there and something on some
14 procedure wasn't right, but I couldn't
15 call it out. So forgive me if sometimes
16 I --

17 THE COURT: That's perfectly all
18 right.

19 BY MR. RAY:

20 Q. Have you ever had occasion, Mr. Phillips,
21 where you and Mr. Birnbaum have had any hard
22 feelings or words between the two of you?

23 A. Only about the property line -- clearing of
24 the property line.

25 Q. What was that, sir?

1 A. He didn't want it cleared. And I said if I
2 was going to -- "It's my property as much as it is
3 yours. As far as I'm concerned, if you're not going
4 to clean it up, and I need to clean it up, I'm going
5 to clean it up".

6 Q. What was the purpose of cleaning up the
7 property at that point?

8 A. The fence is just about gone. In fact, some
9 places it's not even there. It's just flat -- and
10 trees are flattened over it and the brush is laid
11 down. There are places where they can just walk
12 back and forth all they want. So I've gone in there
13 and had to clean it up, and fix it up, and cut down
14 some of the brush, just to maintain a fence line.

15 Q. Do you run cattle?

16 A. Yes, sir.

17 Q. Did you need a fence for cattle?

18 A. Yeah -- because I've had cows over at his
19 property.

20 Q. Was it because of the poor condition of the
21 fence?

22 A. Probably. I don't know how they got through,
23 exactly. I picked one up about six months ago -- in
24 fact, over there.

25 Q. Yes, sir.

1 A. Actually, he picked it up and took it to the
2 sale for me.

3 Q. He picked it up and took it to the sale for
4 you?

5 A. It was on his property. I was going to take
6 it any how. He said he was going to run some cows
7 to the market, so he said he'd run it for me if I
8 wanted him to. I said, "That's fine. It was just
9 going to keep jumping fences". So he did it for me.

10 Q. Has the fence problem revolved itself between
11 yourself and Mr. Birnbaum now?

12 A. The fence is not -- If I find a break, I'll
13 just go ahead and fix it.

14 Q. Okay. Are you and Mr. Birnbaum having any
15 personal difficulties at this time?

16 A. No.

17 MR. RAY: Pass the witness, Your
18 Honor.

19 THE COURT: Mr. Birnbaum?

20 CROSS EXAMINATION

21 BY MR. BIRNBAUM:

22 Q. I'm trying to recollect and recall and get
23 some particulars about what you testified to just
24 then. I believe you were talking about a series of
25 beaver dams -- terraces is what they are -- on

1 Mr. Jones' property. Of course the lower --

2 A. No.

3 Q. You were talking about three of them. What
4 were they referring to -- or where were they?

5 A. Those were on -- across from his fence or the
6 new fence now. I take it that that's -- Now, is
7 that your property? I never have found out where
8 your boundaries are, except you're behind me -- but
9 they're on the far side of his fence where the
10 creek -- Stevens Creek runs?

11 Q. Yes.

12 A. Just across that creek running straight away
13 from his property towards your place.

14 Q. The three dams or terraces that you're
15 talking about, were they on Mr. Jones' property?

16 A. No.

17 Q. They were all three on my property?

18 A. Yes -- If that's your property on that that
19 thickness right through there. See, I didn't know
20 that thickness was even yours. I thought you owned
21 the clearing where the cows were. I didn't know who
22 owned that creekbed there. I take it that's
23 yours -- Yeah, that's your property.

24 Q. I didn't clear any land. I don't know what
25 area you're talking about.

1 A. Where you run your cows -- the field.

2 Q. Oh, that?

3 A. That's adjoining to where these beaver ponds
4 are.

5 Q. We're talking about the wooded area down
6 there?

7 A. Yes.

8 Q. Okay. The wooded area is --

9 (WHEREUPON, a disruption was
10 had in the courtroom where an alarm
11 was sounding.)

12 THE COURT: Hope you can get us out
13 of here.

14 BY MR. BIRNBAUM:

15 Q. Have you been down to that area recently?

16 A. No.

17 Q. So you do not know where the property line now
18 exists between Mr. Jones and me?

19 A. I know where his fence is.

20 Q. You know where the fence is that's between
21 Mr. Jones and me?

22 A. Yes, I do.

23 Q. Okay. That is the property line; would you
24 agree to that?

25 A. Okay -- yes.

1 Q. At least I was trying to find out where we're
2 talking about. If we assume that that is the proper
3 line, there's no question about it?

4 A. Right.

5 Q. Okay. These terraces -- These three terraces
6 that you're talking about, were they on my side of
7 the property or on his side of the property?

8 A. Your side of the property.

9 Q. Okay. You also -- Okay. There were three
10 terraces on my side?

11 A. Yes.

12 Q. Were there any terraces --

13 MR. RAY: Your Honor, at this
14 point, I'd like to lodge an objection,
15 because Mr. Birnbaum is changing what I
16 said were dams. He's stating terraces
17 now to the witness. I think the witness
18 has only testified to dams. I don't
19 ever recall him using the word
20 "terrace". So I would ask that
21 Mr. Birnbaum rephrase his questions to
22 agree with the testimony, or else
23 establish the difference between a
24 terrace and a dam.

25 THE COURT: He can ask about

1 anything he wants to. If the witness is
2 confused between dams, terraces, or
3 something else, all he has to do is tell
4 us that he is and I'm sure --

5 MR. RAY: That's fine.

6 THE COURT: -- Mr. Birnbaum will
7 rephrase it. I'll overrule the
8 objection.

9 Q. I was simply trying to determine -- Were
10 those things that you were talking about, these
11 three --

12 A. Beaver dams.

13 Q. -- beaver dams, fine -- okay. These three
14 beaver dams that you testified to -- and there was
15 some question regarding where the property line was
16 earlier, but you now know where the property line
17 was. These three beaver dams were on my side?

18 A. Yes.

19 Q. Okay. You also, I believe, made some
20 statements after some of these dams were removed; is
21 that correct?

22 A. I don't know that they were removed. I know
23 the water went down. The first dam wasn't there
24 until later on. The second dam had been there -- I
25 don't know how long.

1 Q. But there had been some work done -- Well,
2 there was -- okay. Has any work been -- that you
3 know of, been done there?

4 A. Done where?

5 Q. In the area in question. Is there any
6 indications of there being some bulldozers in there
7 or something like that?

8 A. On his property or yours?

9 Q. Either one.

10 A. On his property there was, yes.

11 Q. Okay. So Mr. Jones did some bulldozer work;
12 right -- There was some bulldozer activity?

13 A. Yes.

14 Q. Okay. Now, you're testifying -- Well, I
15 believe you made the statement that you saw water in
16 these beaver dams, but didn't realize there was a
17 problem. I thought you made some statement to that
18 effect -- that you were coon hunting and found
19 these, something?

20 A. Yeah, I run across some beaver dams.

21 Q. You run across some beaver dams, okay.
22 Which -- Okay. Did you, at that time, believe -- or
23 while looking at it, you said you made no comment
24 about it, that you didn't talk or mention anything
25 to Mr. Jones, because you said you didn't think

1 there was any kind of problem down there at that
2 time. At the time that you saw these dams, did it
3 strike you, in any form, that you were going to take
4 any action, based on that, or you were going to
5 alert Mr. Jones to something?

6 A. Alert somebody because there's beaver dams?

7 Q. That's what I was trying to get you to say.
8 You would not alert somebody, because you saw a
9 beaver dam; is that right?

10 A. No. I don't usually do. No, I did not.

11 Q. That was the answer I was trying to elicit.

12 A. No. I had no reason to tell anybody about
13 it.

14 Q. Okay. So --

15 A. I figured --

16 Q. -- you didn't tell Mr. Jones --

17 THE COURT: Wait a minute. You
18 have to let him finish his answer and
19 I'll make him let you --

20 MR. BIRNBAUM: Sorry.

21 THE COURT: -- finish the question;
22 otherwise, the court reporter will have
23 a problem getting it down.

24 Q. Okay. So you indicated, that by just looking
25 at it, there was nothing that you were overly

1 concerned with, about having beaver dams there or
2 water and beaver dams?

3 A. As far as effecting me, it didn't effect me
4 at all.

5 Q. Right.

6 A. I don't care if there are beaver dams there
7 or not.

8 Q. Did you mention it to Mr. Jones?

9 A. No reason to. I didn't mention it to you or
10 Jones. I figured you both knew they were there.

11 Q. Okay. You're saying -- You're saying you're
12 looking at it, you didn't think it warranted you
13 alerting Mr. Jones that he had a problem?

14 A. It's only a problem if he figures it's a
15 problem. It wouldn't be a problem to me. I don't
16 know what you're asking me. I thought he had a
17 man-made lake there. I didn't even know that it was
18 a beaver pond until I went hunting.

19 Q. Okay.

20 A. But I didn't know if he even cared if it was
21 a beaver pond.

22 Q. Okay.

23 A. I didn't think that you'd care if it was a
24 beaver pond.

25 Q. Okay. How did you first receive notice or

1 any indication that anybody thought that there was a
2 problem down there?

3 A. You stopped on the side of the road --
4 Mr. John Warren was there. Me and him was talking
5 about me getting stuck with my tractor, and he was
6 going to try to pull me out. You stopped and that's
7 when we first had discussed about our property line.
8 You didn't want that cleared. And you said that
9 Mr. Jones and you was having a problem, about your
10 beaver ponds flooding his property -- and he called
11 them rodents. And I asked you, I said, "Do you
12 really think that if your property is flooding his
13 property, that he's going to sit there and tolerate
14 or have to?" And you said, "It was nature." And I
15 said, "Well, that's between you and him, but I sure
16 wouldn't want your property backing up on mine
17 without you doing something about it." And that's
18 when I first felt that you guys had a problem.

19 Q. Regarding your and my fence line, do we have
20 a problem now?

21 A. No.

22 Q. Okay. Let me phrase the relationships
23 between you and me at that time -- on the fence
24 line. It's been so -- It was just interjected as
25 part of the fence line and the nature and the other

1 things. Did I state to you, that on that fence
2 line, I absolutely didn't want anything done to it,
3 or did I express a wish?

4 A. I think that you didn't really want it
5 cleared between us. That you wanted some kind of a
6 natural barrier. That's how I took it.

7 Q. Did you say -- You said that I didn't wish?

8 A. I don't know about your wishing. I don't
9 understand what you're saying.

10 Q. I believe you just used the word "wish" --

11 A. I may have.

12 Q. -- in quoting my expression?

13 A. Yes. Well, let me try it again. I didn't
14 think you really wanted anything done between that
15 fence line. You wanted it all as natural as it
16 could be, because it wouldn't be a barrier between
17 whatever. That's why I figured you didn't want me
18 to touch the fence line -- or really do anything to
19 clear it. You wanted a natural brush barrier; not
20 that you didn't want the fence fixed, if it got
21 broke.

22 Q. Did we wind up in court over this?

23 A. No. We had no problem with it.

24 Q. Okay.

25 A. I didn't have any problem with it.

1 THE COURT: Anything else?

2 Q. All right. About -- There was something
3 about -- one more thing. The three dams, beaver
4 dams that we're talking about, which you said were
5 on Mr. Jones' property.

6 A. No. They're on your property.

7 Q. The three dams were on my property?

8 A. Yes.

9 Q. You didn't tell me there were three dams on
10 my property; did you?

11 A. When?

12 Q. At the time that you saw the three dams --
13 no?

14 A. No. I had seen one before, but nobody
15 bothered to ask me. You never asked me about seeing
16 three dams, either. Nobody has ever asked me about
17 it.

18 Q. I remember a statement that you made -- I
19 don't know the exact context, but it had to do with
20 the three dams -- the three beaver dams. It says,
21 "After something was done, water went back up to the
22 same place".

23 A. I think you're referring to when he blew the
24 dam. He blew a dam on his property. I never had
25 seen that, but I knew he had a dam there, because he

1 told me he blew it -- but I never actually looked at
2 it. He blew that dam. All the water -- Because
3 there was a lot of water over there. When he blew
4 that, the next thing I know that place was dry. I
5 seen it after that, because I was getting ready to
6 put a pond down. That pond -- When he blew that and
7 took out the next pond down -- next beaver dam,
8 because I could almost see it from where I'm at --
9 and it wasn't there.

10 So his property then was drained. It
11 stayed drained for a little while. The next thing
12 you know, that beaver pond is about 200 yards
13 across. They started building it again and it
14 started getting flooded again.

15 Q. So when he blew up his dam, the water
16 disappeared out of the creek?

17 A. Yes. It wiped out the next dam down.

18 Q. Okay.

19 A. Or the next two down, actually.

20 Q. Approximately, what time was that? Was that
21 before I talked to you -- not about our fence? I
22 don't believe I talked to you about that.

23 A. That's the only time we ever talked about it.

24 Q. Yeah.

25 A. That was the only time we talked about that.

1 Q. Can we put it in -- Can you, in some -- I'm
2 trying to tie down the time frame in which some of
3 these things occurred, because nobody ever said
4 anything to me -- And I'm trying to get from you,
5 out of the events that occurred around there, to
6 kind of establish where this blowing up the dam, the
7 creek being down after that and dry, and the
8 initiation of suit.

9 A. Okay.

10 Q. I'm trying to --

11 A. I'll explain it the best I can, what I know
12 about it -- Everybody can figure it out. When I
13 first come across the first dam, that's way down
14 towards -- on the east side. That's a major -- That
15 was a major dam. There was a lot of water in there.
16 We stepped off in there and shooo, right over my
17 head. I had to come back on the dam. We waded in
18 it for awhile -- And we said, well, it's getting
19 mudier and deeper, so we went back. When we stepped
20 off the next place, it was right along side the dam.
21 That was deep water. So we climbed back up, and I
22 said, "Well, this is a big beaver dam."

23 We walked around it, walked back and
24 crossed over to the high ground, crossed over the
25 next little creek that comes north and south, and

1 got back to my property. That's the first time I
2 knew there was a big dam over there.

3 Next thing I -- It was probably six months
4 later, I realized there's another dam, because his
5 whole place was flooded. That's when I got
6 concerned about buying the property. At that
7 time, it wasn't my property. I was looking to buy
8 it. That whole place of his was flooded.

9 Q. I'm trying to establish the time for this,
10 relating to the --

11 A. 1994 was when I first seen the big dam.

12 Q. When did you first see it that it was blown
13 up?

14 A. That wasn't blown up. I've never seen it
15 blown up. I think it would still be there today.

16 Q. No -- When you ever saw anything blown up in
17 there?

18 A. I don't even remember. '90 -- late '96, I
19 guess. I didn't keep up with the dates, because I
20 wasn't concerned about it. I have no idea. I know
21 when I seen the first dam -- I don't even know when
22 he blew the dam up. I don't remember the date he
23 blew it. I'm not even sure it was a beaver dam,
24 because I never seen a beaver dam on his side. I
25 just knew he cleared the water by blowing that water

1 out. Because when he blew it, there was no more
2 water again, until that beaver dam on the other side
3 of the lake -- on the other side about two hundred
4 yards in. When they started moving up there --
5 because I was trying to get rid of them out of the
6 Warren's place. He was having beaver problems down
7 at his place, too. So, I was shooting his for him.

8 Q. So at that time, after -- We'd have to
9 conclude, that after -- or at the time or right
10 after somebody blew up a dam on Mr. Jones' property;
11 right?

12 A. I believe it would be on his property, yes.

13 Q. Okay. We wouldn't expect --

14 A. I don't know if --

15 Q. -- beaver dam -- Okay. But it was blown up?

16 A. What was?

17 Q. Something.

18 A. Something was blown up, yes.

19 Q. Okay. After something was blown up -- after
20 that, some flooding problems was solved, if somebody
21 thought there was a flooding problem?

22 A. Yes -- for a short time.

23 Q. Okay.

24 THE COURT: Anything further?

25 MR. BIRNBAUM: No, sir.

1 THE COURT: May he be excused?

2 MR. BIRNBAUM: Yes, sir -- but I
3 want to recall him for tomorrow -- not
4 recall him, right to recall -- Reserve
5 the right to recall the witness.

6 THE COURT: All right. You're
7 excused for the day. Why don't you come
8 back at one o'clock tomorrow afternoon
9 and we'll get you out of here as quickly
10 as we can.

11 We're going to recess for the day.
12 Ladies and gentlemen, we'll reconvene in
13 the morning at nine a.m. In the
14 meantime, do not discuss the case among
15 yourselves. Do not discuss the case
16 with any other person, that includes
17 your families.

18 Sometimes when you get home, your
19 family is going to want you to tell them
20 all about the thrilling, exciting stuff
21 you did down here, and you'll just have
22 to tell them that you can't talk about
23 it. That this hard-to-get-along-with
24 Judge from Dallas -- Blame it on me.
25 That comes with my territory.

1 When the trial is over -- You can
2 tell them this. When the trial is over
3 you'll be free to talk about it all you
4 want.

5 I don't think that there's any
6 likelihood that this will happen, but I
7 always tell my jurors this, that it's
8 almost unheard of in most of the
9 counties where I sit -- and particularly
10 in Dallas, where I've spent most of my
11 life, that a stranger would come up to
12 you and try and talk to you with an eye
13 toward influencing you in some way.
14 That's virtually unheard of.

15 It happened about six weeks ago in
16 Dallas. It's the first time in
17 anybody's memory that it happened there.
18 I don't believe it's going to happen
19 here. I mean, I sit in Van Zandt County
20 a pretty good bit, and I think I know
21 the territory over here. But if I'm
22 wrong, and if a stranger should approach
23 you in that way, make the facts known to
24 me or to the bailiff.

25 We'll take the appropriate steps to

1 see that that person has talked to their
2 last juror. Have a nice evening. See
3 you in the morning at nine o'clock.

4 Thank you, sir. You may stand
5 down. I didn't mean to leave you on the
6 stand.

7 (WHEREUPON, today's
8 proceedings were concluded.)

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VOLUME ____ OF ____

Continued Trial on the Merits

COURT CAUSE NO. 95-63

WILLIAM B. JONES * IN THE DISTRICT COURT
VS. * VAN ZANDT COUNTY, TEXAS
UDO BIRNBAUM * 294TH JUDICIAL DISTRICT

=====

APPEARANCES:

Attorney for Plaintiff:
Richard L. Ray
300 S. Trade Days Blvd.
(903) 567-2051
SBOT No. _____
Attorney for: William B. Jones

Defendant Pro Se:
Udo Birnbaum
Rt. 1, Box 295
Eustace, Texas 75124
(903) 479-3503
Pro Se for: Udo Birnbaum

=====

On the 26th day of May, 1998, continuing until
the 29th day of May, the above entitled and numbered
cause came on to be heard for trial in the said
Court, Honorable James Zimmermann, Judge Presiding,
and the following proceedings were held, to wit:

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P R O C E E D I N G S

May 28, 1998

(Continued Trial on the Merits)

THE COURT: Good morning ladies and gentlemen. Who do we have next, Mr. Ray?

MR. RAY: Your Honor, I'll be calling myself to testify about attorney fees.

* * *

RICHARD L. RAY,
having been first duly cautioned and sworn upon his oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to wit:

* * *

DIRECT EXAMINATION

* * *

BY MR. RAY:

THE COURT: You were sworn earlier; were you not?

MR. RAY: Yes, Your Honor. Judge if I might have just a moment to check my thing here before I begin. May I proceed?

THE COURT: Sure.

1 MR. RAY: My name is Richard Ray.
2 I'm an attorney, licensed to practice
3 law in the State of Texas and have been
4 since 1974. I have practiced in Van
5 Zandt County for the entire period of my
6 practice. 1974 is when I was licensed
7 to practice -- in October of 1974.

8 My practice has primarily been
9 involved in civil proceedings, such as
10 this proceeding here today. I'm
11 familiar with what the ordinary and
12 customary attorney fees are that are
13 charged in this particular area.

14 Mr. Jones and I --

15 MR. BIRNBAUM: I object.

16 THE COURT: On what grounds?

17 MR. BIRNBAUM: The witness is
18 attempting to testify on his
19 credibility.

20 (WHEREUPON, a loud noise was
21 heard while Mr. Birnbaum was
22 speaking.)

23 THE COURT: I'm sorry, the truck
24 was passing and I missed it.

25 MR. BIRNBAUM: The witness is

1 attempting to testify regarding his own
2 credibility.

3 THE COURT: The Court will overrule
4 your objection.

5 MR. RAY: Mr. Jones and I have
6 entered into a professional contract
7 concerning my services. That
8 professional contract provides for an
9 hourly rate of \$125.00 an hour. That
10 was the customary and usual rate, in my
11 opinion, as an attorney in this area at
12 the time.

13 Subsequently, that fee has
14 increased in terms of hourly rates. My
15 hourly rate is now \$150.00 an hour, but
16 I've abided by the original agreement,
17 that I made with Mr. Jones, and he's
18 familiar with that.

19 In addition, certain cost have been
20 entailed in this proceeding, mainly the
21 filing fee for court costs; in addition,
22 to the cost of depositions. The cost of
23 the deposition ran \$343.00, to depose
24 Mr. Birnbaum, for the court reporter.
25 The filing fees, \$173.00, and then after

1 that, of course is the Service of
2 Citation fee. Service of Citation fee
3 on Mr. Birnbaum ran a cost of \$48.00.

4 The time that I have in the case
5 thus far, amounts to something slightly
6 in excess of 40 hours. That includes
7 through yesterday. Obviously, there
8 will be more billable hours based on the
9 work necessary here today.

10 The pleadings request an attorney
11 fee of 10 thousand for the trial of the
12 case in this court, through to it's
13 conclusion, which would concern
14 additional work, beyond what we're doing
15 here today, in terms of the trial,
16 itself.

17 That is an estimate. At this time,
18 my attorney fees are somewhere, roughly,
19 I would say an approximation of about
20 seven to eight thousand dollars. I
21 can't give you an exact amount, until I
22 know how much time I've got in the
23 case -- And I don't have that as of yet.

24 However, as a jury, you will be
25 allowed to consider that and determine

1 what you think would be the time
2 required for me to complete my
3 representation of Mr. Jones.

4 In addition, \$5,000.00 attorney fee
5 has been requested for appeal of the
6 case, should this case be appealed to
7 the Court of Appeals, which will either
8 be in the Tyler or in the Dallas
9 appellate courts.

10 At that stage, should the case then
11 again be appealed to the Supreme Court
12 of Texas, an additional fee has been
13 requested in the pleadings, I believe,
14 of \$5,000.00. Of course, if there are
15 no appeals, then those attorneys fees
16 would not come into play and not be
17 assessed against the defendant.

18 My purpose in testifying here
19 before you, is that Mr. Jones is seeking
20 his attorney fees and costs in this
21 proceeding; and therefore, I am
22 providing evidence to you of my actual
23 time and efforts and work extended in
24 his behalf. You've heard him testify
25 earlier as to our agreement, and I am

1 now confirmning that same agreement.

2 Your Honor, at this time I would
3 pass the witness.

4 CROSS EXAMINATION

5 BY MR. BIRNBAUM:

6 Q. Do you normally testify regarding to attorney
7 fees at the trial?

8 A. I do.

9 Q. Thank you. No further questions.

10 MR. RAY: May I step down, Your
11 Honor?

12 THE COURT: Sure. Who do you have
13 next?

14 MR. RAY: Judge, at this time, I'd
15 call Mr. Udo Birnbaum as an adverse
16 witness.

17 THE COURT: Mr. Birnbaum, I don't
18 recall, were you sworn yesterday?

19 MR. BIRNBAUM: Yes, sir.

20 * * *

21 UDO BIRNBAUM,
22 having been first duly cautioned and sworn upon his
23 oath to tell the truth, the whole truth, and nothing
24 but the truth, testified as follows, to wit:

25 * * *

1 DIRECT EXAMINATION

2 * * *

3 BY MR. RAY:

4 MR. RAY: May I approach the
5 witness, Your Honor?

6 THE COURT: Sure.

7 Q. Mr. Birnbaum, first of all, would you please
8 state your full name?

9 A. My name is Udo Birnbaum.

10 Q. You are the Mr. Birnbaum that's the defendant
11 in this proceeding; is that correct?

12 A. Yes, sir.

13 Q. Okay.

14 (WHEREUPON, Deposition Exhibit
15 No. P-9 was marked for
16 identification.)

17 Q. I have handed to you an instrument, which I
18 would like for you to identify for the record.

19 A. It says, "Number 7512, Warranty Deed".

20 THE COURT: Has that been marked?

21 MR. RAY: Yes, your Honor, it has.

22 A. Proceed.

23 Q. Do you understand -- Can you identify for me
24 whose deed it is, though? Who owns that property
25 that's described in the deed?

1 A. I do.

2 Q. Okay. That's your deed; isn't it -- to your
3 property?

4 A. Yes, sir.

5 Q. Okay.

6 MR. RAY: Your Honor, at this time,
7 Plaintiff would tender and offer into
8 evidence Plaintiff's Exhibit No. 9,
9 which is the Warranty Deed of the
10 Defendant.

11 THE COURT: Any objection to that,
12 Mr. Birnbaum?

13 MR. BIRNBAUM: No, sir.

14 THE COURT: Plaintiff's 9 is
15 admitted.

16 (WHEREUPON, P-9 was admitted
17 into evidence at this time.)

18 MR. RAY: Thank you, Your Honor.

19 Q. Mr. Birnbaum, would you hand that to me?

20 THE COURT: Hand that to him, would
21 you?

22 MR. RAY: Judge, I would like to go
23 ahead and publish this to the jury

24 THE COURT: Granted.

25 Q. Mr. Birnbaum, that deed describes property

1 which you owned, which lies directly to the east of
2 Mr. Jones' property?

3 A. East and northeast -- extends northeast, yes,
4 sir.

5 Q. Okay, sir. Does that deed describe the
6 property through which Steve's Creek flows?

7 A. Yes. That portion of Steve's Creek that
8 flows through my land.

9 Q. Okay. And this deed indicates, that you
10 owned the property on which the creek flows after
11 leaving Mr. Jones' property?

12 A. Yes.

13 Q. Okay. That is the particular property, where
14 the creek is located, that involves the litigation
15 here today; is that correct?

16 A. That portion of the creek, that flows through
17 my land, is an extension of the creeks in the areas
18 that are under discussion, as I understand it.

19 Q. Okay. It's the property that's in
20 controversy -- or the property where the beaver dams
21 were located, that are in controversy; is that
22 correct?

23 A. You tell me. The controversy in the petition
24 I've requested you, where certain things are that
25 you've described in the petition. I've not been

1 able to obtain answers, thereto.

2 Q. Mr. Birnbaum, I'm not trying to fool you at
3 this stage. I'm just trying to pin down that that
4 deed describes the property that's involved in the
5 litigation, where testimony is coming earlier, that
6 beaver dams were located. You may call them
7 something else entirely, but where beaver dams were
8 located, from Steve's Creek on your property, that
9 flooded onto Mr. Jones'; is that correct?

10 A. I lost the question.

11 Q. Okay.

12 A. Repeat.

13 Q. The property that's described in that deed
14 adjoins Mr. Jones' property; correct?

15 A. Yes, sir.

16 Q. And that property is the property onto which
17 Steve's Creek flows, after departing Mr. Jones'
18 property?

19 A. Yes, sir.

20 Q. Okay. And the impoundment of water and
21 overflow, that would come onto Mr. Jones, would have
22 to come from your side of the property, if in fact
23 it occurred; is that right?

24 A. That overflow, which you claim to come from
25 my side, would have to come from my side.

1 Q. That's what I'm asking you, exactly,
2 Mr. Birnbaum. Thank you. Mr. Birnbaum, have you
3 ever witnessed any beaver dams -- or I think as you
4 term them, beaver terraces, on your property?

5 A. Have I ever witnessed any?

6 Q. Have you ever seen any?

7 A. Yes, sir.

8 Q. How many?

9 A. One and a half -- Two and a half.

10 Q. Okay. Can you explain your answer, then, to
11 the jury, as to how you arrive at two and a half?

12 A. Well, I count the big one as a one, and a
13 half of one is a half -- meaning what we call a
14 standard beaver dam. I don't know what you mean --
15 In other words, as to what I would call a full-sized
16 beaver dam, would be one that -- I don't know.

17 Q. Mr. Birnbaum, if you would, assume my
18 complete ignorance on beaver dams; okay?

19 A. I do.

20 Q. I would like for you to do the same with
21 respect to the jury; although, they might know
22 something about beaver dams. Now, when you say "a
23 whole beaver dam", what do you mean by "a whole
24 beaver dam"?

25 A. I was trying to come up with some sort of a

1 measure of a beaver dam. How do you want to measure
2 beaver dams?

3 Q. I'm asking you, Mr. Birnbaum. I get to ask
4 the questions.

5 A. I don't know how to measure beaver dams.

6 THE COURT: Mr. Ray, would you
7 indulge me a question?

8 MR. RAY: Yes, sir.

9 THE COURT: Mr. Birnbaum, let me
10 ask you this: You said that you had
11 observed two and a half beaver dams. Do
12 you mean by that, two big beaver dams
13 and one small beaver dam? Or, do you
14 mean two beaver dams and part of a third
15 beaver dam? Or, do you mean something
16 else?

17 MR. BIRNBAUM: When I say "two and
18 a half", I meant to say two standard
19 beaver dams and one-half a standard -- I
20 mean, and one-half standard beaver dam.

21 THE COURT: One complete dam, but
22 smaller than the standard?

23 MR. BIRNBAUM: Yes, sir. Yes, sir.

24 MR. RAY: Okay.

25 Q. Do you recall when you observed those dams?

1 A. When I came onto my property, the first one I
2 observed in 1981.

3 Q. Have you ever made any efforts to remove any
4 of those beaver dams?

5 A. No.

6 Q. Have you ever made any efforts to eradicate
7 the beavers from your property?

8 MR. BIRNBAUM: I object to the
9 question. Would you -- What do you mean
10 by "eradicate"?

11 Q. Have you been able to remove the beavers from
12 your property?

13 MR. BIRNBAUM: I object to the word
14 "remove".

15 THE COURT: On what grounds?

16 MR. BIRNBAUM: It sort of implies
17 that it -- that it implies that
18 something that needs to be removed.

19 THE COURT: I'll overrule the
20 objection.

21 MR. BIRNBAUM: Okay.

22 Q. Answer the question, Mr. Birnbaum.

23 A. Say --

24 Q. Your objection was overruled.

25 A. Have I ever removed any?

1 Q. Yes, sir.

2 A. I have modified the tops of some beaver dams
3 in the early years that I was there. When I first
4 came in, it's my understanding that my predecessor
5 had gone in and done some extensive modifications
6 all over the land. He tore down some pine trees
7 along the street. I think he probably -- I don't
8 know what he did, but I understand that there had
9 been a beaver dam.

10 Q. Okay, Mr. Birnbaum. I'm not asking what your
11 predecessor did. I'm not asking what you did to the
12 beaver dams. I'm asking you a simple question.
13 Have you attempted to remove the beavers from your
14 property?

15 A. I'm describing the dam that I was testifying
16 to as to modifying. The dam that he tried to
17 remove, the beavers promptly built -- gradually
18 built themselves back up. I modified, maybe a foot
19 of the thing.

20 Q. Mr. Birnbaum, I'm going to ask the question
21 one more time, and then I'm going to ask the Court
22 to instruct you to answer it. Have you attempted or
23 removed any beavers from your property? And I'm
24 referring to beaver animals; not dams.

25 A. No, sir.

1 Q. Thank you. Do you intend to do so?

2 A. No. I don't see any beavers at the moment.

3 Q. In your opinion, the beavers are not a
4 problem; are they?

5 A. What beavers are you talking about?

6 Q. Any beavers that might be located on your
7 property?

8 A. No. If they become a problem, I might
9 consider removing them. I mean, I'm open-minded.

10 Q. That's your opinion; isn't it, Mr. Birnbaum?

11 A. Of course.

12 Q. And you understand Mr. Jones is in
13 disagreement with your opinion?

14 A. Yes, apparently.

15 Q. I'm sorry, sir, I didn't understand your
16 last --

17 A. Apparently.

18 Q. Apparently?

19 A. Or obviously.

20 Q. Obviously.

21 (WHEREUPON, Deposition Exhibit

22 No. P-10 was marked for
23 identification.)

24 MR. RAY: May I approach the
25 witness, Your Honor?

1 THE COURT: Yes, sir.

2 MR. BIRNBAUM: Uh-huh.

3 Q. Mr. Birnbaum, I'm going to hand to you what's
4 been marked as Plaintiff's Exhibit 10. I'd ask you
5 to identify that?

6 A. That was some communication that I
7 communicated to you privately.

8 Q. Is it a Christmas card?

9 A. It can be interpreted as many things.

10 Q. Yes, sir, I agree. But you do identify this
11 and recognize that to be --

12 A. Yes, sir.

13 Q. -- what you provided to my office?

14 A. Yes, sir.

15 Q. Nothing has happened to it. It's exactly as
16 you delivered it; right?

17 A. I provided it to your secretary or somebody.

18 Q. In my office?

19 A. I believe it was in an enclosed envelope.

20 Q. Is this the envelope?

21 A. That's the envelope -- Yes, sir.

22 Q. Okay, sir. They're all attached together;
23 are they not?

24 A. Yes. May I identify it further? It simply
25 says, "Richard Ray" on it. There was some verbal

1 discussions.

2 Q. I'm going to ask you some questions about it,
3 but right now, I just want you to identify it and
4 let me offer it, Mr. Birnbaum.

