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Case # 4993

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, STATE OF WYOMING

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

Civil No. 4993

FILED

5/20

1981

Margaret V. Hampton CLERK
DEPUTY

VOLUME 53

Morning Session

Thursday, May 7, 1981

ORIGINAL

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APPEARANCES.

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OF WYOMING:

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FOR THE SHOSHONE
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SONOSKY, CHAMBERS & SACHSE
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BY: MR. WILLIAM PERRY

CLERK TO THE
SPECIAL MASTER:

MR. LEO SALAZAR
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1 THE SPECIAL MASTER: Please come to
2 order. We will inject a hearing on a number
3 of motions now, and then resume cross-
4 examination of Dr. Mesghinna as soon there-
5 after as we can.

6 (Off the record.

7 THE SPECIAL MASTER: Would Wyoming
8 proceed with the movant and you'll have a
9 few minutes for rebuttal.

10 MR. MERRILL: Thank you, Your Honor.

11 THE SPECIAL MASTER: This is the argument
12 on the Wyoming Motion to Compel Production of
13 Documents dealing with the Crow Indian
14 Reservation and the work done there by HKM
15 Associates.

16 MR. MERRILL: That's correct, Your Honor.
17 May it please the Court and Counsel, I'm
18 James L. Merrill, Special Assistant Attorney
19 General for the State of Wyoming. I'm going
20 to move the podium back a little, if it's all
21 right with the Court.

22 As Your Honor will recall, during the
23 cross-examination of Mr. Kersich, Wyoming
24 moved to compel production of the land
25 classification standards and reports that HKM

1 had developed admittedly by Mr. Kersich, as
2 part of their work for the United States in
3 preparation for reserved rights litigation
4 concerning the Crow Reservation in Montana.
5 At the time that we made that motion, Your
6 Honor denied the motion, but also stated that
7 you would reconsider the State's Motion to
8 Compel Production of those standards and reports
9 upon "Some closer showing" -- "Showing some
10 closer relationship to the topography, land
11 or other physical features of the two
12 Reservations."

13 Your Honor's statement appears in the
14 transcript on Page 1725, of the transcript of
15 this case.

16 The record now contains showings that
17 the land, the topography and the soils
18 characteristics between the Wind River and the
19 Crow Reservations are in fact remarkably
20 similar. The showing in the record comes
21 through the testimony of the United States'
22 own expert witnesses, particularly Mr. Waples,
23 who, Your Honor, will recall, testified that
24 he classified roughly forty to 50,000 acres of
25 land on the Crow Reservation and he has

1 classified a like amount on the Wind River
2 Reservation in preparation for this case.

3 Having done that much work on the two
4 Reservations, the State cannot but admit
5 that Mr. Waples is well qualified to discuss
6 the soils characteristics, the topography
7 and the land types involved in the two
8 Reservations.

9 Now, in their responsive brief, the
10 United States suggests that the record
11 contains very little showing of the similarities
12 between the two Reservations, and I think
13 that an examination of the record will prove
14 that in fact the record contains a showing
15 that there are many similarities.

16 During my cross-examination -- oh, excuse
17 me, voir dire of Mr. Waples when he was
18 offered as an expert witness, I asked him on
19 Page 3299 of the transcript, "Isn't it true
20 that there are major differences between the
21 land types and soils series on the Crow
22 Reservation and Wind River Indian Reservation?"

23 After several objections and discussions
24 on the record, Mr. Waples volunteered that
25 There are not only differences between the

1 Reservations, but also similarities.
2 which weren't even addressed in the question.

3 He said, "On the Wind, in the Wind River
4 Basin, there are large terraces, large gravel
5 terraces. On the Crow there are some large
6 gravel terraces. On the Wind there are many
7 sandstone uplands, residual soil types --
8 excuse me, residual type soils. On the Crow
9 there are sandstone derived soils, but many
10 of them are more shale derived than sandstone
11 derived. So admittedly there are some
12 distinctions.

13 "There are upland soils, which isn't to
14 say that there aren't some sandstone uplands
15 on the Crow because there are."

16 Later in the same voir dire I asked Mr.
17 Waples to "Characterize some of the major
18 differences between the two Reservations with
19 respect to topography."

20 Again Mr. Echohawk objected. After we
21 disposed of objections the witness answered,
22 "Both Reservations have a certain amount --
23 "Certain mountainous area on them. They have
24 everywhere from, from raw alluvial plains in the
25 lower elevations to sandstone and shale uplands,

1 and sloping foothills and mountainous regions.
 2 Topographically they are not at all that
 3 dissimilar."

4 Then the Special Master asked, "Did each
 5 have broad alluvial valley floors?"

6 The Witness replied, "Yes, they do."

7 So, with respect to topography of the
 8 Reservation, the Witness has testified, Mr.
 9 Waples testified that there is everything
 10 from alluvial floors to terraces above those
 11 floors to sloping upland to mountains,
 12 probably on both Reservations.

13 I then asked Mr. Waples to characterize
 14 the differences and similarities between the
 15 Reservations with respect to drainage, which
 16 is as, Your Honor, is well aware, is a major
 17 point of concern in this litigation. The
 18 question was, "Let's start with the surface
 19 drainage characteristics on the Crow and
 20 Wind River. Are they similar or dissimilar?"

21 The answer, "Where the topography is
 22 similar. they are similar."

23
 24 * * * * *

25

1 MR. MERRILL: And since the witness already
2 testified that there are at least four different
3 major topographical features that occur on both
4 reservations, it's fair to say surface drainage
5 characteristics across the majority of the reser-
6 vations would be similar.

7 I asked the witness about the subsurface
8 drainage characteristics such as hydroelectric --
9 the transcript is incorrect, it should be hydraulic
10 conductivity and depth to barrier. The witness
11 replied, "Well, there again, it depends on where
12 you are talking. If you are talking in a gravel
13 terrace of similar type material, they're going
14 to be the same. If you are talking a heavy clay
15 low land along the river and we have the same
16 type of thing in both places on both reservations,
17 they're going to be similar."

18 So through Mr. Waples's testimony it's
19 fairly clear we are talking about similar land
20 types, very similar topography, a very similar
21 drainage characteristics on the Crow Reservation
22 and Wind River Indian Reservation. There are
23 admittedly distinctions. The reservations are
24 approximately 200 miles apart and there are some
25 distinctions with respect to the soils. The

1 Federal Government's own expert witness says
2 that by and large the land types are the same,
3 and where you have the some topography you
4 are going to have roughly the same surface
5 drainage characteristics, and where you have
6 alluvial valley floors and terraces, you are
7 going to have the same subsurface drainage
8 characteristics.

9 Now, those two particular land forms are
10 important because those are the areas in which
11 HKM has classified the land as arable on the
12 Wind River Indian Reservation. There are
13 other similarities between the work done by
14 HKM to classify land on the Crow Reservation
15 and to classify land on the Wind River Reser-
16 vation. First is the simple fact that both
17 studies were performed by HKM, the same engineer-
18 ing firm in Billings, Montana. Both studies
19 were performed under contract with the Bureau
20 of Indian Affairs. The purpose of both the
21 studies was to define an arable land base on
22 each reservation from which an irrigable land
23 base or the amount of practicably irrigable
24 acres could be developed.

25 The ultimate purpose of both studies was

1 the same, and that was to form a factual basis
2 on which to claim a certain quantity of reserved
3 water rights for general stream adjudication
4 which is going on in Montana precisely like it
5 is here, except it's in a different procedural
6 stage.

7 There are other physical similarities
8 between the two reservations. The Crow, like
9 the Wind River Reservation, lies in the Big
10 Horn River drainage, and geographically the
11 Indian Reservation, the closest to the Wind
12 River Reservation is the Crow Reservation.
13 So I think it's pretty clear simply from the
14 facts in the record that the reservations
15 are remarkably similar and that the land
16 classification programs were done for the
17 same purpose by the same people on these
18 reservations.

19 The United States in their brief in
20 opposition to our motion to compel raised
21 a number of remarkable theories as to why
22 they shouldn't be required to produce the
23 land classification standards and reports;
24 they raised the trial preparation argument,
25 this stuff was prepared in anticipation of

1 trial; they say that the land classification
2 reports somehow contain attorneys' mental
3 impressions; they say it's the work product
4 of attorneys; they claim the attorney-client
5 privilege, and just so that they get every-
6 thing else in, they claim something called
7 basic fairness, which I've yet to see cited
8 anywhere in the Rules of Civil Procedure
9 concerning whether or not documents are dis-
10 coverable.

11 Now, each of these same privileges, abso-
12 lute privileges, partial privileges, could be
13 claimed with respect to land classification
14 standards in a case where there are no dis-
15 tinctions, except procedurally this case is
16 a little bit further along than the general
17 stream adjudication cases in Montana. The
18 trial preparation presumably would apply to
19 the land classification standards in this
20 case, which the United States turned over to
21 the State of Wyoming in depositions almost
22 a year ago without raising any privilege
23 whatsoever. They claimed that the land classi-
24 fication standards somehow contained attorney's
25 mental impressions and they cite a case called

1 Duplan Corporation versus Moulinage et Re-
2 torderie de Chavanoz, several French words
3 which I will give the reporter later. But
4 the very first sentence of that opinion dem-
5 onstrates it's inapplicability to this case,
6 and I will quote the first sentence by a
7 certain Judge Widener, "This case presents
8 the question whether an attorney's opinion
9 work product material developed in prior
10 terminated litagation may properly become
11 the subject of discovery in connection with
12 subsequent litagation," close quotes.

13 Now, that doesn't apply for several
14 reasons. First of all, the Montana lita-
15 gation has not been terminated. The Montana
16 litagation is ongoing. It's procedurally not as
17 far advanced, as I have already pointed out. How-
18 ever, that case will more than likely go to trial
19 at some point. I suppose the United States will
20 argue they don't have to produce the land classifi-
21 cation standards to the Crow general stream adjudi-
22 cation and that will be for Montana to decide
23 whether they have to produce them here.

24 But more interesting is the United States'
25 suggestion that the land classification work done

1 by HKM somehow contains attorney's mental
2 impressions. It's as if they're suggesting
3 that the attorneys for the Bureau of Indian
4 Affairs or the Department of Justice have
5 somehow interfered with the free exercise of
6 professional judgment by HKM in deciding what
7 land classification standards to adopt and how
8 to apply those standards to the data they develop
9 in the field. I don't think that is the case.
10 I think Your Honor has seen enough of HKM's
11 work to know they are not going to permit
12 lawyers from the Department of Justice to tell
13 them how to do their soil studies.

14 The third objection the United States raises
15 is the Work Product Doctrine. As the Court is
16 well aware and as the Rules of Civil Procedure
17 are explicit on the point, the work product doc-
18 trine applies to a work product generated by
19 lawyers. I'm not aware HKM has any lawyers working
20 for them writing land classification reports.
21 I think that this one was just thrown in to make
22 the list complete. There is no showing at all
23 the land classification reports developed by HKM
24 contain any work product, and I don't think the
25 Court can rely on a mere assertion of that by

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counsel and use that for a basis of denying
 discovery. We could all say that everything is
 an attorney work product because we talk to our
 experts about what they do, we obtain information
 from them, and they make suggestions, too. That
 does not insulate experts' work from discovery.

The last objection the United States raises
 is the attorney-client privilege. I would simply
 point out to the Court that if the attorney-client
 privilege applies to land classification standards
 in the Crow case, it would apply those standards
 in this case. They didn't claim the privilege.
 The facts behind them and how the standards are
 developed are practically identical. Therefore,
 I think the Court can dismiss the attorney-client
 privilege claim as not applying, as well.

Finally, the United States argues it's
 basically unfair for them to be required to turn
 over the Crow standards in this case. I would
 suggest to the Court it's not at all basically
 unfair to require the United States to be con-
 sistent in the policies and the factual theories
 under which they pursue the adjudication of their
 reserved rights at claims throughout the western
 states.

1 The final point that the United States makes
2 somewhat surprised me when I was reading through
3 their brief, and the point appears on page 7 of
4 the brief. I believe it's page 7.

5 THE SPECIAL MASTER: The conclusion?

6 MR. MERRILL: I'm sorry, it's page 6, Your
7 Honor. In the second full paragraph they are
8 discussing whether copies of the preliminary
9 data that we have requested may or may not be
10 ordered to be produced in Montana and suggest
11 a court order for this material would have to
12 be sought after and obtained in Montana before
13 the material is disclosed. Now, I don't know
14 whether the Department of Justice is suggesting
15 if you ordered them to produce this material
16 they are going to defy that order, but they are
17 clearly a party in this case and the Court has
18 personal jurisdiction over the United States,
19 the Court also has continuing jurisdiction over
20 the various experts for HKM who have testified
21 in this case, and I believe that if the Court does
22 make such an order compelling the United States
23 or HKM to produce standards, that being within
24 the jurisdiction of this court, they're bound
25 to follow such an order.

1 THE SPECIAL MASTER: I can't see where they
2 may find themselves having to interplead, so to
3 speak, for some direction from the courts because
4 if they comply here, they are in contempt up
5 there, and vice versa.

