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Trial Transcript, Vol. 11, Afternoon Session

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File 118
4369
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Case # 4993

File # 118

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

IN RE:)
)
THE GENERAL ADJUDICATION)
OF RIGHTS TO USE WATER)
IN THE BIG HORN RIVER) Civil No. 4993
SYSTEM AND ALL OTHER)
SOURCES, STATE OF WYO-)
MING.)

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

VOLUME 11
Afternoon Session
Monday, February 9, 1981

ORIGINAL

1 THE SPECIAL MASTER: We are on record. Will
2 we please come to order. Thank you. Mr. Echohawk.

3 MR. ECHOHAWK: Mr. Master, there's a few
4 additional items I'd like to cover before we move the
5 exhibits into evidence.

6 Q (By Mr. Echohawk) Mr. Kersich, it seems as we've
7 gone on this morning that I'm not sure that I
8 have quite gotten out how your particular work
9 programs that we've been discussing here today
10 fits in to the whole overall claim that will
11 result in a claim for a certain amount of water
12 for the Wind River Indian Reservation. Could
13 you please briefly describe that.

14 A Okay. There's really a three-step screening
15 process. Ours is the first step, which involves
16 determining an arable base, or lands which may poten-
17 tially be irrigated on the Reservation. And
18 what that involved was taking the entire Reser-
19 vation, looking at it only from a land capability
20 standpoint, screening it down to the study areas,
21 taking the study areas and reviewing those in
22 much more detail, and eventually establishing
23 areas within those study areas which are capable
24 of irrigation without any regard at this point

25 kersich-direct-echohawk

1 in time to either economics or agricultural
2 engineering. This material then is given to the
3 agricultural engineer and the economist. They
4 further review it, design irrigation systems, do
5 the returns that a person could normally expect
6 from those lands and further then -- probably
7 then it reduced that base to some other base
8 which eventually will be the land base that will
9 be utilized as part of the claim to determine
10 the amount of water that the United States would
11 be requesting for the Tribes.

12 Q So the acreage that will eventually be requested
13 will be for the future lands will be less than
14 the acreage depicted on your exhibits?

15 A Yes, I'm sure it will be.

16 Q Mr. Kersich, in your opinion is the work program
17 that we've discussed here today of sufficient
18 level to determine arability for the purposes
19 that we are -- you're here for?

20 A For the determination of arability, yes.
21 The program is comprehensive and covers the points
22 that we need to know to make a reasonable deter-
23 mination of arability.

24 Q Now, within the various study areas that are
25 kersich-direct-echohawk

1 denoted on, say for instance Exhibit 41, six
2 study areas, Owl Creek, North Crowheart, South
3 Crowheart and so forth, were all the lands that are
4 within those boundaries covered within your land
5 classification program?

6 A In one shape or another they were. We, again
7 let's go back just a moment, if we might. We
8 took the entire Reservation first, we screened
9 that down to the study area map that we talked
10 about previously. Then --

11 THE SPECIAL MASTER: Go ahead, I'm sorry.

12 THE WITNESS: Then we screened that particular
13 area down to study areas where we could afford,
14 from a time and money standpoint, to develop more
15 field information, more laboratory information
16 and so on. Excuse me just a moment.

17 (Brief pause.)

18 THE WITNESS: And then we developed the basic
19 study areas. We examined the lands in green in
20 reasonable detail, initially, first to determine
21 if there are any areas in there like Crowheart
22 Butte or some area that we knew was absolutely im-
23 possible to consider. Then we deducted that total,
24 then we eventually went out on the ground, people

25 kersich-direct-echohawk

1 from our office were on the grounds and screened
2 the bulk of the green areas, and from that we
3 further dropped the potential land base from these
4 green areas to those indicated on, for example,
5 C-41 in the various colors.

6 So what happened, we started out with about
7 a two and a half million acre Reservation, we
8 dropped down to about 490,000 acres, that dropped
9 down to about 300,000 or less through another
10 screening process. And we got about 281,000
11 acres that we basically classified under the semi-
12 detailed level of effort, and from that we are
13 down now to the 84,469 acres.

14 Q Now, take for example, on Exhibit C-41, the areas
15 that are not colored but are found within the
16 various study areas, the areas that are depicted
17 in white. Now, were all of those lands determined
18 to be non-arable?

19 A There are three classes of lands located within
20 the white portion of the study areas. There are
21 Class 6 lands or lands which we determined by our
22 program to be non-arable under the standards that
23 we used at that time. There are lands which
24 are called adjudicated lands, and my understanding

25 kersich-direct-echohawk

1 of those are that those are lands which received
 2 a right or permit from the State presently. We
 3 did not go on to those lands, and there are some
 4 fee lands which we did not include in the study,
 5 although I've got to be honest with you, there
 6 was a problem with boundaries at that time and we
 7 may have done some classification work.

8 Q On the fee lands?

9 A On the fee lands, but the lands that are fee lands,
 10 to the best of our knowledge, have all been re-
 11 moved from the study and none of those acres are
 12 involved in the total.

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1 THE SPECIAL MASTER: Of the acreage
2 you mentioned in these last three or four answers,
3 was 671 total holes drilled on the minimum net 89,000
4 acres left, or was that number of holes probably
5 in about 200,000 acres with some having been
6 excluded from arable classification?

7 THE WITNESS: Well, in that 200,000
8 acres there was some basic screening that occurred
9 that after we got out on the land we didn't
10 necessarily drill any holes because it was
11 obvious from the surface, from greasewood or
12 land cover, that those were areas that didn't
13 really need any studies, so we threw them out.

14 On the other hand, there are acres that are
15 not included within the 84,000 that we actually
16 drilled the hole or logged the hole or made
17 chemical tests or did all parts of the program
18 and then a determination was made that those lands
19 were not acceptable to irrigation under our
20 standards, and those were then taken out.

21 THE SPECIAL MASTER: You have no idea
22 how many acres were encompassed in this 671 holes
23 drilled?

24 THE WITNESS: No, the only way I could

25 kersich-direct-echohawk

1 do that would be, you know, going back to the
2 maps or something.

3 THE SPECIAL MASTER: Thank you.

4 MR. ECHOHAWK: Your Honor, at this time
5 I would like to offer Mr. Kersich as an expert in
6 the field of agricultural engineering.

7 THE SPECIAL MASTER: Without regard to
8 Exhibit 34, are you going to keep that in the
9 package?

10 MR. ECHOHAWK: We will keep that in the
11 package.

12 THE SPECIAL MASTER: Mr. White?

13 MR. ECHOHAWK: For ease of convenience,
14 I'm just about finished. Perhaps we could save
15 any voir dire until I'm done.

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

17 THE SPECIAL MASTER: All right.

18 Q (Mr. Echohawk) Mr. Kersich, do you have an opinion
19 as to the amount of arable acreage contained within
20 the six study areas that we have been discussing?

21 MR. WHITE: I'll object to the question,
22 Your Honor. The witness has not been qualified
23 in the areas of soil science or land classification.
24 He's only been offered as an agricultural engineer.

25 kersich-direct-echohawk

1 Until some qualification is shown in those areas
2 that are traditionally associated with land
3 classification such as Bureau of Reclamation
4 would require, I don't think he's qualified to
5 give an opinion as to arable lands.

6 He may be able to design a system, and he's
7 testified he has done so or reviewed designs in
8 Arizona vs. California, but he has not been
9 qualified in soil science or land classification.

10 MR. ECHOHAWK: Your Honor, I believe
11 that there's been sufficient development for the
12 basis of Mr. Kersich as an agricultural engineer
13 to be able to render an opinion as to arability
14 due to the fact that he has had various inputs
15 from the very beginning of this program all the
16 way through until the final review of the opinions
17 rendered to him by the land classification people
18 employed by HKM, which an agricultural engineer
19 is certainly able to rely on under Rule 703.

20 THE SPECIAL MASTER: I will overrule the
21 objection, if he will confine his answers to
22 arable lands only.

23 And you can ask your question again, if you
24 please.

25 kersich-direct-echohawk

1 Q (By Mr. Echohawk) Do you have an opinion as to
2 the amount of arable lands that were depicted or
3 found by HKM within the six study areas that we
4 have discussed here today?

5 A I do.

6 Q And what is that opinion?

7 A My opinion is that the 84,469 acres of total
8 arable lands do meet the qualifications of arability.

9 THE SPECIAL MASTER: What classes?

10 Q (By Mr. Echohawk) And, Mr. Kersich, do you have a
11 breakout by class?

12 MR. WHITE: Your Honor, I would object
13 to the witness testifying from exhibits that are
14 not in evidence.

15 THE SPECIAL MASTER: Well, he's
16 shuffling papers right now. Maybe he just wants
17 to refresh and recollect his memory, but I think
18 we can have him answer the question.

19 Do you have a number by class?

20 MR. ECHOHAWK: That's correct.

21 THE SPECIAL MASTER: He's testifying
22 from his memory now, I take it, and his profession-
23 alism and not from an exhibit.

24 Q (By Mr. Echohawk) Can you tell us by classification?

25 kersich-direct-echohawk

1 A I have this open now --

2 THE SPECIAL MASTER: Well, he's referring
3 to the same forms, and he described what they are.
4 You may answer.

5 THE WITNESS: Okay.

6 A (Witness) Yes, I have an opinion predicated on the
7 opinions of my land classifiers and my other
8 people of Class 1 lands of 8,819 acres; Class 2
9 lands of 36,611 acres; Class 3 lands, 38,339 acres;
10 and Class 4 lands, 700 acres.

11 THE SPECIAL MASTER: 700 acres?

12 THE WITNESS: Yes, sir.

13 Q (By Mr Echohawk) Mr. Kersich, we have been through
14 quite a few of these exhibit maps today, and I'm
15 going to refer you to various maps, and then I'm
16 going to ask you a question now.

17 In regards to Exhibit 35, which is the Study
18 Area Land Base Map, and in regard to Exhibits 41
19 and 42, which are the Arable Sprinkler Lands and
20 Arable Gravity Lands, the large maps that are
21 leaning against the wall, and in regard to
22 individual unit maps that we have discussed here
23 today -- those would be Exhibits 44 through 54 --
24 were these maps prepared under your direction?

25 kersich-direct-echohawk

1 A Yes, they were.

2 Q And under your supervision?

3 A Yes, they were.

4 Q And are they accurate to the best of your
5 knowlege?

6 A To the best of my knowledge, they are, yes.

7 Q Do they accurately depict the lands by classification?

8 A They do.

9 Q Mr. Kersich, I have been informed that I forgot
10 to identify one exhibit.

11 Would you please identify what has been marked
12 as United States Exhibit C-54?

13 A Yes, C-54 is the blowup of the Arapahoe study area,
14 and it's the recording of the results of the
15 sprinkler land classification study. It depicts
16 the outline of the study area and the lands within
17 that study area that are found to be arable under
18 the sprinkler land classification system and the
19 separate classes of that are identified by the
20 same colors that were used on the other exhibits.

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kersich-direct-echohawk

1 Q (By Mr. Echohawk) Mr. Kersich, this morning we
2 had a discussion with Mr. White about the land
3 classifications standard that were used by HKM
4 in the classifying of these lands; it would be
5 Exhibit 36. He raised certain questions. Do you
6 have any clarifications to any of your previous
7 answers that you would like to give at this time?

8 A. Well, on page 1 there was some concern that -- on
9 C-36, United States Exhibit C-36, the same sentence
10 that was shown on SK-2 was not included. That
11 sentence reads "there must be at least two inches
12 per hour permiability in the top two feet when
13 SAR exceeds 20." That sentence was removed prior
14 to 3-79 and is not a factor in the lands that we
15 classified.

16 And with regard to drainage there was a question
17 of a footnote that was attached to SK-3 and that
18 footnote reads, "no drainage requirement is necessary
19 for these lands." I was confused this morning. That
20 footnote is correct and on the undeveloped lands the
21 700 acres of class 4 lands drainage was not considered.
22 They were considered to be natural draining because
23 they are low quality lands, potentially pasture lands,
24 and drainage was not considered. They would still,

25 kersich - direct - echohawk

1 of course, have to meet all of the other tests.

2 MR. ECHOHAWK: Your Honor, if I could have
3 one moment.

4 THE SPECIAL MASTER: Surely.

5 (Brief pause.

6 MR. ECHOHAWK: Your Honor, at this time I would
7 like to reoffer the exhibit, it would be exhibit
8 34, being the resume; Exhibit 35, being the maps
9 study area land base; 37 would be the map symbol,
10 38 would be the soil triangle, 39 would be the aerial
11 photograph, 40 would be the soil log and 41 would be
12 the large map, arable sprinkler lands selected study
13 areas; Exhibit 42 would be the map arable gravity
14 lands selected study areas of the report entitled
15 Land Classification of North Crow Heart, South Crow
16 Heart, Big Horn Flats, Riverton East, Owl Creek and
17 Arapahoe Units; Exhibit 44 which is the map, North
18 Crow Heart gravity lands; Exhibit 45 which would be
19 the map, North Crow Heart sprinkler lands; Exhibit 46,
20 which would be the maps, South Crow Heart gravity
21 lands; Exhibit 47, which would be the map, South Crow
22 Heart sprinkler lands; Exhibit 48 which would be
23 the map, Big Horn Flats gravity land; Exhibit 49 which
24 would be map, Big Horn Flats sprinkler lands; Exhibit .50

25 kersich - direct - echohawk

1 which would be the map, Riverton East gravity lands;
 2 Exhibit 51 which would be the map, Riverton East
 3 sprinkler land; Exhibit 52 which would be the map,
 4 Owl Creek sprinkler land; Exhibit 53 would be the
 5 map, Arapahoe gravity lands; Exhibit 54 would be the
 6 map, Arapahoe sprinkler lands. At this time I would
 7 like to move all these exhibits into evidence, Your
 8 Honor.

9 THE SPECIAL MASTER: Voir dire, anyone?

10 MR. WHITE: The tribe is up first, Your Honor.

11 THE SPECIAL MASTER: Mr. Sachse?

12 MR. SACHSE: No, we have no voir dire.

13 THE SPECIAL MASTER: Mr. Rogers?

14 MR. ROGERS: None, Your Honor.

15 THE SPECIAL MASTER: Any counsel of the other
 16 defendants? None responding.

17 Mr. White, for the State of Wyoming.

18 VOIR DIRE EXAMINATION

19 MR. WHITE: Your Honor, I would first like to
 20 voir dire with respect to the offer of Mr. Kersich
 21 as an expert in agricultural engineering.

22 BY MR. WHITE:

23 Q Mr. Kersich, on your resume and in your direct
 24 examination you referred to work that you have done
 25 kersich - voir dire - white

1 with respect to irrigation systems on other Indian
2 reservations, do you recall that testimony?

3 A. No, I don't recall that testimony because on
4 different reservations we did different things.

5 Q. Okay. Now let me refer you to the third page and
6 the fourth page of Exhibit C-34 and ask you whether
7 or not the recitation on the bottom of page 3 and
8 the top of page 4 correctly summarizes and accurately
9 portrays your work on other Indian reservations?

10 A. With regards to land classifications on the Crow
11 Indian Reservation, that is correct. Our firm did
12 work of this type there. With regards to the
13 Northern Cheyenne Reservation, to the best of my
14 knowledge, yes, that is correct, also.

15 On the Fort Berthold Reservation that is
16 correct. On the Wind River Reservation, that's what
17 I have -- at that point we also converted gravity
18 systems and sprinkler systems on previously
19 classified lands. We did part of that here but that
20 was part of the problems with the study; we found
21 that the gravity classifications system needed some
22 review so we had to go back and reclassify all of
23 those lands. But that was the intent to start out
24 doing that, sir.

25 kersich - voir dire - white

- 1 Q Now, on the Jicarilla?
- 2 A Jicarilla, those studies are in process right now,
- 3 yes.
- 4 Q I believe you -- I'm sorry.
- 5 A They have not been completed.
- 6 Q I believe you told the master that no irrigation
- 7 project on an Indian reservation has been constructed
- 8 and is operating based on these works of yours that
- 9 are described on Divisions 3 and 4?
- 10 A Okay, on the land classifications study that were
- 11 either in the -- we are either in the process of
- 12 doing or have potentially completed to the best of
- 13 my knowledge there has not been one; no, sir.
- 14 Q Isn't it true that you have appeared in a number of
- 15 adjudications of Indian water rights as an expert?
- 16 A No, sir.
- 17 Q No? When have you before appeared as an expert in
- 18 Indian water rights adjudication cases?
- 19 A I think -- may I define one thing here at this time?
- 20 Q Sure.
- 21 A I'm assuming by your word appear that I have actually
- 22 testified --
- 23 Q Uh-huh.
- 24 A -- in behalf of the tribes in a matter. The only
- 25 kersich - voir dire - white

1 other case I can recall where I testified was the
2 Arizona versus California litigation that I referred
3 to earlier. I have not testified on any of these
4 other matters.

5 Q. And on whose behalf did you testify in that case?

6 A. In that case I was hired by the United States.

7 Q. So you have never testified with respect to or in
8 an Indian water rights case adjudication case except
9 on behalf of either the tribes or the federal
10 government, is that correct?

11 A. Well, it is one out of one as far as Indian cases.
12 I have done private cases, of course, where I have
13 testified on behalf of individuals, and energy
14 companies, for example, in a litigation.

