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File # 121

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

WASHAKIE COUNTY, STATE OF WYOMING

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

Civil No. 4993

FILED _____
2/25 1981
Margaret V. Hampton CLERK
DEPUTY

VOLUME 14

Wednesday, February 11, 1981

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Washington, DC 20006
BY: MR. HARRY SACHSE

1 THE SPECIAL MASTER: Ladies and gentlemen.
2 let's resume. The Reporters are ready.

3 Mr. White.

4 Q (By Mr. White) Mr. Kersich, I believe that in
5 your file report, which is C-43 you indicated
6 that you had based your soil standards on some
7 Muddy Ridge standards?

8 A Yes.

9 MR. SACHSE: Sandy, can you talk a little
10 louder?

11 MR. WHITE: I'm going to have to ask you to
12 move up; I'm talking top volume.

13 MR. SACHSE: I'll listen harder.

14 THE SPECIAL MASTER: There's a couple of
15 seats up here, you're welcome to move right by Leo.

16 MR. SACHSE: I'll see how it works.

17 THE WITNESS: What page is that on, Mr.
18 White, may I ask, please?

19 Q (By Mr. White) I think on page 5.

20 A Yes.

21 Q Fourth paragraph.

22 A Yes.

23 Q What were those standards?

24 A I've got a copy, may I take them out?

25 kersich-cross-white

1 Q May I see them, please?

2 A Um-hum.

3 (Brief pause.)

4 Q Thank you. I want to make sure that the record
5 reflects that I didn't put the red line under 20.

6 A No, I was doing that when I was studying.

7 MR. ECHOHAWK: Can I see those for a second,
8 Sandy?

9 (Brief pause.)

10 MR. WHITE: Your Honor, I'd like to inquire
11 of the United States whether or not we might use a
12 xerox machine in the U.S. Attorney's office to make a
13 copy of these during the next break.

14 MR. ECHOHAWK: That's fine.

15 MR. WHITE: And we'll come back to them.

16 Q (By Mr. White) Al, I will return your original,
17 hopefully in as good a shape as you gave it to me.

18 A Okay.

19 Q In the reference section of your final report,
20 C-43, you have ten references listed. Did you
21 use only those references that are listed on
22 Page 33?

23 A I can't recall; something like the Muddy Ridge
24 specs, for example, we looked at and used, but it
25 kersich-cross-white

1 may not have been listed in here.

2 Q Is there anything else that you know of upon
3 which you relied on as references in the pre-
4 paration of your report?

5 A In the preparation of the report?

6 Q Yeah, aside from your own --

7 A I can't recall at this time.

8 Q So that's correct?

9 A I can't recall. We may have used something else,
10 but these were the major ones as I remember.

11 MR. WHITE: Your Honor, we're entitled to
12 know the facts and data.

13 THE SPECIAL MASTER: Well, he told you these
14 are the major ones as best he knows; that's a pretty
15 good answer.

16 MR. WHITE: Okay.

17 THE SPECIAL MASTER: It's a candid one, it's
18 an honest one. These are the major ones, as far as
19 he knows.

20 Q (By Mr. White) Mr. Kersich, would you be able
21 to review your report with your team members and
22 tell us if there are any other references upon
23 which you relied?

24 A Sure. You know, I don't have any problem doing it.

25 kersich-cross-white

1 Q Thank you. In those references, I see a
 2 reference to the Bureau of Reclamation, 1957,
 3 Third Division, Special Report.

4 A Yes, it's the third one.

5 Q How did you use that report?

6 A That was background information basically for the
 7 work we were going to be doing here.

8 Q Did you review the report in preparation of your
 9 own?

10 A For the preparation of our own?

11 Q Yeah.

12 A Quite some time ago.

13 Q I hand you a document which is entitled Special
 14 Report, Third Division, Riverton Project, Wyoming,
 15 and ask you if you can identify that as your
 16 reference, dated 1957?

17 MR. SACHSE: May it please the Court, I
 18 believe the ordinary procedures, if the attorney
 19 examining a witness is going to show a report or other
 20 document to the witness, that he first shows that
 21 report or other document to the attorneys for the
 22 other parties and then shows it to the witness.

23 MR. WHITE: Your Honor, --

24 MR. SACHSE: I think that procedure should be
 25 kersich-cross-white

1-5

1 used here.

2 MR. WHITE: The ordinary procedure is to
 3 show it to the witness and if he can identify it then
 4 show it to the other counsel, but if counsel would like
 5 it the other way, I'd be glad to provide it. It saves
 6 a little time doing it this way because he may not
 7 recognize the report.

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1 MR. WHITE: If that's the way you
2 would like to do it, Harry, I'd be glad to do it.

3 MR. SACHSE: Good. I would like to
4 see what you are showing to the witness before
5 you show it to him.

6 MR. WHITE: You are always free to
7 come up and look over his shoulder as Mr.
8 Echohawk is, and that might be the way to save
9 time.

10 A (By The Witness) It appears to be a document
11 that I looked at sometime ago.

12 Q (By Mr. White) Okay. Would you please refer to
13 pages 47 and 62, which are reproduced in the
14 document I'm now handing you, SK-9 which I'm
15 also handing to counsel.

16 THE SPECIAL MASTER: What pages did
17 he say?

18 THE REPORTER: 47 and 62.

19 Q (By Mr. White) Mr. Kersich, do you recall our
20 abbreviated discussion yesterday of the
21 experimental farm at Cottonwood Bench?

22 A Yes.

23 Q If I changed the words to development farm,
24 would that ring a bell?

25 kersich-cross-white

1 A No.

2 Q Would you refer to the second paragraph on
3 page 47 then, please?

4 A Okay.

5 Q I believe it's the third full sentence that
6 starts: As a part of the program of investigation,
7 a development farm was established on the Bench
8 in 1951.

9 A What page was that? I'm sorry.

10 Q 47.

11 A Okay. In the second paragraph?

12 Q Yes, sir, about a third of the way down, the
13 second full sentence.

14 A A development farm was established on the Bench
15 in 1951.

16 Q Have you finished reading that paragraph?

17 A Yes, I have.

18 Q Would you turn to page 62 then, and this is also
19 included within SK-9, and I ask you to refer
20 to the last full paragraph.

21 A The last two?

22 Q The last full paragraph. I'm sorry.
23 Especially the first sentence.

24 (Brief pause.

25 kersich-cross-white

1 Q (By Mr. White) Did you classify lands in the
2 Cottonwood Bench area as arable, gravity?

3 A On the Cottonwood Bench?

4 Q Yes.

5 A I would have to go back to the North Crowheart
6 Unit and see.

7 Q Okay. Let's see if we can pull that rascal out.
8 I'm not sure which exhibit it is.

9 Isn't it true, Mr. Kersich, the Cottonwood
10 Bench area lies in the right side of Exhibit 44
11 in the northeast corner where you have lands
12 classified as 1, 3 and 2?

13 A I'd have to sit down and check whether those
14 are the same lands as in that report. I wouldn't
15 say that they are right now.

16 Q How long would it take you to do that?

17 A I'd have to get some of my other work sheets
18 out and so on.

19 THE SPECIAL MASTER: Let's see if I
20 can save a little time on it.

21 Can you look and point at the map, which
22 is Exhibit 44, and find the area that lies
23 between Muddy Creek and Cottonwood Creek?

24 THE WITNESS: Here's Muddywood and
25 kersich-cross-white

1 Cottonwood Creek.

2 THE SPECIAL MASTER: And can you find
3 the North Portal area identified on that exhibit?

4 THE WITNESS: No, sir, I can't -- I
5 don't understand their description there
6 completely.

7 THE SPECIAL MASTER: I guess I can't.

8 Q (By Mr. White) I hand you the main volume of the
9 1957 Special Report and direct your attention
10 to the third page after the cover page, which
11 is a map of the Riverton Project area, and
12 direct your attention to the annotation "North
13 Portal" in the north central portion of the map.

14 A Okay.

15 Q Are you able to identify the North Portal area
16 on Exhibit 44 based on the map within this 1957
17 Special Report?

18 A It appears to be Township 4 North, Range 5 East.
19 Township 4 North, Range -- I haven't looked at
20 this correctly, sir --

21 Q It's early in the morning yet.

22 A No, I'm having a hard time reading it.

23 Q Why don't you find Muddy Creek? Doesn't Muddy
24 Creek run through the North Portal?

25 kersich-cross-white

1 A Yeah, but I'm looking at the ranges up here.

2 Wait a minute. That's --

3 Q Could you point to the North Portal area then
4 on Exhibit C-44?

5 A It appears to be this area here (indicating).

6 Q Isn't the North Portal --

7 MR. SACHSE: Your Honor, for the record,
8 is Mr. White showing the witness what he handed
9 the witness earlier this morning and asked him
10 to identify as the Third Division Report?