6 MR. MERRILL: Your Honor, I'm not aware that
7 there is any order outstanding in Montana that
8 prohibits them.

9 THE SPECIAL MASTER: There may be. I know
10 if I were a Crow counsel and something like
11 this were requested of information of my client's
12 reservation to be used in another case, I would
13 object very strenuously if it be used any other
14 place than the case in which it's being used.

15 You have made your demands and you have had
16 your refusals from HKM people?

17 MR. MERRILL: And we have been refused by
18 the Department of Justice. We felt it more
19 proper to make the request directly to the
20 attorneys and not to the experts for the other
21 side. It seems to me the real issue that is
22 brought up by the Motion to Compel is whether
23 the Court is going to accept the land classifi-
24 cation work that HKM has done just on its own.
25 And perhaps an analogy would help to illustrate

1 the point. Let's say that you are running a
2 professional business, a lawyer's office, a
3 doctor's office, an accounting business of some
4 sort, and you are looking for somebody who will
5 work for you and who will do professional quality
6 work. And applicant comes to you and says, "I
7 can do the job, I do good work," and you say,
8 "Well, why should I believe that?" And they
9 throw their resume across to you and you look at
10 their resume and it says these are the kinds of
11 work that I have done in the past. I've done
12 similar work for other people, and here are
13 some publications I have written as a result of
14 doing that work. And you say, "Fine, that looks
15 great. I would like to see a copy of that report
16 that you have listed on page 3 of your resume and
17 talk to some people about your work."

18 THE SPECIAL MASTER: You are telling me that
19 is analogous to this situation?

20 MR. MERRILL: I believe so because if the
21 applicant then says, "No, you cannot see the re-
22 port and you cannot talk to the people I did the
23 work for," you are going to have to take it on
24 faith, and at best you are going to be suspicious
25 of what is going on.

1 Why is it they will not disclose the
2 results of that work so you have some idea of
3 the consistency of the work that they do?

4 I think that the analogous situation holds
5 in this case. Why shouldn't the United States
6 be required to disclose the land classification
7 standards that they have used on the Crow Reser-
8 vation? Why shouldn't the Court have other land
9 classification programs with which to compare
10 and evaluate the reasons.

11 THE SPECIAL MASTER: It just strikes me it
12 simply doesn't have a great deal of bearing upon
13 the issues before me in this case, and again,
14 I said if you can show some relationship in the
15 nature of the litigation, although this is in
16 Federal Court in Montana and in State Court here,
17 the nature of the similarities in the terrain
18 features you describe, and you stated there were
19 some of those, it might warrant a look at their
20 work up there. But I still, I guess, I stated
21 in my last order, am sort of putting the burden
22 of proceeding on you in this matter to get you
23 to change my mind, so go ahead with your argu-
24 ment.

25 MR. MERRILL: I understand you are, Your Honor.

1 I would point out the difference in Courts, if
2 I'm not mistaken, and perhaps Tom knows more
3 bout this, the case in Montana, the low-lying
4 canal case is a general stream adjudication
5 case which was dismissed out of Federal Court
6 for lack of jurisdiction, and that dismissal
7 has been appealed to the United States Court
8 of Appeals for the 9th Circuit. There are
9 also pending in the Montana State Courts various
10 general stream adjudications which are being
11 held in abeyance right now to give everyone
12 time to get their work products together.

13 THE SPECIAL MASTER: That's like the same
14 concept we had here in this case?

15 MR. MERRILL: Very similar, Your Honor, in
16 that this case was originally removed to the
17 Federal-District Court, who then remanded it
18 back to Judge Joffe.

19 THE SPECIAL MASTER: I'm glad to know we
20 are ahead of somebody on our time table in those
21 matters.

22 MR. MERRILL: That's essentially my argu-
23 ment, Your Honor. I understand the United
24 States is going to put on testimony in opposi-
25 tion to the motion, if necessary, and I may need

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to make a few more points, depending on what is brought out in the testimony.

THE SPECIAL MASTER: Sure, sure.

MR. MERRILL: Thank you.

THE SPECIAL MASTER: Mr. Echohawk?

* * * * *

1 MR. ECHOHAWK: May it please the Court,
 2 Your Honor, Mr. Merrill has started his
 3 argument as, of course, he started his brief,
 4 saying the Reservations are similar. The
 5 United States addressed that point in its
 6 brief saying that the Crow standards in this
 7 case are irrelevant. We have also cited
 8 similar passages of testimony from Mr. Waples
 9 and Mr. Toedter. Certainly Mr. Waples says
 10 where the Reservations are similar the soils
 11 would be similar, where they're not, they're
 12 not. But I mean you could say that about
 13 anywhere in the United States.

14 Should the Master require the United
 15 States to put on testimony it can put on
 16 testimony from Mr. Waples, more detailed, and
 17 Mr. Kersich, if necessary, to show the
 18 relationship overall between the two Reservations.

19 We're talking very general on Mr. Waples'
 20 voir dire as to the two Reservations. I think
 21 if you want to get real specific as to the
 22 land classification standards and the derivation
 23 of such for the Wind River Reservation as
 24 opposed to the Crow Reservation, I think that
 25 it will be made quite clear that in doing land

1 classification work you develop site specific
2 standards. I believe that we had testimony
3 from Mr. Kersich on the development of how
4 you draw some things in the area, in which he
5 testified that he used the Bureau of Reclamation
6 studies, I think from Muddy Ridge, around the
7 area, to develop their standards for this case.
8 HKM did similar things in the Crow case
9 in that area. There are two different
10 derivations. Certainly topography may be
11 similar, but the topography may be similar in
12 Denver. Just because somebody does land
13 classification work in Denver doesn't mean it
14 can apply to the Wind River Reservation.

15 The United States has complied with
16 Wyoming's request to produce land classification
17 work done by the Bureau of Reclamation upon
18 which HKM relied, and that information is
19 being generated and produced right now. That
20 certainly is relevant because HKM did rely on
21 that in this area within the Reservation.
22 We're turning that over, the United States has
23 no objection to that.

24 But it's just totally irrelevant to draw
25 on land classification standards or land

1 classification work done on another Reservation
2 in another state. And if the Master wishes,
3 the United States can put on such testimony.

4 In relation to the other arguments raised
5 by the State of Wyoming in opposition to the
6 points discussed by the United States, as
7 regards to privilege, Mr. Merrill calls those
8 remarks remarkable. The United States has
9 cited numerous cases in its briefs, and I
10 direct the Court's attention to Breedlove
11 versus Beech Aircraft Corporation case, 57
12 Federal Rules Decisions, 1972.

13 In that case, that case dealt specifically
14 with reports prepared by experts for the
15 attorneys in pursuit of the litigation.

16 Again, Your Honor, the United States can
17 put on such testimony to show that the land
18 classification reports, there are several
19 drafts of those reports, were prepared directly
20 at the request of the attorneys for the United
21 States Department of Justice.

22 THE SPECIAL MASTER: Did they deal with
23 fatalities or crashes from similar aircraft
24 in different lawsuits?

25 MR. ECHOHAWK: Dealt with the crash of --

1 in that lawsuit, it was the attorneys for
2 Beech, asked their experts to prepare infor-
3 mation relating directly to that case. I
4 think that is correct, Your Honor.

5 Your Honor, the main point, which is of
6 the utmost importance to the United States
7 is that the State of Wyoming, through this
8 case, is attempting to get a work product
9 generated in preparation of trial in another
10 case that has not yet gone to trial.

11 THE SPECIAL MASTER: Are you saying that
12 the South Dakota case has a bearing on this
13 too?

14 MR. ECHOHAWK: Yes, this has a bearing on
15 all general adjudicated cases that the United
16 States is pursuing water rights in. There
17 are many cases in Montana, Arizona, South
18 Dakota, they're all in the preparation phase.
19 As the Court is well aware, I believe Mr.
20 White is the attorney for the State of South
21 Dakota. Similar reports and similar documents
22 will be prepared in anticipation of trial in
23 that case. It's of the utmost importance to
24 the United States that the information prepared
25 in preparation of trial in its preliminary stages

1 not be discovered in other cases. I mean this
2 is certainly a very convenient tool for Mr.
3 White to get at not only the information in
4 the Wyoming -- in the Montana cases, but also
5 in the South Dakota cases and for the other
6 attorneys to create a lawsuit in one situation
7 to get at documents that may or may not be
8 discoverable in another lawsuit.

9 The work product point raised in Rule 26B3
10 is admittedly a qualified privilege, but
11 Wyoming, in order to overcome that qualified
12 privilege must state, must show a substantial
13 need for those documents in the preparation
14 of its case in chief. Mr. Merrill fails to
15 address that point.

16 We've had -- We've seen time and time again
17 Wyoming's attempt to get at cross-examination
18 of other work as how that relates to HKM's
19 land classification work here. Specifically
20 they've used Bureau of Reclamation work around
21 the area to cross-examine HKM and even Dr.
22 Mesghinna yesterday.

23 We still fail to see how Wyoming need
24 the Crow information to put on its case in
25 chief, in this particular item. And Wyoming

1 must further show that it's unable, without
2 undue hardship, to obtain the substantial
3 equivalent, the materials by other means. If
4 Wyoming feels that the Crow Reservation is so
5 absolutely essential to this case and they
6 want land classification information from the
7 Crow Reservation, Your Honor, as I pointed out
8 in my brief, they can make a request to enter
9 the Crow Reservation and do the land classification
10 program there.

11 Wyoming has absolutely failed to address
12 and failed to meet the required test to
13 overcome the qualified privilege contained in
14 Rule 26B3.

15 In relation to the attorney work product
16 or mental impressions, the United States is
17 also prepared to present testimony as to the --
18 how those particular land classification reports
19 were prepared to draft copies. Those reports
20 are somewhat similar in format to the land
21 classification reports present in this case.
22 They are the preliminary early versions pre-
23 pared at the direction of the attorney to help
24 the attorney, you know, prepare for his case.
25 And in that process, there is great interchange

1 back and forth between the attorneys and the
2 experts. And contained within that, Your
3 Honor, by its very nature, are the mental
4 processes of the attorneys.

5 Related to the other arguments, Your
6 Honor, is --

7 THE SPECIAL MASTER: You want a glass of
8 water?

9 MR. ECHOHAWK: Yes, if I could.

10 THE SPECIAL MASTER: Here you are.

11 MR. ECHOHAWK: Thank you. The other
12 argument raised by the United States is that
13 this information is also protected by the
14 attorney/client privilege. In this situation
15 the Justice Department is in fact the lawyers
16 for the Department of Interior and the Bureau
17 of Indian Affairs. This information was
18 prepared in contract, through a contract with
19 the Bureau of Indian Affairs, our client, and
20 as such, the relationship back and forth
21 between the Department of Interior and the
22 Justice Department is in fact the same as any
23 other attorney/client privilege. And the
24 information prepared back and forth in
25 anticipation of litigation and through our

1 client's agent, which would be HKM, that
2 information is of a confidential nature
3 while we're preparing our case. Once the case
4 is prepared and ready to go to trial, Your
5 Honor, the documents are then usually, we
6 usually turn those documents over through
7 discovery and the open interchange, hopefully
8 of some resolution before trial.

9 And finally, again, Your Honor, the --
10 just to recap, the United States feels it is
11 vitally important to keep trial preparation
12 work that is protected by Rule 26B3, to
13 keep that information in fact in our other
14 lawsuits that have not yet gone to trial. In
15 my brief, I cited several cases, that I
16 prepared, that regarded documents prepared for
17 trial in cases that had already gone to trial
18 and closed and even those documents were
19 protected. It seems that the documents pre-
20 pared for trial that have not yet gone through
21 the trial stage and has yet not even gone to
22 discovery stage should even receive more
23 protection than trials that have since been
24 closed.

25 I said if the Court requires, I would also

1 I have my witnesses available should testimony
2 be required. Thank you.

3 THE SPECIAL MASTER: All right. Thank
4 you, Mr. Echohawk. Do you wish to surrebut for
5 a few minutes, Mr. Merrill?

6 MR. MERRILL: If I could, Your Honor.

7 THE SPECIAL MASTER: All right.

8 MR. MERRILL: I would first like to point
9 out to the Court that the state of the record
10 to this motion, I already quoted extensively
11 from the testimony that shows the similarities,
12 and I'm sure the Court has decided one way or
13 another on what you think between the
14 similarities of the two Reservations, through
15 the Government's own witnesses. It's pretty
16 clear there are similar land forms with
17 similar characteristics, particularly drainage
18 ability, which we're very interested in for
19 an arable land base in both cases.

20 Mr. Echohawk talks about the qualified
21 privilege under Rule 26B3, and that the
22 State has not made any showing of substantial
23 need for those materials. I would simply
24 point out to the Court a way in which we
25 might use the materials. We might have one of

1 the experts for the United States on the
2 witness stand and say, "Mr. Expert, isn't it
3 true that you've done land classification
4 work on other Reservations?" "Yes, I have."

5 "Well, isn't it true that in doing land
6 classification work on other Reservations,
7 the two Reservations have very similar land
8 types?" "Yeah, in some places they do."

9 "Well, isn't it true that in classifying
10 the land as arable on the two different
11 Reservations you used very different land
12 classification standards?" "Well, yeah, I did."