15 Q. Did you receive a copy of the request for proposal
16 in South Dakota for the similar work there?

17 A. Yes, I did.

18 Q. And have you filed a proposal in response to that?

19 A. No, sir.

20 MR. WHITE: Good.

21 THE WITNESS: Excuse me just a minute.

22 Q. (By Mr. White) Mr. Kersich, when was the last time
23 you did any soil mapping in the field?

24 A. Friday.

25 kersich - voir dire - white

1 Q You yourself?

2 A Yes, I was with Mr. Waples and we went out and toured
3 some of the areas of the Reservation again.

4 Q And what area did you map?

5 A We didn't map, we checked the work that had been
6 done.

7 Q I see. So when was the last time you yourself did
8 any soil mapping?

9 A I don't do soils mapping as such.

10 Q I didn't think so.

11 When was the last time you personally logged
12 a hole --

13 A Friday.

14 Q -- on boring?

15 You personally logged that hole?

16 A Yes, sir, I even drilled it.

17 Q How did you do it?

18 A How did I do it? Very simply, sir. I took a pick
19 and got down through the frost, that was the first
20 problem, then I took a soils auger and I drilled the
21 hole, and every time I would fill up the auger with
22 soils I would bring it up, I would make a little pile
23 until I had the soil as deep as I could go at that
24 particular time. And then with the help of Mr. Waples
25 kersich - voir dire - white

1 we textured a particular matter and between the
2 two of us we classified that hole.

3 Q Prior to the time --

4 A -- or logged it.

5 Q Prior to Friday, how many holes did you actually
6 log on the Indian Reservation, the Wind River Indian
7 Reservation?

8 A Prior to Friday? Well, back in November there was
9 about a dozen I suppose that I drilled the holes in,
10 I didn't necessarily log them because for example, we
11 had a question on Arapahoe Flats. I wondered why
12 so much land was in class 6 and the opinion that I
13 had from Mr. Waples and Mr. Smith is that the depth
14 of barrier was less than six feet; in most instances
15 less than six feet, considerably less. So we made
16 a tour of the Reservation in -- as a matter of fact
17 we were in a helicopter and I would ask the pilot,
18 I want to land there, and we would land there and
19 I would get out with a soils auger and at this time
20 the soil was not frozen and so I drilled a hole and
21 sure enough, they were right.

22 Q Okay. How did you complete the log, though?

23 The question was when did you log a hole?

24 A Log them?

25 kersich - voir dire - white

- 1 Q Uh-huh.
- 2 A I don't recall that I logged any other holes on
- 3 the Reservation other than the ones Friday.
- 4 Q Are you familiar with what's called the Seventh
- 5 Approximation Scheme?
- 6 A No, sir, I am not.
- 7 Q Have you ever used the textbook entitled Soils
- 8 Tax -- Taxonomy?
- 9 A Do you mean the big green book?
- 10 Q Uh-huh.
- 11 A Yeah, I've been involved in reading it and trying
- 12 to review the portions of it that were applicable
- 13 to work that I was concerned with.
- 14 Q And, yet, you're not familiar with the Seventh
- 15 Approximation Scheme?
- 16 A No, because I think what you're referring to is
- 17 soils survey work there, aren't you, or soil
- 18 morphology.
- 19 Q Well, it is something that most soils scientists
- 20 would understand, I suppose.
- 21 A Possibly soils scientists but not necessarily land
- 22 classifiers, Mr. White.
- 23 MR. WHITE: I have no objection, Your Honor,
- 24 to the Court receiving Mr. Kersich as an expert in
- 25 kersich - voir dire - white

1 agricultural engineering. We, of course, would
2 maintain our objections to any opinions having to
3 do with those matters normally dealt with by soils
4 scientists or land classifiers.

5 THE SPECIAL MASTER: All right. Thirty-four
6 is admitted.

7 Q (By Mr. White) Now, I think Exhibit 35 is behind
8 you; is that Exhibit 35, I can't see?

9 A. That's correct, sir, it is C-35.

10 THE SPECIAL MASTER: Do you want to go around --

11 MR. WHITE: That's all right as long as he
12 can see it and the audience can see it, Your Honor.

13 Q (By Mr. White) As I recall your testimony, that
14 really illustrates the first step in your work in
15 determining the arable land base, is that correct?

16 A. That's part of the first step, yes.

17 Q Is there a difference between an arable land base
18 and a cultivable land base?

19 THE SPECIAL MASTER: And a what, Mr. White?

20 MR. WHITE: Cultivable.

21 THE WITNESS: I guess I don't concern myself
22 about a difference like that. Arability is what
23 we are trying to determine and that's what we are
24 looking for.

25 kersich - voir dire - white

1 Q (By Mr. White) To a person of your expertise in
2 the agricultural engineering field, do you know
3 what the term cultivable means?

4 A. It means many things to many people.

5 Q What does it mean to you?

6 A. Again, I don't use the term ordinarily but
7 cultivation practices or agricultural procedures
8 for the area are those usually associated with the
9 ability to farm the lands and raise crops and harvest
10 crops; yes, sir.

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kersich - voir dire - white

1 Q (By Mr. White) (continued) So that's akin,
2 cultivable is akin to irrigable?

3 A No, you could have cultivable.

4 Q Dry land cultivable?

5 A I can't pronounce the word, but basically
6 there's many types of ways to raise crops and
7 harvest crops.

8 MR. WHITE: Your Honor, we have no objection
9 to Exhibit 35.

10 THE SPECIAL MASTER: Thirty-five is admitted.

11 (United States Exhibit
12 C-35 was received into
evidence.)

13 MR. WHITE: Sir, 36 is already admitted,
14 Your Honor. I wanted to inquire of the witness,
15 however, whether he had annotated the Court's
16 copy of 36 to reflect the footnote 4.

17 THE WITNESS: I don't understand the
18 question.

19 Q (By Mr. White) Well, do you have the Court's
20 copy of the Exhibit 36?

21 A I have a copy here in front of me. I don't
22 know whether it's the Court's copy or not, sir.

23 Q We need to find one with the sticker.

24 MR. ECHOHAWK: Al, does it have the original

25 kersich-voir dire-white

1 THE WITNESS: Yes, it has an exhibit
2 sticker with number 36 on it.

3 MR. ECHOHAWK: That's the original.

4 THE WITNESS: Okay.

5 Q (By Mr. White) Would you please examine the
6 original of Exhibit 36 to determine whether or
7 not footnote 4 appears on the third page.

8 A No, it does not, and all of a sudden I think I
9 may have committed another sin. I've already
10 marked the word "Arable" on this. If this is
11 the original copy I've --

12 Q You mean in footnote 3, 2 rather?

13 A Yeah, footnote 2.

14 THE SPECIAL MASTER: Footnote 2.

15 Q (By Mr. White) What should that be, irrigable
16 or arable?

17 A My understanding of it is that we're talking about
18 arable lands that would be attached to potentially
19 irrigable lands, and this is being a judgment that
20 the land classifier would make in the field. And
21 I've noted that, and I guess I've committed a sin
22 because this is the original court exhibit.

23 Q We want it to be correct, and if you make it so
24 that it is correct and correctly reflects those
25 kersich-voir dire-white

1 standards you applied and as correct as it is,
2 leave footnote 2 as you've annotated it and add
3 footnote 4 if you wish to.

4 A Okay.

5 THE SPECIAL MASTER: Just write it in which
6 you're proceeding to do.

7 (Brief pause.)

8 MR. EXHOHAWK: Your Honor, may I inquire
9 one question of the witness that he seems to be
10 somewhat confused about, I'm not sure whether
11 footnote 4 is supposed to be in or not.

12 THE SPECIAL MASTER: I'm letting it come in
13 in view of his explanation not more than five
14 minutes ago regarding footnote 4. I think it's
15 proper that it should be in.

16 Q (By Mr. White) Do you have footnote 4 in there?

17 A I'm getting it in.

18 MR. ROGERS: Your Honor, just to clarify the
19 record, footnote 4 by now coming in and appearing
20 on Exhibit C-36 should, in addition to the
21 narrative, the footnote itself, we should insert
22 the appropriate points above there where it goes.

23 MR. WHITE: That's an excellent suggestion.

24 Al, would you please do that?

25 kersich-voir dire-white

1 THE WITNESS: I've done it.

2 Q (By Mr. White) You've got it under the last two
3 entries, under drainage, land Class 4?

4 A Shown under the last two entries under drainage,
5 and then I've described the footnote underneath
6 that.

7 THE SPECIAL MASTER: Under the last two
8 entries under drainage on page 3 of the exhibit?

9 THE WITNESS: That's right, sir.

10 MR. WHITE: As modified, Your Honor, we
11 have no objection to the exhibit.

12 THE SPECIAL MASTER: Very good. It's now in
13 completely.

14 (United States Exhibit C-36
15 was received into evidence.)

16 Q (By Mr. White) Mr. Kersich, would you please
17 get Exhibit C-37 in front of you. Those are
18 your map symbol codes?

19 A Okay.

20 THE SPECIAL MASTER: Thirty-seven is the map
21 symbol code.

22 Q (By Mr. White) In the top half of the exhibit,
23 you see that you list the drainage deficiency of
24 the symbol of Y.

25 kersich-voir dire-white

- 1 A That's correct.
- 2 Q What does Y stand for?
- 3 A Y stands for correctable drainage. In other
4 words, you note to the agricultural engineer
5 that there may be a problem with drainage, with
6 these lands. You bring it to his attention.
7 However, in the opinion of the land classifier
8 and H.K.M., the drainage -- the condition is not
9 severe enough to warrant excluding the lands, so
10 he would examine them and then his decision would
11 control at that point.
- 12 Q Are all the symbols which he used as part of your
13 symbol code listed on Exhibit 37?
- 14 A Under drainage symbols, the Y should have been
15 listed as a correctable deficiency.
- 16 Q Anything else?
- 17 A Let me check very closely now.
- 18 Q Please do. I want you to be absolutely certain.
19 (Brief pause.)
- 20 A I believe that's correct now.
- 21 Q Go ahead.
- 22 A Without doing any further -- going back to the
23 files, but I believe it does contain all the
24 symbols that we used.
- 25 kersich-voir dire-white

1 Q So in evaluating the arable land analysis that
2 you've described in your direct examination,
3 we should rely on the symbols which are included
4 on C-37?

5 A Well, to the best of my knowledge at this time
6 that's correct, yes.

7 Q Well, was C-37 the basis of the opinion that you
8 expressed with respect to arable land or one of
9 the bases?

10 A Just looking at it right now I see no symbol that
11 we might have left off. The symbols that have
12 to do with the predominate soil, in both the
13 top 12 inches and the next three feet are all
14 there. We've got the symbol for gravel where we
15 encountered gravel. Where we encountered a bed-
16 rock or drainage barrier, we have the symbol B,
17 which was listed there. If there was a problem
18 or concern with available moisture holding capacity,
19 that symbol Q is listed. Salinity or alkalinity
20 is listed as A; that is shown here.

21 Stone removal was R, leveling was U, slope
22 or gradient is G, size and shape factor was J.
23 If there's a problem with cobble, X would have
24 been used. Cover was C, flooding is -- that's
25 kersich-voir dire-white

1 surface flooding where surface drainage might
2 be a problem, that was shown.

3 In the final analysis, yes, I believe we've
4 got them all here.

5 Q Okay. You'd be the person that would know.

6 A For any changes they should have come to me,
7 although I've got to admit sometimes they don't.
8 But ordinarily I would say, yes, I would know.
9 about it.

10 Q Where do you stand on it? Is this final and
11 complete?

12 THE SPECIAL MASTER: He said it is.

13 Q (By Mr. White) Okay.

14 A Did you want me to add the Y?

15 Q If you'd like to add the Y, to make it accurate,
16 that would be fine.

17 (Brief pause.)

18 A Okay.

19 Q If, in reviewing your mapping we ran into a
20 capital U as opposed to a lower case U, that would
21 mean leveling, wouldn't it?

22 A I don't recall running into a capital U. To me
23 they all look like little U's, although there may
24 have been some there. That may have been under --

25 kersich-voir dire-white

1 originally we did have another symbol on drainage
2 where we may have tried to determine or distinguish
3 the types of drainage problems that might be
4 there, but in the final analysis, as I recall that
5 was taken out.

6 Q So if there's a U there, capital or small case now,
7 it deals with leveling; is that --

8 A That's correct, yes.

9 Q You list a symbol F for flooding. Do you have a
10 land classification standard that's related to
11 flooding?

12 A Surface drainage.

13 Q Could you show me on 36? Are you on page 3?

14 A Yes, sir.

15 Q Towards the top?

16 A Um-hum.

17 Q So when we find an F on your map symbols, that
18 indicates that there's a surface drainage or
19 flooding problem?

20 A Potential surface drainage problems.

21 Q In your work, the term surface drainage and
22 flooding are synonymous?

23 A Can be used that way.

24 Q If you've got -- how is that?

25 kersich-voir dire-white

1 A The way I use it would be in the broader sense,
2 I would be concerned if I have an F show up in
3 a classification. I would try to see what kind
4 of contribution I was getting from the areas
5 adjacent to it. I would be concerned about how
6 the water was going to pass through the tract I'm
7 working on, things of this nature.

8 Q I'm sorry, I'm a little fuzzy this afternoon,
9 I'm not sure I'm picking you up. Is it true then
10 where the symbol F appears, that means surface
11 drainage deficiency?

12 A It means some type of surface drainage deficiency,
13 yes.

14 Q With respect to the symbol X, is gravel included
15 within the cobble tillage problem that you listed
16 there? This is back on 37.

17 A Okay. Cobble is defined somewhat differently
18 than gravel. As I recall, we defined gravel from
19 being about two-tenths of a millimeter to three
20 inches. And cobbles are defined as being from
21 three to ten inches, so cobbles are much more
22 concerned than say the gravels.

23 Q Is it true then that you did not include a symbol
24 with respect to topography that deals with gravel?

25 kersich-voir dire-white

- 1 You have a symbol for stone and cobble, but
2 not for gravel?
- 3 A Gravel is defined as K, isn't it?
- 4 Q You're talking about the soil symbol there --
- 5 A Well, sure.
- 6 Q -- rather than a deficiency?
- 7 A Um-hum.
- 8 Q So you have no symbol other than K to indicate
9 that you have a gravel removal problem or a
10 gravel tillage problem?
- 11 A Well, the K, as far as I'm concerned, again in
12 my review here could occur either in the soils
13 profile, but remember the surface of the soil
14 is defined as the top 12 inches, so you could
15 have the gravel on top of the surface or within
16 that top 12 inches.
- 17 Q Do the soils symbols in the left-hand column
18 toward the bottom of Exhibit 37 also relate
19 to the textural classes that are shown on
20 Exhibit 38 which is the textural triangle?
- 21 A Somewhat, yes.
- 22 Q So if you found a symbol H in your map, you'd
23 know that it is a clay and you'd go to Exhibit 38
24 and you would be able to find that clay was made
25 kersich-voir dire-white

1 up of a certain percentage of sandsilt, etcetra;
2 is that right?

3 A Yes. In some instances the clay loam, in the
4 determination of the land classifier, could be
5 called a heavy texture. In other words, there's
6 all sorts of clay loams as you can see, some with
7 more clays, some with more sand. We didn't have
8 every class that's shown on the soil textural
9 triangle of concern in the field. For one thing,
10 it's quite impossible to sit there and determine
11 whether you got this percentage of clay or that
12 percentage of clay, but you do know from what its
13 reaction with water that it might have more clay,
14 and you would be concerned about it, so you would
15 probably put that under a heavy texture than say
16 a medium texture.

17 On the other hand, you might examine a texture
18 later on that you feel is a clay loam texture
19 but you don't get the same feel of it during this
20 feel test I have talked about, and you may call it
21 a medium texture. So there's -- There is judgment
22 that is used in the relationship of these
23 particular textures, and the reporting on both
24 the log form and aerial photographs. That's one
25 kersich-voir dire-white

1 of the reasons, frankly, that you try to get
2 people with a lot of experience in this type
3 of work, where you can depend on their judgment.
4 And you also check their judgment through, having
5 them get samples of soil and you have them
6 texturize it, make a texture test analysis and
7 you check it with the mechanical analysis.

8 Q Could you explain to me how you would use the
9 soil or textural triangle on Exhibit 38 if you
10 had a soil particles analysis, 50 percent sand,
11 35 percent silt and 15 percent clay?

12 A Okay. Let me read this back to make sure I got it.
13 Fifty percent sand.

14 Q Right.

15 A Thirty-five percent silt and 15 percent clay.

16 Q Yes.

17 A What I would do, I would go here where it says
18 sand on the bottom of the triangle and follow
19 up that line until I intersected 35 percent silt
20 and 15 percent clay. It appears to me that --
21 I'm having trouble with my glasses on my exhibit.
22 Could I have an exhibit -- never mind.

(Brief pause.)

24 A Well, you're going to be right inside loam.

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1 THE SPECIAL MASTER: Right inside what,
2 Mr. Kersich?

3 THE WITNESS: The loam. There's an area
4 there --

5 THE SPECIAL MASTER: I see that.

6 THE WITNESS: That's impounded right --

7 Q (By Mr. White) So that would be classified as
8 a loam soil, is that correct?

9 A That's correct, yes.

10 Q Back on Exhibit 37 I see that you have a symbol L
11 for fine sandy loam.

12 A Yes.

13 Q How would you determine what is fine sandy loam
14 based on the textural descriptions in Exhibit 38?

15 A Fine sandy loams would basically -- When the
16 person texturizes it in the field he'll make
17 this test, he can feel the sand, he can feel that
18 they're very fine, so what he's telling us in his
19 estimation is that the sand particles, that the
20 sand fraction contains a number of fine sands or
21 smaller sands. If you'll notice, the sands are
22 later broken down in different size, and there's
23 a definition of fine, coarse and sand itself.