11 MR. WHITE: Yes.

12 MR. SACHSE: Has that been identified
13 as an SK exhibit?

14 MR. WHITE: No, not yet, but it will be.

15 A (By Witness) Here is Muddy Creek (indicating),
16 correct?

17 Q (By Mr. White) Yes.

18 A Here is Township 4 North (indicating), correct?

19 Q Yes.

20 A Range 3 East (indicating), right?

21 Q Right.

22 A And that's what appears to be this area right
23 here that you are talking about.

24 Q Mr. Kersich, is the North Portal area you have
25 kersich-cross-white

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described in the Muddy Creek area in the withdrawal area?

A It's in the withdrawal area, yes, sir.

MR. WHITE: Your Honor, we'll need to make a xerox copy of the map so I can provide it to counsel and we'll mark it as --

THE SPECIAL MASTER: SK-10?

MR. WHITE: No, sir, Your Honor. Let's mark it as SK-9A because I have a 10 floating around somewhere now.

THE SPECIAL MASTER: Do you want to do it now?

MR. WHITE: It might be a good idea.

MR. ECHOHAWK: Why don't we just mark the entire document as SK-9A?

MR. WHITE: That would be fine with me.

THE SPECIAL MASTER: Okay. We'll mark the entire document SK-9A.

We are off the record.

(Brief recess.

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kersich-cross-white

1 Q (By Mr. White) Mr. Kersich, I hand you what's
2 now been marked as SK-9-A and ask you if you
3 can identify that?

4 A That appears to be the same document you handed
5 to me a moment ago.

6 Q The Special Report?

7 A Yes.

8 Q I'm also going to hand you an unmarked piece of
9 paper and ask you to verify it as a copy of the
10 map found on the third page of that document.

11 Do you have the map in front of you?

12 A I have the map in front of me, yes, sir.

13 Q Would you also turn in Exhibit SK-9, page 47.

14 Would you please read the first sentence
15 on page 47.

16 A "Cottonwood Bench lies between Muddy Creek and
17 Cottonwood Creek and adjoins the eastern edge
18 of the North Portal area."

19 Q Now, by going to the map in the third page of
20 SK-9-A, would you please indicate on Exhibit 44
21 the location of the North Portal area.

22 A North Portal area, from the way I have it on this
23 map here is Township 4 North, Range 3 East
24 roughly or in that portion on our map that's

25 kersich-cross-white

1 Exhibit C-44; it's entitled the Withdrawal Area.
2 Q Is the North Portal area shown on the SK-9-A
3 map located generally within the withdrawal area
4 on Exhibit C-44 and in the general area where
5 the words "Muddy Creek" appear, within the
6 withdrawal area on C-44?

7 A It runs, yes, Muddy Creek runs through it.

8 Q From the description of the location of the
9 Cottonwood Bench on page 47, would you be able
10 to indicate its location on Exhibit C-44?

11 A Well, the sentence says here "Cottonwood Bench
12 lies between Muddy Creek and Cottonwood Creek and
13 adjoins the eastern edge of the North
14 Portal area", and I'm going to have to make a
15 guess, but if that's the case, it will be some-
16 place down here (indicating).

17 Q You think that the Cottonwood Bench area is
18 down --

19 A Isn't that what the description is telling me?

20 Q First of all, do you know where the Cottonwood
21 Bench area is?

22 A I'm not worried about the Cottonwood Bench area,
23 I'm worried --

24 THE SPECIAL MASTER: Would you both -- Would
25 kersich-cross-white

1 you sit down, Mr. Witness and try to use --

2 THE WITNESS: I'm sorry.

3 THE SPECIAL MASTER: -- a pointer, if you
4 can, so the rest of us can see the map. And would
5 we try to proceed with --

6 MR. SACHSE: Your Honor, so that the record
7 can be clear, when the witness points to the white
8 area where he's not classified any land, says that's
9 where this appears, could --

10 THE SPECIAL MASTER: Give us the T, Township
11 and Range on it and that way it's identified what
12 you're pointing at.

13 Q (By Mr. White) Is it your testimony, Mr. Kersich,
14 that Cottonwood Bench area lies in Township 4
15 North, 3 East and apparently in the NW -- excuse
16 me, NE corner of that Township where it adjoins
17 the withdrawal area?

18 A It may very well run from Township 5 North, 3 East
19 all the way down until it ends. We have to get
20 the photos out to find it, which we can do, of
21 course, but the point I was trying to make is I
22 was under the assumption that you wanted me to
23 identify this particular location from the sentences
24 and maps that you gave me.

25 kersich-cross-white

1 Q Isn't it true that lands in the bottom tier
 2 of -- in the southern half of the bottoms tiers
 3 in Township 5 North, Range 3 East would also
 4 be to the east of the North Portal area?

5 A That's correct, sir.

6 Q And the southern half of those sections in
 7 Township 5 North, 3 East would include lands that
 8 you classified then, wouldn't they?

9 A There are some lands classified as arable within
 10 those areas.

11 Q Having used SK-9-A as a reference in your report
 12 and having classified lands as being arable for
 13 gravity purposes in the Cottonwood Bench area,
 14 what investigation did you make, if any, to
 15 determine the relevancy for impact of the develop-
 16 mental farm described in SK-9 on your soil
 17 standards or your land classification?

18 A First of all I think that we should take a
 19 look at those lands and see why they were
 20 classified as arable. From our information, see
 21 what the quality of lands were, see what the
 22 logs say, things of this nature, and find out
 23 what material is there.

24 MR. WHITE: Could you please read back the
 25 kersich-cross-white

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1 Q And you added Y?

2 A Yes.

3 Q Is equivalent to correctable drainage deficiency?

4 A Yes.

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end 39

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1 question?

(Thereupon the following question was read back as follows: "Q Having used SK-9-A as a reference in your report and having classified lands as being arable for gravity purposes in the Cottonwood Bench area, what investigation did you make, if any, to determine the revelancy for impact of the developmental farm described in SK-9 on your soil standards or your land classification?")

10 THE WITNESS: We did not, to the best of my
11 knowledge, consider the information from the
12 farm in the development of the standards.

13 Q (By Mr. White) Thank you.

14 MR. WHITE: Your Honor, may we have permission
15 to withdraw SK-9-A to make a copy? It happens to be
16 the only copy we have and we'll return the original.

17 THE SPECIAL MASTER: Yes.

18 MR. WHITE: Thank you.

19 Q (By Mr. White) Mr. Kersich, would you please
20 place in front of yourself Exhibit C-37, your map
21 symbol codes.

22 Did you make an addition during the voir dire
23 to that?

24 A Yes, I did.

25 kersich-cross-white

1 Q (By Mr. White) Do the symbols in the fractional
2 form shown on Exhibit C-37 correspond in format
3 and type to those symbols which appear on the
4 aerial photographs which you reviewed as part
5 of your work leading up to your opinion on
6 arable lands?

7 A By and large, yes. There were some we put on
8 individually that we dropped that in the final
9 analysis weren't important.

10 Q I don't find on C-37 any symbol "O". Are
11 you familiar with the use of a symbol "O" by
12 your land classifiers?

13 A Not one that we kept in the final class.

14 Q Are you familiar with the symbol small "e"?

15 A That was erosion, if it was necessary to use it.

16 Q Does small "e" appear on C-37?

17 A No.

18 Q Would you like to annotate C-37 so as to reflect
19 the inclusion of the small "e"?

20 A Those are our work sheets, and I said we dropped
21 "e".

22 Q You dropped "e" and you didn't use "e"?

23 A Right.

24 Q Why did you drop the other symbols aside from "e"

25 kersich-cross-white

1 for subsurface drainage deficiencies?

2 A Because in the final analysis they didn't as
3 I recall, we either threw the lands out or they
4 were correctable.

5 Q Did you go through your photographs and change
6 symbols?

7 A No, sir, we did not.

8 Q When did you establish the map symbols which
9 appear on C-37?

10 A Basically those would have been established,
11 as I recall, about the time we were coming
12 up with our final tabulations for arable land.

13 Q Are the map symbols on C-37 those symbols which
14 were used by your field classifiers?

15 A Yes,

16 Q And did you specifically change the symbols or
17 the symbol "X" as it might appear on your
18 fractional description to "Y"?

19 A To the best of my knowledge, we did, or we ruled
20 out "X" as a portion of the symbol for the
21 drainage,

22 Q I hand you what's been marked for identification
23 as SK-20,

24 A Okay,

25 kersich-cross-white

1 Q And ask you if you can identify that?

2 A Okay.

3 Q Is Mr. Waples one of your land or soils
4 classifiers?

5 A He is.

6 Q Do you recognize this table?

7 A Yes, I do.

8 Q Would you please explain then the reason for
9 the difference between the symbols under drainage,
10 subsurface? Where Exhibit SK-20 has correctable
11 "X" and your Exhibit C-37 has correctable "Y"
12 and Exhibit SK-20 has marginal as "Y" and your
13 Exhibit C-37 has correctable as "Y"?