5 A. Yes.

6 Q. I'll come back to it.

7 A. Yes, sir.

8 MR. RAY: Your Honor, at this time
9 the Plaintiff would offer into evidence
10 Plaintiff's Exhibit 10.

11 THE COURT: Plaintiff's 10 is
12 admitted.

13 (WHEREUPON, P-10 was admitted
14 into evidence at this time.)

15 MR. RAY: Thank you, Your Honor.

16 Q. Mr. Birnbaum, I want to hand back to you this
17 card. I want you to read the front of the card for
18 me?

19 MR. BIRNBAUM: Your Honor, I
20 object.

21 THE COURT: On what grounds?

22 MR. BIRNBAUM: I request that the
23 jury witness the card -- the evidence.

24 THE COURT: A little louder.

25 MR. BIRNBAUM: I request that the

1 Plaintiff provide opportunity for the
2 jury to see those things that he is
3 about to examine me on.

4 THE COURT: Well, I've admitted it
5 into evidence, and the jury is going to
6 get to see it. But he has the right, if
7 he chooses to, to ask you questions
8 about it, either before the jury sees it
9 or after they see it.

10 Mr. Birnbaum, you might want to
11 adjust that microphone toward you and
12 down a little bit.

13 MR. BIRNBAUM: I can adjust it.

14 THE COURT: There you go. I think
15 that may help you a little bit. I'll
16 overrule the objection. Go ahead.

17 MR. RAY: Thank you, Your Honor.

18 Q. Mr. Birnbaum, if you would, read for the jury
19 what the front of that card says?

20 A. The front of the card --

21 Q. Front page of the card.

22 A. The front page of the card says -- It's in
23 the format -- It's in the format of a Christmas
24 card. It says, "Sleigh Bells Ring. Are You
25 Listening?"

1 Q. Okay. Now open the card, and tell me what it
2 says on the inside, on the printed portion of the
3 card; not your handwriting, but what it says in the
4 prepared portion of the card?

5 A. In the prepared portion it said, "You Better
6 Be or You'll Get Your Butt Run Over." Then it
7 continues on the bottom --

8 Q. I didn't ask you to continue. I want you to
9 stop right there for now, Mr. Birnbaum.

10 A. You asked --

11 Q. Now, why would you deliver such a Christmas
12 card to my office, Mr. Birnbaum?

13 A. I believe I was very careful in my answer and
14 did not say it was a Christmas card.

15 Q. So it's not intended as a Christmas card?

16 A. No, sir.

17 Q. What kind of card is it intended to be, then?

18 A. That is in the minds of the -- Are you asking
19 about the total card or the printed portion?

20 Q. I'm asking you what kind of card you intended
21 to deliver to me. You delivered it. You're the
22 only one that knows. Is that intended to be a happy
23 card? A sad card? What kind of card is it?

24 A. It is intended to promote thinking.

25 Q. What kind of thinking were you intending to

1 promote, Mr. Birnbaum?

2 A. Thinking.

3 Q. What? I'm sorry.

4 A. Thinking.

5 Q. Thinking? Is that what you said?

6 A. Uh-huh, yes.

7 Q. Well, obviously when you think, you think of
8 something, so what did you want me to think of when
9 I read that Christmas card?

10 A. That which was contained in the handwritten
11 portion of it.

12 Q. Okay. Read me the hand-written portion that
13 you -- That's your handwriting on the Christmas card
14 inside; isn't it?

15 A. Yes, sir.

16 Q. Okay. What does that say?

17 A. It says, "Dear Ricky: It is time to end
18 these proceedings. If you were to draw up a simple
19 motion, we could sign it jointly." Dated "December
20 2, 1997".

21 Q. What kind of motion are you talking about?

22 A. I was leaving that up to you.

23 Q. Did you not have anything in mind?

24 A. I had some general areas in mind, but I was
25 looking for your inputs. It's --

1 Q. What did you hope -- in a synopsis here,
2 Mr. Birnbaum, what did you hope to accomplish by
3 delivering that card to my office?

4 A. It is time to end these proceedings.

5 Q. So what kind of motion did you want me to
6 prepare?

7 A. Did you ever ask me what kind of a motion I
8 wanted you to prepare?

9 Q. Yes, sir. I think I did, because I asked you
10 that in the deposition -- but we'll talk about that
11 later. What did you want me to do, as a response to
12 that Christmas card, if anything? Let me rephrase
13 that. You didn't call it a Christmas card, so I'll
14 reframe from calling it a Christmas card. What did
15 you want me to do in response to that card?

16 A. Start thinking.

17 Q. What did you want me to think?

18 A. Something first, and then perhaps consult
19 with the -- perhaps consult with me, with any manner
20 as to what it is that I really wanted you to do.

21 Q. Okay. Mr. Birnbaum, let's cut --

22 A. Let me finish.

23 Q. -- to the chase; okay?

24 A. Let me finish.

25 Q. All right.

1 A. You asked me what I intended to do with this.
2 I intended you to start thinking and get off my
3 butt.

4 Q. Was that a method, whereby you hoped to
5 intimidate me, as the attorney for Mr. Jones, to
6 drop the suit? That's what you intended; wasn't it?

7 A. I didn't know exactly which way one would --
8 what was proper or permissible to end this suit.
9 That's why I put it in the phraseology that there
10 was. It was a very generic phraseology. Simply, it
11 is time to end these proceedings.

12 Q. Well, a Christmas card says --

13 A. Pardon -- I beg your pardon?

14 Q. The card says something -- that I better
15 watch out or I'll get my butt run over; is that
16 right?

17 A. No, sir.

18 MR. RAY: May I approach the
19 witness, Your Honor?

20 THE COURT: Yes.

21 Q. Now, Mr. Birnbaum, you just read to me a
22 moment ago, "Sleigh Bells Ring. Are you listening?"
23 And then, "You Better Be or You'll Get Your Butt Run
24 Over." What's that supposed to mean? Is that
25 supposed to intimidate me?

1 A. The tone of the message of this Christmas
2 card is not the tone that you just used in
3 describing this Christmas card.

4 Q. Well, you've already told me it's not a
5 Christmas card. We're already passed that point.

6 A. Okay. Okay. You're getting me confused now.

7 Q. Okay. Mr. Birnbaum, prior to delivering this
8 Christmas card to my office, had you not tried to
9 file a grievance proceeding against me with the
10 State Bar?

11 A. I'm not permitted to answer that, based on
12 the confidentiality rules regarding the State Bar.

13 Q. You can't say yes or no, whether you did
14 that; can you?

15 A. I did.

16 Q. Have you contacted the Federal Bureau of
17 Investigation, the F.B.I, to look at this case,
18 also?

19 A. I have contacted them, and some of that
20 correspondence relating; thereto, appeared -- The
21 reason I'm testifying on it, one is not supposed to
22 talk about this. These sort of things are supposed
23 to be -- Complaints of criminal matters are before
24 the authorities to those that they're addressed to.
25 Now let me ask you, how did you get a hold of any

1 information of the existence of such things?

2 Q. Mr. Birnbaum, I have the opportunity to ask
3 the questions. You may call me as a witness later
4 and ask me any questions you want to, but I'm not
5 testifying right now.

6 A. Thank you.

7 Q. Now, do you believe, Mr. Birnbaum, that it is
8 a crime for this lawsuit to be brought against you
9 over the beavers?

10 A. State that again.

11 Q. In your opinion -- or do you believe, that it
12 is a crime for this suit to be brought against you
13 over the beavers on your property?

14 A. No, sir.

15 Q. Then why have you contacted the F.B.I?

16 A. You used the word "brought".

17 Q. Well, what would you use?

18 A. Well, what was the question? I answered your
19 question regarding the way you phrased the question.

20 THE COURT: Let me see if I can get
21 us back on track.

22 MR. RAY: Thank you, Judge.

23 THE COURT: Mr. Birnbaum, if I
24 understand the testimony, Mr. Ray asked
25 you if you thought the bringing of this

1 lawsuit over the dams, against you was a
2 crime. Your answer, if I recall
3 correctly, was, "No. You did not
4 believe it to be a crime". Mr. Ray's
5 next question was, "In that event, if
6 you don't think it was a crime, why did
7 you contact the F.B.I?" That's the
8 question I think that's before you right
9 now.

10 A. You said whether the bringing of it was a
11 crime. The bringing of it was in 1995, January of
12 1995. We're three and a half years later. I could
13 have spent that time getting a law degree by now.
14 The question you had referred to was the bringing,
15 which was in 1995. You asked me if I thought that
16 was a crime and my answer to that was no.

17 Q. Okay.

18 THE COURT: And the next question
19 that is still before you is: If you did
20 not believe that was a crime --
21 Mr. Ray's next question was: "Then why
22 did you contact the F.B.I?"

23 A. I did not contact the F.B.I. at that time.

24 Q. Did you, at any time, contact the F.B.I?

25 A. Yes.

1 Q. When?

2 A. Oh, it's in open records, which there is some
3 information pertaining to the matters that you're
4 talking about, that appeared in the public records,
5 that should never have appeared in the public
6 records. So I will testify regarding that and put
7 the time frame in mind.

8 There is a document that is now included in
9 the files, whose origin is -- I don't know. I
10 don't know how to describe it. It is a document
11 that was provided to either administrative --
12 administrative or court something, that should
13 never have been in there, so I will openly talk
14 about that document.

15 That document was September 11th, 1995,
16 that was provided to one of the judges. It was
17 not provided as open documents in the Court. It
18 was provided as a correspondence to one of the
19 judges. It is included in the files. That was
20 the document that indicated the existence of such
21 fact -- was September 11th, 1995, I believe.

22 So if I contacted them, I must have
23 contacted them prior to 1995, September. Okay.
24 So -- Yes, sir.

25 Q. Okay.

1

2

MR. RAY: Judge, may I publish the card to the jury? I failed to do so -- and I think Mr. Birnbaum wanted to make sure the jury had an opportunity to see the card.

3

4

5

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7

THE COURT: You may.

8

9

10

(WHEREUPON, Exhibit P-10 was published to the jury at this time.)

11

12

Q. Mr. Birnbaum, have you not also contacted the Texas Natural Resources Conservation Commission?

13

A. Yes, sir.

14

15

16

17

18

Q. As a matter of fact, Mr. Birnbaum, I think you contacted every agency within the state and federal government, that you know of to contact, concerning helping you with your defense of this case; have you not?

19

20

21

22

A. Not all of it was necessarily with the defense. The contact with the Texas Natural Resources, initially, was relating to damage that I had on my property at that time.

23

24

25

Q. But you ultimately sought the help of TNRCC to try do to do something with this lawsuit; didn't you?

1 A. No, sir.

2 Q. You categorically deny that?

3 A. That was an off-the-cuff answer -- And I
4 think I'll stand by it, but I'm going to review it
5 just a minute in my brain. Repeat the question, so
6 I can phrase the answer absolutely correctly.

7 MR. RAY: Judge, I'm afraid I may
8 have to have the court reporter read it
9 back.

10 THE COURT: Her time has come.

11 COURT REPORTER: QUESTION: "But you
12 ultimately sought the help of TNRC to
13 try do to do something with this
14 lawsuit; didn't you?"

15 MR. RAY: I believe, Judge, I
16 followed that -- he said, "no, sir".
17 And I said, "You categorically deny it?"
18 And that's when Mr. Birnbaum said he'd
19 let me review that in my brain.
20 Unfortunately, my brain went to sleep
21 when he was doing that.

22 Q. Mr. Birnbaum, can you answer the question
23 now? Do you still categorically deny that
24 question -- that answer?

25 A. Okay. Let me get the question that I

1 ultimately sought help -- Repeat the question,
2 again.

3 Q. From the TNRCC -- Do you know what that is?

4 A. Uh-huh.

5 Q. Texas Natural Resources Conservation
6 Commission?

7 A. Yes, sir. That I ultimately sought help from
8 the TNRCC?

9 Q. With respect to this lawsuit.

10 A. Okay. I'm not sure that that statement there
11 was the same that the court reporter read back.

12 Q. Mr. Birnbaum, I don't want to play word games
13 with you; okay? The jury doesn't want you and I to
14 play word games. If you would just simply tell me,
15 that you categorically deny that you tried to enlist
16 the support of the Texas Natural Resources
17 Conservation Commission, trying to stop or end or
18 give you some remedy in this lawsuit? Did you or
19 did you not? Simple question -- yes or no?

20 A. Not simply a remedy -- in terms of a remedy,
21 in terms of what to do to my land. That I had some
22 erosion caused by the event that was related --
23 that was, I think, the basis of the lawsuit. In
24 other words, that there were some things that
25 occurred that the Plaintiff did, which are not

1 reflected in the petition.

2 The petition and the damages sought in the
3 petition, effectively reflect the damages he did
4 upon me. They do not reflect the things -- So
5 ultimately, any kind of documentation that I could
6 get, relating to the facts that were out there,
7 the -- I haven't sought conservation in that
8 area -- And I first sought the help of some kind
9 of a protection from the conservation people, that
10 regardless of what -- that whenever somebody was
11 claiming that I was doing exactly that which they
12 had told me to do, and after they found out, or
13 stated, or it became apparent that they have
14 general policies -- In other words, they're
15 interested in coming out to your place to look at
16 all kinds of things and give you all kinds of help
17 until they find out about a lawsuit, and then they
18 scatter like I don't know what.

19 So the thing kind of came out of my
20 contacting the conservation to establish the
21 facts -- and what protection that would be
22 provided by having a conservation plan on it and
23 complying with it, and then things kind of grew
24 from there. Somebody contacted somebody else --
25 And I don't know, you know, what agency has --

1 what agency has control over that. Is this --
2 Does this whole thing fall under Parks and
3 Wildlife? Does it fall under Water Commission?
4 Does the whole thing -- In other words, who has
5 jurisdiction over this kind of thing?

6 It was in connection with where can I sort
7 of get help from both. Where can I kind of get
8 help for both, the damages that were done to my
9 property, and at the same time, get -- I don't
10 know how to exactly put that word -- that which
11 I'm doing -- that which one reasonably should be
12 doing regarding the land.

13 Q. Have you completed your answer, Mr. Birnbaum?
14 I think the court reporter needs to change her tape.

15 Q. Did you get any help from the TNRCC at all?

16 A. There was some letters that were flying back
17 and forth. I believe I got a -- The last letter
18 effectively says, that they have no jurisdiction
19 over this and that was the end of that. I don't
20 know how that was established.

21 (WHEREUPON, Deposition Exhibit
22 No. P-11 was marked for
23 identification.)

24 Q. I'm handing to you what purports to be that
25 letter. Can you identify that?

1 A. Yeah. That was the letter I was referring
2 to. That was the last letter. I'm not sure -- It's
3 not the only letter.

4 Q. Okay, sir.

5 A. I feel there's something else, but I don't
6 know.

7 Q. But you identify that letter, though; do you
8 not? You received a copy of it?

9 A. Yes, sir.

10 Q. You received a copy of the attachment to the
11 letter, also; didn't you?

12 A. No, sir. I did not receive a copy of that.

13 MR. RAY: I'll remove the
14 attachment, then, Judge. Plaintiff
15 would offer into evidence Exhibit 11.

16 THE COURT: Any objection to
17 Plaintiff's 11?

18 MR. BIRNBAUM: Yes, sir.

19 THE COURT: What's that?

20 MR. BIRNBAUM: That the attachment
21 that was made thereto -- and which I
22 have not had a chance to see, be made a
23 part of the exhibit that was just
24 exhibited.

25 MR. RAY: Judge, I have no problem

1 putting the attachment back on. I took
2 it off, I thought to accomodate,
3 Mr. Birnbaum. Judge, here's the
4 attachment, also, if you want to look at
5 that again -- if the Court permits it.

6 THE COURT: All right. I'm going
7 to sustain Mr. Birnbaum's objection. I
8 will admitt Plaintiff's Exhibit 11,
9 after reattaching the exhibit, the
10 absence of which was the basis of his
11 objection.

12 MR. RAY: Yes, sir.

13 THE COURT: 11 consisting of two
14 pages is admitted.

15 (WHEREUPON, P-11 was admitted
16 into evidence at this time.)

17 MR. RAY: Judge, may I publish this
18 to the jury?

19 THE COURT: Yes, sir.

20 Q. Mr. Birnbaum, not to belabor the matter any
21 further than is necessary for these good people on
22 the jury --

23 MR. BIRNBAUM: I object.

24 THE COURT: To what?

25 MR. BIRNBAUM: The Defendant

1 requests to have time to study the
2 attachment, which was made a part of the
3 exhibit, which was given to him and
4 which has become a part of the exhibit.

5 THE COURT: Well, the exhibit,
6 together with the attachment, are now in
7 evidence; in part, because you objected
8 to the attachment not being connected to
9 Plaintiff's Exhibit 11. I sustained
10 your objection and put the attachment
11 back on to the main exhibit, Plaintiff's
12 11.

13 You certainly may have access to it
14 and review it; but otherwise, I will
15 overrule your objection.

16 MR. BIRNBAUM: My request was to
17 have knowledge of the information
18 that -- knowledge of the information
19 that was just discovered.

20 THE COURT: Well, you have a right
21 to review any exhibits before they're
22 submitted to the jury, and you have a
23 right to object to them. That exhibit,
24 consisting of two pages, Plaintiff's 11
25 and an attachment, was submitted to you

1 and offered into evidence.

2 I asked if you had any objection,
3 and I believe your response was you --
4 or you stated that you had not seen the
5 attachment. And when I asked you if you
6 had any objection, I believe you
7 responded that you objected to Mr. Ray
8 removing the attachment.

9 I sustained that objection and put
10 the attachment back on to the exhibit.
11 The attachment either has to be attached
12 to the exhibit or not attached to the
13 exhibit. And you objected to it not
14 being attached. I sustained your
15 objection and admitted the exhibit as it
16 is now constituted. At the next break,
17 the court reporter will make the exhibit
18 and the attachment available to you for
19 any further study that you might need.
20 Go ahead.

21 MR. RAY: Thank you, Your Honor.

22 MR. BIRNBAUM: I object. Different
23 objection.

24 THE COURT: Well, now hang on a
25 second. What are you objecting to?

1 MR. BIRNBAUM: I'm objecting on the
2 grounds --

3 THE COURT: No. What are you
4 objecting to and then I'll ask you what
5 the grounds are?

6 MR. BIRNBAUM: I object to having
7 to testify, regarding matters that
8 plaintiff is obviously attempting to
9 lead into, with the exhibit that he just
10 provided.

11 THE COURT: Okay. I'll overrule
12 your objection.

13 BY MR. RAY:

14 Q. Mr. Birnbaum, have you refused to remove any
15 dams that might exist on your property, that would
16 impede the flow of Steve's Creek?

17 A. No, but I will -- I will ask to be very
18 specific and --

19 Q. Mr. Birnbaum, let me stop you there. You can
20 get me as a witness later, but I'm not a witness
21 right now; okay? Don't ask me a question. You
22 answer my question -- all right? Now, will you
23 agree --

24 MR. BIRNBAUM: I object.

25 THE COURT: When you object,

1 Mr. Birnbaum, you need to tell me
2 exactly what it is you're objecting to,
3 and if I need to know the grounds for
4 your objection, then I'll ask you. But
5 if you just kind of -- in the middle of
6 the proceeding, say "I object", I have
7 no way of knowing to what you're
8 objecting, and I can't effectively rule
9 on it. So you need to tell me exactly
10 what it is that you're objecting to.
11 Will you do that, please?

12 MR. BIRNBAUM: Yes. Plaintiff was
13 very careful the way he worded the
14 question, and I was very careful in
15 providing an answer only to that
16 question as it was worded.

17 THE COURT: Is that what you're
18 objecting to?

19 MR. BIRNBAUM: And I wanted to
20 establish, at this time, the question in
21 writing.

22 THE COURT: Well, now wait a
23 minute. My question to you,
24 Mr. Birnbaum, is you've lodged an
25 objection; I don't know what you're

1 objecting to; and I'm asking you to tell
2 me exactly what it is to which you are
3 objecting, so that I can rule on it.
4 Otherwise, I have no way of knowing
5 whether to sustain your objection or
6 overrule your objection. So if you can
7 do that, fine. If you want to withdraw
8 your objection, you can do that.

9 MR. BIRNBAUM: I'm objecting on the
10 grounds that --

11 THE COURT: Don't tell me the
12 grounds, yet. Tell me what it is that
13 you're objecting to, then we'll get to
14 the grounds.

15 MR. BIRNBAUM: I'm objecting to
16 having to answer the second question,
17 when it may not be clear to the jury
18 what the first question was.

19 THE COURT: I'll overrule the
20 objection.

21 MR. RAY: Thank you, Your Honor.

22 BY MR. RAY:

23 Q. Mr. Birnbaum, will you agree to remove any
24 beaver dam from Steve's Creek, that would -- either
25 in the future or now exists on your property, that

1 could possibly cause overflow onto Mr. Jones' land?

2 A. Regarding agreements, those sort of things
3 would be in writing and would -- An agreement,
4 before being considered or giving definite testimony
5 as to admitting to that statement, that statement
6 would have to be very well anchored down, before one
7 would say that one would agree to that statement.

8 THE COURT: Would the court
9 reporter read that answer back, please
10 ma'am.

11 THE COURT: Now, listen very
12 carefully to your response,
13 Mr. Birnbaum.

14 COURT REPORTER: ANSWER:
15 "Regarding agreements, those sort of
16 things would be in writing and would --
17 An agreement, before being considered or
18 giving definite testimony as to
19 admitting to that statement, that
20 statement would have to be very well
21 anchored down, before one would say that
22 one would agree to that statement."

23 THE COURT: Mr. Birnbaum, I believe
24 the question is -- The question that was
25 asked you, was "Would you agree to

1 remove the dams that have or are causing
2 problems for your neighbors?" Could you
3 respond to that?

4 MR. BIRNBAUM: I could answer that
5 question fairly freely. But I don't
6 believe that was the question.

7 THE COURT: Well, I didn't -- I'm
8 not trying to tell you that I'm phrasing
9 it word for word --

10 MR. BIRNBAUM: Right.

11 THE COURT: -- like Mr. Ray is, but
12 if you would respond directly to the
13 questions as you can, it will help us
14 all. And I think it will help the jury
15 understand your testimony a lot better.

16 MR. BIRNBAUM: Regarding the
17 matters that are before the Court, the
18 thing that I said in my introductory
19 statement, that these things are not so.
20 They just ain't so; okay?

21 He wants testimony -- for me to
22 remove the dams that are causing --
23 There are no dams that are causing any
24 problems. And he wants me to enter into
25 agreements to remove the dams that are

1 not causing -- The questions are of the
2 nature, "Did you stop beating wife"?

3 THE COURT: Well --

4 MR. BIRNBAUM: I pass.

5 THE COURT: Go ahead, Mr. Ray.

6 BY MR. RAY:

7 Q. Mr. Birnbaum, I think your testimony earlier,
8 was that there had been, in the past, beavers on
9 your property?

10 A. Yes, sir.

11 Q. Okay. And I asked you if beavers came onto
12 your property -- presuming for a moment that maybe
13 they're not even there now, but if they were, would
14 you agree to not allow them to obstruct the flow of
15 the stream, so that there's no overflow onto
16 Mr. Jones' property? And that calls for a simple
17 yes or no answer, in my opinion.

18 A. I would expect Mr. Jones to go to somebody --
19 the Water Commission or the Parks and Wildlife or --
20 somebody says there's a problem out here, what's the
21 legal status of this thing? What can you do?

22 Q. Okay.

23 A. I would not expect Mr. Jones to hire you
24 right here to tie me up in court for three and a
25 half years.

1 Q. Okay.

2 A. I expect you to go --

3 Q. All right.

4 A. -- to somebody.

5 Q. All right. Let's get down to the exact
6 point, here; all right? You will not agree to stop
7 any possibility of beaver dams on your property,
8 that would cause overflow onto Mr. Jones; is that
9 true?

10 A. I will not stop any possibility? I don't
11 know what that means.

12 Q. Mr. Birnbaum, in truth, there are beaver dams
13 on your property right now; aren't there? Yes or
14 no?

15 A. I don't think so.

16 Q. How long has it been since you've been up and
17 down the creek?

18 A. A month ago.

19 Q. There's been beaver dams on your property;
20 hasn't there?

21 A. Yes, sir.

22 Q. At one time, there existed a sizable lake,
23 that extended from your property to Mr. Jones'; is
24 that true? Yes or no?

25 A. During some portions of the years, back in

1 1981, there was water, during the winter season,
2 that extended onto Mr. Jones'. There was water all
3 over the place.

4 Q. In 1994 did they exist there, in your
5 opinion?

6 A. What time in 1994?

7 Q. In October 1994?

8 A. No, sir.

9 Q. Did you physically go down there and check it
10 yourself?

11 A. Yes, sir -- October 1994, yes, sir. I won't
12 say it was 1994, but it was approximately that time.
13 It was the time that I went down there with
14 Mr. Jones, with him claiming water down there, and
15 there was no water down there.

16 Q. Before that time had you been down there?

17 A. I had not been down there in four or five
18 years -- into that exact area.

19 Q. Okay. Now, Mr. Birnbaum, Mr. Jones is
20 requesting that, one: You won't allow dams on your
21 property that cause water to back up on him. You
22 understand that?

23 A. Repeat that.

24 Q. You understand that Mr. Jones is requesting
25 in his suit, that you won't allow dams on your

1 property, that cause the creek to back up on him; do
2 you understand that?

3 A. He is contending that I not allow -- I don't
4 know what that means.

5 Q. Mr. Birnbaum --

6 A. I mean, sometimes under cross examination, I
7 may not even repeat back to you exactly what it was
8 I said, but I give the answers --

9 Q. Let me see if I can distill the question to
10 where maybe you can recall. Mr. Birnbaum, would you
11 agree to not build a dam so close to Mr. Jones'
12 property -- or to not allow a dam to be built so
13 close to Mr. Jones' property, that it would back
14 water up to it?

15 A. Let me repeat the question as I understood
16 you said. "Mr. Birnbaum, will you agree not to
17 build a dam?"

18 Q. Or allow one to be built that would back up
19 water onto Mr. Jones'?

20 A. No -- There's a difference. Those are two
21 questions.

22 Q. Okay. Mr. Birnbaum, I'm really trying to get
23 you to answer yes or no. Whether you do this -- I
24 think it's readily apparent to the jury, that you
25 won't answer that question, and that's why we're

1 here today; is that true?

2 A. No.

3 Q. That you wouldn't enter into an agreement --

4 A. No. I said it was not true that that was my
5 reason. That's what you asked me.

6 Q. But Mr. Birnbaum, you would never come
7 forward and say, "I won't let the beaver problem
8 continue to build up on my property", and "I won't
9 do anything to impede or obstruct the free-flow of
10 the stream through my property, so that it doesn't
11 back up to Mr. Jones"? You would never make that
12 agreement. You would never concede to that point;
13 would you?

14 A. I might -- I would make such an agreement, if
15 it was necessary that such an agreement needed to be
16 made. My contention is, is that all these things
17 are being talked about, that there is no basis in
18 fact in this thing, whatsoever. That there are no
19 beaver dams down there now, that cause any problem
20 or really no significant -- not really a beaver dam,
21 that I know of, that I seen in the petition, that
22 I'm flooding 13 acres -- And I went down there and
23 have witnesses --

24 Q. Mr. Birnbaum, I think in your deposition, you
25 called -- You said simply there was no problem

1 involved here; wasn't there? This is just not a
2 problem to you; is it?

3 A. No. I didn't say it wasn't a problem to me.
4 I said there wasn't a problem there.

5 Q. What did you just say, Mr. Birnbaum? What
6 was your answer then?

7 A. It was a distinction between something that
8 had to do with problem or problem to me. And I
9 believe you said -- you had some -- The question
10 needed to be anchored down a little bit more before
11 one starts asking -- arguing about the questions.

12 Q. Okay. Mr. Birnbaum, I'm reading from page 60
13 of your deposition, line number 20. I'm reading to
14 you -- And this is your response in an answer. You
15 say, "He saw it as a dam." And I believe there
16 "he", you're referring to Mr. Jones. "I saw it as a
17 Terrace. He saw it as a problem. I saw it as there
18 was no problem. We had a disagreement."

19 A. Within the context of -- That statement is
20 correct and I stand by that statement.

21 Q. And you made that statement in the
22 deposition; didn't you? Do you want to see the
23 deposition to verify that?

24 A. That sounds --

25 Q. That sounds accurate?

1 A. That pretty well -- I believe I was quoting
2 at that -- I believe I was quoting and reading from
3 the answers to the interrogatories that I had given
4 you. I was reading from documents that I had
5 provided to you previously, I believe.

6 MR. RAY: Judge, could I have the
7 original deposition?

8 THE COURT: I'm trying to get it as
9 quickly as I can.

10 MR. RAY: I'll ask him from the
11 original deposition. May I approach the
12 witness, Your Honor?

13 THE COURT: Yes, sir. I think --

14 (WHEREUPON, the following was
15 a discussion held at the bench.)

16 MR. RAY: Judge, those are not the
17 pages involved in Mr. Birnbaum's earlier
18 objections to it.

19 THE COURT: You say they are not?

20 MR. RAY: They are not.

21 THE COURT: Okay.

22 (WHEREUPON, the bench
23 discussion was concluded.)

24 Q. Mr. Birnbaum, I want you to read for me, from
25 your deposition, from line 20 to line 22, which is

1 your answer.

2 A. I'm looking at the context of it. "He saw it
3 as a dam; I saw it as a terrace. He saw it as a
4 problem; I saw there was no problem. We had a
5 disagreement", yes, sir.

6 Q. Okay. Now, if you would turn over to page
7 61, and read for the jury my question beginning with
8 line six.

9 A. Which one?

10 Q. My question beginning with line six.

11 A. Your question -- okay. Okay. The question
12 number six, QUESTION: "Did you give Mr. Jones the
13 impression, that you were going to take no action
14 concerning resolving what he thought was a problem?"
15 ANSWER: "I have forgotten the question, but..."

16 Q. Okay. Read my question again.

17 A. QUESTION: "Did you give Mr. Jones the
18 impression that you were going to take no action
19 concerning what he thought was obviously a problem?"
20 ANSWER: "I must have given that impression for him
21 to sue me." QUESTION: "Did you take any action
22 after he left when you all met"? "No". "Did you do
23 anything to try to correct what he thought was a
24 problem?" "I didn't do anything over there. I
25 didn't think there was anything to correct."

1 Q. Okay. You can stop right there.

2 A. Let me --

3 Q. You can stop right there, sir. You can call
4 yourself as a witness and read the rest of the
5 deposition if you want to. Thank you.

6 A. Thank you.

7 MR. RAY: Judge, I pass the
8 witness.

9 THE COURT: Mr. Birnbaum, you may
10 now -- If you have anything you want to
11 add on cross-examination, you may, or
12 you may return to your seat and we'll
13 call the next witness, whichever you
14 prefer. Who do you have next?

15 MR. RAY: Your Honor --

16 MR. BIRNBAUM: Pardon?

17 MR. RAY: I'm sorry.

18 MR. BIRNBAUM: I don't know exactly
19 how to cross-examine myself. I'm
20 puzzled. I guess on cross -- I guess --
21 Point of law, what does it mean to have
22 the right to cross-examine ones' self?

23 THE COURT: Do you know what
24 cross-examination means?

25 MR. BIRNBAUM: Yes, sir.

1 THE COURT: Well, you are -- or
2 have just finished, if in fact, you are
3 finished being a witness.

4 MR. BIRNBAUM: I'm finished being a
5 witness.

6 THE COURT: I'm sorry?

7 MR. BIRNBAUM: I'm standing here
8 excused from the witness box, and I'm
9 approaching you to ask a question.

10 THE COURT: I understand what
11 you're doing. If you'll just be
12 patient. You asked me a question, and I
13 can't just answer everything that you
14 ask, and I'm trying to respond within
15 the limits that the law allows.

16 When a witness is finished with the
17 testimony, or when a witness is through
18 answering the questions propounded by
19 the side that called the witness, the
20 other side has a right, if they choose,
21 to ask questions on cross-examination.

22 Now, this is one of those
23 situations, Mr. Birnbaum, where you're
24 not represented by counsel, and you're
25 in this litigation pro se, by yourself.

1 That does not eliminate your right -- or
2 it doesn't, in any way, lessen your
3 right of cross-examination. It just
4 means that you've got to do it yourself,
5 because there's no one else to ask you
6 the questions, as there would be had you
7 elected to appear with counsel.

8 MR. BIRNBAUM: I follow the train
9 of thought, that gives me the right to
10 effectively cross-examine myself,
11 regarding any matter that I want to be
12 cross-examined about; is that correct?

13 THE COURT: Read back what he said.

14 COURT REPORTER: MR. BIRNBAUM: "I
15 follow the train of thought, that gives
16 me the right to effectively
17 cross-examine myself regarding any
18 matter that I want to be cross-examined
19 about; is that correct?"

20 THE COURT: Mr. Birnbaum, you have
21 a right to cross-examine yourself. I'm
22 not going to speculate what you meant by
23 your statement. If you wish to
24 cross-examine yourself, you may. If you
25 wish to not do so now, and simply give

1 whatever testimony you want to give at
2 the time you testify in your own behalf,
3 if you choose to do that -- And there's
4 no law that says you have to, you may do
5 that.

