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## Trial Transcript, Vol. 17, Morning Session

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File 124  
4375  
Box 10

Case # 4993

File # 124

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

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

Civil No. 4993

FILED \_\_\_\_\_  
2/25 1981  
Margaret V. Hampton CLERK  
DEPUTY

VOLUME 17

Morning Session

Friday, February 13, 1981

**ORIGINAL**

APPEARANCES

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FOR THE STATE  
OF WYOMING:

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FOR THE UNITED STATES  
OF AMERICA:

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MR. JAMES MERRILL and  
MR. MICHAEL D. WHITE  
Special Assistant Attorneys  
General

2900 Energy Center Building  
Denver, CO 80202

ALSO: MR. RIFKIN

MS. REGINA SLEATER  
Attorney at Law  
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Cheyenne, WY 82002

and

MR. TOM ECHOHAWK  
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Division

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Denver, CO 80294

and

MR. JOSEPH MEMBRINO  
Attorney at Law  
U.S. Department of Justice  
Washington, DC 20006

FOR THE ARAPAHOE  
TRIBE:

WILKINSON, CRAGUN & BARKER  
1735 New York Avenue, N.W.  
Washington, DC 20006  
BY: MR. R. ANTHONY ROGERS

1 MR. MERRILL: Mr. Master, before Mr. White  
2 resumes his cross-examination of Mr. Kersich, I have  
3 several matters that I'd like to bring up. I spoke  
4 this morning with some of the private counsel, counsel  
5 for the private parties in the Basin, and they asked  
6 me to convey to you their apologies for not attending  
7 this week. They had other commitments.

8 THE SPECIAL MASTER: Nobody owes me any  
9 apologies.

10 MR. MERRILL: They asked that I ask the United  
11 States on the record --

12 THE SPECIAL MASTER: Who are "They"?

13 MR. MERRILL: Mr. Donnell and Mr. Cozzens,  
14 Your Honor, asked that I request a listing of the order  
15 of the witnesses who will be called at the resumption  
16 of these hearings in March. The private counsel  
17 indicated two things: Number one, that they wish to  
18 come down during the week of March 9th and some of  
19 those people have some cross-examination of Mr. Kersich  
20 that they would like to do at that time. And secondly  
21 they wanted some indication of who the United States'  
22 next one or two witnesses might be in order that they  
23 could prepare and obtain copies of the materials they  
24 need.

25 THE SPECIAL MASTER: Do you know who the next



1 one or two witnesses of the United States is going  
2 to be?

3 MR. MERRILL: No, Your Honor, I don't.

4 THE SPECIAL MASTER: You'd like to know  
5 also, would you not?

6 MR. MERRILL: Yes, sir, we sure would.

7 THE SPECIAL MASTER: I presume there'll  
8 be an announcement of that before we break up today.

9 MR. ECHOHAWK: The United States will call  
10 Ron Billstein of H.K.M. Associates next.

11 THE SPECIAL MASTER: Do you know who after  
12 Ron?

13 MR. ECHOHAWK: Probably Ross Waples, but  
14 we're not sure.

15 THE SPECIAL MASTER: Those two would  
16 probably be another week to ten days with them on  
17 the stand.

18 MR. ECHOHAWK: Your Honor, it depends on  
19 Mr. White.

20 THE SPECIAL MASTER: Mr. White, what do you  
21 think, as long and as detailed cross of those as with  
22 Mr. Kersich?

23 MR. WHITE: They're pretty high up, so we'll  
24 work them over.

25 THE SPECIAL MASTER: Okay. So, if you let

1 them know that, that's about what all of us know.

2 MR. MERRILL: I thank Mr. Echohawk for that.

3 The other thing I'd like to raise is the  
4 availability of the remaining United States' witnesses  
5 to complete their depositions sometime during the  
6 proceedings, and find out if the United States is  
7 going to make those people available before they testify  
8 in March. I'm speaking specifically of Mr. Billstein,  
9 Mr. Keene and Mr. Stetson and also we were in the  
10 middle of taking the deposition of Mr. Mesghinna,  
11 and we recessed that deposition on the Friday evening  
12 before the trial commenced.