13 "Isn't it true that one of the standards
14 that's different is the standard for X?"
15 "Yes, that's true,"

16 "Well, why is it that one Reservation you
17 you used X and on another Reservation you
18 used 3X?"

19 That's part of the information that we
20 could use in developing cross-examination of
21 the federal experts, not only the soil
22 scientists, but the engineers and the economists
23 who are also supposed to have relied on these
24 land classification standards and the
25 information developed under them. And I would

1 think that the questions concerning why a
2 particular set of standards was chosen as
3 opposed to another set of standards or
4 variance or various versions in preliminary
5 drafts might be of great interest to the
6 Court as well as to counsel. I think thus
7 there is a substantial need for Wyoming to
8 have access to those documents to prepare
9 our cross-examination as well as our case in
10 chief, in which we might point out the
11 disparities in the land classification work.

12 I think it's pretty clear to the Court
13 from the attitude that the United States
14 has taken with respect to discovery in this
15 case, that we cannot get the information
16 elsewhere. Mr. Rogers for the Crow Tribe
17 has already asserted a variety of privileges
18 on their behalf, that the Crow Tribe would
19 not turn over these standards nor would we
20 be permitted to perform our own land classi-
21 fication work on their lands. We have trouble
22 enough getting on the Wind River Reservation
23 in this case.

24 The final point is the attorney/client
25 privilege, which Mr. Echohawk says somehow

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evaporates once everyone's reached final conclusions, that's simply not the case in the law, and that's simply not how this case has been prepared and tried. The United States, the Indian Tribes and the State of Wyoming have all exchanged preliminary information through depositions, through answers to interrogatories, through requests for production, and in no case up until now has the United States claimed that we will -- we're not quite done with that, so there's this attorney/client privilege that attaches, once we're done we'll let you know and turn it over. What we're playing is a whole new ballgame with respect to discovery that's very different from the rules that we have all been playing by for the past couple of years. Thank you, Your Honor.

* * * * *

1 MR. MERRILL: Thank you, Your Honor.

2 THE SPECIAL MASTER: Thank you very much. I
3 want to compliment both of you on your presentation
4 on this motion and your vigor and your enthusiasm
5 and determination in your arguments. I am ready to
6 make a ruling, and I don't have to have any submis-
7 sion of any further briefs for it.

8 The ruling is this: That I have not found any-
9 thing in your arguments or in the papers submitted
10 in support thereof to change my mind. I think if
11 the ---I think the strongest duty that is before us
12 is to assure that we don't open up a can of worms
13 that spills off into four and five and six differ-
14 ent lawsuits while we add another interminable area
15 of delay and postponement and continuation of liti-
16 gation while we assert costs of duties on different
17 reservations.

18 And I may or may not agree with some of the
19 bases that are cited for me in the Unites States'
20 response, but I still don't feel that this Court
21 has any business compelling the production of
22 HKM's or anybody else's materials from some other
23 reservation.

24 We made some qualifications on this the first
25 time around, but I believe that there are still

1 no bases for me complying with that motion that the
2 land classification work on the Crow Reservation be
3 produced in this lawsuit. I think this lawsuit has
4 determined the quantification of waters to be
5 made and the reserved doctrine to the Wind River
6 Indian Reservation should depend upon that testimony
7 which is clearly acceptable and which has not been
8 refuted and which has been measured and clipped and
9 distilled, refined properly into what is left in
10 the way of practicably irrigable acreage. There
11 will be a lot of other matters that should affect
12 it, but I doubt very much if comparisons of the land
13 classifications of the same client on two different
14 reservations would have that much bearing on this
15 case. So I'm going to rule that way. If you want
16 to prepare an order, you can; I'll sign it. If
17 you don't, we will let the record speak for itself.

18 Mr. White, are you ready to proceed with cross-
19 examination of Dr. Mesghinna?

20 MR. WHITE: Yes, sir, I am.

21 THE SPECIAL MASTER: All right. Dr. Mesghinna,
22 will you take the stand, please?

23 MR. MERRILL: Your Honor, before Mr. White
24 proceeds, there is another matter that I forgot
25 to bring up. We have obtained another copy of the

1 Stetson computer program from some of our engineers
2 in Denver. That copy is thicker because it also
3 contains the HKM computer program listing about
4 which the United States expressed concern yesterday.
5 So the HKM listings are also included with that copy,
6 and I would advise the Court we are working to get
7 the rest of these back, as well.

8 THE SPECIAL MASTER: We appreciate that very
9 much. We threw these out yesterday. Do you want
10 this copy now?

11 MR. MERRILL: I would appreciate the Court dis-
12 posing of that copy.

13 THE SPECIAL MASTER: This has the notes on it
14 like yesterday or --

15 MR. MERRILL: It may or may not. I'm not sure.

16 THE SPECIAL MASTER: We will dispose of them
17 summarily.

18 MR. MERRILL: Thank you, Your Honor.

19 CROSS-EXAMINATION (RESUMED)

20 BY MR. WHITE:

21 Q Dr. Mesghinna, isn't it true you had no role in
22 developing the land classification standards which
23 were used for the classification of the HKM arable
24 land base?

25 mesghinna - cross - white

1 A. Could you say the question again, please?

2 Q. Isn't it true that you played no role in the develop-
3 ment of the land classification standards which were
4 used in the development of the HKM arable land base?

5 A. Yeah, I did not play at all.

6 Q. Isn't it true you played no role in developing that
7 land base by the application of those standards?

8 THE SPECIAL MASTER: He has answered that. He
9 said, "I played no role."

10 MR. WHITE: The first question was respect to
11 the creation of the standards, Your Honor. The
12 second question was with respect to the application
13 of the standards in developing the land base.

14 THE SPECIAL MASTER: Did you play a role when
15 those standards were applied to this Reservation?

16 THE WITNESS: Well, I have seen what -- I have
17 seen and observed what HKM has been doing, for example,
18 in taking some tests, soil classification tests, and
19 so on in the field.

20 Q. (By Mr. White) Did you participate in the decision
21 to classify any parcel of land as arable or nonarable?

22 A. No, I did not participate in that respect except what
23 I have seen was a good and proper way of doing it.

24 Q. Okay, you previous testified that hand-move sprinklers

25 mesghinna - cross - white

1 would be used for corn; is that correct?

2 A. Yes.

3 Q. That would mean that there would be no hand-move
4 sprinklers used for these fields at elevations
5 greater than 5900 feet; is that correct?

6 A. There is a possibility where hand-move sprinklers
7 will be used in elevations higher than 5900.

8 Q. Could you describe that possibility?

9 A. The possibility that in areas where we have less
10 than 40 acres of land we generally have used hand-
11 move sprinklers.

12 Q. So if you were to describe a field having less than
13 40 acres in it, that would be a hand-move sprinkler
14 field?

15 THE SPECIAL MASTER: No, he said there would
16 be a possibility it could be.

17 THE WITNESS: Let me answer it, sir. In
18 generally, you see, our criteria is -- our criteria
19 is, in general, less than 40 acres hand-move, but
20 we have also some acreages more than 40 acres
21 which are hand-move.

22 Q. (By Mr. White) Okay. Is it true that if you have
23 40 acres or smaller in a field, that's going to be
24 hand-move?

25 mesghinna - cross - white

1 A. That's going to be hand-move.

2 Q. And some of the fields that are greater than 40
3 acres will also be hand-move; is that correct?

4 A. A few of those will be hand-move.

5 MR. WHITE: Your Honor, could I close the door
6 behind him. When someone walks by, I can't hear
7 him.

8 THE SPECIAL MASTER: I'll get it.

9 Q. (By Mr. White) Which fields, if you know, larger
10 than 40 acres and above 5900 feet in elevation have
11 you designed hand-move sprinklers for?

12 A. Which fields?

13 Q. Yes.

14 A. I have said those fields which are less than 40
15 acres.

16 Q. I'm sorry, I thought you said that in some cases
17 fields larger than 40 acres. No, no

18 A. No, no, in some cases. That is in some cases.

19 Q. I'm asking you about those some cases. Which fields
20 are those?

21 A. Okay. In areas of elevation greater than 5900, I
22 don't believe we have any hand-move greater than
23 40 acres.

24 Q. Okay. Now, let's turn to the fields that are at
25 mesghinna - cross - white

- 1 elevations less than 5900.
- 2 A. Yes.
- 3 Q. Is it true there that all fields 40 acres and
4 smaller use hand-move sprinklers?
- 5 A. Yes, sir.
- 6 Q. At elevations less than 5900 --
- 7 A. Okay.
- 8 Q. -- are there some fields larger than 40 acres you
9 use hand-move?
- 10 A. Let me explain to you the whole process.
- 11 Q. Okay.
- 12 A. Above 5900 there is no corn, as we have said, so we
13 are not worried about having 12 percent of our
14 sprinklers to be hand-move. So I think we have
15 understood each other on that one. But the compli-
16 cation comes when you are below 5900. When you are
17 below 5900, first of all, all fields which are less
18 than 40 acres are hand-move.
- 19 Q. Okay.
- 20 A. However, in order to make it 12 percent hand-move,
21 we have to add certain percentage from the side-roll
22 to hand-move.
- 23 Q. What percentage is that, Wold?
- 24 A. I can give you it.
- 25 mesghinna - cross - white

1 Q Thank you.

2 A I have it in front of me. Let me go one by one for
3 each unit.

4 Q All right.

5 A That will make things easier.

6 In South Crowheart there is 9 percent of the
7 area -- about 9 percent of the area will be acreage
8 less than 40 acres, meaning fields less than 40 acres.
9 So these are all hand-move.

10 Q Okay. Is South Crowheart totally below 5900 feet?

11 A Oh, yes, yes. Let's go to Arapahoe. In Arapahoe
12 we have 8 percent of the fields are less than 40
13 acres, so we have hand-move in here. In Riverton
14 East we have 7 percent less than 40 acres, so this
15 is all hand-move. In Big Horn Flats we have 6 acres
16 of the land -- of the fields less than 40 acres.

17 Q You said 6 acres?

18 THE SPECIAL MASTER: Six percent?

19 THE WITNESS: Yes, 6 percent. Six percent less
20 than 40 acres. Now, I didn't say about North Crow-
21 heart. North Crowheart, about 9 percent.

22 Q (By Mr.White) Let me interrupt you for just a
23 minute, Wold. Are all these values you are giving
24 us now for areas less than 5900, or does it include

25 mesghinna - cross - white

1 the entire project?

2 A. You see, the problem when we talk of North Crowheart
3 and Big Horn Flats, they touch both areas, you see.
4 Let's clear the first three.

5 Q. Okay.

6 A. Okay, South Crowheart, Arapahoe, and Riverton East,
7 then we will go to more complex ones.

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1 A (Continued) So in South Crowheart, it means
2 we have to add three percent greater than 40
3 acres to make up that 14 -- that 12 percent
4 of cost. Now, before I go, those three
5 percent, their costs and design is for side
6 rolls, which is almost twice the cost of
7 hand moved, so we have no choice but we have
8 to use that cost. Okay. The same thing with
9 all the rest.

10 For Arapahoe we have added four percent
11 of the side rolls, for side rolls we have
12 assumed then as if they are hand moved. And
13 for Riverton East it means we have added five
14 percent of the side rolls to make it 12 per-
15 cent of cost.

16 Now, I think you want me to give you a
17 breakdown in North Crowheart and Big Horn
18 Flats. That will take a short time.

19 THE SPECIAL MASTER: Is that what you
20 want him to do?

21 MR. WHITE: Yes. The Witness always
22 anticipates where I'm going, it's a nice
23 witness to have on the stand.

24 (Brief pause.)

25 mesghinna-cross-white ✓

1 THE WITNESS: I have to go through a long
2 calculation in order to --

3 Q (By Mr. White) Can you give us approximate
4 numbers?

5 A Why don't we approximate it the same as overall
6 for the North Crowheart, nine percent it would
7 be. If you want me I will go through it. It
8 will take some time, at least an hour.

9 Q Why don't you approximate the breakout above
10 and below 5,900. If you're willing to live
11 with that, I am.

12 A Okay. Let's make it the same percentage, you
13 know, nine percent in --

14 Q In North Crowheart?

15 A Yes.

16 Q Nine percent of the fields below 5,900 --

17 A And nine percent of the fields above 5,900
18 will be --

19 Q Less than 40 acres?

20 A Less than 40 acres.

21 Q How about Big Horn Flats, six and six?

22 A Big Horn Flats is a very small area in above
23 5,900, only 240 acres in total, I believe,
24 and it is -- Let me check it.

25 mesghinna-cross-white

(Brief pause.

1

2

A Let's assume -- Let's take that in Big

3

Horn Flats, there is zero percentage of hand

4

move.

5

Q Above 5,900?

6

A Above 5,900.

7

Q In your design work, have you simply applied

8

general percentages or have you actually

9

identified those fields greater than 40 acres

10

which use hand-moved sprinklers?

11

A No, we did --

12

Q Just general percentage?

13

A General percentage. We can identify it if

14

necessary, you know, if it is necessary we

15

can identify them. I mean it's --

16

Q My question was have you?

