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Trial Transcript, Vol. 37, Afternoon Session

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case # 4993

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHANIE 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.)

FILED _____
_____ 5/1 1981
Margaret L. Hampton CLERK
_____ DEPUTY

VOLUME 37

Afternoon Session

Wednesday, April 15, 1981

ORIGINAL

1 THE SPECIAL MASTER: May we come to order,
2 please. All right, let's go on record.

3 MR. WHITE: Your Honor, a diligent search
4 of your files and everybody else's files has failed to
5 turn up even a copy of 10-B, Exhibit SK-10-B. Having
6 reviewed the transcript and believing it to be non-
7 essential to the interest of the State of Wyoming --

8 THE SPECIAL MASTER: Overall picture.

9 MR. WHITE: -- I would therefore withdraw
10 the offer of 10-B.

11 THE SPECIAL MASTER: I appreciate that, Mr.
12 White. And I hope it's the only exhibit we lose track
13 of, and if it's the only one it will be a very
14 commendable record.

15 MR. WHITE: Well, out of all of them it was
16 probably a good one to lose.

17 THE SPECIAL MASTER: Very good, fine. Mr.
18 Echohawk, you may proceed with this on redirect.

19 MR. ECHOHAWK: The United States has some-
20 what of an objection as to the exhibits offered by
21 Mr. White, specifically SK-2, SK-3, SK-8, SK-10, SK-20,
22 SK-30 on the grounds that the United States would
23 object to their limited offer. We would like to offer
24 them for the truth of their content -- truth of their
25 contents or for whatever they actually are. Say, for

1 instance I believe SK-2 and SK-3 were some deposition
2 exhibits and some land classification standards.
3 The United States' position is those are preliminary
4 land classification standards. If they're entered for
5 that purpose the United States has no objection. We
6 believe it's a point for the lawyers to argue at a
7 later time whether or not that information impeaches
8 the witness, and we would just like no ruling that
9 they're accepted for impeachment purposes.

10 MR. WHITE: They're offered for impeachment
11 purposes, and whether or not they have the effect of
12 impeaching the witness is a decision for the Court.
13 Accepting them as exhibits that are offered for that
14 purpose certainly doesn't bind the Court to say the
15 witness has been impeached and we will maintain our
16 offer on that basis, Your Honor.

17 THE SPECIAL MASTER: I seem to recall that
18 these were taken verbatim out of some other document,
19 were they, Mr. White?

20 MR. WHITE: No, sir.

21 MR. ECHOHAWK: Certain of them were like the
22 phase two were taken out of some other document.

23 MR. WHITE: With respect to 2 and 3, Your
24 Honor, they were not. They were provided to us by
25 various witnesses during depositions. I believe 20 also.

1 Was that the Waples' land classification standards?

2 THE SPECIAL MASTER: The objection to SK-2
3 and SK-3 is overruled.

4 MR. ECHOHAWK: Okay.

5 THE SPECIAL MASTER: Okay, Mr. Echohawk.
6 Let's proceed and hear the objection for SK-8.

7 MR. ECHOHAWK: SK-8 is basically the same
8 item. Perhaps it can be cleared up if either through
9 Mr. White because I believe he identified the entire
10 document during the last session of trial as the
11 phase two report prepared by HKM. I think he identified
12 it in its entirety and then used an excerpt.

13 THE SPECIAL MASTER: Give me just a minute
14 to rule on this.

15 (Brief pause.)

16 THE SPECIAL MASTER: Mr. Kersich was voir
17 dired on this exhibit, was he not? Any of you
18 remember?

19 MR. WHITE: He was not voir dired. I asked
20 him about it, asked him if that was a document
21 prepared by his firm or excerpt of the document and
22 he said that it was. And I offered it for impeachment
23 purposes and that's the offer I maintain.

24 THE SPECIAL MASTER: Yes, this was the --
25 This is the issue regarding the language and definitions

1 of specific class lands.

2 Let me remove your objection to that too
3 and admit it for the purpose of helping the Court
4 come to a conclusion upon these definitions.

5 MR. ECHOHAWK: My point is, and perhaps I
6 can even clear it up on redirect, if you rule against
7 me on this I would like the whole document put in for
8 the truth of its contents. I think the document itself
9 explains, you know, --

10 THE SPECIAL MASTER: If you offer it I'll
11 certainly rule on it at that time.

12 MR. ECHOHAWK: Okay. Generally, Your Honor,
13 we have the same objection to the other exhibits that
14 were offered for impeachment purposes. We think that
15 they should be offered for in fact whatever they are
16 and arguments can be made at a later time as to whether
17 or not they impeach the testimony.

18 THE SPECIAL MASTER: I gather they're offered
19 to show a potential inconsistency --

20 MR. WHITE: Yes, sir.

21 THE SPECIAL MASTER: -- in technical evidence
22 relied upon?

23 MR. WHITE: Yes, sir.

24 THE SPECIAL MASTER: So to speak, and for that
25 purpose they should be admitted?

1 MR. ECHOHAWK: What I would like them in
2 the record for, Your Honor, is for whatever they are.
3 Some of them may be Reclamation studies that were
4 later disclaimed by the Bureau of Reclamation. That
5 is an example, I'm not sure that's exactly the case.
6 I would like them in for whatever they are not for any
7 real limited purpose.

8 MR. WHITE: The offer is up to me.

9 THE SPECIAL MASTER: I see no objection to
10 that, if they're in they're in. I can use them for
11 whatever purpose the Court wishes.

12 MR. WHITE: I offer them for only the
13 purposes I stated.

14 THE SPECIAL MASTER: I appreciate that, but
15 once it's in it's almost impossible for me to avoid
16 using them in coming to a conclusion upon what they
17 contain and comparing them with other exhibits with
18 which there is a conflict or controversy.

19 MR. ECHOHAWK: What I would like --

20 THE SPECIAL MASTER: And that's, of course,
21 what you want me to do, Mr. White?

22 MR. ECHOHAWK: What I would like, Your Honor,
23 is for you to accept them for all purposes.

24 MR. WHITE: They're not offered for all
25 purposes. If the United States wants to offer them for

1 all purposes --

2 MR. ECHOHAWK: We can do that now and join
3 in the offer for all purposes or I can do that on
4 redirect.

5 THE SPECIAL MASTER: You can do it on direct,
6 and it will be accepted, but for the purposes it is
7 offered, I'd rather accept it for the purposes he has
8 now, what Mr. White had now.

9 MR. ROGERS: Your Honor, the Arapahoe Tribe
10 has no further objections other than those stated by
11 the United States to these exhibits.

12 THE SPECIAL MASTER: All right, and the
13 Shoshone?

14 MR. PERRY: No objection.

15 MR. WHITE: So are all of those admitted,
16 Your Honor?

17 THE SPECIAL MASTER: Yes. I will make the
18 rule now on them. The following exhibits are hereby
19 introduced and admitted -- The following exhibits are
20 hereby admitted into evidence: SK-2, SK-3, SK-4, SK-5,
21 SK-8, SK-9, SK-9-A, SK-10-A,

22 MR. WHITE: Ten should be as well.

23 THE SPECIAL MASTER: 10-a, B should be
24 irrelevant and B is not going in.

25 MR. WHITE: I believe 10, 10-A was offered

1 but 10-B was withdrawn.

2 THE SPECIAL MASTER: SK-10-A -- SK-10,
3 SK-10-A, SK-20, SK-30, SK-40, SK-51, SK-52, and SK-53.

4 MR. WHITE: I believe that SK-50, 41, and 42
5 were also offered, Your Honor.

6 THE SPECIAL MASTER: The two big folding ones.
7 SK-41 and SK-42.

8 MR. WHITE: As well as SK-50.

9 THE SPECIAL MASTER: Yes, I read SK-50, I
10 hope I did. Yes, as well as SK-50.

11 MR. WHITE: I have no further questions.

12 (Whereupon Exhibits SK-2,
13 (SK-3, SK-4, SK-5, SK-8,
14 (SK-9, SK-9-A, SK-10, SK-10-A,
15 (SK-20, SK-30, SK-40- SK-41,
16 (SK-42, SK-50, SK-51, SK-52,
17 (SK-53 were admitted into
18 evidence.)

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1 THE SPECIAL MASTER: Okay, Mr. Echohawk.

2 MR. ECHOHAWK: Your Honor, just to take care
3 of that housekeeping matter, the United States
4 would join in the same exhibits that were just
5 offered into evidence by Mr. White, the sequence
6 that we just talked about, and offer those into
7 evidence for all purposes.

8 MR. WHITE: I would object on the lack of
9 foundation for all purposes, Your Honor.

10 THE SPECIAL MASTER: The objection will be
11 overruled, and the exhibits will be admitted for
12 all purposes, for whatever probative value they
13 may have.

14 REDIRECT EXAMINATION

15 BY MR. ECHOHAWK:

16 Q Mr. Kersich, would you get your report out? I
17 think it's United States Exhibit C-43.

18 Please turn to pages 26 and 27. Those would
19 be Table 7 and 8.

20 MR. ECHOHAWK: Table 7 and 8, Your Honor.

21 MR. WHITE: 41 and 42, Your Honor.

22 THE SPECIAL MASTER: I wonder what I did with
23 my folded copies. Those are the originals, but I
24 had a couple -- I keep my own set of stuff to work

25 kersich-redirect-echohawk

1 with, as you have probably gathered by now.

2 Okay. Proceed, please.

3 Q (By Mr. Echohawk) Mr. Kersich, would you again
4 identify for the record what Table 7 is?

5 A Table 7 is a table contained within our report,
6 C-43, and it defines the lands, the arable lands
7 by class, that were found arable -- or the lands
8 that were found arable by class according to the
9 gravity and sprinkler classifications for the six
10 study areas on the Wind River Indian Reservation.

11 Q Now, turn to page 27, Table 8, and describe that
12 chart again.

13 A Table 8 is another table that's contained within
14 our exhibit or our report. That's the summary of
15 arable lands by class showing those lands that
16 come under the gravity showing lands which may not
17 have met the gravity land classification system,
18 but which could be irrigated by continuous or
19 intermoved [sic] sprinkler as additional sprinkler
20 and then the gravity lands and the additional
21 sprinklers are added up to a total of the arable
22 lands for each of the six study areas that we
23 worked on on the Wind River Indian Reservation.

24 Q Yesterday Mr. White raised a question as to why

25 kersich-redirect-echohawk

1 you couldn't take the gravity lands -- why
2 there was no numerical correlation between Table
3 7 and Table 8. We had some discussion there.

4 Could you again try to clarify that for us?

5 A. Okay. You really wind up with three classes of
6 lands out there. Forgetting about land class now,
7 let's talk about the systems.

8 There are some lands that are applicable only
9 to the gravity systems. There are some lands
10 which can be irrigated by either gravity methods
11 or sprinkler methods, and there are some lands
12 which are only applicable to sprinkler methods --

13 THE SPECIAL MASTER: Let me interrupt only
14 enough to say that did you not say yesterday all
15 gravity land could be irrigated by sprinkler?

16 THE WITNESS: Yes, and I said that just a
17 moment ago. Maybe I could draw a little sketch,
18 if I could --

19 (Whereupon the witness marked
20 on a document.)

21 THE WITNESS: We start out with a block of
22 gravity lands, and can I just do this --

23 MR. ECHOHAWK: Can you see that, Your Honor?

24 THE SPECIAL MASTER: Yes, I would suppose you

25 kersich-redirect-echohawk

1 may.

2 MR. WHITE: We have no objection to him doing
3 that, Your Honor.

4 THE SPECIAL MASTER: Proceed.

5 MR. ECHOHAWK: Use a marker that maybe you
6 could see a little better.

7 THE WITNESS: Let's take the first block,
8 which I have just made out in black pen. That's
9 a block of lands which were classified under
10 gravity irrigation methods and, as such, any con-
11 ventional border dyke system or any lateral system
12 or any type of even using solid move -- or solid
13 set or hand move sprinkler systems, for example,
14 fell under that category.