14 A Okay. For one thing, we had "X" for cobble
15 tillage problem and correctable, so we changed
16 that so we wouldn't have a double meaning for
17 one symbol, so then we made the correctable "Y".
18 The noncorrectable we didn't keep in at all
19 because if it was not correctable, it was Class C
20 lands and we threw it out.

21 Q What about the marginal that was originally "Y"?
22 What did you do with that?

23 A Okay. Each of those lands when they came in
24 with the "Y" were reviewed as to this particular
25 kersich-cross-white

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1 problem we were talking about.

2 In other words, there was either -- the
3 depth to barrier was of concern to the classifier.
4 The texture of the material was a concern to the
5 classifier, and he felt that might be a potential
6 hydraulic conductivity problem. At that time
7 we had developed our curves which, by plotting
8 conductivity against depth to barrier, you can
9 determine the drain spacing and at that time
10 those "Y's" were reviewed. If they were correct-
11 able, they were kept as a "Y." If they were
12 noncorrectable, in our opinion, would not meet
13 the standards that we had established of 250
14 drain spacing, those lands were then placed in
15 Class 6 and not declared arable.

16 Q So then in reviewing your photographs, we should
17 rely on C-37 with the correctable "Y" and assume
18 that the symbols which are shown on SK-20 are
19 no longer of any meaning?

20 A Well, the photos have not been all corrected
21 yet. That's the final step, I assume, before
22 we turn the information over, but basically that's
23 correct, yes.

24 Q So if we should find a small "e" on your
25 kersich-cross-white

1 photographs, does that mean that there's erosion
2 potential, or does it mean something else?

3 A The "e's" were no longer used. That class was
4 either changed or the potential was examined
5 further and not considered to be there.

6 Q And the same thing is true with respect to
7 capital "O" for outcrops?

8 A Yes, on our photos you will find that outcrops
9 are little diamonds that we have placed on there
10 so they could be located by the people in
11 the office.

12 Q So all "O's" are now diamonds; is that correct?

13 A On the photos.

14 THE SPECIAL MASTER: While you are
15 crossing on to another subject matter, you said
16 a moment ago you used the term Class 3 lands,
17 or did you mean -- you said Class C lands?

18 THE WITNESS: 6 lands, I thought.

19 THE SPECIAL MASTER: 6 lands?

20 THE WITNESS: Those are the nonarable
21 lands, so lands that we will not--

22 THE SPECIAL MASTER: I didn't want to
23 confuse it with 3.

24 THE WITNESS: I think if I might explain,

25 kersich-cross-white

1 was that when I was discussing a marginal
2 drainage deficiency and then would review it
3 and if it made it, we would classify it into
4 Class C, or if it didn't make the drain spacing,
5 then it was rejected?

6 THE SPECIAL MASTER: Yes.

7 Q (By Mr. White) Mr. Kersich, during your
8 direct examination you mentioned something about
9 either the deletion or addition of some lands
10 in the Arapahoe area, 110 or 100 acres?

11 A There was 110 acres that we deleted, yes.

12 Q Where are those lands that you deleted?
13 Can I help you find an exhibit?

14 A Let me find the exhibit.

15 (Brief pause.

16 A (By The Witness) I think there are some down
17 in this area now (indicating). I would have to
18 go back and check my field book.

19 Q (By Mr. White) Could you do that, please, so
20 we know exactly what was dropped out?

21 A Yes. There is one other place I might do it
22 quicker. If I could have time to go back and
23 look at one of my earlier exhibits --

24 Q Sure. Go ahead and do that.

25 kersich-cross-white (Brief pause.

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A (By The Witness) It's not going to be that simple, sir. I'm going to have to look through --

THE SPECIAL MASTER: Are you on the record or are you not, ladies and gentlemen?

MR. WHITE: I don't believe we are, Your Honor.

THE SPECIAL MASTER: Why don't we do that and take a five or ten-minute break now.

(Brief recess.)

* * * * *

kersich-cross-white

1 THE SPECIAL MASTER: Mr. White,

2 Q (By Mr. White) Mr. Kersich, would you please
3 describe the 110 acres in the Aprahoe sprinkler
4 area that were eliminated.

5 A Okay. All the, for ease here of finding it,
6 I'm going to use Exhibit C-54.

7 THE SPECIAL MASTER: Just stand back from
8 it and use this little pointer; I'll be grateful
9 to you.

10 THE WITNESS: All right, sir.

11 If you'll notice, this is another map that
12 we had prepared. We had a parcel that was
13 classified as 2 sprinkler, located in Township 2
14 South, Range 2 East in Sections 19 and 20.

15 THE SPECIAL MASTER: Let the record also
16 show the witness is not pointing at C-54 but pointing
17 at a map almost that's identical but one that's a
18 blank, that's not yet in evidence.

19 THE WITNESS: That's correct.

20 Q (By Mr. White) Are you sure about the section
21 numbers, Al? Would you check that again. Maybe --

22 A I'm sorry, it's Sections 16 and 17. And I'm
23 referring to a map, again as the Master said,
24 that was very similar to the one that's entitled

25 kersich-cross-white

1 C-54. That particular parcel does not appear
2 on United States Exhibit WRIR C-54. It's
3 approximately 110 acres and located within the
4 sections I just described.

5 THE SPECIAL MASTER: Very good.

6 Q (By Mr. White) Was that land similarly excluded
7 from the Arapahoe gravity arable area?

8 A As I recall, I don't believe that land was ever
9 included in the gravity Arapahoe area. If you
10 want, I'll take the time to look at the proper
11 exhibit and ascertain that.

12 Q Yes, thank you.

13 THE SPECIAL MASTER: You need him to do
14 that?

15 MR. WHITE: I just wanted to know whether
16 it was or not, Your Honor.

17 THE SPECIAL MASTER: Well, he answered he
18 didn't think it was, and I wondered if it's
19 necessary for him to delay our proceedings with
20 another search.

21 Go ahead.

22 THE WITNESS: No, it is not located within
23 that exhibit.

24 Q (By Mr. White) Thank you.

25 kersich-cross-white

1

(Brief pause.)

2

Q Do you have your workbook of photographs in front of you, Mr. Kersich?

3

4

A Yes, sir.

5

Q Let's see if it's necessary to go through these areas one by one, by asking you whether you know the number of acres included within parcels which you have classified arable but which have no logged holes within those parcels?

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A Well, first of all, do I know the number of parcels?

11

12

Q Yes.

13

A That don't have a hole in them particularly?

14

Q That's right.

15

A Not without going to the map here. And here again, as I said yesterday, there may be holes all around them, and that information may be there and there may be other information available that the soils -- that the land classifier took into consideration, so --

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Q How many acres, if you know, were included in parcels without any logged hole in them?

22

23

A I couldn't answer that question without going back and doing a section by section search.

24

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kersich-cross-white

1 Q Okay.

2 MR. SACHSE: Your Honor, I object to the
3 line of questioning that Mr. White is about to begin.
4 I think --

5 THE SPECIAL MASTER: Are you clairvoyant?

6 MR. SACHSE: Just like people in the next
7 trial. I think Mr. White has made clear that he is
8 now going to go tract by tract to ask whether how many
9 acres are in each tract, if there was not a deep hole
10 in that tract. I think the testimony has already shown
11 that that is in no way relevant to proper land
12 classification, whether a deep hole was put in a part-
13 icular tract. The configuration of the tracts is
14 quite accidental in terms of what has been found to
15 be one class of land or what has been found to be
16 another, and there simply is no logical relevance
17 to the proposition, how many acres are in a particular
18 tract where the test hole may have been outside the
19 tract.

20 Now, if you think this is relevant and that
21 we should take what may be another four, five hours
22 in doing that, then Mr. White can go ahead with it,
23 but I ask the Court to rule at this point that the
24 proposition has been fully investigated. The deep logs
25 kersich-cross-white

1 were not drilled in every single tract, that the
2 witness has already testified that in his pro-
3 fessional opinion there was no need to do so, and
4 to now take another four or five hours perhaps of
5 all of our time and the State's money, the Tribes'
6 money, the United States' money to go through this
7 is letting cross-examination go too far.

8 THE SPECIAL MASTER: Well, my first observa-
9 tion on your objection is that it comes about a half
10 a day late because we spent almost all of yesterday
11 afternoon doing what you alluded to. We went through
12 parcel after parcel with an identification of either
13 one probe, no probe, one hole, no hole, distance
14 from each and non-distance from each, and I thought
15 those matters were relevant to give the case an accurate
16 guideline or inquiry into the degree of efficiency,
17 expertness, propriety, whatever you want to call it
18 that the witness put into his work. Now, if Mr.
19 White wants to continue that similar type questioning,
20 I don't see that we can call it improper now, so I
21 would rule against the objection.

22 MR. SACHSE: Your Honor --

23 THE SPECIAL MASTER: Just a minute. But if
24 Mr. White's point is to go in and give an acre by acre
25 kersich-cross-white

1 analysis of every parcel and its relationship to probe
2 holes or to a hole to find a barrier, I'm going to
3 have to object because there's not enough months and
4 years left in my life to go through the 80,000 acres,
5 of that kind of an examination. So we'll try to keep
6 it within some reason, within those restraints that
7 I've mentioned.