17

A Okay, no.

18

Q Okay.

19

A We didn't find it necessary.

20

Q Could you please describe once more, tassling

21

on the corn, how the hand-move sprinklers

22

will be moved?

23

THE SPECIAL MASTER: Would you please ask

24

that question again?

25

mesghinna-cross-white

1 Q (By Mr. White) Could you please describe
2 once more, tassing on the corn, how the
3 hand-moved sprinkler will be moved?

4 A I wish I brought a sample of pipe of hand
5 move from my office, I had it in my office.
6 There are quick coupling joints that you
7 just pull them out and take them to the next
8 field.

9 Q So you just walk out in the field and un-
10 couple the pipes and move them to the next
11 location?

12 A That's what I believe, yeah.

13 Q That's how you've designed those to be moved?

14 A Yeah, hand moved is really human, all of it
15 is human, it's labor work.

16 Q It is fairly labor intensive?

17 A It is labor, there's no question.

18 Q With respect to small grains, did you assume
19 that there would be the same net irrigation
20 requirements for all small grains? In other
21 words, same irrigation requirement for oats
22 as opposed to barley?

23 A Yeah, we use the same, the KC factor that --
24 the crop coefficient factor that you get from
25 mesghinna-cross-white

1 Jensen is the same for small grains. They --
2 They haven't come up to subdivide them.

3 Q Based on your professional experience, isn't
4 it true, however, that small grains have,
5 between one another, different net irrigation
6 requirements?

7 A I don't think I would dare to say that, Mr.
8 White, because this land, you cannot make a
9 fine tuning on this land, on this work, really,
10 especially on small grains. There could be,
11 but it is not tangible that we can really,
12 you know, differentiate it.

13 Q Dr. Mesghinna, for the North Crowheart project,
14 how long do you anticipate it will take the
15 completion of the construction of that project
16 and get it into operation?

17 MR. CLEAR: Objection, Your Honor, this
18 was not a subject of his direct examination.

19 THE SPECIAL MASTER: Well, it was what
20 I think is an improper question. What
21 difference does it make --

22 MR. WHITE: It has a lot to do with costs.

23 THE SPECIAL MASTER: So does anything else
24 that's extended beyond an anticipated time or

25 mesghinna-cross-white

1 extends over projected times, but what
2 difference does that make to the matter here?

3 MR. WHITE: Well, the question of the
4 cost is very much a portion of the determination
5 of practicably irrigable acreage, Your Honor.

6 THE SPECIAL MASTER: I recognize that.

7 MR. WHITE: So, I'm asking him what the
8 anticipated time to construct that project is.

9 THE SPECIAL MASTER: His anticipated time
10 to construct the project, what difference does
11 that make? If the project runs over his time,
12 then I see what costs erupt, but what
13 difference does it make how much time it takes
14 to build it?

15 MR. WHITE: Well, Your Honor, because --

16 THE SPECIAL MASTER: You see my point?
17 My point is if it drags on an unreasonably long
18 time and the time to construct goes over the
19 anticipated work schedule that the engineers
20 project, I can see some costs overrun as a
21 result of that, but that has nothing to do, I
22 think, with their case.

23 MR. WHITE: Well, it goes further --

24 THE SPECIAL MASTER: All right, answer the
25 question, I think you two have your own thing

1 going anyway. Go ahead, Dr. Mesghinna.

2 THE WITNESS: Mr. White, I think Mr.
3 Dornbusch would be more qualified to discuss
4 this matter.

5 Q (By Mr. White) Okay. We'll ask him then.

6 Is it true then that you've made,
7 developed no schedule of expenditures for
8 the construction of these projects year by
9 year?

10 A Well, I'd like -- I wish you could follow up
11 this question to Mr. Dornbusch.

12 Q I asked whether you prepared one.

13 THE SPECIAL MASTER: He's answered that
14 twice for you now, I don't think you're
15 entitled to three cracks at him.

16 He said twice now if you'll ask this of
17 Mr. Dornbusch.

18 MR. WHITE: I don't want to be in a
19 position for Mr. Dornbusch to say Dr. Mesghinna
20 prepared all that work, Your Honor, and we've
21 already had our shot at Dr. Mesghinna. So
22 if your answer is no, we'll just go on.

23 THE WITNESS: The point is we discussed
24 back and forth on this matter, you know, we

25 mesghinna-cross-white

1 discussed back and forth on this matter with
2 Mr. Dornbusch and so. So it seems the final
3 decision is on Mr. Dornbusch. I think he can
4 answer the question, he can elaborate it
5 more and give you whatever information you
6 want on this.

7 Q (By Mr. White) So Mr. Dornbusch won't have to
8 defer to you, he can answer the question,
9 correct?

10 A I hope so.

11 Q Dr. Mesghinna, I think you indicated on cross-
12 examination by the Tribes that there was no
13 drainage problem in the areas covered by your
14 unit; is that correct?

15 A If those areas are virgin areas, meaning that
16 no irrigation is going on.

17 Q Without irrigation you don't have a drainage
18 problem, do you?

19 A Well, not that I know, and from the works that
20 I have seen, I don't remember of any drainage
21 problems present.

22 Q Dr. Mesghinna, in addition to the design work
23 that we described yesterday for the wasteways,
24 did you do any design work for roads?

25 mesghinna-cross-white

1 A Design work for roads?

2 Q Yes.

3 A How do you mean design?

4 Q Same level of design that you did on the
5 wasteways.

6 A As I have discussed it yesterday, we have the
7 embankments,, meaning the road itself and this
8 is compacted soil and then I said we have put
9 gravel on top of the road on one side and in
10 some cases it's about 12 feet in width, in some
11 cases it's about 10 feet in width.

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mesghinna-cross-white

1 Q (By Mr. White) Did you do a schematic
2 design, did you do cross-sections, did you
3 material lists?

4 A We have typical cross-sections.

5 Q Are you able to identify how many miles of
6 road you had at 12 feet in width and how
7 many at 10 feet in width?

8 A Yes. If I can go through all my notes and so
9 on, I can.

10 Q Do you have that prepared in tabular form
11 someplace?

12 THE SPECIAL MASTER: I would object. I
13 think that is going into insignificant,
14 unnecessary minute detail of this litigation
15 and I forbid it. Make your -- it's not that
16 important for getting on with the work before
17 us.

18 Q (By Mr. White) Did you do any design work
19 such as we have discussed for bridges or road
20 crossings?

21 A When you say design, you mean --

22 Q Any schematic cross-sections?

23 A In terms of what kind of crossings we have
24 and so on?

25 mesghinna-cross-white

1 Q Yes.

2 A Yes, as I have said it yesterday. For example,
3 in North Crowheart we have assumed 17
4 crossings.

5 Q But for those crossings did you develop typical
6 designs?

7 A The design is meant for estimation, you know,
8 sketches are meant for estimation. We just
9 use these for cost estimations. We are not
10 really going to give designs and specifications
11 because the level of study does not allow it.

12 Q I understand. But there are designs you use
13 for cost estimations, is that correct?

14 A I would call them sketch rather than design.

15 Q Let's change your word sketch for cross
16 estimation.

17 A Yes, because without having those sketches
18 there is no way one can determine the necessary
19 quantities of materials.

20 Q That's right. What parameters did you use
21 in deciding whether or not costs would need be
22 incurred for land level?

23 A I discussed that yesterday.

24 Q You told me there was very little required, and
25 mesghinna-cross-white

1 I want to know what parameters you used to
2 arrive at that conclusion.

3 A Well, we generally know the topography of
4 the area, and based on the topography, the
5 slopes and so on of those areas, we don't
6 believe there will be leveling as such like
7 what you do in gravity irrigation.

8 Q But there will be leveling for gullies?

9 A Well, if you have a small gully..

10 Q For rock outcrops and things like that?

11 A Well, that is part of the land preparation
12 work, yes.

13 Q Well, let's turn to land preparation. How
14 did you figure costs associated with land
15 preparation?

16 A Didn't I say that yesterday?

17 Q No.

18 A I said, Mr. Dornbusch has that cost.

19 Q Oh, okay. Did you do sketches in order to
20 develop cost estimates for diversion structures?

21 THE SPECIAL MASTER: For what, Mr. White?

22 MR. WHITE: Diversion structures, to
23 take the water out of the rivers for your
24 canals?

25 mesghinna-cross-white

1 THE SPECIAL MASTER: I'm with you.

2 Thank you.

3 THE WITNESS: You know, a sketch like
4 cross-sections, a simple cross-section of a
5 spillway.

6 Q Did you do a similar sketch for each canal
7 segment?

8 A I have indicated it, Mr. White, that we have
9 typical sections.

10 Q How many sections did you prepare?

11 A Oh, God knows how many. As much as we think
12 it is necessary, you know. These are just
13 for cost calculations.

14 Q Did you prepare sketches for cost calculations
15 on siphons?

16 A We know the length of our siphons, and I have
17 I think stated it.

18 Q Did you prepare sketches, though?

19 A You don't really need a sketch. What you need
20 is -- perhaps let me back up -- an inlet and
21 outlet part where you need riprap.

22 THE SPECIAL MASTER: What is that word,
23 please?

24 MR. WHITE: Riprap, Your Honor.

25 mesghinna-cross-white

1 Muskrat Creek. We have a pipe that goes
2 through that.

3 Q What is the diameter of that pipe, please?

4 A I have to go through my notes and find it.

5 Q Do you know an approximate diameter?

6 A Well, let's say 24 inches probably, but there
7 is a siphon, a real siphon before that, before
8 the one that I just said.

9 Q Now, you have got me lost. I thought there was
10 only one siphon in Riverton East on your map.
11 Maybe I didn't see them all.

12 A Well, the one that I just mentioned when you
13 asked me is towards the end of Riverton East
14 where we claim we don't have any arable lands.
15 However, there is another one.

16 Q Okay. Tell me about the other one.

17 A Well, let me try to look on my -- because I
18 don't want to --

19 THE SPECIAL MASTER: Excuse me, what do
20 you want to know about the other one? I don't
21 want you spending all --

22 MR. WHITE: The type of pipe and diameter.

23 THE SPECIAL MASTER: Type of pipe and
24 diameter?

25 mesghinna-cross-white

1 THE SPECIAL MASTER: In setting your
2 siphons, you are concerned about riprapping?

3 A Yes. The reason why we need that is when we
4 have the siphon, the siphon is nothing but a
5 pipe. The canal is coming from one side and if
6 there is a big stream or creek, you know, that
7 crosses that, we use a pipe. So when the
8 water comes out from the pipe, from the siphon,
9 we don't want to just throw it out into the
10 canal itself, we want to put riprap material
11 to protect the soil from erosion and so on.

12 THE SPECIAL MASTER: And that cost is
13 the cost of siphoning?

14 THE WITNESS: Yes, for siphoning.

15 Q (By Mr. White) What was the pipe diameter
16 and what type of pipe did you use for your
17 siphon in Riverton East?

18 A If you are talking about the siphons, I believe
19 all our siphons are concrete pipes.

20 Q Isn't it true that you know have one siphon
21 on Riverton East?

22 A There is one very small -- I hate to call it
23 a siphon. There is one which you claimed the
24 day before yesterday where it crosses the

25 mesghinna-cross-white

1 MR. WHITE: Yes.

2 Q (By Mr. White) Concrete pipe, I assume?

3 A Yes, it's concrete pipe.

4 Q And what diameter?

5 A Let me try to look. Let's leave the one I
6 said first, the one we said 24 inch, the one
7 I said 24 inch. Let's scrap it out. Let us
8 scrap it out, it's not there, I don't believe.
9 I don't want to take it as a siphon. However,
10 there is a siphon in Kirby Draw, and that is
11 48 inch.

12 Q Aside from determining the horsepower required,
13 did you do any sketches for the purpose of
14 cost estimation on your pumps or pump stations?

15 A Say it again, please.

16 Q Aside from making determinations of horse-
17 power required, did you -- well, strike that
18 and let me ask it this way: Did you make any
19 sketches for cost estimation?

20 THE SPECIAL MASTER: We are starting all
21 over. Did you make any estimations?

22 Q (By Mr. White) For the purpose of cost
23 estimates associated with pumps or pump stations?

24 A As you well know, Mr. White, we based our costs

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on those figures that we discussed yesterday,
and, however, for our understanding, you
know, how the pumping plant looks like, of
course, we have to put some kind of sketch,
typical sketch.

* * * * *

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1 MR. CLEAR: Your Honor, could we take a
2 couple minutes because Mr. Mesghinna has some
3 stuff and he has to leave to make a plane.

4 THE SPECIAL MASTER: All right, we'll
5 take a five minute break.

6 (Thereupon a five minute
7 recess was taken.

8 THE SPECIAL MASTER: All right, we'll
9 resume.

10 Q (By Mr. White) Dr. Mesghinna, did you prepare
11 a sketch for your pumping flow panels?

12 A Yeah, although our costing of pump and pumping
13 plants is based on a figure that I discussed
14 yesterday, for the purpose of clarity in our
15 mind, what we are trying to do, we have made a
16 sketch, typical sketch.