15 Those same lands at the time we were doing
16 the classification were reviewed for the possibility
17 of being used under sprinkler irrigation, and
18 sprinkler in this instance would be defined as
19 continuous or intermittent move, center pivot,
20 things of that nature.

21 Many of the lands that were under the gravity
22 system could also be sprinkler irrigated, so you
23 would draw another block, and this would be --
24 there's an overlap there. Some of the lands are

25 kersich-redirect-echohawk

1 applicable to any type of system, and then what
2 you have, you have a small portion here which
3 would only work under gravity, and you have a
4 small portion on the other end of the scale which
5 would only work under sprinkler, and so it would
6 be erroneous to take the totals that we have on
7 page 26 and add up -- for example, let's take
8 North Crowheart for purposes of discussion.

9 You can't take the 46,649 acres that we found
10 applicable under gravity irrigation only and the
11 44,382 acres which would work only under sprinkler
12 irrigation and add them up. That would be erro-
13 eous.

14 What you have to do is find out in your
15 tabulation work which lands fall under the first
16 category of gravity, which lands are under the
17 category that are common to both systems and,
18 therefore, that acreage should not be doubled, and
19 then which lands would work only as sprinkler
20 irrigated, so what we tried to do, we tried to
21 say, "Okay, gravity irrigation basically is a
22 base. We know that one type of system will work
23 on all of those lands. Those lands that are in
24 excess of the gravity lands and can only be handled

25 kersich-redirect-echohawk

1 by sprinkler, we add that to the arable total,"
2 so, therefore, instead of coming up with a total
3 on North Crowheart of some 93 or 94 thousand acres --

4 THE SPECIAL MASTER: 47.

5 THE WITNESS: Well, if you added the 46 and
6 the 44, you would have 90 thousand, but we said
7 no, there's only 79,000 on North Crowheart which
8 are arable, and that's how we arrived at this
9 table.

10 Q (By Mr. Echohawk) Mr. Kersich, we had some ques-
11 tions also as to the aerial mosaics or the
12 compilation of the large photos that your people
13 took to the field and did their land classification
14 work with.

15 When that mosaic was put together, was it
16 just a process of putting one photo, complete
17 photo, right beside the next photo, just lining
18 up the edges?

19 A. No, sir.

20 Q How did you do that?

21 A. Basically, these were compiled under Saunders'
22 direction in our office. What we did, the mappers
23 worked in the center of the photos as much as
24 possible, and that's the portion that was used to

25 kersich-redirect-echohawk

1 make the mosaic, and the reason that was done is
2 that there's less distortion, less problems with
3 accuracy working in the center of the aerial photo,
4 and these were 12 by 12 photos, as I mentioned.

5 Q So even though on your work copies or your soils
6 photos, if there is information that appears on
7 the edge of the soils mosaic, in fact, it would
8 be out of the heart of one of the small photos?

9 A That's right, yes.

10 Q We had some discussion yesterday in your report --
11 I believe it was on page 21 of Exhibit C-43 -- to
12 do with whether or not your laboratory techniques
13 were the same as those as described in the Rec-
14 lamation manual. Do you recall that testimony?

15 A Yes, I do.

16 Q Did you have a chance to review that and review
17 your laboratory manual last night?

18 A Yes.

19 Q And were, in fact, the laboratory procedures
20 described in the Reclamation manual those that you
21 actually used?

22 MR. WHITE: Objection, Your Honor. The
23 question is beyond the scope of cross. The ques-
24 tion is whether or not they were approved in any

25 kersich-redirect-echohawk

1 manual, not whether or not they were described by
2 that manual.

3 THE SPECIAL MASTER: Would you read back,
4 please, the colloquy of the last half minute or
5 so beginning with Mr. Echohawk's last full state-
6 ment?

7 (Thereupon the record was read
8 back as follows: "Q. So even
9 though on your work copies or
10 your soils photos, if there is
11 information that appears on the
12 edge of the soils mosaic, in
13 fact, it would be out of the
14 heart of one of the small
15 photos? A. That's right, yes.
16 Q. We had some discussion
17 yesterday in your report -- I
18 believe it was on page 21 of
19 Exhibit C-43 -- to do with
20 whether or not your laboratory
21 techniques were the same as
22 those as described in the
23 Reclamation manual. Do you
24 recall that testimony?

16 A. Yes, I do.

17 Q. Did you have a chance to
18 review that and review your
19 laboratory manual last night?

18 A. Yes.

19 Q. And were, in fact, the lab-
20 oratory procedures described
21 in the Reclamation manual those
22 that you actually used?

21 MR. WHITE: Objection, Your
22 Honor. The question is beyond
23 the scope of cross. The ques-
24 tion is whether or not they
25 were approved in any manual,
not whether or not they were
described by that manual."

25 kersich-redirect-echohawk.

1 THE SPECIAL MASTER: It wasn't cross. It
2 was redirect, but it is also objected to, I think,
3 because of the fact that he stated quite clearly
4 and with great specific reference time and time
5 again to those parts of the techniques and the
6 classification standards in SK-40 that were used
7 and others that were not used and in their place
8 an alternative method was used taken from the HKM
9 manual, and that was what his answer was. So,
10 therefore, I think the question has been asked and
11 answered.

12 MR. ECHOHAWK: That was just a preliminary
13 question. I was going to get to --

14 MR. WHITE: I will join in your objection,
15 Your Honor.

16 THE SPECIAL MASTER: You can't object to a
17 question until he's asked it, so I have sustained
18 Mr. White on that.

19 Now, proceed with your question.

20 MR. ECHOHAWK: In regard to Mr. White's
21 comment, the line on page 21 that we were all
22 concerned with says techniques for each laboratory
23 procedure is described in land classification
24 techniques and standards, U.S. Bureau of

25 kersich-redirect-echohawk

1 Reclamation, Office of Chief Engineer, September,
2 1967.

3 My point is I'm trying to clear up whether
4 or not the procedures used in the laboratory work
5 done by HKM are those described in the laboratory
6 manual, the Reclamation manual, or are they some
7 other ones.

8 THE SPECIAL MASTER: Well, you may answer
9 that, but it's a little different than what Mr.
10 White objected to.

11 MR. WHITE: I would still object to the
12 question because the questions directed to Mr.
13 Kersich during cross-examination were whether
14 these were the approved methods by the Bureau of
15 Reclamation, and I'll be glad to stipulate that
16 the methods were mentioned as alternative methods,
17 but not approved methods, and that's where the
18 question lies.

19 For instance, the pipette test, you remember
20 the discussion about that.

21 THE SPECIAL MASTER: The objection is over-
22 ruled. He may answer this latter question.

23 A. (By the witness) We had some differences from the
24 laboratory manual of the Bureau of Reclamation, yes.

25 kersich-redirect-echohawk

1 Q (By Mr. Echohawk) So, in fact, the line on page
2 21 is not quite correct then?

3 A That's correct.

4 Q But you did use the procedures as described in the
5 HKM manual; is that correct?

6 A Yes.

7 Q Do you know whether or not the procedures described
8 in the HKM manual are procedures that are accepted
9 in the profession?

10 A Yes.

11 MR. WHITE: Objection. Foundation, Your
12 Honor. And also it's beyond the witness' expertise.
13 He's qualified as an agricultural engineer, not a
14 soils scientist. There's no basis for him to say
15 whether or not these procedures are generally
16 accepted within the profession that uses them, and
17 that's the profession of soil scientist.

18 THE SPECIAL MASTER: I think we let him say
19 several times yesterday that they were, and I think
20 it would be inconsistent if I didn't allow it now.
21 I will overrule, but I recognize the distinction.
22 He's not a laboratory technician.

23 * * * * *

24

25 kersich-redirect-echohawk

1 MR. ECHOHAWK: Could we get the answer?

2 THE SPECIAL MASTER: No, the answer is in
3 the record.

4 MR. ECHOHAWK: Okay.

5 THE SPECIAL MASTER: I have lots of questions
6 for you in a few minutes.

7 MR. WHITE: Off the record.

8 (Off-the-record discussion.)

9 THE SPECIAL MASTER: Yes.

10 Q (By Mr. Echohawk) Mr. Kersich, you recall the
11 previous session where you testified, I believe
12 that was February, I think, Mr. White asked you
13 whether you know anything about some experimental
14 farm that was mentioned in the third division
15 report?

16 A Yes, I remember the interchange.

17 Q Have you subsequently directed people on your
18 staff to investigate that or have you yourself
19 investigated that?

20 MR. WHITE: I object to the general line
21 of questioning. I asked the question and he said
22 he didn't know anything about it. He can't be
23 now allowed to expand his question -- or his
24 answer by the work of subsequent work of the staff.

25 kersich-redirect-echohawk

1 The question was primarily for impeachment
2 purposes. The substance of the question can be
3 developed on our direct case.

4 The fact that the witness at that time did
5 not know anything about the farm, which was a
6 major activity in the third division, was for
7 the purpose of impeachment, and he can't
8 rehabilitate his witness now some weeks later
9 based on some work that his staff has done in the
10 meantime.

11 MR. ECHOHAWK: Your Honor, my point is --
12 I believe it's even in one of the documents that
13 Mr. White introduced, is that there's information
14 in there about some experimental farm that failed,
15 and therefore, perhaps we should have taken,
16 concerned ourselves with that fact. What I'm saying
17 is the information contained in the third division
18 report is proper to rebut that right now. We
19 can address that issue.

20 MR. WHITE: I object --

21 MR. ECHOHAWK: We're rebutting what's
22 contained in the third division report.

23 MR. WHITE: I've said enough.

24 THE SPECIAL MASTER: Let me rule on it,

25 kersich-redirect-echohawk

1 Mr. White. It's a little difficult, and I'm
2 inclined to sustain the objection, but I'm going
3 to only one more time overrule it and permit
4 the man to answer, but I'm getting close to the
5 point where I may have to sustain this type of
6 thing if it seeks clearly to -- You don't want
7 to impeach your own witness obviously, so you
8 proceed with that questioning on that experimental
9 farm.

10 Q (By Mr. Echohawk) Did either you yourself or
11 your staff investigate the experimental farm?

12 MR. WHITE: Objection, it's a compound
13 question. He asked whether he investigated it
14 or whether his staff investigated it. I have no
15 problem with it, but to ask either/or --

16 THE SPECIAL MASTER: Begin with either one
17 or the other and take them one at a time.

18 Q (By Mr. Echohawk) Did your staff investigate
19 the experimental farm, or what was the experimental
20 farm?

21 A The experimental farm was a --

22 MR. WHITE: Objection, it's unresponsive to
23 the question. He asked whether they investigated
24 it, not whether he could have some description of it.

25 kersich-redirect-echohawk

1 THE SPECIAL MASTER: Did you investigate it?

2 THE WITNESS: Yes. A member of my staff
3 did directly and I indirectly.

4 THE SPECIAL MASTER: What did you find?
5 Save everybody else trouble.

6 MR. WHITE: I'll object to your question.
7 I'll withdraw the objection.

8 THE SPECIAL MASTER: I have a duty, I have
9 a duty to provide guidelines if possible to
10 assist us through these quagmires or problems.

11 MR. WHITE: I withdraw the objection. As
12 long as it's what he found out I got no objection.

13 THE WITNESS: What was reported to me by
14 my staff --

15 MR. WHITE: Now I'll move the answer be
16 stricken. It's clearly a hearsay answer, it's
17 not an opinion answer. It's an answer describing
18 a fact.

19 THE SPECIAL MASTER: I will overrule your
20 objection. He's been permitted to testify a
21 dozen times and so have other expert witnesses
22 on discussions with their staff. These are
23 experts, and we've granted that latitude to them
24 and the law certainly does.

25 kersich-redirect-echohawk

1 MR. WHITE: Thank you, Your Honor. Can I
2 have a continuing objection?

3 THE SPECIAL MASTER: Of course you can.

4 MR. WHITE: On the basis of hearsay.

5 Q (By Mr. Echohawk) What was found?

6 A What was found, it was found that the area is
7 presently being farmed under an owner by the
8 name of Gene Jordan, and he is receiving water
9 from the Bureau of Reclamation water under a
10 service contract.