8 MR. ECHOHAWK: Your Honor.

9 THE SPECIAL MASTER: Yes.

10 MR. ECHOHAWK: I would like to join in the
11 Tribes' objection and again renew the objection I
12 made yesterday afternoon along the same lines.

13 THE SPECIAL MASTER: Your objection is heard
14 and noted.

15 MR. SACHSE: I would like to clarify one
16 point in my objection. The fact that we did not
17 object earlier was to give Mr. White as much leeway
18 as he wanted to go into this, but after an entire
19 afternoon of this, I think it is now clear that he
20 has made his point and he has made his investigation,
21 and the proposition that every tract of land does not
22 have what he calls deep log hole and it is clear.
23 The witness's testimony as to the lack of need for
24 that is also clear.

25 kersich-cross-white

1 He can bring in witnesses to testify to
 2 the contrary if he wants to, and there is nothing
 3 wrong with letting a matter go to the point that it
 4 has served some purpose and then say but we won't
 5 continue with it forever.

6 THE SPECIAL MASTER: Well, I was surprised
 7 at your objection, coming when it did. We all pride
 8 ourselves on the degree of clairvoyance and proper
 9 anticipating, whether golf players, tennis players,
 10 judges or lawyers and I had anticipated that Mr. White
 11 was proceeding to a different line of questioning,
 12 so now let's see which of us --

13 MR. SACHSE: Perhaps you're correct.

14 THE SPECIAL MASTER: -- is correct in our
 15 anticipation.

16 Go ahead, Mr. White, with whatever you had
 17 in mind.

end 5

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1 THE WITNESS: Can I bring up one thing?

2 THE SPECIAL MASTER: No, not yet.

3 If he asks about it --

4 MR. WHITE: I'm afraid for once Mr.
5 Sachse is correct, Your Honor.

6 THE SPECIAL MASTER: But again do so
7 within the cautions of my restraints.

8 MR. WHITE: I will try to do so very
9 quickly, Your Honor. The purpose of the cross-
10 examination will be to show you the large
11 frequency and the enormity of the number of acres
12 involved in this sort of classification.

13 MR. ECHOHAWK: I believe the evidence
14 will speak for itself.

15 MR. WHITE: I was just making a discussion
16 of where I was going, Your Honor.

17 Q (By Mr. White) Okay, Mr. Kersich, let's go back
18 to the Arapahoe area, please.

19 A Can you give me the township and range?

20 Q Township 1 South, 3 East.

21 A 1 South, 3 East.

22 Q Do you find a parcel of 27 acres located in
23 Section 32, the west half of Section 32, of
24 that township in which there is no hole whatsoever?

25 kersich-cross-white

1 A I'm in 1 South, 3 East. I'm in Section 32, and
2 you're talking about a 32-acre parcel?

3 Q A 27-acre parcel. It's classified 2 for
4 sprinkler.

5 Are you in 1 South, 3 East?

6 A Yes, I am. Are you talking about this parcel
7 here (indicating)?

8 Q Right.

9 A Okay.

10 Q Do you find the 27-acre parcel?

11 A Yes, I do.

12 Q Is it true that there's no hole of any type,
13 logged or unlogged in that parcel?

14 A In that particular parcel, there's not, and
15 I think the record should be made clear though
16 that within, let's say, 500 feet there's a
17 deep hole that goes to 28 feet; from the boundary
18 of that parcel, maybe 500 feet to the south,
19 there's a log. 21, which indicates that that
20 particular log is 120 inches in depth; just to
21 the -- about 1000 feet to the right there's
22 another 72-inch hole.

23 As a matter of fact, we have one, two, three,
24 four, five, six logged holes in that section

25 kersich-cross-white

1 which well meets the minimum requirements for
2 land classification, semi-detailed specifications.

3 Q Are those logs in the same land form?

4 A Are they in the same land form? No, they
5 are in various land forms throughout that to
6 make the identification of the various parcels
7 more practical.

8 Q I didn't think they were. Section 29.

9 A In the same township?

10 Q Same township.

11 A Yes.

12 Q 17-acre tract in the southwest corner, overlaps
13 Section 30 a bit, classified 3 : gravity, 6 sprinkler?

14 A That's correct.

15 Q Do you find that?

16 A Yes.

17 Q Is it true there's no hole whatsoever within
18 the boundaries of that parcel?

19 A There's no hole whatsoever, but there's a hole
20 just directly south of that that's logged.
21 There's another hole to the east of that.

22 Q Are those in the same land form?

23 A No, that's why they are not. There are different
24 holes in different land forms to be able to make

25 kersich-cross-white

1 the land classification.

2 THE SPECIAL MASTER: Can I have a
3 definition of land form?

4 MR. WHITE: Let me ask the witness.

5 Q (By Mr. White) What is meant by land form?

6 A Sure, there are different types of lands which
7 may be located in different positions. They
8 may have different types of cover. They may
9 have different gradients, have different slopes.
10 All of these things are put together in making
11 the classification.

12 THE SPECIAL MASTER: All right. Thank
13 you.

14 Q (By Mr. White) Turn to 1 South, 2 East.

15 A Okay, sir.

16 Q Section 23.

17 A Okay. I'm in Section 23.

18 Q Do you find a 77-acre tract classified 6 gravity,
19 3 sprinkler, in the east half of the NE 1/4?

20 A Yes, I do.

21 Q Is it true that there are no holes whatsoever
22 within that parcel?

23 A There are no holes directly within that parcel,
24 but here again just 200 feet to the west we have

25 kersich-cross-white

1 a 96-inch hole that has been logged and six or
2 eight hundred feet to the east we have a 120-
3 inch deep hole that's been logged, and within
4 that quarter section or within the boundary of
5 that quarter section we have a 33-foot deep hole,
6 so within about 107 acres we have three holes,
7 plus there were some Bureau holes that we
8 used to confirm what we might have found.

9 No, I'll take that back. We have hole no. 2
10 that's 78 inches deep that is just slightly to
11 the west of that.

12 Q Are those holes in the same land form?

13 A There's a difference in cover there possibly and
14 there's also a difference in gradient.

15 Q Thank you. The same section, I believe there's
16 a 23-acre parcel that's classified 6 gravity,
17 3 sprinkler in the --

18 A A 23-acre parcel?

19 Q Northeast to the northwest. Maybe 21. I can't
20 read it very well.

21 A It's 21 acres on my map here.

22 Q Okay.

23 A Yes.

24 Q Is it true that there's no hole whatsoever within
25 kersich-cross-white

1 the boundaries of that parcel?

2 A Within that, no, but right just to the east
3 of that is a 96-inch deep hole.

4 Q And is that hole in the same land form?

5 A No, because it's obvious that there's a gradient
6 problem there so we -- that 21-acre parcel
7 was actually downgraded to 6 sprinkler -- I'm
8 sorry -- 6 gravity and 3 sprinkler, so he was
9 concerned about physical features that he saw
10 in his observation and actually downgraded that
11 parcel.

12 Q Do you know of your own personal knowledge that
13 that's what the land classifier did there?

14 A I may have seen that parcel. I have been on
15 most of those.

16 MR. WHITE: Could you read the question
17 back, please?

18 THE SPECIAL MASTER: Well, he answered
19 it the best he could, I believe. I think that's
20 a no -- well, go ahead and read it back.

21 (Thereupon the question was
22 (read back by the reporter as
23 (follows: "Q Do you know of
24 (your own personal knowledge
25 (that that's what the land
(classifier did there?"

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1 MR. ECHOHAWK: Could we also have the
2 answer read back?

3 (Thereupon the answer was read
4 (back by the reporter as
5 (follows: "A I may have seen
6 (that parcel. I have been on
7 (most of those."

8 Q (By Mr. White) Can you answer the question as
9 asked, please?

10 A I'm sorry. I was looking at this again.

11 THE SPECIAL MASTER: That's all right.

12 Read the question one more time, and will you answer
13 it one more time or repeat your answer if you
14 want to or just say it's answered.

15 MR. WHITE: I believe, Your Honor, the
16 question --

17 THE SPECIAL MASTER: Let's let him go
18 on, Mr. White, if we are going to finish up
19 these matters.

20 (Thereupon the question was
21 (read back by the reporter as
22 (follows: "Q Do you know of
23 (your own personal knowledge
24 (that that's what the land
25 (classifier did there?"

26 A (By The Witness) Well, I was in through this area.
27 I have seen many areas that were fairly level but
28 did not have a gradient mark that were 3's, 2's

29 kersich-cross-white

1 things of this nature. This has been downgraded.
2 The only thing I can say is that I believe grade
3 is the problem there.

4 MR. WHITE: Your Honor, I would move
5 to strike his testimony with respect to what
6 the land classifier did. He's unable to state
7 of his own personal knowledge that he knows
8 what happened there and it's based on speculation.