6 MR. BIRNBAUM: I wish to
7 cross-examine myself.

8 THE COURT: Then notwithstanding,
9 get to it.

10 CROSS EXAMINATION

11 BY MR. BIRNBAUM:

12 MR. BIRNBAUM: I wish to
13 cross-examine the witness regarding to
14 what I'm thinking, in order to
15 express --

16 THE COURT: You don't need to tell
17 me what you want to do or why you want
18 to cross-examine. Those are rights that
19 you have, and simply do what you want to
20 do on cross-examination. If Mr. Ray has
21 an objection; I'll hear it, and either
22 overrule it or sustain it. You don't
23 have to explain to me why you want to
24 cross-examine yourself.

25 MR. BIRNBAUM: The witness is now

1 testifying. Witness wishes to
2 testify -- Witness is testifying
3 regarding answers he would provide if he
4 were standing outside the witness box.
5 Let me, let me --

6 MR. RAY: Judge, I don't want to
7 cause Mr. Birnbaum problems; but Judge,
8 I think he does want to provide
9 testimony inside the witness box or not
10 outside the witness box as a witness.

11 MR. BIRNBAUM: I object, Your
12 Honor.

13 THE COURT: Okay. Hold it right
14 there. To what do you object? Don't
15 tell me the grounds, yet. Tell me what
16 it is you're objecting to.

17 MR. BIRNBAUM: I'm objecting to
18 plaintiff implying that he were giving
19 witness problems.

20 MR. RAY: Judge, I'll withdraw my
21 comment, if that's a problem.

22 THE COURT: I'll just sustain the
23 objection and that will be that. Let's
24 go back to one thing. Are you telling
25 me that you wish to cross-examine

1 yourself, but you want to do it standing
2 in front of the bench, rather than in
3 the chair -- in the witness chair? Is
4 that part of what you're telling me?

5 MR. BIRNBAUM: Are you asking me as
6 outside or inside the witness box?

7 THE COURT: I'm asking you where
8 you wish to physically be when you
9 cross-examine yourself.

10 MR. BIRNBAUM: Either one, Your
11 Honor. I tried it here and then I went
12 inside the witness box.

13 THE COURT: Well, it doesn't
14 matter. I'll let you do it either way
15 you want to do it, Mr. Birnbaum, but
16 could we kind of start it, and let's do
17 it -- whether it's standing or sitting,
18 I don't think the law cares about that.

19 MR. BIRNBAUM: I repeat -- As a
20 witness, I repeat the answer.

21 THE COURT: Move the microphone
22 back toward you, if you would.

23 MR. BIRNBAUM: I repeat the things
24 that the witness is testifying about.
25 The witness is testifying regarding the

1 answers he would provide, if he were
2 outside of the witness box. Witness
3 would like to question the defendant --
4 Witness would like to ask the Plaintiff
5 if he would like to withdraw witness out
6 of the witness box?

7 THE COURT: Excuse me. Read that
8 one back to me, Lynda. I think I heard
9 it, but I'm not sure.

10 MR. BIRNBAUM: I have it written
11 down, Your Honor.

12 THE COURT: No. Just let the court
13 reporter read it back.

14 COURT REPORTER: "I repeat the
15 things that the witness is testifying
16 about. The witness is testifying
17 regarding the answers he would provide,
18 if he were outside of the witness box.
19 Witness would like to question the
20 defendant -- Witness would like to ask
21 the Plaintiff if he would like to
22 withdraw witness out of the witness
23 box?"

24 THE COURT: Do you have anything
25 further, Mr. Birnbaum?

1 MR. BIRNBAUM: I believe witness
2 thinks that question effectively
3 states -- Would you like to ask me any
4 other further questions?

5 (WHEREUPON, witness sobs.)

6 THE COURT: Mr. Birnbaum, do you
7 need a recess for a few moments?

8 MR. BIRNBAUM: I think the Court
9 needs to recess, Your Honor. I need a
10 recess.

11 THE COURT: Retire the jury,
12 please.

13 THE COURT: We'll take a 15 minute
14 recess. The jury may take a break and
15 go wherever they want to go around the
16 courthouse, but don't discuss the case
17 among yourselves, obviously.

18 (WHEREUPON, the jury was
19 dismissed from the jury room.)

20 THE COURT: Let the record reflect
21 that the jury is retired. Mr. Birnbaum,
22 I'm going to come around here to talk to
23 you a minute, instead of on the bench,
24 because, as you've probably noticed,
25 when I'm on the bench, I'm looking right

1 at the back of your head. It's kind of
2 hard for me to hear you and probably for
3 you to hear me.

4 The first thing that I want to
5 check, is to see if you feel well enough
6 to continue?

7 MR. BIRNBAUM: Yes, sir.

8 THE COURT: Now, I suspect that you
9 are aware of this, but I want to -- I'm
10 going to tell you this, because I want
11 to be sure that you know it.

12 My job, as I think you know, is to
13 be a referee or umpire; not to represent
14 you or not to represent Mr. Jones -- And
15 that's what I've done, and that's what
16 I'll continue to do, however long the
17 trial last.

18 Now, whenever a party, or a lawyer,
19 or a witness, or a juror, is in some way
20 made ill or stricken -- or has a
21 problem, where it's a hardship on them
22 to continue, I have the authority to --
23 as I did here -- to take a recess to let
24 everybody kind of get well enough to go
25 on, to use that phrase.

1 Frankly, I probably would have
2 taken one a little sooner than I did,
3 except I couldn't see your distress,
4 because I was sitting behind you.

5 MR. BIRNBAUM: There was no
6 distress. I had no distress in the
7 witness box, Your Honor.

8 THE COURT: That's okay. You don't
9 need to -- I want to tell you this.
10 First, I'm not going to resume the
11 trial, until you tell me that you feel
12 comfortable in going on. That's number
13 one.

14 Number two, if you have any desire
15 to have me lengthen this recess, so that
16 you can talk with either Mr. Ray or
17 Mr. Jones, about possible settlement of
18 these disputes, I'll be glad to do it.

19 I will tell you, that the reason
20 that I'm saying that, is that I looked
21 at the exhibit -- I've forgotten the
22 number, but the Christmas card -- that
23 exhibit, whatever the number is, and
24 also I looked at several letters that
25 are in the file, in which letters you

1 say that you are willing to negotiate.

2 The Christmas card indicated to
3 me -- Now it may be subject to some
4 other interpretation, I don't have a
5 quarrel with that, but it indicated to
6 me that you had an interest in
7 terminating these proceedings.

8 MR. BIRNBAUM: Uh-huh.

9 THE COURT: Which is -- certainly
10 makes sense. Nobody enjoys being sued,
11 I wouldn't think. It occurred to me, I
12 guess, Mr. Birnbaum, that you're pro se,
13 representing yourself, and I assume you
14 probably hadn't done this too many times
15 in the past.

16 It may very well be that you have
17 gotten, you know, a half, two-thirds of
18 the way through this lawsuit, and are
19 beginning to get in a little bit over
20 your head.

21 If that was the case, I can't -- I
22 don't have the authority or frankly the
23 time to call a time-out, and conduct a
24 law school seminar about how cases ought
25 to be tried or ought not to be tried. I

1 can't do that. But I can give you some
2 time, if you would like it, and if the
3 other side has any interest in having a
4 little conference, to see if there's any
5 way that you can bring this to a -- this
6 litigation to a conclusion, without
7 having the jury have to decide for you.

8 Because, you know, a lot of times
9 you can come to an agreement -- and it
10 may not be the perfect agreement, but it
11 may very well be better than what you'll
12 get from either a judge or a jury.

13 I'm not ordering you to do that.
14 You don't have to do it. You said in
15 your letters several times, that you
16 wanted the dispute heard by a jury of
17 twelve -- and that's, of course what
18 we're doing, but you've also said you're
19 willing to negotiate. So if you want to
20 take a few minutes, you're free to tell
21 me and I'll --

22 MR. BIRNBAUM: Right now, I'm ready
23 to proceed. I was asking of you what
24 the procedure was regarding
25 cross-examination by a pro se defendant.

1 And I don't believe we arrived at an
2 exact definition of what that meant from
3 you from the bench. And so I proceeded
4 to cross-examine myself.

5 THE COURT: Well, that's all right.
6 You have that right.

7 MR. BIRNBAUM: Was there anything
8 procedurally incorrect?

9 THE COURT: No.

10 MR. BIRNBAUM: Let's proceed.

11 THE COURT: Let me say this.
12 There's nothing procedurally incorrect
13 about it. The reason I took the recess,
14 was because I asked you if you needed a
15 short recess, and you said you did, so I
16 took it.

17 MR. BIRNBAUM: Yeah.

18 THE COURT: You're telling me now
19 that you want --

20 MR. BIRNBAUM: Yeah, I'm ready.

21 THE COURT: -- to press on?

22 MR. BIRNBAUM: Yes, sir.

23 THE COURT: And that you feel up to
24 going on?

25 MR. BIRNBAUM: Oh, yeah. Yes, sir.

1 THE COURT: All right. Okie-doke,
2 bring in the jury. Oh, one other thing,
3 Mr. Tibideaux. (sic)

4 MR. BIRNBAUM: Mr. Birnbaum.

5 THE COURT: I'm sorry --
6 Mr. Birnbaum, excuse me. If at any time
7 you feel the need for a recess, just ask
8 me and we'll --

9 MR. BIRNBAUM: Yes, sir.

10 (WHEREUPON, a recess in the
11 proceedings was had at this time.)

12 THE COURT: Mr. Ray, have you got
13 any objection to a narrative
14 cross-examination?

15 MR. RAY: No, Your Honor.

16 THE COURT: Mr. Birnbaum, the
17 simplest way to do it, is just tell the
18 jury what you want to testify to on
19 cross-examination.

20 CROSS EXAMINATION CONTINUED

21 BY MR. BIRNBAUM?

22 MR. BIRNBAUM: The witness is
23 testifying --

24 THE COURT: Wait until they all get
25 in the box.

1 (WHEREUPON, all jurors are now
2 present in the courtroom.)

3 THE COURT: Go ahead, Mr. Birnbaum.

4 MR. BIRNBAUM: The witness is
5 testifying regarding the answers that he
6 he would give if -- The witness is
7 testifying --

8 MR. RAY: Your Honor, I'm sorry to
9 interrupt. Mr. Birnbaum, you pushed the
10 mic away.

11 MR. BIRNBAUM: I'm sorry.

12 MR. RAY: That's okay.

13 MR. BIRNBAUM: I'm pushed it out of
14 the way because I thought I'd be too
15 loud. The witness is testifying
16 regarding the answers he would provide
17 if he were seated -- if he were standing
18 outside the witness box.

19 I'm testifying regarding the
20 answers that I would reply if I was
21 standing there asking. So the witness
22 would like to ask the Plaintiff if he
23 would withdraw -- if he would like to
24 withdraw the witness from the witness
25 box?

1 This defendant is observing proper
2 response by the Plaintiff, because I did
3 not ask the Plaintiff what I would like
4 to ask. I simply asked -- I would like
5 to ask, but I didn't ask. So the point
6 I'm making, there's certain problems
7 with being a pro se -- procedural
8 problems with being a pro se defendant,
9 that I can effectively ask myself
10 cross-examination, any kind of questions
11 that I wish to be cross-examined on,
12 which effectively says the same thing
13 that you, Your Honor, just said. If
14 there was anything that I would like to
15 tell the jury; is that correct?

16 THE COURT: That's correct.

17 MR. BIRNBAUM: Okay.

18 THE COURT: Tell the jury what you
19 want to tell them.

20 MR. BIRNBAUM: Okay. What I would
21 like to tell the jury, is those things
22 that I was denied by prior procedure,
23 and use of other procedure to deny me
24 addressing you in the first place.

25 THE COURT: Wait a minute. I'm a

1 little confused. Are you saying that
2 someone denied you the opportunity to
3 address the jury?

4 MR. BIRNBAUM: I am testifying
5 regarding my thoughts.

6 THE COURT: Okay -- Go ahead.

7 MR. BIRNBAUM: Witness would like
8 to get outside of the jury box. Witness
9 would like to position himself outside
10 the witness box.

11 THE COURT: You may do that,
12 Mr. Birnbaum.

13 MR. BIRNBAUM: Your Honor, I could
14 request -- Can everybody hear me? I
15 could request asking to cross -- to
16 cross-examine again. There's no point
17 in that. The point I'm making is that
18 it causes procedural problems, when a
19 man tries to use procedure to get me to
20 testify in his behalf. It causes
21 problems to me, you, and you -- And I'd
22 like to remove myself out of the
23 cross-examine -- Finish
24 cross-examination.

25 THE COURT: Are you telling me that

1 you have no further remarks to make to
2 the jury on cross-examination?

3 MR. BIRNBAUM: I have no further
4 cross-examination to do.

5 THE COURT: All right. Do you have
6 anything further?

7 MR. RAY: Nothing further on
8 redirect, Your Honor. At this time, the
9 plaintiff would rest.

10 THE COURT: Okay. Mr. Birnbaum,
11 the plaintiff has rested. Now what that
12 means is that Mr. Jones and Mr. Ray have
13 presented all of the evidence that they
14 intend to present at this time. It's
15 now your turn to call witnesses or
16 present evidence, if you'd like to.

17 MR. BIRNBAUM: I'd like to address
18 the jury.

19 THE COURT: Well, now is this in
20 the way of calling yourself as a
21 witness?

22 MR. BIRNBAUM: Plain English, I'd
23 like to talk to the jury.

24 THE COURT: I understand.

25 MR. BIRNBAUM: I can procedurally

1 do this in multiple ways.

2 MR. RAY: Your Honor, I'm sorry. I
3 didn't hear the last of that statement.

4 THE COURT: Well, he wants to
5 address the jury. There are two ways
6 that he can do that. One, he can mount
7 the witness stand and testify in his own
8 behalf to the jury; and secondly, he can
9 address the jury in the form of jury
10 argument.

11 In other words, just make a speech
12 to the jury and discuss the evidence and
13 the law and draw reasonable deductions
14 and logical inferences therefrom, but
15 the time has not yet come to do that.

16 MR. BIRNBAUM: Oh, no. I'm
17 saying -- The point being that I can
18 effectively make myself either outside
19 or inside the jury box. I can get
20 myself inside the jury box --

21 THE COURT: You're not going to get
22 in the jury box. I think you mean the
23 witness stand.

24 MR. BIRNBAUM: I mean the witness
25 stand.

1 THE COURT: Okay.

2 MR. BIRNBAUM: I don't want to go
3 through the rituals of this. I want to
4 talk to the jury.

5 THE COURT: Well, there's some
6 rituals the law simply says that you
7 have to go through. Now --

8 MR. BIRNBAUM: Okay.

9 THE COURT: I'm just -- You're
10 going to have to help me now, because my
11 job is to see to it that your rights get
12 protected. And so far, I think we've
13 done pretty well, but I'm not exactly
14 sure when you say "address the jury",
15 what you mean by that. Do you mean
16 testify before the jury?

17 MR. BIRNBAUM: No, sir. At the
18 start of --

19 MR. RAY: Judge, I think he's
20 referring to an opening statement.

21 MR. BIRNBAUM: I'm referring to an
22 opening statement. May I make an
23 opening statement?

24 THE COURT: No, you may not. If
25 you recall yesterday, I asked -- Well,

1 let me go back. Obviously, this is
2 highly unusual. The law says that when
3 the plaintiff makes an opening
4 statement, you have a right to make an
5 opening statement. But when the
6 plaintiff does not make an opening
7 statement, then you do not have the
8 right to make an opening statement.

9 Now, unless Mr. Ray wants to waive
10 his rights under that, or unless you've
11 got some law to show me to the contrary,
12 then --

13 MR. RAY: Your Honor, we do not
14 want to waive our rights. We waived our
15 rights in opening statement, originally.
16 And because we waived our right to an
17 opening statement, we would request that
18 the Court also require that the
19 defendant not make an opening statement.

20 THE COURT: And that's the law
21 and --

22 MR. BIRNBAUM: I did not hear that
23 request. I don't believe such request
24 was made. I don't believe you made a
25 request that I not make an opening

1 statement.

2 THE COURT: No, no, no, no. He
3 didn't say that. What he said,
4 Mr. Birnbaum, was when I asked Mr. Ray
5 if "he", Mr. Ray, wished to make an
6 opening statement, Mr. Ray said that
7 "he", Mr. Ray, did not wish to make one.
8 And by saying that, he cuts off your
9 right to make one.

10 MR. BIRNBAUM: That's not what he
11 just said. I remember hearing that he
12 said -- that he approached the bench and
13 requested the bench -- that since he did
14 not do that, that I --

15 MR. RAY: That you be denied, also.

16 MR. BIRNBAUM: That I be denied.

17 THE COURT: That's true.

18 MR. BIRNBAUM: That's what he just
19 said.

20 THE COURT: That's what he just
21 said.

22 MR. BIRNBAUM: The rules -- the
23 rules --

24 MR. RAY: You show the law to the
25 Judge, Mr. Birnbaum.

1 THE COURT: Let me see what you're
2 wanting me to read.

3 MR. BIRNBAUM: I do have the 1997.
4 Rule 267-A.

5 THE COURT: Okay. I'm familiar
6 with this.

7 MR. BIRNBAUM: The very first line
8 of that, if I remember, it says "The
9 plaintiff shall make an opening
10 statement". The Rule specifically
11 states he shall make an opening
12 statement. And there's definitions in
13 this box about "shall" and "would" and
14 "may", but "shall" is mandatory. It is
15 mandatory that he make an opening
16 statement.

17 And therefore, by the Rules, if he
18 makes an opening statement, I'm entitled
19 to an opening statement; is that
20 correct?

21 THE COURT: You want to be heard?

22 MR. RAY: Your Honor, I have never
23 known, in any proceeding, that I've ever
24 been involved in as a trial, where there
25 is a requirement of an opening

1 statement.

2 As a matter of fact, many times we
3 waive opening statements, because
4 usually we cover a lot of that same
5 information in the voir dire of the jury
6 panel and selection of the jury. I
7 think in this particular instance, we
8 already did the same. The evidence is
9 pretty clear and concise.

10 So as a result, Judge, I waived my
11 opening statement at that time. And in
12 every instance, in every case that I've
13 ever participated in, where counsel for
14 the plaintiff waived their opening
15 statement; the defendant, likewise, did
16 not present an opening statement.

17 THE COURT: Well, I agree -- but
18 I'm going to let him make one.

19 MR. RAY: That's fine, Judge. I
20 understand, Judge.

21 THE COURT: That's just what I'm
22 going to do.

23 MR. BIRNBAUM: May I now make an
24 opening statement --

25 THE COURT: Make it. You may make

1 it.

2 MR. BIRNBAUM: -- which I was
3 previously being denied?

4 THE COURT: You may make it.

5 MR. RAY: Your Honor, however, I
6 would like for the jury to understand,
7 that this opening statement is an
8 opening statement, which is not
9 testimony about fact, but simply an
10 opening statement addressing the jury.

11 THE COURT: All right. Ladies and
12 gentlemen, let me reiterate. Opening
13 statements; number one, are not
14 evidence -- can't be considered as
15 evidence, and they cannot be used to
16 resolve the case. In other words, you
17 can't decide the case on the strength or
18 weakness of what you hear in an opening
19 statement.

20 The opening statement is designed
21 to give you a preview of what the person
22 making the statement believes is going
23 to be presented to you from the witness
24 stand. It's in effect, an anticipation
25 of upcoming testimony -- a preview, if

1 you will. Go ahead, Mr. Birnbaum.

2 OPENING STATEMENT

3 BY MR. BIRNBAUM:

4 MR. BIRNBAUM: I'm making that
5 opening statement, which I was denied
6 making to you as a jury, by the
7 procedural things that I could not talk
8 to you. I could only talk by procedure
9 regarding -- in rebuttal to anything
10 that he wanted to say. And I could only
11 question those witnesses that he wanted
12 to present. I have yet to present my
13 witnesses and I have some very solid
14 witnesses.

15 And what I intended to show, which
16 I only eluded to very shortly to the
17 total jury panel before, which was that
18 all this stuff that's in here, ain't so.
19 But I didn't get to elaborate that at
20 the beginning of the presentation of my
21 testimony.

22 In other words, before -- I'm going
23 to speak to you what it is that I intend
24 to present as evidence. Now I am not
25 presenting you with evidence right now.

1 I'm just telling you what I intend to
2 present as evidence.

3 Now the evidence will be
4 witnesses -- officers of the law and so
5 forth. And I may, at that point, call
6 myself as a witness, if necessary, but
7 probably not.

8 If I can develop material facts
9 regarding this case, I believe we won't
10 have to go through the shuffle again.
11 But it was a shuffle that I was required
12 to do, to get to address you in this
13 way. I finally got around to getting
14 myself into the witness box, to testify
15 what I wanted to talk to you about
16 anyway.

17 And then after I was sitting here
18 with the right talk to you about
19 whatever it was that I wanted to talk
20 about, then I made the mistake of
21 getting myself outside of the witness
22 box, and denying myself the right that I
23 had just won -- to talk to the witness
24 box. Now, I'm going to talk to you
25 about what I want to talk to you

1 about -- okay.

2 The general thing on these
3 things -- And I'm a rancher in South Van
4 Zandt County, as I briefly eluded to.
5 I'm an electrical engineer. I'm sort of
6 semi-retired from that. I worked in the
7 Dallas area. And my parents are out
8 here and settling in South Van Zandt
9 County near China Grove and so forth.
10 And I'm trying to show that these things
11 ain't so.

12 For your information -- And I'm new
13 to this stuff. You're sort of pro se,
14 also. What I'm saying is, I'm
15 experiencing this for the first time, in
16 being in court -- and for many of you it
17 is also. It's not real clear to me what
18 my rights before the Court are. And I'm
19 going to dwell a little bit about what
20 it is that your rights also are as a
21 jury -- as sort of a pro se jury.

22 In other words, you're on this on
23 your own in the court, as you being you,
24 okay. The thing that the Plaintiff is
25 trying to show, is essentially those

1 things that he has prepared on a piece
2 of paper -- And it's called an original
3 petition. It sort of -- It says --
4 States that he has certain claims before
5 the Court. It says that I've done him
6 damages of some kind. It is the
7 instrument upon which the whole
8 proceeding starts.

9 Now, it's called a petition. An
10 original petition that starts the
11 process. Now this was filed in 1995,
12 early in '95. My pleadings -- and I
13 answered to this, and I'm asked to come
14 up here and be summoned. The Sheriff
15 summons you and thou shalt be here, and
16 then you appear over here.

17 The way you appear, is you put
18 another piece of paper on top of this
19 and now you're both in court.

20 Now you can claim certain things at
21 that particular point, that says -- that
22 say, you know, "I'm here". The paper
23 says that. "I'm here", and "Mr. So and
24 So has done me such and such wrong". He
25 has filed this -- some sort of suit or

1 something. As a result of this, I'm
2 entitled to some sort of award -- some
3 sort of thousand dollars or something,
4 and the lawyer's fees -- so forth and so
5 forth, okay.

6 Now, there are claims made in this
7 form. There are two different distinct
8 words for claims. It's contrary to the
9 way us outside-the-court people think of
10 claims.

11 This is a claim to be repaid for
12 damages. The other thing is something
13 that somebody claims to be true. I
14 mean, I think the word "claim" has a
15 very particular meaning in the Court.
16 That you have a claim, that says that
17 you want to be awarded something, okay.

18 I'm in this court simply stating
19 that these things are not true. I have
20 no -- This is the petition. I have no
21 petition of this kind, in the Court,
22 asking the plaintiff to pay me anything
23 or do anything.

24 In other words, my pleading before
25 the Court is effectively, "It ain't so".

1 I'm not trying to seek to recover any
2 money from them -- any lawyer, any fees,
3 any anything. Because -- procedurally,
4 as soon as I do that, then I'm subject
5 to certain other rules, to which I don't
6 want to be subjected to, which says I'm
7 vulnerable to certain things -- that
8 somebody can get judgments on you.

9 As of the moment that you make a
10 claim that he did wrong, that he -- In
11 other words, when I say "claim", a claim
12 is the piece of paper, regardless what
13 other complaints have been talked about
14 before, those are not the kind of claims
15 that we're talking about.

16 THE COURT: Excuse me,
17 Mr. Birnbaum. I am loathed to interrupt
18 you, but an opening statement is for the
19 purpose of giving a jury a preview of
20 what evidence you're going to present.

21 MR. BIRNBAUM: Accepted.

22 THE COURT: So if you would limit
23 your remarks to that, it would be very
24 helpful.

25 MR. BIRNBAUM: With that said, I

1 intend to show -- I intend to show with
2 my exhibits -- and it's time to get on
3 with the exhibits. I intend to call my
4 witnesses regarding the evidence this
5 party has introduced.

6 My contention is the real solid
7 evidence of the photographs. Everything
8 else can be argued about and subject to
9 interpretation -- and whether the people
10 remember what it is.

11 So the only thing that I really see
12 concrete -- that I've seen concrete
13 before is, I've seen -- you know, papers
14 of this guy this, and this was -- so and
15 so died so and so -- and is this your
16 property.

17 But the only thing that is really
18 concrete is those photographs. And he
19 has introduced those as evidence, of
20 claiming that they all show -- that all
21 these photographs are evidence of damage
22 that I have done.

23 I will -- I am going to refute --
24 attempt to refute all of this
25 photographic evidence. In other words,

1 all of his -- those photos are intended
2 to reflect damage that I caused -- or
3 that I'm the cause of.

4 So I'm going to concentrate and try
5 to dispose of all those photographs or
6 discredit, as the word may be. In other
7 words, to try to show to you, with
8 expert witnesses, regarding these
9 photographs, that these photographs give
10 no indication that I did it or that I'm
11 the cause of it. That's the point.

12 In other words, the contention is
13 that this evidence over here -- And I'm
14 going to call on all the photographs --
15 shows that there's something bad that I
16 did. And I'm going to try to address
17 all these photographs and say, "No, it
18 doesn't show that. Ain't so". Okay.

19 Then after that, I will address the
20 petition, itself. I'm saying what is
21 this party really showing? And I will
22 show that by cross-examination, probably
23 of the plaintiff. I'm through with my
24 opening statement.

25 THE COURT: Who will be your first

1 witness?

2 MR. BIRNBAUM: My first witness
3 will be Scott Johnson.

4 * * *

5 SCOTT JOHNSON,
6 having been first duly cautioned and sworn upon his
7 oath to tell the truth, the whole truth, and nothing
8 but the truth, testified as follows, to wit:

9 * * *

10 DIRECT EXAMINATION

11 * * *

12 BY MR. BIRNBAUM:

13 THE COURT: You were sworn
14 yesterday; were you not?

15 MR. S. JOHNSON-WITNESS: Yes, sir.

16 Q. Please state your name and what capacity you
17 are now working?

18 A. My name is Scott Smith Johnson.

19 THE COURT: Pull the mic up towards
20 you a little bit. I've got it turned up
21 as high as I can get it down here
22 without getting a squeal.

23 MR. RAY: I'm not really having any
24 trouble hearing Mr. Johnson. I am
25 having some trouble hearing

1 Mr. Birnbaum. If you can turn his
2 volume up a little bit.

3 THE COURT: I think I've got it --

4 MR. BIRNBAUM: I can speak louder
5 if I have to.

6 THE COURT: Good.

7 MR. BIRNBAUM: I just don't want to
8 sound unnatural. If anybody can't hear
9 me -- I don't want to go pounding
10 anybody's eardrums. My throat is giving
11 me a little problem, but I do want to be
12 heard. So if anybody can't hear me, you
13 let me know; okay? Thank you.

14 A. I'm Scott Smith Johnson. I'm an investigator
15 with the City of Wills Point -- Wills Point, Texas,
16 Van Zandt County.

17 Q. What did you do before that?

18 A. I was a patrolman with the Van Zandt County
19 Sheriff's Department, Sargent with the Van Zandt
20 County Sheriff's Department, Chief Deputy with the
21 Van Zandt County Sheriff's Department.

22 Q. Do you remember, that as part of the Van
23 Zandt Sheriff's Department, you had contact with me?

24 A. Yes, sir.

25 Q. Okay. Would you describe what it -- what it

1 was you did?

2 A. Well, I was requested by you to come to a
3 location off of 1256, FM 1256 in Van Zandt County.
4 You had some type of a problem -- a land problem,
5 and that you wanted me to come down and look at some
6 land, and I did.

7 Q. Okay. I'm going to present to you here, a
8 narrative that you wrote at that time. Do you
9 recognize that as your narrative?

10 THE COURT: Have it marked, first,
11 by the reporter.

12 MR. BIRNBAUM: I request that it be
13 marked first by the reporter.

14 (WHEREUPON, Deposition Exhibit
15 No. D-2 was marked for
16 identification.)

17 THE COURT: Okay. You're showing
18 the witness what's been marked as
19 Defendant's Exhibit 2. Go ahead.

20 Q. Mister --

21 A. May I have a minute to read?

22 THE COURT: Just hang on just a
23 second. If you need a minute, well
24 then, I'll give it to you, but let him
25 ask the next question.

1 Q. At what time was this report and your entry
2 upon the land for an examination?

3 A. I have it dated down here.

4 THE COURT: Hold on a second. I'm
5 not sure -- Are you asking what time he
6 went on the land, or what time does the
7 report say he went on the land?

8 Q. What time -- What time was the report made?

9 A. I'll have to see the front of it.

10 Q. Here's the front of it.

11 THE COURT: Well, let's just --

12 MR. RAY: Your Honor, I don't think
13 the front of that has been offered as an
14 exhibit.

15 THE COURT: Well, it isn't -- but
16 let's just attach the -- How many pages
17 were there in this report?

18 MR. S. JOHNSON-WITNESS: There is
19 two pages.

20 THE COURT: Okay. Let's just
21 attach the two pages together, and the
22 two pages together will consist of
23 Defendant's Exhibit 2. Here's a paper
24 clip.

25 Q. Repeat the question -- I'm going to repeat.

1 At what time was the report made?

2 A. On 2-8 of '95 at two p.m.

3 Q. 2-8-95. That was about the time -- or very
4 close to the filing of the suit. I'm trying to
5 determine, by testimony, whether that was close
6 to -- whether that was close -- withdraw the
7 question. If -- Would you read -- Would you read,
8 for your own information and for the information of
9 the jury, the text of the report?

10 MR. RAY: Your Honor, I'll object
11 to the reading of the report.

12 THE COURT: Sustained. He may read
13 the report to himself, but I'm going to
14 sustain reading it to the jury until
15 it's admitted into evidence. Tell you
16 what, it might save us a little time if
17 you would go ahead and ask whatever
18 other questions you want to ask him.

19 MR. BIRNBAUM: Okay.

20 Q. When you went on the land, more or less what
21 did -- Did you find -- Did you see any large amounts
22 of water?

23 A. No, sir.

24 Q. You did not see any large amounts of water?

25 A. No, sir.

1 Q. Okay. The suit was filed on the 6th of
2 February. And if the suit were filed on the 6th of
3 February, and you were out there on the 8th of
4 February, would that say that that document -- what
5 you saw, fairly closely reflects what the thing was
6 like two days prior?

7 A. I could tell you what it looked like on the
8 8th.

9 Q. Well, do you believe that what you saw out
10 there, pretty well reflects what it looked like two
11 days earlier?

12 MR. RAY: Your Honor, I think he's
13 asking the witness to speculate what he
14 believes -- And if he would just ask --

15 THE COURT: I sustain it.

16 MR. RAY: -- the facts.

17 Q. What did you see on that date?

18 A. Okay. You accompanied me; I followed you.
19 We went down to a low area, which looked like a
20 natural wetland area, because it was in a low spot.
21 I saw approximately three to four hundred feet of
22 fence that was missing. I saw a tractor tire --
23 tracks that were in the ground. It was very wet for
24 that time of year. It was muddy in some spots. I
25 saw where it looked like the land had been washed

1 down-stream and had created a considerable amount of
2 damage too

3 Q. To whom?

4 A. I don't know who the other -- Where the fence
5 was, I don't have -- know who owned the other
6 property.

7 Q. Okay.

8 A. All I know is you told me it was Mr. Jones'
9 land, but I don't know who owned the property.

10 Q. In order to establish the area where we're
11 talking about, that there was an area there, where a
12 fence appeared to have been torn down?

13 A. Yes, sir -- three to four hundred yards or
14 feet.

15 Q. Okay. In trying to establish -- when we
16 refer to it now as the one side and the other side,
17 there was one side that was somewhat cleared, and
18 the other side that was somewhat brushy; is that
19 correct?

20 A. Yes, sir.

21 Q. Okay. The side that is brushy, is the one
22 that I'm referring to -- and we talked about was my
23 property. The one that was cleared was Mr. Jones'.

24 THE COURT: Is that a question?

25 MR. RAY: Your Honor, I'd object to

1 Mr. Birnbaum -- What he's attempting to
2 do is essentially make a factual
3 statement, and ask the witness to agree
4 to it. I'd object to it on that basis,
5 Your Honor, Because I think Mr. Johnson
6 has already testified, he does not know
7 who the land owners are, and is not
8 going to know unless Mr. Birnbaum --

9 THE COURT: I'm going to sustain
10 the objection to the last statement made
11 by Mr. Birnbaum to the witness.

12 MR. RAY: Thank you, Your Honor.

13 MR. BIRNBAUM: Okay.

14 Q. Did I tell you which side of the fence was
15 mine?

16 A. Yes, sir.

17 Q. Which side was it?

18 A. Well, if we were standing in front of it, it
19 would be right in front of me or left of the --

20 Q. Which -- We have already established that
21 there was a woody side and a non-woody side.

22 MR. RAY: Your Honor, I'm going to
23 object to that statement. I think
24 Mr. Birnbaum established that in trying
25 to ask questions, but I don't think the

1 witness has testified --

2 THE COURT: I'll sustain the
3 objection to his testifying.

4 MR. BIRNBAUM: On that question?

5 THE COURT: It wasn't a question.

6 MR. BIRNBAUM: Okay.

7 Q. From the fence, do you recall which side was
8 the up-stream -- which one is the up-stream and
9 which one was the down-stream?