24 Q So you have no percentage breakdowns for those;
25 kersich-voir dire-white

1 is that correct, fine sandy loams?

2 A Well, we know that we had a sandy loam where
3 the sands appeared to be fine, on the finer
4 side or the smaller side.

5 Q Have you given your soil scientists or land
6 classifiers any direction with respect to the
7 relative percentages, the types, composition of
8 fine sandy loam?

9 A I would have to say that I would trust Chick
10 Smith's, Reed Olsen's, -- or Lyle Olsen and Reed
11 Hansen to determine a fine loam, which contain
12 a large percentage of fine. I think that's a good
13 warning to the Ag engineer because it tips them
14 off that water holding capacity has to be looked
15 at in a different sense, possibly even drainage
16 in some instances.

17 THE WITNESS: Could we take a break in about
18 five minutes?

19 MR. WHITE: Why don't we take a break now.

20 THE SPECIAL MASTER: Let's take a ten minute
21 break.

22 (Thereupon a ten minute
23 recess was taken.)

24 end 16

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1 THE SPECIAL MASTER: We will come to
2 order, please, and I wanted to ask just two
3 short questions on 37 when you are through, Mr.
4 White.

5 MR. WHITE: I'm through with 37.

6 THE SPECIAL MASTER: The only thing I
7 have on 37 is was there a particular reason why
8 your symbols were not used in that exhibit in
9 Class 1?

10 THE WITNESS: Technically, Class 1
11 soils should not have any soils topographic or
12 drainage deficiencies that are of concern to anyone.

13 THE SPECIAL MASTER: I see. Now, your
14 capital H and capital M under soils symbols, is
15 there some way to read those as distinct from what
16 might be -- I see. The symbol stands for two
17 things then, doesn't it?

18 THE WITNESS: Well, for example, as
19 we talked about prior to the break, sir, if the
20 classifier when he was profiling his hole got into
21 a stratum or a horizon where he said this is clay
22 and it's heavy, then he would use H.

23 Now, the clay loam could have been either
24 heavy or light, depending on the texture of the
25 kersich- voir dire-white

1 particular clay loam that he had, and the same goes
2 for silty clay loams or silty loams. This is a
3 determination that he makes.

4 The actual way -- if you want to find out
5 what he found in the particular hole, you would
6 have to look at the particular hole number and
7 go back to the log book, and on that log book he
8 put down the texture that he actually described
9 in the field.

10 MR. WHITE: The State has no objection
11 to 37, Your Honor.

12 THE SPECIAL MASTER: 37 is admitted.

13 (Thereupon United States Exhibit
14 (WRIR C-37 was admitted into
evidence.)

15 Q (By Mr. White) With respect to Exhibit 38.

16 A Yes.

17 Q You indicate the source is USDA.

18 A Yes, this particular soils triangle was Xeroxed
19 from the Soil Drainage Manual, the drainage manual
20 of the USBR, and the source given there was the
21 United States Department of Agriculture.

22 Q That's for the triangle?

23 A That's correct, yes.

24 Q And how about the particle size classification?

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1 A Particle size classification was taken also out
2 of that manual, and it approximates what we used
3 in the field.

4 For example, I know we defined as cobbles,
5 stones from three to ten inches in size, gravel from
6 2.0 millimeters -- I may have said .2 before, but
7 that was wrong -- but 2.0 millimeters to --

8 Q Two inches?

9 A Whatever the definitions are here. Those are the
10 approximations of particle sizes.

11 Q You used three inches as a gravel parameter?

12 A That's the maximum size on the gravel, yes.

13 Q And it's your testimony that all of the information
14 on Exhibit C-38 came out of the Soil Drainage
15 Manual?

16 A Yes, I'm sure of that. Yes.

17 Q Could you explain quickly how your land classifiers,
18 the soil scientists, actually used Exhibit 38?

19 A They used it to give us the basic textures that
20 we talked about here. We use it also to check
21 their textures when we run a mechanical analysis,
22 and then I use it to determine what the texture
23 is, knowing that it's going to fall within these
24 parameters here that we have described within the
25 kersich- voir dire-white

1 soils triangle.

2 MR. WHITE: Your Honor, the State has
3 no objection to Exhibit 38.

4 THE SPECIAL MASTER: U.S.38 is admitted.

5 (Thereupon United States Exhibit
6 (WRIR C-38 was admitted into
7 evidence.)

8 THE WITNESS: May I ask a question?
9 I have the originals here. What do you want me
10 to do with those?

11 MR. WHITE: You should give those to the
12 reporter.

13 THE WITNESS: Mr. White, do you want
14 these two back here?

15 MR. WHITE: No, they should be given to
16 the reporter too. They were identified but not
17 admitted, but they become part of the record.

18 Q (By Mr. White) Mr. Kersich, I direct your attention
19 to what was offered as C-39 and ask you whether or
20 not all the symbols which you used in your aerial
21 photograph annotations are described in the
22 caption on the lower right-hand corner of Exhibit 39?

23 A May I take a look at that, please?

24 Q You bet.

25 A It appears that the one that we didn't add there
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1 would be -- let's see. There's a log profile, a
2 sample profile -- I can't tell without looking
3 through each one individually, but sometimes for
4 the USBR profile we might have had a smaller circle,
5 a circle smaller than that that identifies HKM.

6 Q What would an eight-sided octagon symbol mean if
7 it were located on the map? I don't see anything
8 right off, but I have seen eight-sided symbols
9 on another photograph, and that's why I ask.

10 A All right. Normally anything -- probably there
11 were some octagons but basically anything that was
12 a hexagon or potentially an octagon could have been
13 either HKM or the States. What we tried to do
14 is try to put the information that you have turned
15 over to us on these township plats.

16 Q Would you make absolutely certain about the
17 symbology for the USBR log profile?

18 A Yes. The only way I could do that would be to go
19 back to the other plats that I have. On some of
20 the sheets we did mark out the symbol.

21 Q You used another symbol aside from the caption on
22 Exhibit 39?

23 A For the USBR, yes. There could have been a circle
24 used on some of them.

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1 Q What would the relative size of the circle have
2 been of the USBR holes as opposed to the HKM
3 holes?

4 A Well, speaking from my memory, sir, and to the
5 best of my recollection, the circle would have
6 been smaller than any of the circles that would
7 define an HKM hole, and it probably would not
8 have a hole number in it, a log number, but I
9 would have to check on that to be able to tell you.

10 Q What does it mean where there is an open circle
11 with a number outside?

12 A You mean like -- would you show me what you mean?
13 I'm sure you have something in mind.

14 Q I don't know if one is located on that photograph,
15 but there are some on other photographs I have
16 seen, and I'm just curious. Do you know what that
17 means?

18 A It would normally mean either a logged hole or a
19 sample profile, the problem being that the fellow
20 didn't feel he could write the number inside the
21 hole legibly, and I think you realize, especially
22 when you start getting into something like forty
23 or thirty or something of this nature, you might
24 have a problem putting the number inside the circle.

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1 Q And again if you have a number associated with
2 a circle, is that the number of the soil profile
3 log?

4 A That's what it's intended to be, yes.

5 MR. WHITE: Your Honor, we have no
6 objection to Exhibit 39.

7 THE SPECIAL MASTER: 39 is admitted.

8 (Thereupon United States Exhibit
9 (WRIR C-39 was admitted into
evidence.)

10 Q (By Mr. White) Now, would you please get Exhibit 40
11 in front of you, please?

12 A Yes.

13 Q Is this Exhibit 40 a logged hole from the Bureau of
14 Reclamation or HKM?

15 A No, sir. As the title here on the top says, the
16 project is Wind River, the hole number, the
17 location of the hole, and it was logged by LJO,
18 which is one of our land classifiers, and the date
19 he logged it, and above that is the particular
20 photo number, the 12-by-12 photo he used in the
21 field where he put this number on.

22 Q So this is an HKM logged hole?

23 A That's right, yes.

24 Q What does the little H after 4, the hole number, mean?

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1 A Well, that's just part of a designation that we
2 were using to keep numerical track of these holes.
3 What we wanted to do was eventually wind up with
4 a series of holes numbered in consecutive order
5 per township, okay? And the H is just a desig-
6 nation that was used at that time. It has no
7 particular designation from a land classification
8 standpoint. It's a bookkeeping procedure.

9 Q / The numbers under the depth column, are those
10 inches?

11 A Yes, sir.

12 Q On other soil logs where no unit is shown, as in
13 Exhibit 40, would the assumption be that those
14 are inches as well?

15 A Normally they are inches, yes. If they are feet,
16 they are usually described as feet then.

17 Q Looking at the soil log, which is Exhibit 40, what's
18 the soil texture, or how would you tell the soil
19 texture for the depth 11 to 24 inches?

20 A I would look over here on the hole where he actually
21 drew the log out. If you notice, he had -- this
22 indicates depth. You see the little horizontal
23 lines in the right-hand side of that rectangular
24 enclosure?

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1 Q Yes.

2 A Okay, sir, Those usually are meant to indicate
3 12 inches or one foot.

4 Q I see.

5 A Okay, so he had a horizontal line that he drew
6 just above the little first horizontal indentation,
7 Looking at that, in other words, from zero to
8 eleven inches he was in loam. He showed loam in
9 that particular block.

10 Now, eleven to twenty-four inches, if you'll
11 notice the next horizontal line is right at the
12 two-foot line or as close as you draw it in the
13 field, that he defined as fine sandy loams, and
14 that is the texture I would put under eleven to
15 twenty-four here.

16
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1 Q (By Mr. White) When you were describing Exhibit 40
2 you mentioned something about the sodium absorption
3 ratio being shown on there and I didn't understand
4 where it was, could you describe that?

5 A Okay. On the right-hand side we have for the first
6 horizon 0.1, 0.1 then in the third horizon or the
7 third level that he texturized he has 0.1 to 0.8
8 and underneath that the figure 2.6. Do you see
9 that, sir?

10 Q Oh, yes, I see that.

11 A Okay, the 2.6 then is the result of the sodium
12 absorption, or is the sodium absorption ratio for
13 that particular horizon of soil.

14 Q Why didn't you make an SAR test for the area
15 above 24 inches?

16 A Well, you see the figures 0.1?

17 Q Yeah.

18 A That is a very minimum amount of salt in the profile
19 at that point and if you can see down here we had
20 2.6 SAR which meant there wasn't any particular
21 concerns, if you will check our standards.

22 Q Uh-huh.

23 A And so it is a matter of time and money. If things
24 are going good and you know that there are very few
25 kersich - voir dire - white

1 salts there you don't necessarily do the rest of
2 the test.

3 Q The third column has the word color in it --

4 A Yes, sir.

5 Q -- and I can't read the first --

6 A Munsel, M-u-n-s-e-l.

7 Q Uh-huh. And what does that mean, Munsel column?

8 A Well, there is a book of standard colors that are
9 put together. I don't know where the name comes
10 from -- soils classifiers.

11 Lands classifiers use this as a matter of
12 record and what they do, they take a look at the
13 sample that they have and then locate a comparable
14 color in this particular color manual that they
15 have. And in this instance it came out to be 10YR5/2.
16 And what's of interest to me in there is the fact
17 there was a change in color and I would ask the guy
18 why did it change in color, in his estimation was
19 there a problem or not. You see that's the type
20 of thing that gives you some idea of whether water
21 affects things of that nature.

22 Q What's the name of the publication that the --

23 A Munsel color book.

24 Q Munsel color book?

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1 A I call it the Munsel Color Book but other people
2 may call it different things. But it is a color
3 code.

4 MR. WHITE: Your Honor, we have no objection
5 to Exhibit 40.

6 THE SPECIAL MASTER: All right. In all of
7 your work with these Exhibits I might mention
8 this to you: I note with interest your minute
9 logging and classification of various characteristics
10 to which you have alluded. The reference is made,
11 however, to a particular area of ground as to
12 whether it requires leveling or not. And how much
13 surface work would be necessary? Not in your
14 province?

15 THE WITNESS: It is somewhat, sir. For example
16 slope, 3 to 7 percent is listed here.

17 THE SPECIAL MASTER: Yes. That's what brought
18 my question on.

19 THE WITNESS: Sir?

20 THE SPECIAL MASTER: That's what brought my
21 question on.

22 THE WITNESS: Yeah. And the surface relief
23 gives us some idea. In this instance the gentleman
24 that was on the piece of ground said that it was
25 kersich - voir dire - white

1 gently undulating to roly so that would, you know,
2 wake you up. If we were to look at the particular
3 photo it might be that he put a symbol for surface
4 consideration there. It might be a topographic
5 symbol, for example, or the T would be in the top
6 of the symbol and then down underneath would be
7 TU for -- especially for gravity. This would
8 probably be Class 3 gravity land, I suspect.

9 THE SPECIAL MASTER: But this would have
10 been his visual observation, not any instrument
11 helping him make that decision?

12 THE WITNESS: No, sir. With this slope he
13 may have an Amney level or a hand level and he
14 takes a shot on the predominant grade and tries
15 to describe it as best he can to you.

16 THE SPECIAL MASTER: Okay.

17 Go ahead, Mr. White.

18 Q (By Mr. White) Behind you are Exhibits 41 and 42?

19 THE WITNESS: Can I put this over here?

20 MR. WHITE: You bet.

21 MR. ECHOHAWK: Is Exhibit 40 in?

22 THE SPECIAL MASTER: You bet, Exhibit 40 is
23 admitted.

24 Q (By Mr. White) Are those 41 and 42 behind you?

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1 A. Yes, they are.

2 THE SPECIAL MASTER: Do you want those up?

3 MR. WHITE: No, that's fine, Your Honor.

4 Thank you.

5 Q (By Mr. White) I believe you testified that those
6 represent or accurately represent a consensus of
7 opinion of the people that you had up in this
8 arable lands study, is that correct?

9 MR. ECHOHAWK: Objection, Your Honor. I
10 think Mr. White misstates Mr. Kersich's testimony.

11 MR. WHITE: Well, maybe we ought to let the
12 witness testify instead of counsel answering the
13 question.

14 THE SPECIAL MASTER: You can ask him and let
15 the witness answer. It would be better.

16 Q (By Mr. White) Was this the result of a collective
17 opinion or a consensus?

18 A. Well, the final opinion is the result of the final
19 review.

20 Q Okay.

21 A. And the land classifier placed the classification
22 upon a particular tract and then later when he got
23 the result of chemical or any additional tests that
24 might have been done on that particular tract then he

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1 would review his opinion and then finally it went
2 through a review process in our office, and my
3 opinion is that on the basis of arability that those
4 tracts are arable.

5 Q So that's your opinion; it is not a collective
6 opinion, it is your opinion?

7 A It is my opinion based upon the opinions of the
8 people that work for me.

9 Q Is it true that Exhibits 41 through 54 represent
10 your opinion based on the opinions of others?

11 A Yes, I believe that's just what I just stated,
12 sir.

13 MR. WHITE: Your Honor, we would object to the
14 admission of Exhibits 41 through 54 on the basis
15 that they are of no probative value in that it
16 represents one expert's opinions which are based
17 on the opinions of another expert. And the opinions
18 of another expert, under the case law, are not facts
19 or data upon which an expert may base his opinion.

20 We have a brief on that and will submit it to
21 the Court and give copies to counsel.

22 MR. ECHOHAWK: Your Honor, I would, just in
23 response to that, I would just refer to rule 703
24 which allows one expert to base his opinion on

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1 just what Mr. Kersich bases his opinion on.

2 THE SPECIAL MASTER: May we see Rule 703,
3 please? Then I'll take five minutes to decide
4 this. If you want to take a brief break --

5 MR. SACHSE: Your Honor, can I make a comment
6 on that?

7 THE SPECIAL MASTER: Yeah, I'll hear any
8 additional briefs or arguments. I'll hear them
9 right now. Mr. Sachse.

10 MR. SACHSE: Experts under the Rule are allowed
11 to base their opinions upon the kind of data that
12 experts in their field customarily rely upon.
13 Mr. Kersich, from what I have heard, has gone way
14 beyond that. He's describedd the vast amount of work
15 that's been done under his direction; people going
16 out digging holes and first assembling all of that
17 data that was already there, then going out and
18 drilling different kinds of holes, having people
19 feel the soil, him going out himself afterwards to
20 check the holes when they didn't go out there. Now,
21 what Mr. White has done is to ask Mr. Kersich to sum
22 all this up in one sentence, you know. Are these
23 maps based on your opinions based upon the opinion
24 of others. Mr. Kersich has said yes, but that one
25 kersich - voir dire - white

1 statement can only be understood in terms of his
2 entire testimony which is that he has participated
3 and people directly under his control have
4 participated not only in just gathering information
5 from USGS and so forth, as we have seen with some
6 prior experts who weren't hired to go out in the
7 field and dig holes and so forth, but they have
8 spent two years doing the physical work themselves,
9 and the admissibility of this evidence I submit is
10 just unimpeachable, it is absolutely admissible
11 evidence.

12 THE SPECIAL MASTER: Anybody else wish to
13 argue?

14 Thank you. We'll take a five minute recess.

15 MR. WHITE: Your Honor, I was just going to
16 say we don't need any further argument. We'll
17 stand on the record and on our brief. Your Honor
18 the law is pretty clear.

19 THE SPECIAL MASTER: All right.

20 (Brief recess, 2:52 p.m.
21 (to 2:56 p.m.)

