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File 171
Box 12
4422

case # 4993

File # 171

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

WASHAKIE COUNTY, STATE OF WYOMING

IN RE:	
THE GENERAL ADJUDICATION OF ALL 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 W. Hampton CLERK

DEPUTY

VOLUME 64

Friday, May 15, 1981

ORIGINAL

APPEARANCES

FOR THE STATE OF WYOMING:	HALL & EVANS 2900 Energy Center One Building 717 17th Street Denver, CO 80202 BY: MR. MICHAEL D. WHITE, Special Assistant Attorney General
FOR THE UNITED STATES OF AMERICA:	MR. JAMES CLEAR and MR. JOSEPH MEMBRINO Attorneys at Law Land and Natural Resources Division Department of Justice 1961 Stout Street Denver, CO 80294 and MR. THOMAS ECHOHAWK Attorney at Law Land and Natural Resources Division Department of Justice 1961 Stout Street Denver, CO 80294
FOR THE SHOSHONE and ARAPAHOE TRIBES:	WILKINSON, CRAGUN & BARKER 1735 New York Avenue, N.W. Washington, DC 20006 BY: MR. R. ANTHONY ROGERS
CLERK TO THE SPECIAL MASTER:	MR. LEO SALAZAR Attorney at Law 701 Rocky Mountain Plaza Cheyenne, WY 82001

THE SPECIAL MASTER: Ladies and Gentlemen, we'll please come to order. I've got a serious problem, and I don't know what to decide to do, but all of you ought to know about it, and I welcome your comments.

I'm supposed to be a pallbearer Monday in Sundance, Wyoming, at the funeral of Mrs. Carolyn Barton, a lifelong friend. I don't want to go. For one thing, you can hardly get from Cheyenne to Sundance without starting in with Sunday driving all night and getting there in the morning. But there's something else inside of me that tells me I got to go. So before we adjourn at noon I'll know what we're going to do.

MR. WHITE: Maybe we ought to talk about this off the record.

THE SPECIAL MASTER: All right, off the record for the balance of the discussion.

(Off-the-record discussion.

THE SPECIAL MASTER: Okay. Let's go back on the record. This is to announce that there will be no session Monday next, and after today's session, we will resume Tuesday morning at 9:15 in this room, 302, Capitol.

(Off-the-record discussion.

MR. WHITE: Your Honor, we may go to fits and jerks today because we still have maps that are being copied

that we need to provide to counsel, but I'll try to make it hold together as much as I can.

THE SPECIAL MASTER: Very good.

CROSS-EXAMINATION (CONTINUED)

BY MR. WHITE:

Q And Dr. Mesghinna, let's talk about the issue that we left off with yesterday, and that is whether or not you were working on the same arable land base that HKM testified to in this action. Let me move this over a little closer.

THE SPECIAL MASTER: About where your chair is might be good. I'll help you with it.

MR. WHITE: Maybe we can do it right here.

MR. ROGERS: I'll do it, Your Honor.

(Off the record discussion.

Q (By Mr. White) I have on the easel what was admitted during Mr. Kersich's testimony for the truth of its contents as U. S. Exhibit C-52. I don't know how the best way to do this is so that everyone can see it, but let me clip what's been marked for identification as Plaintiff's Exhibit FM-8-A or future Mesghinna 8 and Arapahoe-52, which matches this exhibit number over in the right-hand side, and I ask you if FM-8-A-52 is not a blue line copy of your Plate 11 of the Arapahoe Ranch?

A. Yeah, these are the proposed irrigation project plans for Arapahoe Ranch Unit.

Q. And it has a red line on it, that's not on your blue line?

A. Yes, it has a red line on it.

Q. Now, would you check the boundaries of the red line and see whether or not these accurately portray boundaries of the arable land base on Mr. Kersich's exhibit?

(Brief pause.

A. Although --

Q. Which is C-52.

A. Although it is quite hard to exactly check based on this, on the -- which one is this, C-52, to compare C-52 and what that is, EF --

Q. It should be FM-8-A-52.

A. 8-A-52, it seems there is some error in exactly designating the area in question for Arapahoe Ranch.

* * * *

Q So, there seems to be a difference between the irrigable land base on this exhibit, with which you worked, and the irrigable land base shown on Exhibit C-52, which was the irrigable land base given to the Court; is that correct?

A. Well, the area -- the total area bounded by the WRIR C-52 and the FM-8-A-52 might be equal as to, I guess, the gross acreage of 256 acres each, but it seems the area on WRIR C-52 is shifted southward, as compared to FM-8-A-52.

Q. Dr. Mesghinna, when did you receive the irrigable land base depicted by the vertical shading or vertical etching on FM-8-A-52?

A. I can't say exactly when, but we have been working on it until recently, and the latest time could be -- this is could be -- on September, 1980.

MR. WHITE: Your Honor, I would move to strike Dr. Mesghinna's testimony concerning the Arapahoe Ranch area, not because of any fault of Dr. Mesghinna's, but because it seems remarkably clear that the irrigable land base that Dr. Mesghinna was working with is simply not the irrigable land base that Mr. Kersich gave to the Court.

This makes it virtually impossible for the

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State to cross-examine on these areas, because there is just a mismatch of information.

It is the same type of problem we were trying to point out on Dr. Mesghinna's future areas, again through no fault of his. But here is a very distinct example and it happens to be the entirety of the Arapahoe Ranch lands which are involved in this particular example.

THE SPECIAL MASTER: The Motion to Strike is overruled. The discrepancy is apparent to which the Doctor testified, but the acreage remains the same and the whole area is within the same section and the same township and the same range. And because of those facts, I believe it is worthy to overrule the Motion to Strike.

MR. WHITE: Your Honor, we have not had time to make copies of FM-8-A-52 for counsel, but we will.

THE SPECIAL MASTER: Do you want to take time now or a little later?

MR. WHITE: I would like to do it during the break. We have copying of other exhibits being made right now also.

THE SPECIAL MASTER: Off the record.

(Off-the-record discussion.

THE SPECIAL MASTER: On the record again, please. While Mr. White is working with exhibits, I will ask these questions -- although maybe I shouldn't, if that distracts you from the work you are doing. So, I will wait.

Q (By Mr. White) Dr. Mesghinna, I have placed on the board or the easel an exhibit previously admitted for the truth of the contents through Mr. Waples, in which his irrigable land base is described. I ask you to compare that irrigable land base with what has been marked for identification as Plaintiff's Exhibit FM-8-A-209, which matches the exhibit number of Mr. Waples.

I will specifically ask you, first, if FM-8-A-209 is a copy of your Plat 13, which accompanied your report for the Subagency and Lefthand Units?

A. Yes, that is mine.

Q Would you please examine the area which we have annotated or bounded in red on FM-8-A-209 and compare that with the area shown in white just north of Mr. Waples' parcel 3-20X on C-209, and tell me whether or not the area bounded in red is shown as white rather than being shaded, on Exhibit C-209? What do you need?

A. As you can see from the Exhibit WRIR C-209, it is quite hard to make an exact distinction because of the sections and so on.

Q. But let me ask you this on Exhibit C-209: Isn't it true the northern boundary of Tract 3-20X goes along roughly the northern boundary line of Section 12?

A. That is what I was going to say.

Q. On FM-8-A-209, isn't it true that your fields, especially that portion bounded in red, extends well above the section line, the northern section line, for Section 12, into Section I?

A. Yes. By comparing these two exhibits, it looks like the uppermost part of the area in FM-8-A-209 is a little bit out of the irrigable land, as shown by WRIR C-209. There is a small acreage outside of that. It looks like there is a small acreage outside of it.

THE SPECIAL MASTER: Is that small acreage, as a matter of fact, out of the historic irrigable acreage, or does it just appear to be?

THE WITNESS: By comparing -- it is within the Federal Indian Project land, there is no question about it, but it appears to be based on this, on 209.

Q. (By Mr. White) That is Waples 209.

A. Waples 209. This area is outside of the irrigable land,

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newly classified land. As shown by Mr. Waples, this is the newly classified land. But according to my plat, it shows there is a small area in here that is also irrigable. So there is some discrepancy in here based upon these two maps.

MR. WHITE: Your Honor, I am going to renew my Motion to Strike and extend it to not only the Arapahoe land, but also to the Subagency and Lefthand Units.

I will ask you to reserve your judgment on that until we have had a chance to do a complete analysis of these two areas. And I believe we will also do an analysis of the future areas, and to pick up other discrepancies, which we have not had time to do. And I would like to point out the problem and ask you to reserve on the motion until we have a chance to look at it.

THE SPECIAL MASTER: I appreciate that. And in order to rule on whether I should even reserve a motion or not, or ruling or not, I would like to ask you, Mr. White, if an improper inclusion has been made in Dr. Mesghinna's study that truly is not new Type VIIIs, isn't the best procedure that you impeach or contradict his testimony with your own evidence, rather than to strike that which he has testified to?

* * * * *

MR. WHITE: It can be done either way, Your Honor. As an evidentiary matter, I must make a Motion to Strike at the time the evidence comes on --

THE SPECIAL MASTER: Keep the record clear.

MR. WHITE: -- to keep a clean record, and I would like you to reserve on that motion until I have a chance to get our people to do a complete analysis. I don't --

THE SPECIAL MASTER: Are there more areas than these two?

MR. WHITE: No. With respect to the Type VIII lands and the Arapahoe Ranch lands, although the inspection was mighty hurried, these are the only two significant -- they're small problems, but these are the only two significant areas that we were able to find. And we have not completed the analysis of Dr. Mesghinna's future projects. And, again, I don't want this to be any reflection on Dr. Mesghinna. What I think has happened here is he was provided an earlier land base or perhaps an erroneous land base by HKM. I don't know what happened, but it's certainly different than the one HKM gave you, and they don't go together, and that's why I'm asking you to reserve until we have a chance to gather the information.

MR. CLEAR: Your Honor, with respect to WRIR C-209, I would point out that this is a second line, so it may be possible that this portion of land appears on another

map in a different section (indicating).

If they're mapping this by section, it would be another map showing this area, that's possible, Your Honor, and I believe that the box of maps that we gave you yesterday, I think which you're going to give us, do those include Type VIII?

THE SPECIAL MASTER: A little louder.

MR. CLEAR: Did those include Type VIII?

MR. WHITE: There are some Type VIIIs in there, Your Honor. I should say we did look for that problem, and our conclusion was, and sort of speculative in a way, that two quad sheets were put together here and they were put together not quite on the section line as furnished to Dr. Mesghinna. And the second line runs here and the map line where the map sort of came together or perhaps there's some other cultural features shown here, runs up here (indicating). And some way there was a mistake made, perhaps, giving everyone the benefit of the doubt as to where those section lines were.