10 A. It was in a natural low area. The water
11 looked like it had flowed from the south -- what I
12 would call the south to the north. I mean, I don't
13 know that --

14 Q. Did the water -- Did the water -- I'm trying
15 to establish what everybody knows. Did the water
16 flow from the side that you just testified to, that
17 had the tracks on it, to the side that did not have
18 the tracks on it?

19 A. I don't know. There wasn't any water
20 flowing, it was --

21 Q. There was no water there; right?

22 A. No, sir. It was mud, but there was no water
23 flowing.

24 Q. Well, how big an area was there of mud?

25 A. I don't know. I could estimate.

1 MR. BIRNBAUM: I wish to excuse the
2 witness, until we can establish with
3 another witness, the clear identity of
4 which side -- and I'd like to call
5 Investigator Pool.

6 THE COURT: Do you have any
7 other --

8 MR. BIRNBAUM: I have no other
9 questions.

10 THE COURT: In other words, you're
11 through with this witness except for --

12 MR. BIRNBAUM: For recall upon the
13 other witness.

14 THE COURT: Well, what I'm trying
15 to find out, Mr. Birnbaum, is that -- I
16 don't mind having this witness wait, but
17 why don't you go ahead with the rest of
18 your examination, and then if you have
19 to recall him for one or two questions,
20 why that will save us quite a bit of
21 time.

22 MR. BIRNBAUM: No, no. The key
23 examination has to be the determination
24 as to which side we're calling which
25 side on this particular thing. It is

1 there, please.

2 Q. Please state your name, and what it is that
3 you have holding in your hands?

4 A. My name is Doug Pool. I have Mr. Birnbaum's
5 file folder from 1995.

6 Q. What were you doing for me at that time?

7 A. We came down and examined your creek bottom.

8 Q. In what capacity did you come down, and what
9 did you do upon examining my creek bottom?

10 A. We were -- I was working as a private
11 investigator.

12 Q. Okay. You produced what?

13 A. We produced a two-page report and a
14 photograph.

15 Q. Yes, sir. You have the copy of that in front
16 of you?

17 A. Yes.

18 Q. Okay. The area -- You do remember the area;
19 right?

20 A. Yes, sir.

21 Q. Okay. There was some bulldozer activity and
22 some -- There were certain types of evidence around
23 the area of -- Did you see a lot of water in that
24 area at that time?

25 A. No, sir.

1 Q. You saw no water in that area at that time.
2 Did you see any evidence of large amounts of water
3 having been there?

4 A. No.

5 Q. Just to repeat, I want to ask the question.
6 At the time that you came down there, did you see
7 any large -- Did you see any significant amount of
8 water?

9 A. No significant amount of water. A small
10 trickle of water through the stream bed.

11 Q. Okay. Was there any flooding of any kind of
12 anything?

13 A. No.

14 Q. Was there any possibility of any flooding
15 being at that time?

16 A. It didn't appear to me, no.

17 Q. Okay. Did it appear that there had been some
18 modifications on the land made in that area?

19 A. Yes.

20 Q. Would you describe them?

21 A. On the up-stream from your property, the
22 creek bed appeared to have been cleaned or
23 bull-dozed out, to where it was just a drainage
24 ditch. And, of course, when it hit Mr. Birnbaum's
25 property, which it returned the -- I guess a natural

1 creek flow. The only obstructions that I noted,
2 from one side of Mr. Birnbaum's property to the
3 other side, were trees, sand bars -- just the
4 natural flow of the creek.

5 Q. Okay. Did you -- Did you see -- Was there a
6 line, where it was indicated, that there was a fence
7 line between the two of them? Was it clear to you
8 where the fence line had been?

9 A. Yes.

10 Q. And the fence line was removed?

11 A. Yes.

12 Q. And how was the fence line removed?

13 A. Other than seeing the tracks and the evidence
14 that there had been some excavation there by some
15 heavy equipment, I assumed then that --

16 Q. A bulldozer or something like that?

17 A. Yeah.

18 Q. Okay.

19 MR. RAY: Your Honor, I would
20 object at this point. I don't mind the
21 witness testifying to what he can draw
22 as actual --

23 THE COURT: I'll sustain it as to
24 the assumption.

25 MR. RAY: Thank you.

1 Q. Okay. Was there any -- Was there any
2 indication that I, Mr. Birnbaum, had done any land
3 modification on my side?

4 MR. RAY: I object, again, Your
5 Honor, because I don't think the witness
6 can testify as to who might have made
7 the changes. He can testify all day
8 long as to what he saw with his visual.

9 THE COURT: Sustained.

10 Q. The tracks from the bulldozers or the heavy
11 equipment, when they came into that area, would they
12 have had to come from the cleared side or from my
13 side?

14 A. They would have had to have come from the
15 cleared side.

16 Q. Okay. Do you know which the cleared side
17 was?

18 A. The land adjoining your property.

19 Q. So --

20 A. Up-stream.

21 Q. You're testifying that the bulldozers could
22 not have come from my side of the property?

23 A. I didn't see any indications, it could have
24 come across your property, from the way I came in.

25 Q. Do you believe it would be a proper

1 inference, to state that the bulldozers would have
2 had to have come from Mr. Jones' property?

3 A. That was my belief.

4 MR. RAY: Your Honor, at this
5 point, I'm going to object based on
6 relevancy. I fail to see how it goes to
7 the case at hand. There's no
8 affirmative pleadings on Mr. Birnbaum's
9 part, nor any counter-claim of any kind
10 to which he's filed. I fail to see how
11 any tracks on Mr. Jones' side of the
12 property is going to be pertinent to the
13 issue at hand.

14 THE COURT: I'll overrule the
15 objection. Go ahead.

16 Q. But you did -- You did testify --

17 THE COURT: You're getting ready to
18 ask a question that's already been
19 answered.

20 Q. But you do testify, that the land
21 modification was done on Jones' side?

22 A. Yes, sir.

23 THE COURT: Hadn't you already
24 asked that?

25 MR. BIRNBAUM: Yes, sir

1 THE COURT: Don't repeat.

2 MR. BIRNBAUM: Okay. I'm going to
3 ask now for the exhibits -- the
4 Plaintiff's exhibits that the --
5 photographic, so we can determine which
6 things we're talking about. I would
7 like the reporter to provide the
8 photographic evidence submitted.

9 (WHEREUPON, the court reporter
10 made the exhibits available.)

11 MR. BIRNBAUM: I present this to
12 Mr. Ray for inspection.

13 THE COURT: You can, but I have a
14 feeling he's already inspected them.
15 These are exhibits that have been
16 admitted; are they not?

17 MR. BIRNBAUM: Are these all --

18 MR. RAY: They have already been
19 admitted. I don't need to review them
20 again.

21 MR. BIRNBAUM: Are these all of the
22 photographic exhibits?

23 THE COURT: I'm sorry,
24 Mr. Birnbaum, you need to address your
25 remarks to the Court. What was your

1 question?

2 MR. BIRNBAUM: I would like to ask
3 Mr. Ray if these are all of the
4 photographic exhibits.

5 THE COURT: You may ask the court
6 reporter -- or I'll ask the court
7 reporter, if the exhibits that she has
8 tendered to you, are all that have been
9 introduced into evidence? He has all
10 the exhibits; doesn't he, Lynda?

11 COURT REPORTER: Yes, sir. Let me
12 make absolutely sure.

13 THE COURT: Well, now there's
14 another photograph; is that --

15 COURT REPORTER: Defendant's 1.

16 THE COURT: That's Defendant's --
17 Okay.

18 MR. BIRNBAUM: Let the record
19 reveal that I'm putting these in order,
20 so that it will make it a little easier
21 in the future.

22 MR. RAY: I'm sorry, I just simply
23 can't hear Mr. Birnbaum.

24 THE COURT: He said let the record
25 reflect, that he's putting the exhibits

1 in numerical order, so it will be easier
2 in the future.

3 MR. RAY: That's fine, Your Honor.

4 MR. BIRNBAUM: For the record, I
5 have in front of me photographic
6 exhibits, P-6A through P-6G, P-7A
7 through P-7D, and Exhibit P-8. I
8 will -- I'm submitting these to the
9 witness as these having -- these
10 pictures having been offered by the
11 Plaintiff as evidence of some kind of
12 bad that I did.

13 Q. Mr. Pool, I would like to ask you, in light
14 of what you just testified to, as to where the human
15 activity -- as to who did what. You have already
16 testified to -- In light of who did what, and what
17 you saw there, and upon the assumption that these
18 things are in deed all on Mr. Jones' property, since
19 they have been offered as evidence of damage on his
20 property -- We presume that. That this could --

21 THE COURT: Mr. Birnbaum, first
22 hand the exhibit to the witness. Now
23 ask him -- You may ask him anything you
24 want to ask him, but ask him one
25 question at a time, get his answer, then

1 go to the next question.

2 MR. BIRNBAUM: Okay.

3 Q. Refer to these pictures one at a time. Look
4 at P-6A. Does this look like --

5 A. As I remember, P-6A looks like --

6 MR. RAY: Your Honor, I object to
7 the witness testifying without a
8 question being asked to elicit
9 information.

10 THE COURT: Sustained.

11 Q. I'm going to ask the witness -- Does this
12 look like something that may well have been done --
13 that Mr. Jones may well have done himself?

14 A. Yes.

15 Q. Okay -- P-6A. The damage in P-6A, if there
16 is indeed any damage, may well have been done by
17 Mr. Jones, himself? You already said "yes"?

18 A. Yes.

19 Q. May well. We're not saying that he did, but
20 that he may well have; all right.

21 A. P-6B --

22 MR. RAY: Your Honor, once again
23 I'm going to object to the witness
24 testifying without a question being
25 asked.

1 THE COURT: Sustained.

2 Q. Regarding P-6B, does the problems, if any in
3 that thing, look like they may well have been done
4 by Mr. Jones?

5 A. There was no water when I was down there, so
6 I really can't tell, because these other pictures
7 have a lot of water in them.

8 Q. P-6B put --

9 MR. RAY: Your Honor, may I take
10 the witness on voir dire?

11 THE COURT: Yes, sir.

12 VOIR DIRE OF THE WITNESS

13 BY MR. RAY:

14 Q. Mr. Pool, my name is Richard Ray. I think we
15 know each other from the past?

16 A. Yes, sir.

17 Q. If I might see those photographs for a
18 second. All of these photographs that you've looked
19 at, are you able to identify these photographs being
20 photographs of property that you're familiar with?

21 A. Only that --

22 MR. BIRNBAUM: I object.

23 A. -- first one.

24 Q. Only the first one -- 6A?

25 THE COURT: Overruled.

1 A. Yes, sir.

2 Q. Okay.

3 MR. RAY: Your Honor, we would
4 object to any further testimony coming
5 in with respect to any other
6 photographs, other than the photograph
7 the witness testified that he can
8 identify the property.

9 THE COURT: That's 6A?

10 MR. RAY: Yes, sir -- That's 6A.

11 THE COURT: All right. I'll
12 sustain it.

13 MR. BIRNBAUM: Call for a recess --
14 about five minutes.

15 THE COURT: For what purpose?

16 MR. BIRNBAUM: For me to think.

17 THE COURT: Do you have any further
18 questions of this witness?

19 MR. BIRNBAUM: Yes, sir.

20 THE COURT: We're going to recess
21 for lunch in about twelve minutes. Why
22 don't you go ahead and get as many
23 questions asked as you can, and then
24 we'll recess at high noon, and you can
25 review your documents at that time.

1 CONTINUED DIRECT EXAMINATION

2 BY MR. BIRNBAUM:

3 MR. BIRNBAUM: I'd like this to be
4 marked as an exhibit for the defense.

5 (WHEREUPON, Deposition Exhibit
6 No. D-3 was marked for
7 identification.)

8 MR. BIRNBAUM: Let the record
9 reveal that it is Defendant's Exhibit 3,
10 and I'm going to ask you to look at
11 that --

12 THE COURT: Show it to Mr. Ray,
13 first.

14 MR. RAY: Okay.

15 Q. Would you read what it says on the top --

16 MR. RAY: Your Honor, I'm going to
17 object to the witness reading from that
18 particular exhibit, until it's admitted
19 into evidence.

20 THE COURT: Sustained.

21 MR. RAY: Quite frankly, Judge, I
22 don't think it's admissible. That's
23 part of the pleadings, and it's not even
24 a live pleading at this point. It's the
25 original petition of the suit.

1 MR. BIRNBAUM: I'd like to excuse
2 the witness, and right after the recess
3 call the Plaintiff on the stand.

4 THE COURT: I don't mind excusing
5 the witness, but we're not going to take
6 a recess for another 10 minutes. What
7 are we going to do during that time?

8 MR. BIRNBAUM: Call the plaintiff.

9 THE COURT: Thank you, sir. You
10 may stand down.

11 MR. RAY: Your Honor, do I need to
12 cross-examine him before he goes, or is
13 he just going to be recalled and I need
14 to reserve my cross-examination?

15 THE COURT: Well, you'll have your
16 cross-examination. If he's recalled
17 you'll get it then. If he doesn't
18 recall him, then you'll still have a
19 chance to put him back on and
20 cross-examine him if you want to.

21 MR. RAY: Judge, I just think -- I
22 mean is Mr. Birnbaum -- If he's not
23 intending to release him, I'll just do a
24 quick cross on him now, Judge.

25 THE COURT: That will be fine. You

1 want to pass the witness to Mr. Ray for
2 the beginning of cross-examination? Do
3 you have any objection to that?

4 MR. BIRNBAUM: Yes.

5 THE COURT: Overruled. Go ahead.

6 MR. RAY: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. RAY:

9 Q. Mr. Pool, did I understand that you did an
10 investigation for Mr. Birnbaum?

11 A. Yes, sir.

12 Q. What specific date was it, that you went down
13 to the property and viewed it?

14 A. It was September of '95 -- I believe the 20th
15 or 21st.

16 Q. Okay, sir. That's good enough. Were you
17 ever on this property at all, during the period of
18 time from October of 1994 to February of 1995?

19 A. No, sir.

20 Q. Okay.

21 A. I was never on it prior to September of '95.

22 Q. You were never there on the property prior to
23 September of 1995?

24 A. No.

25 Q. All right, sir. And the bulldozer tracks

1 me to respond to that? I think the
2 record speaks for itself.

3 THE COURT: I think so. I believe
4 that's correct. I think I'll have
5 nothing further to say about that.
6 Don't lean on the bench.

7 MR. BIRNBAUM: Trying to find a
8 procedure, by which to establish which
9 petition to cross-examine the Plaintiff
10 on, without examining the Plaintiff
11 regarding which one is his petition.

12 MR. RAY: Judge, you want me to
13 tell him? I filed the first one, that's
14 the original. I filed one and then I
15 filed a second amended. The last one is
16 the live one -- is the one that's been
17 here now.

18 MR. BIRNBAUM: That's fine.

19 THE COURT: Now wait a minute.

20 MR. BIRNBAUM: There have been no
21 hearings or anything on this, and it's
22 not clear exactly which one of the
23 petitions is the one that has been
24 presented.

25 THE COURT: Mr. Birnbaum, it's

1 customary not to interrupt the Court
2 when the Court is speaking. Is it your
3 intention to offer the pleading into
4 evidence?

5 MR. BIRNBAUM: That's what I was
6 trying to do.

7 MR. RAY: Judge, I'll object.
8 That's not a proper --

9 THE COURT: Mr. Birnbaum, I don't
10 believe the pleadings are admissible
11 into evidence.

12 MR. BIRNBAUM: Okay. Can I examine
13 the witness regarding the items in the
14 pleading?

15 THE COURT: Well, sure, you --

16 COURT REPORTER: Judge, I'm sorry,
17 I'm having trouble hearing.

18 THE COURT: This is all off the
19 record.

20 (WHEREUPON, off-the-record
21 discussions were had at the bench.)

22 THE COURT: We'll recess for lunch.
23 We'll resume at 1:15, ladies and
24 gentlemen. Same instructions given you
25 previously still obtain. I've got a few

1 matters to take up here, and I don't
2 want to take your time while I do it.
3 Jury is in recess until 1:15. Thank
4 you.

5 (WHEREUPON, the lunch break
6 was taken at this time.)

7 THE COURT: All right. You're
8 prepared to excuse the witness Johnson?

9 MR. BIRNBAUM: Yeah. For the
10 reasons I can't get him on the court
11 anyway. I'm prepared to excuse him.

12 COURT REPORTER: I'm sorry, sir.
13 "For the reasons I" --

14 MR. BIRNBAUM: That I can't seem to
15 get him to testify for myself.

16 THE COURT: Okay. Then I'm going
17 to -- What about the other witness --
18 Pool? Were you through with him?

19 MR. BIRNBAUM: Yes.

20 THE COURT: Okay. Then I'm going
21 to ask the bailiff to tell Mr. Pool and
22 Mr. Johnson that they are finally
23 excused and may leave.

24 MR. BIRNBAUM: And tell them thank
25 you.

1 MR. RAY: Judge, could I consult
2 with Mr. Jones just a moment, because I
3 never conducted any cross on
4 Mr. Johnson?

5 THE COURT: Oh, yeah. I forgot
6 about that.

7 MR. RAY: I reserved my cross, and
8 I don't know that it's all that
9 important anyway.

10 THE COURT: Okay. Stand by Fred.
11 I forgot about that.

12 MR. RAY: Let him go, Your Honor.

13 THE COURT: Tell Mr. Pool and
14 Mr. Johnson that both sides have agreed
15 to excuse them. They're free to go.
16 Who do you have next, Mr. Birnbaum?

17 MR. RAY: Judge, Mr. Phillips and
18 Mr. Leos are back here as recalled. I
19 forget about that. They came back at
20 one -- from yesterday. My witnesses.

21 THE COURT: All right.

22 MR. RAY: I don't know whether
23 Mr. Birnbaum wants to keep them out
24 there as subject to recall or not,
25 because they'd obviously like to go too

1 when they see the other witnesses
2 depart.

3 MR. BIRNBAUM: They may go. They
4 both may go.

5 THE COURT: For the record, their
6 names? Phillips and --

7 MR. RAY: What's Mr. Phillips'
8 first name?

9 MR. BIRNBAUM: Roy.

10 MR. RAY: Roy Phillips and
11 Mr. Ignacia Leos.

12 THE COURT: They are both excused
13 by agreement from both sides?

14 MR. BIRNBAUM: Yes, sir.

15 MR. RAY: They're already unhappy
16 with me for being late as it is.

17 THE COURT: Well, tell them my
18 story -- not now, tell them my story
19 later. Who do you have next?

20 MR. BIRNBAUM: I've got a special
21 request.

22 THE COURT: You want this on the
23 record?

24 MR. BIRNBAUM: Yes, sir. No -- off
25 the record, off the record.

1 (WHEREUPON, a discussion was
2 had off the record at the bench.)

3 THE COURT: The record will show
4 the next witness has been sworn -- has
5 been on the stand previously and has
6 been sworn.

7 THE COURT: For the record,
8 Mr. Birnbaum, who will you have next as
9 your witness?

10 MR. BIRNBAUM: I will testify onto
11 my thoughts and to my evidence.

12 THE COURT: Record will show
13 Mr. Birnbaum to have been sworn.

14 MR. BIRNBAUM: Okay.

15 (WHEREUPON, Mr. Birnbaum was
16 previously sworn.)

17 DIRECT EXAMINATION

18 BY MR. BIRNBAUM:

19 THE COURT: Get the microphone
20 where you had it before, so that
21 everything will be heard.

22 MR. BIRNBAUM: I have observed what
23 I can do, and what I can do from which
24 positions in this court, and what
25 happens when I try to present the

1 testimony of my own witnesses on to the
2 jury. That the procedures that are laid
3 in place by the lawyers -- the rules of
4 procedure. I don't mean that in a
5 derogatory manner.

6 That the procedures that lawyers
7 have to abide by and have been taught to
8 abide by -- and to be able to proceed in
9 spite of all that -- is a good system
10 for disposing of cases, where both
11 parties are represented by lawyers.

12 But as you see right now, I'm able
13 to sit on the witness bench and talk to
14 you directly, as no lawyer could, as no
15 client could, when he were represented
16 by a lawyer.

17 You're seeing and have seen -- Now
18 this was something that I discovered
19 here today, that I can talk to you
20 directly. That I am allowed to talk to
21 you directly. I can appeal to you
22 directly. I can show unto you directly,
23 without having to abide -- not abide, by
24 using those extraordinary powers given
25 to me, by being both the -- both parts

1 of the -- the party calling and the
2 party being called. I can effectively
3 talk to you directly.

4 I found out that this is
5 extraordinary. Because as you saw
6 today, I discovered it and I
7 accidentally discovered -- I discovered
8 that when Mister -- and I discovered
9 that today -- that when Mr. Ray called
10 me as a witness, and I was trying to be
11 very careful, that somewhere near the
12 end I had the right to cross-examine
13 myself.

14 I don't know who used that word --
15 whether it was Mr. Ray or the Judge.
16 Somebody mentioned the word
17 "cross-examination". And I said "huh,
18 all right".

19 Now, then, I thought, "Now what
20 does this mean"? And then I went up to
21 the bench, "Your Honor" -- And remember
22 I'm testifying. I'm under oath. I am
23 under oath. I'm sitting in the witness
24 box.

25 I am under oath. I'm subject to

1 the rules of perjury. I'm under oath,
2 but I do have the extraordinary power of
3 talking to you directly -- And remember,
4 the final wording was a finding upon
5 you, upon the evidence that you have
6 been presented, and I am presenting
7 evidence to you now.

8 MR. RAY: Your Honor, if I might
9 interject something here. I certainly
10 don't mind Mr. Birnbaum testifying to
11 the facts of the case, but thus far I
12 haven't heard anything concerning the
13 facts of the case.

14 I would object to the testimony,
15 that essentially amounts to a
16 dissertation on what his rights are.

17 Judge, I'm happy to sit and listen,
18 as long as the Court wants to abide
19 that, I'm interested in hearing what
20 Mr. Birnbaum has got to say about the
21 case.

22 MR. BIRNBAUM: Okay. I'm going to
23 proceed to provide the evidence in the
24 way that I, as a pro se defendant, am
25 entitled to present it.

1 Ladies and gentlemen, there were
2 all kinds of pictures over here, that I
3 was not able to present to you, because
4 of the rules of evidence. However,
5 there's an alternate way of me
6 presenting the same evidence.

7 MR. RAY: Judge, I'm going to
8 object to the jury seeing anything,
9 until it's been actually -- proper
10 predicate laid for admitting it, and it
11 being admitted into evidence before the
12 Court, before it's provided to the jury.

13 THE COURT: Sustained.

14 MR. BIRNBAUM: I do not call on the
15 jury to say anything. I am testifying
16 onto my thoughts, and I'm -- and the
17 evidence, both by my words -- what I
18 show you by my words, my actions, my
19 being, what I have in front of it, what
20 I have personal knowledge of.

21 So this exact material, that I was
22 trying to get my paid investigator to
23 present before you, so that you might
24 see it, I have to present to you as upon
25 my knowledge of it -- and of course, you

1 as jurors, have the right to believe me
2 or not to believe me, and ultimately
3 make a finding upon the facts that you
4 are being presented with.

5 In other words, it's directly
6 between me and you. I have
7 extraordinary powers.

8 (WHEREUPON, Mr. Birnbaum
9 walked over to the jury box.)

10 MR. BIRNBAUM: I'm going to show
11 you --

12 THE COURT: No, no, no.

13 MR. RAY: Judge, I'm going to
14 object, again.

15 THE COURT: Mr. Birnbaum, the rules
16 don't permit you to just walk up and
17 hand the jury an exhibit. You have to
18 have it marked. It has to be
19 identified. The other side has the
20 right to look at it, and then I get a
21 right to look at it, and see whether or
22 not I'm going to let the jury look at
23 it. So could we do it that way, please?

24 MR. BIRNBAUM: Your Honor, I'm not
25 going to hand it to the jury; I'm going

1 to show it to the jury.

2 THE COURT: No -- I'm sorry. You
3 can't do that, either. I mean, you have
4 to first have it marked by the court
5 reporter. And she'll mark it
6 Defendant's Exhibit number whatever it
7 is, and then if you lay the proper
8 predicate, and you show it to the lawyer
9 on the other side, Mr. Ray, to give him
10 a chance to object to it, then I'll rule
11 on the objection. And if I don't
12 sustain the objection, then you may show
13 it to the jury. That's the way we do
14 that.

15 MR. BIRNBAUM: Agreed.

16 THE COURT: Are you ready?

17 MR. BIRNBAUM: The comment -- I
18 wasn't trying to bypass any of the
19 steps. I was somewhat trying to keep my
20 material in order, that it didn't
21 just -- that I have a big stack of
22 evidence over there this thick. I was
23 trying to get evidence into the Court.
24 And now after that, I find that I've
25 gotten the evidence in the Court, and I

1 don't have anything more at home. I was
2 trying to avoid losing all my evidence
3 into the files.

4 Your Honor, what is the mechanism
5 by which I can still have access to this
6 information?

7 THE COURT: I'm sorry, I'm having a
8 little trouble. No, don't get closer.
9 Now, you were asking me something?

10 MR. BIRNBAUM: Yes. The procedure
11 for me having access to that which I
12 submit as evidence.

13 THE COURT: I guess I just don't
14 understand the question.

15 MR. BIRNBAUM: Okay.

16 THE COURT: You have access to
17 whatever it is that you have in your
18 hand. If you're asking me what you have
19 to do -- or what the procedure is to get
20 the documents you have in your hand into
21 the hands of the jury, I think I've
22 explained this.

23 MR. BIRNBAUM: Yes, sir. I was
24 asking, what is the procedure of
25 ultimately getting some of these

1 documents or the copies of them back to
2 me -- or is there a procedure for
3 getting copies for me to --

4 THE COURT: Oh, I see. In other
5 words, you want to know --

6 MR. BIRNBAUM: I don't want to lose
7 all my files.

8 THE COURT: Well, let me explain it
9 this way. Until your files are admitted
10 into evidence, they're yours to do with
11 what you want. Once they're admitted
12 into evidence, then they are -- I guess
13 the best way to put it, they belong to
14 the Court.

15 There are a number of different
16 ways to get them back to you, which I
17 don't need to go into now, but no one is
18 going to destroy your files or hide them
19 or keep them from you. So with that
20 understanding, go ahead.

21 MR. BIRNBAUM: I request that this
22 be entered into evidence -- this folder.

23 THE COURT: Let me take a look at
24 it for a moment, maybe I can --

25 MR. BIRNBAUM: Well, I don't know.

1 The intent is to enter the photographs.

2 THE COURT: What you've done,
3 you've handed me a manila file folder,
4 that has some papers in it, and a series
5 of photographs. Are you trying to admit
6 the entire --

7 MR. BIRNBAUM: The photographs.

8 THE COURT: Just the photographs?

9 MR. BIRNBAUM: Just the
10 photographs.

11 THE COURT: All right. I'm going
12 to take the photographs out of the file
13 and give you the file back. I now have
14 what appears to be better than a dozen
15 photographs. Do you -- I don't have
16 a -- I'll tell you what, let me --
17 Mr. Birnbaum, would you hand those to
18 the court reporter, please.

19 MR. BIRNBAUM: Let me take that
20 back. Let me take these back and take
21 another group of photographs -- pictures
22 that I have much more direct knowledge.

23 THE COURT: All right.

24 MR. BIRNBAUM: I have just shown
25 that I have the right to show you, by

1 going through the proper procedure of
2 submitting, marking, having inspected,
3 and then showing them to you. I chose
4 not to do so, because I would lose the
5 documents.

6 THE COURT: Because you what?

7 MR. BIRNBAUM: I would lose
8 immediate access to the documents --
9 convenient access.

10 THE COURT: Nobody has said that
11 you wouldn't have access to the
12 documents, or the pictures, or anything
13 else that's introduced into evidence.
14 I'm not going to let the record reflect
15 that.

16 MR. BIRNBAUM: Okay. I take that
17 statement about the access back. That
18 was my belief; I've been corrected.

19 THE COURT: Okay. Go ahead and
20 offer what you wish to offer.

21 CONTINUED DIRECT EXAMINATION

22 BY MR. BIRNBAUM:

23 MR. BIRNBAUM: I testify upon my
24 own knowledge, of pictures taken in the
25 area; not reviewed, but taken within --

1 on the day or one or two days after suit
2 was filed, which was -- I received the
3 suit on the -- It was filed on the 6th
4 of February, and I received a summons on
5 the 8th of February.

6 These were taken either on the day,
7 or one or two days later, at the most.
8 Without me reviewing these in detail --
9 these are a little bit larger pictures.
10 It makes it more convenient. I would
11 like to enter all these pictures into
12 evidence to be marked.

13 THE COURT: The reporter will mark
14 them serially, starting with the number
15 next from the last defense exhibit. Go
16 ahead, Mr. Birnbaum.

17 (WHEREUPON, Deposition Exhibit
18 Nos. D-4 through D-46 were marked
19 for identification.)

20 MR. BIRNBAUM: In the interest of
21 time, now that I have the right to show
22 this exhibit on to the -- on to the
23 jury, I request that Mister -- whether
24 Mr. Ray has any objection?

25 THE COURT: All right. Let the

1 record reflect that Mr. Ray has been
2 tendered Defendant's Exhibits 4 through
3 46 inclusive.

4 MR. BIRNBAUM: Your Honor, I was
5 trying to save some time, because I'm
6 going to do this to another package of
7 pictures. I was trying to do this in
8 mass, which means I didn't want to take
9 the Court's time, by any one individual
10 to flip through them.

11 I don't know exactly which picture
12 it was. I don't intend to discuss
13 specifically any one picture, unless
14 there's some questions raised later by
15 the Plaintiff.

16 So what I was proposing to do, is
17 take these over and give them to the
18 jury -- and there should be about 36
19 pictures. If everybody takes three, and
20 you just sort of look at them -- I'm
21 trying to give the flavor of that batch
22 of pictures. I'm trying to save time,
23 instead of everyone looking at every one
24 of the pictures, they essentially show
25 the same thing. For the record and for

1 the jury, these pictures -- I was trying
2 to treat them as a group.

3 MR. RAY: Your Honor, I'm going to
4 object to any testimony from
5 Mr. Birnbaum, until they're properly
6 admitted into evidence, concerning what
7 the pictures depict.

8 THE COURT: I'll sustain it.

9 MR. RAY: Your Honor, may I take
10 the witness on voir dire on a couple of
11 questions?

12 THE COURT: Surely.

13 VOIR DIRE OF THE WITNESS

14 BY MR. RAY:

15 Q. Mr. Birnbaum, I know you've got some more
16 photographs, are you intending to introduce those
17 also?

18 A. I have introduced those.

19 Q. You haven't introduced those yet, though;
20 have you?

21 A. Huh-uh.

22 Q. Okay. I'm talking about your exhibit 4 down
23 to 46; okay?

24 A. Uh-huh.

25 Q. Who took the photographs?

1 A. I did.

2 Q. Well, there's one that you're in the picture,
3 so you didn't take that photograph; did you?

4 A. There may have been one that may have been
5 taken --

6 Q. It was someone else taking it at your
7 direction, then?

8 A. Yes.

9 Q. Can you tell me the date the photographs were
10 taken?

11 A. They were taken one or two days following --
12 after I received the -- No.

13 Q. Well, can you tell me the month and the year?

14 A. Yes. This was -- These were taken in
15 February of '95, middle of February.

16 Q. Okay. Do they accurately depict the scene as
17 you recall?

18 A. Do photographs lie?

19 Q. Do these photographs accurately -- Do these
20 photographs accurately depict the scene as you
21 recall? Do they accurately --

22 A. Yes.

23 Q. -- show the scene --

24 A. Yes.

25 Q. -- as you recall it?

1 A. Yes, yes.

2 Q. Okay.

3 MR. RAY: Your Honor, we have no
4 objection.

5 THE COURT: 4 through 46,
6 inclusive, are admitted.

7 (WHEREUPON, D-4 through D-46
8 were admitted into evidence at this
9 time.)

10 MR. RAY: You want me to hand them
11 back to Mr. Birnbaum?

12 THE COURT: Yeah.

13 CONTINUED DIRECT EXAMINATION

14 BY MR. BIRNBAUM:

15 MR. BIRNBAUM: In the interest of
16 time of you hearing from me --

17 THE COURT: Mr. Birnbaum, if you
18 would -- Your back is to me and I need
19 to hear --

20 MR. BIRNBAUM: I'm sorry.

21 THE COURT: No -- That's all right.
22 You can stand up, but just raise your
23 voice enough so that I can hear you.

24 MR. BIRNBAUM: No need to. In the
25 interest of time, I was trying to deal

1 with these in total, instead of having
2 everybody look at everything. This is
3 my testifying upon how -- what the
4 evidence shows.

5 Remember these are entered into
6 evidence by me. Previously, I had
7 problems entering evidence. I couldn't
8 even get the pictures, that I had taken
9 by the person that I'd hired, to provide
10 a report regarding to it.