22 THE SPECIAL MASTER: I'm ready to rule on
23 this.

24 MR. WHITE: We need a reporter.

25 kersich - voir dire - white

1 THE SPECIAL MASTER: We have a reporter.

2 MR. WHITE: I thought you were another justice
3 there.

4 THE SPECIAL MASTER: He's so quiet.

5 MR. WHITE: That's right.

6 THE SPECIAL MASTER: Okay. We have read the
7 rules and the brief in support of the State's
8 position to exclude and that motion will be
9 overruled. And I want to note these distinctions
10 in the record; that facts and data upon which this
11 witness relies are facts and data of which he was
12 a part of in the field work which compiled those
13 facts and data as distinguished from something that
14 would have been foreign to him or based upon other
15 opinions, which would indeed be a case of something
16 shifting in sand. The other distinction I think
17 that is clear is that he had and has testified to
18 his personal knowledge of the nature and the extent
19 of the studies conducted from which all of these
20 parties met in a consensus in a review process to
21 formulate conclusions to which he testified. So the
22 evidence is -- so the exhibits -- you're not through
23 yet, though, are you?

24 Exhibit 42 to which objections have been made
25 are hereby admitted --

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MR. WHITE: Your Honor, you might as well go ahead and admit them through 54 because I meant to make my objection on the basis of the brief.

THE SPECIAL MASTER: Through the whole group?

MR. WHITE: Through the whole group.

THE SPECIAL MASTER: All right then, all exhibits from the last one we admitted -- 37, was it not?

MS. SLEATER: Forty was the last one.

THE SPECIAL MASTER: The following exhibits: Forty-one, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54 are admitted in evidence.

Off the record, please.

* * * * *

1 THE SPECIAL MASTER: Off the record, please.
2 (Off-the-record discussion.)

3 THE SPECIAL MASTER: Okay, Mr. White.

4 MR. WHITE: I'm through, Your Honor. I
5 believe we've covered everything they offered.

6 THE SPECIAL MASTER: Okay. Mr. Echohawk.
7 (Brief pause.)

8 MR. ECHOHAWK: I have no further questions,
9 Your Honor. That concludes the direct examination of
10 the United States.

11 THE SPECIAL MASTER: Does anyone wish this
12 witness to be on-hand through the balance of this
13 week?

14 MR. SACHSE: We have cross-examination.

15 MR. WHITE: We have cross-examination yet.

16 THE SPECIAL MASTER: I beg your pardon. I
17 thought we were through with cross-examination; I'm
18 anticipating.

19 All right, proceed.

20 MR. SACHSE: The Tribes have just a few
21 questions.

22 CROSS-EXAMINATION

23 BY MR. SACHSE:

24 Q Mr. Kersich, you defined arable lands as lands
25 kersich-cross-sachse

1 which are capable of sustained irrigation; is
2 that correct?

3 A That's correct.

4 Q Would this be a definition that some people in
5 your field would apply to irrigable lands as
6 opposed to lands that could just be farmed by
7 dry land farming?

8 A Yes, sir. One has to be careful, the terms
9 arable and irrigable are used interchangeably
10 many times.

11 Q All right. Now, from your testimony, I understand
12 that you've had, I don't remember exactly how
13 many years, but maybe 18 or 20 years experience
14 with arable or irrigable lands in this part of
15 the country?

16 A Yes. I've been involved in irrigation for a
17 number of years.

18 Q And that's for private parties and industries as
19 well as for Indian Tribes?

20 A That's correct.

21 Q Have you seen lands such as these lands that you've
22 testified as arable under irrigation?

23 A You mean lands that were originally in the State
24 that we are talking about here?

25 kersich-cross-sachse

1 Q That's right.

2 A Yes, I have.

3 Q Is it at all unusual to see lands like that put
4 into irrigation?

5 A No.

6 Q Now --

7 THE SPECIAL MASTER: I'm almost constrained
8 to ask, Mr. Sachse, in observing your last
9 question that the witness answered, the mere
10 observation, all 84,000 acres of them. But no
11 objections were made so I won't ask it.

12 MR. WHITE: I was going to ask it, Your
13 Honor.

14 Q (By Mr. Sachse) Well, I'll ask it now. All
15 84,000 acres of them?

16 A I can say this: I've looked at most of these
17 lands. I've seen lands of better quality than
18 this irrigated and I've seen lands of lesser
19 quality than this irrigated.

20 Q Thank you. Do you have reason to believe that
21 these are all the arable lands, using your
22 definition of arable, on the Wind River Reservation?

23 MR. WHITE: Objection, Your Honor, foundation.

24 How would he know that lands other than those

25 kersich-cross-sachse

1 which he studied were not arable?

2 THE SPECIAL MASTER: That's a pretty good
3 objection.

4 Q (By Mr. Sachse) I'll ask a slightly different
5 question.

6 In your study of the Reservation on the
7 large scale in which you brought it down to the
8 study areas as shown on WRIR C-35, did you find
9 indications that there are other arable lands
10 on the Reservation but that you simply didn't
11 study them because you didn't have the time or
12 money to do it?

13 A Well, time and --

14 THE SPECIAL MASTER: Go ahead, answer the
15 question.

16 THE WITNESS: Okay, sir. Well, we found
17 other lands which merited further studies, depending
18 if a different set of criteria were established
19 for water availability and costs of returning
20 the lands and things of this nature. There were
21 lands that could have been involved in more
22 studies.

23 Q (By Mr. Sachse) So our first effort, as I under-
24 stand it then was to take a larger amount of

25 kersich-cross-sachse

1 possibly irrigable acreage on the Reservation
2 than is found in the study areas, narrow that
3 down to the study areas? You then took the
4 study areas and as I recall your testimony, you
5 had about 300,000 -- you can correct me -- acres?

6 A Okay. We originally came down about 490,000, as
7 I recall, and we reduced that further to approxi-
8 mately 300 plus, and I don't remember the exact
9 figure. Then we reduced that further to about
10 200, and I'm getting figured out, 281,000,
11 roughly. And then from that we came down to the
12 84,469 acres that we feel are arable.

13 Q Is it fair to say that in these exhibits that show
14 the arable acreage within the study areas, that
15 there is more land that you excluded than that
16 you actually kept as arable?

17 A Okay. If I understand the question correctly,
18 now you're saying that within -- Can we refer to
19 a particular exhibit, it might be easier to answer
20 the question if we might?

21 Q Let's look, just because it's --

22 A Arapahoe area?

23 Q Arapahoe area.

24 A Which is Exhibit C-54.

25 kersich-cross-sachse

1 Q Fifty-four.

2 A Well, there are -- There are lands -- There is
3 more land within that study area boundary. Let
4 me get the answer correct here if I might think
5 a minute.

6 The question, as I understand it is that we
7 actually, in our screening process, rejected more
8 lands than we assigned an arability classification?

9 Q That was my question.

10 A Was that your question?

11 Well, the answer to that is, yes, we reviewed
12 a large base of land and much of those lands were
13 summarily dismissed as being non-arable, and that
14 the arable classification was only given to the
15 parcels that we denote in the colors. And from
16 the information you can see we looked at much
17 more land than we actually certified as arable.

18 Q So while there might just be a tiny bit of Class 4
19 lands that you included as arable, there's a rather
20 large amount of Class 6 and beyond that you've
21 excluded totally in those maps?

22 A Yes, there's much more land that we excluded than
23 we included.

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25 kersich-cross-sachse

1 Q Now, I want to just ask one question or two
2 questions about sprinkler irrigation. Just before
3 lunch you testified that sprinkler irrigation is
4 not necessarily from groundwater and that you've
5 seen many center pivot sprinklers running from
6 surface water sources. Aren't there other kinds of
7 sprinkler irrigation than center pivot sprinkler?

8 A Yes, there are many types of sprinkler irrigation.
9 There is intermittent move or wheel moves, lateral
10 moves or continuous moves, so -- There are hand
11 moved for that matter, that you use, so the type
12 of system used really isn't dependent on the water
13 source. You try to match the land and the system
14 together and then take what water source you have.
15 If you're close to a surface supply or if you're
16 close to a ditch or whatever, you know, it's just
17 a matter of bringing water to the land and then
18 putting it into the system, whether it's an
19 intermittent move, wheel roll or whether it's
20 continuous roll like a center pivot.

21 Q Now, in this difference between a sprinkler
22 irrigation and gravity irrigation, if someone
23 had looked at the irrigability of this reservation
24 forty years ago, I suppose they would have thought

25 kersich-cross-sachse

1 only in terms of gravity irrigation?

2 MR. WHITE: Objection, Your Honor, calls
3 for speculation, no foundation.

4 THE SPECIAL MASTER: I'm going to
5 overrule the objection.

6 THE WITNESS: Well, forty years ago,
7 that's right, we -- the things that we're talking
8 about today, the method of irrigation we're talking
9 about today are a result of forty years experience
10 in the field.

11 Q (By Mr. Sachse) And with sprinkler irrigation you
12 can irrigate more lands, but you tend to use less
13 water per acre of land; is that correct?

14 MR. WHITE: Objection, foundation, Your
15 Honor.

16 THE SPECIAL MASTER: May I hear the
17 question again, please.

18 (Thereupon the last question
19 (was read back as follows: "Q
20 (And with sprinkler irrigation
21 (you can irrigate more lands,
(but you tend to use less water
(per acre of land; is that
(correct?"

22 THE SPECIAL MASTER: You may answer.

23 THE WITNESS: If you properly design the
24 system, you can normally design a more efficient

25 kersich-cross-sachse

1 system using mechanical application than you can
2 in gravity application. I say that, normally.

3 MR. SACHSE: I have no other questions.
4 Thank you.

5 THE SPECIAL MASTER: Do you, in fact,
6 irrigate more land and use less water or do you
7 just get a horrific increase in yield from the
8 same lands and water?

9 THE WITNESS: Well, there are many
10 instances here, sir, where you can irrigate
11 lands that wouldn't be practical to irrigate with
12 a gravity system, lands with a high content of
13 sand, but by applying the water frequently in
14 light applications, you can many times take those
15 sands that have other good characteristics like
16 aeration, good aeration, things of this nature,
17 and you can develop some outstanding yields. If
18 you try to irrigate those lands with gravity systems,
19 then you'd be in a situation where you have to
20 put so much water on them. They become highly
21 inefficient, you waste your water, and many times
22 you can't get back on it soon enough and you
23 drought out your crops. So what it really amounts
24 to is you try to match the type of soil you have,
25 kersich-cross-sachse

1 the characteristics of the soil with the system
2 that would do the job best.

3 THE SPECIAL MASTER: Thank you.

4 Mr. Rogers.

5 MR. ROGERS: One brief sequence of
6 questions, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. ROGERS:

9 Q Mr. Kersich, on the narrowing down of the original
10 land base to the study areas, I believe you
11 testified, and it's been reviewed here that certain
12 constraints on your own firm's budget and so forth
13 caused some of the reduction of area of study;
14 is that correct?

15 A Yes.

16 Q Is it fair to say that in making that inter-firm
17 budget determination that you tended to focus
18 on larger areas of land, contiguous areas of land
19 that would make your work more economic and
20 efficient?

21 A What we tried to do is work on large blocks of
22 land that had the potential capability of arability,
23 and that could eventually be assembled into a
24 project by someone else. In this case, it would

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be the agricultural engineer, Mr. Stetson, and
the economist, Mr. Dornbusch; the idea being just
from a practical standpoint, if you have a
large mass of land relatively close to a water
supply, if the land can meet the tests, then the
potential of that land passing the other two tests,
the design and the economic test, would be much
higher, and that's the reason that was used here.

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kersich-cross-rogers

1 Q (Continued) Is it fair to say then it was to
2 make a manageable planning tool for the purpose
3 of the case for the other experts, Mr. Stetson
4 and Mr. Dornbusch?

5 A Again, yes, that's what we are trying to do is
6 develop a project type of land base here, sir.

7 Q And by that process we got down to the areas
8 that are on WRIR Exhibit C-35, those lands that
9 are within the red borders?

10 A Those lands within the red borders then, yes,
11 were the ones that we wanted to focus our efforts
12 on.

13 Q Are any of the lands that lie outside those
14 red borders that are colored in green on Exhibit
15 C-35 potentially arable lands under your
16 definition?

17 A The lands in green outside the red borders from
18 a land standpoint would, could be studied further
19 for determination of arability.

20 Q But your studies, you did not go into water
21 availability for those lands or certain other
22 considerations?

23 THE SPECIAL MASTER: May I ask, on that
24 question you did not go into water availability

25 kersich-cross-rogers

1 anywhere, did you? You said that several times
2 times this morning.

3 THE WITNESS: Well, only in the sense that
4 we looked at the lands that might be contiguous
5 to a potential supply of water.

6 THE SPECIAL MASTER: No, but your expertise
7 you said this morning was limited, and it excluded
8 from consideration any consideration of water
9 availability. Now, is that still the case this
10 afternoon?

11 THE WITNESS: Yes, it's still the case this
12 afternoon.

13 THE SPECIAL MASTER: All right. That's all
14 I wanted to know, and that answers Mr. Rogers'
15 question.

16 THE WITNESS: May I explain that answer one
17 more time, sir, please. What we did after we got --
18 Forget about the red lines, if we might on Exhibit
19 35 for just a moment. We had a map basically with
20 all these lands that were colored in green. Now,
21 for example, I'm sure most of you are familiar
22 with the Reservation, the country begins to rise
23 up where there's mountains here.

24 THE SPECIAL MASTER: Right.

25 kersich-cross-rogers

1 THE WITNESS: It gets away from firm sources
2 of supply of water. These are -- some of these
3 streams are continuous streams, but they have
4 a high degree of flow at a certain time of year,
5 and the rest of the year there's very little
6 water. So the chances of, first of all having
7 water there without a massive storage project or
8 something of this nature are something very
9 minimal.

10 The second thing is as you begin to rise in
11 elevation, you've got the climate problem, your
12 cropping pattern begins to diminish.

13 THE SPECIAL MASTER: I appreciate that now.
14 That is true. You did mention that was one
15 consideration, whether the land was not considered.

16 THE WITNESS: Yes. So when you look at the
17 Crowheart Unit, there was an attempt to look at
18 potential gravity supply from a firm source. There
19 is no question there's quite a bit of water in
20 the Wind River yet, so we looked at the idea of
21 being able to tie to a source, and in this instance
22 the Wind River. And there should be some water
23 there for development. I can't tell you at this
24 instant how much water there is and how many acres

25 kersich-cross-rogers

1 are going to come out of this, but the point is
2 if we had to confine ourself to reasonable time
3 efforts, a reasonable budget to look at lands,
4 it would be more practical to look at those
5 lands which had the potential, highest potential
6 from an observation here of becoming irrigable --

7 THE SPECIAL MASTER: Yes.

8 THE WITNESS: -- than trying to examine
9 every acre on the Reservation.

10 Q (By Mr. Rogers) But there were lands outside the
11 red bounded areas colored in green that with a
12 water supply could become arable under your
13 definition, physically arable under --

14 THE SPECIAL MASTER: I'll sustain that
15 objection. He's already answered a question and
16 said that the lands outside the acres could
17 warrant further studies toward their arability,
18 and I'm going to take his first answer.

19 MR. ROGERS: I'm asking the question beyond
20 that. Does he have an opinion as to whether or
21 not some of the green lands outside of the red
22 bounded areas are arable as you have studied them,
23 as you define that term.

24 THE SPECIAL MASTER: Have you not already

25 kersich-cross-rogers

1 answered the question?

2 THE WITNESS: I've answered the question,
3 but I say those lands warrant further study.
4 And in certain studies the land might show to be
5 arable and in certain studies non-arable.

6 Q (By Mr. Rogers) The delineation of the green
7 areas throughout the Reservation on C-35, those
8 were made based upon your view and your firm's
9 view of previous studies; is that correct?

10 A The basic study that was used in terms of green
11 areas, as I testified this morning, was a
12 document entitled The Range in Soils Inventory,
13 and I believe it was done about 1962 by the
14 BIA. Additionally, some information was gathered
15 from a geological survey, maps of the area give
16 us some idea of apparent material and those were
17 the two basic documents used to develop the green
18 areas within the Reservation boundaries.

19 Q So is there a possibility from your professional
20 experience in studying land areas of this size
21 in the same manner that there are even lands
22 beyond those delineated in green on Exhibit C-35
23 that might be arable under your definition?

24 MR. WHITE: Objection.

25 kersich-cross-rogers

1 THE SPECIAL MASTER: I'm going to object
2 to the question because I think you're attempting
3 to get into the record what you've already got
4 in once. One shot at a time is sufficient.

5 I think he's answered that by saying there
6 may very well be additional land in the green if
7 study was warranted, and there may not. A
8 question comes to my mind, Mr. Rogers --

9 MR. ROGERS: My question goes beyond the
10 green, Your Honor.

11 THE SPECIAL MASTER: All right. But if in
12 the latter studies of land use planning of our
13 society it is determined that a huge beautiful
14 swath is cut across the northern one-third of this
15 Reservation and called pristine lands, would you
16 put a plow to that pristine lands, Mr. Kersich?

17 THE WITNESS: I'm not a recreational planner,
18 sir, I'm not going to answer that question.

19 THE SPECIAL MASTER: But I appreciate what
20 Mr. Rogers is saying, and I think you got it in
21 the record that this isn't a maximum, that's what
22 you're trying to say.