11 THE SPECIAL MASTER: Is he a nonIndian who
12 acquired title in fee simple for the lands from
13 an Indian who had been an allottee for a number
14 of years?

15 THE WITNESS: This area is within the
16 withdrawal area, and I don't know how he acquired
17 title to it, but it is my understanding that he
18 is the owner of the land and it's located on the
19 Cottonwood Bench area.

20 MR. WHITE: I move to strike the answer for
21 lack of foundation.

22 THE SPECIAL MASTER: I would be inclined not
23 to be very interested in the answers actually to
24 Mr. Echohawk's questions unless you can draw some

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1 particular relationship to what you're trying
2 to elucidate from that which is already on
3 record from cross-examination.

4 Q (By Mr. Echohawk) In the investigation conducted
5 of that, of the land that was formerly the
6 experimental farm, was it discovered why the
7 experimental farm went out of business?

8 MR. WHITE: Let me renew my objection on
9 the basis of hearsay, and since it's in a new
10 area of inquiry, and if I could just have a
11 continuing objection with respect to this inquiry.

12 THE SPECIAL MASTER: Mr. Echohawk, did this
13 witness say to us in the earlier hearing that
14 he did not know why it had gone out of business
15 and shut down?

16 MR. ECHOHAWK: He said he wasn't aware that
17 there was an experimental farm there. What I am
18 attempting to show, Your Honor, is in the third
19 division it makes indication, that Mr. White made
20 reference to the fact that this type of soil,
21 where this experimental farm should have been
22 considered, these situations causing erosion,
23 sandy soils and so forth, that type of information
24 should have been considered. The fact that there

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1 was a farm there, went out of business should have
2 had some determination on land classification
3 in the area and formulation of the standards.

4 I'm attempting to show through this witness
5 is that the land is now under current irrigation
6 practices.

7 THE SPECIAL MASTER: I will sustain the
8 objection. Make your offer of proof of what you
9 intend to show with this witness in regard to
10 the area of the experimental farm.

11 MR. ECHOHAWK: I intend to show, Your Honor,
12 assuming Mr. Kersich was allowed to testify, is
13 that this land is sandy land, can currently be
14 irrigated by modern irrigation practices. Mr.
15 Kersich is certainly capable, has much experience
16 in irrigation design to handle sandy soils, and
17 that the fact that there are sandy soils out
18 there cause no problems in land classification and
19 are of really no real concern.

20 THE SPECIAL MASTER: I would be happy to let
21 your matter come into evidence, but I believe
22 I'm correct in ruling as I have because on cross-
23 examination, on his earlier questions at no time
24 did Mr. Kersich -- at no time did he have any

25 kersich-redirect-echohawk

1 knowledge of this area, and I don't think he's
2 competent to tell us what's been done since
3 then. He had no knowledge at the conclusion of
4 his long several years study of the Reservation.
5 He has sufficient knowledge of a lot of other
6 lands with the same problems, where some are
7 productive and some aren't.

8 MR. ECHOHAWK: My point is, Your Honor, in
9 the third division report as Mr. White pointed
10 out, there's reference to this farm going bust
11 in the area.

12 THE SPECIAL MASTER: Right.

13 MR. ECHOHAWK: It seems proper that we can
14 come back and put on testimony that relates to
15 addressing that question. There's no doubt Mr.
16 Kersich said he didn't know about it at the time
17 he testified. Since that time they have gone out
18 and investigated and found it to be no problem.
19 I would just like to clear up the fact that the
20 third division report says that there is this
21 experimental farm that went bust. It's of no
22 concern to Mr. Kersich.

23 THE SPECIAL MASTER: The offer of proof has
24 been made. Proceed, Mr. Echohawk, to your next
25 kersich-redirect-echohawk

1 point.

2 (Brief pause.)

3 Q (By Mr. Echohawk) Mr. Kersich, in Mr. White's
4 cross-examination there were certain questions
5 raised as to the 20 percent slope item in your
6 land classification standards. Do you recall that?

7 A Yes, I do.

8 Q Since that time have you had prepared under your
9 direction a chart that addresses the amounts of
10 acreage by degree of slope?

11 A Yes, I have.

12 MR. WHITE: Object to the question because
13 it's ambiguous and I would move that the answer
14 be stricken; the amount of what acreage by slope.
15 And I think some foundation need to be laid that
16 the information was available at the time of cross
17 or it's beyond the scope --

18 THE SPECIAL MASTER: The objection is overruled.
19 I think the reference is to the dialogue you had
20 with the witness on sprinkler versus gravity,
21 and what is available, what can be done.

22 MR. WHITE: I thought that was eight percent.

23 THE SPECIAL MASTER: Land beginning with
24 eight percent up to as high as 20 percent with

25 kersich-redirect-echohawk

1 the proper conditions and proper yields.

2 Go ahead.

3 Q (By Mr. Echohawk) Mr. Kersich, I show you what's
4 been marked as United States WRIR C-146. Would
5 you please identify that exhibit for us.

6 A Yes. This was a chart that was prepared by a
7 member of my staff in reviewing the aerial
8 photographs and the land classification logs
9 which carried various notes describing the slopes
10 of the portions that was either being logged or
11 reviewed at that time. And its been broken down
12 into the acres which were found predicated on
13 that information which would have a slope of five
14 to ten percent and greater than ten percent.
15 Everything else then would be from zero to five
16 percent slope. And we found --

17 Q Does this --

18 A Excuse me.

19 Q Does this chart deal with arable acres?

20 A Yes, that's all we're dealing with here.

21 Q Is this a chart prepared under your direction?

22 A Yes, it was prepared at my direction.

23 Q Deals with the same arable acreage you've
24 testified to?

25 kersich-redirect-echohawk

1 A That's correct.

2 Q Mr. Kersich, what were the results of your
3 study?

4 MR. WHITE: Object to the question, Your
5 Honor, it calls --

6 THE SPECIAL MASTER: The exhibit pretty
7 well speaks for itself, does it not? You're
8 asking what are the results, the results
9 contained on the exhibit I believe.

10 MR. ECHOHAWK: That's correct.

11 MR. WHITE: Your Honor, I renew my
12 objection also on the basis of hearsay. It
13 calls for the rankest form of hearsay. It's
14 not an opinion question, it's a question of
15 fact, the observation of slopes.

16 THE SPECIAL MASTER: Was the information
17 contained on this Exhibit C-146 gathered by
18 those under your direct control and supervision?

19 THE WITNESS: That's correct, sir.

20

21

22

* * * * *

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Kersich-redirect-echohawk

1 THE SPECIAL MASTER: The objection is over-
2 ruled then, Mr. White.

3 You seek to offer this into evidence?

4 MR. ECHOHAWK: I will, Your Honor. I have
5 some other exhibits I'll offer all at the same
6 time.

7 THE SPECIAL MASTER: All right.

8 MR. ECHOHAWK: Your Honor, I have what has
9 been marked as United States Exhibit WRIR C-147-A,
10 147-B, and 147-C, which are the soils logs and
11 deep hole logs that accompany or were recorded
12 in the course of Mr. Kersich's work.

13 MR. WHITE: Could I just ask -- these are
14 only HKM holes?

15 MR. ECHOHAWK: Those are only HKM holes.

16 MR. WHITE: We have no objection, Your Honor,
17 to the admission.

18 THE SPECIAL MASTER: All right. The three
19 exhibits referred to by Mr. Echohawk -- do you
20 want them admitted now, or do you want to put them
21 all in at the same time?

22 MR. ECHOHAWK: I want to put them all in at
23 one time. I need to have the witness identify
24 them.

25 kersich-redirect-echohawk

1 MR. WHITE: We will stipulate as to what
2 they are, if it's any easier.

3 THE SPECIAL MASTER: Well, let the witness
4 identify them too to strengthen the stipulation.
5 What are they, Mr. Kersich?

6 THE WITNESS: They are the land class logs
7 and drainage holes on the future lands or the
8 lands that we are calling for future development
9 on the Wind River Indian Reservation.

10 THE SPECIAL MASTER: What is the difference
11 between A, B, and C?

12 THE WITNESS: Okay, sir. It's just that A
13 and B are the land class logs and we couldn't put
14 them all into one book, so we put them into the
15 two books.

16 147-C is entitled, "Drainage," and those are
17 the deeper holes that were drilled with the augers
18 and things of this nature.

19 THE SPECIAL MASTER: All right.

20 Q (By Mr. Echohawk) Mr. Kersich, I have placed in
21 front of you in this large brown box some aerial
22 photos which have been marked United States Ex-
23 hibit No. 148-1 through 148-30. Could you describe
24 what those exhibits are?

25 kersich-redirect-echohawk

1 A. Those are the mosaics of the aerial photographs
2 we worked on in the field and contain the parcel
3 boundaries, hole locations, things of this nature
4 that were used in the classification of the lands
5 on the Wind River Indian Reservation.

6 Q. These are the actual sheets used in the field?

7 A. Yes.

8 Q. These have the acreage totals within each parcel
9 delineated on them?

10 A. There are acreage totals, yes.

11 Q. Are these the photographs from which the plani-
12 metric figures were taken to derive the acreage
13 totals presented by you?

14 A. They were.

15 Q. Mr. Kersich, I show you what I will mark as United
16 States Exhibit C-150. Could you please identify
17 that?

18 A. This is a Preliminary Draft Inventory of Water
19 Resources, Wind River Indian Reservation, Wyoming,
20 Phase 2, Needs and Uses. It was prepared by my
21 firm.

22 Q. I show you what has been introduced as SK-8.
23 Would you please identify that again for the record?

24 A. SK-8, the front page is entitled, "Preliminary
25 kersich-redirect-echohawk

1 Draft Inventory, Water Resources, Wind River
2 Indian Reservation, Phase 2, Needs and Uses."

3 THE SPECIAL MASTER: Is it taken from the
4 document offered to you?

5 THE WITNESS: Yes, it appears to be -- let
6 me take one look.

7 Yes.

8 Q (By Mr. Echohawk) There's been some question
9 raised by Mr. White as to the fact that there are
10 land classification standards contained in the
11 Phase 2 report which are different from those
12 used by HKM in the land classification work that
13 you've testified to here?

14 A That's correct.

15 Q Why is there a difference?

16 A I'm not sure I know exactly why there is a complete
17 difference, but the land classification standards
18 that the Bureau of Indian Affairs gave us to use
19 in this report were developed as part of one of
20 their earlier studies, and I'm not sure I know the
21 history on those.

22 They were just put together and given to us
23 to include in the report. Our standards then were
24 developed for the purposes of classifying the

25 kersich-redirect-echohawk

1 arable lands by our own work methods in the field
2 on the Reservation.

3 These standards, as far as I know, were never
4 tested in the field.

5 Q So you don't know whether they were tested in the
6 field?

7 A I said I do not believe they were tested in the
8 field. It's my understanding that they were used
9 to take a soil and range study and basically con-
10 vert it into standards or land classes which are
11 basically similar to those of the Bureau of
12 Reclamation.

13 Q Mr. Kersich, were you requested by the Bureau of
14 Indian Affairs to do actual land classification
15 work for the Phase 2 report?

16 A No, we did not. We did not do any field work or
17 any field verification. The work had been done
18 by the Bureau itself, and the results of that work
19 had been submitted to us.

20 MR. ECHOHAWK: Your Honor, could I have a
21 short break? I would like to compare a document
22 I have to --

23 THE SPECIAL MASTER: Yes. We can take a
24 five-minute break.

25 kersich-redirect-echohawk

1

(Pause.

2

MR. ECHOHAWK: I'm ready.

3

THE SPECIAL MASTER: Okay, Mr. Echohawk.

4

Q (By Mr. Echohawk) Mr. Kersich, do you have a copy of SK-52, which is the laboratory sheets?

5

6

A. No, I do not.

7

Q Mr. Kersich, as I recall your earlier testimony,

8

we were talking about the areas under sodium

9

adsorption ratio?