THE SPECIAL MASTER: All right, I'll reserve judgment on it, but it's beginning to appear that it could very well be a type of engineering draftsmanship -- What's the compensation called on the curvature when you get to a quarter or a quarter? We might even have some of that here, I don't know. We'll wait and see.

MR. WHITE: I should also say, Your Honor, we suspect some of these problems may be that -- because of the type of scale rectification on the HKM photographs, and this will come out in our case in chief, there may well be distortions to compound the problem when it's put on quad sheets, and again, that's not Dr. Mesghinna's fault.

THE WITNESS: I think we can solve this problem.

Q. (By Mr. White) All right, go ahead. This is with respect to the 209 exhibit?

A. Yes. I think there might be another map of the same kind as this one, which is outside of this.

Q. We'll take a look for that, we must have misplaced it the first time.

MR. CLEAR: They're a different parcel there, Your Honor. These three, 20X, which is shown on 209.

THE SPECIAL MASTER: Will the record show what the witness is pointing to on his desk now?

(Witness indicating.

THE SPECIAL MASTER: No, I meant identification.

THE WITNESS: This is a Subagency and Lefthand study unit of the arable lands.

MR. WHITE: This is essentially the same thing that has already been put in through Mr. Toedter, Your Honor.

Q. (By Mr. White) Dr. Waples -- or, Dr. Mesghinna, do you

know whether or not the Parcel 3-8X is a Type VIII land or could that possibly be a Type VII land?

A. I believe it is Type VIII land. You see, I have marked all those Type VIII lands.

MR. WHITE: At any rate, we'll get back to it.

THE SPECIAL MASTER: At any rate, you have that ready to make your showing on this matter, gentlemen, and I'll reserve both Motions to Strike.

MR. WHITE: Thank you, Your Honor. If we could have a few minutes, Your Honor, I need to get the maps with the field numbers on them so we know where we're going.

THE SPECIAL MASTER: Let's take a ten-minute work session away from the ordinary work session.

* * * * *

THE SPECIAL MASTER: Come to order, please.

MR. WHITE: Your Honor, before we go on with the cross-examination of Dr. Mesghinna, I would like to withdraw my motion to strike with respect to Type VIII lands.

THE SPECIAL MASTER: Both motions?

MR. WHITE: No, only with respect to Type VIII, not the Arapahoe Ranch.

THE SPECIAL MASTER: All right. The first motion remains.

MR. WHITE: And the reason is that, as Dr. Mesghinna correctly pointed out, there was a parcel on another exhibit that showed his land to be Mr. Waples' irrigable land base. We checked. It was Type VIII. And I apologize to the Court.

THE SPECIAL MASTER: No problem.

MR. WHITE: It was a late-at-night mistake on our part.

THE SPECIAL MASTER: If that is your first mistake in the lawsuit, you are a remarkable man.

MR. WHITE: I hope it is the only mistake I make.

Q. (By Mr. White) Dr. Mesghinna, let's talk a few minutes about computer programs.

A. Okay.

Q. Do you remember the computer programs you described during

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your cross-examination with respect to future projects?

A. Yes.

Q. Could you describe for us what computer programs you used here?

A. Part of them, but not all.

Q. What ones did you use?

A. What ones?

Q. You described the computer programs, such as the drainage, on-farm systems, and several others.

A. Yes.

Q. Could you tell us which ones of those you used?

A. I used part of them, but not all.

MR. WHITE: Your Honor, I wonder if we could get a stipulation to save time on this matter, among the parties, that if Dr. Mesghinna were asked the same questions about his consumptive-use programs and drainage programs during cross-examination today that he was asked during cross-examination on his future project lands, he would give the same answers, and the parties would take the same position, and the Court would rule in the same way?

MR. CLEAR: I think that is correct.

MR. ROGERS: Yes, Your Honor.

MR. ECHOHAWK: Yes.

THE SPECIAL MASTER: Mr. Echohawk nods in -- for the record. Thank you for the stipulation. Very well.

Q. Dr. Mesghinna, I will hand you what has been marked for identification as WRIR FM 8-A-12, Plaintiff's Exhibit, and ask you whether or not that is a copy of your plat 12 which accompanied your report, with the addition of certain field notes?

A. Yes, this is my plat. It is true, however, really the field numbers are based on our worksheets, you know.

Q. That is the next question. Are those the field numbers which you assigned to them in your worksheets?

A. Well, that -- yes. Well, let me say, I hope we have transferred it correctly from my worksheet to this map.

Q. Okay.

A. It looks like it.

Q. Would you be more comfortable about that if we attached a copy of that worksheet to this map, so if there is any discrepancy we will know about it, or the record would be clear about it?

A. Well, I can see it, I guess, without it. I can use my worksheet to compare it, if there is any question on this.

Q. I will hand you what has been marked for identification as FM8-A-13 and ask you whether or not that is the copy with the similar numbers placed on it with respect to your plat 13 for the Subagency and Left-hand Units?

A. My answer would be the same as the answers I gave on

FM-8-A-12.

Q. I will hand you what has been marked as Plaintiff's Exhibit FM8-A-14 and ask you if that is a copy of plat 14 from your report for Upper Wind Unit and if it contains the field numbers which are shown in your worksheets?

A. My answer would be the same as the former exhibits.

Q. I will hand you what has been marked for identification as FM8A-15 and ask you whether or not that is a copy of plat 15 from your report for the Ray and Coolidge Units, with your field numbers from the worksheets annotated thereon?

THE SPECIAL MASTER: A much smaller area, but a much bigger map.

MR. WHITE: That's right.

(Discussion was held off the (record.

Q. Dr. Mesghinna, as you have pointed out during our off-the-record discussion on plat 15, which is FM8A-15, there are numbers on this exhibit which do not exactly coincide with your worksheet, and those are for the parcels in the northern and southern portions of the central part of this exhibit.

The field numbers are correct, but they are preceded by 1-B for the southern portion and 1-A for the upper portion, both pump stations having been called "1," and

they were divided in 1-A and 1-B.

Does that cause any confusion for you to refer to them as 1-A-1 and 2 and 1-B-1 and 2?

A. I wish we could call them with my numbers, but I think for the sake of discussion we can go ahead with that.

Q. Have you circled your numbers?

A. Yes, I have circled my numbers. Yes.

Q. The same thing is true on the right-hand portion of that exhibit, where the pump station number has been added as a prefix to the field numbers; is that correct?

A. Yes.

Q. You have circled the field numbers which are directly out of your notes?

A. Yes, sir. And that was FM8A-15.

Q. Yes. Now, I will hand you a copy of what has been marked as FM8A-11, which is plat 11 from your report for the Arapahoe Unit with the addition of four field numbers, 1 through 4, for your fields in that unit. Is that a correct copy of that exhibit or of that plat, I mean?

A. Yes.

Q. And do the numbers match your work notes?

A. Yes. The FM8A-11 matches my field numbers.

MR. WHITE: Your Honor, excuse me, I thought we didn't have copies for you.

THE SPECIAL MASTER: Can you tell me the difference between FM8A-11 and FM8A-52, which was used at the beginning of these proceedings?

MR. WHITE: It is similar, Your Honor. The difference is that the 52 does not have the field numbers on it and it has the red outline of the Kersich arable basin.

THE SPECIAL MASTER: I see.

MR. WHITE: You can leave that open, Your Honor.

THE SPECIAL MASTER: Okay.

(Discussion was held off the (record.

THE SPECIAL MASTER: Back on the record, please. Is it your intention, Mr. White, to offer these exhibits now or are you holding off?

MR. WHITE: I will hold off, Your Honor.

THE SPECIAL MASTER: All right.

MR. WHITE: I'm not sure how much more cross we will get into today because we need those maps to complete it, but we will go ahead and do as much as we can.

At the end of the day, while it is fresh in everybody's mind, whether we have done it or not, we will offer those.

THE SPECIAL MASTER: At the end of today?

MR. WHITE: Yes.

THE SPECIAL MASTER: All right.

Q. (By Mr. White) Dr. Mesghinna, have you developed the acreages for each of your fields in each of those areas?

A. Yes.

MR. WHITE: Off the record.

(Discussion was held off the (record.

Q. Back on the record. Have you developed that into some tabular form?

A. Yes.

Q. Do you have it with you?

A. Yes.

Q. May I see it, please?

A. There is the unit, and then here is the map number, and then the HKM unit for the soil unit, and the HKM classification, the HKM acreage, and the Stetson acreage.

Q. Do you have that information for each of the fields on FM8A-11 through 15?

A. Yes, we have it. It is in here.

MR. WHITE: Your Honor, what I would like to do is go through and identify those things which Dr. Mesghinna has, those materials, which are in tabular form, so we don't have to ask the questions one by one for the benefit

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of the record, and then when we have a recess, rather than doing them one by one, when we have a recess, then we will make some copies.

I think that would be the easiest way, because that way we don't have to mark his originals as an exhibit.

THE SPECIAL MASTER: How many pages of them are there? About three?

MR. WHITE: There must be more than that, Your Honor.

THE WITNESS: There are three.

Q. That is just for one unit, isn't it?

A. No, this is Subagency.

Q. Have you got the Arapahoe in there?

A. And Upper Wind.

Q. How about the Arapahoe?

A. I don't have the Arapahoe. I would have to find it.

Q. Why don't you just pull that out as you come to it and put it on the corner of the desk.

THE SPECIAL MASTER: With the totals of your acreages, Dr. Mesghinna, you could give it quite easily as the Stetson acreages?

THE WITNESS: Yes.

THE SPECIAL MASTER: But Mr. White wants to see how you arrived at it by seeing all the other computations.

MR. WHITE: Yes, sir.

THE SPECIAL MASTER: All right.

Q. (By Mr. White) Dr. Mesghinna, did you develop water-holding capacities for your various fields?

A. No, we did not do water-holding capacities.

Q. Did you develop water -- does that mean you didn't develop and water-holding capacities at all?

A. Let me explain how we did it. It will be better.

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Q All right.

A And this area, seeing they are very scattered --

THE SPECIAL MASTER: Scattered?

A Seeing they are very scattered, we assumed what we have learned from our former studies of the future lands. Based on those future lands, the important thing of water-holding capacity is, as you might know, is to find out how many laterals we need in a given field.

And based on our studies of the future lands, the cost of the laterals on a hand-move sprinkler irrigation system was about $70 or $80.

However, on this Type VIII lands we have allowed $175 for hand-move systems.

THE SPECIAL MASTER: $165?

THE WITNESS: Over $175.

THE SPECIAL MASTER: $135?

A Just to be on the conservative side. So, we based on the conservative irrigation frequency, about ten days of the irrigation frequency. And based on that, we determined the number of laterals. And from there we determined the cost of the laterals on the conservative side.