23 MR. ROGERS: I would like to establish at
24 least, Your Honor -- Let me ask the question.

25 kersich-cross-rogers

1 Q (By Mr. Rogers) You, your firm and you have done
2 no review of the land other than that colored
3 green on the map?

4 MR. WHITE: Objection, Your Honor, the
5 question is misleading.

6 THE SPECIAL MASTER: No, he may answer that.
7 His firm, and other than what's in green, go ahead
8 and answer that.

9 THE WITNESS: Within the study areas we looked
10 at lands which may not have been colored green
11 because the study that we used to determine the
12 green area was a very low intensive study, and as
13 a consequence, the data was incomplete, it didn't
14 represent an awful lot of field work, for example,
15 drilling to barrier, things of this nature. So
16 we may very well -- well, not "May", let me change
17 that right now. We did look at the basic area
18 within the red. After we established the red line,
19 we didn't care about the green as much as what was
20 actually there because we were going to do more
21 intensive study that what the green was predicated
22 on, okay, sir?

23 Q (By Mr. Rogers) Fine, I understand that answer.
24 Now, let me ask my last question then. Did you --
25 kersich-cross-rogers

1 did your firm study the areas outside the red
2 bounded areas that are not colored green?

3 A As a matter of fact, our firm did not actually
4 study the green areas outside the red study areas.

5 Q Let me define study.

6 THE SPECIAL MASTER: Let him finish, please.

7 THE WITNESS: We, let's go back to what we
8 use this for. We -- Again, we're back to a
9 process of trying to delineate a study area. Once
10 the study area was delineated, we didn't have the
11 time, the budget to go out and study all the
12 individual green areas outside of there.

13 It may well be that those green areas could
14 be larger, smaller because, again they're based
15 on a very low intensity reconnaissance level type
16 study, and so they were just a guide to let us
17 develop the areas where "Green areas" were massed
18 into the best, where we could determine the
19 potential for getting water was fairly reasonable,
20 and so that's how we got the red. The areas out-
21 side those green areas has not been studied by
22 H.K.M. other than in an office level study of this
23 reconnaissance study.

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END 19

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1 Q (By Mr. Rogers) Is your answer then that you did
2 study through the reconnaissance -- that's what
3 I meant to define by study, Your Honor.

4 You did study as a reconnaissance some of
5 the areas outside the red bounded areas that
6 aren't colored green?

7 A We made an office study of the reconnaissance
8 study that was made and selected those areas
9 which could meet our screening criteria, irrespective
10 of where they are located and colored in green
11 on that, Your Honor.

12 MR. ROGERS: Thank you.

13 THE SPECIAL MASTER: Did your study
14 include the area in red that has been described
15 as after-acquired land that I'm pointing too,
16 sometimes described as the Arapahoe Ranch?

17 Did you follow that question all right?

18 THE WITNESS: Yes, I believe I followed
19 the question, and you are concerned about the
20 portion north of the boundary indicated on that
21 map?

22 THE SPECIAL MASTER: Yes. I'm not
23 concerned about it, but it's one of the things
24 I want to ask about.

25 kersich-cross-rogers

1 THE WITNESS: We looked at that area
2 in the sense that we looked at what was there.
3 There was quite a bit of irrigation, some historic
4 and some adjudicated -- frankly, at this time I
5 couldn't tell you whether it was historic or
6 adjudicated -- and at that point it didn't
7 appear there was much more we could do with it,
8 so we didn't give it an in-depth field study.

9 THE SPECIAL MASTER: You earlier said
10 there were about 617 holes that were augered --

11 THE WITNESS: 671.

12 THE SPECIAL MASTER: I'm sorry. 671.
13 I have a transposition.

14 Were all of those holes done inside the red-
15 bordered areas on that exhibit?

16 THE WITNESS: Primarily, yes. Again,
17 when we got into the field, we sometimes found
18 ourselves just outside the border or something of
19 this nature.

20 A hole might have been placed in that parcel,
21 because he might have been examining a parcel
22 that wasn't in the area or outside the area.

23 THE SPECIAL MASTER: But primarily yes?
24 Or substantially?

25 kersich-cross-rogers

1 THE WITNESS: Substantially they were
2 all within the area, yes.

3 THE SPECIAL MASTER: Mr. Rogers?

4 MR. ROGERS: That's all I have.

5 THE SPECIAL MASTER: I'm glad to see
6 Mr. Merrill up.

7 MR. MERRILL: Thank you, Your Honor.
8 I apologize for my absence this morning.

9 THE SPECIAL MASTER: I guess we had better
10 add him to the appearances.

11 MR. WHITE: I can't help but ask a
12 couple of follow-up questions to your previous
13 cross-examination.

14 CROSS-EXAMINATION

15 BY MR. WHITE:

16 Q Are you saying that or did you mean to say during
17 Mr. Sachse's cross-examination that consumptive
18 use of water is greater -- excuse me -- is less
19 with sprinkler irrigation?

20 A No, we were talking about the amount of water used
21 in the irrigation systems. Consumptive use is
22 another matter entirely, but when we get into
23 talking about the method of irrigation, we add on
24 one more factor, which is the efficiencies, and

25 kersich-cross-white

1 normally if we do a well-designed mechanical
2 system, match it to the soils -- and I said
3 normally -- we should be able to maintain a
4 more efficient rate and, therefore, require less
5 diversion, have less deep percolation, have less
6 losses, you know, so that the total effect is
7 that we use less water, yes.

8 Q So you divert --

9 A But the plant still is using the same amount of
10 water.

11 Q The same amount of water is used, but less may be
12 diverted; is that correct?

13 A What do you mean by "use" now? You know, the point
14 is -- if you are talking about consumptive use,
15 that's the -- the evapo-transpiration occurs
16 in the normal crop pattern. That's what the
17 crop is using, the plant.

18 Q So the consumptive use --

19 A The consumptive use is not a function of the system.

20 Q Naturally?

21 A Yes, but there are other losses associated with
22 irrigation, such as deep percolation, conveyance
23 losses. I bring that in because we are many times
24 talking about pipe systems. Those normally have

25 kersich-cross-white

1 a higher efficiency than a canal or a ditch,
2 so those losses would be minimized, and the total
3 amount that would have to be diverted to satisfy
4 the crop requirement of all the losses should
5 normally be less.

6 Q If you did not use a sprinkler system, you would
7 have to divert more water to get to the same
8 consumptive use?

9 MR. ECHOHAWK: This is pretty far afield
10 for his direct.

11 MR. WHITE: It's not far afield from the
12 cross-examination.

13 MR. ECHOHAWK: I believe direct is what
14 we are concerned about.

15 MR. WHITE: No, when you have a
16 friendly cross, that's included in cross.

17 MR. ECHOHAWK: We are all separate
18 parties.

19 THE SPECIAL MASTER: Go ahead and
20 answer it.

21 A (Witness) Remember I used the word normally?
22 Okay. There are certain times in gravity systems
23 when you talk about a level basin that's used
24 essentially in the Southwest, where it's been my

25 kersich-cross-white

1 experience, where they are, with the proper soil
2 and proper design -- in other words, keeping
3 their runs to certain levels and one thing and
4 another -- they can achieve some efficiency.
5 Studies of the Soil Conservation Service and the
6 Bureau of Reclamation have shown that they are
7 capable of turning a large head of water into
8 a basically level field or a slight grade so the
9 water can get across the field, and the soil
10 has a high infiltration rate and the water could
11 be utilized very efficiently by the crop, so I
12 guess the point I'm trying to say is that if you
13 use good design methods, you can get some pretty
14 high efficiencies, depending on the type of
15 systems you use on certain soils.

16 Q What happens to the water that's diverted in a
17 nonsprinkler irrigation system that is not
18 consumed by evapotranspiration?

19 MR. ECHOHAWK: Same objection, Your
20 Honor.

21 THE SPECIAL MASTER: I would like to
22 hear him answer. I think it adds some possible
23 understanding of the irrigation.

24 A (By Witness) In a typical irrigation project you
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are going to have some conveyance losses through the ditch getting it to the land. You are going to have some losses through deep percolation, which occur depending on the method you use to irrigate.

You are going to have some waste that's involved. In other words, depending on how the system is, you get hit with a rain or something or, for example, that the farmer couldn't use the water, we get into a situation where there isn't a demand for the water. The water may go right through the system and be wasted back to the original drainage, depending on the location or the system. Those are some of the losses that you have.

Q (By Mr. White) But those losses aren't losses forever, are they? That water is returned and is available for use by somebody else, isn't it?

A Well, you are giving me specific criteria to a question here. You tell me where the ditch is, where the people are located on the ditch, you know.

Q I would like to ask about the same level of generality as you were asked by Mr. Sachse, but I will be glad to make it more specific.

kersich-cross-white

1 Say you are going to divert water out of the
2 Wind River into the North Crowheart area here.
3 (indicating) You cross no hydrologic divide,
4 and you use nonsprinkler irrigation, and you have
5 an efficiency of fifty-five percent or forty-five
6 percent loss before you get to the farm gate.

7 What happens to that forty-five percent of the
8 water that's diverted? Does it go away and is
9 it never available for anybody else to use?

10 A Many times that water is available for others to
11 use, but there are some irrecoverable losses.

12 Q That's right.

13 A And that varies, of course, from system to system,
14 but, yes, I'm not sure about Wyoming, but, for
15 example, in Montana, you could have a wasteway
16 or a drain out of your canal, for example. Someone
17 files on that, and they are allowed to use that
18 water, and they do use it many times.

19 Q Mr. Rogers in his cross-examination of you indicated
20 there were some budgetary constraints that limited
21 the scope and intensity of your examination; is
22 that correct?

23 A Within reason, yes. We had two things. We had
24 the time of trial. That was of concern to

25 kersich-cross-white

1 everyone to try and develop some information that
2 would accurately reflect what we found there and
3 have it ready for trial.

4 Q And you have done the best you could in the time
5 available; is that correct?

6 A We have worked very hard within the time available
7 to come to where we are today, yes.

8 THE SPECIAL MASTER: Did the extra two
9 months help you?

10 THE WITNESS: Oh, yes, sir. I would like
11 to thank you on the record because I almost died
12 before Christmas when I didn't know whether we
13 were going to get it or not.

14 MR. WHITE: There's another side to that
15 coin, Your Honor.

16 Q (By Mr. White) Well, the other factor then was
17 budget in addition to time; is that correct?

18 A Well, there isn't any project that I don't work
19 on where there isn't some budget constraints, sir.

20 Q But you indicated there were budget constraints
21 that limited your irrigable land investigation;
22 is that correct?

23 A Well, they get the time first and then you know
24 how much you can spend within that time, and that's

25 kersich-cross-white

1 it, I guess. You know, the two of them are
2 concurrent things.

3 You couldn't afford to study every acre of
4 the reservation to the same depth that we
5 studied these limited acres. On the other hand,
6 one of the things we do know, predicated on our
7 experience in this type of work and also with
8 experience with the people I have working for me
9 in the Bureau of Reclamation, is the level of
10 detail you pick up in these investigations sometimes
11 is very little, even though you put a much more
12 intense field effort into it, and as a consequence,
13 I think if you look at the specifications that the
14 Bureau of Reclamation has for detailed land
15 classification studies versus semi-detailed land
16 classification studies, you will find that the
17 record of accuracy -- and I'm going to quote
18 these from memory, so I might be one or two
19 percent off -- I believe on the semi-detailed
20 they say that, first of all, the level of accuracy
21 is about ninety percent so, in other words, their
22 delineation of irrigable versus nonirrigable is
23 fairly high. Their delineation of the classes and
24 subclasses is not quite as high.

25 kersich-cross-white

1 Under detailed land classification studies,
2 they talk about a ninety-seven percent accuracy
3 level, but if you have had the opportunity to
4 see what it costs to do a detailed study versus
5 a semi-detailed study, there's a tremendous
6 expansion of the money without that much more
7 increase in accuracy.

8 Q But the detailed study is what is required for
9 authorization of construction, isn't it?

10 A That's what it used to be, but I wouldn't testify
11 that that's what it is now, but it's my understanding
12 that many times the Bureau is using semi-detailed
13 or they are at least in the process of switching,
14 so I'm not sure of that, and I'm not going to
15 testify as an expert in that area.

16 Q Well, we will get to that later in the cross-examin-
17 ation then.

18 A All right.

19 Q So was budget a limiting factor or not, or was
20 time the only problem?

21 A Time was of a limiting factor, primarily. Budget
22 determined the level of study somewhat, yes.

23 Q What was your budget?

24 A I don't remember the exact figures now.

25 kersich-cross-white

1 Q You don't?

2 A No, I don't.

3 Q How much more money would it have taken for you
4 to do a complete study such as those --

5 THE SPECIAL MASTER: I will object to
6 that. I have no business knowing what the cost
7 of these studies is. That's not relevant to
8 the Special Master, I don't think.

9 MR. WHITE: I think the law is to the
10 contrary, but you won't let me ask the question,
11 so I won't. I just want to make a record on that
12 basis. Okay.

13 THE SPECIAL MASTER: Well, if I'm
14 wrong, give me some law and show it to me.

15 MR. WHITE: We'll get back to it. I
16 have a brief floating around.

17 THE SPECIAL MASTER: But generally I
18 don't feel those are matters that I have a proper
19 duty to inquire into.

20 MR. WHITE: I think the amount of the
21 budget, Your Honor, is appropriate for inquiry,
22 and I'll give you a brief on it simply because it
23 shows in a way that is often understandable to all
24 the level of intensity of the study vis-a-vis

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the other studies of the same area.

For example, if there was another study that was at a low budget, it might not be nearly as probative in its nature as a high budget.

THE SPECIAL MASTER: I agree with you, Mr. White, but if we go that far, then we have a duty to continue to say what are the benefit cost ratios? What projects will be formed? What will the market analysis be? And it gets into a quagmire after a while.

MR. WHITE: We are in the quagmire already.

THE SPECIAL MASTER: We are in a big enough one now as it is, and I'm only trying to limit this to matters that are within our reason and comprehension and ability to determine.

* * * * *

kersich-cross-white

1 Q This arable land figure which you gave in your
2 opinion, Mr. Kersich, are gross figures, are they
3 not?

4 A Yes.

5 Q They are not net figures?

6 A Well, okay. Let's stop right now. What do you
7 mean by gross and net? You know, I really want to
8 know because there are different definitions of
9 gross and net to different members of the team.

10 MR. WHITE: Let me ask the questions.

11 THE SPECIAL MASTER: Do you want that 15
12 minute break I promised you in the afternoon around
13 three o'clock or don't you?

14 MS. LUNDBERG: It doesn't matter.

15 THE SPECIAL MASTER: All right. Let's take
16 a 10 minute break right now because I forgot.

17 (10 minute recess,
18 (3:36 p.m. to 3:50 p.m.)

19 THE SPECIAL MASTER: Okay. We are on the
20 record. All right, Mr. White.

21 Q (By Mr. White) Mr. Kersich, if you know, what is
22 the relationship between the arable acres identified
23 by you in your opinion and the practicably
24 irrigated acreage set forth in the statement of claim?

25 kersich - cross - white

1 A About all I can tell you there is that I assumed
2 that our arable acreage was used as the base for
3 the practicably irrigable acreage in the statement
4 of claims, but I personally didn't make that
5 transposition.

6 Q So you don't know that there is a relationship,
7 is that correct?

8 A All I can do --

9 THE SPECIAL MASTER: In this lawsuit.

10 MR. WHITE: In this lawsuit, yes.

11 A All I can assume is that the arable base was used
12 as a portion of the practicably --

13 Q (By Mr. White) Practicably.

14 A -- practicably irrigable acreage that was made in
15 the statement of claims. That's the best I can do
16 at this time.

17 Q Isn't it true that based on your experience and
18 expertise you know of no engineering meaning for
19 the term practicably irrigable acres?

20 A That is correct, that is a legal term that's been
21 defined to me by a number of attorneys as only being
22 legal in nature and having nothing to do with
23 engineering.

24 Q Okay. Do you know, Mr. Kersich, in which of your
25 kersich - cross - white

1 arable land study areas the 62,606 practicably
2 irrigable acres set forth in the statement of claim
3 occur that are irrigated out of the Wind River?

4 A. No, I'm going back to the answer I gave you before.
5 I didn't have the responsibility of making up the
6 statement of claims and I don't know how our figures
7 were used in arriving at the figures that eventually
8 appeared in the statement of claims, sir.

9 MR. WHITE: Your Honor, on the basis of the
10 witness' response we would move to strike his
11 testimony on the grounds of relevancy. Because it's
12 not been demonstrated during his direct examination
13 as well as any of his cross examination that there is
14 a relationship between the arable acres which he's
15 identified which are shown on Exhibits 41 through 54
16 and the practicably irrigable acres set forth in
17 the statement of claim.

18 THE SPECIAL MASTER: The objection will be
19 overruled. This witness -- this expert,
20 in his field of expertise, professes to have
21 knowledge of those matters to which he's testified
22 dealing with the arable acreage. I'm not aware
23 that he had anything to do with the preparation of
24 the statement of claims and therefore I'll keep them

25 kersich - cross - white

1 separate, Mr. White.

2 Q (By Mr. White) Mr. Kersich, I believe your
3 definition of arable land was that land that can
4 sustain long-term irrigation?

5 A Yes, from the soil, or physical and chemical
6 characteristics.

7 Q And in your report glossary, that's Exhibit 43,
8 I believe, page 28, you say, you define arable land
9 as those lands which are capable of sustained
10 irrigation?

11 A Yes.

12 Q Are those synonymous meanings?

13 A To me they are, yes; long-term and sustained I think
14 I would have to say they are both the same.

15 Q Isn't it true that your definition of arable land
16 is markedly different, substantially different from
17 that used by the Bureau of Reclamation?