11 MR. RAY: Your Honor, if I might
12 interrupt here a moment. If I
13 understand Mr. Birnbaum's testimony, the
14 person that he hired to take the
15 photographs -- Now you're not
16 testifying, are you, that Mr. Pool took
17 those photographs?

18 MR. BIRNBAUM: No, sir.

19 MR. RAY: Okay. I'm sorry.

20 MR. BIRNBAUM: I was testifying
21 regarding those pictures -- that I was
22 not allowed to enter because of
23 procedure. So in the interest -- I have
24 this evidence entered.

25 THE COURT: Now wait a minute.

1 You're going to confuse the jury as well
2 as the Court. Defense Exhibits 4
3 through 46, inclusive, which you have in
4 your hand, are admitted into evidence.
5 You may testify about those.

6 Before you testify about any other
7 exhibits, that are not admitted into
8 evidence, have them marked and offered
9 in the same fashion you did 4 through
10 46.

11 MR. BIRNBAUM: I am testifying
12 regarding this group of pictures.

13 THE COURT: Go ahead.

14 MR. BIRNBAUM: These were all
15 pictures taken on -- although they may
16 be some erroneous pictures, that have to
17 do with my house or the dog or something
18 like that. These are all pictures that
19 I personally took within one or two
20 weeks of the filing of the suit.

21 Therefore, they -- I stated that
22 those things -- I'm telling the jury
23 what these pictures testify to. That
24 they testify to the state, two weeks
25 afterwards, and you can draw some

1 inferences as to where -- These pictures
2 on both my property or the property of
3 Mr. Jones, right adjacent to him, but
4 they just depict the area.

5 The general rule, we can come back
6 to whether they're on my property or his
7 property -- by looking at the pictures.
8 The general rule you can take -- If it's
9 wooded, it's on my area. If they're
10 not, on his area -- but they depict the
11 activity and the state of the area as
12 they existed at that time.

13 We have already heard testimony
14 that there was heavy machinery -- a
15 bulldozer in the area. That bulldozer
16 was there at the direction -- not by
17 Mr. Birnbaum.

18 So that whatever damage or other
19 things that you see on here, were not
20 caused by Birnbaum. This is the -- I'll
21 let you draw your own inferences. I'll
22 pass those out. Everybody take about
23 three.

24 MR. RAY: Judge, as opposed to
25 everybody taking about three, I prefer

1 that the jury have the opportunity to
2 have access to all the photographs.

3 THE COURT: The jury has got the
4 exhibits. They can divi them up any way
5 they want to.

6 MR. RAY: Thank you, Your Honor.

7 THE COURT: That will be up to
8 them. Anything further, Mr. Birnbaum?

9 THE COURT: Thank you, Your Honor,
10 on that one.

11 (WHEREUPON, Deposition Exhibit
12 Nos. D-47 through D-66 were marked
13 for identification.)

14 MR. BIRNBAUM: I'd like to enter
15 into evidence this group of pictures.

16 THE COURT: I'll tell you what, if
17 you've got some more pictures that
18 haven't been marked -- Have those been
19 marked?

20 MR. BIRNBAUM: Yes, sir.

21 THE COURT: Let me see those. All
22 right. These are Defendant's exhibits
23 47 through 66, inclusive. Have you seen
24 them Mr. Ray?

25 MR. RAY: I don't think I've seen

1 those, Judge.

2 THE COURT: Do you have any more
3 pictures besides these, Mr. Birnbaum?

4 MR. BIRNBAUM: I believe not.

5 THE COURT: All right. If you
6 do -- The reason I'm asking is, if you
7 do, let's get them marked now, while the
8 jury is looking at the first batch of
9 pictures you gave, and we won't have to
10 do this thing sequentially. If you
11 don't have any more pictures, that's
12 fine.

13 MR. RAY: Your Honor, could I ask
14 Mr. Birnbaum a couple of questions about
15 these?

16 THE COURT: Sure.

17 VOIR DIRE OF THE WITNESS

18 BY MR. RAY:

19 Q. Mr. Birnbaum, did you take these photographs
20 at the same time you took the other photographs?

21 THE COURT: You're referring to 47
22 through 66?

23 MR. RAY: Yes, sir.

24 THE COURT: Inclusive?

25 MR. RAY: I'm referring, Judge, to

1 4 through 47.

2 THE COURT: Oh.

3 Q. Did did you take these photographs, that I've
4 handed to you, which are your proposed Exhibits
5 40 -- I believe 47 through 66?

6 THE COURT: 4 through 46, I think
7 the jury has those and they're admitted.

8 MR. RAY: That's right. Yes, sir.
9 So this is 47 through 66.

10 Q. Did you take these photographs at the same
11 time that you took the other photographs,
12 Mr. Birnbaum?

13 A. I cannot tell you that --

14 THE COURT: I'm sorry, I didn't
15 hear you.

16 A. That can only -- That can be determined by
17 looking at the pictures, if need be; okay? That the
18 time I gave you, for the time that the pictures were
19 taken, which was no more than two weeks -- that I
20 gave you -- definitely refers to these.

21 Q. Okay. Let me rephrase.

22 A. In other words, may have even been taken
23 earlier.

24 Q. Let me rephrase the question. Did you take
25 these photographs in February of 1995?

1 A. Yes, sir.

2 Q. I'm referring to photographs No. 47 through
3 66 -- The ones you hold in your hand?

4 A. Yes, sir.

5 Q. Now, I think you've got three or four
6 personal photographs in there. I don't mind if you
7 want them in, but they're photographs of your home
8 and your dog. I think that was what you were
9 referring to earlier?

10 A. Yes, sir.

11 Q. Okay. But you took those all at the same
12 time?

13 A. Yes, sir.

14 Q. They accurately depict the scene as you
15 recall it?

16 A. Yes, sir. And I wanted them, in there, to
17 indicate that this was a somewhat --

18 THE COURT: No. I don't want you
19 to tell me that right now. I'm still
20 trying to hear if Mr. Ray has an
21 objection.

22 MR. RAY: Judge, I don't have an
23 objection. I see these as being
24 primarily repetitive, but other than
25 that --

1 THE COURT: Well, I'm going to let
2 them in. 47 through 66 are admitted.

3 (WHEREUPON, D-47 through D-66
4 were admitted into evidence at this
5 time.)

6 MR. RAY: Judge the only ones are
7 the pictures of the home and dogs and
8 some things like that. I don't know
9 that they're relevant at all to the
10 proceeding.

11 THE COURT: Well, absent some
12 specific objection, I'm going to let 47
13 through 66, inclusive, into evidence.
14 How many are in that other group, Lynda?

15 COURT REPORTER: 12.

16 THE COURT: Okay. Did you want to
17 offer that last group?

18 MR. BIRNBAUM: Yes, sir.

19 THE COURT: If you'd mark them,
20 Lynda, that will be fine.

21 (WHEREUPON, Deposition Exhibit
22 Nos. D-69 through D-78 were marked
23 for identification.)

24 THE COURT: Do you wish to offer
25 those, 69 through 78, Mr. Birnbaum?

1 MR. BIRNBAUM: Yes.

2 THE COURT: May I ask him a
3 predatory question?

4 MR. RAY: Judge, I don't think I've
5 even seen these.

6 THE COURT: I'm sorry.

7 THE COURT: Any objection to 67
8 through 78?

9 MR. RAY: Judge, I need to ask
10 Mr. Birnbaum a couple of questions about
11 them, first.

12 VOIR DIRE OF THE WITNESS

13 BY MR. RAY:

14 Q. Mr. Birnbaum, you've got a date on the back
15 of each of these proposed exhibits -- and they are
16 67 through 78 photographs -- exhibits that are
17 photographs. You've got a date of August the 20th
18 of 1995; is that correct?

19 A. That's correct.

20 Q. Is that when you took these photographs?

21 A. No, sir.

22 Q. When did you take them, sir?

23 A. These are -- Those pictures that Doug Pool
24 took in my presence.

25 Q. So you didn't take these photographs?

1 A. No, sir.

2 Q. You were present when they were taken?

3 A. Yes, sir.

4 Q. And they accurately depict the scene as you
5 recall it?

6 A. Yes, sir.

7 Q. Okay, sir.

8 MR. RAY: No objection, Your Honor.

9 THE COURT: They're admitted.

10 (WHEREUPON, D-67 through D-78
11 were admitted into evidence at this
12 time.)

13 THE COURT: Now, Mr. Birnbaum, let
14 me hand you the previous group that have
15 been admitted -- That's 47 through 66.
16 Now, do you have any other pictures
17 you're going to offer?

18 MR. BIRNBAUM: No, sir -- No.

19 THE COURT: We've gotten all the
20 pictures that you want to offer marked
21 and introduced and admitted. Go ahead.

22 CONTINUED DIRECT EXAMINATION

23 BY MR. BIRNBAUM:

24 MR. BIRNBAUM: The evidence I'm
25 introducing is -- when you look at it,

1 it more or less -- you can make your
2 judgment on that as to the facts, as
3 somebody here mentioned, that these all
4 show some of the same thing -- and
5 that's the point I'm trying to make.

6 The point I'm trying to make, is
7 that there is something that is the
8 cause of all of this. That's the main
9 evidence that I'm trying to convey. I'm
10 providing this evidence to the jury, in
11 an attempt to convey knowledge upon the
12 jury -- upon the evidence, and draw the
13 inferences out of it, as to what it is
14 that might have been that caused this.

15 Here's a second group that was
16 taken about the same time, as we
17 established earlier. It was within two
18 weeks of the filing of the suit.

19 In fact, that group may have been
20 on the day or two days -- but the latest
21 of any of these was two weeks
22 afterwards. So, if they look
23 somewhat -- I'll let you draw your
24 inferences, but the inferences you might
25 be thinking about, are if one group of

1 pictures looks about the same as the
2 other one, they reflect the occurrence
3 of some event. That is the evidence
4 that I'm trying to convey.

5 May I speak while the jury is
6 looking at the pictures?

7 THE COURT: Say again?

8 MR. BIRNBAUM: May I -- May I --
9 May I testify upon my thoughts as I --

10 THE COURT: I wish you would.

11 MR. BIRNBAUM: Okay -- please do.
12 The general pattern of this, is to show
13 you a group of pictures, that I
14 testified to, reflect the condition of
15 that area -- And I obviously -- There's
16 no point of my arguing any one of these
17 pictures, individually. It is what they
18 represent in total, as a whole, as to
19 the state of the thing and what might
20 have caused this thing -- whatever
21 occurred.

22 Again remember, if it's kind of
23 woody, it's on my land. Something --
24 some event did something that did
25 something to my land. If it's an area

1 that is on the not-so-wooded side, in
2 general, is in all likelihood, almost
3 necessarily, on Mr. Jones' property,
4 because he had cleared that land
5 approximately at that time.

6 I'm trying to draw some inferences
7 by the jury, regarding the relationship
8 between the bull-dozing activity, which
9 I testified to, occurred shortly before
10 that, and this event that may have
11 caused this -- and whether the
12 bull-dozing that was done upon
13 Mr. Jones' land, may have caused this
14 event upon my land and Mr. Jones' land.

15 THE COURT: Anything further?

16 MR. BIRNBAUM: Okay. And I further
17 testify, that I was not even aware of
18 the existence of this condition.
19 Witness is conversing with his thoughts.
20 Witness is conversing with his thoughts.

21 THE COURT: I'm sorry -- Read back
22 what Mr. Birnbaum said, Lynda.

23 COURT REPORTER: The last two
24 sentences?

25 THE COURT: Yeah.

1 COURT REPORTER: "Okay. And I
2 further testify, that I was not even
3 aware of the existence of this
4 condition. Witness is conversing with
5 his thoughts. Witness is conversing
6 with his thoughts."

7 THE COURT: Anything further,
8 Mr. Birnbaum?

9 MR. BIRNBAUM: Yes, sir. Witness
10 has rearranged his thoughts. Witness
11 was aware of this condition prior to
12 this, but only took these pictures upon
13 serving of suit. Witness first
14 discovered this condition, upon first
15 meeting with Mr. Jones, in October 1994.
16 Approximately three or four months
17 before these pictures.

18 I'm testifying, after thinking,
19 these pictures were taken shortly after
20 commencement of suit. I'd been putting
21 up with this condition since October of
22 1994. I first discovered this condition
23 in October 1994, when you called me.

24 MR. RAY: Your Honor, I'd request
25 that the witness reframe from pointing

1 his finger at Mr. Jones.

2 THE COURT: I'll sustain it.

3 MR. BIRNBAUM: Witness was trying
4 to testify upon his thoughts, and
5 properly establish his prior knowledge
6 of this condition and the existence of
7 this condition, and to testify upon that
8 witness regain knowledge of his -- of
9 this condition earlier, and only
10 obtained recollection of the existence
11 of this condition in 1994.

12 Witness spontaneously gained access
13 to his prior knowledge of this
14 condition, which is testimony on the
15 spot regarding -- in support that this
16 condition existed earlier in October
17 1994.

18 You have just witnessed on the spot
19 witness recollection, which I believe
20 has some legal bearing.

21 THE COURT: Do you have anything
22 further?

23 MR. BIRNBAUM: I'm through.

24 THE COURT: Which ones are those?
25 Let me see what the numbers are. These

1 are 67 through 78. They've been
2 admitted; have they not?

3 MR. RAY: Yes, Your Honor, they
4 had.

5 THE COURT: Do you want --

6 MR. RAY: Those are the September
7 or August photographs of your
8 investigator?

9 MR. BIRNBAUM: Yes, these are
10 the --

11 MR. RAY: Yes, sir

12 MR. BIRNBAUM: -- pictures taken by
13 the investigator.

14 THE COURT: They are admitted; are
15 they not?

16 MR. RAY: Yes, sir.

17 THE COURT: You may hand those to
18 the jury, if you'd like, Mr. Birnbaum.
19 Anything further?

20 MR. BIRNBAUM: Yes, sir. Those
21 pictures that have just been submitted
22 into evidence, which was in 1995, were
23 the pictures taken by Investigator Pool,
24 taken in my presence, which I was trying
25 to get into evidence earlier with my

1 witness, Mr. Pool -- as my investigator,
2 and by procedure, was denied showing
3 such onto the jury -- and now showing
4 onto the jury.

5 MR. RAY: Your Honor, I object to
6 that as simply not being an accurate
7 statement of the facts. I don't think
8 Mr. Birnbaum ever offered these
9 photographs. The objection that the
10 Court granted, was with respect to the
11 photographs that I had introduced
12 earlier.

13 THE COURT: Sustained.

14 MR. BIRNBAUM: Witnesses is
15 communicating his recollection of his
16 attempt -- in the presence of
17 Investigator Pool, to show these
18 pictures as evidence to the jury. In
19 plain English, to get the jury to look
20 at it.

21 THE COURT: Anything further?

22 MR. BIRNBAUM: No. This is the
23 evidence. This is -- I'm presenting the
24 evidence to the jury.

25 MR. RAY: Your Honor, am I on cross

1 now? May I have just a moment with
2 Mr. Jones?

3 THE COURT: Sure.

4 CROSS EXAMINATION

5 BY MR. RAY:

6 Q. Mr. Birnbaum?

7 A. You may cross-examine me.

8 Q. Thank you, sir. Mr. Birnbaum, with respect
9 to the photographs, which you have offered into
10 evidence and they've been admitted, I think your
11 testimony is, if I am correct, that these
12 photographs were taken either in February of 1995 or
13 in September of 1995; is that true?

14 A. Which pictures are you talking about?

15 Q. All of them.

16 A. They -- They were all taken in February of
17 '95. That was the first group. Those are the big
18 ones that were taken by me, directly -- February of
19 '95.

20 Q. Okay, sir. Let me do it like this.
21 Photographs 4 through 46 were -- you testified they
22 were taken by you in February of '95?

23 A. I don't have the numbers right in front of
24 me -- the big pictures.

25 Q. Okay.

1 A. What is the question? What are you concerned
2 about?

3 Q. Let me try to rephrase the question where you
4 can answer it, sir. Have you offered into evidence,
5 any photographs that were taken prior to February of
6 1995?

7 A. No, sir.

8 Q. Now, did I hear you testify a little while
9 ago, that you said the condition that was shown in
10 your photographs, that you took in February of '95,
11 is the same condition in October of 1994 -- or did I
12 misunderstood your testimony?

13 A. I was testifying to my recollection, that
14 upon my visit upon the property with Mr. Jones, upon
15 which this suit is based, the condition was
16 essentially the same.

17 Q. Okay, sir. When you went with Mr. Jones to
18 view the problem, if it was a problem, in October of
19 1994, was there not an overflow and a substantial
20 impoundment of water -- like a small lake?

21 A. No, sir.

22 Q. You deny it's existence, totally?

23 A. Categorically deny it. I have testified that
24 the condition that existed in 1994, upon which
25 Mr. Jones bases his suit, was essentially the same

1 condition that is shown on all these big pictures
2 right over here, and no such condition existed. And
3 I further testify upon my thoughts --

4 MR. RAY: May I approach the --
5 A. -- that no such condition every existed.

6 MR. RAY: May I approach the
7 witness, Your Honor?

8 THE COURT: Yes, sir.

9 MR. RAY: I'm going to need to look
10 at some of the photographs, Judge, but I
11 don't know which batch is which.

12 Q. Is that the 4 through 46 to your left,
13 Mr. Birnbaum?

14 A. You may look at it.

15 Q. Thank you, sir.

16 MR. RAY: Judge, unfortunately the
17 photographs are out of order. I'm going
18 to need to get them in order. I've got
19 questions on some of the photographs and
20 I have to find those photographs.

21 (WHEREUPON, a brief
22 off-the-record break was had with
23 the jury still present.)

24 MR. RAY: Your Honor, I'm ready to
25 proceed if Mr. Birnbaum is.

1 THE COURT: Yeah -- Mr. Birnbaum,
2 if you would resume the stand, please.

3 Q. Okay. Mr. Birnbaum, I'm going to hand to you
4 what has been marked as Defendant's Exhibit 20.
5 When you're looking at that particular photograph,
6 are you looking back out of the open area of
7 Mr. Jones' property, where you see the sand silted
8 up and that sort of thing?

9 A. I'm looking at an area -- And again, I'm
10 looking at an area that is very close to the
11 property line on Steve's Creek, probably no more
12 than 50 feet from my property line.

13 Q. Okay, sir. What I'm asking you is, sir, is
14 this open area of the photograph, is that Mr. Jones'
15 property?

16 A. I cannot tell from that one.

17 Q. Where the sand is?

18 A. I cannot tell from that one. I could go
19 back, if that is absolutely --

20 Q. Well, to the right. Are those trees on your
21 property?

22 A. Probably.

23 Q. Okay, sir.

24 MR. RAY: I'm going to let ya'll
25 take another look at these photographs,

1 if that's permissible, Judge.

2 Q. Now, who is this gentleman in that photograph
3 right there? Let me identify it for you,
4 Mr. Birnbaum -- No. 10. Who is the gentleman there
5 standing on the creek?

6 A. That's Mr. Louis Tibideaux, who was the
7 gentleman that was taking the picture that had me in
8 it.

9 Q. What is this handle right at the bottom of
10 the photograph? It looks like a shovel handle or
11 something.

12 A. I don't have quite the good light. I see it.
13 I see it, but I cannot tell what that is.

14 Q. What is that?

15 A. I do not know.

16 Q. Did you take a shovel with you when you went
17 over there?

18 A. I may have, but I'm not sure that it looked
19 like a shovel.

20 Q. Where Mr. Tibideaux is standing, is that on
21 Mr. Jones' property?

22 A. I do not know that. It may be pretty close
23 to there.

24 Q. Does it appear to you to be on Mr. Jones'
25 property, since it's open property? Your property

1 is all wooded -- you've already testified; is that
2 correct? Is that correct, Mr. Birnbaum?

3 A. Yes. He may have been standing on Mr. Jones'
4 property, but he was -- We were in the area, trying
5 to take pictures of the condition. And as one walks
6 around over there, that -- you know, one of those
7 may or may not be. But he did not -- Mr. Tibideaux
8 has not been a witness on my behalf. We established
9 that this morning, that one of your witnesses was on
10 my property to testify, Mr. Leos.

11 Q. Mr. Birnbaum, you've answered my question. I
12 just simply asked you if he was on the property;
13 okay?

14 A. Yes, sir.

15 Q. Let me hand to you what's marked as
16 Defendant's Exhibit 8. I believe that also
17 indicates Mr. Tibideaux in the picture?

18 A. I request better light.

19 Q. Do what?

20 A. I request better lighting.

21 Q. Okay. Now, Mr. Birnbaum, when we went over
22 these photographs, you identified them and said they
23 accurately depicted the scene and you could see
24 everything, and now you're indicating you can't see
25 what the photograph shows?

1 A. No. I'm testifying as accurately
2 representing the scene. One can see on that -- if
3 one looks at it, how much investigation -- one would
4 need a microscope. If we want to get a microscope,
5 you can. I testified that these accurately, in
6 total, represent what is there. I'm not saying that
7 I can testify on any part of it. We can develop it,
8 you can --

9 Q. Mr. Birnbaum?

10 A. -- if you wish.

11 Q. I'm not trying to be difficult with you;
12 okay?

13 A. You are being difficult.

14 Q. Now, Mr. Tibideaux, I believe is standing in
15 this photograph; is that correct? There's a person
16 in the photograph?

17 A. Yes, sir.

18 Q. If you can't identify Mr. Tibideaux -- that's
19 fine.

20 A. Yes, sir.

21 Q. Is there a home located up on the hill? Is
22 that a house? Do you see the structure up on the
23 hill?

24 A. Yes, sir.

25 Q. Is that Mr. Jones' home?

1 A. It's probably either Jones or one of the
2 other witnesses. I would have to look at the
3 picture more in the light.

4 Q. Okay. So I'm presuming, if you're looking
5 up-stream on Steve's Creek, which would be looking
6 toward the west, this photograph was taken --

7 A. I would assume that up-stream is to the
8 right.

9 Q. Okay. The stream is running to the right of
10 the photograph?

11 A. No. Up-stream is to the right. The stream
12 is running to the left.

13 Q. Okay.

14 A. Probably the left side is more towards me or
15 on me or it's on me.

16 Q. Okay.

17 A. But it is no more than 50 feet from the
18 junction -- my property in that area.

19 Q. I'm going to hand to you what's been marked
20 as Defendant's Exhibit 15, I believe. To your left,
21 you will see a large open area where there's a good
22 bit of sand -- what appears, to me, to be
23 flooding -- is that located on your property or
24 Mr. Jones'?

25 A. It doesn't appear to be like flooding to me.

1 Q. You see this dead tree to the right?

2 A. Yes, I do.

3 Q. Do you have any idea what would have caused
4 that tree to die, then?

5 A. No, sir.

6 Q. You don't think the impoundment of water,
7 there for a significant period of time, would have
8 caused that tree to die?

9 A. I do not know.

10 Q. Okay, sir. This Defendant's Exhibit 9,
11 there's a fence right here to the immediate left.
12 Whose fence is that?

13 A. That is the property line between -- I took
14 that picture to show and reference the whole thing,
15 regarding the location. And again, there's a dead
16 tree in the background.

17 Q. Okay. Now, I take it, to the immediate left
18 in this photograph, there looks to be a home up on
19 the hill; would that be Mr. Jones' home, then?

20 A. It would be either Mr. Jones or Mr. Leos.

21 Q. Or Mr. Leos -- okay. And this fence that we
22 see here, is that a corner fence in the boundary
23 line between yourself and Mr. Jones?

24 A. Yes, sir.

25 Q. Okay. Mr. Tibideaux is standing on

1 Mr. Jones' side, then; isn't he?

2 A. Yes, sir.

3 Q. Okay. Do you see a lot of water out over a
4 broad area there?

5 A. No, I do not.

6 Q. You don't see that water? Let me give it to
7 you again. That's some distance from the stream
8 bank; isn't it?

9 A. No, it's not.

10 Q. You don't see the water right at
11 Mr. Tibideaux's feet?

12 A. Yes, I see water.

13 Q. Let me hand to you what's marked as
14 Defendant's Exhibit 16. Is that also another view
15 of Mr. Jones' property?

16 A. I believe that is a view of Mr. Jones'
17 property.

18 Q. Thank you.

19 A. Also to be stated -- that's a view of
20 Mr. Jones' property from my side, depicting the same
21 event that I testified here today that -- that I
22 wish the jury to consider the connection between an
23 event and whatever it is that Mr. Jones did.

24 Q. Defendant's Exhibit 16 is another picture of
25 Mr. Tibideaux standing up on the bank; is that

1 correct? And that corner fence that we were
2 discussing earlier, is that a photo of him from
3 another direction, looking back at your property?

4 A. No, sir. This is a photograph of
5 Mr. Tibideaux standing on what used to be the bank
6 before the event.

7 Q. Okay. Now, I'm going to hand to you what's
8 been marked as Defendant's Exhibit No. 32 and
9 Defendant's Exhibit 31. What is that picture
10 supposed to show?

11 A. That's a picture of a dead beaver, which I
12 presume -- Which I didn't kill.

13 Q. Okay, sir. Was that located on Mr. Jones'
14 property or on your property?

15 A. This was on my property.

16 Q. How close to your property line, sir?

17 A. I do not know -- Probably no more than 50
18 feet -- washed down there, or I don't know how it
19 got there. Beavers can't live in that kind of
20 environment. In other words, something -- some
21 event happened, that did something. Mr. Jones has
22 continued to use dynamite in there. I guess, it
23 might have killed them -- Oh, the time was too long
24 after that, but it's a dead beaver.

25 Q. Is it safe to say, Mr. Birnbaum, that you,

1 quite frankly, appreciate beavers a great deal more
2 than Mr. Jones?

3 A. Say that again.

4 Q. Is it safe to say, that you, quite frankly,
5 probably appreciate the beaver animal more than
6 Mr. Jones?

7 A. You'll have to ask Mr. Jones on that. We
8 would have to confer upon that.

9 Q. Okay. Just so the jury knows, who are the
10 children in these photographs?

11 A. These were some of the friends in the
12 neighborhood -- the children of some of the
13 neighbors.

14 Q. Is that on Mr. Jones' property?

15 A. I can't tell.

16 Q. It appears to be; doesn't it? That's open
17 area, right?

18 A. It may be.

19 Q. Why did you have a bunch of children -- I
20 think there's another man in some of the other
21 pictures. Why did you have these people come with
22 you to take photographs?

23 A. Because you had sued me and I was looking for
24 witnesses.

25 Q. Okay. Exhibit No. 39.

1 A. Do you understand, that I was looking for
2 witnesses at the time? That's why I took those
3 pictures at that time.

4 Q. I understood. On Exhibit No. 39,
5 Mr. Birnbaum, to your right, is that an area of
6 standing water?

7 A. Yes.

8 Q. Okay.

9 A. May I ask you how much it's standing?

10 Q. I'll let the jury take a look at it and
11 tell -- if that's all right. Now, Exhibit No. 38,
12 is that a picture of Mr. Jones' property? It shows
13 a brush pile back up here. It appears to be a
14 fairly old brush pile; doesn't it?

15 A. Yeah.

16 Q. I mean it doesn't appear to be a brush pile
17 that was that recently done; does it?

18 A. I'll ask your opinion on that. It's on your
19 Plaintiff's property.

20 Q. I'm asking you. You're the witness.

21 A. I don't know what it appears like. If you
22 want any evidence on that brush pile, that brush
23 pile is on Mr. Jones' property. You might have more
24 evidence on it.

25 Q. Okay. Is the land up to the brush pile --

1 does that appear to be some of the flooded property?

2 A. Not at the time. Testify upon my thoughts.

3 MR. RAY: Judge, I've got him on
4 cross. I request that he not testify
5 upon his thoughts at this point.

6 THE COURT: Sustained.

7 MR. RAY: Judge, I have just a few
8 more questions about the photographs and
9 then I'll be through.

10 THE COURT: And then we'll take a
11 recess, so the jury can get up and
12 stretch.

13 MR. RAY: I would imagine they're
14 looking forward to it.

15 Q. Mr. Birnbaum, this is Defendant's Exhibit 54.
16 It appears to be an animal in that photograph, but I
17 can't tell what kind of an animal it is; can you
18 identify that?

19 A. No, I can't either.

20 Q. Okay. Then Defendant's Exhibit No. 53, is
21 that a photograph that shows essentially the
22 overflow area?

23 A. What do you mean by "overflow"? Overflow
24 from what?

25 Q. You can see where there's sand -- overflow

1 from water, because there's sand all over the area;
2 isn't there?

3 A. Yeah, there's sand all over the area.

4 Q. All right.

5 A. Let me finish on the picture. Yes, there's
6 sand all over the area. The question is why is
7 there sand all over the picture. And that is what
8 I'm trying to testify to the jury, that there's sand
9 over there --

10 THE COURT: Mr. Birnbaum, you're on
11 cross-examination. If you would, just
12 respond to the questions and that
13 will --

14 MR. RAY: Judge, I believe there's
15 69 through 78.

16 Q. Okay. Mr. Birnbaum, I'm going to hand to you
17 what you marked as Defendant's Exhibit 21. Now,
18 this is the photograph that also shows the brush
19 pile on Mr. Jones' property, but is that a fence
20 stake all alone, standing out to the right -- just
21 to the right of the dead tree?

22 A. It may be.

23 Q. Okay. And then this is Defendant's Exhibit
24 69, which was taken later in August or September, by
25 your investigator. Is that the new fence that was

1 built into this very same area? You can compare the
2 two photographs.

3 A. Well, except this photograph is this and this
4 photograph is that. I made no inference that they
5 depicted the same area.

6 Q. I understand, but is this the new fence that
7 was built to replace the fence that was washed out?

8 A. You're showing me a post standing out in the
9 middle of nowhere, which I told you I could not
10 identify, and I made no statement as to what it was.
11 And there's something --

12 Q. Let me stop you there just a second. That
13 post, that you see out in the middle of nowhere, in
14 Defendant's Exhibit No. 21, was that one of the
15 boundary posts -- a boundary fence between you and
16 Mr. Jones?

17 A. I do not know.

18 Q. Now, I'm going to hand you back Defendant's
19 Exhibit 69, and ask you to take a look at that
20 fence. Is that a new fence, which is a boundary
21 fence between yourself and Mr. Jones?

22 A. Yes.

23 Q. Who erected that fence? Who built that
24 fence?

25 A. I do not know.

1 Q. You certainly didn't build it and put it back
2 yourself; did you? Did you, Mr. Birnbaum? Did you
3 spend any money on that fence?

4 A. I think we need to establish what fence it
5 is.

6 Q. Well, this is your photograph. You're the
7 one that testified that it accurately depicted the
8 scene, and you remembered the photograph being
9 taken, so I think you ought to be able to tell us
10 whose fence it is. Can you tell us whose fence that
11 is?

12 A. No, sir. I do not know who the owner of that
13 fence is, because I do not know who constructed the
14 fence. I believe that that is the same fence that
15 had been there for years and years and years. I do
16 not believe that that was the original fence -- not
17 that portion.

18 Q. Take a look at that fence. Does that fence
19 have new wire on it, Mr. Birnbaum? And do the metal
20 stake posts not appear new to you?

21 A. I can't tell.

22 Q. Okay.

23 A. They appear to be not 10 years old -- and
24 they may well be.

25 MR. RAY: Judge, I've gotten all

1 the exhibits now scattered everywhere.
2 Your Honor, I may have a little more
3 cross of Mr. Birnbaum. I don't know if
4 you want to give me a second to talk to
5 Mr. Jones.

6 THE COURT: Go ahead and talk to
7 him and see if you have any more.

8 MR. RAY: No further questions,
9 Your Honor.

10 THE COURT: We'll take a 15 minute
11 recess. You may stand down. Thank you,
12 Mr. Birnbaum.

13 MR. BIRNBAUM: Thank you.

14 THE COURT: The jury may retire to
15 the jury room or they may wander around
16 the courthouse. Same instructions given
17 you previously still pertain.

18 (WHEREUPON, a recess in the
19 proceedings was had at this time.)

20 THE COURT: Let the record reflect
21 that the jury is retired. Let it
22 further reflect -- This is more for
23 Mr. Ray's benefit than anything else --
24 during the recess, Mr. Birnbaum
25 indicated to me that he had four -- And

1 you correct me, Mr. Birnbaum, if I
2 misstate anything that you indicated.

3 That he had four remaining exhibits
4 that he wanted to offer. He also
5 indicated to me that he had one further
6 witness -- and that's Mr. Munns.

7 MR. BIRNBAUM: Mr. Munns.

8 THE COURT: That he did not plan to
9 call or recall Mr. Jones. And I
10 suggested to him that he take the four
11 exhibits, have the reporter mark them,
12 and that we have a brief hearing now,
13 outside the jury's presence, to
14 determine the admissibility of what has
15 now been marked as Defendant's Exhibits
16 79, 80, 81 and 82.

17 Now, are you -- This is a
18 formality, Mr. Birnbaum, but are you
19 formally offering these exhibits into
20 evidence?

21 MR. BIRNBAUM: Yes, I am.

22 THE COURT: Okay. Now, let me tell
23 you gentlemen my understanding of the
24 law. My understanding of the law, is
25 that pleadings, as such, are not

1 admissible into evidence.

2 Now, if you have some -- either one
3 of you have some law that you want to
4 show me to the contrary, I'll certainly
5 look at it. Likewise, Mr. Ray, you're
6 in the position of being the party that
7 would either object or not object to
8 some or all of these exhibits. So let
9 me stop talking and let you respond to
10 the offer to begin with.