So, we don't have to use the water-holding capacities and the rest of the things.

Q Did you develop the number of laterals which would be

used for each of your fields on those five exhibits?

A Yes.

Q Do you have that in tabular form?

A Yes, I have.

Q Could I see it, please? Let me show it to your lawyers first.

A You want me to take it out?

THE SPECIAL MASTER: Is the number of laterals in each field in this area of such importance, Mr. White, you should have to have them, or ask him questions from his workpapers?

MR. WHITE: It will be a lot easier to have them, Your Honor, than to go through them essentially one by one.

THE SPECIAL MASTER: How many are there, Dr. Mesghinna? How many pages?

THE WITNESS: Well, the summary is on two pages.

THE SPECIAL MASTER: Why don't you pull those out. He can make copies of those two when we have a break.

MR. WHITE: Let me show them to your lawyers at this point.

THE SPECIAL MASTER: These are just your tabulations and totals, are they not?

THE WITNESS: No, they are not only totals. In

fact, they are detailed. They tell you the number of laterals in a field, the length of the field, the maximum lengths of the fields, the widths, the lengths of the laterals, you know.

THE SPECIAL MASTER: Yes, but they contain no information regarding your methods or your priority work? They are just statistics dealing with the area?

THE WITNESS: In a sense, yes.

THE SPECIAL MASTER: Okay.

Q (By Mr. White) Dr. Mesghinna, I'm going to informally mark the acreage tabulation you gave me as FM 8A-100 and the lateral information which you just gave me as FM 8A-101.

Dr. Mesghinna, did you develop the total costs of the laterals by pump station for each unit?

A I don't have it in tabular form. I don't think I have it in a tabular form, but I can pull it out, you know, and make a summary of it if 10 or 15 minutes is given to me.

Q Let me ask you this: Did you develop the costs?

A Yes, I have the costs per acre.

Q Right. I understand that. What I am asking for is the cost per acre subdivided within each unit by pump station.

A I think it is very easy to find out from this the cost of each.

THE SPECIAL MASTER: What are you showing him? What are you holding in your hand?

THE WITNESS: FM 8A-101. And based on this, it can be determined, the cost of the laterals.

Q You can determine the cost per lateral; is that correct?

A Yes.

Q Would you describe how that would be done?

THE SPECIAL MASTER: Which area or on which ditch? Take one at random and describe how it works. Take it step by step and lead it through the work process.

A Okay. Let's take the Coolidge Unit, which is the first one on the summary sheet. Pump Number 1 has three laterals. It says the number of laterals in here. And one of the laterals is 800 feet long. I'm sorry. The cost of the laterals, of hand-move laterals, is about $2 per feet.

Q Is that the value you used; $2 per foot?

A Yes.

Q Okay.

A So, actually it is between $1.80 to $1.90, but we used $2.

Q Okay.

Q Okay.

A So, 800 times $2 is $1,600 for this lateral, for one of the laterals.

The other two laterals are 1,080 feet long, and if we multiply [illegible] 2 times 1,080 we determine the total costs.

Q Okay.

A For each pump station.

Q You just used the $2 value?

A Yes.

Q What is the source of your $2 value in laterals?

A It is actually $1.90 or $1.80, I can't exactly recall. But it is, I believe, from Riverton, Mr. Shepherd, Tom Shepherd, I believe.

Q With respect to future land, all you are talking about is 1979 costs, aren't you?

A This is all 1979 costs.

Q Did you develop seasonal pumping hours for each of your pump stations?

A Yes, we have.

Q And were your energy costs in part based on the number of hours each station pumped?

A Yes. This is exactly like the future lands; the same.

Q Do you have the seasonal pumping hours for each of your

pumping stations broken down in tabular form?

A I might be able to find it.

Q Would you look, please?

A Yes, I have it.

Q There are a large number of values. Can you give it to us orally, or would it be quicker to give it to us in the form of your tabulation?

A Well, there are only six values.

Q Well, tell us, then.

A Coolidge Unit, 2320; Johnstown Unit, 2320; Upper Wind, 2100.

Q Okay.

A Subagency, 2320.

Q All right.

A Ray, 2200; Arapahoe, 2250.

Q Are those cumulative values for each of those areas, or is there some way to break those values down, say, among the 16 pumps in the Upper Wind?

A Each unit has the same.

Q Each pump has the same?

A Each pump has the same within a given unit.

Q Thank you. Within your units did you -- let me strike that. What climatic zone did you determine that the Coolidge Unit lands were?

A That is Riverton. Mainly Riverton.

Q Are they all in Riverton?

A Yes. We assumed that they are all in Riverton.

Q How about Johnstown?

A Okay. Let me go back to Riverton.

Q Okay.

A There is a very small field in Fort Washakie, but we assume that is in Riverton, because Riverton has a higher, what we call, pumping hours. So, to be on the conservative side.

In Johnstown there is also -- there are also fields on the north which are in Pavillion, but we assumed all of them to be in Riverton, because the rest are all in Riverton, and Riverton and Pavillion doesn't have much of a difference.

Q Upper Wind?

A Burris.

Q Subagency?

A Fort Washakie. Oh, no, Subagency is in Riverton.

Q Ray?

A Fort Washakie.

Q And Arapahoe?

A Diversion Dam.

THE SPECIAL MASTER: He explained that yesterday quite thoroughly.

mesghinna - cross - white

END

Q. Dr. Mesghinna, did you develop your drainage costs on a field by field basis, pump station basis, or any smaller breakdown basis than those contained in your report?

A. It is exactly like we did in the future lands. We studied a portion which have the same, what you call, hydrologic permeability and depth to barrier. So, those areas will have the same, essentially the same, what you call spacing.

Q. Are you able to define each of those areas by field number?

A. Those areas, if you are looking for the costs?

Q. Yes, that is what I asked you about; your cost breakdown.

A. If you are looking for the cost, I have the total land and types and other necessary things for each unit.

Q. Okay. Thank you. Do you have them with you?

A. Yes, I think I have it.

Q. Dr. Mesghinna, I am informally marking your copy of the subsurface drainage pipe costs as Exhibit FM-8-A-102.

A. Subsurface drainage?

Q. Yes.

A. Yes, sir.

Q. I may have misspoken.

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THE SPECIAL MASTER: I've got to put an end to this sometime and an offer of proof can follow.

I should have overruled the last two, because they were identical to the work on the future lands, but I didn't. I want you to consider that, Mr. White.

MR. WHITE: My point is, if you look at it, you will see they contain different values. There is the same methodology, but what I am asking for is the values he used. And this all has to do with the verification of the cost analysis which is contained in his report.

THE SPECIAL MASTER: Sure.

A. It is so rough I don't know if even you can understand it.

THE SPECIAL MASTER: It is so rough you don't know whether we can understand it?

THE WITNESS: If they can understand it, they are welcome.

THE SPECIAL MASTER: If they can, they are welcome? All right. Do you want that one?

Q. Would you examine what I have marked as Exhibit FM-8-A-103?

A. This is the Coolidge Unit. And you see the pump number 1 here, and you see there is a pipe line that goes in

A. No, no, that's okay.

Q. Does that mean that you used 6-inch drains throughout all the Type VIII and Arapahoe Ranch lands?

A. Yes. There is not much flow in here. These are small particles, even for 6-inch. We could have used 4-inch, but we believe it is easier to work in construction with 6-inch, although it is more expensive.

THE SPECIAL MASTER: The perforations are the same? The gravel is the same? The jacket and the other testimony?

THE WITNESS: It is the same. There is no difference.

Q. And your costs were the same?

A. The same. Everything is the same.

Q. Dr. Mesghinna, did you develop a distribution pipeline system which is not shown on your plats?

A. I have the same rough work sheet.

Q. Do you have them with you?

A. Yes, I think I have them. Of course, I have them.

Q. I know you have them, Wold. Would you get them out, please?

THE SPECIAL MASTER: I am going to reserve -- I am going to make a ruling on whether they are germane or necessary. So, get them out and let's look at them.

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here. And although this area is also irrigable, we have drawn it out.

THE SPECIAL MASTER: This is land you have taken out?

THE WITNESS: Yes, we threw it out. We didn't think it is, although it is irrigable, we don't think it is appropriate to include it in the Type VIII lands.

Q. Do you have a similar map for the other units?

A. I think I have all of them.

Q. Could you get those out, please?

THE SPECIAL MASTER: How many maps altogether will that include?

MR. WHITE: It should be five. I'm sorry, it would be more than than.

THE WITNESS: There are many in one. These are all Coolidge. This is also Coolidge. And this is also for Coolidge.

THE SPECIAL MASTER: Why don't you take Coolidge only and let those be a guideline to you and to serve as an example?

MR. WHITE: Your Honor, I would like to have them all. The reason is, I think we are entitled to learn how the cost estimates contained in the last page of Dr. Mesghinna's report were derived.

THE SPECIAL MASTER: All right. I will allow these three pages he is now about to hand to you. These will provide for you some insight into his method of determining drainage works and costs on all units, and should be sufficient.

And if there is any error, you can make your exception -- I mean, make your offer of proof, Mr. White. Go ahead and give those to Mr. White, Dr. Mesghinna, the document.

Q. Those three only, Wold.

A. Those three only?

THE SPECIAL MASTER: Yes. Go ahead. I think that should be adequate.

Q. Dr. Mesghinna, what has been marked informally as Exhibit FM-8-A-103 is for the Coolidge Unit?

A. Yes.

Q. Are those the maps for the Coolidge Unit, showing your distribution network for pipes?

A. Yes, sir, and the pump locations.

Q. And the pump locations?

THE SPECIAL MASTER: Give me your identification number again, Mr. White.

MR. WHITE: FM-8-A-103. It should be 8-A, I'm sorry, Your Honor. It stands for Type VIII in the Arapahoe.

THE SPECIAL MASTER: So, it is now what?

MR. WHITE: FM-8-A-103.

Q. With respect to the Coolidge Unit, did you determine any costs based on the distribution system set forth in the three pages of FM-8-A-103?

A. Yes, we did determine the pipe costs.

MR. WHITE: Your Honor, I would like to go ahead for purposes of the record, and inquire if he didn't determine the pipe networks in the unit --

THE SPECIAL MASTER: He says they were similar. I think he said that.

THE WITNESS: I did.

Q. This is for Coolidge?

A. I did for all.

Q. You did for all?

A. Yes.

MR. WHITE: Your Honor, then I would offer to prove, or the State of Wyoming would offer to prove, that if allowed to see the pipe distribution network for the other four units, in addition to Coolidge, similar to FM-8-A-103, the State would be able to confirm the costs described by Dr. Mesghinna, which can be determined from those maps, and without those maps, we are unable

to do so.