17 Q Did you prepare any sketches for cost
18 estimation purposes for your electric power
19 distribution system?

20 A No, we didn't make them.

21 Q How about for the distribution pipeline system?

22 A I already have handed it to you.

23 Q Okay.

24 THE SPECIAL MASTER: Mr. White, I'm about
25 mesghinna-cross-white

1 to conclude that further cross-examination
2 on the point of sketches on any of the
3 physical plans would constitute a needless
4 consumption of time and is repetitious and an
5 unnecessarily burdensome carrying on of these
6 proceedings. If you have something new, new
7 subject matter that you have to move on to,
8 fine and dandy, if not, I think we ought to
9 wind down on this area.

10 MR. WHITE: Is it your order that I cannot
11 further inquire into sketches with which the
12 Witness may have prepared during his --

13 THE SPECIAL MASTER: No further inquiry
14 of the horsepowers of the pump stations and
15 panels and matters on which he's already
16 testified or which you already have in your
17 possession and are still asking him about.

18 (Brief pause.)

19 Q (By Mr. White) With respect to the distribution
20 pipeline system, did you prepare any cross-
21 sectional sketches?

22 A We didn't find it necessary.

23 Q Okay. Aside from any information which you may
24 have already provided us, did you prepare any

25 mesghinna-cross-white

1 sketches of -- for the purpose of estimating
2 cost for your field maintenance pipes and
3 risers?

4 A Yes, I believe I made a simple sketch. You
5 mean the connection, the connection between our
6 laterals and the field mainline?

7 Q Yes.

8 A Yes.

9 Q Aside from the information which you may have
10 provided us and the information that is

11 already in evidence, have you prepared any
12 sketches for cost estimation purposes of the
13 various components of your irrigation system?

14 A I don't remember all of them, Mr. White, but
15 I'm sure we've made, you know,

16 Q For those fields for which you developed drainage
17 systems and except for the information which
18 is already in evidence and which you have
19 provided us, have you prepared any sketches for
20 cost estimation purposes of your drainage pipe
21 network?

22 A You mean as a design?

23 Q Yes.

24 A No, except it's the same thing, we cut it down,

25 mesghinna-cross-white

1 we cut those things that we get it in different
2 sketches in order to handle them, you know,
3 in our files.

4 Q Same question with respect to drainage outlet
5 ditches.

6 A We have a sketch on cross-section. And by the
7 way, on the cross-section of subsurface
8 drainage, it is the one that I gave it on the
9 blackboard on my direct testimony.

10 Q Okay. Same question with respect to open
11 drain ditches.

12 MR. CLEAR: Your Honor, I fail to see the
13 relevancy.

14 THE SPECIAL MASTER: Just sit down, Mr.
15 Clear, if you don't mind. I'm going to intercede
16 and I'm going to ask you this question: Dr.
17 Mesghinna, in an attempt to complete this phase
18 of the cross-examination on sketches about cost,
19 do you have any sketches that you used in pre-
20 paring your cost figures, any portion of this
21 system that has not already been touched upon
22 either in direct evidence or in cross-examination
23 or in your deposition or that you haven't already
24 told us about? Do you know of some?

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1 THE WITNESS: I think Mr. White touched,
2 hit the main points of sketches and so on.

3 THE SPECIAL MASTER: Very well.

4 THE WITNESS: But there might be some
5 more here and there, you just sketch it in
6 order to see what you are doing.

7 THE SPECIAL MASTER: I think that pretty
8 well adds justice --

9 THE WITNESS: But the main components you
10 have touched them.

11 THE SPECIAL MASTER: The main what?

12 THE WITNESS: Components.

13 THE SPECIAL MASTER: They have been touched
14 upon?

15 THE WITNESS: Yes, have been mentioned by
16 Mr. White.

17 MR. WHITE: At this time, Your Honor, we
18 would -- Well, I'll first ask the Witness and
19 then I'll probably have to make a motion.

20 Q (By Mr. White) Dr. Mesghinna, can you provide
21 us with the sketches with which you used as
22 part of your cost estimation work?

23 THE SPECIAL MASTER: Well, now, Mr. White,
24 he just go through saying that you've got

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1 everything except for various minor matters.
2 He just answered that and said you have those
3 before you.

4 Did you not just do that?

5 THE WITNESS: No, but Mr. White is asking
6 me if I can provide those documents?

7 THE SPECIAL MASTER: Yes.

8 THE WITNESS: You know, providing these
9 documents have no end if we have to go on like
10 this.

11 THE SPECIAL MASTER: We're not going to go
12 on like this, Dr. Mesghinna, and Mr. White
13 knows that too. I have already ruled once that
14 the further cross-examination on this point is
15 a needless consumption of time and is repetitious
16 and unnecessarily burdensome to these proceedings,
17 and Mr. White, I don't want anymore questions on
18 this, and I will appeal upon your professional
19 judgment and good sense to abide by my ruling
20 and to proceed on to some other subject of your
21 cross-examination.

22 MR. WHITE: At this time the State would
23 move for the production by the United States
24 and specifically this Witness, Dr. Mesghinna,
25 mesghinna-cross-white

1 of all sketches prepared by the Witness which
2 he used in developing his cost estimate about
3 which he's testified in this matter.

4 THE SPECIAL MASTER: I'm going to deny your
5 motion, Mr. White, because I think it's argu-
6 mentative, contentious and disputatious. You
7 have a good portion of these in your possession
8 now. This Witness has said he'd be glad to
9 provide them providing this is not an endless
10 pursuit, which it will be if you're given a
11 free hand. You have proved that now in these
12 proceedings time and again.

13 Now, your motion is denied, Mr. White,
14 and I appeal to you to return to some basis
15 of reason in your pursuit of information and
16 material, otherwise there is no end in our
17 lifetime to this litigation.

18 Q (By Mr. White) Dr. Mesghinna, in developing
19 your designs, what analysis, if any, did you
20 make of the future availability and cost of
21 the energy required to operate the energy
22 intensive systems which you've designed?

23 A Our costs on energy are based on 1979 costs,
24 and we know there might be some shortages in

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1 the future, however, as soon as the project
2 is designed for several years this thing will
3 come up within the costs and so on. But at
4 any rate, to answer your question simply, I
5 did not analyze the future energy.

6 Q Cost and availability?

7 A Yes, but one thing.

8 Q Excuse me, Dr. Mesghinna.

9 I'm sorry, Wold, thank you very much.

10 A Our discussions with the power people in
11 Riverton, Riverton Power, they have told us
12 if they -- if we tell them that in advance
13 that we are going to have this much energy,
14 we're going to demand this much energy, as soon
15 as they have some cross connections, I think
16 with other power plants, they will provide
17 to us as long as we tell them in advance.

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1 Q (By Mr. White) As long as you what?

2 A As long as we inform them in advance that we need
3 this much energy.

4 Q Do you recall the person with whom you spoke at
5 Riverton Power?

6 A I can try to find the name.

7 THE SPECIAL MASTER: I will ask that is not
8 necessary. That's got nothing to do with what we
9 are doing here. He inquired of Riverton and he
10 got the answer in the record. You don't need to
11 give us the name of the person with whom you talked
12 to at Riverton Power or REA.

13 Q (By Mr. White) Dr. Mesghinna, you told us either
14 yesterday morning or the day before yesterday or
15 yesterday afternoon that you had the number of acres
16 and the field dimensions for each of your fields in
17 tabular form so it wouldn't be necessary to go
18 through those one by one. Do you have those with
19 you now?

20 A Yes, I have them, but, Mr. White, I want to make it
21 clear on this thing. Those things are not really
22 true dimensions in a sense because when you supply
23 to the computer, you supply length and width so that
24 it will determine the area. Some of the fields, as

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1 you know, are triangular, not all rectangular in
2 shape and so on. So they give you the acreage. If
3 you multiply those numbers, they give you the acre-
4 age, but they may not be necessarily rectangular in
5 shape and exact dimensions, but we have those.

6 Q Could I have them, please, and we will just mark
7 them?

8 A Do you want to see them?

9 (The witness hands the documents
10 to Mr. White.)

11 A This (indicating) is No. 1 field.

12 THE SPECIAL MASTER: Speak right up, please,
13 Dr. Mesghinna.

14 THE WITNESS: I'm showing Mr. White the newly
15 classified lands or the future lands of Riverton
16 East Unit, and in the first column it shows field
17 number, and then the widths and the lengths which
18 Mr. White asked and also the acreage that he asked
19 is also shown on another column.

20 MR. WHITE: Okay, Your Honor, I would like to,
21 instead of going through this one by one or making
22 hand copies, I would like to be able to make just
23 copies of these particular pages that he has the
24 tabulations made of, and I think it will save us a

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1 lot of time.

2 THE SPECIAL MASTER: How many pages are there,
3 are there four or five?

4 THE WITNESS: This unit is three, and the North
5 Crowheart is probably about fifteen. About 20, 25
6 pages.

7 THE SPECIAL MASTER: Do you desire to make
8 copies of those?

9 MR. WHITE: Yes, sir.

10 THE SPECIAL MASTER: You are sure they are
11 necessary to your case, you have to have them to do
12 a competent job in this case, or is this more --

13 MR. WHITE: Well, Your Honor, everything that
14 I have asked for has been necessary to do a compe-
15 tent job.

16 THE SPECIAL MASTER: I have had serious doubts
17 about that, and I think the record will reveal that.
18 You are making demands of these 20 or 25 copies of
19 work papers?

20 MR. WHITE: Yes, sir.

21 THE SPECIAL MASTER: And to get the dimension
22 of each field?

23 MR. WHITE: And the acreages.

24 THE SPECIAL MASTER: Any objections to that?

25 MR. CLEAR: I have no objection if Dr.

1 Mesghinna has no objection, Your Honor. They are
2 his papers.

3 THE WITNESS: I think for the sake of decreas-
4 ing the argument, let's do it.

5 THE SPECIAL MASTER: If you will remove that --

6 MR. WHITE: We can have that done while we are
7 putting in other exhibits, Your Honor.

8 THE SPECIAL MASTER: Why don't you see about
9 it after the proceedings. I'm sure you can work
10 that out.

11 MR. WHITE: I was going to suggest if Wold
12 could take them out at this time, we could have
13 somebody doing the copying and we would have them
14 available within the next hour. Let me get some
15 paperclips so we keep them straight.

16 (Off-the-record discussion.)

17 THE SPECIAL MASTER: I was going to suggest
18 by answer to thoughtfulness which might be exerted
19 by some of us accommodating witnesses to catch
20 their planes and so on, if Dr. Mesghinna copies
21 these himself when he gets back to his office and
22 mails them to you, you can save yourself the time
23 you are now utilizing in searching for them. Would
24 that be acceptable, Mr. White?

25 MR. WHITE: That would be all right, Your

1 Honor, but he's almost done now.

2 THE WITNESS: We are almost done.

3 THE SPECIAL MASTER: Sure.

4 MR. WHITE: Off the record.

5 (Off-the-record.)

6 THE SPECIAL MASTER: I was under the impres-
7 sion the total constituted about 20 pages.

8 THE WITNESS: That was a mistake on my own
9 estimate.

10 THE SPECIAL MASTER: Well, are you about
11 finished with them now?

12 THE WITNESS: Yes, I'm almost finished. This
13 is the last one. That's it. Besides what you asked
14 for, there is some more information there.

15 MR. WHITE: I see there is water-holding
16 capacity and intake rate.

17 THE WITNESS: Yeah.

18 MR. WHITE: Excuse me a minute, Your Honor,
19 and I'll get them off to the Xerox.

20 THE WITNESS: These things that I give you
21 are, you know, rough by nature and they may not
22 constitute the finals. They are where we made
23 the calculations.

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1 Q (By Mr. White) Dr. Mesghinna, I hand you what's
2 been marked for identification as Plaintiff's
3 Exhibit FM-5-A. Is that the copy, is that a
4 copy of the percentage of possible sunshine and
5 a document which you received from HKM and
6 provided a sample of the type of information
7 upon which you based your analysis?

8 A Yes, this is of the same sample, this is not the
9 exact one that I used, may not be the exact one
10 that I used.

11 MR. WHITE: At this time, Your Honor --
12 Well, I've save the offer till the end.

13 Q (By Mr. White) Dr. Mesghinna, isn't it true that
14 you had not furnished us this type of documenta-
15 tion for the calculation which you actually made
16 in this case?

17 A I did not -- I gave you the average values that
18 I used.

19 Q Total average?

20 A Total average, yeah.

21 Q Dr. Mesghinna, I'm handing you now a package of
22 deposition exhibits which are also marked as
23 Trial Exhibits in the one hundred series, FM-100
24 series, beginning with FM-100. Would you please

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1 go through those exhibits, indicate for the record
2 what each of them are by trial exhibit number,
3 that's the yellow sticker in the lower right
4 hand corner, and reaffirm that those constitute
5 facts, data, formula, calculations, interim
6 conclusions or whatever, which you use in your
7 analysis?

8 A First of all, there are changes that have been
9 made on these things, you know.

10 THE SPECIAL MASTER: First of all what, sir?

11 THE WITNESS: After the deposition was taken,
12 I think this was in June, 1980, there has been
13 several changes that have been made. These are
14 not final products, but --

15 Q (By Mr. White) If I hand you a red pen, can you
16 indicate the changes?

17 A I have indicated those changes, the first changes
18 into my second deposition.

19 THE SPECIAL MASTER: How many depositions
20 did you give on this material that's now being
21 put in your hands, two depositions?