10

A. Yes.

11

Q You indicated that the three columns headed by

12

Na, Ca, and Mg should add up to the totals in the

13

first column under there labeled TFC; is that

14

correct?

15

A. Yes.

16

Q Look at the third row down, and they don't add up.

17

Do you know why?

18

MR. WHITE: I object, Your Honor, and I'm

19

not sure it's a good objection. The rule used to

20

be --

21

MR. ECHOHAWK: I don't think it is.

22

MR. WHITE: The rule used to be --

23

THE SPECIAL MASTER: You do have a heart.

24

MR. WHITE: The rule used to be that you could

25

kersich-redirect-echohawk

1 not impeach your own witness. I don't know if
2 that's still the rule, but I will make the
3 objection on the basis that they are impeaching
4 their own witness, which is not permitted.

5 THE SPECIAL MASTER: I would overrule the
6 objection no matter what its basis because
7 specifically this witness in great detail described
8 the fact that these columns don't necessarily need,
9 as a matter of fact, to add up to what the first
10 one contained, and this may be a case in point,
11 but proceed with your question.

12 Q (By Mr. Echohawk) Do you know why they may not
13 add up -- why they don't add up?

14 A I'm looking at line three, and under TSC we have
15 162.4 sodium should have been the difference
16 between the 162.4 and the 26.4 and the 19.4. I
17 would have to look at the original log. It might
18 just be that the one -- I believe that the 116.6
19 and either the transposition is on the sheet or
20 the figure 1 was left off or it might be a boundary
21 line -- maybe it was just xeroxing, I don't know,
22 but it is interesting that the SAR appears to be
23 correct.

24 * * * * *

25 kersich-redirect-echohawk

- 1 Q (By Mr. Echohawk) So under the item headed by
2 NA --
- 3 A Sodium, correct.
- 4 Q The 16.6 you refer to is under that heading;
5 is that right?
- 6 A Yes.
- 7 Q So if that number were 116.6 they would add up;
8 is that correct?
- 9 A Yes. Checking it to make sure.
- 10 Q Referring back to Exhibit C-43, the land
11 classification standards that are contained in
12 your report, I believe they start at page 10.
- 13 A Okay.
- 14 Q I believe a corrected footnote was added there,
15 footnote 4, is that correct? You added a foot-
16 note 4 there?
- 17 A Yes, I did.
- 18 Q With that footnote 4 added, land classification
19 standards as they exist with that correction,
20 the standards under which the final land
21 classification of the arable lands that were
22 discussed in your testimony, were those the lands
23 used?
- 24 A Yes.
- 25 kersich-redirect-echohawk

1 MR. WHITE: Off the record a second.

2 (Off-the-record discussion.)

3 MR. ECHOHAWK: Your Honor, at this time
4 I would like to offer into evidence what has
5 been marked and identified as Exhibit C-146,
6 which is the slope chart that breaks the acreages
7 down by slope; Exhibits 147-A, B and C which are
8 the soil logs in the deep drainage holes done
9 by HKM; Exhibits 148-1 through 148-30, which
10 are the arable photo-mosaic field sheets;
11 Exhibit 51, which is the phase two report in its
12 entirety. I would now offer those into evidence.

13 THE SPECIAL MASTER: No 149?

14 MR. ECHOHAWK: Your Honor, that was the
15 photograph of the experimental farm that I never
16 got to.

17 THE SPECIAL MASTER: Then there will be no
18 offer of 149.

19 MR. ECHOHAWK: No, that's correct. I would
20 offer those into evidence with the request that
21 I be permitted to withdraw 150 for -- to make
22 copies of it and possibly also the arable
23 photographs to make copies of those also.

24 THE SPECIAL MASTER: Your request is granted.

25 kersich-redirect-echohawk

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Mr. White, any objections?

MR. WHITE: I'd like to voir dire, Your Honor.

THE SPECIAL MASTER: All right.

MR. WHITE: First of all, I'd like to inquire the purpose of the offer of all of these exhibits.

THE SPECIAL MASTER: Truth of their contents.

MR. ECHOHAWK: Truth of their contents.

THE SPECIAL MASTER: Probative value they may have.

VOIR DIRE EXAMINATION

BY MR. WHITE:

Q Let's start with the phase two report, which is --

THE SPECIAL MASTER: 150.

Q (By Mr. White) -- C-150. Mr. Kersich, do you know of your own personal knowledge that everything contained in that report is true?

A I hadn't read this report for a considerable length of time.

Q But do you know that the contents of that report are true, yes or no?

A To my knowledge they are, yes.

Q Okay. Could I please see it.

kersich-voir dire-white

1

(Witness complied.)

2

MR. WHITE: Your Honor, I don't have a

3

copy, perhaps could I stand up here by the

4

witness so he could see the things I'm looking

5

at?

6

THE SPECIAL MASTER: I don't know. If you

7

wish to you may, but I don't know that it's

8

necessary. You're asking if the contents of

9

that document are true, are true what, are true

10

contents of documents published by the Bureau of

11

Reclamation at a given time, that pages haven't

12

been substituted by somebody else?

13

MR. WHITE: I'm asking whether or not the

14

facts --

15

THE SPECIAL MASTER: Contained on those

16

pages --

17

MR. WHITE: -- contained in this document

18

are true.

19

THE SPECIAL MASTER: Are true facts?

20

MR. WHITE: Are true facts.

21

THE SPECIAL MASTER: No human being on earth

22

would know that because you may have all sorts

23

of little misunderstandings or additions or matters

24

that have been misproved because agricultural

25

kersich-voir dire-white

1 science is an on-going science like law is and
2 who knows from decade to decade what may come
3 about, but with that context, go ahead.

4 MR. WHITE: Let me say that we would have
5 no objection to the admission of this document,
6 which I believe is 150.

7 MR. ECHOHAWK: Right.

8 MR. WHITE: If it were offered solely for
9 the purpose of showing what was contained in
10 a previous report issued by HKM. Now, if it's
11 offered for the truth of its contents, that
12 every fact in here is true, then we're going to
13 have a lot of objections and a long voir dire.
14 But as I recall, the report isn't even dated.

15 THE SPECIAL MASTER: The objection is of no
16 moment. The only purpose I'm going to make of
17 that document is reference to the three pages of
18 it that you referred to earlier today.

19 MR. WHITE: But what I'm worried about --

20 THE SPECIAL MASTER: Mr. Echohawk wants
21 it all in because if he finds I go off in the
22 deep end, out on a tangent that isn't accepted
23 by the practices in the agricultural world, I
24 suppose he wants to refer to some other portion

25 kersich-voir dire-white

1 of that document to sustain his objection to
2 what I may be concluding, but I don't see that
3 I should exclude the document on that basis,
4 Mr. White, and I don't think I'll do it.

5 MR. WHITE: As I say, Your Honor, as you
6 pointed out we had a couple of work weeks of
7 cross-examination on this report.

8 THE SPECIAL MASTER: We did.

9 MR. WHITE: Exhibit 43, which was offered
10 for the truth of its contents. You can imagine
11 what the voir dire is going to be on this
12 report.

13 THE SPECIAL MASTER: I can make a quick
14 distinction that can sustain you in this ruling,
15 Mr. White. It is with the report No. 43, the
16 witness Mr. Kersich lived with that report for
17 the better part of a year, year and a half, and
18 he contributed, he or other people working
19 directly for him contributed all maps in the back,
20 contributed virtually all of the work, the key
21 definitions, glossary, the tables. The analysis
22 of C-43 was his work.

23 MR. WHITE: Exactly the point.

24 THE SPECIAL MASTER: That one was not.

25 kersich-voir dire-white

1 of that document to sustain his objection to
2 what I may be concluding, but I don't see that
3 I should exclude the document on that basis,
4 Mr. White, and I don't think I'll do it.

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6 pointed out we had a couple of work weeks of
7 cross-examination on this report.

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10 for the truth of its contents. You can imagine
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15 Mr. White. It is with the report No. 43, the
16 witness Mr. Kersich lived with that report for
17 the better part of a year, year and a half, and
18 he contributed, he or other people working
19 directly for him contributed all maps in the back,
20 contributed virtually all of the work, the key
21 definitions, glossary, the tables. The analysis
22 of C-43 was his work.

23 MR. WHITE: Exactly the point.

24 THE SPECIAL MASTER: That one was not.

25 kersich-voir dire-white

1 'MR. WHITE: That's exactly the point.

2 They're offered for the same purpose.

3 THE SPECIAL MASTER: They are not. They're
4 offered for whatever value they may have, and
5 that one has infinitely less value than 43. Let
6 us continue this interesting dialogue.

7 MR. WHITE: Your Honor, if the United
8 States would amend its offer to exactly what you
9 said we would have no objection.

10 MR. ECHOHAWK: We will so amend.

11 THE SPECIAL MASTER: All right. I appreciate
12 the distinction. That's not coming in as a
13 Bible by any means.

14 MR. WHITE: Now, let me go to the next one.

15 THE SPECIAL MASTER: All right. One fifty
16 has been voir dired.

17 MR. WHITE: Let me give this back to
18 Counsel so he can mark it. I assume we'll get
19 a copy, Tom?

20 MR. ECHOHAWK: You already have a copy.

21 MR. WHITE: No, not of this one. I have one
22 that's marked R.L. Sleater with all the pages
23 jumbled up.

24 With respect to Exhibit 147-A, B and C, I'd
25 kersich-voir dire-white

1 like to inquire now of the United States
2 whether or not they will furnish us a copy of
3 those exhibits.

4 MR. ECHOHAWK: Your Honor, we've provided
5 copies of those soil logs through discovery.
6 That's all they are are the very same --

7 MR. WHITE: They didn't provide all the
8 soil logs. We found that out when we went
9 through, and we'd like to have a copy of the
10 complete set.

11 THE SPECIAL MASTER: How many are you
12 missing, how many are you short?

13 MR. WHITE: We don't know, we keep coming
14 up with a hole that doesn't have any logs, and
15 we'd like to have a complete set of what Mr.
16 Kersich says is the whole set.

17 MR. ECHOHAWK: It seems wasteful for us to
18 go ahead and have to recopy 99 percent of the
19 things Mr. White has just so he can get in a
20 few extra pages.

21 THE SPECIAL MASTER: Mr. White, if you will
22 let us know specifically which ones you don't
23 have a log for, which ones you don't have a copy
24 of we will provide them, but I don't think I should

25 kersich-voir dire-white

1 require the United States to copy every page
2 of all these exhibits.

3 MR. WHITE: Okay, Your Honor. It becomes
4 law of the case pretty soon. We'll follow the
5 law too. With respect to the mosaic photographs --

6 THE SPECIAL MASTER: Are there 30 photo-
7 graphs in that document?

8 MR. ECHOHAWK: Yes, there are.

9 THE SPECIAL MASTER: Are they identified and
10 numbered 148-1, 148-2 and so on?

11 MR. ECHOHAWK: That's correct, Your Honor.

12 THE SPECIAL MASTER: Let me look at them
13 for a half a minute.

14 (Brief pause.)

15 THE SPECIAL MASTER: I only find 26 in my
16 count.

17 MR. ECHOHAWK: Your Honor, we numbered those
18 last night consecutively and there should be 30
19 photos.

20 THE SPECIAL MASTER: Well, let's take a break,
21 it's time for a break, and we'll count them during
22 the break. We'll resume in ten to 15 minutes.

23 (Thereupon a 15 minute
24 recess was taken.)

24 * * * * *

25 kersich-voir dire-white

1 THE SPECIAL MASTER: Proceed, Mr. White.

2 MR. WHITE: Thank you, Your Honor. With
3 respect to the 148-1, et. seq., series of photographs,
4 so as to avoid the same problem that we had with Mr.
5 Billstein's photographs, I'd like to inquire of the
6 United States as to whether or not they will provide us
7 a copy because, again, we have copies of earlier photo-
8 graphy, different scales with different annotations on
9 them.