11 MR. RAY: Judge, I would object.
12 I'm terribly afraid that that would
13 confuse the jury -- And I think that's
14 one reason, that historically, that's
15 the way pleadings have been treated.

16 Pleadings are essentially
17 allegations. They do not constitute
18 evidence. They're what my side claims
19 or what his side claims, but it's up to
20 us to actually produce evidence here in
21 court -- And the evidence is what the
22 jury receives, and pleadings do not
23 constitute evidence at all.

24 The only thing that concerned me,
25 Judge, is one of the proposed exhibits

1 of Mr. Birnbaum, which was a copy of my
2 second amended petition, did not have
3 attached to it the verification.

4 (WHEREUPON, an interruption
5 was had in the courtroom. A siren
6 was sounding.)

7 MR. RAY: Judge, I was addressing
8 Mr. Birnbaum's copy to my second amended
9 petition. I noticed it did not have the
10 verification on there, which is
11 required. I did go back and look at the
12 court's file, Judge, the verification is
13 in the court's file. So the original
14 document, itself, rather than the copy
15 sent to Mr. Birnbaum has it. So other
16 than that, Judge --

17 MR. BIRNBAUM: No.

18 MR. RAY: Quite frankly, I think it
19 will just confuse the jury. I don't
20 think it constitutes evidence. I would
21 object to the admissibility of all of
22 those documents, including No. 82, which
23 I think might be beneficial to me,
24 Mr. Birnbaum.

25 MR. BIRNBAUM: 82?

1 THE COURT: Hang on, let me see
2 what -- Well, 82 is Defendant's
3 pleadings of duress and fraudulent
4 process, and attached to it is
5 Mr. Jones' original petition. Now, I --

6 (WHEREUPON, another
7 interruption was had in the
8 courtroom. A loud voice coming
9 from the siren box.)

10 THE COURT: Let's go back on the
11 record. I don't know what to tell you
12 about the dialing alarms going off.

13 MR. RAY: Judge, I just want to
14 make sure our court reporter gets every
15 transmission from that for the
16 transcript.

17 (WHEREUPON, another
18 interruption was had having to do
19 with the alarm system in the
20 courtroom.)

21 THE COURT: If you have some legal
22 authority that will warrant or justify
23 the admissibility of your exhibits 79,
24 80, 81, 82, then now is the time to show
25 me the authority. Because otherwise, I

1 will, as I indicated before, sustain
2 Mr. Ray's objection to these documents.

3 MR. BIRNBAUM: This is regarding my
4 testimony of the documents, that I
5 received and their differences and their
6 similarities.

7 THE COURT: Well, I understand what
8 you just said, but his objection is that
9 number one; they're pleadings, and as
10 such, are inadmissible as evidence. And
11 number two, I don't remember, but I
12 think he also lodged a hearsay
13 objection, also. Now, do you have some
14 legal authority that will overcome those
15 objections?

16 MR. BIRNBAUM: By some rule of
17 legal reason?

18 THE COURT: Well, I mean do you
19 have a rule of evidence, or a statute,
20 or a constitutional provision, or a
21 reported legal case, that would
22 authorize the admission of these
23 documents?

24 MR. BIRNBAUM: Defendant does
25 not -- is not entering them into

1 evidence -- It is to enlighten the jury,
2 rather than confuse -- of the doubts --
3 of my inability to determine which one
4 is the right -- which one is the
5 pleading and so forth.

6 THE COURT: Well --

7 MR. BIRNBAUM: As evidence as to
8 being able to pin down in court, which
9 things it is that one is talking about.

10 THE COURT: Well, I understand all
11 of that. My question was, do you have
12 any legal authority that authorizes me
13 to admit these documents into
14 evidence -- And I take it that you do
15 not?

16 MR. BIRNBAUM: Do not -- And they
17 may not be -- may not be that necessary,
18 no.

19 THE COURT: All right. I'm going
20 to sustain the objection to 79, 80, 81
21 and 82. But now --

22 MR. BIRNBAUM: Now, what was your
23 ruling on the last one?

24 THE COURT: I sustained the
25 objection on all four of them: 79, 80,

1 81 and 82. Now, they've been marked as
2 exhibits -- Defense Exhibits 79, 80, 81
3 and 82, but they're not admitted into
4 evidence.

5 Accordingly, they are your exhibits
6 and I'm tendering them back to you,
7 because you've expressed concern before
8 that somebody was going to --

9 MR. BIRNBAUM: Yeah.

10 THE COURT: -- deny you access to
11 the documents, or otherwise lose them or
12 destroy them, or what have you. So I
13 want the record to reflect that
14 Defendants 79, 80, 81 and 82 have been
15 tendered back to Mr. Birnbaum. He has
16 them in his hands, and they're his to do
17 with what he wants, other than to show
18 to the jury. Now, having taken care of
19 that, are we ready to call Mr. Munns?

20 MR. BIRNBAUM: Having rejected
21 the -- not that one.

22 THE COURT: That's Defense Exhibit
23 82?

24 MR. BIRNBAUM: Yeah. Having
25 rejected the -- having rejected the one,

1 two, three -- the pleadings, and having
2 rejected the -- Okay.

3 THE COURT: All right. Do you
4 remember what my question was?

5 MR. BIRNBAUM: I was trying to get
6 another document submitted as evidence,
7 but decided it was probably being
8 denied.

9 THE COURT: Well, I --

10 MR. BIRNBAUM: Therefore, I decided
11 not to submit it at this time.

12 THE COURT: Well, that's your
13 decision. Now, you know, I can't -- I
14 can't rule on exhibits until they're
15 presented to me, and until the other
16 side has a chance to object.

17 Now, if you choose to not offer an
18 exhibit, because you believe that it
19 will probably be objected to and the
20 objection sustained, that's your
21 prerogative. You're free to do that.

22 But I want to be sure you
23 understand, I'm giving you the
24 opportunity to offer anything into
25 evidence that you want to, subject to

1 the rules of admissibility.

2 MR. BIRNBAUM: I'm trying to avoid
3 the need for an objection.

4 THE COURT: Well, my question I had
5 before, I'll ask again. Are you ready
6 for Mr. Munns?

7 MR. BIRNBAUM: No, sir. Want to
8 testify -- real short.

9 THE COURT: All right. Bring the
10 jury in now.

11 (WHEREUPON, the jury was
12 brought into the courtroom at this
13 time.)

14 THE COURT: Ladies and gentlemen,
15 when I came over here to hold court, as
16 I say, I've done it a number of times
17 over the years -- nobody explained to me
18 how the alarm system worked. I know you
19 were probably a little bit edgy when the
20 alarm went off and a voice started
21 crying for help. I was too.

22 The bailiff has checked it out and
23 apparently everything is okay. I just
24 didn't know how to turn it off or
25 frankly how to respond to it. As far as

1 I know, everything is okay; isn't it,
2 Fred?

3 THE BAILIFF: Yes, Your Honor.

4 THE COURT: Go ahead, Mr. Birnbaum.

5 (WHEREUPON, Mr. Birnbaum was
6 previously sworn.)

7 FURTHER REDIRECT EXAMINATION

8 BY MR. BIRNBAUM:

9 MR. BIRNBAUM: Okay. Wish to
10 testify upon my thoughts about the
11 existence of three documents.

12 MR. RAY: Judge, I can't hear him.

13 MR. BIRNBAUM: I wish to testify
14 upon my thoughts.

15 MR. RAY: Thank you, Mr. Birnbaum.

16 MR. BIRNBAUM: About the existence
17 of three documents, which Defendant has
18 been able to show as evidence to the
19 jury, by the procedure; and therefore,
20 Defendant is forced to testify upon the
21 document, itself, rather than provide
22 the document.

23 There is a document that's called a
24 pleading, that we talked about earlier.

25 MR. RAY: Your Honor --

1 THE COURT: Excuse me.
2 Mr. Birnbaum, I'm not sure that you
3 understood my ruling. The documents and
4 the documents' contents are not
5 admissible -- And I've made that ruling.
6 Because of that ruling, you're not
7 authorized to disclose the contents of
8 the document, by either telling the jury
9 what the documents say, or by reading
10 from the documents, any more than you're
11 authorized to hand them the documents.

12 MR. BIRNBAUM: I misunderstood
13 that. Do you mean that I was not to
14 show it? I beg your pardon for that.

15 THE COURT: That's okay. Just --

16 MR. BIRNBAUM: Okay.

17 THE COURT: The documents are
18 excluded from the jury's knowledge.

19 MR. BIRNBAUM: Okay. But the jury
20 has received evidence of the exclusion
21 of the documents.

22 THE COURT: Well, they probably
23 have. They're probably -- yeah, I think
24 that's probably true to say they have
25 received that evidence, but they cannot

1 receive the documents or the contents of
2 the documents, directly, indirectly,
3 verbally, physically or in writing.

4 MR. BIRNBAUM: I testify upon my
5 thoughts -- What you have just seen is
6 the rules of procedure, as they apply to
7 court proceedings, and the way that they
8 are -- The way procedure needs to be
9 used, it is the procedure that's in
10 place and so forth. But you have
11 seen -- But you have seen how
12 evidence -- not evidence, how material
13 can or cannot be shown to you for you to
14 reach a verdict. And --

15 MR. RAY: Your Honor, I wish I'd
16 known Mr. Birnbaum was fixing to try to
17 testify about something that had been
18 excluded, but I certainly don't want the
19 jury to have the inpression that some
20 evidence is being hidden from them.
21 Because those exhibits that he has,
22 obviously don't constitute evidence, and
23 has been excluded, but I would like the
24 Court to instruct the jury of that. I
25 don't really care if they know what has

1 been excluded by name. It might be
2 beneficial.

3 THE COURT: All right. I'm going
4 to make an explanation, ladies and
5 gentlemen, I don't usually do this, and
6 it has to be done with considerable
7 care. There are four exhibits that
8 Mr. Birnbaum has.

9 During the last recess, I asked him
10 to have those exhibits marked, which he
11 did. They're Defendant's Exhibit 79,
12 80, 81 and 82. I conducted a brief
13 hearing, while you were retired, to
14 determine the admissibility of those
15 exhibits.

16 I determined, under the law, that
17 they're not admissible. They are not
18 evidence and they --

19 (WHEREUPON, another
20 interruption from the alarm system
21 in the courtroom sounded.)

22 THE COURT: They can't be -- The
23 documents can't be given to you. They
24 can't be read to you, and they can't be
25 told to you.

1 Now, Mr. Birnbaum has persisted in
2 talking about those documents, and
3 talking about my rulings, and talking
4 about what he refers to as -- I guess,
5 procedures or rules of procedure.

6 Mr. Ray has now raised a concern,
7 which I frankly share, that because of
8 the way -- because of the last few
9 things that Mr. Birnbaum has said, that
10 you may get the idea that either the
11 Plaintiff or the Court is trying to hide
12 something from you.

13 Now, I don't know how really to go
14 much further, except to say that what
15 these documents are, are what are called
16 pleadings. To make a pleading, you put
17 a piece of paper in a typewriter and you
18 type on it anything you want to -- And
19 you come down to the courthouse. You
20 give it to this lady right over here,
21 the District Clerk. She puts a file
22 stamp on it. It's a pleading.

23 The law says that pleadings are not
24 evidence. They are the very allegations
25 that you've been summoned down here to

1 address.

2 Now, the simplest way to analogize
3 it, so it won't be confused with this
4 instance in this case is, is if one of
5 you all were indicted by the Van Zandt
6 County Grand Jury, and accused in a
7 criminal pleading of the crime of
8 murder, let's say, there will be a
9 written document called an indictment.
10 It will have your name on it, and it
11 will accuse you of having killed
12 someone, willfully, knowingly,
13 intentionally and all of that.

14 Now, the law is very clear, that
15 that indictment is not evidence of
16 anything. It's not evidence of your
17 guilt. It's not evidence of your
18 innocence. It is the very accusation,
19 the truth of which another jury might be
20 assembled down here to determine.

21 So the law says that pleadings,
22 allegations, if you will, are not
23 evidence. If they are not, by
24 definition, evidence, then they are not
25 to be admitted to the jury for any

1 purpose.

2 So it's not a question of anybody
3 trying to hide anything. I'm going to
4 instruct Mr. Birnbaum now, to say no
5 more about exhibits that I've ruled on
6 or about my rulings.

7 Now, if Mr. Birnbaum does not like
8 my rulings, that's okay. He has the
9 right to like or dislike them. But the
10 group to which he should express that
11 displeasure is a Court of Appeals, not
12 the jury.

13 If I make a mistake in my ruling,
14 that's what the Courts of Appeals are
15 there for -- to decide whether or not, I
16 should have, in this instance, let those
17 four exhibits into evidence or not. But
18 it's not something that you're going to
19 hear another word out of Mr. Birnbaum
20 from this moment on. Mr. Birnbaum?

21 MR. BIRNBAUM: I call the next
22 witness.

23 THE COURT: Is that Mr. Munns?

24 MR. BIRNBAUM: Yes, sir.

25 MR. RAY: Judge, I have no further

1 questions of Mr. Birnbaum. I think he's
2 submitted himself as a witness.

3 * * *

4 OTIS MUNNS,
5 having been first duly cautioned and sworn upon his
6 oath to tell the truth, the whole truth, and nothing
7 but the truth, testified as follows, to wit:

8 * * *

9 DIRECT EXAMINATION

10 * * *

11 BY MR. BIRNBAUM:

12 THE COURT: Mr. Munns, were you
13 sworn earlier in the week?

14 MR. MUNNS-WITNESS: Yes, Your
15 Honor.

16 THE COURT: Would you have a seat
17 right here, please.

18 Q. Please state your name?

19 A. Otis Munns.

20 Q. What do you do and what --

21 MR. RAY: Judge, I simply can't
22 here Mr. Birnbaum.

23 THE COURT: I'll try to get him to
24 talk a little louder.

25 Q. What do you do now, and in what part of the

1 county -- and what's your present occupation?

2 A. My present occupation is a Pastor in a
3 church. I retired in February from the Sheriff's
4 Department.

5 Q. How long did you work for the Sheriff's
6 Department?

7 A. I helped them 17 years.

8 Q. How long have you known Mr. Birnbaum?

9 A. 10, 12 years.

10 Q. Thank you.

11 MR. RAY: Your Honor, the jury is
12 having difficulty hearing Brother Munns,
13 also.

14 MR. MUNNS-WITNESS: Sir?

15 THE COURT: Mr. Munns, you just get
16 comfortable and one of us will get this.

17 MR. MUNNS-WITNESS: Okay.

18 THE COURT: I think I may have it
19 as close to you as I can. Now tell us
20 your name again, just for sound
21 purposes.

22 MR. MUNNS-WITNESS: Otis Munns.

23 THE COURT: Okay. Can you hear
24 that? Go ahead, Mr. Birnbaum.

25 Q. Okay. In the interest of time, I'm going to

1 ask you to testify regarding certain evidence, which
2 are pictures that I've -- that I have entered as
3 evidence, that I have taken. Did you ever visit
4 Mr. Birnbaum's property, regarding to any
5 extensive -- Did you ever -- Were you ever asked to
6 visit the area between Mr. Jones and Mr. Birnbaum?

7 A. Yes, sir.

8 Q. And were you aware when Mr. Birnbaum first
9 was served with summons for suit?

10 A. Yes, sir.

11 Q. Tell me how you became aware of serving of
12 suit?

13 A. I served it.

14 Q. Yes, sir. Okay. And did you shortly
15 thereafter -- Were you shortly thereafter asked by
16 Mr. Birnbaum to visit that area?

17 A. Yes, sir.

18 Q. And you did?

19 A. Yes, sir.

20 Q. Okay. In the interest of -- There is a
21 lawsuit going on between Mr. Jones and
22 Mr. Birnbaum --

23 A. Yes.

24 Q. -- and I'm going to ask you -- The general
25 thing that the jury has to determine is whether

1 Mr. Birnbaum caused any damage onto Mr. Jones or
2 visa-versa. To put it kind of bluntly, can you
3 express your knowledge of that -- upon your personal
4 examination of that area?

5 A. The day that I visited it, it had been dozed
6 off. You could see a few tracks of dozer work. The
7 fence was -- had been removed. There was a few old
8 line posts, and the water was all in the creek bed
9 when I was there.

10 Q. Okay. Was there any indication of any
11 activity that Mr. Birnbaum had done?

12 A. It looked like the dozer work was done on the
13 west side of your property.

14 Q. Okay. Did you -- I will ask it as a general
15 question and try to let the details be revealed by
16 cross-examination. Did you see any evidence, of any
17 kind, that Birnbaum caused any damage onto Mr. Jones
18 in that area?

19 A. No, I did not.

20 Q. Why do you -- Why do you say -- Why do you
21 say that?

22 A. Because I didn't see anything.

23 Q. Thank you. Okay. Did you ever see any
24 evidence of Mr. Birnbaum having built a dam in that
25 area?

1 A. No, sir.

2 Q. Did you see a lot of sand, driftwood, debris
3 or other things that had washed onto Mr. Birnbaum's
4 land?

5 A. There was some trash, driftwood.

6 Q. These pictures have been entered into
7 evidence, 14 through 78; that is Defendant's Exhibit
8 14 through 78. Without commenting on more than you
9 have to on anything, look -- I submit them to the
10 witness to testify, whether that was the kind of --
11 whether he saw things like that -- whether these --
12 whether what he saw is represented by this evidence?

13 MR. BIRNBAUM: Let the record
14 reflect that Reverend Munns is thumbing
15 through that stack of photographs.

16 Q. Without spending any more time with that
17 portion -- you have probably looked through about 10
18 or 15 -- does it, in general, reflect what you saw?

19 A. Pretty much so, yes, sir.

20 Q. Okay. Thank you. I now present to
21 Mr. Jones -- no -- Reverend Munns, Plaintiff's --
22 all of Plaintiff's photographic exhibits, allegedly
23 portraying damage caused to Jones by Birnbaum, by
24 whatever means. And being aware that this is
25 pictures of evidence on Jones' land, and knowing

1 that these are pictures on Jones' land, supposedly
2 or supposedly depicting -- or, in deed, depicting
3 damage, whether based on what he personally saw in
4 the area, that Mr. Birnbaum did, whether any of this
5 could possibly have been caused by Mr. Birnbaum?

6 MR. RAY: Your Honor, I think he's
7 asking the witness to testify as to his
8 opinion. I would object, because he's
9 not a qualified expert at this stage.

10 THE COURT: Sustained. You may ask
11 the next question now, Mr. Birnbaum.

12 MR. BIRNBAUM: Yeah. I would like
13 to have my single photographic exhibit.

14 COURT REPORTER: Which one?

15 MR. BIRNBAUM: The first one.

16 Q. Reverend Munns, you are aware of the lay of
17 the land in that area -- the road that I live on,
18 which is 29 Van Zandt -- 2916, and the bridge that
19 is at the hill, called Womble Hill, and the nature
20 and -- you are familiar with that bridge?

21 A. Yes, sir.

22 Q. Okay. And Steve's Creek does run through
23 that area?

24 A. Yes, sir.

25 Q. Do you know the name of that creek?

1 A. Steve's Creek.

2 Q. Yes, sir. Okay. Does this picture represent
3 that creek?

4 THE COURT: For the record, that's
5 Defendant's Exhibit No --

6 MR. BIRNBAUM: One.

7 THE COURT: -- one.

8 A. Probably so. I couldn't positively identify
9 the picture whether --

10 COURT REPORTER: I'm sorry?

11 Q. Well, does it look like it?

12 A. Yes, sir.

13 Q. Okay. You would not definitely say this is
14 not it -- It looks like it?

15 A. Right.

16 Q. Okay. It is representative of that bridge?

17 A. Yes, sir.

18 Q. Okay. Thank you. Okay. Having that in
19 mind, the bridge, Mr. Munns is going to testify to,
20 is similar to Exhibit 1. How high have you seen the
21 water come up on that bridge?

22 MR. RAY: Your Honor, I'll go to a
23 certain extent, but I think Mr. Munns
24 has testified that he's not for certain
25 that's even the bridge or the stream or

1 anything. That he thinks it looks like
2 it -- And then to go a little bit beyond
3 that, Mr. Birnbaum, to get it in has
4 said, "Well, its representative of that
5 bridge", and then I thought he might
6 stop there, but now he's going to try to
7 utilize that photograph to develop
8 factual evidence of how high the water
9 would flow with respect to that
10 particular bridge. Your Honor, I'm
11 going to object.

12 THE COURT: I'm going to overrule
13 the objection, because the witness has
14 testified that he's familiar with the
15 bridge.

16 MR. RAY: Judge, I have no
17 objection to him testifying about the
18 bridge --

19 THE COURT: Hear me out. I'm going
20 to let Mr. Birnbaum ask the witness how
21 high the water, to his personal
22 knowledge -- Mr. Munns' personal
23 knowledge, how high the water has risen
24 on the bridge, without regard to the
25 picture.

1 MR. BIRNBAUM: Yes, sir.

2 THE COURT: You understand my
3 ruling, Mr. Munns?

4 MR. MUNNS-WITNESS: You're asking
5 me how high the water rises there?

6 Q. Yes, sir. From the bottom of the creek to
7 when it goes to the highest?

8 A. You know it would just be a guess, eight to
9 ten feet rising through there.

10 Q. Okay. Thank you. That is during --

11 A. Floods -- overflow.

12 Q. During floods?

13 A. Right.

14 Q. A substantial amount of water does come down
15 that creek?

16 A. Oh, definitely so.

17 Q. What do you mean by -- Give some kind of
18 description of what you really -- what you call
19 substantial in Van Zandt County.

20 THE COURT: I think substantial was
21 your word.

22 MR. BIRNBAUM: Okay.

23 A. Well, during the flash floods that we have,
24 it's just a tremendous amount of water comes down
25 underneath it.

1 Q. Okay. If I were alleged to have built a dam
2 on that creek, do you believe such dam -- Do you
3 believe any one would build a dam on that creek?

4 MR. RAY: Your Honor, I object to
5 the witness testifying about his
6 beliefs.

7 THE COURT: Sustained.

8 Q. Returning back to the area between Mr. Jones
9 and Mr. Birnbaum, based on what you saw and your
10 knowledge of the area and occurrences, in our -- in
11 the community that you're aware of, based on your
12 personal knowledge, is there -- is there any way --
13 Did Birnbaum do any damage, to your knowledge, of
14 any kind onto Mr. Jones?

15 A. No.

16 Q. Were you --

17 MR. BIRNBAUM: Witness for
18 cross-examination.

19 THE COURT: You may cross-examine.

20 MR. RAY: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. RAY:

23 Q. Brother Munns, I'm Ricky Ray -- and we've
24 known each other for a number of years; haven't we?

25 A. Yes, sir.

1 Q. First of all, I want to start with really,
2 exactly where Mr. Birnbaum stopped. He asked you if
3 you had any knowledge of any damage Mr. Birnbaum had
4 done to Mr. Jones. And I think you said you did not
5 have any knowledge; is that correct?

6 A. That's true.

7 Q. As a matter of fact, there could be or could
8 not be, and you wouldn't know one way or the other;
9 would you?

10 A. Not at the scene there wasn't any -- at
11 Steve's creek, where the crossing was, there wasn't
12 any.

13 Q. When were you at Steve's Creek?

14 A. I don't have the exact date. It was roughly
15 mid February '95.

16 Q. Okay, sir. I take it, if you recall, it
17 would be somewhere shortly thereafter you having
18 served a notice of the suit upon Mr. Birnbaum; is
19 that correct?

20 A. That's right.

21 Q. Matter of fact, that was the reason for going
22 to look at the location; wasn't it?

23 A. After he was served?

24 Q. Yes, sir.

25 A. He asked me during that week, would I come

1 Saturday and look at that time, and we went I
2 believe --

3 Q. Okay.

4 A. -- the following Saturday of the day that he
5 was served.

6 Q. All right. You were never down in the creek
7 area or along that particular same piece of
8 property, any time in October of 1994, were you?

9 A. No, sir.

10 Q. You have no knowledge concerning that period
11 of time; do you?

12 A. I do not.

13 Q. Now, if Mr. Birnbaum had previously answered
14 interrogatories and indicated there had been a
15 beaver terrace located on his side of the creek, do
16 you recall seeing any evidence of that?

17 A. They was some beaver signs at the line --
18 whole fence line back there. In fact, there was a
19 dead beaver in the creek the day we were there.

20 Q. Okay, sir. That was along the property line
21 between Mr. Jones and Mr. Birnbaum?

22 A. Yes, sir.

23 Q. Does Mr. Birnbaum attend your church, Brother
24 Munns?

25 A. Yes, sir.

1 Q. How long a period has he been attending your
2 church?

3 A. Probably eight years.

4 Q. Okay, sir. I take it, then, ya'll know each
5 other well -- And in addition to being a clergyman
6 for him, that ya'll are also social acquaintances
7 and friends?

8 A. Yes, sir.

9 Q. I take it that Mr. Birnbaum had asked you to
10 come down and testify for him to help him out on
11 this case?

12 A. I was subpoenaed.

13 Q. He subpoenaed you?

14 A. Yes, sir.

15 Q. He subpoenaed his own minister?

16 A. I guess.

17 Q. Okay. Well, Brother Munns, you are familiar
18 with serving subpoenas, because you served a number
19 of them; didn't you?

20 A. Yes, sir.

21 Q. Had he asked you to come of your own
22 volition, would you have done so?

23 A. Yes, sir.

24 Q. Ya'll have that kind of relationship; don't
25 you?

1 A. Right.

2 Q. Okay. Now, I think in earlier testimony,
3 Mr. Birnbaum asked you if you saw evidence of dozer
4 work. If I understood your answer, you said you saw
5 where a dozer had been on Mr. Birnbaum's -- the west
6 side of his property or did I misunderstand you?

7 A. On my answer awhile ago?

8 Q. Yes, sir.

9 A. Yes, sir. There was some dim tracks of --
10 tracks like a dozer track.

11 Q. Okay. Those were on Mr. Birnbaum's side of
12 the property line; not Mr. Jones?

13 A. Coming from Mr. Jones -- Just like I said
14 when Birnbaum asked me.

15 Q. Other than the one trip to look at the
16 location, have you been back out there at all --

17 A. No, sir.

18 Q. -- for several months? Do you have any other
19 knowledge of this, other than what's been really
20 told you, to an extent, by Mr. Birnbaum, and his
21 taking you out to look at the location?

22 A. That's all that I could -- is viewing it
23 myself.

24 Q. Thank you, sir. I take it you have no
25 special knowledge of what beavers or beaver damages

1 could do to a creek?

2 A. Oh, yes. I live on a farm.

3 Q. Okay, sir. What will a beaver dam do to a
4 creek?

5 A. What would it do?

6 Q. Yes, sir.

7 A. It will dam it up.

8 Q. And will it flood up-stream?

9 A. It's just like putting a dam across whatever
10 height.

11 Q. Okay, sir. And so --

12 MR. BIRNBAUM: I object.

13 THE COURT: On what grounds?

14 MR. BIRNBAUM: Seeking speculative
15 answers, "Would it".

16 THE COURT: Overruled.

17 Q. Brother Munns, if a beaver dam -- in your
18 experience as a land owner, if a beaver dam is
19 placed on a stream, what's the result of that?

20 MR. BIRNBAUM: I object. The
21 question infers the existence of a thing
22 upon which you seek testimony. Has made
23 no proof that such event exists upon
24 which testimony is sought.

25 THE COURT: Overruled.

1 Q. Go ahead and answer the question.

2 A. Would you ask it again, please.

3 Q. Brother Munns, I'm asking you a pretty simple
4 question, that I think that folks that own farms and
5 have streams and know about beavers. If beavers go
6 out and build a dam on a stream, what happens?

7 A. It backs the water up. It's a dam.

8 Q. And how big can it be and how much water can
9 it back up?

10 A. I have no idea. High as the dam gets.

11 Q. Okay, sir. I take it, it would depend
12 perhaps on two things. How high the dam gets; and
13 number two, the volume of water that runs down the
14 stream?

15 A. Well, they can build it so water just flows
16 over the dam.

17 Q. Uh-huh.

18 A. You know so the height of the dam --

19 Q. So in other words, they can build a dam,
20 whereby the water continues to flow on through, but
21 they'll dam up a great deal of water anyway; is that
22 what you're saying?

23 A. Yes.

24 Q. If I understand you correctly.

25 A. They dam up water, but the water can overflow

1 the dam.

2 Q. So the stream continues to flow on
3 down-stream; doesn't it?

4 A. It can.

5 Q. But it doesn't flow with that volume; is that
6 right?

7 A. Well, once it gets full, it flows --

8 Q. As it usually would, I guess?

9 A. Yeah.

10 Q. Okay. They're pretty good engineers, in
11 other words?

12 A. They're great.

13 Q. Have you ever had any occasions on your own
14 places, where you've had to erradicate or get rid of
15 beavers, because they've flooded large areas of
16 land?

17 A. No. I have them -- and I have some named.
18 They don't bother me that much. They're just sort
19 of a sight-seeing creature. I enjoy them --
20 visiting with them.

21 Q. Yes, sir. Is it conceavible, though, that
22 they could flood land and ruin land?

23 A. Is it possible?

24 Q. Yes, sir.

25 A. Oh, it's possible, I'm sure. I haven't

1 suffered any damage to that extent.

2 Q. Okay, sir. Thank you, Brother Munns. I
3 appreciate your candidness.

4 MR. RAY: I pass the witness, Your
5 Honor.

6 THE COURT: May he be excused?

7 MR. BIRNBAUM: Yes.

8 THE COURT: Thank you, Reverend
9 Munns for your -- You had a long wait
10 for a short bit of testimony, but we're
11 very grateful for your patience and
12 you're excused.

13 MR. MUNNS-WITNESS: For the day or
14 for the trial?

15 THE COURT: Forever and ever.

16 MR. MUNNS-WITNESS: Thank you, Your
17 Honor.

18 MR. RAY: Judge, I don't know about
19 forever and ever. We may need Brother
20 Munns -- He's served so many papers in
21 this county, we may have to get him back
22 some day. I don't know. When did you
23 retire, Brother Munns?

24 MR. MUNNS-WITNESS: When did I
25 retire?

1 MR. RAY: Yes, sir.

2 MR. MUNNS-WITNESS: February 27th.

3 MR. RAY: Just recently, Judge. He
4 was the service processor for many, many
5 years here. Did a fine job.

6 THE COURT: Thank you, Reverend
7 Munns. You rest, Mr. Birnbaum?

8 MR. BIRNBAUM: Testify upon my
9 thoughts.

10 THE COURT: I'm sorry?

11 MR. BIRNBAUM: Testify upon my
12 thoughts.

13 THE COURT: Are you recalling
14 yourself?

15 MR. BIRNBAUM: Yes, sir

16 THE COURT: Is that going to be
17 your last one?

18 MR. BIRNBAUM: Yes, sir.

19 DIRECT EXAMINATION

20 BY MR. BIRNBAUM:

21 MR. BIRNBAUM: You have just
22 observed how difficult it is to get what
23 one thinks is evidence before the jury.
24 And that despite my attempts of having
25 three witnesses, there is not as strong

1 of evidence before you, as I myself
2 personally can give.

3 And it being so difficult to
4 present evidence to you, other than that
5 extraordinary power -- if one might call
6 it that -- that I have by representing
7 myself and being able to talk to you
8 directly, you will have to -- in a
9 determination of this matter, as to who
10 caused damage to whom.

11 You will have to weigh the
12 credibility of my evidence, that I have
13 introduced to you. In reaching a
14 verdict, base it on the total facts that
15 you have seen, including all evidence.
16 Evidence of evidence, lack of
17 evidence -- whatever you have seen that
18 has become evidence, whether you saw it,
19 heard it, heard it not there, it not
20 being there, and so forth.

21 Upon that, that me being summoned
22 into this court as an individual, that I
23 have certain extraordinary powers. Now,
24 if I'm to name one of those, is that I
25 can communicate directly to you -- and

1 I've tried to do so, and portray to the
2 best of my knowledge, the events that I
3 could.

4 And sometimes I may have had to go
5 to some procedural matters, to be able
6 to talk to you directly. If I were not
7 able to testify upon myself, as I
8 discovered in the process today, when I
9 was asked to cross-examine myself, I
10 wouldn't have been able to talk to you
11 like this at all.

12 So weigh my evidence -- of the
13 evidence that I have been able to
14 provide, both in my communication with
15 you, those pictures that I've
16 testified -- that I provided to you as
17 being related to the event. In other
18 words, who did what to whom. Regardless
19 of what -- regardless of what somebody
20 says and testifies to some matter that
21 is --

22 MR. RAY: Judge, I'm going to
23 object to Mr. Birnbaum continuing
24 testimony in this fashion. Because,
25 Your Honor, what it essentially sounds

1 like to me, is he's trying to make his
2 closing argument to the jury. I've not
3 heard any new testimony concerning any
4 new additional facts.