9 THE SPECIAL MASTER: Would you answer
10 yes or know? If your answer is no, say no.

11 A (By The Witness) I don't recall exactly.

12 THE SPECIAL MASTER: That's right.

13 MR. WHITE: Then I would move to strike
14 his remarks about what the land classifier did
15 because he has no personal knowledge of them
16 and they represent speculation.

17 THE SPECIAL MASTER: The objection is
18 overruled. He's worked with the land classifiers
19 intimately on hundreds of these parcels and I
20 think he can speak for the guidelines that
21 governed his activities. He's a supervisor in
22 charge of this, and they were prepared directly
23 under his supervision and control.

24 I might say, Mr. White, at this point, if

25 kersich-cross-white

1 the nature of the continuing examination is
2 similar to that which is now an established
3 pattern of his operations, it would become
4 redundant and subject to termination of some
5 type.

6 If an examination were to be made in this
7 general mainstream adjudication of the water
8 rights in Water Division 3 of every holder of
9 water right with the minute examination you are
10 giving this, it is quite possible that there
11 ought to be 3000 water rights and not 2300
12 water rights in those that are going to be
13 confirmed.

14 This is a two-edged sword, and it works
15 both ways, and I would throw that out as a
16 matter of guidance for what we are doing.

17 MR. WHITE: I appreciate that, Your
18 Honor, but I have a duty to make sure that all
19 of the defects in this study are brought to the
20 attention of the Master, and I would ask your
21 indulgence to allow me to go ahead.

22 THE SPECIAL MASTER: I appreciate
23 that, but it is your duty to not run this on
24 adnauseam with redundancy and duplications

25 kersich-cross-white

1 and repetition of those shortcomings.

2 MR. WHITE: Maybe I can solve it by
3 asking a couple of leading questions, Your Honor.

4 THE SPECIAL MASTER: Good luck.

5 MR. WHITE: I tried to before and I'll
6 try again.

7 Q (By Mr. White) Mr. Kersich, isn't it true that
8 within the arable land base that you determined
9 there are approximately 9500 acres of lands that's
10 classified as arable for sprinkler which is
11 included within parcels having no logged hole
12 or no holes whatsoever within their boundaries?

13 MR. ECHOHAWK: May I have that question
14 read back?

15 THE WITNESS: I don't understand the
16 question.

17 THE SPECIAL MASTER: Read it back, please.

18 (Thereupon the question was
19 (read back by the reporter as
20 (follows: "Q Mr. Kersich, isn't
21 (it true that within the arable
22 (land base that you determined
23 (there are approximately 9500
24 (acres of lands that's classified
25 (as arable for sprinkler which
(is included within parcels
(having no logged hole or no
(holes whatsoever within their
(boundaries?"

kersich-cross-white

1 A (By The Witness) I can't give you an exact
2 acreage figure at this time. It is quite
3 possible that there are parcels that are
4 classified as arable for sprinkler out of the
5 79,000, I believe -- is that the correct figure?
6 May I look up that figure for a minute?

7 Yes, under the sprinkler classification
8 that we accomplished here -- that would be on
9 Table 7, sir, the total in the lower right-hand
10 corner -- there were 79,689 acres, and it's
11 quite possible that some of those acres didn't
12 have a particular hole in that particular parcel.

13 However, I've got to remind everyone again
14 that those lands could have been classified
15 through a number of ways: The visual observations,
16 through exposed banks, road cuts, stream cuts,
17 things of this nature, so the profile could have
18 been observed.

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1 Q (By Mr. White) (Continued) Do you know of your
2 own personal knowledge that those, the lands
3 that were classified having no holes whatsoever
4 or no logged holes whatsoever classified under
5 the bases that you've described?

6 A I know that is a common and accepted practice
7 in the field to utilize geological formations
8 anyplace you can see them, through banks, through
9 eroded slopes, through all the possible things
10 that you can use to gather and detail the infor-
11 mation to be able to make land classification
12 of various types, yes.

13 Q Do you know that that was done with respect to
14 the acreage included within parcels for which
15 there were no logged holes?

16 A I know that I had people out there with an excess
17 of 30 years of experience in doing this business,
18 doing it in a highly efficient manner, and it's
19 like anything else, you got good people, you
20 give them good instructions and you give them the
21 time to do the job and they're going to do every
22 method reasonable to make a proper and honest
23 and professional determination.

24 Q Do you know of your own personal knowledge that
25 kersich-cross-white

1 for the lands included within those parcels,
2 having no logged holes, the classification was
3 made based on the other criteria which you've
4 described?

5 A Well, we talked about some other criteria also.
6 They talk about --

7 Q The question is do you know --

8 THE SPECIAL MASTER: I didn't understand
9 your question either. Maybe you could repeat it,
10 Mr. White.

11 MR. WHITE: Yes.

12 Q (By Mr. White) Do you know of your own personal
13 knowledge that where land was classified in
14 parcels having no logged hole, the classification
15 was made based on the other factors which you've
16 described? This calls for a yes or no answer.

17 A I feel that it was, yes. I have no problem
18 making that answer.

19 Q How do you know of your personal knowledge that
20 that was done? For example --

21 MR. ECHOHAWK: This has been asked and
22 answered already, Your Honor.

23 MR. WHITE: I'm testing the answer, Your
24 Honor.

25 kersich-cross-white

1 THE SPECIAL MASTER: Let me see the full
2 question to see if you're right.

3 Again, Mr. White.

4 MR. WHITE: How do you know, for example,
5 that was done for the 202 acre parcel classified
6 as Class 3 gravity, Class 3 sprinkler lying
7 in Sections 35 and 36, in the East 1/2 of the
8 NE 1/4 of Section 35 and in the NW 1/4 of Section
9 36, Township 2 North, 5 East?

10 THE SPECIAL MASTER: I'll permit that to
11 stay.

12 THE WITNESS: I would have to go look at
13 my particular map then.

14 THE SPECIAL MASTER: Would you do that,
15 please.

16 What's it in, Sandy?

17 MR. WHITE: It's in Riverton East, Your
18 Honor.

19 THE SPECIAL MASTER: It's in Riverton East,
20 2 North, 5 East.

21 THE WITNESS: Okay. 2 North, 5 East,
22 Sections 35 and 36.

23 THE SPECIAL MASTER: NW 1/4 of 36.

24 THE WITNESS: Okay. I don't see a 202 acre

25 kersich-cross-white

1 parcel there, sir.

2 Q (By Mr. White) Well, let me get my maps out
3 here.

4 A We're discussing Section 35 and 36. I see one
5 deep hole that went 12 foot, I see a number of
6 other logged holes within that parcel. I see
7 another deep hole of 20 feet.

8 Q I gave you the wrong description. Let's go to
9 1 South, 4 East, Section 13.

10 A Section 13, sir?

11 Q Yes. SW 1/4, 69-acre tract, classified 3 and 3.
12 Do you find that?

13 A I see the 69-acre tract, yes. And that's
14 classified 3. I'm having a hard time reading it,
15 it's a little bit darker. Three ST, 3, which
16 would mean 3 for gravity, 3 for sprinkler.

17 There's medium light textures, barrier grade and
18 shape and size factor.

19 Q That's one that has a hole in it?

20 A That's correct, it sure does.

21 THE SPECIAL MASTER: Then your question is
22 irrelevant. Proceed.

23 MR. WHITE: May I go ahead and ask it?

24 THE SPECIAL MASTER: You may indeed.

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1 The question you asked to be answered is
2 irrelevant. It has a hole in it; not your
3 question but the land.

4 MR. WHITE: Let me ask quickly about the
5 land.

6 Q (By Mr. White) There are two holes in there,
7 aren't there?

8 A Sir?

9 Q There are two holes in there?

10 A A Bureau hole and our hole, a probe.

11 Q Depth of the barrier needs to be six feet; is
12 that correct?

13 A That's correct.

14 Q And your probe went in to five feet and found
15 sandstone?

16 A That's correct.

17 Q The Bureau hole went to 24 inches and found
18 sandstone?

19 A I don't know; I want to see the Bureau log.

20 Q Take a look at it, please.

21 A I don't have it.

22 THE SPECIAL MASTER: Find it for him, would
23 you, Mr. White?

24 MR. WHITE: It's not my log, Your Honor.

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THE SPECIAL MASTER: It's not his either.

MR. ECHOHAWK: I believe they're in the Courtroom, Your Honor.

THE SPECIAL MASTER: I believe a little cooperation with the witness will be appreciated. Let's take a five minute break.

(Thereupon a five minute recess was taken.)

END 7

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THE SPECIAL MASTER: Come to order,
please. Mr. White?

Q (By Mr. White) Mr. Kersich, do you recognize the
sheet before you which has not yet been marked --

MR. WHITE: But we'll mark it if we
can have permission to withdraw it and make a
copy, Your Honor. It's our only copy --

Q (By Mr. White) -- as SK-10A and ask you whether
or not you can --

THE SPECIAL MASTER: Would you answer the
question? Do you recognize it?