13 MS. SLEATER: Your Honor, the deposition of  
14 Dr. Mesghinna was completed; the United States so  
15 stated at that time. As to the three remaining people  
16 which --

17 THE SPECIAL MASTER: The United States might  
18 have said it, but did Wyoming state --

19 MS. SLEATER: Your Honor, since that time  
20 there's been a letter with the State of Wyoming that  
21 talks about the depositions of Mr. Stetson, Mr. Billstein  
22 and Mr. Keene. We will make those people available  
23 during the first week of March. I've been talking to  
24 them to see to their availability, and that's the week  
25 they are available and they will be available for

1 depositions at that time.

2 THE SPECIAL MASTER: All right.

3 MR. WHITE: I'm sorry, I didn't hear the  
4 three names; Billstein, Keene and Stetson?

5 All right, let's forget about Mesghinna.

6 THE SPECIAL MASTER: Okay, fine, Mr. Merrill.

7 MR. MERRILL: Thank you, Your Honor.

8 MR. ECHOHAWK: Your Honor, as long as we're  
9 discussing this, I can foresee a problem now that if  
10 Mr. White may finish today by some chance, that the  
11 private parties want to cross Mr. Kersich. The week  
12 of March 9th he has a previous commitment to testify  
13 again in Arizona versus California, which also resumes  
14 March 9th, and I discussed that matter with Mr. White.

15 THE SPECIAL MASTER: I thought you said  
16 yesterday he would be available for this continuation  
17 of the hearing March 9 because we're going to need  
18 him, I think.

19 MR. WHITE: I have told Mr. Echohawk, and  
20 he said it correctly, I have no objection to Mr.  
21 Kersich filling his other obligations in Arizona versus  
22 California before we resume the cross.

23 THE SPECIAL MASTER: Oh, I see.

24 MR. WHITE: And I've got no problem with that.

25 THE SPECIAL MASTER: All right. We'll move



1 on with the other witnesses at that time and other  
2 counsel can fall in line as the rest of the counsel  
3 do.

4 MR. WHITE: Your Honor, I also told the  
5 United States that I have no objections if they wish  
6 to, in order to preserve continuity, keep Mr. Kersich  
7 as the next person up so that we would skip Monday  
8 and Tuesday of the week of March 9th. I have no  
9 objection to that.

10 THE SPECIAL MASTER: Can you be back  
11 Wednesday, the 11th?

12 THE WITNESS: I don't know, sir. It would  
13 be improper for me to say because I was scheduled to  
14 be the first witness, but I don't know how long my  
15 cross-examination will be.

16 THE SPECIAL MASTER: Let's see what evolves  
17 between now and then.

18 MR. ECHOHAWK: I discussed that matter with  
19 my co-counsel in that case, and he has some leeway  
20 with when Mr. Kersich goes on that first week, either  
21 he can put him on the first of the week and Mr. Kersich  
22 could be back probably ready to go Thursday morning  
23 because the trial is in Atlanta --

24 THE SPECIAL MASTER: Can he do it otherwise?

25 MR. ECHOHAWK: Or he could do it the other way,

1 assuming the other parties were finished in the first  
2 couple days of the week.

3 THE SPECIAL MASTER: Why don't you see if  
4 we can do it the other way, and maybe have an agree-  
5 ment that we could be finished with Mr. Kersich by  
6 Tuesday.

7 MR. WHITE: Your Honor, I don't think that's  
8 going to work. We're in the second major phase of  
9 cross-examination, and the way I've got it layed out,  
10 I would guess there are four, maybe five, depending on  
11 how you define the phases, of cross-examination. I  
12 know that the private counsel are depending on us to  
13 do the pick and shovel work in the cross-examination  
14 and then they want to talk about specific areas, so I  
15 can't imagine we'd be done in two days. We plan on not  
16 being --

17 THE SPECIAL MASTER: All right, let's proceed  
18 toward the March 9th hearing and see what falls into  
19 place when that date arrives. That's the best we can  
20 do.

21 MR. MERRILL: My only request, Your Honor,  
22 would be that we keep informed of who the witnesses  
23 will be and whether we begin on March 9th or 11th so I  
24 can tell private counsel so they don't drive down.

25 THE SPECIAL MASTER: I hope you can make that

1 work ---

2 MR. MERRILL: We will work it out, Your

3 Honor.

4 THE SPECIAL MASTER: -- between you all.

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1 Q (By Mr. White) Mr. Kersich, before we start  
 2 back in on the parcels, where you have HKM  
 3 holes, let me ask you about the holes.