10 We do not have a copy of these as they are submitted
11 to the Court, and I would like to inquire whether or not
12 we will get a copy or whether we have to play the same
13 games we played with Mr. Billstein.

14 MR. ECHOHAWK: May I have one minute?

15 (Brief pause.)

16 MR. ECHOHAWK: Your Honor, again we have the
17 same problem. I believe there are some minor modifica-
18 tions on some of these that have been changed since the
19 State of Wyoming was provided their initial copies. But
20 again, I would suggest the same procedure where Wyoming
21 be allowed to check them out, annotate their copies,
22 rather than requiring us to go to the additional several
23 thousand dollar expense of providing an entirely new
24 copy.

25 THE SPECIAL MASTER: Is that agreeable, Mr.

1 White?

2 MR. WHITE: Well, it's a question on which
3 party bears the cost, whether it's on the United States
4 who offered the exhibits or upon the State, and if you
5 want to impose the cost upon the State, I assume you
6 will impose the same costs on the United States when we
7 get to ours.

8 THE SPECIAL MASTER: My thought is there are
9 30 of them, are there not?

10 MR. WHITE: Yes.

11 THE SPECIAL MASTER: Let's assume there may be
12 five or four that may have annotations.

13 MR. WHITE: Let me ask Craig off the record.

14 (Off-the-record discussion.)

15 MR. WHITE: Your Honor, I'm advised in the form
16 of a sort of a professional guess by Mr. Sommers that it
17 will take approximately two weeks to make the revisions
18 and a cost in excess of \$1,000. It could be more. He
19 didn't know for sure.

20 And all I'm trying to do is get a little rule of
21 the case so that when we come up with these sort of
22 things, it's clear whether we provide copies or whether
23 the United States --

24 THE SPECIAL MASTER: Well, is it the best rule
25 that the person who is the movant in moving their admission

1 into evidence have the burden of paying for the cost of
2 duplicating a set for the adverse party involved?

3 MR. WHITE: That's the usual rule, Your Honor.
4 It's not what happened with Mr. Billstein's photos, and
5 we are laboring to get those completed.

6 THE SPECIAL MASTER: All right. Let's put the
7 burden of these on the United States this time and we
8 will try to rotate. At least it will be fair in two
9 sets.

10 MR. ECHOHAWK: We have already gone through
11 this with Mr. Billstein and the State has just about com-
12 pleted their work of updating their copies.

13 THE SPECIAL MASTER: But it's their expense
14 this time.

15 MR. ECHOHAWK: What this comes out to, Your
16 Honor, is the State -- I mean, we made one copy for the
17 State the first time around. They have a copy, and it
18 just seems like additional expense --

19 THE SPECIAL MASTER: Yes, but there have been
20 changes made on your set that necessitates a ruling re-
21 garding the costs of updating their set so that their
22 set will be exactly the same as the 30 photographs you
23 are now moving into evidence.

24 MR. WHITE: Well, for the purposes of consis-
25 tency, Your Honor, you ought to rule against me because

1 you made me bear the cost --

2 THE SPECIAL MASTER: That's what I'm proposing
3 to do is not rule against you.

4 MR. ECHOHAWK: To rule against me.

5 THE SPECIAL MASTER: But to rule that the
6 United States pay for the cost of bringing them to con-
7 sistency.

8 MR. WHITE: Can we send them a bill for Mr.
9 Billstein's photos, Your Honor?

10 THE SPECIAL MASTER: No, I think we are trying
11 to keep it balanced. We will let them pay this one and
12 you the last and try to keep it fair that way.

13 MR. WHITE: All right. Let me ask a few ques-
14 tions about this, Your Honor.

15 VOIR DIRE (RESUMED)

16 BY MR. WHITE:

17 Q Mr. Kersich, do you know of your personal knowledge
18 whether or not the facts contained in the annotations
19 in these photographs are true? Are these annotations
20 which were made by persons other than yourself based
21 on observations which they made?

22 In other words, do you know whether these are
23 true, or did you use these as a basis of your opin-
24 ion?

25 kersich - voir dire - white

1 MR. ECHOHAWK: Which question is he supposed to
2 answer, Your Honor? I believe there are three out-
3 standing questions.

4 MR. WHITE: Let's start with the last one.

5 THE SPECIAL MASTER: If I know the witness, he
6 will probably take all three of them and answer them
7 at one time. Try it, Mr. Kersich.

8 A. The hole locations, the sample hole locations, things
9 of this nature were all put on by the specific classi-
10 fier who was working for HKM at the time, and they
11 were later inked in the office. Most of those were
12 put on in the field in pencil and later inked in the
13 office, and they were used as a basis for making my
14 conclusion.

15 MR. WHITE: Your Honor, we would have no objec-
16 tion to this series of exhibits being admitted, if
17 they were admitted, for showing the basis of Mr.
18 Kersich's professional opinion.

19 We do object to their admission for the truth
20 of their contents because there are many things on
21 here like names of ditches, such as types of lands
22 as opposed to classes. Remember the distinction,
23 and there are all sorts of types on here to which
24 Mr. Kersich didn't even testify.

25 kersich - voir dire - white

1 There are all sorts of other annotations that
2 have nothing to do with his opinion. And, finally,
3 there are annotations which deal with his opinion,
4 but they are the basis of his opinion and he is
5 personally unable to say that they are true. So
6 if it's offered for showing the foundation or the
7 basis of his opinion, we have no objection other
8 than our standing objection to the way the opinion
9 was formed.

10 If they are offered for the truth of their con-
11 tents, we do have an objection because there is no
12 foundation.

13 THE SPECIAL MASTER: We will admit them into
14 evidence for whatever probative value they may have
15 to the Court. They will not be inquired into in a
16 way that would be a departure from the facts and the
17 testimony in evidence. The material entered in there
18 was entered along the procedures that Mr. Kersich
19 mentioned, and his only knowledge of that is that
20 they were done by his competent subordinates in his
21 office.

22 Q (By Mr. White) Now, with respect to Exhibit C-146,
23 Mr. Kersich, do you have a copy of that with you?

24 A Yes.

25 kersich - voir dire - white

- 1 Q Isn't it true that you do not know of your personal
2 knowledge that the facts contained here are true,
3 of your personal knowledge?
- 4 A I did not check each of these categories, but this
5 was prepared under my direction.
- 6 Q This was prepared by somebody else?
- 7 A It was prepared by a land classifier, yes.
- 8 Q Who was it prepared by?
- 9 A Mr. Chick Smith.
- 10 Q Under Big Horn Flats -- Well, first of all, you have
11 a caption, "5 to 10 Percent", and then another caption
12 of column heading of "10 Percent"?
- 13 A Greater than 10.
- 14 Q Greater than 10 percent. Isn't it true that the
15 value 10 percent does not appear in your land classi-
16 fication standards, Page 11?
- 17 A That's correct.
- 18 Q And isn't it true that the value 5 percent appears
19 only as the point between Class 2 and Class 3?
- 20 A That's correct, yes.
- 21
- 22
- 23 * * * * *
- 24
- 25

- 1 Q (By Mr. White) For gravity?
- 2 A Yes, for gravity.
- 3 Q Now, under Big Horn Flats, you show 2,023 acres
- 4 as having a slope between five and ten percent;
- 5 is that correct?
- 6 A That's correct.
- 7 Q And those are arable lands?
- 8 A Yes, they were taken from arable lands.
- 9 Q Are those arable gravity or arable sprinkler?
- 10 A I don't know, and I didn't ask Mr. Smith to
- 11 check that. What I was interested in was just
- 12 seeing what kind of slopes we actually encountered
- 13 in the field, and this is just a representation
- 14 of that --
- 15 Q But you can't -- I'm sorry, please finish.
- 16 A It's not tied to any particular acre here. I'm
- 17 just going to the acreage that was delineated
- 18 on the photos obtained that had holes in them
- 19 or logs where there were notations showing the
- 20 slopes located on that field. And the aerial
- 21 photographs, I didn't tie these to the land
- 22 class specifications.
- 23 Q Specifically how do you measure slopes from an
- 24 aerial photograph?
- 25 kersich-voir dire-white

- 1 A No, I didn't say that. I said it was denoted
2 on the aerial photograph.
- 3 Q So you just used your hole logs?
- 4 A No.
- 5 Q Okay. Well, tell me again.
- 6 A Sometime ago I testified to the fact that the
7 classifier in the field took down certain data,
8 and one of them, they used a map to develop the
9 principle slope of the field, and that's what
10 we were trying to portray here. This is a
11 summation of that type of result.
- 12 Q Are there readings with their levels in evidence?
- 13 A Much of that will be contained right here in
14 these logs.
- 15 Q Is all of it there?
- 16 A I'd say the majority of it. I'm not going to say
17 there are some logs without --
- 18 Q Can you identify those logs that were used in
19 developing this information?
- 20 A They were basically -- This is a review of the
21 logs here. This information came from these
22 logs.
- 23 Q Okay. so every single log was viewed to come
24 up with the information shown on Exhibit C-146;
25 kersich-voir dire-white

1 is that correct?

2 A Yes. That was the instructions that were given
3 to the persons to look at logs.

4 Q But you don't know for sure those were the
5 instructions you gave them; is that correct?

6 A Well --

7 THE SPECIAL MASTER: He's saying he knows
8 for sure that those were the instructions given
9 to the person and the person did it.

10 Q (By Mr. White) Do you know if they carried out
11 your instructions?

12 A I asked them that question specifically and his
13 answer was that he looked at the logs and looked
14 at the aerial photos, and this was his best
15 work product that he developed from that.

16 Q Are there any logs that do not show slope?

17 A Yes. I think I mentioned that previously here
18 just a minute ago, that some of them may have not
19 included slope, yes.

20 Q What rough percentage of those logs excluded a
21 reflection of slope?

22 A I can't tell you offhand.

23 Q So you don't know whether or not this is a
24 representative indication of the slope, of the

25 kersich-voir dire-white

1 lands covered by the logs?

2 A Normally when they leave slope off it would
3 have been on lands which were less than five
4 percent. That's the normal procedure that we
5 follow if they would have left it off. That
6 can happen occasionally, yes.

7 Q Do you know the location, can you point out on
8 any of the pictures such as C-45, which I believe
9 is this large exhibit over here, the location
10 of the 2,023 acres with a slope of five to ten
11 percent?

12 A Well, on C-45 that's the North Crowheart area --

13 Q Excuse me, I apologize.

14 A That wouldn't match up to the question you just
15 asked me, sir.

16 Q How about the 7,452 acres?

17 A Not without sitting down and going through his
18 worksheets, no.

19 Q Isn't it fair to say that the lands described
20 here on Exhibit C-146 are only those lands that
21 had logged holes?

22 A Yes.

23 Q And would not include those lands without logged
24 holes; is that correct?

25 kersich-voir dire-white

1 A That may be correct, yes. To expand on that a
2 little bit, that may be correct in the sense
3 that he may not have had a logged hole on it,
4 but when the classification -- if it didn't
5 include a topographic deficiency it would give
6 some idea of where that land would fall with
7 regard to slope.

8 Q You said Chick Smith did the analysis on C-146;
9 is that right?

10 A Did the review, yes.

11 Q Did he examine those soil classification symbols
12 or did he just look at the hole logs?

13 A He would have had to examine the soil classification
14 standards along with the soil logs.

15 Q Did Mr. Smith provide any worksheets along with
16 this or provide any worksheets along with this?

17 A I didn't get any worksheets from him personally,
18 no. I don't know frankly. What I got was a
19 summary.

20 MR. WHITE: Your Honor, the State would
21 object to the admission of C-146 for the truth
22 of its contents on several grounds, most important
23 of which are hearsay and foundation. There has
24 been inadequate foundation to show that the

25 kersich-voir dire-white

1 information contained in C-146 is reliable.
2 The witness is unable to state which of the
3 hole logs were used, not able to state what
4 percentage of the hole logs had no indication
5 of slope, he's unable to state whether or not
6 the acreages here include or exclude with any
7 specificity lands without hole logs.