THE SPECIAL MASTER: And I will respond, Mr. White, that the Court has allowed you to go on a fishing expedition and cast your bait and hooks into Coolidge. If you can pull up from Coolidge some production, you are welcome to the others. If you don't, your right to go on a fishing expedition with the witness terminates with Coolidge.

I think that is very reasonable, and I think it sustains everything I know of in a lifetime in the law.

You do not have the right to go on a fishing expedition with every document and with every witness presented, but you do have the right to inquire and go into the work method, his methodology, his accuracy, his competence. And I think I have been very, very -- the word "liberal" is now in this use in politics and in judicial proceedings, but I think I have been very, very fair.

And you have a right to this, and if you show some discrepancy, all you have to do is come back and say you want to see the rest because you've found something wrong in the Coolidge structures. But if you find the work methods there are proper and don't come up with anything that is irregular or that benefits your case, then that is the end of your

fishing with respect to the Type VIII lands, nearly irrigable, or this question at least.

It doesn't prescribe you from going into other things at all.

MR. WHITE: I would like to point out, Your Honor, as the Court may know, this work was done since the deposition of the witness. The State was provided the report which came in and was identified by the witness yesterday only the day before that, and that was during a period where we were cross-examining Mr. Stetson where we had gotten the report, I believe, on Monday for Mr. Stetson.

Now, it was a complete violation of the five-day rule, but this puts in a heck of a bind in knowing exactly what to pursue on cross-examination.

Secondly, I think we are entitled to get the facts and data upon which Dr. Mesghinna based his opinion.

And that concludes my objections.

THE SPECIAL MASTER: I appreciate that, Mr. White, and I know you appreciate the need for getting on with the trial, and I'm trying to balance these interests and these equities.

Q (By Mr. White) Dr. Mesghinna, as far as the pipe

diameters are, the velocity flow within the pipes shown on FM-8-A-103 displayed on that map for those pipes?

A. It is exactly the same as the future lands.

Q. You mean the values are exactly the same?

A. I mean the methodology and criterias are exactly the same.

Q. How about values that you used?

A. The values?

Q. Yes.

A. The values depend on the calculations you get, and every pipe is different from another pipe, depending on their flows, and so on.

Q. What values did you use to make your calculations?

THE SPECIAL MASTER: Values regarding what? Values regarding the efficiency of the system, or values of the crop yield? What are you talking about when you say values?

MR. WHITE: The same values Dr. Mesghinna was talking about with respect to this pipe network.

A. We have used a maximum of seven feet per second velocity.

Q. Did you use less than seven feet per second velocity for any pipe?

A. All are less than seven feet per second.

Q. Do you develop different velocities for the various pipe sections within those networks?

A. No. What I am saying is the maximum velocity would be seven feet per second. We won't go beyond that.

Q. Did you make any assumptions with respect to friction head loss within those pipes?

A. No assumptions except a determination of the friction head losses.

Q. What were those determinations?

A. We used the same as the future lands, the Haise-Jensen Equation.

THE SPECIAL MASTER: I am going to move that that question should be stricken, because it has been answered about three times. We went into that formula on the historic, and it is in the record.

Q. Did you make a determination with respect to the total dynamic head?

A. Yes.

Q. In connection with those?

A. Yes. Without those we can't create the pump stations, you know. So, if you want me to describe it, the total dynamic head is equal to the static head plus --

THE SPECIAL MASTER: That is not necessary.

Q. I am asking what values you calculated for the total

dynamic head with respect to that particular plat network on Exhibit 103, if you know.

A. I don't exactly recall it, but to make things short, I think I know where you are driving at, and I think --

THE SPECIAL MASTER: You know what he is shooting for? All right.

A. I think you are looking at the total dynamic head of each pump station.

Q. Yes.

A. The cost of each pump station and the cost of the pipe network.

Q. Yes.

A. We can make it short. I can give you a table on this.

Q. Thank you.

A. For all the areas.

Q. Thank you. We will save a lot of time if we can do that.

A. All right.

THE SPECIAL MASTER: Okay.

A. This is the summary of the pipe network, with the pumps, the energy and power, for the Big Wind Unit, Ray Unit, Type VIII lands, and in the Arapahoe Ranch area. They are contained on this sheet.

Q. I am marking that as FM-8-A-104.

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A. Okay. And the second sheet of it contains a summary of the pipeline network, pumping plat, energy and power, for Coolidge, Johnstown, and Subagency of Type VIII lands. It contains the pump number, the total lift in feet, the discharge in CMS, that is the flow, the pipe line costs, pump costs, demand costs, which is your power cost and energy cost.

Q. Thank you. I will mark that as FM-8-A-105.

THE SPECIAL MASTER: I think you want sometime to make some copies, so we had better take a break.

MR. WHITE: I can take a break any time you want.

THE SPECIAL MASTER: Let's take fifteen minutes. I would appreciate it if we could get all of the copies made, and I will even try to help you to move it along.

(The trial was recessed
(from 10:40 a.m. until 11:10 a.m.

* * * * *

THE SPECIAL MASTER: On the record, please.

Q (By Mr. White) Dr. Mesghinna, in your Type VIII lands, isn't it true that you included some Class 6 lands as classified for either sprinkler or gravity?

A. Yes. Mr. White, let me make a bit of an explanation here, if I may.

As you know, the land classification system made by HKM is for both gravity irrigation and the sprinkler irrigation. On the sprinkler irrigation, it is specifically for side-roll wheel movement sprinklers.

So, they have assimed that side-roll would economically irrigate, I think, over 40 acres of land.

So, if it is less than 40 acres of land, they said it is Class 6 land, because of size and the sprinkler.

Q That would be one reason?

A. Yes, that might be one reason. However, if we use hand-move sprinkler irrigation, any gravity irrigation, any gravity classified land as irrigable land is irrigable by hand-move sprinkler irrigation.

I think they have it as a footnote.

Q Yes, they do.

A. So, based on that, there are some lands which are Class 6 lands which we have included as irrigable lands.

Q Those would be Class 6 sprinklers?

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A. Yes.
Q. Class 6 for sprinkler?
A. Yes, Class 6 for sprinkler.
Q. What about the lands you included that were Class 6 gravity? Would you like some examples?
A. You mean the squaring off process?
Q. No. Take a look at the Subagency and Lefthand Units, Fields 5, 8 and 9. I believe those were classified by Mr. Waples as 6-gravity, 2-sprinkler.

THE SPECIAL MASTER: Upper Wind or Subagency?

MR. WHITE: Subagency and Lefthand.

A. Which field is that?
Q. (By Mr. White) Fields 5, 8 and 9.
A. Okay. They are Class 6 in gravity and Class 2 in sprinkler. That is perfect as far as we were concerned because it is Class 2 land in the sprinkler irrigation.
Q. So, it doesn't make any difference? It could be Class 6 gravity and you would include it, and it could be Class 6 sprinkler, and you would include it?
A. Let me explain it a little bit on this. I'm sure the main reason that that one is Class 6 in gravity irrigation is mainly because of the topography and slope.

THE SPECIAL MASTER: Topography and slope?

A. Yes. That is the main reason, but I can't go by the point.

mesghinna - cross - white

As I say, it is Class 2 as far as sprinkler irrigation is concerned, and we are including in our work all Class 2, Class 3 and Class 1 lands.

Q. What you are doing, even if it is Class 6 sprinkler, or if it is Class 6 gravity, so long as it is irrigable for other purposes, you have included it?

THE SPECIAL MASTER: That isn't what he said.

MR. WHITE: I believe it is, Your Honor.

A. Yes, because we are using hand-move sprinkler irrigation. You see, that is the difference. You have the advantage of that in using hand-move sprinkler irrigation.

Q. (By Mr. White) Let's talk about, say, Field 6 -- excuse me, Field 5 in Subagency and Lefthand.

A. Yes.

Q. It is classified as 6 gravity, 2 sprinkler?

A. Sprinkler.

Q. Let's go on the other side. Let's take any number of fields in the Johnstown Unit. They are classified as 3 gravity, 6 sprinkler?

A. Good.

Q. Whereas your assumption then that the 6th classification for sprinkler is due solely to field size?

A. It should be not all field size; it could be the topography. If the slope of the land is quite high.

No, no, no, I don't mean that. It should be really -- Let me back up.

It said it is 6 gravity or 2 sprinkler or what?

Q. 3 gravity and 6 sprinkler.

A. 3 gravity and 6 sprinkler? Well, by definition, any gravity irrigable land is irrigable by hand-move sprinkler irrigation. Let's start from that definition. Okay.

So, now, we have this Class 3 land in gravity. So, by definition, Class 3 land is irrigable by hand-move sprinkler irrigation, but not irrigable by side-roll.

Q. Let's go back to the Subagency and Lefthand Unit, where there are two -- excuse me, 6 gravity and 2 sprinkler.

A. 6 gravity and 2 sprinkler?

Q. Yes.

A. This is perfectly okay for sprinkler irrigation. You don't have to even ask about it, because it is Class 2 sprinkler to start with.

Q. But I thought the hand-move and solid set footnote on the HKM land classification standards applied only to gravity? They didn't make any classification, did they, for hand-move sprinklers?

A. They didn't make it, but they said in their footnote that any -- you can correct me on this -- any gravity irrigable land is irrigable by hand-move sprinkler.

Q. Isn't it true, Dr. Mesghinna, that the land classification for sprinklers done by HKM was only for side-roll sprinklers and did not include hand-move or solid set, or do you know?

A. As I said it earlier, the land classification, as I know -- I can be corrected on this -- is based on sprinkler irrigation of the side-roll type. But they have also included a footnote stating that any gravity irrigable land is irrigable by sprinkler hand-moved.

THE SPECIAL MASTER: Hand-move sprinkler?

Q. (By White) But where you have gravity, that is Class 6 and sprinkler, that is irrigable, that irrigable determination was only made for the side-roll for sprinkler, wasn't it?

A. I'm not sure about that.

Q. Okay, it's not your fault.

A. But the point is --

THE SPECIAL MASTER: I have a question on that, too, for my education. If in that area or parcel it is gravity 6, I come away with the conclusion it is not very productive land under the definition of gravity 6, and, therefore, to say it is sprinkler 2 would make me think it is not going to be too productive even under sprinkler irrigation. Can you, either of you, comment on that?

MR. WHITE: Your Honor, I think that is HKM's area and not Dr. Mesghinna's area. And that is one of the basic

problems that we have.

The statement has been trying to point it out. Dr. Mesghinna didn't apply the standards and he didn't create the standards; he just used the results.

THE SPECIAL MASTER: Dr. Mesghinna, have you not said that when you find a gravity sprinkler, 2, that that is perfect?