22 THE WITNESS: Yeah, two sets of depositions.

23 THE SPECIAL MASTER: Two sets of depositions.

24 And Mr. White has just now handed you a sheaf of

25 mesghinna-cross-white

1 papers containing how many sheets?

2 THE WITNESS: Let's say a pack of sheets.

3 THE SPECIAL MASTER: And these are documents
4 that you worked with during the depositions?

5 THE WITNESS: Yes. These are documents that
6 I gave, during my deposition.

7 THE SPECIAL MASTER: I see. And he now
8 wishes for you to see if these contain the materials
9 you worked with in coming to your conclusions on
10 the -- about which you testified in this case? Is
11 that what you want to know, Mr. White?

12 MR. WHITE: Yes, Your Honor.

13 THE SPECIAL MASTER: I'm going to rule that's
14 inadmissible and improper cross examination unless
15 it can be specifically related to what you testified
16 to on direct examination. This goes beyond the
17 scope of the direct examination and deals with the
18 materials during the depositions which is not this
19 Court's business. You may hand those back, Mr.
20 Mesghinna to Mr. White.

21 Q (By Mr. White) Well, let me hand them back to you,
22 Dr. Mesghinna, and ask you the question: Isn't
23 it true that this material is related to your direct
24 testimony in this case?

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1 A It has some relationships, but some of it I have,
2 you know, left it out, I have changed it, some of
3 it I have retained it.

4 THE SPECIAL MASTER: Mr. White, don't tempt
5 the Court. Please make your offer of proof and
6 let's proceed with the trial. I've ruled and
7 I would appreciate your cooperation in abiding
8 in my ruling, I will be grateful to you for it.

9 MR. WHITE: Your Honor, the State would
10 make the following offer of proof, but if asked,
11 Dr. Mesghinna would testify -- or if the State
12 were allowed to ask Dr. Mesghinna, he would
13 testify that the exhibits which have been marked
14 for identification as Plaintiff's Exhibit Wind
15 River Reservation, FM -- that should be FM-100,
16 FM-101, FM-102, FM-103, FM-104, FM-105, FM-106,
17 FM-107, FM-108, FM-109, FM-110, FM-111, FM-112,
18 FM-113, FM-114, FM-115, FM-116, FM-117, FM-119,
19 FM-120, FM-121, FM-122, FM-123, FM-124, FM-125,
20 FM-126, FM-127, FM-128, FM-129 and FM-118 which
21 I skipped, constitute the facts and data relied
22 upon by Dr. Mesghinna, calculations made by
23 Dr. Mesghinna, interim calculations made by
24 Dr. Mesghinna, assumptions made by Dr. Mesghinna
25 mesghinna-cross-white

1 and other facts and data upon which Dr. Mesghinna
2 based the opinion which he testified to during
3 his direct examination in this matter.

4 It may well be that Dr. Mesghinna has made
5 changes since the time of his deposition in those
6 facts, data and calculations or interim conclusions
7 or assumptions. Without the opportunity, however,
8 to ask Dr. Mesghinna about those changes and
9 amendments, if any, or depletions, the State makes
10 the offer of proof as if these are in fact the
11 facts, data, assumptions and interim conclusions,
12 calculations and formula upon which Dr. Mesghinna
13 based his opinion.

14 THE SPECIAL MASTER: I think your proof in-
15 accurately restates your offer, but that's be-
16 sides -- I don't wish to question it. You could
17 have, Mr. White, had you wanted to, bring out
18 some of these differences between those exhibits,
19 material contained in the direct testimony, you
20 could have done so, you chose not to do that.
21 Instead you chose to drop them on Dr. Mesghinna,
22 the witness and have him take an abundance of time
23 to go through each one and do in an hour what
24 might have been done in five minutes, and this is

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1 the reason, another one of the reasons that I
2 think supports my rule and that was an improper
3 procedure on your part.

4 MR. WHITE: I think the record speaks for
5 itself.

6 THE SPECIAL MASTER: It does indeed, it does
7 indeed fortunately.

8 Q (By Mr. White) Dr. Mesghinna, I hand you another
9 set of exhibits which has been marked for identi-
10 fication as Plaintiff's Exhibits 200 through 210,
11 which is information which you provided us in
12 response to the ninth discovery request. Would
13 you please look at each one of those documents,
14 indicate that those documents, whether or not
15 those documents constitute facts, data, assumptions,
16 calculations, formulas --

17 THE SPECIAL MASTER: I'm taking exception
18 to your question, Mr. White, and I would like
19 you to say to the witness, if you would, "What
20 do these contain," and let the witness tell us
21 what they contain. I believe that's a proper
22 procedure for discerning facts and matters in
23 the fact finding world, in fairness.

24 Q (By Mr. White) Dr. Mesghinna, would you please
25 mesghinna-cross-white

1 examine Exhibits FM-200 through 210 --

2 THE SPECIAL MASTER: You have numbered them.
3 Would you please examine exhibits, just hand them
4 to him and tell us what they contain. Is that
5 agreeable, Mr. White?

6 MR. WHITE: That's fine, Your Honor.

7 THE WITNESS: Okay. The first set contains
8 soil log profiles. That includes the texture
9 of the soil, the depth and water holding capacities,
10 including township, range, section and location of
11 the boring. That is FM-200.

12 The next one is FM-201. It contains pump
13 station number, number of laterals, cost of
14 laterals per acre, pump station, number of laterals
15 and cost of laterals per acre for all the units,
16 I believe.

17 The second --

18 Q (By Mr. White) Did you identify that one by
19 exhibit number?

20 A Yeah, I said 201.

21 The third exhibit is WRIR FM-202, which is
22 pump station summary and the pump station summary
23 gives pump station number acreage and seasonal
24 pumping hours, I believe for each unit.

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1 THE SPECIAL MASTER: Meaning what for that unit?
2 I didn't hear that word.

3 THE WITNESS: Pumping hours.

4 THE SPECIAL MASTER: Hours?

5 THE WITNESS: Yeah, the last column was
6 pumping hours.

7 The next set includes -- is WRIR FM-203 and
8 it has the canal reach and the flows, the net
9 flows, rather, for May, June, July, August,
10 September and maximum Q, meaning maximum dis-
11 charge, and length of each reach and the C
12 values of each reach.

13 The next set contains -- is WRIR FM-204,
14 and it shows, it gives the canal hydraulic
15 properties that would include the reach number, the slope,
16 the free board, the bottom wheels of the canal,
17 the depth of water in the canal for each unit.

18 The next exhibit is WRIR FM-205. It shows
19 the private trust lands, meaning the historic
20 lands, drainage name, climatic zone and acreage.
21 However, I would like to point out on this one,
22 this one is part of the historic lands which I
23 did not testify.

24 THE SPECIAL MASTER: Which you did not what?
25 mesghinna-cross-white

1 THE WITNESS: Which I have not testified.

2 THE SPECIAL MASTER: About which you have not
3 testified?

4 THE WITNESS: Yes.

5 Q (By Mr. White) Which portion is that?

6 A FM-205.

7 Q The whole thing applies to which you've not
8 testified?

9 A Yes. Well, I mean in my deposition.

10 Q I understand, but on the stand here?

11 A On the stand here I didn't.

12 The next exhibit is WRIR FM-206. These are
13 historic lands, acreages and percentages of
14 climatic zone of each of the units, which are
15 Johnstown unit, Ray unit, Coolidge unit, sub-
16 agency and a left-hand unit, and upper wind
17 unit.

18 Q Wold, with respect to that exhibit, is it --
19 Did you rely on this at all for your future
20 land analysis which you testified on direct?

21 A No, I didn't.

22 Q Okay, thank you.

23 A The next one is the WRIR FM-207, and it is, this
24 sheet of paper shows the pipe ratio ranges.

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The next one is WRIR FM-208, and this one, I believe contains the cost estimates for open drains and outlet ditches by unit for all the units. I don't have to mention it, I guess.

The next exhibit is WRIR FM-209, and it shows costs for open drains and outlet ditches were estimated, using a cost of one dollar for excavated cubic yard, and it also continues reading that cost for subsurface drains or estimated from one abstract of bids by the U.S. Bureau of Reclamation for the following areas. It mentions the areas, if you want me --

Q No, you just need to describe the exhibit. The idea, Wold, is that somebody can look at the exhibit and connect it with the number.

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mesghinna-cross-white

1 THE WITNESS: The next exhibit is WRIR
2 FM-210, and this exhibit shows the length
3 of each size of the drain line used by unit,
4 for each unit for six-inch pipes, eight-inch
5 pipes and ten-inch pipes, including -- I
6 mean, the lengths.

7 MR. WHITE: Your Honor, with the consent
8 of Court and Counsel, I would withdraw at
9 this time FM-205 and 206, which have to do
10 with historic lands, and which we would offer
11 when we get around to historic lands.

12 THE SPECIAL MASTER: Very well.

13 MR. WHITE: I can leave them with the
14 Court, if you like.

15 THE SPECIAL MASTER: Very well. No.
16 What numbers did you just take out, 200 what?

17 MR. WHITE: Five and six, I believe,
18 Your Honor.

19 THE SPECIAL MASTER: All right. All
20 righty.

21 Q (By Mr. White) Dr. Mesghinna, do you recall
22 that on approximately April 21, 1981, Henry
23 Sostrom visited you in your San Francisco
24 office to obtain certain documents?

25 mesghinna-cross-white

1 A (Witness nodding head in the affirmative)

2 Q I hand you what has been marked as Exhibits,
3 Plaintiff's Exhibits FM-301 and 300 and ask
4 you if you would please identify those.

5 A Exhibit WRIR FM-300 contains the layout of
6 pipelines with respect to the fields and the
7 pump stations I believe for all the units.
8 In some cases also it has some calculations
9 in it of pipeline network design.

10 The next exhibit, which is WRIR FM-301,
11 was not part of the documents that was
12 supposed to be xeroxed and handed to the
13 State people. It was through discussion with
14 Mr. Sostrom that by -- that the C values --
15 I informed him that the C values could also
16 be found in other handbooks, there could be
17 also several handbooks, one of which was this
18 one.

19 Q Well, this is an excerpt from a hydroelectric
20 handbook?

21 A Yes.

22 Q In which certain C values are given?

23 A Yes, so I don't think this one should be
24 entered as an exhibit.

25 mesghinna-cross-white

1 Q Are these the C values which you used?

2 A No. No, I have sent this in order to -- what
3 do you call --

4 THE SPECIAL MASTER: Evaluate?

5 THE WITNESS: Evaluate, to see where I
6 arrange and so on. It helped to make my
7 evaluation, but --

8 MR. WHITE: Your Honor, we would with-
9 draw 301.

10 Q (By Mr. White) Dr. Mesghinna, you may recall
11 that on Friday, April 24th, you provided some
12 information to the State, and I hand you what
13 has been marked as FM-400 and ask you to
14 identify that.

15 A Okay. WRIR FM-400 consists of pipe costs
16 of each of the units by columns having pump
17 number, cost of the pumping plant, acreage
18 served by that pumping plant, and following
19 the pipe costs for each of the units there
20 are the pumping stations summary of each unit
21 by columns having pump station number, acreage,
22 pump lift in feet, number of pumps in a station
23 in gallons per minute, meaning discharge in
24 gallons per minute. The next column, discharge

25 mesghinna-cross-white

1 of Q maximum in cubic feet per second, pump
2 station costs in dollars, horsepower for that
3 pump station, climatic zone for that pump
4 station, seasonal pumping hours for that pump
5 station, pumping costs, which is energy costs
6 for that pump station. I believe they continue
7 like this first with the pipeline cost
8 summary, followed by pumping station summary
9 for each unit.

10 Q Dr. Mesghinna, I hand you a set of blue-line
11 plates which have been marked for identification
12 as FM-401 through 407, and ask you whether
13 or not these are the plates --

14 MR. CLEAR: Didn't we have these identified
15 already? We talked about them on the first
16 day of your cross.

17 MR. WHITE: No.

18 MR. CLEAR: These are different?

19 Q (By Mr. White) Those are the plates which you
20 also provided to the State during -- or at the
21 end of your direct examination on April 24th,
22 which show field numbers, hole locations, other
23 types of data?

24 A Yes, yes. Mr. White mentioned these are the
25 mesghinna-cross-white

1 plates that show the pumping plant numbers in
2 each of the units, the soil characteristics
3 such as water holding capacity, intake rate,
4 etcetera, and the field numbers and so on
5 for each of the units, It starts with W --

6 Q It should be FM-401 through 407. They may not
7 be in order.

8 A I don't see 401. Oh, yes, here.

9 Q I think it was used to wrap them since it was
10 larger. It should be --

11 A Okay. Let me read them: FM-401, FM-402, FM-403,
12 FM-404, FM-405, FM-406, and FM-407.

13 Q Dr. Mesghinna, do you remember providing
14 certain information over the telephone by
15 agreement of counsel to Dr. Mesghinna --
16 excuse me, to Henry Sostrom on April 30, 1981?