THE WITNESS: I can identify it only
here from -- I don't recognize the sheet. It's
Township 1 South, Range 4 East, semi-detailed
land classification, Wind Division, Wyoming.

Q (By Mr. White) Does that contain the log of
the Bureau of Reclamation hole which you indicated
occurred in that 69-acre parcel?

A It occurred somewhere close to the 69-acre
parcel. We have the very edge of it here, yes.
There's a log 16.

Q And what's the depth on that log?

A 48 inches, if I'm reading this correctly, yes.

Q So the Bureau log was 28 inches deep and it hit
kersich-cross-white

1 sandstone there, didn't it?

2 A It says shale, greenish olive gray -- shale
3 sandstone outcrop.

4 Q And the HKM hole hit sandstone at 60 inches or
5 5 feet, isn't that correct?

6 A That's correct. It hit sandstone at 60 inches.

7 Q How did, for that parcel, you form an opinion
8 that the depth to barrier was at least 6 feet
9 when you had two holes, one hit sandstone at
10 28 inches, I believe maybe even 24 inches from
11 the log, and your own hole hit sandstone at 5
12 feet?

13 A Well, there are a couple of things here that I
14 would like to bring out. It's a long narrow
15 tract. We didn't have the exact location of
16 the Bureau hole. We showed it on the very edge
17 of it.

18 There is a drainage here that one can see
19 where the shales are, and we hit it at 60 inches.

20 We have a hole directly below about a half
21 mile in the middle of the section where we got
22 shale at 72 inches. I can't say I looked at
23 this particular parcel personally, but it's a
24 long narrow parcel. Natural drainage is afforded

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1 to it,

2 Secondly, there seems to be a wide disparity
3 in the 60 inches versus the 24 inches,

4 Our drainage engineer, I'm sure, had to
5 review that because we noted it as barrier in
6 the soils log here, so it would be looked at,
7 possibly -- the only explanation I have is that
8 drainage may have been possible in that particular
9 tract and we do have the one hole of 60 inches,
10 I don't dispute that at all.

11 We have a hole down here at 72 inches also,
12 and there appears to be a variant in the depth to
13 shale in that area,

14 Q Of your personal knowledge do you know what the
15 basis of the classification was that that's
16 Class 3 lands requiring at least 6 feet to
17 barrier?

18 A Well, as I told you before, in Class 3 lands
19 you may find the shales at 6 feet. You may go
20 over a half mile and find them at 5 foot 6, but
21 you can still install drains, and that's the
22 important thing, and if the hydraulic conductivity
23 of the soils -- and I think one thing that should
24 be made a part of the record here is that the

25 kersich-cross-white

1 soils are classified in the surface and sub-
2 surface -- the surface 12 inches is classified
3 as medium textured. The lower 3 feet of that
4 is light textured, which means it's sand. It
5 could be coarse sand. It could be anything
6 of those things which have a high hydraulic
7 conductivity and, therefore, the drain spacing
8 might have exceeded 200 feet.

9 Now, without going back and looking every-
10 thing over again, I can't see that this one
11 60-acre tract -- but it is interesting to me,
12 frankly, that we do have light textured soils.
13 We have the deeper holes here (indicating).

14 Q Under what circumstances would you classify lands
15 in violation of your own standards such as you
16 did here?

17 A I think about the standards they are not an
18 out-fixed limit. Standards are guidelines to
19 be used with reasonable and professional
20 interpretation.

21 (Off-the-record discussion.)

22 MR. WHITE: Well, we'll come back to
23 that. As the Master pointed out, I switched
24 areas on you, but I couldn't resist it.

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THE SPECIAL MASTER: Go ahead, Mr.

White.

THE WITNESS: Can I put this away now?

THE SPECIAL Master: Are you going to withdraw it?

MR. WHITE: Let's leave it in. I'll mark it and get a copy here. It will probably be overnight because we have to get an oversized copier.

Q (By Mr. White) Mr. Kersich, now let's go back to Township 2 North, 5 East, and I direct your attention to Sections 35 and 36 in the Riverton East Project.

A 2 North --

THE SPECIAL MASTER: Is this a 200-acre tract?

MR. WHITE: I misled him when I asked for it because I misadded, so I'll start again.

Q (By Mr. White) Do you find a 74-acre tract that's located principally in the NW 1/4 of Section 32 -- 36? Excuse me.

A Are you talking about the fee land there?

* * * * *

kersich-cross-white

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1 Q (By Mr. White) (Continued) No, I'm talking about
2 174 acres that's classified 3.

3 THE SPECIAL MASTER: Seventy-four or 174?

4 MR. WHITE: One hundred and seventy-four,
5 Your Honor.

6 Q (By Mr. White) Let me show you something, Mr.
7 Kersich, and you may not be able to identify
8 it, but I show you what I'll mark as Kersich
9 Deposition -- or Kersich, excuse me, Exhibit
10 SK-10-B, which is an excerpt of a map which
11 you provided during discovery, and ask you
12 whether or not a 74 -- 174-acre parcel class-
13 ified as 3 gravity and 3 sprinkler appears
14 primarily in the NW 1/4 of Section 36 on that
15 map that you provided? I should say that it's
16 outlined in red on that map.

17 A I can't, you know, say whether it is or not.

18 Q Okay. On your --

19 A When was that provided, can I ask the question?

20 Q About two weeks ago, I believe.

21 MR. ROGERS: Your Honor, can we have in the
22 record, stated whether the witness knows that he
23 in fact furnished that to Mr. Kersich?

24 THE SPECIAL MASTER: That's not necessary.

25 kersich-cross-white

1 I will correct it this way: Mr. White is handing
2 you what he marked as -- and give it specifically
3 again.

4 MR. WHITE: SK-10-B, Your Honor.

5 THE SPECIAL MASTER: Now, go ahead with your
6 question.

7 Q (By Mr. White) Does the 174-acre -- Well, do you
8 recognize that portion of a copy or a copy of a
9 portion of your map?

10 A Well, I have a copy of, a blue-line print here
11 which could be the same as the aerial photographs
12 that you and I are looking at now.

13 Q The 44 acres below is the same?

14 A Yes.

15 Q But there's been a difference in the acreage
16 and the shape of the tract between the two photo-
17 graphs; is that correct?

18 A That's correct.

19 Q And 174 acres have become 148?

20 A That's what it is on my worksheet here, sure.

21 Q Okay.

22 THE SPECIAL MASTER: So return to your
23 positions.

24 Q (By Mr. White) On that 148-acre tract is there

25 kersich-cross-white

1 any logged hole?

2 A Not in that particular tract. There is a probe
3 though.

4 Q Do you have any log for that probe that shows
5 depth to barrier in that parcel?

6 A No, we do not. We do have a deep hole in the
7 next section.

8 THE SPECIAL MASTER: Do you keep any logs
9 of probes?

10 THE WITNESS: No, sir.

11 THE SPECIAL MASTER: I thought you said that
12 yesterday, that's good.

13 THE WITNESS: Probes --

14 THE SPECIAL MASTER: That's good.

15 MR. ECHOHAWK: Your Honor, I'm not quite
16 clear as to what particular parcel we're talking
17 about.

18 THE SPECIAL MASTER: We're talking about 148
19 acres in Township 2 North, 5 East, NW 1/4 of
20 Section 36.

21 MR. ECHOHAWK: One hundred and forty-eight
22 acres?

23 THE SPECIAL MASTER: That's correct.

24 Mr. White.

25 kersich-cross-white

1 Q (By Mr. White) Of your personal knowledge, do
2 you know the basis upon which this land was
3 classified as arable when you have no logged hole
4 in the parcel?

5 A We do not have any logged hole in the parcel,
6 but may I explain my answer?

7 THE SPECIAL MASTER: Just answer him, just
8 answer his question. Mr. Kersich, all you got
9 to do is just answer his question and we're
10 going to get along beautifully. I don't know
11 why we're in these ruts this morning.

12 THE WITNESS: We do not have any logged
13 holes in that parcel, but I just must explain
14 that there are logged holes and there are other
15 probes located in the major land formation there.

16 Q (By Mr. White) Are they the identical land
17 forms?

18 A I would probably have to say, yes, here looking
19 at it, reasonably close enough that determinations
20 like this could be made.

21 Q Isn't there a draw that goes through that 148-
22 acre parcel running north to south?

23 A Yes, and that draw is delineated on this map,
24 and the change has been made and the thing has

25 kersich-cross-white

1 been classified as 6 for gravity, 3 for sprinkler.
2 And there are probes which indicate that the
3 basic soils are similar. I think we got more holes
4 than we need down here. I wouldn't say more than
5 we need, but we have adequate holes.

6 Q Aren't the holes to which you're referring that
7 are anywhere close to that parcel on the other
8 side of the draw that runs down through the
9 parcel?

10 A Well, I point out that there are deep holes
11 located just south of that parcel. There's a
12 probe located within the deep holes, there's a
13 probe located on the north side of Class 6 land,
14 but within the parcel you're talking about near
15 the NW corner of Section 36.