THE WITNESS: Yes, as far as I am concerned, it is perfect, because, you see, there are two advantages on hand-move sprinkler irrigation that none of the other types or methods of irrigation have.

And let me say this: One is it is adaptable to areas which are less than 40 acres of land and where the side-roll is adaptable, but is uneconomical, talking in generalities.

The second thing is the advantage of the sprinkler irrigation, hand-move, over gravity is that a gravity land that is Class 6 may be, because of slope or surface characteristics and topography and so on, and the excessive costs of gravity, but it can fit in sprinkler irrigation because it doesn't require all those.

THE SPECIAL MASTER: You can move the sprinkler and get it around?

THE WITNESS: You can physically take it here and there.

THE SPECIAL MASTER: All right. I think I am a little clearer.

Q (By Mr.White) Let me ask you one more question, Dr. Mesghinna. Isn't it true that the determination of whether or not land is irrigable for sprinkler purposes was made by HKM solely for side-roll and not for hand-move sprinklers or for solid set, primarily? It wasn't made with hand-move sprinklers in mind; isn't that correct?

MR. ECHOHAWK: Could I have the question read?

(The pending question was read.

Q (By Mr. White) Let me add to the question, if you know.

MR. ECHOHAWK: Objection, Your Honor. Counsel mis-states the evidence. Table 7 of the HKM report, Exhibit 43, clearly states that it is.

MR. WHITE: I am asking the question if he knows.

THE SPECIAL MASTER: Let me take a look at it.

MR. WHITE: Let me look over your shoulder.

THE SPECIAL MASTER: Page what?

MR. ECHOHAWK: Table 7, Page 26 of Exhibit 43.

MR. WHITE: That makes my point for me, Your Honor, if you read it carefully. I think the footnote applies to gravity.

THE SPECIAL MASTER: All right. Then that removes the question.

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MR. WHITE: Your Honor, I think the footnote applies to the gravity classification, as I read it. If I might look at it again -- I don't have it right with me.

THE SPECIAL MASTER: "All gravity, irrigable, also capable of being irrigated by sprinkler method, including continuous move, intermittent move, and solid set."

MR. WHITE: And my question is: Isn't it true that the sprinkler irrigable determination was for side-roll and not for hand-move? I'm not talking about gravity; I'm talking about the sprinkler.

THE SPECIAL MASTER: I think he would not be the one to ask that. It is in the record. It is in evidence.

MR. WHITE: That's right. And I asked him if he knew.

THE SPECIAL MASTER: All right. You have a very simple answer, Dr. Mesghinna, you can give.

MR. WHITE: Let's go on to the next area then.

THE SPECIAL MASTER: All right.

* * * * *

Q (By Mr. White) Dr. Mesghinna, I'm going to hand you what has already been admitted as U.S. Exhibit C 101-A and ask you whether or not the area marked as Type IX on C 101-A does not fall within your field nine in the Johnstown Unit?

A This is a squaring off approximation of land. We have included some, I don't know, Type IX land in here, which is a very small thing.

Q Do you know what Type IX land is, Dr. Mesghinna?

A You just called it Type IX; that is why I am calling it Type IX.

Q Do you know what that is? It says Roman numeral IX?

THE SPECIAL MASTER: Roman numeral or Arabic?

MR. WHITE: Roman numeral. It is field 9, but it is Type IX.

THE SPECIAL MASTER: That is confusing. I see a 9 here.

MR. WHITE: The Arabic numeral, Your Honor, is his field number and the Roman numeral is the type number, like Type VIII and Type II over here.

A You see, my land should have been like this. Something like this.

THE SPECIAL MASTER: You are talking about a difference in acreage of what?

MR. WHITE: It is only two acres at the most.

THE WITNESS: Two acres. All right.

Q Dr. Mesghinna, do you know what Type IX land is?

A I don't think Type IX means anything at this time.

Q I would like you to assume that Mr. Waples has indicated the Type IX is nonirrigable lands, usually steep hillsides, dry hillsides, something like that. Were you told by HKM that that area, which is covered by your field 9, included some Type IX lands?

A No. Let me make it clear. The reason why we have included this area is just for a squaring off process. Otherwise, it is not because we think it is irrigable land, you know. It has nothing to do because it is Type IX or another thing. It is just for the sake of the squaring off process.

THE SPECIAL MASTER: Squaring off process?

THE WITNESS: Yes. When we square off our lands, you know, we exclude a lot of lands, but we also include in fields nonirrigable land. That is something we can not avoid.

THE SPECIAL MASTER: Not avoid?

THE WITNESS: Any where you go in the world, that is how it goes. In fact, if you see my list of acreage here, if you compare HKM's acreage and my acreage, all

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my acreages are smaller than -- yes, I believe all my acreages are smaller than HKM's.

I can be corrected if there are a few exceptions. There could be some exceptions, but all are smaller than HKM, because we are afraid to include more of Class 6 lands, so we exclude a lot of irrigable land.

Q Isn't it true that that Type IX land is where you start up the breaks going to the tabletop or a bluff?

MR. CLEAR: Objection, Your Honor. He testified he didn't know what Type IX lands were.

MR. WHITE: I am asking him.

THE SPECIAL MASTER: And he is saying he didn't have to worry about what Type IX was or its definition. But if he can answer it, go ahead.

Q On Exhibit 109A, isn't the Type IX lands at the beginning of the breaks leading up to a table or bluff?

A I think, if I am correct, this is the bluff.

Q Yes.

A The bluff, yes. The Roman numeral IX is going towards the higher slope from the aerial photos.

Q You wouldn't expect in actuality for people to put hand-move sprinklers along those breaks covered by this Type IX, would you?

A Yes and no. The yes is because I and my people have been

there and have seen the area, and the no is just from this aerial photo. It seems that is getting steeper, probably over 20 percent.

THE SPECIAL MASTER: The area is such a small piece, I wonder if we might not pass on to the next area, Mr. White.

MR. WHITE: The next question was just going to ask him if it wasn't about half the size of that field. And I will be glad to pass on, Your Honor.

THE SPECIAL MASTER: All right. Is that area about half of that particular field?

THE WITNESS: To start with, the area is only five acres.

THE SPECIAL MASTER: All right. But I have lived long enough to learn that an acre is an acre, and every acre is being fought over, and every gallon of water.

Q To be sure the record is clear, HKM didn't tell you that was Class 9?

A They did not tell me that area is irrigable. It is just based on our squaring off. This is engineering.

MR. ECHOHAWK: Your Honor, just a point of clarification, just so the record is clear, regarding whether or not land that is classified as irrigable sprinkler lands could also be irrigated with hand-moved sprinklers.

You recall during Mr. Waples' testimony Mr. Merrill

covered that point with him and had Mr. Waples' annotated the table in one of his reports, on Page 7, with the annotation.

I think it read, "Fields that are too small or irregular in shape for intermittent or continuous move sprinklers can be irrigated with hand-move or solid set systems."

I think you recall that. And I think that Mr. Waples annotated the original exhibit.

MR. WHITE: I think the record should also reflect, Your Honor, that applies only to those lands classified by Mr. Waples, and not during his testimony, and not during -- and doesn't include the testimony of Mr. Kersich.

MR. ECHOHAWK: I don't think that is correct. The land classification standards of Mr. Waples are the annotated land classification standards that apply to the project lands and FIPs and to Mr. Kersich's view of the project.

THE SPECIAL MASTER: All right. Let's move on.

MR. WHITE: We can argue later and we can show you parts of the transcript, Your Honor.

THE SPECIAL MASTER: All right.

Q Dr. Mesghinna, did you make your determination of the depth of the barrier, the depth to barrier, for the Type VIII

and the Arapahoe Ranch lands using the same general methodology you did for the future lands or future project?

A Okay. To start with, I did not determine the depth to the barrier. Mr. Toedter determined the depth to barrier. But it was exactly the same methodology.

Q The same reliance on Mr. Toedter's areas that he developed the averages for?

A Yes. The same areas that have the same hydrologic permeability and depth to barrier were also applied here.

Q Dr. Mesghinna, take a look at the one sheet out of the Bureau of Reclamation Drainage Study, and I will ask you whether or not in that sheet, which I will mark for identification purposes as FM 8A-200, and I will direct your attention to what is on the blue-line drawing with a red circle around it as D-9, or drainage holding 9, and ask you whether or not that hole is located within your field two in the Subagency and left-hand unit?

MR. WHITE: I've got copies for counsel.

A This is section 12?

Q Yes, this is section 12.

(Discussion was held off the record.

* * * * *

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Q. Why don't you go ahead and answer for the record.

A. Yes. Parts of Field No. 1 and probably No. 2 are included in that area Mr. White just showed me.

Q. What I am asking about is whether or not the hole labeled D-9 is in the Field No. 2. It may be close to the border of Field 1 and 2.

A. Yes. It is on the border of -- inside the border of Field No. 1.

Q. On FM-8-A-200, then, would you refer to the log for D-9 and confirm that it shows at five feet of depth hard, sandy, yellow shale between five and ten feet.

A. Yes. It says here, "Hard, sandy, yellow shale at five feet, ten inches," I believe -- or five to ten feet.

Q. Five to ten feet?

A. Five to ten feet. But if I were the one to interpret this, I would interpret the depth to barrier to be at about twelve feet.

Q. You don't consider a hard shale to be a barrier?

MR. CLEAR: Your Honor, that is objectionable.

THE SPECIAL MASTER: That is contentious and arguable, and the question has been answered.

MR. ROGERS: Beyond that, Your Honor, this is beyond the scope of the witness' expertise.

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THE SPECIAL MASTER: It is not his conclusion, it is not his map, it is not his work, but he went ahead and answered it with his professional interpretation.

MR. WHITE: I think it is within the proper scope of direct, Your Honor, because again it illustrates the discrepancy between the materials given --

THE SPECIAL MASTER: Between two professionals, I know.

MR. WHITE: -- to this witness.--

MR. CLEAR: Your Honor, this material was not given to this witness, and it is not in evidence.

MR. WHITE: If Mr. Clear would let me finish, I will readily admit it wasn't given to this witness and isn't in evidence. I am just simply suggesting that it should be, and it is no reflection on the witness that he didn't get it.

THE SPECIAL MASTER: Unless there is a Motion to Strike, I am not going to hassle, it's in the evidence, and let's leave it in. Do you want to answer?

THE WITNESS: Yes, could I have a chance? I would like to to delete -- I want the things that I said to be deleted.

THE SPECIAL MASTER: All right.

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THE WITNESS: Because, from here, what I believe is the depth to barrier should be greater than ten feet, according to me.

Q. Okay.

A. From what I can see.

Q. How would you reach that conclusion?

A. Let me say Mr. Toedter is the one professional who reached the conclusion on this, so I have taken what he gave me for my analysis as to the depth to barrier.