18 A I don't think I could testify to that right now.

19 Q You don't know?

20 A The Bureau has an irrigable determination that
21 is used in many instances.

22 Q Let me direct your attention to what has been marked
23 for identification as Plaintiff's Exhibit WRIR SK-4
24 which is a certified copy -- no, I guess it is not

25 kersich - cross - white

1 certified but it's a copy signed by an officer
2 of WAPRS a portion from the Bureau of Reclamation
3 manual. Would you please examine SK-4 and tell me
4 whether or not you recognize that?

5 THE SPECIAL MASTER: What page?

6 MR. WHITE: I was just asking him to take a
7 look at it, Your Honor.

8 THE WITNESS: Yes, I have looked at this in
9 past.

10 Q (By Mr. White) Would you turn to page 2.1.1?

11 A 2.1.1?

12 Q Yes, sir. It ought to be the one, two, three,
13 fourth page in that. Have I got it right?

14 THE SPECIAL MASTER: 2.1.1?

15 MR. WHITE: Yes.

16 THE WITNESS: Yes.

17 Q (By Mr. White) About a third of the way down
18 the page there is a definition of arable land.
19 Would you please read that?

20 A "Arable land is land which, in adequate sized
21 units and if properly provided with the essential
22 improvements of leveling, drainage, irrigation
23 facilities, and the like, would have a productive
24 capacity, under sustained irrigation, sufficient

25 kersich - cross - white

1 to: meet all production expenses, including
2 irrigation operation and maintenance costs and a
3 reasonable return on the farm investment to repay
4 a reasonable amount of the cost of the project
5 facilities; and to provide a satisfactory level of
6 living for the farm family. The arable area comprises
7 all lands delineated in the land classification which
8 have sufficient potential payment capacity to warrant
9 consideration for irrigation development."

10 Q Are you familiar with the 1980 additions to the
11 Bureau or rather WAPRS manual?

12 A. No, I don't think I am.

13 THE SPECIAL MASTER: Speaking as a good Italian
14 I take exception to that acronym -- terrible.

15 (Laughter.

16 MR. WHITE: You know, Your Honor, I always
17 seem to be in trouble. Now I've figured out why.

18 THE SPECIAL MASTER: You're all right. Keep
19 using it.

20 MR. WHITE: I don't think I will. I think
21 I'll talk to Mr. Kersich --

22 THE SPECIAL MASTER: Back we go to the Bureau.

23 MR. WHITE: Yeah.

24 THE WITNESS: Well it is awful hard for me not

25 kersich - cross - white

1 to call it the Bureau.

2 THE SPECIAL MASTER: Well, to me it's been
3 Bureau all my life.

4 Do you want me to put this away?

5 MR. WHITE: Keep it out. We're going to work
6 with both of them.

7 Q (By Mr. White) In Exhibit SK-5, would you turn to
8 page 15.2.3g.

9 A G?

10 Q Uh-huh.

11 THE SPECIAL MASTER: 115.2?

12 MR. WHITE: Yes, sir, Your Honor. I'm sorry.
13 115.2.3g, I'm sorry. I didn't invent the page
14 numbers.

15 Q (By Mr. White) Do you find a definition of arable
16 lands there?

17 A Yes, sir, I do.

18 Q Would you please read that definition?

19 A Okay. "Arable land is land which when farmed in
20 adequate sized units for the prevailing climatic
21 and economic setting and provided with the essential
22 on-farm improvements of removing vegetation, leveling,
23 soil reclamation, drainage, and irrigation related
24 facilities will generate sufficient income under

25 kersich - cross - white

1 irrigation to pay all farm production expenses;
2 provide a reasonable return of farm family's labor,
3 management and capital; and at least pay the
4 operation, maintenance and replacement costs of
5 associated project irrigation and drainage facilities.
6 The arable area comprises all land delineated in the
7 land classification that will provide sufficient
8 income to warrant consideration for irrigation
9 development."

10 Q Let's stay with the last passage that you just read.

11 Isn't it true that the Bureau definition of
12 arable lands includes lands that are farmed in
13 adequate sized units for the prevailing climatic
14 and economic setting?

15 A That's what it says here, yes, in the definition
16 that they are using.

17 Q What investigations, if any, did you make with
18 respect to adequate sized units for the prevailing
19 climatic an economic setting?

20 A Very fine. What we did, frankly, is, as I stated
21 before today, is try to develop project type
22 lands. The Bureau, referring especially to the
23 smaller units, as I recall, and I'm sure there are
24 people here who could testify to more knowledge

25 kersich - cross - white

1 than I do, they are still limited to 160 acre units
2 and as a consequence there is a little different
3 situation than we're looking at, an arable base
4 in this instance here. So it is not quite the same
5 sense.

6 Now, climate is coming into this thing through
7 productivity.

8 Q Let's start from the beginning. Where in 115.2.3g
9 is the definition of arability -- where in the
10 arability investigation that's described in there is it
11 limited to 160 acres?

12 A In adequate sized units. What law does the Bureau
13 operate under?

14 Q Wait, wait --

15 A They operate under specific --

16 Q Mr. Kersich, I'm asking the questions.

17 Tell me where in that Exhibit SK-5 a 160 acre
18 limitation applies to that definition?

19 A A hundred and sixty acres is not in this -- not
20 listed here.

21 Q That's right.

22 What investigations did you make with respect
23 to minimum size or adequate size in terms of the units
24 which you identified, of arable lands within each of
25 kersich - cross - white

21-10

1 your study areas?

2 A. Are you talking about individual units?

3 Q. Yes.

4 A. As I stated before, we at no time looked at an
5 individual unit basis here. This was to be a
6 project type development. We had no idea of the
7 size of the units, if any. This could be developed
8 by the tribe, it could be developed by the United
9 States for the tribe. The determination of economic
10 sized units at this point in time would have been
11 premature.

12 Q. What necessary improvements did you assume would need
13 to be made to the land before it could be classified
14 as arable?

15 A. Many improvements such as leveling, things of this
16 nature, are noted in the land classifications. And
17 those improvements will be covered in studies that
18 are being accomplished by the agricultural engineer
19 and the economists.

20 Q. But isn't it true, Mr. Kersich, that the Bureau
21 requires those economic considerations to be dealt
22 with in the very definition of arable land?

23 MR. SACHSE: I object to the use of the term
24 "the Bureau" because we're dealing here with the
25 kersich - cross - white

1 Bureau of Indian Affairs and the Bureau of
2 Reclamation and that's -- unless the attorneys
3 make that clear we'll have a very confusing
4 record.

5 MR. WHITE: I've got no problems stipulating
6 that when I say Bureau why I mean Bureau of
7 Reclamation or the Water and Power Resources
8 Services, whatever it is called.

9 THE SPECIAL MASTER: You want that as an on-going
10 understanding? You may have a different understanding
11 today when you're talking about the Bureau of
12 Reclamation --

13 MR. WHITE: Today, yes, sir. I think it has
14 been clear from the context of the questions what
15 I mean.

16 THE SPECIAL MASTER: Good.

17 MR. WHITE: Go ahead.

18 THE WITNESS: Can I have the question read
19 back now? After all of that I'm confused.

20 MR. WHITE: It was designed to give you a little
21 breather so --

22 THE WITNESS: Obviously.

23 (The above question was
24 (read back by the reporter
25 (as follows: "Q But isn't
(it true, Mr. Kersich, that
(the Bureau requires those

1 (economic considerations
2 (to be dealt with in the
3 (very definition of arable
4 (land?"

4 A. As they define arable land for their purposes
5 it is true. But I might point out that their studies
6 are very similar to this that you first have to
7 have a land base so that you can begin to do
8 engineering and economic studies to develop the
9 costs and develop the returns and determine which
10 lands are going to meet their definition of arable.

11 Q (By Mr. White) Are you saying that your definition
12 of arable is different than the definition used
13 by the Bureau?

14 A. I think it is obvious that it is different and I
15 think during my testimony I have pointed out that
16 we are talking about the arable land base that will
17 be -- that exhibits the physical and chemical
18 characteristics to sustain irrigation and that that
19 base will further be studied by agricultural engineers
20 and by an economist to determine in this instance
21 irrigable lands.

22 Q Isn't that the same process that the Bureau goes
23 through?

24 A. It goes through it in many ways and what the Bureau
25 kersich - cross - white

- 1 does is not what we're doing here.
- 2 Q Okay.
- 3 A We have outlined the study that gives us an
4 answer, it may or may not meet what the Bureau is
5 doing at that particular time.
- 6 Q So your methodology or procedure is unique then,
7 it is not one that is shared with the Bureau?
- 8 A I don't think it is unique, I think it is the
9 normal process that one follows trying to determine
10 whether the lands are irrigable. In this sense
11 it is -- it follows exactly what was done in say,
12 Arizona versus California, at least, the portion
13 that I'm knowledgeable about. I'm not going to
14 talk about the original litigation.
- 15 Q But it is not the Bureau's process --
- 16 A Not complete, no.
- 17 Q And it is not the Bureau process. The economic
18 considerations were not included in your arability
19 investigation --
- 20 THE SPECIAL MASTER: I'll almost object to
21 the question because he's answered that almost
22 twice now, Mr. White.
- 23 Q (By Mr. White) Isn't it true that the Bureau
24 also uses a two-step analysis in determining what
25 kersich - cross - white

1 lands may be irrigable?

2 A. Exactly what do you mean by two-step, Mr. White?

3 Q. Well, SK-5, why don't you turn to page 115.1.1a.

4 THE WITNESS: Repeat that number, please.

5 MR. WHITE: 115.1.1a.

6 THE WITNESS: Okay. I have 115.1.1 but I
7 don't have "a". I've got 1.3a.

8 THE SPECIAL MASTER: Same with me.

9 MR. WHITE: Well, maybe they have dropped
10 something out in the copying.

11 We'll come back to that tomorrow.

12 THE SPECIAL MASTER: Oh, I beg your pardon
13 115.1.3a? It is the next page after that.

14 THE WITNESS: Oh. I thought it was 1a.

15 MR. WHITE: I'm sorry, I misstated. It should
16 be --

17 THE WITNESS: Okay. I have it here.

18 MR. ECHOHAWK: Wait. What are we on now?

19 MR. WHITE: We are on 1.3.1a.

20 THE WITNESS: Oh, wait a minute. I'm really
21 off then.

22 THE SPECIAL MASTER: I have 115.1.3a and it
23 has the commissioner's office, engineering regional
24 office --

25 kersich - cross - white

1 MR. WHITE: No.

2 THE SPECIAL MASTER: Is it a short half page?

3 MR. WHITE: I'm referring to 115.3.1a, Your
4 Honor, which must be 10 or 12 pages into the
5 document.

6 THE SPECIAL MASTER: All right, let's see if
7 I can't find it.

8 There you are. Have you got it?

9 THE WITNESS: Yes, I've got it.

10 THE SPECIAL MASTER: Okay.

11 Q (By Mr. White) Down at the bottom of the page is
12 a (4):

13 A Yes.

14 Q Isn't the two-step process that is described there
15 virtually identical to the process which you have
16 described, an arable investigation first then an
17 irrigable investigation?

18 A May I just take the time to read this, please?

19 MR. WHITE: You bet.

20 A It appears that they have.

21 MS. SLEATER: Your Honor, could I note in the
22 record that this paragraph extends to the next page?

23 THE SPECIAL MASTER: All right. Thank you for
24 telling us.

25 kersich - cross - white

1 Q. (By Mr. White) While you're on the next page would
2 you -- I'm sorry. You didn't answer that question,
3 did you?

4 THE WITNESS: Let's see. Let's go back to the
5 question again. Would you --

6 MR. WHITE: Okay, Lamont.

7 THE SPECIAL MASTER: It is essentially a
8 two-stage process.

9 MR. WHITE: Yeah.

10 A. That's what it says here, right.

11 Q. (By Mr. White) And while you're on 115.3.1b would
12 you look at paragraph B, general application,
13 particularly the first two sentences?

14 A. I'm over on the third page now. Was that --

15 Q. No, I was just wanting you to read the two sentences.
16 If you want to read anything else go ahead and read
17 it.

18 THE SPECIAL MASTER: No, he wanted your
19 observations I think on the first two sentences.

20 THE WITNESS: Okay.

21 Q. (By Mr. White) Isn't it true that those two
22 sentences provide that the most important phase
23 of the Bureau's land classification work is the
24 arability determination?

25 kersich - cross - white

1 A. If I understand the question correctly, yes.

2 Q. So you have in fact participated in what appears
3 to be the Bureau process, the two-step process,
4 but you have not used the same definition for
5 arable lands, is that correct?

6 A. Well, going back to my experience in the Bureau
7 and as I testified a couple of times today these
8 questions -- or development of arable and irrigable
9 are all inclusive. I know what it says here, but I
10 know that you get into trouble if you talk about a
11 land classification program when you go out and
12 determine the physical and chemical characteristics
13 of the soil and say you are doing an irrigable
14 classification. So for purposes of trying to keep
15 it clean, and trying to keep it understandable or
16 simplify it we made a definition of arability
17 which we put in our report which that can sustain
18 irrigation, and it is meant that those lands which
19 can meet the physical and chemical characteristics
20 which -- which exhibit the physical and chemical
21 characteristics which allow them to be irrigated.
22 Further understanding that that land base then will
23 be refined through more severe tests or -- not
24 severe tests, but different tests to determine their
25 irrigability.

kersich - cross - white

1 Q (By Mr. White) (Continued) Let's turn for a moment
2 to the land classes to which you've assigned the
3 arable lands that you determined.

4 Let me ask you whether or not page 8 in your
5 report, which is Exhibit 43, I believe, correctly
6 sets forth the definition of land classes which
7 you used in this claim.

8 THE SPECIAL MASTER: The middle of page 8?

9 MR. WHITE: Bottom of page 8 and I think it
10 carries over on 9 as well, Your Honor.

11 THE WITNESS: May I just take a moment to
12 put these things back on a clip?

13 MR. WHITE: You might as well keep it
14 together because we'll be looking at it fairly
15 frequently for the next day or so.

16 (Brief pause.)

17 THE WITNESS: Okay, I got them put together.

18 Q (By Mr. White) Are those -- Do those classifications
19 definitions correctly set forth the definitions
20 which you used in your study?

21 A That's correct.

22 Q You haven't always used those definitions with
23 respect to the Wind River Indian Reservation, have
24 you?

25 kersich - cross - white

1 A. I can't recall.

2 Q. I hand you a document which is entitled preliminary
3 draft inventory water resources, Wind River
4 Indian Reservation, page 2, needs and uses.

5 THE SPECIAL MASTER: By whom, Mr. White?

6 MR. WHITE: By Hobert, Kersich and McCulloch
7 Consulting Engineers, Billings, Montana.

8 Q. (By Mr. White) And ask you if you remember that
9 document?

10 A. Yes, I remember the document.

11 Q. Now, I hand you excerpts from that document which
12 have been marked as SK-8, which contains the
13 first two pages as well as page V.7. Would you
14 please determine whether or not the page V.7,
15 that appears in SK-8 is in fact the page V.7 that
16 appears in the study itself?

17 A. Yes, sir. Yes, it appears to be, right.

18 Q. In Exhibit 43 you indicate that Class 3 consists
19 of fair quality land; is that correct?

20 A. Just a moment.

21 Yes.

22 Q. Yet in Exhibit SK-8 you indicated that Class 3 lands
23 considered marginal; isn't that correct?

24 A. Right, but we ought -- maybe I can explain one thing.

25 kersich - cross - white

1 Q You bet.

2 A These land classification information that's given
3 here in the needs and uses was given to us directly
4 as what BIA was doing. We had no input in them,
5 we had no foundation for them. In other words, we
6 didn't make any of these definitions.

7 This was supposedly what BIA was using. As
8 a matter of fact, in this whole, in this whole
9 study the land portion was given to us basically
10 by BIA.

11 MR. ROGERS: Your Honor, could he clarify for
12 the record which Exhibit he was referring to in that
13 past answer? I don't think it was clear whether he
14 was talking about SK-8 --

15 THE WITNESS: There isn't an Exhibit number
16 on this.

17 MR. WHITE: Well, if you refer to SK-8, which
18 was an excerpt from that larger volume.

19 THE WITNESS: Okay, SK-8 is the exhibit I was
20 referring to when I made this statement.

21 Q (By Mr. White) Do you know why BIA provided a land
22 classification for the Class 3, land classification
23 definition for land Class 3 which provides that Class
24 3 lands are marginal?

25 kersich - cross - white

1 A Because they may have had the Bureau doing the
2 entire study for them at that time. And they
3 utilized the standards and the definitions of these
4 classes that the Bureau might have been using.

5 And when I refer to the Bureau here, I'm
6 talking of the Reclamation, WPRS.

7 Q You're talking about the Bureau of Reclamation.

8 A Yes.

9 Q It may be easier, when we mean the Bureau of
10 Indian Affairs, call it BIA, would that be all right?

11 A Okay.

12 Q And you feel at the time this report, which is
13 extracted in SK-8 was published, the Bureau
14 considered Class 3 lands to be marginal?

15 A Well, this is what it says in here.

16 Q Okay.

17 A But they also say in the last paragraph, which I
18 think is important, they say: Under proper management,
19 however, this class is expected to have adequate
20 payment capacity.

21 So, what they're saying is that it contains
22 more deficiencies than Class 1 but if you know
23 what you're doing from the farming stand point, you
24 can still make a return on Class 3 lands.

25 kersich - cross - white

1 Q What management did you assume for Class 3 lands?

2 MR. ECHOHAWK: Your Honor, I'd just like to
3 clarify whether he is referring to Classification
4 standards used by Mr. Kersich and United States
5 Exhibit, I believe it's 37, or in the phase 2
6 report?