8 He's unable to state what percentage of
9 total lands involved in each of these projects,
10 the six projects were included in the total
11 area analyzed. In other words, it may be less
12 that all of the project.

13 Finally, the document is based on the grossest
14 form of hearsay. It's not a professional opinion
15 that can be based on facts which might not be
16 admissable. It is a representation of the facts
17 themselves.

18 If it's offered to become the basis or as the
19 basis containing the facts and data of a pro-
20 fessional opinion reached by Mr. Kersich, the
21 State would have no objection, but being offered
22 for the truth of its contents means that it's not
23 misleading, means that it's complete and means
24 that this witness himself can testify with respect

25 kersich-voir dire-white

1 to the accuracy of each of those figures, and
 2 this witness himself can't even tell us which
 3 logs were examined which contained slopes upon
 4 which the document was based.

5 MR. ECHOHAWK: I believe the witness stated
 6 that the logs used were all those contained
 7 within 147-A and B.

8 THE SPECIAL MASTER: He said A and B or did
 9 he say C?

10 THE WITNESS: There is --

11 MR. ECHOHAWK: Perhaps --

12 THE WITNESS: I don't believe there's any
 13 slope information contained on any of the
 14 drainage logs.

15 MR. ECHOHAWK: As specified where the
 16 information was drawn from, Your Honor. I believe
 17 this chart merely breaks it out in a different
 18 scheme, the testimony offered by Mr. Kersich
 19 or the facts and data that he bases his opinion
 20 on. I think he is certainly entitled to rely
 21 upon Mr. Smith who works for Mr. Kersich, has
 22 plenty of experience in land classification. I
 23 think it's proper for Mr. Kersich to base his
 24 testimony based on the work done by Mr. Smith.

25 kersich-voir dire-white

1 THE SPECIAL MASTER: If this were not a
2 piece of professional work I would sustain it,
3 but I believe it is so I'm going to overrule
4 the objection and admit it.

5 It isn't all that weighty in the final
6 analysis, I don't think anyway.

7 MR. ECHOHAWK: Your Honor, so I understand,
8 all the exhibits offered were accepted?

9 THE SPECIAL MASTER: All the exhibits
10 offered by Mr. Echohawk, beginning with C-146
11 and ending with C-150, the phase two report, are
12 admitted into evidence. They include all 30
13 of the copies of the photographs in Exhibit 148,
14 which has been counted in the recess and found
15 to be complete.

16 MR. ECHOHAWK: And I understand that the
17 United States is to provide copies of those
18 to the State of Wyoming?

19 THE SPECIAL MASTER: The United States is
20 to provide copies as requested by the State of
21 Wyoming at the time the State of Wyoming requests
22 it, at the expense of the United States.

23 (Whereupon Exhibits C-146
24 (through C-150 were admitted
25 (into evidence.

kersich-voir dire-white

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MR. ECHOHAWK: Okay.

MR. WHITE: We'll look through them, Your Honor, and see if -- we'll make a quick inspection, perhaps in a day's time or so to see which of those photographs we need copies of.

THE SPECIAL MASTER: If you want time for that tomorrow, just let me know. I'd just as soon not come in at 9:15 and come at ten as long as you're working on that, and I can be doing something at my chambers, at my office rather than wait on a break type thing. We can have better efficient use of all our time if we convene at ten o'clock and hold the trial from ten to twelve instead of convening at nine o'clock, stay in recess in trial while research work goes on.

MR. ECHOHAWK: That's fine.

MR. WHITE: Can I confer with the guy that's got to do the work?

THE SPECIAL MASTER: Please do.

MR. WHITE: We just as soon pull an all-nighter. We'll have it ready for you at 9:15 and get the trial going.

THE SPECIAL MASTER: That's fine.

MR. ECHOHAWK: The United States has no more
kersich-voir dire-white

1 redirect for Mr. Kersich.

2 THE SPECIAL MASTER: All right. Let me
3 ask some questions that I know some of you have
4 been anticipating with bated breath.

5 EXAMINATION

6 BY THE SPECIAL MASTER:

7 Q Mr. Kersich, the total arable lands for which
8 you have spent several weeks in testifying to
9 on the Reservation are contained exclusively in
10 six areas defined as we know from North Crowheart
11 through Arapahoe, listed on the front of your
12 Exhibit 43. Are those the six areas sometimes
13 referred to as the FIF's or the Federal Irrigation --

14 A P's.

15 Q FIP's, Federal Irrigation Project?

16 A No, sir, they are not.

17 Q They are not. What are they?

18 A They are future lands which are located --

19 Q No, what are these six, what is the North
20 Crwoheart Unit?

21 A All right, sir. That's a study area outside of
22 any presently irrigated area. Let me qualify
23 that by saying there might be some small piece
24 of historic lands of that nature, but these are

25 kersich-examination-special master

1 lands which are not included in any irrigation
2 project on the Wind River Indian Reservation
3 at the present time.

4 Q Who defined the boundaries of the North Crow-
5 heart Unit of your land classification study?

6 A Of the study area, that was done by us in
7 conjunction with other members of the team, sir,
8 by HKM.

9 Q And who defined the area of South Crowheart
10 Unit?

11 A Again that was done by HKM working with the other
12 members of the team.

13 Q And also Big Horn, Riverton, Owl Creek and
14 Arapahoe?

15 A Yes, sir.

16 Q And your testimony is that none of the existing
17 or historic Federal Irrigation Projects contain
18 an acre that is in your six units to which you've
19 testified?

20 A The acreage that we have here should be all lands
21 which are presently not being irrigated, unless
22 there is an overlap in some area between historic
23 and --

24 Q So we would conclude therefore that the lands about
25 kersich-examination-special master

1 which Mr. Billstein testified during his
 2 appearance, include no, virtually no acreage?
 3 A few acreage here and there is inevitable --
 4 that is in your area and similiarly your area
 5 of maps of these six units contained no acreage
 6 which he dealt with in his testimony regarding
 7 lands now in irrigation?

8 A Okay.

9 MR. ECHOHAWK: Your Honor, perhaps if I
 10 could get two large exhibits that have already
 11 been introduced into evidence, set those side by
 12 side. They have the Federal Irrigation Projects
 13 on there and then Mr. Kersich's study area.

14 THE SPECIAL MASTER: All right. It might
 15 be helpful, and we might get those tomorrow,
 16 but we don't need them today for the purpose of
 17 my following questions.

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 20 * * * * *

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 25 kersich-examination-special master

1 THE SPECIAL MASTER: Mr. Kersich, can you
2 tell us of the total acreage in the six units of
3 yours classified in 43 -- can you tell us which
4 of these units lie wholly in what has been
5 referred to as the ceded lands, the lands that
6 were ceded in 1905? Are you familiar with that
7 distinction on the Reservation, as distinguished
8 from the land usually referred to as the diminished
9 portion or the land that remained?

10 THE WITNESS: No.

11 THE SPECIAL MASTER: You are not familiar
12 with that. Okay. I wish we were in the office
13 where -- we haven't those here at all, an exhibit
14 showing the 1905 ceded lands.

15 MR. WHITE: Your Honor, if you would ask --
16 I would like to suggest that you might ask the
17 witness which of these lands lie north of the
18 Wind River and East of the Popo Agie.

19 THE SPECIAL MASTER: Except for the Popo
20 Agie -- do you know which of these six units lie
21 to the North of the Wind River and which lie to
22 the South of the Wind River?

23 THE WITNESS: Well, basically all of North
24 Crowheart lies North of the Wind River.

25 kersich-redirect-echohawk

1 THE SPECIAL MASTER: Your testimony is that
2 all of North Crowheart unit is North of the
3 River?

4 THE WITNESS: Yes, sir. May I refer to
5 Exhibit C-45?

6 THE SPECIAL MASTER: And C-45 shows this,
7 does it not?

8 THE WITNESS: Yes.

9 THE SPECIAL MASTER: All right, sir. Where
10 does South Crowheart unit rest with regard to the
11 Wind River, North or South?

12 THE WITNESS: May I get one of these large --

13 THE SPECIAL MASTER: Of course you may.

14 THE WITNESS: I think I can finish it at one
15 time.

16 MR. WHITE: All right.

17 MR. ECHOHAWK: Mr. Master, the exhibits I
18 referred to that have this kind of laid out in a
19 big picture are like just two doors down.

20 THE SPECIAL MASTER: Why don't you go down and
21 get them if you may.

22 THE WITNESS: I have another map here. I
23 think it might be easier if I might -- I made a
24 map and traced out the rivers on it so it would be
25 very distinguishable, if I may have two seconds

1 THE SPECIAL MASTER: All right.

2 What was my last question on the record, Vi?

3 THE WITNESS: Okay. I'll start from the
4 beginning.

5 THE SPECIAL MASTER: Was my last question on
6 the record, Vi?

7 (Thereupon the following question
8 was read back as follows: "Q
9 Where does South Crowheart unit
rest with regard to the Wind
River, North or South?"

10 THE SPECIAL MASTER: That's the question, Mr.
11 Kersich.

12 THE WITNESS: The South Crowheart unit is
13 South of the Wind River (indicating).

14 When I refer to Wind River, now, I'm referring
15 to the Big Wind.

16 THE SPECIAL MASTER: Where does the Big Horn
17 Flats unit rest regarding the Wind River?

18 THE WITNESS: It's also South of the Wind
19 River. This is the Wind River on this map (indi-
20 cating). This would be the Big Horn Flats area
21 here (indicating).

22 THE SPECIAL MASTER: And the Riverton East unit?

23 THE WITNESS: Riverton East is East of
24 Riverton, and it would be East of -- I believe on
25 this map we would call that the Big Horn River

1 (indicating).

2 THE SPECIAL MASTER: And South of it also,
3 is that correct?

4 THE WITNESS: East and South, yes.

5 THE SPECIAL MASTER: Let me ask assembled
6 counsel if it is correct -- if my conclusion is
7 correct -- if I conclude that that is in the
8 diminished portion?

9 MR. WHITE: We would agree with that, Your
10 Honor -- excuse me --

11 THE SPECIAL MASTER: I know you don't like
12 the word, but does it rest in that portion that
13 was ceded in 1905?

14 MR. WHITE: Which portion?

15 THE SPECIAL MASTER: Riverton East.

16 MR. WHITE: No, we wouldn't agree because we
17 believe that portion East of the Popo Agie was
18 also ceded in 1905.

19 THE SPECIAL MASTER: It should be a matter of
20 record in this whether it is or not.

21 MR. WHITE: I think that's what the document
22 says, North of the Wind and East of the Popo Agie.
23 There's been a fabulous disagreement as to whether
24 or not that causes a disestablishment, but I don't
25 think there's any disagreement --

1 THE SPECIAL MASTER: That has no bearing upon
2 whether there was -- in 1905 was this a part of
3 that which was ceded or was it not? That's what
4 I would like to know.

5 MR. ROGERS: Mr. White is correct that the
6 portion of the Reservation which was affected by
7 the 1905 Act is North of the Big Wind River and
8 East of the Popo Agie.

9 MR. WHITE: It would be in the -- if we have
10 a neutral term, I don't know what it is.

11 THE SPECIAL MASTER: Is it in the portion
12 that was ceded in 1905?

13 MR. WHITE: Yes.

14 MR. ROGERS: May we say open portion?

15 THE SPECIAL MASTER: Open portion. Fine.
16 That reminds me of the cattle business, but if
17 you want to use open and closed on a heifer, fine.

18 Okay. I will call those open. And that is
19 open.

20 Where is Owl Creek unit, obviously open?

21 THE WITNESS: South of Owl Creek located on
22 the North --

23 THE SPECIAL MASTER: But where is it with
24 regard to the Wind River?

25 THE WITNESS: It would be North of the Wind

1 River, sir.

2 THE SPECIAL MASTER: And where is the Arapahoe
3 unit?

4 THE WITNESS: The Arapahoe is located South
5 of the Big Wind River and actually between the
6 Little Wind River and the Popo Agie.

7 THE SPECIAL MASTER: Very well. I would ask
8 you this question, and you will need a pencil to
9 give me the answer, and you can maybe run the
10 totals from your desk, Mr. Kersich.