MR. ROGERS: Your Honor, I think the Tribes will move to strike that, all the last colloquy and the witness' answer relating to these series of questions on the drainage hole and this exhibit, on the grounds that the State had a full opportunity to examine the witness who did the work in this very point, and that this is not an appropriate examination of this witness.

THE SPECIAL MASTER: Normally I would sustain the objection, but I recall there were many questions asked on many holes, many augers, and it doesn't mean all that much when it is over.

Sustained. This is a true professional thing. Each has made his call. So, I will leave it for whatever probative value it may have.

THE WITNESS: One thing that has to be clear is

I had nothing to do with the determination of depth to barrier. I have accepted what Mr. Toedter gave me.

MR. WHITE: The State so stipulates, Your Honor.

THE SPECIAL MASTER: We've got a lot of material here to be offering in evidence, gentlemen, on both sides before noon.

MR. WHITE: I expect I would have about another ten minutes of cross. I only have two areas and a couple of what I am sure will be offers of proof.

THE SPECIAL MASTER: We anticipate that.

MR. WHITE: I think we can reasonably expect to be out of here by noon, say plus or minus five minutes or so.

THE SPECIAL MASTER: All right.

Q Dr. Mesghinna, let me hand you a copy -- or the original of an aerial photograph that was provided to the State during discovery by the United States. I will tell you that the yellow annotations or the yellow markings on that photograph have been added by the State and are in no way part of the material provided during discovery.

I will direct your attention to the small parcel that has a double circle in it and an 11.

Isn't it true that that parcel is part of your

Field 6-2 in the Upper Wind?

THE SPECIAL MASTER: We just got through moving the map. There you are. Only the one you want is still on the floor. Here it is.

A. Yes. It is 6-2, but your aerial photo shows it as Type VII rather than Type VIII. It might have been an error in reading. It is very hard to read whether it is VII or VIII. Someone might have included it as Type VIII rather than Type VII.

MR. WHITE: Off the record.

(Off the record discussion.

(The witness examined the (exhibit with a magnifying (glass.

A. Yes, this is Type VII.

Q. It is included within one of your fields as Type VIII?

A. Yes.

Q. Were you advised by HKM that was Type VII?

A. I'm sure I must have. This must be an error on us in reading it, this Type VII.

MR. CLEAR: Your Honor, can I ask a few questions on this exhibit?

MR. WHITE: I haven't even offered it yet, Your Honor.

MR. CLEAR: Well, Your Honor, we are --

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THE SPECIAL MASTER: Mr. White, would you permit Mr. Clear to ask them now in the interest of amicability?

MR. WHITE: I think Mr. Clear would be relieved if I ask a couple more questions, Your Honor. It might make it easier for him.

THE SPECIAL MASTER: All right.

Q. Do you see the hole with the number 11 in that field?

A. Yes.

Q. And I will hand you a copy, which I have provided to counsel, of a log for Hole No. 11 in that area and ask you if in the comments column it doesn't indicate the land has been irrigated?

A. "Ditches are in fair condition." These are in the remarks.

Q. Yes, the remarks column.

A. Yes. "From a digging made by" -- which I can't read "by Mr." -- somebody.

Q. Right above that, doesn't it say that?

A. "Has been irrigated."

Q. Has been irrigated?

A. And it also says "idle" in there. "Idle; has been irrigated." But, at any rate, what I am trying to say here is it is quite hard to read, you know, VII and VIII, and so on.

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So, this mistake should be on our side from reading VII not VIII, in this acreage. I don't know how many there are. I can find them on that list there.

Q. It is whatever it is in the list for Field 8-2?

A. Yes.

Q. Okay.

A. So, that can be reduced from my acreage.

THE SPECIAL MASTER: By mere subtraction?

THE WITNESS: Yes.

THE SPECIAL MASTER: If it is idle, rather than really classified?

THE WITNESS: If we have the same aerial photograph, I'm sure it's the same.

MR. CLEAR: The only question I had, Mr. White says that just the yellow coloring was added; not these numbers. Were they added by your people?

MR. WHITE: I think, yes, the numbers were. I was talking about the interior of the photograph.

On the boundary of the photograph, there are some other yellow colorings in the right-hand margin that have the Roman numeral two and Roman numeral four, and those were also entered.

THE SPECIAL MASTER: To avoid the difficulties

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now appearing of using several photographs or documents not identified nor in evidence, do you two wish to stipulate out a few acreage of land at this time?

MR. CLEAR: Your Honor, I am just asking about -- when you were asking him to read the VII, where was the VII?

MR. WHITE: The VII was right in the middle of the field right there.

MR. CLEAR: I see. And that figure was not --

MR. WHITE: That figure was not added.

THE SPECIAL MASTER: The question goes begging for an answer.

MR. WHITE: Your Honor, we will stipulate.

MR. CLEAR: Can you figure the acreage out now?

THE WITNESS: Yes.

MR. WHITE: Where is the list with the numbers of acres?

Q. (By Mr. White) Here is your original copy back, Wold. I think that is Field 6-2, rather than 8-2. Your cross-hatching there confused me.

A. Okay. We can reduce it 17.3 acres.

THE SPECIAL MASTER: That is much better than 3 and 4 and 5.2. Seventeen point what?

THE WITNESS: Wait a second. It can be less than that.

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It is five percent less than that.

Q. Ninety-five times 17.3?

A. Yes.

Q. It is hedge row by hedge row.

A. 16.4 acres less.

THE SPECIAL MASTER: All right. 16.4 acres; is that stipulated to, gentlemen?

MR. CLEAR: Yes.

MR. ECHOHAWK: Yes.

THE SPECIAL MASTER: Let the record show a nod from the United States table.

MR. ROGERS: 16.4.

THE SPECIAL MASTER: He had to use the reading glass to see the VII though; the record should show that.

* * * * *

Q. Dr. Mesghinna, I'll hand you another photograph provided by the United States during discovery and ask you whether or not the area that is marked as Type VIII with the hole No. 3 with double circles around it, contains your field numbers 3 and 4, mainly 4, in the Johnstown Unit?

A. Yes, it contains 4; mainly 4.

Q. Did you reach any conclusion regarding the water holding capacity of that particular field 4?

THE SPECIAL MASTER: I think he said he made no conclusions about the water holding capacity for any field. I will let the question stand, however.

A. As I told you, we took a general figure.

Q. Were you provided with the HKM log, which I am handing you now, it is already in evidence as part of their exhibits, for that hole No. 3?

A. Well, as I say, it is very easy to say the water holding capacity is a question mark.

Q. Did they provide that information to you?

A. I'm sure they provided that information to us, but that information is not really too important for me, because, I mean, this is only a remark. This is in the remarks column.

The important thing for the water holding capacity, as I have discussed it, is the area and the texture of the

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soil, and the texture of the soil is really good. It is sandy loam, sandy clay, loamy sand, all the way to 120 inches. So --

Q. Why would the field classifier say, however, that the water holding capacity is questionable?

MR. CLEAR: Objection, Your Honor.

THE SPECIAL MASTER: That question is overruled. Sustained.

Q. Does the fact that the field investigator reached that conclusion cast any --

MR. CLEAR: Objection, Your Honor. He reached no conclusion if he put a question mark there.

MR. WHITE: Wait a minute, Your Honor. If he said that "Very easy to dig; water holding capacity is a question mark," I assume it is in question. And I think that is a fair assumption.

THE SPECIAL MASTER: That is an assumption that will not be indulged in by this Court. The evidence speaks for itself. The exhibit speaks for itself.

Q. Well, did you examine this exhibit before you reached your general conclusion with respect to the water holding capacity?

THE SPECIAL MASTER: You aren't getting any further, Mr. White. Any further probing on this is going to be a

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hard row. It is going to run into an impermeable barrier.

MR. WHITE: I'm never sure when I've reached the depth to barrier around here.

THE SPECIAL MASTER: Your questioning is reaching impermeability. It is running into impermeable grounds. You may ask one more question on this particular issue.

Q. Did you examine this particular log before reaching your general conclusions with respect to the water holding capacity which applied to all your fields?

A. As I have stated it earlier, Mr. White, really the important thing is I am not the one who determined the water holding capacity; I am the engineer.

Q. Right.

A. And I see the texture and the texture is really good. This is one of the best soils, as far as texture is concerned, as you can see there.

Q. Let me ask you this, did you examine this log before you made your determination?

A. I had hundreds upon hundreds of logs, probably thousands. I can't remember each and every log.

THE SPECIAL MASTER: That is good enough for the subject matter.

MR. WHITE: If I can have just a minute, Your Honor, I will find that place.

Q. Dr. Mesghinna, isn't it true that you assumed that the lands covered by your fields would be available for use in irrigation under the systems that you have designed for those fields?

A. I am not sure of the question.

Q. I will try it again.

Dr. Mesghinna, did you assume that the lands covered by your fields would in fact be available for irrigation as designed by you?

THE SPECIAL MASTER: The lands covered by what?

MR. WHITE: Fields, Your Honor.

A. These are irrigable lands. They are all, as I stated earlier, from Class 1 to Class 3 soils.

Q. I didn't mean to inquire into the suitability; I am inquiring whether or not you made any assumptions as to their availability for use for irrigation purposes, as you designed them?

MR. CLEAR: I think this is ambiguous as to what was available.

THE SPECIAL MASTER: There is an ambiguity. That is not in his area, is it? Whether or not they are accessible or whether trespass would be committed to get to them and so on?

MR. WHITE: I am just asking if he made any

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assumptions with respect to that. I am sure the answer will be he assumed they were available. He had nothing to do with their status.

A. Well, Mr. White, these lands were given to me to design a system for them, so, I designed it.

THE SPECIAL MASTER: And that is what you did?

THE WITNESS: And that is what I did.

MR. WHITE: You see, that is the answer. Your Honor, at this time, if allowed to do so, I would point out those fields, through the examination of Dr. Mesghinna and by comparison with the Exhibit M-1 show those fields that fall on individual allotments.

They may be in trust, but they fall on allotments, as shown by the Exhibit M-1.

There is no one here that can state on behalf of those individual allotees, since nobody represents those individual allotees, or at least nobody in the courtroom, whether or not those allotments are in fact available.

And I am sure the Special Master doesn't want me to inquire of this witness, but I think it is appropriate to at least make an offer of proof in respect to those matters, and I will do so quickly.

THE SPECIAL MASTER: Proceed.

MR. WHITE: If allowed to inquire of Dr. Mesghinna,

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in asking him to compare his Type VIII lands contained within his fields on Exhibits FM8A-12 through 15, with the allotments shown on Exhibit M-1, we would show all the following fields are on allotments, as described by that tract, within the Johnstown Unit:

Plat 12 or Exhibit FM8A-12, the following fields: 1, 2, 14, 16, 17, 18, 19, 20, and 21.