17 A Yes, I remember that.

18 Q I hand you what has been marked for identification
19 as FM-500 and ask you whether or not FM-500
20 accurately sets forth the information which
21 you provided to Mr. Sostrom?

22 A The only thing that I can say at this stage
23 is I have to go through my file as to check
24 each and every number, and let's hope that --

25 mesghinna-cross-white

1 we might have a flip in telephone conversations
2 or something like that, but if there is any
3 miscalculation or addition problem or something
4 else, I'm sure he would call me and ask me
5 about it. But it is FM-500.

6 THE SPECIAL MASTER: With those qualifi-
7 cations you were, in fact, saying this was
8 his memorandum of your conversation, you are
9 not sure it purports to be the truth of your
10 conversation?

11 THE WITNESS: Yes.

12 THE SPECIAL MASTER: I understand.

13 MR. WHITE: Your Honor, I think in light
14 of the Witness' statement, I will withdraw
15 FM-500 and put it on through Mr. Sostrom in
16 our case in chief.

17 THE SPECIAL MASTER: Or ask this Witness
18 to come up with his own memorandum when he
19 gets back and bring it in later, either way.

20 MR. WHITE: I think what happened, Your
21 Honor, they talked on the telephone, they
22 created a chart that was common to all of them
23 and Dr. Mesghinna would look in his records
24 and give Henry a value for each blank in the

25 mesghinna-cross-white

1 chart, and what Wold would have to do is go
2 back and look in his records in each location,
3 and it would just be a lot easier for every-
4 body to have Henry testify to that.

5 THE SPECIAL MASTER: Very well.

6 MR. WHITE: If I could have about three
7 minutes, Your Honor, I have acreage sheets
8 back and I need to mark them and I'll return
9 the originals to Dr. Mesghinna at this time.

10 THE SPECIAL MASTER: These you will
11 probably want to introduce when you have
12 completed all your exhibits, all your FM series?

13 MR. WHITE: Yes, when I'm done I will
14 offer those for a particular purpose.

15 Here are your materials, Wold. Do you
16 want to check to make sure we have them right?

17 THE SPECIAL MASTER: What was that?
18 Speak up, please.

19 MR. WHITE: I said here are your materials,
20 Wold, do you want to check to make sure we
21 have them right.

22 THE SPECIAL MASTER: Off the record, please.
23 (Off-the-record discussion.)

24 * * * * *

25 mesghinna-cross-white

1 THE SPECIAL MASTER: We'll go back on the
2 record then with that.

3 Q (By Mr. White) I'm going to ask you, Dr. Mesghinna,
4 a question about the 600 series of exhibits. I
5 appreciate you waiting to answer till your counsel
6 has copies of them in front of them.

7 Dr. Mesghinna, I hand you what has been
8 marked for identification as Plaintiff's Exhibits
9 WRIR FM-600, 601, 602, 603 and 604, and ask you
10 to identify those.

11 You guys have them?

12 MR. CLEAR: Yes.

13 Q (By Mr. White) Go ahead and answer, please.

14 A WRIR FM-600 is the newly classified lands, meaning
15 the future lands of Riverton East Unit that shows
16 by climatic zone of the field number, field width,
17 field length, water holding capacity, in-take data,
18 acreages, pump number, wheel move or hand move.

19 WRIR FM-601 shows the same materials that
20 I just mentioned for Riverton East for Arapahoe.

21 The next material -- The next exhibit is
22 WRIR FM-603, it shows --

23 THE SPECIAL MASTER: You go from 601 to 603?

24 MR. WHITE: I think he did 602, Your Honor.

25 mesghinna-cross-white

1 THE SPECIAL MASTER: 602 was Arapahoe?

2 THE WITNESS: 601 was -- Let me start. 600
3 was the Riverton East, 601 was Arapahoe, 603 is
4 South Crowheart unit, 604 is North Crowheart
5 unit, but I don't see --

6 Q (By Mr. White) You skipped it.

7 A 602 is Big Horn Flats unit.

8 THE SPECIAL MASTER: Okay.

9 (Brief pause.)

10 MR. WHITE: Your Honor, at this time the
11 State would offer the following WRIR FM series
12 exhibits for the indicated purposes: One, two,
13 three, four -- I need to start again, Your
14 Honor. One and two for the purposes of showing
15 the facts and data, calculations and assumptions --

16 THE SPECIAL MASTER: All right.

17 MR. WHITE: -- that were relied on by Dr.
18 Mesghinna.

19 Three and four for impeachment purposes.

20 THE SPECIAL MASTER: Three, we will identify
21 as a communication of HKM Associates dealing
22 with criteria for selection project study areas.
23 Is that the heading?

24 MR. WHITE: And four is the BIA plan for
25 mesghinna-cross-white

1 completion of Wind River Irrigation Project.

2 THE SPECIAL MASTER: Dated June, 1968, all
3 right.

4 MR. WHITE: FM-5-A for illustrative pur-
5 poses.

6 THE SPECIAL MASTER: 5-A, I don't have,
7 Mr. White.

8 MR. WHITE: That's the one I did first
9 this morning, Your Honor.

10 THE SPECIAL MASTER: I don't have a copy,
11 it was the one like he used but not the one he
12 used?

13 MR. WHITE: Yes, sir, that's why --

14 THE SPECIAL MASTER: All right, I'll just
15 make a note of it on 5.

16 THE WITNESS: I think it's down there.

17 THE SPECIAL MASTER: I don't need it, Mr.
18 White.

19 THE WITNESS: Here it is.-- No.

20 MR. WHITE: That's the original.

21 THE SPECIAL MASTER: I don't need it, I'll
22 make a note of it.

23 MR. WHITE: FM-5, 6, 8, 9 --

24 THE SPECIAL MASTER: 9 will be identified as
25 mesghinna-cross-white

1 an excerpt dealing with canals and laterals for
2 BIR publication?

3 MR. WHITE: Except from BIR manual concerning
4 canals, concerning the lining policy, I'm not sure.

5 10 -- I need to back up. FM-5 and 6 are
6 offered to show facts, data, conclusions and
7 assumptions upon which -- No, sorry again.

8 5, 6, 8, 9, 10 and 15 are offered for im-
9 peachment purposes. Although I originally offered
10 FM-2 as I previously indicated during cross examina-
11 tion, FM's 2 withdrawn and the offer is instead of,
12 FM-2 replacement.

13 THE SPECIAL MASTER: How will you designate
14 the FM-2 replacement?

15 MR. WHITE: That's what it has on the exhibit
16 sticker, FM-2 replacement.

17 THE SPECIAL MASTER: We have not seen a copy
18 of that.

19 MR. WHITE: Yes, sir, I handed it to you
20 yesterday, it should be around here.

21 THE SPECIAL MASTER: Does anyone have an
22 extra copy of FM-2 replacement, please?

23 Oh, that was the instructions to destroy.

24 MR. WHITE: No.

25 mesghinna-cross-white

1 MR. CLEAR: There are two pages, the print-
2 out chart.

3 MR. WHITE: They're pages --

4 THE SPECIAL MASTER: All right, we have it
5 at the office, thank you.

6 (Off the record discussion.

7 (Brief pause.

8 MR. PERRY: Your Honor, it might be helpful
9 if Mr. White provided a description of each
10 exhibit as he went along.

11 THE SPECIAL MASTER: We'll try to see that
12 there's something, either I'll try to announce
13 it or he will or Leo for two reasons: one, so
14 you know what the exhibit was and two, so you
15 know how to find it in the index as it will be
16 labeled in the index with the report. You'll
17 be looking for it when you all get ready to
18 appeal.

19 MR. WHITE: Okay. Beginning with FM-200,
20 the following exhibits are offered for the pur-
21 pose of showing facts, data, conclusions or
22 facts, data, calculations or assumptions upon
23 which Dr. Mesghinna based his opinion, and
24 these are all those copies which have been --

25 mesghinna-cross-white

1 THE SPECIAL MASTER: 201 through 210 except
2 for 205 and 206, is that stated accurately?

3 MR. WHITE: Yes, sir, 201 through 204 and
4 207 --

5 THE SPECIAL MASTER: -- through 210?

6 MR. WHITE: Yes, sir.

7 THE SPECIAL MASTER: Okay.

8 MR. WHITE: I'm sorry, I've neglected to
9 say 200 as well as 201 through 210. It should
10 start with 200.

11 THE SPECIAL MASTER: Okay.

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mesghinna-cross-white

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1 MR. WHITE: FM-300, same purpose; FM-400,
2 401, 402, 403, 404, 405, 406, 407.

3 THE SPECIAL MASTER: For the same purpose?

4 MR. WHITE: Same purpose, Your Honor.

5 THE SPECIAL MASTER: All right.

6 MR. WHITE: Six hundred, 601, 602, 603, 604,
7 same purpose.

8 THE SPECIAL MASTER: You failed to
9 identify those as to their content.

10 MR. WHITE: I'm sorry, Your Honor.

11 THE SPECIAL MASTER: We should on the
12 600 series, anyway.

13 MR. WHITE: The 600 series are the future
14 lands tables showing acreages for the five
15 projects.

16 THE SPECIAL MASTER: With respect to
17 units?

18 MR. WHITE: Yes, sir, five units.

19 I believe that FM-1249 through FM-1255
20 have already been admitted for illustrative
21 purposes, and we now offer --

22 THE SPECIAL MASTER: They were what, a
23 brief description?

24 MR. WHITE: Those were the plates with
25 mesghinna-cross-white

1 Dr. Mesghinna's field numbers added.

2 THE SPECIAL MASTER: They're 1249
3 through 1255?

4 MR. WHITE: Yes, sir. We also offer for
5 illustrative purposes FM-1249-A through
6 1255-A.

7 THE SPECIAL MASTER: Do you have those?
8 And their brief description?

9 MR. WHITE: Those are parallel maps with
10 further annotations, Your Honor. That's all
11 the offers I have at this time.

12 THE SPECIAL MASTER: All right. If there
13 is not request to voir dire these exhibits,
14 and I presume there probably are not or they
15 would have been made as each were identified,
16 I will proceed to admit them into evidence.

17 MR. CLEAR: Your Honor, the only
18 objection I have is to three and four, which
19 were offered for impeachment purposes, which
20 I believe the Witness said he had never seen
21 before. Five and six were again offered for
22 impeachment purposes and were again not
23 identified by the Witness other than saying it's
24 a form he's familiar with. I think there is a
25 lack of foundation on those exhibits, too,

1 Your Honor.

2 THE SPECIAL MASTER: Mr. Echohawk?

3 MR. ECHOHAWK: I join in Mr. Clear's
4 objection.

5 THE SPECIAL MASTER: All right, fine.
6 Mr. Perry?

7 MR. PERRY: No additional objections.

8 THE SPECIAL MASTER: All right. There
9 will be no need to counter that. I have looked
10 over those and they will be admitted for the
11 purposes for what may be developed. I'm going
12 to move, therefore, the exhibits just offered
13 by Mr. White, beginning with Plaintiff's
14 Exhibits WRIR FM-1 and concluding with Plaintiff's
15 Exhibits WRIR FM-1255-A, be and they are all
16 hereby admitted into evidence.

17 (Whereupon Plaintiff's
18 Exhibits WRIR FM-1
19 through FM-1255-A are
hereby admitted into
evidence.)

20 MR. WHITE: Thank you, Your Honor.

21 Q (By Mr. White) Dr. Mesghinna, what type of
22 study for these future lands were you instructed
23 to do?

24 A What type of studies?

25 mesghinna-cross-white

1 Q Yes, sir.

2 A As I have indicated it in my direct testimony,
3 I'll briefly say it, crop water requirements,
4 determination of diversion requirements, design
5 of the irrigation system and design of the
6 drainage system and costs.

7 Q Is there additional work which would have to
8 be done, engineering work that would have to
9 be done, prior to the construction -- or the
10 initiation of construction of these projects?

11 A I beleive there is what they call a design
12 and specification study, and that has to be
13 done, yes, in order to give the specifications,
14 you know. In fact, if you see it in my cost
15 calcualtions, I have included that cost,
16 engineering and calculations.

17 Q Are you familiar with the various levels of
18 study by the Bureau of Reclamation such as
19 reconnaissance, feasibility and final complete
20 design?

21 A Well, these levels of study have different
22 meanings for different people in differnt
23 organizations, but I am familiar with that
24 Bureau definition.

25 mesghinna-cross-white

1 Q Using the Bureau definitions, what level of
2 study have you made with respect to the
3 five units involved in your direct examination?

4 A It would be very hard to characterize at what
5 level it is because, you know -- although I
6 know from the outset what the Bureau's
7 standards are, you know, I don't know them in
8 detail to say this is this, you know, a certain
9 level of study goes from this point to this
10 point. There are many things, many guidelines
11 in each of these studies. So it would be in-
12 appropriate for me to say this level of study
13 is this, but just for -- if you want me to
14 approximate it --

15 Q Certainly. Please go ahead. Did you say you
16 could approximate it?

17 THE SPECIAL MASTER: It would be
18 inappropriate.

19 THE WITNESS: It would be inappropriate,
20 but if you push me towards to say something,
21 you know, I have personal opinion to what
22 level it may be, you know.