11 If you were to take your testimony's total
12 figures of the summary of arable lands by class
13 in North Crowheart, Riverton East, and Owl Creek,
14 what would that total be?

15 THE WITNESS: Okay. If I understand the
16 question correctly, you asked me for the total of
17 arable lands on North Crowheart, Riverton East,
18 and Owl Creek, and I added those figures up here,
19 and I come up with 52,825 acres.

20 THE SPECIAL MASTER: You have added 44,382,
21 4,691, and 258; is that correct?

22 THE WITNESS: No. I took the total arable
23 lands located on page 27, sir.

24 THE SPECIAL MASTER: So you used --

25 THE WITNESS: I used 47,876 acres for North

1

Crowheart.

2

THE SPECIAL MASTER: Right.

3

THE WITNESS: 4,691 acres for Riverton East.

4

THE SPECIAL MASTER: Right.

5

THE WITNESS: And 258 acres for Owl Creek.

6

THE SPECIAL MASTER: And your total is?

7

THE WITNESS: I came up with 52,825.

8

THE SPECIAL MASTER: What?

9

THE WITNESS: 52,825.

10

THE SPECIAL MASTER: All right. If you were

11

to take the totals, therefore, of South Crowheart

12

and of Big Horn Flats and of Arapahoe, the remaining

13

three units of the total in your summary of arable

14

lands by class, what would your total be of those?

15

THE WITNESS: 31,644.

16

THE SPECIAL MASTER: Thirty-one thousand --

17

THE WITNESS: Six hundred forty-four acres.

18

THE SPECIAL MASTER: Very good. Thank you.

19

That's all I have of this witness.

20

MR. ECHOHAWK: I might point out that we

21

brought in the map that has the federal Indian

22

projects noted on them --

23

THE SPECIAL MASTER: I would like to see that

24

while we are here. At the risk of -- they are

25

separate exhibits, aren't they?

1 MR. ECHOHAWK: I believe those were in the
2 very first week of testimony.

3 THE SPECIAL MASTER: C-5 shows the existing
4 units. C-35 shows the study of the arable units;
5 is that correct?

6 MR. ECHOHAWK: C-35 shows the areas delineated
7 in red, which are Mr. Kersich's study areas, large
8 study areas.

9 MR. WHITE: Your Honor, I might say that we
10 have an exhibit which combines them. It's not
11 in evidence.

12 With the permission of counsel, I would let
13 him see it and just for informational purposes
14 it might be helpful for you to view it.

15 THE SPECIAL MASTER: Does anybody have an
16 objection if Mr. White were to give me a copy of
17 that at this time?

18 MR. ECHOHAWK: I would like to look at it
19 first.

20 THE SPECIAL MASTER: I don't mean to get you
21 out of step in your case, but I think we are
22 making some remarkable headway, and that's what I
23 wanted.

24 Thank you for showing me those and thank you
25 for your answers.

1 MR. WHITE: If we can take a 4- or 5-minute
2 break, we can get those.

3 MR. ECHOHAWK: Before we would go off, I
4 would also like to point out, so the record is
5 clear again, that the final acreage to be claimed
6 by the United States within the study areas that
7 Mr. Kersich has testified to will be substantially
8 less than the arable acreage that he has testified
9 about. That acreage will be reduced.

10 THE SPECIAL MASTER: I appreciate your fears
11 and concerns, but I assume that there will be
12 other evidence regarding irrigability?

13 MR. ECHOHAWK: That's correct, Your Honor.

14 THE SPECIAL MASTER: Fine. Thank you.

15 (Recess.

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1 MR. WHITE: Your Honor, the State has no
2 recross, and we would have no objection to the
3 witness being excused subject to the right to recall
4 him, to his remaining within the Court's jurisdiction.

5 THE SPECIAL MASTER: Within a reasonable
6 notice considering the time and travels. All right,
7 Mr. Echohawk, is that agreeable with you?

8 MR. ECHOHAWK: It's agreeable, Your Honor.

9 THE SPECIAL MASTER: Very fine. Mr.
10 Kersich, I congratulate you on having survived the
11 ordeal so far, but we may be seeing more of you in
12 the few weeks or months to come, and you've heard the
13 conditions.

14 Anymore witnesses or evidence for today?

15 All right, Mr. Echohawk.

16 MR. ECHOHAWK: I would prefer if we could
17 start the next witness tomorrow.

18 THE SPECIAL MASTER: All right. That is
19 agreeable with me.

20 MR. WHITE: I would object just for the
21 record. I think we've got another hour and a half
22 today, and we ought to get going.

23 THE SPECIAL MASTER: Is the witness here
24 ready to go?

25 MR. ECHOHAWK: Your Honor, at the close of

1 Mr. Kersich's testimony last time he was here, Mr.
2 White advised us that it would be about five days
3 additional cross-examination. I talked to Mr. Merrill
4 on Monday of this week, he told me there would be
5 four days of cross-examination. Here we finished Mr.
6 Kersich in a day and a half after.

7 THE SPECIAL MASTER: I don't want you to
8 discourage that trend, Mr. Echohawk.

9 MR. ECHOHAWK: I find myself somewhat
10 caught short.

11 MR. WHITE: I'd like to say for the record,
12 we got our signals on cross. We're trying to reduce
13 cross, and you recall yesterday I announced to the
14 Court and Counsel we would be done by noon. I don't
15 think there is any surprise involved. I'd just like
16 to see the case move along.

17 THE SPECIAL MASTER: You did indeed. Mr.
18 Echohawk is caught a little short, so without looking
19 for punishment for a reason to go for an hour or two,
20 I can use a little early break, so I'll take it and
21 let's stand in recess until tomorrow morning at 9:15,
22 yes?

23 MR. ECHOHAWK: One additional item, actually
24 two items that relate to the famous ten-day rule that
25 are also slow as a result of the reduced cross-examination

1 in time. We have, like we said earlier, we were
2 advised that Dr. Mesghinna may be testifying at the
3 end of next week. Yet we were advised by him that
4 his exhibits will not arrive until Saturday. If he
5 goes on the stand Thursday or Friday that is certainly
6 not the ten-day rule, so we would ask the State of
7 Wyoming, if they would waive their objections to the
8 ten-day rule for that.

9 MR. WHITE: That gives us the weekend to
10 work on it, and I think weekends are for the purpose
11 of getting a little rest.

12 THE SPECIAL MASTER: And being with families.

13 MR. WHITE: So I won't waive the ten-day
14 rule, and I'd like to say for the record that the
15 United States should assume from now on that there
16 will be, for the purposes of the ten-day rule, that
17 there will be no cross. We may have cross, we may
18 not. We want to move the case along. We may have
19 long cross, but for the purposes of the ten-day rule
20 they should assume there is no cross and we won't
21 get ourselves in this bind again.

22 MR. ECHOHAWK: In addition, Your Honor, it
23 would come to the witness that follows, we have
24 Mr. Waples who testifies next, who will go on tomorrow.
25 Following him is Mr. Toedter. We've given the State

1 of Wyoming Mr. Toedter's exhibits on this past
2 Monday, and again we may run into the ten-day rule.

3 THE SPECIAL MASTER: Okay. If, Mr. White,
4 Mr. Echohawk agrees to put Mr. Waples on now would
5 you waive the ten-day rule regarding the evidence
6 and the doctrine of the ten-day rule?

7 MR. ECHOHAWK: Mr. Waples' information was
8 given to you ten days in advance.

9 MR. WHITE: We'll waive it, Your Honor,
10 with respect to those matters that have been given
11 to us.

12 THE SPECIAL MASTER: Mr. Echohawk, I think --

13 MR. ECHOHAWK: That's not the thing. We
14 gave the State Mr. Waples' information as far ahead
15 of time as we could. There were some small very
16 minor corrections on his report. We gave them the
17 draft as soon as we could. We followed up with a
18 finalized version, and then we found one minor mistake
19 in it so then we -- at the beginning of this week we
20 gave them the very finalized copy.

21 MR. WHITE: I don't know what the worry is.
22 We waived the objection and we want to go ahead and
23 put him on.

24 MR. ECHOHAWK: For what they've received,
25 and if that addresses all the problems, even the revised

1 exhibits --

2 MR. WHITE: If you come up with new
3 exhibits that you haven't given us, we'll have a
4 complaint, but if you have given us the exhibits
5 for Waples, we've got not complaint.

6 MR. ECHOHAWK: It's Mr. Waples, and they
7 don't have a complaint about it, and there's a
8 question still that goes to Mr. Toedter's exhibits
9 and Mr. Mesghinna's exhibits.

10 MR. WHITE: Your Honor, the problem -- We
11 can't stall forever just for the United States to
12 get their exhibits together. They've had four years
13 to get ready for this case. We're moving cross as
14 fast as we can. We got the signals from you to cut
15 our cross, and we've tried to do that.

16 We may not be successful in the future in
17 cutting all of the cross like we'd like to see it,
18 but the case is set for trial, its been set for trial
19 for a long time. Its had two continuances already,
20 two major continuances.

21 MR. ECHOHAWK: I think Mr. White is
22 certainly entitled to cross-examine on as many areas
23 as he wants to. Its just when he gets into this
24 repetitive nature of going through acre by acre. We've
25 certainly allowed him to cross-examine on a very large

1 portion of it. It's when it gets entirely redundant
2 and repetitious that we raise the objection. I don't
3 think he should feel that he's being precluded from
4 cross-examination.

5 MR. WHITE: I didn't say I was being
6 precluded, I was saying let's get on with the next
7 witness.

8 THE SPECIAL MASTER: Let's go back to the
9 first matter you raised a moment ago, Mr. Echohawk.
10 Dr. Mesghinna, you have to tell me who he is.

11 MR. ECHOHAWK: He's an agricultural engineer
12 for Stetson Engineers who will be laying out the
13 future irrigation system designs and costs.

14 THE SPECIAL MASTER: You propose him for a
15 witness soon, he is scheduled to be a witness for
16 you when?

17 MR. ECHOHAWK: He is the third witness away.
18 We have Mr. Waples, who will start tomorrow; we have
19 Mr. Toedter who follows Mr. Waples, and we have Dr.
20 Mesghinna.

21 THE SPECIAL MASTER: Dr. who?

22 MR. ECHOHAWK: Mesghinna. The State has
23 given us indications that they're not going to take
24 very long at all with Mr. Waples or Mr. Toedter. In
25 fact, Mr. Mesghinna may go on next Friday or next

1 Thursday. Certainly it's much different from the
2 other --

3 THE SPECIAL MASTER: Now, Dr. Mesghinna
4 has some materials however that cannot be put in the
5 hands of Wyoming until when?

6 MR. ECHOHAWK: Saturday.

7 THE SPECIAL MASTER: The day after tomorrow?

8 MR. ECHOHAWK: That's correct.

9 MR. WHITE: For all technical purposes that's
10 Monday because it's right in the middle of a weekend.

11 THE SPECIAL MASTER: Yes, but if you don't
12 put Dr. Mesghinna on until about Wednesday or Thursday,
13 what the United States is asking you is that will you
14 waive the ten-day requirement for his material and
15 you said no you won't unless he proceeds today with
16 Mr. Waples.

17 MR. WHITE: No.

18 THE SPECIAL MASTER: Is Mr. Waples in the
19 building now, in the courtroom now?

20 MR. ECHOHAWK: He's here, Your Honor, but
21 I don't think that's what Mr. White agreed to.

22 THE SPECIAL MASTER: That's what I was
23 hoping you said.

24 MR. WHITE: No. This is really a sore spot
25 with me, Your Honor, and let me tell you why. The

1 State of Wyoming gave thousands of exhibits to the
2 United States ten days prior to the trial beginning.
3 Then the United States came in and got you to change
4 the order so it was just ten days before the week in
5 which the witness appeared. Now, it's ten days before
6 the witness takes the stand, and it's just taking
7 a remarkable advantage of the patience of the Court
8 and the ability of the State to respond to short
9 notice exhibits to do it this way. So I would like
10 to insist the trial go forward. I know it's your
11 decision so I won't insist, I would just ask that the
12 trial go forward, and use the time that's available
13 to us today to go with Mr. Waples. And I would like
14 to ask that the Court enforce the ten-day rule, and
15 I'll waive the ten-day rule with respect to Mr. Waples.
16 I think it's important in getting started today. We'll
17 have him all day tomorrow, we may not even get to the
18 next witness.