THE SPECIAL MASTER: Do you have the acreage totals?

MR. WHITE: I don't have those, Your Honor. I can give them to you by referring to some of these exhibits, but I don't have it at hand.

THE SPECIAL MASTER: Okay.

MR. WHITE: Subagency and Lefthand Unit, Plate 13, also Exhibit FM8A-13, all of the fields 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, and 12, and approximately 30 acres in field 4.

In the Upper Wind Unit, which would be on Exhibit FM8A-14, all of the following fields: 5-3, -4, -6, and -5; 5-5; and 6-1, 6-2; and 10-3 and 10-4; 12-7 and 12-8; 13-5 and 13-6; 14-1, -2, -3, -4; 16-3 and 16-4.

Ray and Coolidge Units, Exhibit FM8A-15, fields 1A-1, 1A-2, 3-2, 3-4 and roughly 20 acres in field 3-7.

MR. ROGERS: Your Honor, while it may not be appropriate under the law to move to strike an offer of proof, if I were allowed to move to strike this offer of

proof I would on the ground that if Mr. White had made these inquiries of this witness, this witness would not have been able to answer those questions in any event.

THE SPECIAL MASTER: Of course, Mr. White can make the offer of proof, if he wants to make his record. And this may be an appropriate group of questions for somebody, and in the absence of a proof -- of a showing that we have a right to it, or that somebody has a right to it, are the allottee would let somebody on his property. But I will not permit you to strike an offer of proof.

MR. WHITE: I don't think he is correct, Your Hpnor, because I have faced this Dr. Mesghinna can look at his maps, which have section numbers on them, and look at the Exhibit M-1, which also has section numbers on it, and tell us where his field falls in there.

THE SPECIAL MASTER: He may be able to, but I will not accept the fact M-1 or any other exhibit is irrefutable proof that the evidence is improper to allow adjudication of water on the land.

Somebody is going to want some water for it, if he is entitled to it.

MR. CLEAR: Your Honor, I will also point out the inherent in Mr. White's offer of proof he said these were allotments. That means that those lands are owned by the

United States.

THE SPECIAL MASTER: Of course. We appreciate that. All right. Next item.

Gentlemen, I am trying to make that noon goal. We have only five minutes now to get there.

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MR. WHITE: The last area I want to get into, which I also expect you will require an offer of proof on, and that is with respect to the election of remedies issue. I would like to hand the witness a certified copy of the permit number 66-32, the Coolidge Ditch issued by the State Engineer's Office. And by doing so --

THE SPECIAL MASTER: March 25, 1916; is that the date?

MR. WHITE: Let me see, Your Honor. March 15, 1906, Your Honor.

THE SPECIAL MASTER: All right. I was almost right.

MR. WHITE: There are several proof numbers and permits in there.

THE SPECIAL MASTER: Go ahead, Mr. White.

MR. WHITE: I assume that you would want me to do that by an offer of proof.

THE SPECIAL MASTER: This is to assert that there is an election of remedies, and if the Tribes elect this method, they could not assert the other; is that the case?

MR. WHITE: That is the gist of it. They can't have the two. Or vice versa, if they elected -- this really goes against the government, Your Honor. If the

government has elected to acquire water rights under State law for the area, it is an inconsistent remedy now to reserve rights not under the State law of an area.

It is an area where Dr. Mesghinna has done no work. He would, however, be able to tell us whether his fields fell within this permit or not. And I think this is about the only time in the posture of the case that it can be raised.

THE SPECIAL MASTER: I suspect this will be up again in this lawsuit before we are through with it. So, I will want some law, gentlemen, when it occurs.

Okay, make your offer of proof. I think you have already made it.

MR. WHITE: We would offer to prove that permit did overlap Dr. Mesghinna's fields and would be included within the Ray and Coolidge Units, an overlap with Permit 66-2 with Fields 2-3, 2-4, 3-5, 3-6, and 3-7.

I am sorry, I don't have the total acreage, Your Honor, but it would be all of those fields.

THE SPECIAL MASTER: If those fields are under a permit issued back in 1906, how can these be Type VIII fields?

MR. WHITE: It is an interesting question, Your Honor, but it is not -- this witness didn't do it.

THE SPECIAL MASTER: Type VIII lands are lands that have not heretofore been classed as irrigable lands.

MR. WHITE: Well, they weren't classed as irrigable lands in the permits either.

THE SPECIAL MASTER: The VII's that are now in this case as VIII's? Maybe I should be just quiet and let your folks worry about that. I have a natural question arising within my mind of why should a permit have been issued, or why should this land be included now under the scope of his work regarding Type VIII lands, of lands for which there was a permit granted in 1906 to irrigate.

I am in a matter of uncertainty as to that. And that is enough to be said. A word of note of that is adequate for the purposes now.

Okay, that is your offer?

MR. WHITE: Even I didn't think it would be appropriate to inquire of Dr. Mesghinna on that.

THE SPECIAL MASTER: Okay. What is the next thing you need? Next?

MR. WHITE: I am ready to get these things into evidence, Your Honor.

(Off the record discussion.

MR. WHITE: The State of Wyoming at this time would offer -- and the witness doesn't need to be here for this first offer -- FM-8-A-52 for illustrative purposes.

THE SPECIAL MASTER: All right. It will be described as a blue line of plate 11, Arapahoe Ranch, his work map. It shows a red outline of his irrigable land. Is that correct?

MR. WHITE: That's correct, Your Honor. Then I would also offer for illustrative purposes FM-8-A-11 through 15. Those are his plates with field numbers on them.

THE SPECIAL MASTER: All right. FM-8-A-11 through FM-8-A-15.

MR. WHITE: Yes, sir.

THE SPECIAL MASTER: Blue line copies, and you will identify the plate on them.

MR. WHITE: The plate is the number of the exhibit, Your Honor. Plate 15 is FM-8-A-15.

Then we would offer FM-8-A-100, 101, 102, 103, 104, and 105, to illustrate the facts and data upon which Dr. Mesghinna based his opinion in part.

THE SPECIAL MASTER: You didn't say 106?

MR. WHITE: It didn't go to 106.

THE SPECIAL MASTER: 100 through 105, dynamic pump costs.

Q (By Mr. White) Then I would hand Dr. Mesghinna what has been marked for identification as FM-8-A-106, and ask

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him to identify that.

A. FM-8-A-106 is the Arapahoe Ranch drainage study. It shows the total --

THE SPECIAL MASTER: Just the caption on it is good. It's from your work papers?

THE WITNESS: It's from my work papers.

MR. WHITE: I offer FM-8-A-106 as showing the facts in part he based his opinion on.

Q. I will had Dr. Mesghinna FM-8-A-107 and ask him to identify that.

A. FM-8-A-107 is the Arapahoe Ranch Unit summary of system costs.

THE SPECIAL MASTER: Very good.

MR. WHITE: We offer that for the same purposes, Your Honor.

THE SPECIAL MASTER: All right.

Q. Dr. Mesghinna, I will hand you FM-8-A-108 and ask you to identify that.

A. FM-8-A-108 is the Ray drainage study.

MR. WHITE: We offer that for the same purposes, Your Honor.

Q. I will had you, Dr. Mesghinna, FM-8-A-109, and ask you to identify that.

A. FM-8-A-109 is the Ray Unit, summary of system costs.

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MR. WHITE: The State of Wyoming offers that for the same purpose, Your Honor.

Q. I will hand you, Dr. Mesghinna, FM-8-A-110, and ask you to identify that.

A. FM-8-A-110 is the Subagency drainage study.

MR. WHITE: The State of Wyoming offers this for the same purpose, Your Honor.

Q. I will hand you, Dr. Mesghinna, FM-8-A-111 and ask you to identify that.

A. FM-8-A-111 is the drainage study of the Upper Wind Unit.

MR. WHITE: The State offers that for the same purpose, Your Honor.

Q. I will hand you, Dr. Mesghinna, what has been marked for identification FM-8-A-112 and ask you to identify that.

A. FM-8-A-112 is the Johnstown drainage study.

MR. WHITE: The State offers that for the same purpose, Your Honor.

Q. Dr. Mesghinna, I will hand you what has been marked for identification FM-8-A-113 and ask you if you can identify that.

A. FM-8-A-113 is the Johnstown summary of system costs.

Q. Dr. Mesghinna, I will hand you what has been marked for identification as FM-8-A-114 and ask you if you can identify that?

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A. FM-8-A-114 is the summary of system costs of the Upper Wind Unit.

MR. WHITE: The State offers that for the same purpose, Your Honor.

* * * * *

Q. Dr. Mesghinna, I will hand you what has been marked for identification FM8A-115 and ask you to identify that.

A. FM8A-115 is the summary of system costs of the Subagency.

MR. WHITE: The State would offer that for the same purpose, Your Honor.

Q. Dr. Mesghinna, I'll hand you what has been marked for identification as FM8A-116 and ask if you can identify that.

A. FM8A-116 is the summary of system costs for the Coolidge Unit, Type VIII lands.

MR. WHITE: The State would offer this for the same purpose, Your Honor.

Q. Dr. Mesghinna, I will hand you what is marked for identification FM8A-117 and ask you to identify that.

A. FM8A-117 is the Coolidge Unit, Type VIII lands, drainage study.

Q. And I will hand you what has been marked for identification FM8A-118 and ask you to identify that.

A. FM8A-118 is the acreage summary of Type VIII lands.

MR. WHITE: Your Honor -- I'm sorry, go ahead.

A. There is some unidentified writing on it.

MR. WHITE: Your Honor, I'm not sure I made an individual offer on all of those 100 series exhibits, but the State would offer all of the 100 series exhibits, which I believe go from FM8A-100 to 118, for the purpose of

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showing the facts and data which in part Dr. Mesghinna relied upon in reaching his conclusions.

THE SPECIAL MASTER: He received back all of his originals for his files?

THE WITNESS: Yes.

MR. WHITE: Yes.

THE SPECIAL MASTER: Thank you all for that.

MR. WHITE: Let me look at those again. That completes our offer, Your Honor.

THE SPECIAL MASTER: Very well. I presume there will be virtually no more voir dire of these since we have worked with them so closely.

Mr. Clear?

MR. CLEAR: Your Honor, I think basically they are all documents from Dr. Mesghinna's papers, so we will assume he can identify them.

MR. ROGERS: The tribes have none, Your Honor.

THE SPECIAL MASTER: Mr. Membrino?

MR. MEMBRINO: No.

THE SPECIAL MASTER: Mr. Echohawk?

MR. ECHOHAWK: No, Your Honor.