7 MR. WHITE: It only appears in the phase 2
8 report, SK-8.

9 THE WITNESS: Well, you're talking now when
10 you refer to management --

11 THE SPECIAL MASTER: He's referring to the
12 definition using Exhibit C-43.

13 MR. WHITE: I meant to refer to SK-8, Your
14 Honor. I thought that was what the witness referred
15 to when he spoke about proper management.

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kersich - cross - white

1 THE SPECIAL MASTER: Oh, all right, we're
2 on with the 2.

3 THE WITNESS: As I said, we took this infor-
4 mation predicated on the source. We didn't
5 develop any of it, we didn't get involved in the
6 development. This is what BIA gave us to put in
7 this report, in this particular --

8 THE SPECIAL MASTER: What Mr. White is
9 saying, and interested me too, is this has to
10 some accurate and definite, certain definitions
11 to justify the classification of so many thousands
12 of acres of different areas. And this is a very
13 important point, we've come up with a very
14 distinct definition of Class 3 under one definition
15 that the Reservation had a few years ago, Class 3,
16 it now hits your acreage, that's why this is
17 important.

18 THE WITNESS: Not quite yet. I think we have
19 to understand what we're doing. There's a level
20 of management that would be provided for in an
21 economic study, and a methodology that the
22 agricultural engineer uses on his irrigation
23 designs. That's all involved here.

24 We pick out the lands that can physically

25 kersich-cross-white

1 and chemically sustain irrigation. He still got
2 to meet the problems that are inherent in
3 Class 3 lands. For example, normally on a
4 Class 3 land in our study you would very likely
5 have soils and topography deficiencies. So that
6 means he's got to concern himself with leveling,
7 he has to concern himself with the slopes that
8 might be inherent on that piece of land, all
9 these things. These would necessarily require
10 more costs for development. If the soils are
11 thin or they don't have as much water holding
12 capacity, he has to increase the cost to manage
13 or to provide that additional water to manage
14 those lands. Those are all parts of the manage-
15 ment scheme, but it's beyond here. We're telling
16 them what there is and what he should be aware
17 of, and for him to take care of.

18 THE SPECIAL MASTER: Right, but in the
19 definitions under the Class 3 in which you've
20 put many of these lands that would have the short-
21 comings or requirements you mentioned, up until
22 recently if there were marginal lands they would
23 have been put there, but under your definition that
24 you have to go to Class 4 to be marginal, and that
25 kersich-cross-white

1 makes a difference of about 40,000 acres in
2 this definition. And that's what I found myself
3 faced with.

4 THE WITNESS: Well, there are certain lands
5 in Class 3 which have only one deficiency under
6 our standard which would have sage topography.

7 THE SPECIAL MASTER: But they're in Class 3
8 now.

9 THE WITNESS: Yes, but under gravity, remember
10 this is land classification. Under sprinkler
11 those might be Class 1 or 2 if they had sufficient
12 soil depth, if they had all the characteristics,
13 and therefore management can be achieved by
14 matching the system to the land. For example, if
15 you have a, let's say a nine percent slope --
16 let's make it eight percent slope, that's the top
17 limit for Class 3, okay. From a gravity stand-
18 point that's a serious deficiency because the
19 widths of the runs.

20 THE SPECIAL MASTER: Washout.

21 THE WITNESS: That's right, sir, but from
22 a sprinkler, if you irrigate that with sprinklers
23 and you have the same depths of soil that you might
24 have under Class 1, for example, 36 inches or greater

25 kersich-cross-white

1 of good free-working soil, the lands have a
2 productive capacity the lands can meet, can be
3 easily managed by the matching of the system to
4 the land, and therefore the returns to the owner
5 or manager could be much higher than a Class 3,
6 you see it from that standpoint? I'm trying to
7 make this very clear.

8 We set up our classes to alert the person as
9 to the number of deficiencies that may be present.
10 Under Class 1 he could assume they were normally
11 almost level or within two percent slope, let's
12 say. They didn't have any drainage problems, they
13 didn't have any texture problems, good water
14 holding capacity, good soil. But still someone
15 has to design a system to fit that with the
16 attendant costs. Someone has to determine the
17 yields of those lands, that being done by other
18 people.

19 So our classification system does not follow
20 exactly what the Bureau does, and I've been trying
21 to make that very clear here because we considered
22 the soil and physical and chemical characteristics
23 only, understanding that these lands would warrant
24 further investigation and very likely the amount

25 kersich-cross-white

1 of lands that will be warranted as irrigable
2 would be less than that which we may certify
3 as arable.

4 THE SPECIAL MASTER: I understand. Thank
5 you.

6 Q (By Mr. White) On Page 8 of Exhibit 43 -- excuse
7 me, let me back up just a minute, please.

8 Isn't it true that Class 3 lands constitute
9 just a little less than half of the arable lands
10 which you have identified?

11 A On Page 8, did you say?

12 Q No, no.

13 THE SPECIAL MASTER: He struck that.

14 MR. WHITE: I struck that.

15 THE WITNESS: Are you talking about Table 8,
16 sir?

17 THE SPECIAL MASTER: He's talking about totals.

18 MR. WHITE: Yes.

19 THE SPECIAL MASTER: Does Class 3 constitute
20 about what percentage of the total if you put
21 in Class 3 of all of your arable lands?

22 THE WITNESS: It would be something less
23 than half. It's about 38,000 over 85,000,
24 roughly.

25 kersich-cross-white

1 Q (By Mr. White) About 45 percent, isn't it?

2 A Yes, whatever, you put the pencil to it, what-
3 ever the figure comes out.

4 Q Let's go to Page 8 then since we're starting from
5 that direction. Your definition of Class 1 is
6 that it's land which will yield higher returns
7 with minimum production and management costs;
8 is that correct?

9 A Yes.

10 Q What do you mean by returns?

11 A Based on the type of crops we find in that area,
12 based on the location of the lands, those should
13 be able to get the highest yields with the least
14 amount of soil amendments, with the least amount
15 of management, many times with the cheapest system
16 you can put on it.

17 I guess you might say they're a piece of
18 land I could farm when I'm working hard at it.
19 They have the potential, all the things are there
20 for being able to return maximum amount to the
21 farmer and minimize the amount of costs involved
22 in putting it under production and keeping it
23 under production.

24 Q Does return mean profit?

25 kersich-cross-white

1 A Returns in this instance could mean either
2 profit or total returns to be balanced against
3 the costs involved with production and manage-
4 ment costs.

5 Q With respect to your Class 1 lands, what investi-
6 gations did you make to determine that these
7 lands would yield high returns?

8 A We made no economic studies. That's being done
9 now.

10 Q But that's part of your definition, isn't it?

11 A Again, this is --

12 THE SPECIAL MASTER: I'm going to say that's
13 clever, but argumentative. He already said, he
14 gave his definition to the word return as used
15 in Class 1 and it's in the record now. It could
16 be gross or it could be net, he said.

17 MR. WHITE: I'd like to follow your obser-
18 vation up with one question, Your Honor.

19 Q (By Mr. White) Did you make any determination
20 of either gross or net returns for Class 1 lands?

21 A Not that I can recall.

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1 Q (By Mr. White) If you made no determination
2 as to returns, how did you determine what lands
3 should be Class 1?

4 A As I said, Class 1 lands, the determination was
5 made on the characteristics that we found in
6 our field office and laboratory work, and those
7 lands which would, from a developmental stand-
8 point, require the least amount of effort. For
9 example, there were level areas, had very little
10 slope. They had good waterholding characteristics,
11 things of this nature.

12 Q What investigations did you make with respect to
13 production and management costs associated with
14 Class 1 lands?

15 A No direct. Those are being done now.

16 Q Isn't it true, Mr. Kersich, that until you make
17 a determination of returns and until you make a
18 determination of production and management costs,
19 there's no way to know whether or not any particular
20 parcel of land meets your definition of Class 1
21 lands?

22 A Not particularly. I disagree with that. That is
23 not true, no.

24 THE SPECIAL MASTER: That's understandable.

25 kersich-cross-white

1 Q (By Mr. White) I understand that you disagree
2 with me, but if part of your definition deals with
3 returns and part of your definition deals with
4 costs and those determinations of costs and
5 returns haven't been made, how do you know it
6 meets your definition?

7 A Some of those are within the purview of the
8 person that's there. That's why he said this
9 piece of land is going to require very little
10 work to put it in irrigation, other than maybe
11 bring the water to it. It's good and deep. I
12 don't have any problems with it. I don't have
13 any slant to contend with. I don't have any
14 particular leaching or amendments that I have to
15 apply to it. This is good land, and he's alerting
16 the people that are doing the other parts of this
17 design that, hey, this is land that requires
18 very little work. Take note of it and of all of
19 the lands that I have observed here, these are
20 the best lands.

21 Q Is it fair to say then that while you made no
22 economic determination, economics is very much
23 a part of your definition?

24 A Economics is not a part of the definition in the
25 kersich-cross-white

1 sense that we are alerting the person that is the
2 economist that these are, from a soils standpoint,
3 from the location of the lands and that -- these
4 are the best lands we are finding.

5 Q In SK-5, would you please turn to Page -- let me
6 check and make sure I have the right page -- 115.4.2B-1.

7 A 2B?

8 Q 115.4.2B-1. It looks like it's about a third of the
9 way through the package.

10 (Off-the-record discussion.)

11 Q (By Mr. White) Take a look at paren A, Mr. Kersich.
12 Isn't it true that the Bureau definition, Class 1
13 arable lands, is significantly different than your
14 definition of Class 1 arable lands?

15 A There's no question about that.

16 Q And that's because the Bureau's definition of
17 Class 1 lands builds into it --

18 THE SPECIAL MASTER: Go ahead. I'm
19 just anticipating the balance of your --

20 Q (By Mr. White) -- net income?

21 A At the end of their study it does. I think an
22 important thing to point out here is that you
23 are bringing up the final analysis of the study,
24 and we are talking about my work at the beginning

25 kersich-cross-white

1 of the study, the land base, but we're again
2 pointing out to the people to be doing the rest
3 of the study that the limitations of the lands
4 are minimal for Class 1 and that the efficiencies
5 are the least or they least met -- they are not
6 over what we have put down for the parameters
7 of Class 1 lands and you can't -- you can't be
8 comparing apples and oranges.

9 Q That's right because your definition of Class 1
10 is different than the Bureau's; is that correct?

11 A No, sir, that's not the point. The definition of
12 Class 1 for the study we are doing meets it. Now,
13 later on there will be another test put to that
14 land.

15 Q Well, we will get into that in a little more
16 detail tomorrow, but let me make sure I understand
17 your position. Is it your position that even the
18 Bureau doesn't consider the economic determinations
19 in its determination --

20 A I didn't say that, but they still do separate land
21 out as to the potential deficiencies that they
22 have established in a screening process.

23 Q And that screening process has nothing to do
24 with economics?

25 kersich-cross-white

1 A No, it has a lot to do with it, but you have got
2 to find a piece of ground to work on first before
3 you can start applying economics and entering
4 into it, and I guess that's what I'm having a
5 difficult time explaining to you, and that's
6 what I think is what we did.

7 THE SPECIAL MASTER: This is precisely
8 all right. There is no problem with these
9 questions and there's no problem with the answers.
10 You carry right on.

11 Mr. White has a right to make an analysis
12 as to your procedure and your thinking, and you
13 have a right to stick to these things that
14 went into your definition of this. There is
15 nothing wrong with this.

16 THE WITNESS: Thank you.

17 THE SPECIAL MASTER: If you think you
18 are being badgered, let me know, but I don't
19 think you are.

20 MR. WHITE: I'm the guy being badgered,
21 Your Honor.

22 THE SPECIAL MASTER: You are not either.

23 Q (By Mr. White) Well, let's get into some specifics
24 for the rest of the afternoon and come back a
25 kersich-cross-white

1 little later tomorrow and talk about the Bureau's
2 approach again.

3 As I understand, the land you classified,
4 Mr. Kersich, did not include those lands which
5 were not trust lands and it did not include those
6 lands which were either presently or historically
7 irrigated; is that correct?

8 A I believe I said adjudicated lands using the term
9 that they have already got a permit, and I also
10 stated, I think, that while we did classify some
11 of those other lands, we did inadvertently end
12 up doing some work on them.

13 Q But your totals in terms of your arable land base,
14 did that include any land that is not trust land?

15 A That's not trust land?

16 Q Is anything besides trust land in your arable
17 totals?

18 A In the arable totals, that is supposed to be
19 undeveloped trust lands.

20 Q Isn't it true that you gave an arable land
21 classification of 2 to the SE 1/4 of the NW 1/4
22 of Section 35? Do you want to write this down?
23 SE 1/4 of the NW 1/4 of Section 35, 4 North, 1
24 East, in the North Crowheart --

25 kersich-cross-white

1 THE SPECIAL MASTER: Is that on this --

2 THE WITNESS: No. The only way I could

3 tell you would be by looking at --

4 Q (By Mr. White) Let's take a look at the map and

5 show you how --

6 A And you say that was Class 2?

7 MR. ECHOHAWK: North Crowheart would

8 be the back one.

9 THE WITNESS: May I use my field notes?

10 THE SPECIAL MASTER: Oh, sure.

11 THE WITNESS: This is called Kersich's

12 Notebook here, sir.

13 4 North, 1 East; is that correct?

14 Q (By Mr. White) Well, let's take a look at --

15 THE SPECIAL MASTER: 4 North, 1 West

16 of the 6th Principal Meridian --

17 MR. WHITE: Of the Wind River Meridian.

18 Q (By Mr. White) 4 North, 1 West, Section 35.

19 A Section 35, the SE 1/4 of the SW 1/4 --

20 THE SPECIAL MASTER: No, the SE 1/4 of

21 the -- I think Mr. White that's right, SE of the

22 NW.

23 A (By Witness) SE of the NW. That would be this

24 quarter down here (indicating).

25 kersich-cross-white

1 It appears from what I have here that that
2 was classified as -- which are my field
3 notes -- that that was classified as 3 gravity
4 and 2 sprinkler.

5 Now, let me look at the map.

6 THE SPECIAL MASTER: Is that what you
7 wanted?

8 MR. WHITE: We will have a bunch more.

9 THE SPECIAL MASTER: I will quit whenever
10 you want. Regina wanted to be off by five.

11 MS. SLEATER: No, Your Honor, I don't
12 particularly care one way or the other.

13 THE SPECIAL MASTER: Okay. Let's go
14 ahead and finish it up.

15 A (By Witness) On the Exhibit 45, the SE 1/4 of the
16 NW 1/4 appears to be classified as Class 2,
17 sprinkler, yes.

18 Q (By Mr. White) Would you now check in the same
19 unit, North Crowheart area in Section
20 27, Range 5 North, Township 2 East -- 5 North,
21 2 East?

22 A Okay. Section 27. This is 30, 29, 28 -- 5 North?

23 Q 5 North, 2 East.

24 A Okay, 5 North, 2 East.

25 kersich-cross-white

1 A 27, yes.

2 Q NW of the NW.

3 A NW of the NW.

4 THE SPECIAL MASTER: Up in the very
5 corner.

6 Q (By Mr. White) Did you classify that?

7 A That's fee land and it shouldn't be appearing on
8 our maps.

9 Q I direct your attention to Exhibit 45, C-45, and
10 ask you whether or not the NW of the NW of
11 Section 27 in 5 North, 2 East, is not, in fact,
12 colored in as Class 2 lands?

13 A Yes, it appears to be.

14 Q But it's not on your field notes?

15 A On my notes that particular corner here shows
16 as fee lands with the Class 2 being outside that
17 particular area.

18 Q What are you looking at here, A1?

19 A These are some township plats that I had made up
20 so I could do my review work, Mr. White.

21 Q And, specifically, are these aerial photographs?

22 A Yes, these are composites of the field photographs
23 shot down to quad size scale.

24 Q And this is for 5 North, 2 East?

25 kersich-cross-white

1 A Yes, sir. See, it's 5 North, 2 East.

2 Q And how do you know which is Section 27?

3 A Well, it's the normal layout of a township, so
4 this would be Section 30, so I just counted
5 back 30, 29, 28, 27.

6 Q So Exhibit 45 is in error with respect to the --

7 THE SPECIAL MASTER: The Class 2 --

8 A (By Witness) It's slid down a little bit, yeah.

9 THE SPECIAL MASTER: Let's be totally
10 candid about that. There's a mighty small portion
11 of the 5 North, 2 East in green. Ninety-five
12 percent of it, Mr. White, is that correct --

13 MR. WHITE: That's correct, Your Honor.
14 I'm just trying to find out what land he classified
15 and test these exhibits against his field notes.

16 THE SPECIAL MASTER: All right.

17 Q (By Mr. White) Would you go to the South Crowheart
18 area, Township 1 South, 3 East?

19 A I've got the plat, sir.

20 Q Okay. Section 10.

21 A Yes, sir. I'm in Section 10.

22 Q Would you look at the NW 1/4 of the SE 1/4 and
23 see if there's any Class 2 land in that?

24 A There's none indicated in here. Which are you
25 kersich-cross-white

1 talking about? Sprinkler or gravity?

2 Q I'm talking about sprinkler.

3 A Okay.

4 Q South Crowheart sprinkler is --

5 THE WITNESS: Could you put that out
6 in front? Thank you.

7 Now, we are in Township 1 South -- did you
8 give me -- or 1 North?

9 Q (By Mr. White) No, we are in Township 1 South,
10 3 East.

11 A Okay. That's way over to your right then. 1 South
12 would be at the bottom of the photo.

13 Q Let me get out of your way.

14 A 1 South, 3 East.

15 Q I'm talking about the NW of the SE.

16 A Okay. Section 10 would be the third section over
17 from that. On my map it shows a boundary line
18 which may have indicated fee, but on that one
19 that's not brought in. I would have to check
20 relative to the two maps here very closely if
21 I might. There may have been a change in mine.