19 THE SPECIAL MASTER: I'd like to start with
20 him today, to be frank with you, Mr. Echohawk, but
21 I was hoping that perhaps you might agree if we
22 started with Mr. Waples today, the waiver of whatever
23 he's testifying to, that you don't already have copies
24 of, haven't learned by deposition is accepted, but in
25 addition you will not object to the fact that there may

1 be a shortening of the ten days in the Mesghinna
2 case.

3 MR. WHITE: I can't agree to that because
4 Dr. Mesghinna is the very witness we were talking
5 about this morning, to get the hundreds of pipeline
6 layouts we've got to fly to San Francisco to get
7 them, and I just can't agree to that.

8 We're going to send an engineer out there,
9 hopefully on Monday, to pick them up. That's as fast
10 as we can do it, and I won't waive the ten days. I
11 would ask we go with Mr. Waples.

12 MR. ECHOHAWK: Again, I would ask the
13 Court's indulgence that we continue with the trial
14 tomorrow and recess. I was anticipating about four
15 to five days of cross-examination of Mr. Kersich and
16 quite frankly I'm caught a little short. We have
17 only one hour of trial left today, and we're all a
18 little weary. I think it would be best if we would
19 adjourn now.

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1 MR. WHITE: Well, I'm not weary, Your Honor,
2 but if the United States counsel is so weary that
3 they want to stop for the day, I will stipulate
4 that we can stop for the day.

5 THE SPECIAL MASTER: Well, in that case let's
6 stop for the day and convene at 9:15 tomorrow
7 morning.

8 We have got a problem next week, gentlemen.

9 (Thereupon an off-the-record
10 discussion was held.)

11 THE SPECIAL MASTER: Mr. Salazar, will you
12 ask that question, please?

13 MR. WHITE: Let me ask the question --

14 THE SPECIAL MASTER: I want Mr. Salazar's
15 question on the record.

16 MR. SALAZAR: Are the exhibits which Dr.
17 Mesghinna is going to provide by Saturday exhibits
18 the copies of which have already been provided
19 in the past and have merely been updated or cor-
20 rected or revised, or are they brand new exhibits?

21 MR. ECHOHAWK: Most of them are corrected
22 revised copies of documents or irrigation outlines
23 that were provided during the deposition. They
24 are not entirely new documents. They are just
25 updated documents.

1 THE SPECIAL MASTER: That would beg a
2 reconsideration or reevaluation of your conclusion
3 on that.

4 MR. WHITE: I would have to see them first,
5 Your Honor. It's easy to say they are just some
6 changes, but when you are dealing with tens of
7 thousands of acres, a few changes here and there
8 add up to many thousands of acres, and it's just
9 like the photography that we've dealt with with
10 Mr. Billstein and Mr. Kersich.

11 If I see it and it's not a problem for us,
12 I won't make it a problem for the Court, but if I
13 see it and it is a problem, I will bring it to
14 the attention of the Court, and I think the only
15 way I can do that is by objection at the time
16 that it's identified.

17 MR. ROGERS: Your Honor, it might be applica-
18 ble to add at this time that based on the trial
19 schedule we developed this morning, that even
20 assuming that Dr. Mesghinna does start on Thursday
21 or Friday, it's not likely that his cross-
22 examination would even commence before the end
23 of next week and, in fact, it might not commence
24 at all or wouldn't commence very much, so Mr. White
25 would, indeed, have the entire week following that

1 to prepare for his cross-examination and review
2 those exhibits.

3 MR. WHITE: Let me ask two questions, Your
4 Honor. The first one is an easy one.

5 The first one is that I understand that Mr.
6 Salazar, your assistant, has kept a list of ex-
7 hibits that have been identified, offered, rejected,
8 or admitted, and I would like to ask -- and I
9 believe I would be joined in this one request by
10 all counsel; I think everybody is in agreement --
11 if that list could be provided to all counsel so
12 that we can keep our own records straight and
13 ensure that our own recordkeeping is in accordance
14 with that of the Court.

15 THE SPECIAL MASTER: If I have agreement of
16 all major counsel for the Tribes -- all counsel
17 for the Tribes, all counsel for the United States,
18 and all counsel for the State of Wyoming, and if
19 I have your approval in this I will use and
20 distribute to you who are present here today when
21 you ask for it the Master's exhibit list giving
22 the exhibit number, the introduction, the party
23 introducing it, the date introduced, whether
24 admitted or not and for what purpose and the page
25 in the transcript where it can be found and a

1 description of the exhibit.

2 Mr. White, I'm not going to send this out to
3 every attorney of record because it's just too
4 darned burdensome and bulky a job, but if they
5 ask for it, they will get it.

6 MR. WHITE: I would volunteer to make a copy
7 of that for those counsel that are present.
8 Would that be all right?

9 THE SPECIAL MASTER: For those present?

10 MR. ECHOHAWK: That would be fine.

11 THE SPECIAL MASTER: All right. Then that
12 will be done. And if you will do that, those can
13 be provided certainly in a day or two.

14 Now, that helps us come to the observation
15 that Mr. Rogers has made, which is really quite
16 a valid one.

17 If it will take certainly two or three days
18 of direct to finish up Waples, the middle man, and
19 Mesghinna, during that time you will have had in
20 your possession, if you are going to get them by
21 day after tomorrow, the documents from Mesghinna.

22 Therefore, won't you search yourself to see
23 if you can, in good conscience, and consult your
24 assistants too because you may get a word --

25 MR. WHITE: I always get admonished each day

1 after trial, Your Honor. Don't make it worse.

2 THE SPECIAL MASTER: That you can say if
3 the United States puts on Dr. Mesghinna no earlier
4 than next Wednesday, that you would not -- that
5 you will waive the 10-day rule?

6 MR. WHITE: I have to see the documents, and
7 I would assure the Court that I will take a look
8 at them, and if we can continue without making
9 the objection, we will not make the objection.

10 Now, let me ask one other thing, and that is
11 with respect to the week that you have previously
12 ordered that we take off, the week after next, I
13 would like to ask the Court and ask for the con-
14 sent of the other counsel that if we are going to
15 take a week off, it not be the last week of April
16 but instead be the first week in May, and the
17 reason is that I explained to my wife over the noon
18 hour that we were going to take off the last week
19 in April and with some joy because her sister's
20 wedding is the following week, and I anticipated
21 not having to go.

22 She instructed me to ask the Court whether or
23 not we could change the week off from the last
24 week in April to the first week in May so I can
25 attend her sister's wedding.

1 THE SPECIAL MASTER: What is the day in May
2 that you want that time off?

3 MR. ROGERS: Your Honor, off-the-record.

4 THE SPECIAL MASTER: Yes, off-the-record.

5 (Thereupon an off-the-record
6 discussion was held.)

7 THE SPECIAL MASTER: Mr. White, is that day
8 you have got to be away Monday, the 4th, and Tues-
9 day, the 5th, and if those two days were free, you
10 are home free at home? If we resume on Wednesday,
11 May the 6th, can you get back to work then?

12 MR. WHITE: Why don't I ask if we could stop
13 that Wednesday during that last week? I think
14 that that would be about the last day in April and
15 resume --

16 THE SPECIAL MASTER: We made commitments this
17 morning, and I get boxed in on one. I can be back
18 here Monday the 27th without any big hassle.

19 I'm going to a reunion of the First Division.
20 I know that none of you -- the big red one, and
21 General Haig is speaking to us, and I want to go,
22 and I can be back Monday morning, no big hassle,
23 but if I don't have to, I will take a couple days
24 and use them advisedly, and I will come back on
25 the 29th or 30th and we can do May -- I can come

1 back on the 29th or 30th, and we can do May 1 or
2 2, but if those dates that you have to be there
3 are the 4th and 5th -- what were you going to
4 say, Mr. White?

5 MR. WHITE: Can I look at your calendar, Tom?

6 MR. ECHOHAWK: Perhaps we could keep the week
7 of the 27th off as it is set now and take off the
8 days of the following week that Mr. White needs
9 off.

10 MR. WHITE: I don't need them off, Your
11 Honor.

12 THE SPECIAL MASTER: You need something off
13 the week of the 4th.

14 We don't need to be on the record.

15 (Thereupon an off-the-record
16 discussion was held.)

17 THE SPECIAL MASTER: Back on the record again.
18 Mr. Membrino?

19 MR. MEMBRINO: We have overlooked Mr. Toedter,
20 who is the witness to follow Mr. Waples on Monday --
21 or rather Tuesday -- we provided exhibits --

22 MR. WHITE: Sunday --

23 MR. MEMBRINO: Sunday it was -- we provided
24 the exhibits that Mr. Toedter was going to be using
25 to the State.

1 Now, the accelerated pace of the trial is
2 such that Mr. Toedter is going to testify next
3 week and they also fall without the 10-day rule,
4 and I'm wondering what Mr. White would say to
5 reaching accommodation on that issue.

6 MR. WHITE: For the record, Your Honor, I
7 believe -- I was incorrect. They were supplied
8 on Monday rather than Sunday.

9 And the exhibits that I have looked at that
10 were supplied for Mr. Toedter are those which
11 had not been previously supplied to the State; is
12 that correct?

13 MR. MEMBRINO: That's correct.

14 MR. WHITE: And he was not originally endorsed.
15 It was only late last week that we found out he
16 was going to testify, so I think that until I take
17 a very careful look at those exhibits -- and I will
18 do so today and tomorrow -- I can't waive the 10-
19 day rule.

20 Let's see if we can figure out something on
21 the 10-day rule, though, Your Honor. Maybe we
22 ought to make the 10-rule 10 days prior to the
23 beginning of cross. That seemed to be what you
24 were concerned about.

25 THE SPECIAL MASTER: Do you want to do that?

1 MR. WHITE: That might save a lot of trouble,
2 and we are glad to --

3 MR. MEMBRINO: It may not solve this particular
4 problem because Mr. Toedter's cross-examination
5 may proceed next week.

6 The problem is that the case has picked up.
7 We have been operating under information from the
8 State that cross-examination would take a lot
9 longer than it would.

10 Now, it's fine that they cut it short, and we
11 are all enthused about that, but it has thrown
12 this crimp into our planning for our witnesses.

13 THE SPECIAL MASTER: Let's do the best we
14 can, and let's don't try to resolve now problems
15 that may or may not arise next week. Let's hope-
16 fully work with a view that we can solve them
17 when they appear and that maybe they won't appear.
18 Let's don't anticipate trouble.

19 MR. MEMBRINO: Thank you.

20 THE SPECIAL MASTER: You bet.

21 (Whereupon the hearing recessed
22 at 3:43 p.m. to reconvene at
23 9:15 a.m. on April 16, 1981.)

24 * * * * *

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REPORTERS' CERTIFICATE

1
2 State of Wyoming)
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5 We, Merissa Racine and Viola J. Lundberg,
6 Registered Professional Reporters and Notaries Public,
7 hereby certify that we did at the time, date and place,
8 as set forth, report the proceedings had before the
9 Honorable Teno Roncalio, Special Master Presiding, in
10 stenotype; that the foregoing pages, numbered 3133-3279
11 inclusive, constitute a true, correct and complete tran-
12 script of our stenographic notes as reduced to typewrit-
13 ten form under our direction.

14 We further certify that we are not agents, at-
15 torneys or counsel to any of the parties hereto, nor are
16 we interested in the outcome thereof.

17 Dated this 15th day of April, 1981.

18 Merissa Racine
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20 Registered Professional
21 Reporter

22 Viola J. Lundberg
23 VIOLA J. LUNDBERG
24 Registered Professional
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