THE SPECIAL MASTER: All right.

The exhibits just identified and offered by Mr. White, being the same, are hereby admitted into evidence. Is

there any questions on redirect of Dr. Mesghinna?

MR. CLEAR: Yes, Your Honor.

THE SPECIAL MASTER: All right. You may proceed, Mr. Clear.

MR. WHITE: Your Honor, I had one more question I wanted to ask Dr. Mesghinna, and it is just one question, if I might ask it. I haven't said "No further questions" yet.

THE SPECIAL MASTER: Well, in law-making circles, I will say Mr. White asked for your unanimous consent. Do we have objections? Hearing none, proceed.

MR. WHITE: I've not seen that done before, Your Honor, but it's a good idea.

Q. (By Mr. White) Dr. Mesghinna, you have mentioned several times that you designed the fields described during your direct examination the second time only around Class 1 through 3 lands. Why did you exclude Class 4 lands here, but not in your future project analysis?

A. To myrecollection, I have excluded also Class 4 lands in my future lands.

MR. WHITE: I have no further questions at this time.

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

A. I can't be a hundred percent certain of that, though.

THE SPECIAL MASTER: That is understandable.

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MR. CLEAR: Your Honor, we would like to offer into evidence United States Exhibit C-277, which was the report prepared by Dr. Mesghinna, which included the smaller copies of the maps that had been referred to, and contains the conclusions he reached.

I think we should note in there that he excluded during cross-examination, or we stipulated the exclusion of some acres in there, which the record will reflect.

THE SPECIAL MASTER: And similarly, Mr. White, I presume there will be no voir dire on the fact since we have been over the report the last several days?

MR. WHITE: I have two problems, one of which I will waive, and I suspect the United States will waive it if I were to forget to do something during direct. The objection would be that the offer wasn't made during direct, as the appropriate time, and so the right to offer it has been waived. But I will waive that objection and hope I will get the same consideration when I forget to do something.

The second is, I would object for the record to the admission of this exhibit since it contains an opinion based on opinions. And I think we have seen several examples of where opinions based on opinions may have some difficulties with them.

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The objection in no way seeks to discredit the professional competency or ability of Mr. Mesghinna.

THE SPECIAL MASTER: I appreciate and understand that. The objection will be overruled. And I want to give my reasons for that.

There may well be in this report an example here or there of an opinion based upon an opinion, but the instances are so minute in area and in professional competence, compared to the massive area that represents his own work, that I think it is an invalid objection.

Therefore, US Exhibit WRIRC-277, being the same, is hereby admitted into evidence.

MR. CLEAR: Thank you.

THE SPECIAL MASTER: Gentlemen, if there is nothing else to come before us --

MR. CLEAR: I have a little more, Your Honor.

THE SPECIAL MASTER: All right.

REDIRECT EXAMINATION

BY MR. CLEAR:

Q. Dr. Mesghinna, I am handing you Exhibit FM8A-52, which you have already identified as containing the plats you designed in the irrigation system for the Arapahoe Ranch, and superimposed on that is a red area, which the State's experts have put on that map to show what they state is the

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irrigability land base, as testified to by Mr. Kersich.

I am now handing you what has been admitted into evidence as United States Exhibit WRIRC-148-30, which is an aerial photograph, with markings put on it by HKM superimposed upon it.

Can you locate on that aerial photograph the Arapahoe Ranch area which is designated on your exhibit, which was designated on your Plat 11?

A. The WRIRC-148-30 roughly corresponds, if not exactly, with FM8A-52.

Q. When you say corresponds, does it correspond with the area outlined in red, or does it correspond with the fields that you designated on the map as irrigable lands, trust?

A. With the areas that I have designated as irrigable lands in my fields.

MR. CLEAR: Thank you, doctor. I have no further questions.

MR. WHITE: Your Honor, I would have a motion to strike, at the option of the United States, either Exhibit C-52, from which the red lines came, Exhibit FM8A-52, or U.S. Exhibit WRIRC-148-30, which the witness has identified has a different arable boundary, for the reason that they are both offered for the proof of their

comments.

The objection is the State of Wyoming -- the Court admitted both of those for the truth of their contents. They are clearly dissimilar and the State has at some point the right to be able to rely on one or the other of those exhibits for the truth of their contents in doing its work.

I guess what I am asking is for the United States to make an election of which one do they stand by? And then once we find out which one they stand by, we can look at those.

MR. CLEAR: Your Honor, I think at this point, as you recall, there was a motion to strike Dr. Mesghinna's testimony on the Arapahoe Ranch, because it was said that on the basis of --

THE SPECIAL MASTER: That was the part that was not withdrawn?

MR. CLEAR: Right, Your Honor. The other part that was withdrawn was the Type VIII. So, Arapahoe Ranch is not Type VIII lands.

The motion was to strike the Arapahoe lands testimony on the basis that his determination, as shown on his Plat 12, Dr. Mesghinna's Plat 12, was not based on any evidence in the records that showed that it

had irrigable land base. And as Mr. White points out, this is already in the record and shows an irrigable land base.

mesghinna-redirect-clear

MR. WHITE: That is fine. That observation is correct, Your Honor, but what has clearly happened here is that exhibits like Exhibit C-52, which Mr. Kersich went over in some detail, and all our cross-examination was based on this, was offered for the truth of its contents. It had a different arable land base than is shown on the photograph, which was sort of a last minute offer.

He was asked if the photograph was the same as this, and he said yes. So, it got offered for the truth of its contents.

We are entitled to know, Your Honor, which one of these the United States stands by.

THE SPECIAL MASTER: I am going to overrule the request, Mr. White, on the same basis I did a couple of hours ago on a motion of some kind.

That is, they are in the same township and same range and generally the same area and generally the same format. And if there is a discrepancy there, it isn't of such gravity to warrant striking the entire testimony.

MR. WHITE: Your Honor, it creates a very difficult problem for the State. The State is attempting to develop a case in response to that of the United States, and part of that case is to deal with the irrigable lands that have been presented by the United States' experts.

We now have a graphic demonstration in at least two

areas, one in the Upper Wind area and one in the Arapahoe Ranch area, where there are differences.

They may be in the same 640 acres, but there are significant differences. And I think we ought to know from the United States which ones they stand by.

THE SPECIAL MASTER: This is not the last example of cases where we are going to find discrepancies between exhibits or between witnesses. And I think there just aren't sufficient differences in this case to warrant not accepting the testimony. There may be in some other case.

MR. WHITE: I just hope you remember that when one of our experts testifies on one side and they come up and say "What about the other side?"

THE SPECIAL MASTER: It is not an exact science in this business, whether you are an engineer or a lawyer. Yes?

MR. ECHOHAWK: Just clear up that point. In certain instances, there may be a drafting error, and I think that was the case with the Arapahoe Ranch.

In the instance where there would be a discrepancy as to, say, a location or whether certain lands should be included, we should go to the aerial photographs, since that is where those maps, the exhibit maps, were drawn up of the aerial photos. The aerial photos would form the base for those lands designated as irrigable within the

acreage totals.

THE SPECIAL MASTER: All right. Gentlemen, I appreciate your understanding of the reason for no Monday meeting, and we will reconvene Tuesday morning at 9:00 in this room.

MR. ROGERS: Your Honor, may I have an opportunity for maybe a couple questions?

THE SPECIAL MASTER: On recross?

All right.

MR. WHITE: I would like to object that I don't think it is proper, Your Honor, but let him ask it anyway.

MR. ROGERS: I don't think it is objectionable, Your Honor. Mr. White has asked his questions and there was redirect by the government. I think it is my time now.

THE SPECIAL MASTER: Go ahead, Mr. Rogers.

RECROSS-EXAMINATION

BY MR. ROGERS:

Q. Dr. Mesghinna, are you familiar with any lands within the Wind River Indian Reservation that have been classified as Class 4 lands that are in fact now being irrigated? Are you personally familiar with any such lands?

A. Yes, there are Class 4 lands which are irrigated.

Q. But yet you have chosen to exclude in your workbook on

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future lands and on these Type VIII lands any lands that are classified as Class IV?

A. Yes, we have excluded Class IV lands in our analysis of future lands and Type VIII lands in the Arapahoe Ranch.

Q. Despite the fact there are some Class 4 lands being irrigated?

A. Yes, there are some being irrigated.

MR. ROGERS: I have no further questions, Your Honor.

MR. WHITE: I have nothing further.

MR. CLEAR: I have no questions on redirect, Your Honor.

MR. WHITE: I would just ask the witness remain in the jurisdiction of the Court, subject to recall by the State.

THE SPECIAL MASTER: Certainly.

MR. WHITE: And before we go off the record, I want to serve a request for production on the United States. I just didn't want to get off the record before that was done.

THE SPECIAL MASTER: All right. Make your service of a request and do it now, Mr. White. I am not going to rule on this motion until about a week or two from now,so all of you know. I will let at least five days go before ruling. Your request is being served now?

MR. WHITE: I am filing with the Court and serving on

counsel 13 requests for production to the United States.

I will state that the copies which I am giving to counsel for the United States and the tribes have typewritten 12, but it should be 13, and I am writing in the 13.

MR. ECHOHAWK: Are you sure it is not 14?

MR. WHITE: It is 13. It is filed today.

THE SPECIAL MASTER: Today is the 15th. What is the date of the requests?

MR. WHITE: It will be the 15th.

MR. ROGERS: Your Honor, just a point on, I believe, the motion filed by Mr. Radosovich.

THE SPECIAL MASTER: Yes.

MR. ROGERS: We would like an opportunity to speak to that and be heard on that.

THE SPECIAL MASTER: I would like you to speak to it; at least, to know what to do with it. I am sure I have no duty. This gets in the field of political necessities, but that is not my role anymore.

Maybe somebody has got a duty to advise people around the country, Indian and non-Indian and everybody else, where we are going.

I am really surprised, quite surprised, that there hasn't been much more interest in the press here every day

advising people of the progress of the case and what took place. But if they don't want to do that that is their business.

The Riverton paper came out about a month ago with a beautiful article describing what was going on in Federal Court, and showing all of you guys between breaks, and giving somebody some ideas.

But I don't know whether this is my duty or not. We will have some input from you when we get to this in a week or so.

MR. ROGERS: I was hurt because my picture wasn't in the Riverton news article.

MR. WHITE: For the record, I think you should have been.

MR. ROGERS: I am not asking for an opportunity to address this now, but at some point perhaps next week.

THE SPECIAL MASTER: It will be saved for you.

MR. ROGERS: Thank you, Your Honor.

THE SPECIAL MASTER: All right. We will see you all Tuesday morning at 9:00. We are now adjourned.

(The trial was recessed at 12:30 (p.m.

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