22 Q Go ahead and do it because isn't it true that
23 on Exhibit 47 the NW of the SE 1/4 is colored
24 green Class 2?

25 kersich-cross-white

1 A Which is for sprinkler, yes.

2 Q For sprinkler?

3 A Yes.

4 Q What does your base map show?

5 A This base map shows it as 2 for sprinkler.

6 Q And that's the classification?

7 A Yes.

8 Q Now, would you turn to still in the South

9 Crowheart --

10 THE SPECIAL MASTER: Wait. I have got
11 a problem with that if I may, gentlemen. I just
12 thought your notes showed that was fee land?

13 A That's what I'm checking right here. I asked
14 time to check, sir.

15 THE SPECIAL MASTER: And you just said
16 that's Class 2 for sprinkler.

17 THE WITNESS: Yes, I pointed out that
18 there were some areas in here where test boundaries
19 that we have had problems with them and this is
20 one that it appears may have been a piece of fee
21 land that was inadvertently classified, but I
22 have got to check that if the total came in in the
23 final total.

24 THE SPECIAL MASTER: All right.

25 kersich-cross-white

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THE WITNESS: Let me write that down,

2

will you?

3

MR. WHITE: All right.

4

(Pause.

5

THE WITNESS: Okay.

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1 Q (By Mr. White) Next let's go to South Crowheart,
2 sprinkler again, 1 South, 3 East, Section 18.

3 A Okay.

4 Q The Northeast Quarter of the Northeast Quarter,
5 which I believe -- is it not shown as Class 1
6 land on Exhibit C-47? Can you see Exhibit C-47
7 from there?

8 A Yes, and it shows as Class 1 land sprinkler here
9 on my particular photo.

10 Q Okay. Now let's go to Township 1 North, 2 East.

11 A One North, 2 East?

12 THE SPECIAL MASTER: Section?

13 THE WITNESS: One North or 2 --

14 Q (By Mr. White) One North, 2 East, Section 5, the
15 NW quarter of the NW quarter.

16 A The NW quarter of the --

17 THE SPECIAL MASTER: Of the NW 1 quarter.

18 THE WITNESS: Okay.

19 Q (By Mr. White) And I direct your attention to
20 Exhibit C-47 and ask you if that is not classified
21 as Class 2 land on that exhibit?

22 A That's difficult for me to read off this photo,
23 but it appears to be.

24 THE SPECIAL MASTER: He's asking you about
25 kersich-cross-white

1 that photo.

2 THE WITNESS: Oh, yes.

3 THE SPECIAL MASTER: How about your field
4 notes?

5 THE WITNESS: My field notes here show it
6 as Class 2 sprinkler, yes.

7 Q (By Mr. White) Would you turn to Township 2
8 North, 1 East?

9 THE WITNESS: Wait a minute.

10 Q (By Mr. White) Section 23.

11 A Township 17

12 THE SPECIAL MASTER: Township 2 North, 1 East.

13 THE WITNESS: Okay.

14 Q (By Mr. White) Section 23.

15 A Two North, 1 East, Section 23.

16 Q (By Mr. White) Norhtwest to the Northwest. I
17 direct your attention to Exhibit C-47 and
18 ask you whether or not lands in that quarter
19 section are not classified as Class 1 arable?

20 A Okay. What section again, please?

21 Q Section 23.

22 A Okay.

23 THE SPECIAL MASTER: Northwest quarter,
24 Northwest quarter. He asked you a question about
25 kersich-cross-white

- 1 what that exhibit shows.
- 2 A (By The Witness) On our map the NW one quarter
- 3 of the NW one quarter of --
- 4 Q (By Mr. White) Of Section 23, 2 North, 1 East.
- 5 A Section 23 of 2 North, 1 East, on shown as Class 1,
- 6 yes.
- 7 Q What is it shown on your field notes?
- 8 A I'm trying to find it. Just a minute, please.
- 9 Well, the NW 1 quarter we have 2 and a 1
- 10 for sprinkler.
- 11 Q So it's 1 for sprinkler and 2 for gravity?
- 12 A Yes, a portion of it, and a portion that looks
- 13 like it was 2 original and then changed to 1 here,
- 14 so it looks like the entire quarter corner was
- 15 supposed to be Class 1 sprinkler.
- 16 Q Let's go to Township 1 North, 5 East, please.
- 17 THE SPECIAL MASTER: Do you want to knock off?
- 18 MR. WHITE: I'm sorry.
- 19 THE SPECIAL MASTER: Do you want to knock
- 20 off?
- 21 MR. WHITE: I would like to get through this.
- 22 THE SPECIAL MASTER: Well, you look pretty
- 23 beat.
- 24 Q (By Mr. White) One North, 5 East. Do you have
- 25 kersich-cross-white

1 that?

2 A Yes.

3 Q Section 4.

4 A Yes.

5 Q Southeast of the Northeast?

6 A Yes.

7 Q I direct your attention to Exhibit C-51 and ask

8 you whether or not that is -- ask you whether

9 this is classified as Class 3 lands?

10 A A portion of that is indicated on that exhibit

11 as Class 3 lands.

12 Q And what do your field notes show?

13 A On that particular one I can't tell right here.

14 There are some heavy black lines. I would have

15 to check that again, but I can't tell reading

16 it off here directly.

17 Q How would you check that?

18 A Probably go back to the original photo.

19 Q Do you have the original photo with you?

20 A Not here in Cheyenne, no, sir.

21 Q Please turn to Township 1 South, 3 East --

22 A Let me write that down, will you, so I can

23 remember all the questions I'm being asked?

24 And that was Section --

25 kersich-cross-white

1 Q That was Section 4 in Township 1 North, 5 East,
2 the Southeast quarter of the Norhteast corner.

3 A What was that again, Sandy?

4 Q Township 1 North, 5 East, Section 4, Southeast
5 to the Northeast.

6 A Southeast to the Northeast. The Southeast to
7 the Northeast. Okay.

8 THE SPECIAL MASTER: Section 4.

9 THE WITNESS: Yes, I'm there.

10 Q (By Mr. White) Now, that was what I thought you
11 were writing down.

12 A Oh, I got that down.

13 Q All right. Let's go to 1 South, 3 East.

14 THE SPECIAL MASTER: One South, 3 East.

15 THE WITNESS: Okay.

16 Q (By Mr. White) Section 25.

17 A Okay.

18 Q Southeast quarter of the Northeast quarter.

19 And just stay in that section, the Northeast
20 quarter of the Southeast quarter.

21 A Okay.

22 Q And the Southeast of the Southeast, all in
23 Section 25, 1 South, 3 East.

24 I direct your attention to what's been marked

25 kersich-cross-white

1 or admitted as U.S. Exhibit C-51 and ask you
2 whether or not those lands which I described in
3 Section 25 are classified as Class 2 lands?
4 A You are looking at 1, 3 --
5 Q One South, 3 East.
6 A Okay. Just a second. Now, I'm looking. There
7 are some lands indicated here as Class 2 lands
8 sprinkler.
9 Q Okay. That's indicated on Exhibit C-51 as well;
10 is that correct?
11 A That's right, yes.
12 Q And by lands indicated here --
13 A I was referring to my --
14 Q Your field notes?
15 A Right.
16 Q Okay. Would you get out your field notes for
17 Township 2 North, 5 East?
18 A Okay.
19 Q And I direct your attention to Section 26.
20 A Okay.
21 Q Specifically the Southwest of the Southeast.
22 And I ask you whether or not there isn't a small
23 portion of that quarter section that's classified
24 as Class 2, perhaps Class 3 gravity?
25 kersich-cross-white

1 A I can read the gravity classification here from
2 my map. It was Class 3 gravity, yes.

3 Q How about in the lower portion of that quarter
4 corner section? Does that upgrade to Class 2?

5 A I can't read the sprinkler classification on
6 the map I have here.

7 Q No, I mean the gravity, in the lower portion
8 of that quarter corner. You have different
9 classifications, don't you, for different portions
10 of that quarter corner?

11 A The Southeast quarter of Section 26 -- wait a
12 minute. We have some Class 6 in the Southeast
13 1 quarter of Section 25 or 26. Let me get that
14 straight.

15 Q Twenty-six we are talking about. We are talking
16 about the Southwest of the Southeast --

17 A And we show Class 6 there for --

18
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20 END 23

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1 Q You've got some Class 3 then gravity, is that cor-
2 rect there?

3 A Well, point to it, will you?

4 Q In this area. It picks up a little on Exhibit --

5 A Yeah, there may be a little fringe of 3 that comes
6 in here, correct, uh-huh. And there is a little
7 fringe of 2 that comes into there also on my work
8 notes here.

9 MR. WHITE: Okay. Your Honor, with the
10 Court's permission, I would like to stop for the
11 day. I have three more legal descriptions. Per-
12 haps I could just give them to Mr. Kersich and ask
13 him to take a look at them over the evening. We
14 may come up with some more because these were done
15 pretty quickly.

16 1 South, 3 East, Section 18.

17 THE WITNESS: Okay.

18 MR. WHITE: NE of the NE, that's in the South
19 Crowheart.

20 THE WITNESS: Okay.

21 MR. WHITE: And I would like you to confirm
22 it was classified 2 for gravity.

23 2 North, 1 East.

24 THE WITNESS: Just a minute, please.

25 THE SPECIAL MASTER: 2 North, 1 East.

kersich - cross - white

1 MR. WHITE: Section 23.
2 THE SPECIAL MASTER: 23.
3 THE WITNESS: Uh-huh.
4 MR. WHITE: NW of the NE.
5 THE WITNESS: NW of the 1/4?
6 MR. WHITE: NW, NE, right.
7 THE WITNESS: Uh-huh.
8 MR. WHITE: That's also in South Crowheart,
9 and I would like you to confirm that that was
10 classified 3 for gravity.
11 THE SPECIAL MASTER: Okay.
12 THE WITNESS: Okay.
13 MR. WHITE: And finally Township 5 North, 2
14 East, the NE of the NE.
15 THE SPECIAL MASTER: Of what section?
16 MR. WHITE: I'm sorry, Section 27, 5 North,
17 2 East, Section 27, NE, NE. That's in the North
18 Crowheart. I would like you to confirm that was
19 classified 2 for gravity.
20 THE SPECIAL MASTER: Okay, those three for
21 tomorrow and we will stand in recess until 9:15
22 tomorrow morning.
23 MR. ECHOHAWK: Your Honor, before we dismiss,
24 if I could, if possible, get from Mr. White what
25 direction he's going so the witness could also

1 prepare and maybe move things along.

2 THE SPECIAL MASTER: Do you wish to discuss
3 that off the record?

4 MR. ECHOHAWK: No, I would rather discuss it
5 on the record, if we could.

6 MR. WHITE: Well, Your Honor, that's part of
7 the cross-examination strategy. We'll find out
8 when we get there. I'll ask him a lot of other
9 questions about this as well.

10 THE SPECIAL MASTER: Okay.

11 MR. WHITE: Your Honor, I say that simply
12 because counsel for the United States are very
13 good at explaining the applicable law and where
14 they ought to be going to their witnesses. I want
15 the witness to answer the question for himself
16 without the aid of counsel.

17 MR. ECHOHAWK: Well --

18 MS. SLEATER: Your Honor --

19 THE SPECIAL MASTER: Ladies first this time
20 of night.

21 MS. SLEATER: I was just -- There was an
22 issue that Mr. Merrill raised at the end of the
23 session a week ago about some information that
24 was requested by his people, and I've got a pre-
25 liminary report, and since Your Honor had ordered

1 us to the extent possible to try to provide public
2 information, where it was, I would like to give Mr.
3 Merrill a report that was filed as a house document
4 with the 92nd Congress, Second Session, which he
5 seemed to be having trouble getting. I would like
6 to give him that, and I would like to point out
7 that other information that he requested on the
8 Shoshone River, like net flow charts, are available
9 through the Wyoming Engineer as the backup informa-
10 tion for water in the Shoshone were done in connec-
11 tion with the Wyoming State Engineer and that, as
12 a matter of fact, for the Big Horn River such data
13 has not been assembled and is not available.

14 MR. WHITE: Your Honor, I would like the record
15 to point out that it's been since the middle of
16 December that we asked for that material from the
17 Bureau of Reclamation. It has not been forthcoming
18 and it was not forthcoming under the guise of a
19 determination of whether public information --
20 that was included within the concept of public
21 information. A month and a half later we find out
22 that it is and that it is published, and I would
23 expect tomorrow we'll ask for some similar orders
24 on other matters which we have asked for at the
25 same time and I have not yet received.

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THE SPECIAL MASTER: Okay, Mr. Sachse.

MR. SACHSE: Yes. There was another loose end left open Friday of the last week which had to do with the so-called ten-day rule. And my interpretation of this ten-day rule as it stands now is that the Tribes have the duty ten days before they present a witness to provide the State and I suppose other parties with copies of the exhibits they intend to use, but I understand this whole thing is under consideration, and I would like it clarified because I know Mr. White takes the position that under the Pre-trial Order, as it stands now, the Tribe had the duty ten days before the 26th of January to present all exhibits.

THE SPECIAL MASTER: All right.

MR. SACHSE: I want to say one other thing on it. Any party can handle his case without exhibits. You can just have the witness stand up and testify and give all the figures and write them on a blackboard and so on and so forth. Exhibits really are a convenience to other parties and to the Master. On the other hand, the other parties ought to have a fair chance to look at exhibits before they come in. So we think a ten-day rule or a five-day rule, either before the

1 witness testifies or before the session where the
2 witness is going to testify, is fair. And I should
3 say that the idea of a ten-day rule ten days before
4 the beginning of the whole trial, and in a trial
5 that's going to be spread out over months, is very
6 unusual. Usually the idea that all exhibits are to
7 be cleared before the trial anticipates a three or
8 four-day or a two-week trial.

9 THE SPECIAL MASTER: That's right. Let me say --

10 MR. WHITE: Your Honor, could I say something?

11 THE SPECIAL MASTER: Yes, you may.

12 MR. WHITE: Your Honor, I would very much op-
13 pose the suggestion of the Tribes. The Pre-trial
14 Order which was agreed to upon by all of the parties
15 indicated that the ten days ran prior to the time of
16 trial.

17 THE SPECIAL MASTER: Yes. But nothing in
18 there can be inferred that a trial is going to go
19 five or six or seven months. All exhibits had to
20 be on record before the first day of the first
21 week of the first session of that trial.

22 MR. WHITE: Let me explain to the Master what
23 that means.

24 THE SPECIAL MASTER: Yes.

25 MR. WHITE: What it means is that the Tribes

1 have the tremendous luxury of having four years to
2 get together their exhibits and then ten days prior
3 to the time that they intend to use them, I guess,
4 according to Mr. Sachse's approach, they deliver
5 them to the State. And the State has ten days to
6 review exhibits for which they have four years to
7 prepare.

8 Now, the State has provided several thousand
9 exhibits in reliance of the ten-day rule as specified
10 in the Pre-trial Order. Just as we sent our experts
11 home when it was moved for them to be excused under
12 Rule 615, we have also complied with the rule in the
13 Pre-trial Order and submitted our exhibits to the
14 Tribes and to the United States. I think it would
15 be unfair at this time for the rule to be changed,
16 just as I thought it was unfair at the time for
17 the rule on the exclusion of witnesses to be changed.
18 I think it is unfair at this time for the rule on
19 endorsement -- or the delivery of exhibits to be
20 changed. Wyoming is willing to live with the rule.
21 We have lived with the rule and we -- it makes the
22 burden put on the State virtually insurmountable
23 when four years of exhibit preparation can be
24 dumped in our laps ten days prior to the time of
25 use.

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MR. ROGERS: Your Honor, I have one thing to add to this.

THE SPECIAL MASTER: I would like to rule on this, if I may, and I don't think any further discussion is going to make much difference. And I'm going to rule. May I proceed, ladies and gentlemen?

I do not perceive that any of my activities or rules herein will cast an undue burden on any of the parties. I believe that by and large we have been through the water rights hearings at Worland, the massive amounts of depositions and re-depositions taking place and the activity for production of evidence and of exhibits so far, and I don't believe anyone has been treated unfairly, unjustly.

And I notice that last week the Tribes did make an oral motion on January 30th for an amendment or a clarification of the ten-day rule. That was Paragraph 7 of it regarding the Pre-trial Conference that was dated November 10, 1980, and the United States joined in this motion, and we heard your arguments and we have heard some more today, and I want to state and find that the intent of Paragraph 7 of the November 10th Order certainly was to require parties to submit copies of their exhibits to other counsel at least ten days before

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trial in which that exhibit is to be used, or certainly before the date of that sequence of that week's trial in which that exhibit is intended to be used.

Number two, the State, the United States and the Tribes will all be expected to put on a case in chief in the present hearings.

Number three, an adequate notice will be accomplished and sufficient preparation time allowed if a party receives a copy of an exhibit within ten days of the date on which that exhibit shall be used in trial.

And I order that that November 10, 1980 Order on Pre-trial Conference have its Paragraph 7 thereof modified to read as follows: 7-Exhibits: The parties will submit copies of their exhibits to counsel for major parties at least ten days before the date of trial in which said exhibit is to be used unless otherwise agreed or persuasive reasons are shown for an inability to present the exhibits within that ten-day rule.

Okay, we'll meet again at 9:15 tomorrow morning.

(Proceedings concluded.)

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