16 Q Your testimony is that those deep holes are
17 within the same identical land form?

18 THE SPECIAL MASTER: He said yes. The
19 question has been asked and answered.

20 MR. WHITE: Your Honor, it would be my
21 intent to go through these parcels without logged
22 holes one by one, and rather than getting in a
23 screaming match on the objections each time,
24 perhaps you could rule whether or not I can go

25 kersich-cross-white

1 ahead and do that. If I cannot, then I'll make
2 an offer of proof.

3 THE SPECIAL MASTER: All right. I will rule,
4 in view of the witness' answer to your question,
5 are there 9,500 acres that have been classified
6 arable for sprinklers -- Do you recall the
7 question?

8 MR. WHITE: Yes.

9 THE SPECIAL MASTER: Without any probing
10 or log holes whatsoever, and the answer was
11 in fact in substance, maybe, could very well be
12 type answer. In view of that answer of the
13 witness and in view of the fact that we have
14 devoted many hours to each specific instance of
15 such an example yesterday and some this morning,
16 I would feel that, Mr. White, a continuation of
17 questions to the very end of every parcel really
18 doesn't serve an additional probative value for
19 the Court.

20 MR. WHITE: Your Honor --

21 THE SPECIAL MASTER: And that's the only
22 reason I would object, not because they're not
23 proper, because they're certainly proper, but
24 I think it takes up a day or two and it wouldn't

25 kersich-cross-white

1 add one iota of information. I already recognize,
2 yes, it's probably 9,500 acres, and I think
3 your purpose of the continued question would be
4 to show that.

5 MR. WHITE: Yes, sir.

6 THE SPECIAL MASTER: And I think it's
7 already in the record and probably already as
8 much as practically admitted.

9 MR. WHITE: I have some other questions in
10 similar vein that I'd like to ask with respect
11 to the totals.

12 THE SPECIAL MASTER: Could you do that,
13 maybe, without having me having to rule on con-
14 stant objections?

15 MR. WHITE: I'd like to make an offer of
16 proof just so I can get into the record the
17 parcels we're referring to, and it will go quite,
18 probably much faster than the cross-examination.

19 THE SPECIAL MASTER: I would permit that.

20 MR. ECHOHAWK: Your Honor, would it be
21 possible for the witness to maybe perhaps get a
22 clarification on the record regarding those
23 potential 9,500 acres?

24 THE SPECIAL MASTER: Well, I'll do it by

25 kersich-cross-white

1 letting Mr. White proceed with his offer of
2 proof.

3 MR. WHITE: You want me to start from
4 scratch, Your Honor?

5 THE SPECIAL MASTER: We'll take your offer
6 and list each of these that you would make an
7 inquiry on, and that way they will be in the
8 record in case you want the specific acreages
9 by description.

10 MR. WHITE: Your Honor, perhaps it would be
11 easier if I could ask the questions about the
12 total acres because if he says "Yes" I don't have
13 to make the inquiry about the individual parcel.

14 THE SPECIAL MASTER: Proceed.

15 Q (By Mr. White) Mr. Kersich, with respect to
16 those lands which you have determined to be
17 arable, is it true that in 87 parcels comprising
18 7,489 acres, the land was classified as being
19 arable gravity although there was no logged hole
20 within the exterior boundaries of any of those
21 parcels?

22 A As to the number of parcels and as to the acres,
23 I cannot agree or disagree, I don't know.

24 I know there are certain parcels that did not

25 kersich-cross-white

1 have a hole directly within the parcel, but may
2 have been classified by holes outside the parcel,
3 and how many acres that would affect, I can't
4 tell you at this time.

5 MR. WHITE: Let me ask a second question,
6 Your Honor, I'm afraid we're going to have to
7 go through it all.

8 Q (By Mr. White) Mr. Kersich, isn't it true that
9 with respect to the land that you classified
10 as arable, approximately 100 parcels containing
11 approximately 9,500 acres or classified arable
12 sprinkler even though there were no logged holes
13 located within the exterior boundaries of those
14 parcels?

15 A My answer to this question would be exactly the
16 same as my answer to the previous question.

17 MR. WHITE: Your Honor, it's my understanding
18 that you would sustain an objection to my further
19 inquiry on a parcel by parcel basis.

20 THE SPECIAL MASTER: I would if you went
21 through 187 parcels that you just alluded to.

22 MR. WHITE: That's what I would like to do,
23 and if I can't, I'll make an offer of proof.

24 THE SPECIAL MASTER: The ruling is you needn't,

25 kersich-cross-white

1 and I'm trying to appeal to your professional
 2 values to agree with me, that's it's really not
 3 necessary, that you're not shorting your clients
 4 by having to insist that you can go through 187
 5 more questions of specific parcels regarding an
 6 absence of a probe hole or a logged hole in those
 7 particular areas, because I have every reason
 8 to believe that your answers are going to be
 9 identical that you heard in the last 35 and 40
 10 that are now on record. These were judgment
 11 calls on the part of the witness or on the part
 12 of his staffers, and he's given us time and time
 13 again these factors that are cranked into his
 14 judgment. You have a right to show these figures
 15 and the Court is just about of the opinion that
 16 these figures are probably pretty accurate of
 17 what did not take probe holes. Whether they should
 18 be included or excluded on arables, I don't know
 19 yet. Whether, when we crank in the irrigable
 20 factor, whether these arables are irrigable,
 21 these may come out. There may be a half dozen other
 22 valid reasons for either excluding them from
 23 consideration for water or including some and
 24 excluding some, but I do not believe that 187 ~~more~~

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questions on the same line add one scintilla to my burden of adjudicating whether these lands are entitled to water or not.

MR. WHITE: I understand the problem. The only purpose for being specific about these is so that when the agricultural engineer part of the United States' case goes on, they lay out their fields of irrigable lands, then we can identify which of these parcels fall under these fields.

THE SPECIAL MASTER: In that case, then I think that I will proceed to rule against your continuing on these questions, and you now can proceed to make your offer of proof and get it in the record at this point in time.

MR. WHITE: Thank you, Your Honor.

END 9

* * * * *

1 MR. WHITE: Thank you.

2 MR. ECHOHAWK: May I inquire as to
3 the purpose as to whether Mr. White's intention
4 is to show that these lands are not arable or
5 for some other reason? If I could understand
6 that?

7 THE SPECIAL MASTER: Well, do you
8 want me to let you know what I think his reasons
9 are, or would you like to hear it from him?

10 MR. ECHOHAWK: Perhaps both, but Mr.
11 White first.

12 MR. WHITE: My purpose is to show
13 exactly what the question asked, that Mr. Kersich
14 made a determination of arability for these
15 parcels even though there was no logged hole
16 within those parcels that would show him that
17 the depth to barrier was at least 6 feet.

18 MR. ECHOHAWK: And then I assume that
19 Mr. White would, in his affirmative portion of
20 his case in chief, prove, in fact, that each
21 of these particular parcels that he has referred
22 to in the past and he's making his offer of
23 proof on, his specific evidence would show that
24 each and every parcel is nonarable?

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MR. WHITE: That may or may not be.
The point is the burden of proof is on the
Government.

MR. ECHOHAWK: As I understand it,
the State of Wyoming is also charged with a
case in chief, and they would be in effect,
proving that that land is not arable.

MR. WHITE: It's an interesting thing
that the State of Wyoming has to prove up the
United States' case on arable lands. We have
no intention of doing so, Your Honor.

We will show the deficiencies in this study,
and we will show those lands which we considered
to be arable based on the data generated by EIM,
and that's what our affirmative case would be,
and I would like to proceed to make my offer of
proof at this time.

MR. ECHOHAWK: So long as --

THE SPECIAL MASTER: All right.

MR. WHITE: If asked, Mr. Kersich
would testify that in addition to the parcels
which he has identified during the cross-examina-
tion yesterday afternoon and this morning, he
would state that with respect to the following:
kersich-cross-white

1 parcels, the indicated classification was made
 2 in spite of the fact that there was no logged
 3 hole within the exterior boundaries of these
 4 parcels, starting with the Arapahoe Unit: Town-
 5 ship 1 South, 3 East, Section 27, a parcel of
 6 approximately 50 acres located in approximately
 7 the NE 1/4 of the NW 1/4, classified 3 gravity,
 8 1 sprinkler.

9 The same township, 1 South, 3 East, Section
 10 21, approximately an 82-acre parcel located in
 11 the SE 1/4 of that section being classified as
 12 6 gravity, 2 sprinkler.

13 Section 32 within that township --

14 THE SPECIAL MASTER: Mr. White, allow
 15 me at this point to modify my ruling of just a
 16 minute or two ago. Since the offer of proof
 17 is being made and is a part of the record, it
 18 might as well be a total part of the record and,
 19 therefore, I'm going to say proceed with these
 20 and they will be a part of the record for me to
 21 consider, rather than being part of an offer
 22 of proof for an appellate court to consider.