5 THE COURT: Sustained.

6 MR. RAY: Judge, I have one
7 question of Mr. Birnbaum, though, before
8 he is permitted to leave the witness
9 stand.

10 THE COURT: Go ahead.

11 CROSS-EXAMINATION

12 BY MR. RAY:

13 Q. Mr. Birnbaum, I referred to an interrogatory,
14 when I asked the question of Brother Otis Munns --
15 and so that the jury is aware of your answer on this
16 particular interrogatory, I'm going to ask you if
17 this is your answer to that interrogatory. The
18 question was, "Were you ever asked to remove the
19 dam, if so, when?" I'm going to read to you your
20 answer, and you tell me if it's your answer or not
21 to this written interrogatory. ANSWER: "Yes. I
22 was asked to remove a beaver dam, but when Jones and
23 I went on my property to look at the area, it turned
24 out to be the remnants of a beaver terrace." It
25 goes on, "Sand had washed down from Jones' property,

1 where he had used a bulldozer. There was no beaver
2 lodge." Now is that essentially the answer that you
3 gave?

4 A. Is that the official record?

5 Q. Yes, sir.

6 A. I can't hear you, Mr. Ray.

7 Q. Sir, I couldn't hear you?

8 A. I can't hear you.

9 Q. You can't hear me?

10 A. No, sir.

11 Q. I said, "Yes, sir. It is".

12 A. Pardon?

13 Q. Did you ask me a question? I don't know.

14 A. I don't know, either.

15 THE COURT: Try it again, Mr. Ray.

16 MR. RAY: Judge, may I approach the
17 witness?

18 THE COURT: Yes.

19 Q. Mr. Birnbaum, this is interrogatory number
20 10, which I submitted to you. This is a written
21 question sent to you. Do you recall answering
22 those?

23 A. I can't hear you.

24 Q. You can't hear me right now? Okay.

25 Mr. Birnbaum, just look at interrogatory number 10,

1 then. Do you have your glasses where you can read?

2 Can you see interrogatory number 10?

3 A. (No audible response.)

4 Q. Are you all right, Mr. Birnbaum?

5 THE COURT: Mr. Birnbaum, do you
6 need a recess?

7 MR. BIRNBAUM: Yes, sir.

8 THE COURT: All right. Retire the
9 jury.

10 MR. RAY: Judge, I'll just withdraw
11 the question at this stage.

12 THE COURT: I'm sorry?

13 MR. RAY: I'll go ahead and just
14 withdraw my question, Judge.

15 THE COURT: You have anything
16 further?

17 MR. RAY: Nothing further, Your
18 Honor.

19 THE COURT: Thank you,
20 Mr. Birnbaum. You may stand down.

21 MR. RAY: Your Honor, at this time,
22 we would close, also.

23 THE COURT: The Plaintiff has
24 rested and closed. Mr. Birnbaum, do you
25 rest and close?

1 MR. BIRNBAUM: I wish to make
2 the -- close evidence?

3 THE COURT: Yes, sir.

4 MR. BIRNBAUM: Yes.

5 THE COURT: All right. Both
6 sides -- Now, you still have the right
7 to address the jury. I suspect that's
8 what you're concerned about. By resting
9 and closing, you're not losing or giving
10 up your right to make a final --

11 MR. BIRNBAUM: Argument.

12 THE COURT: -- final argument to
13 the jury. Ladies and gentlemen, both
14 sides have rested and closed, which
15 means that you have heard, in all
16 probability, all the evidence that
17 you're going to hear in this matter.

18 The law gives me the right to allow
19 either side to reopen, if I think that
20 the demands of justice really require
21 that, but that's very rare that that
22 happens. I frankly, at this stage,
23 don't anticipate it's going to happen
24 here.

25 The next order of business is the

1 presentation by me to you of a written
2 document. I'm going to read it to you
3 first, and then I'm going to give it to
4 you physically, where you can take it
5 back to the jury room when you
6 deliberate.

7 This document is called the Court's
8 Charge. It contains the law that will
9 govern this case. It will govern your
10 deliberations.

11 After I've read that to you -- and
12 I hope to read that to you at nine
13 o'clock straight up in the morning. And
14 after I've read it to you, then the
15 parties -- or actually, Mr. Ray on
16 behalf of Mr. Jones, and Mr. Birnbaum on
17 behalf of himself, will be given a
18 modest amount of time to make a speech
19 to you -- to address you, in an effort
20 to focus your attention on parts of the
21 evidence that they believe to be
22 pertinent and relevant and important.

23 When they're through talking, it's
24 yours to decide. Now, we're going to
25 recess now until nine o'clock in the

1 morning. It's very, very important that
2 from this moment on -- It's always been
3 important that you do what I'm fixing to
4 say next, but it's really important
5 now -- more important than ever before,
6 that from this moment on, knowing as you
7 do, that the evidence is all in, you
8 will be more tempted than ever to start
9 making decisions in your own mind.

10 You must not do that, because
11 number one, you don't have the law
12 before you. And number two, you've not
13 had the benefit of the final arguments
14 from both sides. So please reframe from
15 doing that.

16 The same instructions, otherwise
17 given you, still obtain. Don't talk to
18 anybody, permit no one to talk to you
19 about the case. If anybody does, let me
20 know. Let the bailiff know. We will
21 see you in the morning at nine o'clock.
22 Have a nice evening.

23 (WHEREUPON, the jury was
24 dismissed for the day.)

25 CONTINUED IN VOLUME _____

R E P O R T E R ' S R E C O R D

VOLUME _____ OF _____

Trial Court Cause No. 95-63

WILLIAM B. JONES * IN THE DISTRICT COURT
 VS. * VAN ZANDT COUNTY, TEXAS
 UDO BIRNBAUM * 294TH JUDICIAL DISTRICT

=====

APPEARANCES:

Attorney for Plaintiff:
 Richard L. Ray
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 SBOT No. _____
 Attorney for: William B. Jones

Defendant Pro Se:
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 Pro Se for: Udo Birnbaum

=====

On the 26th day of May, 1998, continuing until
 the 29th day of May, the above entitled and numbered
 cause came on to be heard for trial in the said
 Court, Honorable James Zimmermann, Judge Presiding,
 and the following proceedings were held, to wit:

1 P R O C E E D I N G S

2 May 29, 1998

3 (WHEREUPON, the following was
4 held outside the hearing of the
5 jury.)

6 THE COURT: Gentlemen, I'm going to
7 give each side a copy of the Court's
8 Charge. Mr. Birnbaum, did you have a
9 chance to read the charge?

10 MR. BIRNBAUM: Part of it.

11 THE COURT: Okay. Go ahead.

12 MR. BIRNBAUM: I got the gest of
13 it. I believe I understand it.

14 THE COURT: Any objections to the
15 Court's Charge from either side?

16 MR. RAY: Your Honor, the Plaintiff
17 has no objection.

18 MR. BIRNBAUM: Your Honor,
19 Defendant demands his right for the jury
20 to hear his argument.

21 THE COURT: Mr. Birnbaum, do you
22 remember --

23 MR. BIRNBAUM: I'll rephrase it.

24 THE COURT: No, no. That's all
25 right. Do you remember my question?

1 MR. BIRNBAUM: Do I agree with the
2 charge?

3 THE COURT: Do you have any
4 objections to the charge?

5 MR. BIRNBAUM: No, sir.

6 THE COURT: All right. Let me
7 explain to you what's going to happen
8 next, Mr. Birnbaum, so we'll all be on
9 the same wavelength. Since no
10 objections are expressed from either
11 side to the Charge, the Court is going
12 to bring the jury in. I'm going to read
13 the charge to them.

14 Further, I'm going to give each one
15 of them a copy of the charge, so they'll
16 have the charge before them when they
17 deliberate.

18 Then, when I'm through reading the
19 Charge, Mr. Ray and you will be
20 permitted to make your argument to the
21 jury.

22 MR. BIRNBAUM: I just want to be
23 sure of that -- right.

24 THE COURT: Now, Mr. Ray gets to go
25 first and last.

1 MR. BIRNBAUM: I understand that.

2 THE COURT: And you get to go in
3 the middle.

4 MR. BIRNBAUM: And until such time
5 as he stops.

6 THE COURT: Well, no. Each of you
7 will have 20 minutes to argue. In
8 Mr. Ray's case, he can divide that 20
9 minutes up any way he wants to -- but he
10 has a total of 20 minutes. You have a
11 total of 20 minutes.

12 MR. BIRNBAUM: To divide up which
13 way?

14 THE COURT: Well, I don't know how
15 you can divide yours.

16 MR. BIRNBAUM: No. What I meant
17 was, there's nothing to divide up -- I
18 assume that means Mr. Ray will be
19 talking to them for 20 minutes -- or 20
20 minutes total talking time?

21 THE COURT: Twenty minutes total
22 talking time.

23 MR. BIRNBAUM: Oh, I understand
24 what it means.

25 THE COURT: He can talk two minutes

1 and then sit down, and then you get to
2 talk 20, and then he gets the final --

3 MR. BIRNBAUM: I understand 20
4 minutes of talking. I understand that
5 like the phone bill, okay -- all right.
6 I understand what you mean.

7 THE COURT: Now, I customarily warn
8 the lawyers when they have two minutes
9 left, so that they won't get caught, you
10 know, short. Now, if you want some
11 other kind of warning -- If you want me
12 to warn you when you have five minutes
13 left or 30 seconds left or something,
14 I'll be glad to warn you, however you
15 want me to, that your time is about to
16 run out.

17 MR. RAY: Judge, two minutes is
18 fine with me.

19 MR. BIRNBAUM: Ten-minute warning,
20 five minute warning, two minute warning.

21 THE COURT: You want three
22 warnings?

23 MR. BIRNBAUM: Yes, sir -- Or I can
24 give you another warning --

25 THE COURT: You're not warning me.

1 I'm just --

2 MR. BIRNBAUM: Yeah, I know.

3 THE COURT: I'm just trying to help
4 you all.

5 MR. BIRNBAUM: I got you. Well,
6 upon the 10 minute warning, the rest --
7 five minute warning.

8 THE COURT: You want a warning when
9 you have five minutes left?

10 MR. BIRNBAUM: That's right.

11 THE COURT: That's fair enough.
12 Bring them in, Sheriff.

13 (WHEREUPON, the jury was
14 brought into the courtroom at this
15 time.)

16 CHARGE OF THE COURT

17 THE COURT: Ladies and gentlemen of
18 the jury, I'm going to read to you, in
19 just a moment, the Court's Charge. It
20 contains the law and it will govern your
21 deliberations.

22 We have, for your convenience,
23 prepared a copy of that charge, and
24 that's what Ms. Davis handed you as you
25 walked in.

1 I'm going to read it to you as
2 required by law. When you -- I forget
3 to put a file stamp on it. When you
4 retire to deliberate, I'm going to send
5 the official copy, the one that we're
6 getting a file stamp put on now -- I'm
7 going to send that in to you, and that's
8 the one that needs to be signed and the
9 blanks filled in and that sort of thing.

10 I'm providing a copy for each of
11 you, so that you don't have to get into
12 each others' laps and look over each
13 others shoulders to try and read it.
14 That's your copy -- And when the trial
15 is over, you can keep it or do whatever
16 you want to with it.

17 The presiding juror will sign the
18 official copy, that's in a little
19 three-hole note book. Now, when I have
20 finished reading the Charge, the lawyers
21 are going to -- Thank you, ma'am. The
22 lawyers are going to address you, and
23 then the case will be yours to decide.

24 This is cause number 95-63, William
25 B. Jones against Udo Birnbaum, in the

1 District Court of Van Zandt County,
2 Texas, for the 294th Judicial District.

3 The Court's Charge, ladies and
4 gentlemen of the jury. This case is
5 submitted to you by asking questions
6 about the facts, which you must decide
7 from the evidence you've heard in this
8 trial.

9 You are the sole judges of the
10 credibility of the witnesses, and the
11 weight to be given their testimony, but
12 in matters of law, you must be governed
13 by the instructions in this Charge.

14 In discharging your responsibility
15 on this jury, you will observe all of
16 the instructions, which have been
17 previously given you. I shall now give
18 you additional instructions, which you
19 should carefully and strictly follow
20 during your deliberations.

21 Do not let bias, prejudice, or
22 sympathy play a part in your
23 deliberations. In arriving at your
24 answers, consider only the evidence
25 introduced here under oath, and such

1 exhibits, if any, as have been
2 introduced for your consideration under
3 the rulings of the Court.

4 That is, what you've seen and heard
5 in this courtroom, together with the law
6 as given you by the Court.

7 In your deliberations, you will not
8 consider or discuss anything that is not
9 represented by the evidence in this
10 case.

11 Since every answer that is required
12 by the Charge is important, no juror
13 should state or consider that any
14 required answer is not important.

15 You are must decide -- You must not
16 decide who you think should win and then
17 try and answer the questions
18 accordingly. Simply answer the
19 questions, and do not discuss nor
20 concern yourself with the effect
21 yourselves -- I should say -- with the
22 effect of your answers.

23 You will not decide an issue by lot
24 or drawing straws or by any other method
25 of chance. Do not return a quotient

1 verdict. A quotient means that the
2 jurors agree to abide by the result to
3 be reached, by adding together each
4 jurors figures and dividing the
5 answer -- and dividing the number -- Try
6 it again -- And dividing by the number
7 of jurors to get an average.

8 Do not do any trading on your
9 answers. That is one juror should not
10 agree to answer a certain question one
11 way, if other jurors will agree to
12 answer another question another way.

13 You may render your verdict upon
14 the vote of 10 or more members of the
15 jury. The same 10 or more of you must
16 agree upon all the answers made to the
17 entire verdict.

18 You will not; therefore, enter into
19 an agreement to be bound by a majority
20 or any other vote of less than 10
21 jurors. If the verdict and all of the
22 answers therein are reached by unanimous
23 agreement, the presiding juror shall
24 sign the verdict for the entire jury.

25 If any juror disagrees as to any

1 answer made by the verdict, those jurors
2 who agree to all findings, shall each
3 sign the verdict.

4 These instructions are given you,
5 because your conduct is subject to
6 review, the same as that of the
7 witnesses, the parties, the attorney,
8 and the Judge.

9 If it should be found that you've
10 disregarded any of these instructions,
11 it will be jury misconduct, and may
12 require another trial by another jury,
13 and then all of our time will have been
14 waste.

15 The presiding juror, or any other
16 juror who observes a violation of the
17 Court's instructions, shall immediately
18 warn the one who is violating the same,
19 and cause the juror not to do so again.

20 When words are used in this charge,
21 in the sense which varies from the
22 meaning commonly understood, you're
23 given a proper legal definition, which
24 you are bound to accept in place of any
25 other definition or meaning.

1 Answer "yes" or "no" to all
2 questions, unless otherwise instructed.
3 A "yes" answer must be based on a
4 preponderance of the evidence. If you
5 do not find that a preponderance of the
6 evidence supports a "yes" answer, then
7 answer "no".

8 The term "preponderance of the
9 evidence" means the greater weight and
10 degree of credible testimony or evidence
11 introduced before you and admitted in
12 this case.

13 Whenever a question requires other
14 than a "yes" or "no" answer, you're
15 answer must be based on a preponderance
16 of the evidence, unless instructed
17 otherwise.

18 Now, the next page is the first
19 question that you will be required to
20 answer. Question No. 1, "Did Birnbaum
21 allow dams upon his land to flood Jones
22 up-stream property in October of 1994?
23 Answer yes or no." And then there's a
24 place, of course, for your answer.

25 On the next page there's a further

1 instruction. "If you have answered
2 'yes' to question No. 1, then answer
3 question No. 2; otherwise, do not answer
4 question No. 2." Question No. 2. "What
5 sum of money, if paid now in cash, would
6 fairly and reasonably compensate William
7 B. Jones for his loss, if any, resulting
8 from the occurrence in question? Answer
9 in dollars and cents, if any." And a
10 place for your answer.

11 The next page you have another
12 instruction. "If you have answered
13 'yes' to question No. 1, then answer
14 question number three; otherwise, do not
15 answer question No. 3."

16 Question number three: "What sum
17 of money, if any, do you find from a
18 preponderance of the evidence, would be
19 reasonable and necessary attorney's fees
20 for the services, if any, performed by
21 Plaintiff's attorney?

22 A. For legal services rendered in
23 the preparation and trial of this cause
24 in this court, answer in dollars and
25 cents, if any." And a place for your

1 answer to be expressed with a blank to
2 be filled in.

3 "B. For legal services if this
4 cause is appealed to the Court of
5 Appeals, answer in dollars and cents, if
6 any", and a place -- a blank for your
7 answer there.

8 "C. For legal services if
9 application is made for Writ of Error to
10 the Supreme Court of Texas, answer in
11 dollars and cents, if any", and a place
12 for your answer to be filled in.

13 Beats me why we've got "D"
14 repeated. Have I missed something here,
15 gentlemen?

16 MR. RAY: Let me see, Judge.

17 THE COURT: I think that's a
18 duplication; isn't it?

19 MR. RAY: It is a duplication,
20 Judge.

21 THE COURT: Forget "D". "D" is
22 obviously a duplication of "C". After
23 you retire to the jury room, you will
24 select your own presiding juror.

25 The first thing the presiding juror

1 will do is have this complete charge
2 read allowed, and then you'll deliberate
3 upon your answers to the questions
4 asked.

5 It is the duty of the presiding
6 juror to one, preside during your
7 deliberations. Two, to see that your
8 deliberations are conducted in an
9 orderly manner and in accordance with
10 the instructions in this charge.

11 Three, to write out and hand to the
12 bailiff any communication concerning the
13 case, which you desire to have delivered
14 to the Judge. Four, to vote on the
15 questions. Five, to write your answers
16 to the questions in the spaces provided.
17 And six, to certify to your verdict in
18 the space provided for the presiding
19 juror's signature or obtain the
20 signatures of all of the jurors who
21 agree with the verdict, if your verdict
22 is less than unanimous.

23 You should not discuss the case
24 with anyone, not even with other members
25 of the jury, unless all of you are

1 present and assembled in the jury room.

2 Should anyone attempt to talk to
3 you about the case before the verdict is
4 returned, whether at the courthouse,
5 your home or elsewhere, please inform
6 the Judge of this fact.

7 When you've answered all the
8 questions, which you are required to
9 answer under the instructions of the
10 Judge, and your presiding juror has
11 placed your answers in the spaces
12 provided and signed the verdict as
13 presiding juror or obtained the
14 signatures, you'll inform the bailiff at
15 the door of the jury room, that you've
16 reached a verdict, and you'll return
17 into court with your verdict.

18 Now, this Charge is signed by me as
19 the Judge of this Court. And on the
20 last page, after the signature page, you
21 will find a certificate, which contains
22 a blank for the presiding juror --
23 foreperson as they're now called -- to
24 sign in the event that the verdict is
25 unanimous.

1 If the verdict is less than
2 unanimous, there are blank spaces for
3 all of the jurors, who agree on all of
4 the answers, to sign their name. We
5 will now hear from counsel.

6 CLOSING ARGUMENT

7 BY MR. RAY:

8 THE COURT: Thank you, Judge.

9 (WHEREUPON, Mr. Birnbaum came
10 across the room to address the
11 jury)

12 MR. BIRNBAUM: Ladies and
13 gentlemen --

14 THE COURT: Whoa, whoa, whoa, whoa.

15 MR. BIRNBAUM: Pro se Defendant
16 would like to present his charge.

17 THE COURT: Mr. Birnbaum?

18 Mr. Birnbaum? Assist Mr. Birnbaum.

19 MR. BIRNBAUM: Yes, Your Honor

20 THE COURT: Mr. Birnbaum, what's
21 this all about?

22 MR. BIRNBAUM: I would like to
23 present my charge.

24 THE COURT: No, no. The charge
25 that I just presented is the charge of

1 the Court, and that's the charge that
2 will govern the jury's deliberations.
3 Mr. Ray gets to --

4 MR. BIRNBAUM: Are we on the
5 record?

6 THE COURT: Yes, we're on the
7 record.

8 MR. BIRNBAUM: Thank you.

9 THE COURT: You may take exception
10 to that, if you'd like. Mr. Ray gets to
11 address the jury first, and then you get
12 to address the jury. Any questions?

13 MR. BIRNBAUM: Yes. By what
14 authority is he addressing it first?

15 THE COURT: The authority of the
16 294th Judicial District Court --

17 MR. BIRNBAUM: Yes, sir. Thank
18 you.

19 THE COURT: -- and the laws of the
20 State of Texas. Mr. Ray?

21 CONTINUED CLOSING ARGUMENTS

22 BY MR. RAY:

23 MR. RAY: Ladies and gentlemen of
24 the jury, I donA't think I've ever
25 started a jury argument, in my 24 years

1 of practice, like that. But let me
2 apologize to you, first of all, for
3 telling you I thought we could try this
4 case quickly. I believed that. It was
5 an honest conviction on my part -- And
6 unfortunately it's taken us more time
7 than I really think it should have.

8 But be that as it may, it's finally
9 fixing to be in ya'll's hands. I'm glad
10 for it to be there. I'm confident that
11 you've paid attention, and listened to
12 the testimony as it come in, and the
13 evidence that's been admitted by the
14 Court. I think your deliberations will
15 be a fair and considerate deliberation.

16 Let me, first of all, kind of go
17 back and remind you of some things,
18 which we talked about whenever I was
19 doing the voir dire of the jury panel.

20 I mentioned to you the
21 preponderance of evidence. The Judge
22 has given you an instruction on that.
23 But the preponderance of the evidence,
24 you remember, I did like this -- And I
25 said a slight tip is sufficient. This

1 is a civil proceeding. It's not
2 Mr. Jones' burden to have to prove,
3 beyond a reasonable doubt, all of the
4 various facts that support his side of
5 the case. He just has to tip the
6 scales.

7 That's important in this particular
8 case, because this is a civil
9 proceeding, and you have listened to
10 various testimony. I'm going to recount
11 some of the testimony now with you, and
12 go over that. If you would -- Let me
13 check my time to see where I'm going
14 here. I normally do that at the first,
15 but I must admit, that even lawyers get
16 rattled sometimes, when things happen
17 strangely to them in the courtroom. So
18 I didn't check my watch at the
19 beginning.

20 To start with, our first witness
21 that we called was Mr. Jones. And I
22 want this case to appear simple, in the
23 sense that I think it is. Mr. Jones
24 came in and he testified about what?

25 He testified that he had a buildup

1 of overflow of water onto his property.
2 That he went down and he investigated
3 that, to see what was occurring, and
4 what caused it. He found a beaver
5 dam -- a beaver terrace, whatever you
6 want to call it, but he found where
7 beavers existed on the adjoining
8 property belonging to Mr. Birnbaum.

9 He found where that water, in the
10 creek that flowed through his property,
11 had backed up or overflowed his
12 property. Now this was in October of
13 1994.

14 I want you to focus on October of
15 '94. We've got a whole slew of
16 photographs that's been admitted -- And
17 you'll have an opportunity to see those
18 again, if you want. But those
19 photographs -- none of them, not even
20 our own photographs, are any photographs
21 that show you anything in October of
22 '94.

23 Now, if you will recall Mr. Jones'
24 testimony, Mr. Jones' first effort was
25 to contact Mr. Birnbaum -- Well, the

1 second -- Let me start back up there. I
2 think he had Mr. Leos, his adjoining
3 neighbor, come down and look at the
4 problem with him. They walked over
5 there, and Mr. Leos testified to you,
6 that he saw the beaver dam and he saw
7 the back-up.

8 I think Mr. Leos estimated the
9 acreage covered on Mr. Jones property
10 was -- I believe he said was 10 to 12
11 acres.

12 If I am incorrect in some statement
13 I make about the facts, rely on your own
14 memory. You've been in here and you've
15 heard the same testimony, yourself.

16 Then Mr. Jones decided to contact
17 Mr. Birnbaum -- And he contacted
18 Mr. Birnbaum. I think the evidence
19 shows he contacted him and said, "Look
20 we've got this problem. I've got water
21 flowing over this property of mine".

22 If you will recall, Mr. Jones
23 testified, that in the year of '93, he
24 had done bull dozer work. I think we
25 even have one of the photographs here

1 that shows one of the piles -- And
2 that's obviously a very old pile of
3 timber that's been pushed up -- That he
4 saw on his property, and he felt
5 comfortable that he eradicated the
6 beavers from his own property -- cleaned
7 it up, essentially, so he could use it
8 for agricultural purpose to raise
9 cattle.

10 He called Mr. Birnbaum, as any
11 neighbor would do -- And he said, "You
12 know, we've got a problem over here.
13 Would you come take a look at it and see
14 what we can do". And he did.

15 And his testimony is that he
16 offered to pay for a trapper -- to pay
17 for whatever costs were necessary, to
18 unstop the stream, so it didn't back up
19 onto his property.

20 That being done, he contacted --
21 after he contacted Mr. Birnbaum,
22 Mr. Birnbaum came over. Mr. Birnbaum
23 just simply wouldn't agree to that. Had
24 he done something at that point, we
25 wouldn't be standing here today.

1 Now, Mr. Birnbaum continues to make
2 an effort to say, "Well, there's no
3 problem". And that's interesting in
4 this respect: That the lawsuit was
5 filed in February, after a couple of
6 letters were sent -- You've seen the
7 letters, and shortly after the lawsuit
8 is filed, suddenly the creek goes down.

9 You've seen the pictures where the
10 fence was washed out, and then after
11 that we get all of these pictures. But
12 none of the pictures are prior --
13 actually prior to the creek clearing
14 itself. Since that time, there has been
15 again, some continual build-up of water
16 and the receding.

17 Now, recall Mr. Phillips'
18 testimony -- And Mr. Phillips' testimony
19 was, that he had been coon hunting on
20 Mr. Birnbaum's property. I think he
21 said, at that time, he didn't know whose
22 property it was, but he had been coon
23 hunting up and down that creek. That he
24 recalled two large beaver dams and one
25 small one.

1 That when he moved into the area,
2 he saw that lake -- And that he was able
3 to duck hunt off that lake from his own
4 property -- And that he thought it was a
5 bass fishing lake or something like
6 that. He thought it was something that
7 was intentionally there.

8 The fact that we put on witnesses,
9 that constitutes evidence to you. Those
10 witnesses are live witnesses, that
11 viewed with their own eyes. The fact
12 that we don't have a photograph to match
13 up with that live witness, should not
14 constitute a problem for you, in terms
15 of considering their testimony. Their
16 testimony is as important to you as any
17 photograph.

18 Now, let's talk about some of the
19 other witnesses that we've had.
20 Mr. Johnson came and testified very
21 shortly -- and I really don't know what
22 his testimony was. He appeared to me to
23 be confused by which direction was even
24 which direction. He said he had been
25 down there one time. The creek was

1 flowing at the time, but he testified
2 that he was there after the February
3 date or sometime around that date, but
4 after the creek had been cleared.

5 Mr. Otis Munns, essentially
6 testified to the same thing -- And quite
7 frankly, I always feel you're getting a
8 little desperate when you have to bring
9 your preacher to testify for you.

10 My father was a minister, and I
11 have the utmost respect for clergymen.
12 What I see in Mr. Birnbaum's efforts, is
13 an effort to create witnesses.
14 Unfortunately, he's creating witnesses
15 after the fact -- and that's difficult.

16 But some things that Brother Munns
17 said, that I thought were very
18 interesting, is he indicated that, yes,
19 he knew beavers were a problem; and yes,
20 that beavers built dams of some
21 significance; and yes, they overflowed
22 land -- and you could literally lose the
23 use of your land, if you allow that.

24 I don't know how many of you heard
25 the old statement made, that when the

1 preacher was out visiting with one of
2 his parishioners, and they were walking
3 over to his nice, beautiful farm. It
4 was all clean with grass and look so
5 wonderful, and the preacher looked at
6 his parishioner, the farmer, and he
7 said, "Isn't it beautiful what the Lord
8 has done to this place".

9 The preacher -- And the farmer
10 looked back at him and said, "Yes, but
11 you ought to have seen it when the Lord
12 had it all by himself, before I came
13 along".

14 If you're going to have an
15 agricultural effort going on, you can't
16 have your place flooded with water. It
17 doesn't matter how deep it is. It's
18 going to kill the grass. Mr. Jones
19 testified that it killed the grass. It
20 killed trees. It created problems for
21 him.

22 One of the things that I think you
23 need to realize and focus on,
24 especially -- And I'm going to go over
25 the Charge with you, when I argue to you

1 in close, because I have the opportunity
2 to argue, both opening and closing -- Is
3 that Mr. Jones, number one, is seeking
4 Mr. Birnbaum to remove any and all dams
5 or obstructions that cause overflow
6 water or back-up water to come back onto
7 his side of the property line.

8 Now, if Mr. Birnbaum wants to have
9 beaver dams all over the rest of his
10 property, so long as it doesn't interfere
11 with someone else's use of their
12 property, that's well and good. That's
13 fine. This lawsuit would never have
14 been brought, had that been the case.

15 Now, I personally have cattle and
16 own land. I have a responsibility to
17 take care of my animals, my property --
18 so that it doesn't effect my neighbor.

19 That kind of brings me to a point
20 here, "Good fences make good neighbors".
21 You've heard that. It was interesting
22 to me, when Mr. Birnbaum introduced his
23 photographs, that he came forward with
24 photographs showing a brand new fence
25 constructed, separating the two of

1 them -- And what, to me, visibly
2 appeared to be new wire.

3 Some of you ladies might not have
4 had the opportunity to do some fence
5 building -- and I know something of
6 that -- and you may have, too. I had a
7 grandmother that used to build quite a
8 bit of them.

9 But Mr. Birnbaum testified that
10 that's the boundary fence between
11 himself and Mr. Jones. He testified
12 Mr. Jones had put that fence up entirely
13 of his own expense. And that was after
14 that fence had been washed out, when the
15 beaver lake broke the existing fence.

16 It's a tradgedy that neighbors
17 can't get along. It's with deep regret
18 that we have to come to ya'll in a
19 sense, but thank goodness we do.
20 Because I know where boundary disputes
21 have culminated, and people actually get
22 their guns out.

23 People get very serious about their
24 property rights and their land, because
25 they've worked hard and they've spent

1 their money to be able to own that
2 property. Because of that, Mr. Jones
3 feels he has the right to be entitled to
4 have Mr. Birnbaum remove the
5 obstructions in that creekbed, that
6 would cause water to flow on him -- and
7 to be able to obtain a permanent
8 injunction, so that he doesn't allow it
9 to occur again -- And he thinks he's had
10 some damages, and I'll talk to you about
11 that in my closing.

12 He's certainly had some damages in
13 terms of his attorney's fees, if nothing
14 else -- but that's a different thing,
15 and I'll describe that to you.

16 I do appreciate your attention. I
17 appreciate your concern. I've never
18 tried a case against a pro se party that
19 represented themselves before. It's
20 been an experience for me. It's
21 probably been an experience for ya'll as
22 jurors. You may have a story that you
23 can pass down to the grandkids some day.
24 Thank you.

25 THE COURT: Mr. Birnbaum?

1 CLOSING ARGUMENT

2 BY MR. BIRNBAUM:

3 MR. BIRNBAUM: Ladies and
4 gentlemen, I request opposing party --

5 COURT REPORTER: Excuse me,
6 Mr. Birnbaum, you'll have to speak up
7 just a little bit.

8 MR. BIRNBAUM: I do want to be
9 heard. Ladies and gentlemen, I request
10 opposing party, to show the instrument
11 by which he acquired the right to
12 present the Court's Charge in the name
13 of the 294th District Court.

14 THE COURT: Is that all of your
15 argument?

16 MR. BIRNBAUM: That's my argument.
17 That's 10 seconds worth.

18 THE COURT: You have nothing
19 further to offer?

20 MR. BIRNBAUM: I have further
21 things to offer.

22 THE COURT: Now is the time to
23 present whatever arguments you have,
24 Mr. Birnbaum. Because when your
25 argument is concluded and you sit down,

1 then I'm going to let Mr. Ray complete
2 his argument, and then the jury has the
3 case.

4 So if you have anything further to
5 say, you may present it to the jury.

6 MR. BIRNBAUM: I don't want to take
7 up --

8 COURT REPORTER: Mr. Birnbaum, I
9 can't -- I really can't hear you.
10 You're going to have to speak up for me.

11 MR. BIRNBAUM: I don't want to take
12 up a whole lot of time at this time.
13 There is a petition in the Court, that
14 states --

15 MR. RAY: Your Honor, may we
16 approach the bench?

17 (WHEREUPON, the following
18 discussion was had at the bench.)

19 MR. RAY: Judge, I just think
20 Mr. Birnbaum is fixing to try to read
21 from that petition, which he tried to
22 offer into evidence, which is excluded.

23 THE COURT: I have no way of
24 knowing what he's --

25 MR. RAY: Well, he said, "There is

1 a petition which states".

2 THE COURT: Okay. I didn't hear
3 that.

4 MR. BIRNBAUM: I don't know that
5 it's a petition. I don't know if it's a
6 petition. The jury doesn't know it's a
7 petition.

8 THE COURT: You cannot read
9 anything to the jury that has not been
10 admitted into evidence.

11 (WHEREUPON, the discussion at
12 the bench was concluded.)

13 MR. BIRNBAUM: Ladies and
14 gentlemen, I'm not permitted to show
15 you --

16 COURT REPORTER: Just a minute,
17 Mr. Birnbaum.

18 MR. BIRNBAUM: Ladies and
19 gentlemen, I'm not allowed to show you
20 the instrument, upon which he entered
21 access to this court, to acquire the
22 right to present matters regarding to
23 beavers, before you, in the name of the
24 Court's Charge.

25 Mr. Richard Ray sent me a

1 petition -- And you remember a petition
2 is an instrument that first summons you
3 into court. And that instrument said --
4 and said only, that during 1994, I
5 wrongfully built and have ever since
6 maintained a dam in the spring -- in the
7 channel of the spring creek to the
8 height of four feet and extending twenty
9 feet on either side of that, and that I
10 have ever wrongfully maintained it.
11 That was the instrument by which he
12 gained access to this court.