23 Q Well, if it's inappropriate, I won't push you.

24 MR. WHITE: And I have no further questions
25 mesghinna-cross-white

1 of Dr. Mesghinna at this time, Your Honor.
2 Before sitting down, though, I would like to
3 make the standard motion to strike on the
4 basis of lack of foundation for the opinions
5 expressed by Dr. Mesghinna.

6 THE SPECIAL MASTER: All of them, the
7 entire cross-examination?

8 MR. WHITE: No, his entire direct
9 testimony, his opinion with respect to the
10 projects for lack of foundation shown during
11 cross-examination with respect to such things
12 as the identifications of irrigable land base,
13 the source of information on percentage of
14 sunlight, things like that, Your Honor.

15 THE SPECIAL MASTER: I'm restrained to
16 overrule the motion.

17 MR. WHITE: Thank you, Your Honor.

18 THE SPECIAL MASTER: All right. I thank
19 you, Mr. White, for concluding your cross-
20 examination on this difficult matter, complex
21 matter.

22 Is there any redirect?

23 MR. CLEAR: Yes, Your Honor, but I think
24 we could -- if we could have a ten minute
25 break now --

1 THE SPECIAL MASTER: Do you want a ten
2 minute break now and come back or do you
3 want to have lunch and come back at 1:30?

4 MR. CLEAR: I think it's up to what Wold
5 wants to do is fine with me.

6 THE SPECIAL MASTER: We will be glad to
7 accomodate you, Doctor. Tell us what your
8 plane connections are.

9 MR. ECHOHAWK: The plane is two o'clock.

10 MR. WHITE: Your Honor, I would like to
11 suggest if there's going to be redirect, there
12 might be additional recross, and let's get it
13 out of the way so Dr. Mesghinna --

14 THE SPECIAL MASTER: I appreciate that,
15 but you are the same gentleman that said to
16 me if you're here at nine o'clock I'll begin
17 cross right on the dot, and you came around
18 ten. I just had to say that, and I'm sorry
19 I did, but that's one of the reasons I might
20 have been a little bit petulant this morning,
21 just in case you detected it.

22 MR. WHITE: I didn't detect a thing, Your
23 Honor. I would like to say by explanation
24 that my assumption was I believe our discussion
25 was yesterday the motion hearing would start

1 first thing, and I didn't want to be here at
2 that time.

3 THE SPECIAL MASTER: That was the
4 discussion, but at the end of the day we said
5 we would be here at nine and do cross so he
6 can get out of town here, so we went on those
7 grounds, but that's quite all right.

8 What are the connections?

9 MR. ECHOHAWK: The plane leaves Cheyenne
10 at two o'clock.

11 MR. CLEAR: We better go, then.

12 THE SPECIAL MASTER: Carry on.

13 MR. CLEAR: Yes. Could we have a ten
14 minute break, though?

15 THE SPECIAL MASTER: Do you want a ten
16 minute break?

17 MR. CLEAR: Or five minutes.

18 THE SPECIAL MASTER: Okay, a five minute
19 break we will take.

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1 THE SPECIAL MASTER: All right, come to order,
2 please.

3 All right, Mr. Clear, you may redirect.

4 REDIRECT EXAMINATION

5 BY MR. CLEAR:

6 Q Dr. Mesghinna, I've placed on the easel Plaintiff's
7 Exhibit FM-1255-A that you testified to about yes-
8 terday. You recognize that exhibit, don't you?

9 A Yes, I recognize that exhibit.

10 Q And this is the exhibit showing your fields, your
11 proposed fields on the Riverton East Unit; is that
12 correct?

13 A Yes, that's correct.

14 Q And the numbers in the units are your field numbers
15 from the map that you gave Mr. White during your
16 direct testimony; is that correct?

17 A That's correct.

18 Q Dr. Mesghinna, I'm going to show you in a minute
19 what I have marked U.S. Exhibit WRIR 264 and 265.

20 MR. CLEAR: I don't have extra copies. I
21 will show these to counsel and provide extra copies
22 during the lunch break, if we can do that.

23 THE SPECIAL MASTER: That's fine.

24 MR. CLEAR: I'm sorry, it should be C -- How

25 mesghinna - redirect - clear

1 do we do this? WRIR C --

2 THE SPECIAL MASTER: Wind River Indian Reser-
3 vation C, whatever number.

4 Off the record, please.

5 (Off-the-record discussion.

6 THE SPECIAL MASTER: All right, Mr. Clear.

7 MR. WHITE: With permission of the Court, can
8 I stand over here so I can see these while the wit-
9 ness is testifying about them?

10 Q (By Mr. Clear) Dr. Mesghinna, I hand you U.S. Exhi-
11 bit WRIR C-265 and 264. Can you identify these,
12 please?

13 A Yeah, U.S. Exhibit WRIR C-264 is the Wind River
14 Indian Reservation land classification at location
15 Township 2 North, Range 6 East.

16 Q And the other one?

17 A And the next one is U.S. Exhibit WRIR C-265. It is
18 the Wind River Indian Reservation land classification
19 at location Township 2 North, Range 5 East.

20 Q Have you ever seen those two documents before?

21 A Yes, I have seen those documents before.

22 Q Where have you seen them?

23 A In San Francisco, California.

24 Q Have you utilized those documents at all?

25 mesghinna - redirect - clear

1 A Yeah, we have utilized them.

2 Q Who did you receive them from?

3 A From HKM Associates.

4 Q How did you utilize them?

5 A Well, we took the soil characteristics from these
6 areas, from both of these locations that I just
7 mentioned, and we laid our system, on-farm system
8 design, and we put the rest of the irrigation sys-
9 tem design and drainage, and those are drainage.

10 Q And did you use those to -- when you laid out your
11 farms on what you thought to be arable lands? Did
12 you use those to determine what the arable lands
13 were?

14 A Yes, these, we used these, both of these, of course,
15 in the rest of all the Wind River Indian Reservation
16 project that we discussed the last few days to deter-
17 mine the boundaries of our fields and to determine
18 also the soil characteristics of the different
19 soils which we used as an input for our system
20 design work and drainage work.

21 Q Now, I'd like you to compare those exhibits to --
22 Exhibit C-264 and C-265 with Plaintiff's Exhibit
23 1255-A, and I want you to tell me if you can tell
24 whether certain fields on 1255-A are found on

25 mesghinna - redirect - clear

1 arable lands as indicated on C-264 or 265?

2 MR. WHITE: Your Honor, I may be able to make
3 the question unnecessary if the State is willing to
4 stipulate that the arable land base shown on Dr.
5 Mesghinna's exhibits, including those as shown on
6 EM-1255-A is the arable land base received from
7 HKM, we've got no quarrel with that. I believe
8 him when he tells me that.

9 The whole point of that cross-examination was
10 that that may not be the same arable land base that
11 HKM testified about; and if the purpose is to show
12 that he relied on HKM's arable land base through
13 September of 1980, we'll stipulate to that.

14 THE SPECIAL MASTER: Is that the purpose of
15 your offer?

16 MR. CLEAR: Well, it was part of my purpose,
17 Your Honor. What I'm attempting to do is show that
18 these are the maps that he relied on and that there
19 is in the record evidence introduced by HKM that
20 these lands are the arable land base, and I'm going
21 to do that now.

22 THE SPECIAL MASTER: All right, sir.

23 Q (By Mr. Clear) Dr. Mesghinna, I'm handing you
24 what's in evidence as U.S. Exhibit WRIR C-148-17,

25 mesghinna - redirect - clear

1 and U.S. Exhibit WRIR C-148-18.

2 A. The first exhibit, which is U.S. Exhibit WRIR
3 C-148-17, and the second one, it is in the -- it is
4 in Township 2 North and Range 6 East.

5 And the second exhibit is the United States
6 Exhibit WRIR C-148-18, and it is in Township 2 North,
7 5 East. And these two aerial photos correspond to
8 those exhibits that I just mentioned, which are U.S.
9 Exhibit WRIR C-264 and U.S. Exhibit WRIR C-265.

10 Q. And you have looked at these, 148-18 and 148-17,
11 you looked at those before your testimony today;
12 is that correct?

13 A. Yeah, I have seen this before. They are the same
14 as this.

15 Q. The photographs will show the same arable land base
16 as these?

17 A. Um-hum.

18 Q. As 264 and 265?

19 A. Yes.

20 MR. CLEAR: Just a minute, Your Honor.

21 (Brief pause.)

22 Q. (By Mr. Clear) The lands indicated on 264 and 265
23 are lands included in your total, 84,000-acre total?

24 MR. WHITE: Objection, Your Honor; what

25 mesghinna - redirect - clear

1 84,000-acre total?

2 THE SPECIAL MASTER: I think he wishes to
3 strike that.

4 MR. CLEAR: I think we'll omit that, Your
5 Honor.

6 I have no further redirect, Your Honor.

7 THE SPECIAL MASTER: Okay, Mr. White.

8 MR. WHITE: Short recross, Your Honor.

9 THE SPECIAL MASTER: On recross, on the sub-
10 ject matter of these formats.

11 MR. WHITE: Yes, sir.

12 (Brief pause.)

13 MR. CLEAR: Your Honor, I misspoke myself.
14 I'd just like to introduce WRIR C-264 and WRIR
15 C-265 into evidence.

16 MR. WHITE: Could I voir dire those, Your
17 Honor.

18 VOIR DIRE EXAMINATION

19 BY MR. WHITE:

20 Q Dr. Mesghinna, with respect to C-264 and 265, are
21 these part of the arable land base materials which
22 you received from HKM prior to and including Septem-
23 ber, 1980, or are these documents which you've re-
24 ceived since then?

25 mesghinna - voir dire - white

1 A I can't exactly pinpoint the timing, but it is about
2 that time that we have received this.

3 Q Dr. Mesghinna, there are a number of handwritten
4 notes on these exhibits. Are those all in your
5 handwriting?

6 A No, I don't believe these are my handwriting.

7 Q Okay.

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1 THE WITNESS: It could be our people's
2 handwriting, I mean, people who work with me,
3 their handwriting.

4 MR. WHITE: Your Honor, if these exhibits
5 are offered for the truth of their contents,
6 we would object for lack of foundation. On
7 the other hand, if they are offered for the
8 purpose of showing the facts and data upon which
9 Dr. Mesghinna assumes the arable land base to
10 be as it is shown on his exhibits, and if the
11 offer excluded the handwritten notes on the
12 exhibits which Dr. Mesghinna is unable to
13 identify, then the State would have no objection.

14 THE SPECIAL MASTER: Well, we have over-
15 ruled the objection you would make if they
16 were to be admitted on the truth of their
17 contents, so I will admit them into evidence
18 for whatever probative value they may have.

19 RE-CROSS-EXAMINATION

20 BY MR. WHITE:

21 Q Now, Dr. Mesghinna, I would like you to compare --

22 MR. WHITE: This is recross, Your Honor.

23 Q (By Mr. White) Dr. Mesghinna, I would like you
24 to compare U.S. Exhibit C-264 and Exhibit C-265

25 mesghinna-recross-white

1 with the exhibits I have here before you,
2 C-50 and 51, which represent Mr. Kersich's
3 opinion as to the arable lands for sprinkler
4 and gravity irrigation, and which have been
5 admitted in evidence, and ask you whether all
6 of the arable lands shown on -- or lands shown
7 to be arable on C-254 -- I mean, 264 and 265
8 are shown to be arable on Exhibits C-50 and 51.

9 A Not all those shown in Exhibit C-264 --
10 shown in C-264 are included on the C-51 and
11 C-50. However, there are some areas which are
12 included in here (indicating) -- I mean, in
13 C-51 and C-50 which show also in here that
14 were struck out last time.

15 MR. WHITE: I have no further questions,
16 Your Honor.

17 THE SPECIAL MASTER: Thank you. All
18 right, what is the status of dismissal for
19 this witness?

20 MR. WHITE: Well, the State of Wyoming,
21 as usual, reserves the right to recall him
22 as its own witness at such time as we want
23 to serve him, Your Honor.

24 THE COURT: All right. We thank you very
25 mesghinna-recross-white

1 much for the several weeks you have been with
2 us and look forward to seeing you again in
3 the trial.

4 MR. CLEAR: He is going to be back sooner
5 than that, Your Honor.

6 THE SPECIAL MASTER: Perhaps sooner than
7 that. Why don't we go to lunch and come back
8 to this Courtroom at two o'clock.

9 MR. WHITE: Your Honor, before we recess,
10 is your next witness Mr. Dornbusch?

11 MR. CLEAR: Yes.

12 MR. WHITE: He doesn't happen to be my
13 witness the way we worked it out, Your Honor.
14 I wonder if I might be excused for the rest
15 of the week so I can go see my family.

16 THE SPECIAL MASTER: Certainly. You are
17 lucky.

18 I don't know which courtroom we will be
19 in. We are going to be over there tomorrow,
20 we know, so we might as well move our stuff
21 when we get back over here. If you get back
22 over there, you can move your stuff back to
23 the other courtroom. We will reconvene at two
24 o'clock in the other courtroom.

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