23 MR. WHITE: Thank you, Your Honor.

24 THE SPECIAL MASTER: Proceed.

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Q (By Mr. White) Mr. Kersich, would you please get out your photograph 1 South, 3 East --

THE SPECIAL MASTER: I don't want him to answer one hundred eighty-seven questions. I merely want you to proceed and leave into the record the fact that you are making objections to his having classified these because they had no logged hole within their exterior boundaries, and you list them.

MR. WHITE: I'm at a loss to know how to do it without --

THE SPECIAL MASTER: If at any point within this recitation of yours he feels that logged holes were made, he is free to interrupt.

MS. SLEATER: Your Honor, I hate to disagree with you at this point, but if you would like to consider anything regarding whether or not there are logged holes in these parcels, you will need the testimony from a witness and not from Mr. White as there's not before you in evidence testimony relating to all these parcels. Unless Mr. White either asks Mr. Kersich or some witness of his own who has done this comparison, you cannot --

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statements of lawyers are not evidence suitable for a Court to base judgment on, and I personally think your original ruling was correct.

Mr. White can make his offer of proof going through parcel by parcel adds nothing to what's going on. However, if Your Honor wishes to consider this individual information, you may not take Mr. White's word for it. You need evidence, and the statements of lawyers are not evidence.

MR. ROGERS: We have to join in that on behalf of the Tribes.

THE SPECIAL MASTER: I appreciate that too. I believe that in the first place that the 7,489 acres referred to in the first category is included within the 2900 of the second; is that correct?

MR. WHITE: It is in part, Your Honor. The same problem --

THE SPECIAL MASTER: I believe also that the eighty-seven instances of Class 1 are a part of the one hundred of the second category?

MR. WHITE: No, they are not, Your Honor -- oh, they are. I'm sorry, Your Honor.

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1 They are.

2 THE SPECIAL MASTER: So generally
3 we are talking about 100 more examples like
4 the 30 or 40 that are in the record.

5 Now, my belief is that if Mr. Kersich's
6 competency to classify lands as arable is
7 impugned or damaged by the practice which he has
8 testified to of using many other criteria and
9 methodology -- much other methodology in addition
10 to probes to classify land is so seriously
11 affected by his action in this matter, then
12 these lands may well be not considered in the
13 totals of arable lands.

14 On the other hand, if his professional
15 expertise is such as has already been testified
16 to, that in what has been thrown out and kept in
17 and retained over the land classifications which
18 he has testified to so far this week in this case,
19 then it doesn't make much difference whether
20 another hundred cases are included in arable
21 parcels which did not have probes in them.

22 That is my point. That is my point.

23 MS. SLEATER: Your Honor, I understand
24 your point completely, and I fully agree with

25 kersich-cross-white

1 you. I think Mr. Kersich's professionalism
2 and his staff's work has shown that there has
3 been a full and careful study. However, all I
4 want to point out for the record in this case
5 is that if Your Honor is basing any decision
6 or any belief on statements of Mr. White as
7 to whether or not there are 110 parcels as well
8 as anything else, if that is going to be a
9 factor in your decision, Mr. Kersich has not
10 testified about that. No other witness has, and
11 you can only base your conclusions upon testimony,
12 not upon statements of Mr. White.

13 Now, I think if Mr. White would go through
14 all 110 of these, Mr. Kersich may or may not
15 agree with all 110 that there aren't holes there,
16 but clearly what will come forward is what has
17 come forward up to now, that there are clear
18 and sound reasons for the judgments made by HRM,
19 and for that reason, I think the testimony is
20 redundant and unnecessarily repetitive.

21 However, I do not think that Your Honor can
22 accept that, because Mr. White says so, that there
23 are 110 parcels or there are 9500 acres or
24 anything of that sort when there is no testimony

25 kersich-cross-white

1 and no evidence regarding that in the record.

2 THE SPECIAL MASTER: Well, Regina,
3 your last sentence or two are not quite correct.
4 There is testimony in the evidence that there
5 is approximately 9500 acres that have been
6 classified arable for sprinkler --

7 MS. SLEATER: No, Your Honor --

8 THE SPECIAL MASTER: Just a minute,
9 please. -- in which there's been no logging
10 or probe holes, and the answer to that was it
11 quite possibly might be. Maybe there is.

12 Now, you just got through saying otherwise,
13 so let's keep ourselves talking in the context
14 of what is evidence in this case so far.

15 MS. SLEATER: What I would like to
16 point out is that the evidence -- the witness
17 has testified that there is some number of acres
18 that he doesn't know that doesn't have probe
19 holes.

20 THE SPECIAL MASTER: Right.

21 MS. SLEATER: Okay. That much is
22 clearly in evidence. The amount of acres is
23 not in evidence. That's all I'm trying to
24 point out is that if Your Honor wishes --

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1 THE SPECIAL MASTER: Do you want to
2 take a few minutes and sit down with Mr.
3 White and Mr. Merrill and find out how many
4 acres could be the case that doesn't have probe
5 holes near them for whatever the probative
6 value may be? It may not have any probative
7 value. I could care less if there are probe
8 holes or if there are other reasons for grading
9 that land. There is nothing in the law of
10 agriculture or the law of this land that says
11 you have to have probe holes in some lands to
12 be classified as arable.

13 MR. ECHOHAWK: That's our point also.

14 THE SPECIAL MASTER: So let's get that
15 point clear also. If you can sit down and make
16 a stipulation to cover that --

17 MS. SLEATER: If Mr. White would give
18 us the information so that we could review it,
19 perhaps that would be an efficient way to
20 handle it, Your Honor.

21 THE SPECIAL MASTER: Well, do you want
22 to take another half an hour and try it between
23 now and lunch? Would it be worth a discussion?

24 MR. WHITE: It would be fine with me.

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THE SPECIAL MASTER: Let's do it.

Let's take from now until 1:30 to see if this can't be resolved within the clearly professional confines we have described. I rather find it necessary for all of us to recognize that the State is prepared -- you've had weeks and weeks and months of very tough depositions, thorough and exacting, and I wouldn't imagine that these questions are coming out of nowhere that Mr. White is asking. There must be some basis of some kind for it. Everytime there's a question, up comes another map from the depositions, so if you can agree that the numbers are 100 or 9500 acres or come up with some type of a statement, you may save us all a day of trial.

MR. ECHOHAWK: That may take a little more than half an hour. I think maybe it may take a little longer than half an hour.

MR. WHITE: Maybe we ought to do it by two. It would save a lot of time.

THE SPECIAL MASTER: All right. We will stand adjourned until two o'clock.

(Thereupon a noon recess was taken from 11:30 a.m. until 2:00 p.m.)

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AFTERNOON SESSION

(Proceedings resumed at
2:05 p.m.)

THE SPECIAL MASTER: We'll resume.

Mr. Echohawk.

MR. ECHOHAWK: Your Honor, during the recess we took the expert's -- Mr. Kersich has been reviewing the list given to him by the State of Wyoming, and we've only gone through about five of twelve pages in reviewing it. And from the indications that we have thus far, there appear to be certain -- there appear to be situations where it's not quite the case as represented by the State of Wyoming, and perhaps it would be appropriate for us to either recess and continue with the work that we're going on now to review each parcel to speed things up because certainly I think all information that Mr. Kersich has should be made a part of the record so it's essentially clear. As to the situation --

THE SPECIAL MASTER: Do you think we ought to go back, do you think then we ought to go back to a list of particular items and allow answers, questions made on them and answers in the record?

MR. ECHOHAWK: I think maybe that would be probably the best way to do it, one way certainly to

1 speed it up. One other way is to allow Mr. Kersick
2 to finish reviewing the list and he would have his
3 comments ready rather than have to dig through each
4 particular --

5 THE SPECIAL MASTER: How long will that
6 take?

7 THE WITNESS: May I speak, sir?

8 THE SPECIAL MASTER: Yes.

9 THE WITNESS: The rate we're going, it will
10 take at least all this afternoon and this evening.
11 I'm sure we could be ready in the morning.

12 THE SPECIAL MASTER: Is it worth doing, Mr.
13 White?

14 MR. WHITE: I think it is, Your Honor.

15 THE SPECIAL MASTER: Is it worth doing,
16 United States?

17 MR. ECHOHAWK: Yes, we certainly think it is.

18 THE SPECIAL MASTER: Then let's do it. Let's
19 adjourn now, stay and use the facilities and let's meet
20 at -- what's tomorrow, Friday?

21 MR. WHITE: Thursday.

22 THE SPECIAL MASTER: Let's meet tomorrow
23 morning at nine o'clock, 9:15, whichever you prefer.

24 MR. WHITE: Let's give them until 9:30.

25 If they're going to work they'll be able to sleep in.

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MR. ECHOHAWK: We'll be ready at 9:15.

THE SPECIAL MASTER: All right, 9:15 it is, tomorrow morning, okay.

We are in recess until 9:15 tomorrow morning.

(Thereupon the proceedings were recessed at 2:10 P.M., February 11, 1981.)

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