13 He has modified this instrument
14 twice. The first one was in -- The
15 first one was in February of -- There
16 are two letters. This whole cause
17 started out with a squabble about
18 beavers. Agreed. There's evidence to
19 that. There's documents that have been
20 entered into evidence -- or that I can
21 enter into evidence.

22 But he gained access to the Court
23 with a petition summoned upon me. I was
24 hailed into this Court -- Told to appear
25 within twenty days or else there would

1 be a default judgment. And that
2 instrument said that, "During 1994,
3 Birnbaum built, and has ever since
4 wrongfully maintained a dam to the
5 height of four feet and extending 20
6 feet on either side of the channel."
7 That petition exists -- And that was the
8 instrument by which he entered access
9 into the court, to raise the whole
10 squabble about beavers and dams and
11 terraces and all kinds of other stuff.

12 It's very simple to show whether
13 this dam existed. He has entered
14 another petition, that was amended later
15 on. He has shown no evidence or any
16 mention of any kind, relating to
17 anything about that I built a dam, but
18 that was the instrument upon which I was
19 hailed into this court.

20 He has resisted all of my attempts
21 to discover, as part of this whole
22 discovery process, over three years --
23 to disclose, as part of the discovery
24 process, when and where the things are.
25 I have asked him, "Where is the dam that

1 you state exists?" No answer. Has no
2 witnesses.

3 In fact, there are some documents
4 and interrogatories, that specifically
5 state, he has no witnesses. I have
6 asked before the Court, as to show the
7 witnesses -- to show a witness, or any
8 kind of evidence, upon which you
9 claim -- and when and where these things
10 are that you claim.

11 You forced me to defend myself.
12 You caused me to be hauled into this
13 Court.

14 THE COURT: Mr. Birnbaum, you need
15 to address your remarks to the jury, not
16 to opposing counsel.

17 MR. BIRNBAUM: That person over
18 there hauls me into this court, in the
19 name of the Court, on a summons served
20 by a deputy, on grounds that I built a
21 dam to the height of four feet, and have
22 ever since wrongfully maintained it.
23 And further more, that I did that in
24 1994. At a time that the evidence has
25 shown, there was no bulldozer activity

1 of any kind on my land. How could I
2 have built a dam?

3 Secondly, there was all kinds of
4 indications of other things on the other
5 land, which has nothing to do with me
6 building a dam.

7 I believe that man thought he had
8 some problems with beavers -- And the
9 other person over there, I don't know
10 what he was -- I haven't found what he
11 was trying to do. I haven't found
12 exactly what.

13 But I was hauled into here -- and
14 has every since wrongfully maintained in
15 his petition. He has ever wrongfully
16 maintained this cause. And by
17 manipulating the process, has gotten all
18 the way through this thing, to exclude
19 all the evidence, and me telling
20 anything to the petition.

21 I was trying to submit the petition
22 as evidence of how he hauled me into the
23 Court, during all the testimony, during
24 the last three and a half, three days.
25 And during all of the last three and a

1 half years, every attempt at the
2 discovery of where or what these things
3 are, that he hauled me into court for,
4 has been blocked by the process.

5 I want him to show the authority
6 and the instrument -- or the witnesses,
7 or anything relating to where this thing
8 is that he claims exists.

9 Ladies and gentlemen of the Court,
10 regardless of procedure, procedure may
11 exclude me from addressing you further
12 on this, but that is the question that
13 he has not addressed -- And I request
14 the permission -- I would like him to
15 answer my question, as to where it is
16 that any instrument or anything is, upon
17 that instrument, that authorized him to
18 haul me before you.

19 You think about it. That is the
20 key question. I'm a pro se defendant,
21 and there has been no such mention of
22 the 20-minute rule, to my knowledge, at
23 any time. We can get around that if we
24 have to.

25 There has been no squabble made

1 about the beavers -- And I was defending
2 myself regarding the dam built, that he
3 said that I built. That regardless, the
4 matter of all the things on the
5 beavers -- There was arguments about
6 whether it's a terrace or a dam or who
7 knows what, but the instrument that
8 brought me in before this Court, had to
9 do with the dam, and there is no such
10 dam. Let me show you -- Let me show you
11 evidence. Let me read the evidence
12 that's been -- Let me read upon you.

13 MR. RAY: Your Honor, may we
14 approach the bench?

15 THE COURT: Are you about to read
16 something that's been admitted into
17 evidence?

18 MR. BIRNBAUM: Yes, sir.

19 MR. RAY: Judge, I just want to
20 make sure it's been admitted.

21 THE COURT: What Exhibit No. is it,
22 Mr. Birnbaum?

23 MR. BIRNBAUM: It's the deposition.

24 THE COURT: Has the deposition been
25 admitted into evidence?

1 MR. RAY: The deposition has not
2 been admitted, Your Honor. I think the
3 only area of the deposition that's been
4 admitted, is those specific lines that
5 we read into the record. And I think
6 you have to read the deposition in the
7 record, either in it's entirety or read
8 in the specific pages and lines by
9 reference.

10 Now, I don't know which pages he's
11 referring to. Mr. Birnbaum, bring your
12 deposition with you.

13 (WHEREUPON, the following
14 discussions were had at the bench.)

15 MR. BIRNBAUM: The clock is not
16 running.

17 THE COURT: I beg your pardon?

18 MR. BIRNBAUM: The clock is not
19 running.

20 THE COURT: Who gets to decide
21 that?

22 MR. BIRNBAUM: Okay, thank you.

23 THE COURT: Now, the time to
24 present evidence has past. You can
25 discuss with the jury any evidence --

1 (WHEREUPON, Mr. Birnbaum
2 started to walk away from the
3 bench.)

4 THE COURT: Excuse me,
5 Mr. Birnbaum, there's no need to be
6 rude.

7 MR. BIRNBAUM: Okay, thank you.

8 THE COURT: I'm not going to
9 tolerate that, okay?

10 MR. BIRNBAUM: Yeah.

11 THE COURT: Now, you may read
12 anything to the jury that's been
13 admitted into evidence. If it's not
14 been admitted, do not attempt to read
15 it; okay?

16 MR. BIRNBAUM: Yes, sir.

17 (WHEREUPON, the discussion at
18 the bench was concluded at this
19 time.)

20 MR. BIRNBAUM: I will not read from
21 the document, which forced me into this
22 deposition. I will recall from memory
23 the kind of things that were in the
24 deposition.

25 There was no inquiry, whatsoever,

1 regarding the instrument that he
2 presented, having to do with me building
3 a dam. The kinds of things that were in
4 there -- "Mr. Birnbaum, where were you
5 born?" "What did you do as a child?"
6 It was two and a half hours of just
7 plain harassment.

8 He was interrogating where my
9 parents were -- See, I was born in the
10 United States, here. My parents were in
11 Germany at that time -- and I was moving
12 back to Germany. I was two years old,
13 and it was 13 years before I came back
14 to the United States -- And I lived in
15 America since, myself -- in America.

16 MR. RAY: Judge, I don't desire to
17 impede Mr. Birnbaum's efforts in his
18 argument to the jury any more than I
19 have to, but what Mr. Birnbaum is
20 attempting to do, Judge, is he's
21 attempting now to restate parts of the
22 deposition, which have not been
23 introduced into the record. He had an
24 opportunity to introduce those, if he so
25 desired.

1 I don't know what effect that it
2 may have on the case. I don't
3 necessarily want to hide anything from
4 the jury; but quite frankly, none of
5 that has been admitted.

6 I think he's already violating your
7 rule; but he's violating it by trying to
8 state, essentially, what we did in his
9 deposition, when he was deposed some
10 months ago prior, and in preparation for
11 trial now.

12 THE COURT: Okay.

13 MR. RAY: Judge, I think I would go
14 ahead and lodge an objection at this
15 time, if it's going to continue.

16 THE COURT: I'll sustain it.

17 MR. BIRNBAUM: Defendant was a
18 party --

19 THE COURT: Are you -- Is this part
20 of your argument?

21 MR. BIRNBAUM: To you.

22 THE COURT: No -- Address your
23 remarks now to the jury, Mr. Birnbaum.

24 MR. BIRNBAUM: Your Honor -- Ladies
25 and gentlemen, I was a party and a

1 victim; not just of the first charge of
2 the petition, but also a fraudulent
3 deposition, intended to harass me,
4 regarding to those matters I'm about to
5 talk about here right now.

6 To generate an instrument in the
7 name of the Court, as implying that it
8 was admitted into the Court, and then
9 denying me access to the instrument.
10 All these instruments are not being
11 shown to you, ladies and gentlemen.

12 So I'm testifying upon a deposition
13 that inquired into -- in Germany,
14 whether I had been a Nazi,
15 effectively -- or might have been a
16 Nazi, or might have been subjected to
17 the Nazi -- or my mother or father was.
18 My father -- "Why did he go to Germany
19 in 1938?" "Why did he come back?" Did
20 my mother go with him when I was two
21 years old. "Have you ever had problems
22 with this?" "Have you ever taught in
23 the public school systems?" "What gave
24 you the authority to teach in the public
25 school systems?" "What -- Did you ever

1 get involved in the tutoring of some
2 home-schoolers?" "What were the name of
3 these home-schoolers?" Ten of them --
4 There was only 10.

5 All this -- two and a half hours
6 worth of depositions; okay? The arguing
7 about the difference about a beaver dam
8 and the beaver terrace. Inquiries
9 about, "What's the purpose of a dam".

10 We got off on to, "What kind of a
11 dam are you talking about". He says,
12 you know -- about a dam. I said, "What
13 dam are you talking about". He says,
14 "Any dam". Well, I said, "Hoover dam".

15 You know, it was the same kind of
16 argument that went on -- that you saw
17 here -- That nothing substantial. He
18 showed me pictures. He inquired about
19 this. He grilled me during the
20 deposition, about the same Christmas
21 card that I had over here. When I put
22 that thing in to him, it was to bring
23 these silly proceedings to an end. It
24 was exactly that Christmas -- I called
25 it a Christmas card -- that note for

1 him, Richard, Ricky -- or whatever, "It
2 is time to bring these proceedings to an
3 end. If you were to draw up a simple
4 motion, we could sign it jointly". That
5 says, let's get this thing over with.

6 That's exactly what he meant. He
7 harassed me on the depositions regarding
8 this -- "What does this mean" -- The
9 implications between Richard and
10 Ricky -- and "What does it read here"
11 and "What was printed".

12 The same kind of thing that you saw
13 as evidence, yourself, upon the
14 evidence. You saw the evidence being
15 created by him cross-examining me. You
16 observed the creation of the evidence.

17 I'm testifying to you and telling
18 you my own name, but what went on with
19 this deposition -- and what I'm
20 contending is, that him getting
21 authority to present this, in the name
22 of the Court, is total fraud -- total
23 misrepresentation of his clients.

24 THE COURT: You have five minutes
25 left, Mr. Birnbaum.

1 MR. BIRNBAUM: I believe -- and I
2 honestly believe, that Mr. William B.
3 Jones had no intention, at any time,
4 ever prosecuting me or doing me any harm
5 of any kind -- or paying the kind of
6 legal fees that he has had to pay -- and
7 that I couldn't stop. All he wants is
8 to get out of this thing -- And we don't
9 have any water problems down there any
10 more. We're both getting old.

11 What I don't -- My contention is
12 that Richard Ray has not been acting in
13 behalf of Mr. Jones. I believe
14 Mr. Jones never said those things that
15 were said in his -- in this petition.
16 Mr. Ray trying to get an affidavit to
17 the petition to make the petition
18 evidence.

19 In other words, there's been all
20 kinds of squabbings to take petitions,
21 which can't be evidence. But you make
22 them evidence by having an affidavit in
23 it -- and it's before the Court, and
24 it's in the file, but it's not evidence
25 before you. And you can't talk about

1 it, because it's not evidence, but it's
2 in the Court -- And it's in the name of
3 the Court, and it's signed by you; okay.

4 Bill, I don't believe you ever said
5 that I built a dam.

6 THE COURT: Address your remarks to
7 the jury, Mr. Birnbaum.

8 MR. BIRNBAUM: Did you see that?
9 Did you see his mouth open? Bill?

10 MR. JONES: I'm not answering you.

11 THE COURT: Hey -- Hold on.
12 Mr. Birnbaum, I want to caution you
13 again, address your remarks to the jury.

14 MR. BIRNBAUM: Thank you.

15 THE COURT: If you have something
16 to express to the Court, come up to the
17 bench and tell me, and I'll entertain
18 it, but do not address your remarks to
19 the --

20 MR. BIRNBAUM: Ladies and
21 gentlemen, contained in anything and
22 everything that you see as evidence
23 before you, whether it's admitted or
24 not, the bottom line is what it is that
25 you want.

1 My charge to you -- My charge to
2 you, as the opposing party, the Court --
3 I don't know how to resolve -- not
4 resolve, handle this procedurally, but
5 my request to you, is to categorically
6 deny this thing, on the grounds that the
7 beavers have absolutely nothing to do
8 with this, and that I caused and created
9 no damages.

10 I guess I've got some time-length
11 left. Let me think -- of the 20
12 minutes. My contention is, that there
13 is an instrument, that has been forced
14 upon you, despite three and a half years
15 of process in the Court. It's been my
16 objecting to it upon every time -- In
17 other words, the thing that brought me
18 onto this cause was his petition, which
19 can't be shown; and my answer to the
20 Court, which can't be shown.

21 My answer to the Court -- that was
22 a petition in the initial one, that said
23 I built the dam -- And my answer to this
24 thing was that I had not done such
25 thing. That I've been -- These are the

1 exact words -- that I'm being harassed,
2 victimized and legally assaulted. Those
3 were the exact words -- assaulted by
4 appearing. That is my pleadings,
5 effectively, before the Court.

6 I can't -- The Court has not acted
7 upon either the petition, by which he
8 got me into here, or my pleadings before
9 the Court. And despite all the things
10 along the lines, you can't get -- I
11 couldn't get any hearings to address my
12 pleadings.

13 My pleadings were assault by
14 attorney in the name of the Court. But
15 I can't show you, because it is not
16 quote "admissible". The instrument by
17 which he got into here, which I asked
18 him to show -- and I cannot show you the
19 pleadings, that I have officially in the
20 court, to show you the squabbling that's
21 been going on for three and a half
22 years.

23 You are rendering a verdict upon a
24 very, very simple thing. I was hauled
25 into this Court upon me building a dam.

1 There has been no evidence shown of
2 that. I can't even show you the
3 document, by which he hauled me in here,
4 stating that I built a dam -- And I'm
5 not -- I have gained over the three and
6 a half years, some knowledge of the
7 process that one needs to work with, but
8 the only thing -- the conclusion I came
9 to, the only thing that counts is you,
10 ladies and gentlemen.

11 When things get stacked against
12 you, it's ultimately you and me -- And
13 that is the American system -- right to
14 a trial by jury -- you.

15 At this particular point, I'm
16 talking to you directly, which I could
17 talk to you through the Court process,
18 but everything that happened there --
19 Well, it -- you would effectively --
20 what you were, you were a witness to the
21 squabbling that you were seeing anyway.
22 You were the official witness. It
23 doesn't make any difference. You saw
24 it. You saw it. I wasn't trying to be
25 arrogant or anything.

1 THE COURT: You have one minute,
2 Mr. Birnbaum.

3 MR. BIRNBAUM: Okay. Ladies and
4 gentlemen of the jury, I caused -- I
5 caused no damages, committed no crimes,
6 and there has been no breach of
7 contract. My contention is why am I
8 here before this court?

9 You see my documents and the books
10 that I've had. I've got things this
11 thick. I have a -- I didn't bring them
12 in. I rested last night a little bit.
13 I had two hours sleep one night, and
14 three the night before, and two the
15 night before. Last night I had five. I
16 had a pancake that I put in. I took a
17 nap.

18 I let it kind of simmer on the
19 stove all night long. I was going to
20 show it to you -- But we shouldn't be
21 here at this time. We should never be
22 here. I caused no damage, and committed
23 no crimes, and made no breach of
24 contract -- And I didn't do any of those
25 damages, either.

1 I'm sure he's probably a very fine
2 engineer. I went to Texas A&M,
3 Undergraduate. I knew a lot of
4 engineering students, but if we came to
5 do anything in engineering, I can assure
6 you I wouldn't try to do it myself.

7 Now, I'm not going to say any more
8 about that. I certainly hope that my
9 representation of Mr. Jones has not
10 caused any prejudice to Mr. Jones. I
11 have done the very best I could do in
12 this proceeding, to be as fair as I
13 could to Mr. Birnbaum, under the
14 circumstances.

15 I think you can tell from
16 Mr. Birnbaum's closing arguments, he
17 obviously thinks this is something that
18 I wanted to create -- that I wanted to
19 do as Counsel.

20 It reminds me of the old statement,
21 "That there's not a single good lawyer
22 in the world, except mine" -- and to a
23 certain extent, that's true, because I
24 am Mr. Jones' attorney and counsel in
25 this.

1 I have an obligation to my client
2 to perform -- And I tried to perform
3 that to the best of my ability. That's
4 why I went to law school at SMU. That's
5 why I had to sit for the Bar and pass an
6 exam to be licensed. That's why there's
7 requirements like that.

8 I do believe that if Mr. Birnbaum
9 had chosen to hire counsel, rather than
10 to represent himself, that we might have
11 ever come this far -- but that's purely
12 speculative.

13 Now, Mr. Birnbaum made one last
14 little comment there, that I think is so
15 very accurate. He said, "I'm not being
16 arrogant". And then he said, "the
17 American system allows a jury.
18 Unfortunately, the American system also
19 allows lawsuits".

20 What I'm hearing from Mr. Birnbaum,
21 is that in his own personal arrogance,
22 this suit should just never have been
23 filed.

24 Do you recall Mr. Birnbaum's
25 testimony, when I asked him if he would

1 agree to an injunction -- He said the
2 stream was clear and it was flowing now.
3 I said, "Would you agree to an
4 injunction, that would stop you from
5 ever allowing any obstruction on that
6 creek, that would cause overflow onto
7 Mr. Jones? Would you just agree to
8 that? If it's not happening now, would
9 you just agree to that?" He would not
10 say, yes.

11 Ladies and gentlemen, that's one of
12 the reasons we're here. Because we're
13 asking one, if anything is down that
14 stream that would cause overflow, it be
15 be removed. And two, that it not occur
16 in the future. Because then Mr. Jones
17 would have up and said, "Well, let's
18 just dismiss the lawsuit. It's flowing
19 now." What's going to happen the next
20 time it happens?

21 So Mr. Jones is trying to resolve
22 this issue for once and for all. He's
23 trying to resolve it in the American
24 fashion -- in the court system.

25 Let me go over the charge with

1 you -- And I'm going to ask you to
2 direct your attention to that. The
3 first question, question No. 1. I'll
4 give you an opportunity to get there.

5 On question No. 1, "Did Birnbaum
6 allow dams upon his property to flood
7 Jones' up-stream property in October of
8 1994?" The testimony that supports an
9 answer of "yes" there; number one,
10 Mr. Jones' own testimony. That he went
11 over. He viewed the dam. He saw the
12 water backed up.

13 Mr. Leos also had that same
14 testimony. He testified to you live as
15 a witness. He has no reason to lie to
16 you, that I know of. In addition,
17 Mr. Phillips, who at that time, probably
18 really didn't even know Mr. Jones all
19 that well, but he had been over there
20 coon hunting, and he had the opportunity
21 to see the same dams and see the same
22 backup.

23 We've shown you photographs of the
24 after-effect; primarily, so you could
25 see where the brush is washed up and

1 where that sand that was spread in a
2 very broad area, where the grass has
3 died. And that goes to support a
4 finding on the second question.

5 But the first question, you have to
6 answer that "Yes" to give the Court the
7 legal authority to enter an injunction,
8 so that there will be no more overflow
9 onto Mr. Jones' property.

10 Question No. 2 is, "If you answered
11 yes to question No. 1, then you can
12 proceed to question No. 2." And the law
13 provides that Mr. Jones can be
14 compensated for his damages.

15 Now, this is not his attorney fees.
16 Attorney fees are a whole separate
17 thing. This is his damages. I think he
18 testified to you in his testimony, that
19 he felt he had been damaged in the
20 amount of 10 thousand dollars.

21 As I recall his testimony, is that
22 that was based on the idea of,
23 essentially, he had 10 acres of land out
24 there, and that the land would be worth
25 about a thousand dollars an acre, if he

1 had his land.

2 He does have his land, but he
3 doesn't have the use that he thought he
4 could utilize it for, because he's lost
5 his grass. He's lost -- really a lot of
6 work he's done cleaning his own property
7 up. He's going to go back in and resod
8 and all that.

9 You are the jurors. You have the
10 opportunity -- when you deliberate, to
11 determine what you think, if any, he's
12 entitled to, in the terms of actual
13 damages, for the loss of use of his
14 property, and whatever it takes to put
15 it back.

16 Question No. 3 -- And that's the
17 next page. Has the same instruction,
18 "If you answer question No. 1", not
19 question No. 2, but question No. 1. "If
20 you answer question No. 1, yes, that
21 there was an overflow", then you can
22 proceed to consider my attorney fees in
23 this case.

24 I testified to you, that on
25 question No. 3A, that I estimated the

1 total cost would be as much as 10
2 thousand dollars. Our pleadings have
3 alleged that. I think in my hours and
4 time at that time, I had indicated to
5 you that I was somewhere around, I think
6 45 hours -- And that was an estimate,
7 because we had more time running. I'm
8 probably now somewhere in excess of 65
9 to 70 hours on the case, since that
10 time -- And very likely will have some
11 additional hours.

12 I want you to keep that in mind.
13 Because whatever occurs in this
14 proceeding, it's going to be incumbent
15 on me to prepare paperwork and do other
16 things.

17 Should this case be appealed, that
18 requires more work by me, as an
19 attorney, such as briefs and things of
20 that nature. We have requested five
21 thousand on the answer to question 3B.

22 On question 3C, we have a tier of
23 appeals. You try the case in the
24 original court. The first step of
25 appeals is the Court of Appeals.

1 The Court of Appeals can rule for
2 or against, and then you have another
3 step, the Supreme Court. That's the
4 last step in the appeal process.

5 It's possible to have two separate
6 appeals, then it's possible to incur the
7 attorney fee that goes with the appeals.
8 That's why I -- Question C addresses the
9 last step, which is the Supreme Court.

10 You see a "D" there? The Judge has
11 asked you to disregard that, and I would
12 also. You'll see it's an exact
13 duplication of "C".

14 Ladies and gentlemen, in
15 summation --

16 MR. BIRNBAUM: How much time do you
17 have?

18 THE COURT: I'll tell him when it's
19 time.

20 MR. RAY: In summation, Mr. Jones
21 needs your help or there's going to be a
22 lot of problems out there. This is
23 really the ultimate reason for ever
24 serving as a juror.

25 THE COURT: You have two minutes.

1 MR. RAY: Thank you, Judge. It's
2 the ultimate reason for ever serving as
3 a juror -- is to resolve a dispute. For
4 once in your life, to actually be
5 solving them. To make something happen
6 that can resolve something like that.

7 I don't think there's a way in the
8 world, that Mr. Jones and Mr. Birnbaum
9 could ever resolve this between the two
10 of them. Mr. Birnbaum keeps saying on
11 the bottom of his little letters, that
12 "I'm willing to negotiate", but there's
13 been absolutely none. I don't think
14 there ever will be.

15 I think this photograph of
16 Mr. Birnbaum, where he's scratching the
17 top of his head, standing on the
18 creekbed out on Mr. Jones' property,
19 pretty well tells us where we are,
20 folks.

21 I don't know that Mr. Birnbaum
22 fully understands this proceeding. I
23 regret he doesn't, because all disputes
24 do not have to end in jury trials -- But
25 this one has been headed that way from

1 day-one -- And I had no way to avail it.

2 But do you remember yesterday, at
3 the close of testimony -- and I asked
4 Mr. Birnbaum, and handed to him an
5 interrogatory, which is a legal question
6 that was sent to him. And I asked him,
7 I said, "Mr. Birnbaum, I want you to
8 tell me -- in your answer, you said,
9 "Yes, I was asked to remove the beaver
10 dam. Mr. Jones and I went on to the
11 property and looked at the area and it
12 turned out to be the remnants of beaver
13 terraces."

14 I asked him, if that's what he
15 answered that question as. He told me
16 first, he couldn't see it. When I
17 approached him and handed it to him,
18 then he couldn't hear me. He couldn't
19 hear. I'll tell you why he couldn't
20 hear; he didn't want to hear -- And he's
21 still not hearing and still not
22 listening, ladies and gentlemen. Not
23 until the jury comes back and delivers a
24 verdict, that could resolve this issue,
25 to tell Mr. Birnbaum, it will never be

1 resolved. It will continue and go on.

2 I have tried to control my temper
3 in this case -- and I hope I've done
4 that. I've tried to accomplish that.
5 But I couldn't be more emphatic in
6 telling you, that if there is ever a
7 case, in which a plaintiff deserves a
8 favorable consideration from the jury, I
9 don't know if I've ever seen one. Thank
10 you for your consideration

11 THE COURT: Ladies and gentlemen, I
12 want you to retire to the jury room.
13 Elect one of your number to preside.
14 You have your individual copies of the
15 charge and the Court's official copy is
16 in the little three-ring notebook.

17 That notebook should be given to
18 the presiding juror. That's the one
19 that needs to be signed. When you reach
20 a verdict, let us know, and we'll bring
21 you back in and find out what the
22 verdict is. Thank you.

23 (WHEREUPON, the jury was
24 dismissed to deliberate.)

25 THE COURT: Bring them in then.

1 (WHEREUPON, the jury was
2 brought into the courtroom.)

3 THE COURT: Ladies and gentlemen,
4 have you reached a verdict in this
5 matter?

6 MS. MCCAULEY-PRESIDING JUROR: Yes,
7 Your Honor. Ms. McCauley, are you the
8 presiding juror?

9 MS. MCCAULEY-PRESIDING JUROR: Yes,
10 sir.

11 THE COURT: Is your verdict
12 unanimous?

13 MS. MCCAULEY-PRESIDING JUROR: No,
14 sir. It is not.

15 THE COURT: All right. Have a seat
16 and let me -- All right. The
17 certificate sheet reflects 11 names, and
18 you signed as the presiding juror, and
19 then there are 10 other names?

20 MS. MCCAULEY-PRESIDING JUROR: Yes,
21 sir.

22 THE COURT: Is it your report to
23 me, that the 11 of you all voted for the
24 answers that I'm about to read? The
25 same 11 of you voted the same way --

1 MS. MCCAULEY-PRESIDING JUROR: Yes,
2 sir.

3 THE COURT: -- on each question?

4 MS. MCCAULEY-PRESIDING JUROR: Yes,
5 sir.

6 THE COURT: All right. Question
7 No. 1, "Did Birnbaum allow dams upon his
8 land to flood Jones' up-stream property
9 in October 1994? Answer yes or no."
10 The answer is "Yes".

11 Question No. 2, "What sum of money,
12 if made now in cash, would fairly and
13 reasonably compensate William B. Jones
14 for his loss, if any, resulting from the
15 occurrence in question?" Answer "Zero".

16 Question No. 3, "What sum of money,
17 if any, do you find from a preponderance
18 of the evidence, would be reasonable and
19 necessary attorney's fees for the
20 services, if any, performed by
21 Plaintiff's attorney, for legal services
22 rendered in the preparation and trial of
23 this case in this Court?" Answer, "Ten
24 thousand dollars".

25 "For legal services, if this cause

1 is appealed to the Court of Appeals,"
2 Answer, "Five thousand dollars". "For
3 legal services if application is made
4 for Writ of Error to the Supreme Court
5 of Texas", answer "Zero".

6 If you voted for each of the
7 answers that I just read, raise your
8 hand, please. Keep them up. I need to
9 count. All right. Am I missing
10 something or am I counting twelve hands?

11 Ma'am, I couldn't tell -- Do you
12 have your hand up or are you kind of
13 thinking?

14 JUROR: It was half and half. Are
15 you reading the whole -- all things?

16 THE COURT: No. Put your hands
17 down. Let me go back over this. Let me
18 go back to question No. 1.

19 JUROR: Never mind, then. Never
20 mind.

21 THE COURT: Yes, ma'am, I have to
22 mind, if you'll forgive me. "Did
23 Birnbaum allow dams upon his land to
24 flood Jones' up-stream property in
25 October of '94?" The answer that the

1 the presiding juror reports to me is,
2 "Yes".

3 How many of you voted "yes" for
4 that answer? All right. Let the record
5 reflect that there are 11 votes for yes
6 to that question.

7 Question No. 2, "What sum of money,
8 if paid now in cash, would fairly and
9 reasonably compensate William B. Jones
10 for his loss, if any, resulting from the
11 occurrence in question?" The answer is:
12 "Zero".

13 If you voted for that answer, to
14 that question, raise your hand. All
15 right. The answer to that question was
16 unanimous, which is inclusive of the 11
17 that voted for the first one.

18 Now the third question deals with
19 attorney's fees. "Legal services
20 rendered in the preparation of trial of
21 this case, 10 thousand dollars". How
22 many of you voted for that? Okay. Let
23 the record reflect that the same 11
24 voted for that, that voted for the first
25 question.

1 And B, "Legal services, if this
2 cause is appealed to the Court of
3 Appeals", answer, "Five thousand
4 dollars". Your hand if you voted for
5 that verdict. Let the record reflect
6 that verdict is unanimous.

7 And finally, "Legal services if
8 application is made for Writ of Error to
9 the Supreme Court of Texas", the answer
10 being "Zero". Your hand if you voted
11 for that. Let the record reflect that
12 that answer is also unanimous.

13 The verdict is accepted by the
14 Court, and will be entered among the
15 papers of the cause.

16 Now, I have a number of things to
17 say before I get you out of here.
18 Number one, you are free to talk to
19 anyone that you choose or not as you
20 choose.

21 Some people think jury service is a
22 public service, which it obviously is in
23 one sense -- and they're happy to share
24 it with whoever, their friends, family
25 total strangers, each other.

1 We had four or five jurys, in my
2 past, in Dallas, that have yearly
3 reunions they love it so much. Other
4 people think that jury service is a
5 personal and a private experience, given
6 the fact that you're locked in a room,
7 and no one, not even a Judge is allowed
8 to be in that room when you're
9 deliberating. And because of that
10 personal and private feeling, they want
11 to put it behind them. Put it out of
12 their minds and talk to no one about it.

13 If you feel that way, that's
14 perfectly all right. You don't have to
15 talk to anybody if you don't want to --
16 simple as that.

17 Now the next thing is, the Court
18 discharges you. You're no longer a jury
19 now, my having uttered that word.
20 You're now just twelve people that used
21 to be a jury and happen to be sitting in
22 a jury box.

23 Further, I excuse you -- Which you
24 may recall from the instructions that I
25 gave the group, of which you were a

1 part. By excusing you, in addition to
2 discharging you, I make it possible for
3 you not to have to come down here again
4 in connection with the summons that
5 brought you down here this time.

6 And you, by the way, before I
7 forget it, you're welcome to keep your
8 copy of the Charge. That's your
9 souvenir. I have a feeling that Van
10 Zandt County may only have twelve of
11 those buttons that you're wearing, so
12 you may want to leave those with the
13 bailiff, so that we may use them again.

14 Do we provide them with a slip for
15 their employers?

16 MS. DAVIS-COURT COORDINATOR: Yes,
17 sir. They can get that in the jury room
18 as they go out.

19 MS. YOUNG-DISTRICT CLERK: I've got
20 it right here, Judge.

21 THE COURT: You've got those? Oh,
22 Nancy has them. All right. We have a
23 piece of paper signed by Ms. Young, the
24 Clerk -- or signed by somebody.
25 Ms. Young has the documents. We'll give

1 one to each of you, and that will -- You
2 can give that to your employers, or your
3 spouses, or whomever you may need to
4 assure or prove where you were this
5 week.

6 Finally -- semi-finally, on behalf
7 of Judge Tommy Wallace, who is the duly
8 elected Judge of the 294th District
9 Court -- I think he's over in Quitman
10 this week holding court over there,
11 thank you for being here.

12 He is a marvelous person and a
13 marvelous Judge. He's just not here
14 this week. So my thanks are for him are
15 kind of a generic thanks. But for me, I
16 want to be especially thankful to all of
17 you -- and to you, ma'am, for presiding.

18 I'm an outsider, as I think I said
19 the other day. Everybody in this county
20 has always -- this week being no
21 exception, made me feel welcome. More
22 than that, you made my job much easier
23 than you will ever know, by the patience
24 that you had for this trial.

25 You now know, first-hand, what

1 justice is about in your community. In
2 the final analysis, justice is what you
3 say it is; not what I say it is; not
4 what those guys down in the legislature
5 say it is. It's what you say it is in
6 the final analysis.

7 I'm particularly proud of you for
8 not going back there and giving a lick
9 and a promise, and coming back in 10
10 minutes with a verdict.

11 You spent however much time you
12 needed, and that's the way it ought to
13 be -- And no one can thank you enough
14 for giving this week to justice in Van
15 Zandt County. Now, I'm going to go off
16 the record a minute and tell you two
17 other things.

18 (WHEREUPON, an off-the-record
19 discussion was had and these
20 proceedings were concluded.)
21
22
23
24
25