4 The Master asked you if all of those were  
 5 inside or outside the study area. Do you  
 6 recall the number that were outside the study  
 7 area?

8 A No, but there were very few. They were just  
 9 where they were fee line boundaries.

10 Q Isn't it true that there were approximately  
 11 50 outside the study area?

12 A I haven't counted them.

13 THE SPECIAL MASTER: Out of the total  
 14 671, whatever it is.

15 THE WITNESS: I think the record  
 16 should show that while they may have been  
 17 outside the study area because of a boundary,  
 18 they were still in the same formation or the  
 19 same soils.

20 MR. WHITE: I didn't quite understand  
 21 that.

22 THE SPECIAL MASTER: Read the answer,  
 23 would you, please?

24  
 25 kersich-cross-white



(Thereupon the following  
 (statement by the witness was  
 (read back by the reporter as  
 (follows: "I think the record  
 (should show that while they  
 (may have been outside the  
 (study area because of a  
 (boundary, they were still in  
 (the same formation or the  
 (same soils."

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7 Q (By Mr. White) Is it true, if you know, that  
8 approximately 145 more of the holes were outside  
9 the 85,000 acres that you have classified as  
10 arable?

11 A That wouldn't surprise me because how else could  
12 we have classified it as nonarable? We had  
13 to get that data also. The number of holes  
14 would be something that I could only check by  
15 going back and counting them up individually on  
16 the particular sheets.

17 Q Mr. Kersich, I have a listing of such holes.  
18 Would you like me to give you that listing so  
19 that you can check that listing between now  
20 and the resumption of your cross-examination?

21 THE SPECIAL MASTER: What is your  
22 purpose in wanting him to look over the listing  
23 of those holes?

24 MR. WHITE: If he wants to verify  
25 kersich-cross-white

1 the number of holes within or without the area.

2 THE SPECIAL MASTER: Why would he  
3 want to verify the number of holes? He has  
4 already answered your question.

5 MR. WHITE: All right, Your Honor,

6 Q (By Mr. White) Mr. Kersich, would you please  
7 turn in your workbook to 1 North, 3 East again?

8 THE SPECIAL MASTER: By the way, I  
9 found the SK-7 on my stack that I could not  
10 find yesterday with all of my notes on it.  
11 Whoever brought it back, I thank you for doing  
12 that. That was exactly what I could not find  
13 yesterday when I was looking for it,

14 MR. WHITE: Your Honor, could we go  
15 off the record for just a second?

16 (Off-the-record discussion.)

17 Q (By Mr. White) Do you have 1 North, 3 East,  
18 in front of you, Mr. Kersich?

19 A Yes, I do.

20 Q Do you find that 44-acre tract that we were  
21 talking about yesterday between Sections 29 and 32?

22 A Yes, I do.

23 Q Is that the 44-acre tract in which there were  
24 no holes in that tract greater than 36 inches?

25 kersich-cross-white

1 A That hole that is 36 inches deep is not in that  
2 tract.

3 Q How deep are the holes that are within the  
4 tract?

5 A There's a Bureau hole we looked at yesterday,  
6 and the depth I don't recall. There are some  
7 probes within that tract.

8 Q Isn't it true that the 36-inch hole directly  
9 to the west of the tract shows 3 feet to hard  
10 siltstone?

11 A That's correct.

12 Q Now, I ask you the same question about that  
13 that we had asked all the way along "What did  
14 you base your opinion on that that tract was  
15 arable?" Specifically, how did you determine  
16 that there were 6 foot to barrier when the  
17 closest hole showed that it was 3 feet to  
18 barrier?

19 A The land classifier was out there. He drilled  
20 the hole. He found that particular formation.  
21 He went around, and in his mind was able to  
22 determine that barrier in the remaining portion  
23 was less -- or was greater than 6 feet.

24 I personally discussed this with the  
25 kersich-cross-white

1 person that classified that tract.

2 THE SPECIAL MASTER: On what facts?  
3 On what basis? On what data? On what  
4 observations?

5 You see, the only thing on record here  
6 is that there was a hole that showed that there  
7 was a siltstone that could pass for a barrier  
8 less than 6 foot there.

9 THE WITNESS: Yes, but that was outside  
10 the tract. He went back --

11 THE SPECIAL MASTER: What did he find?  
12 If you know --

13 THE WITNESS: Well, there are various  
14 land formations he can review to be able to  
15 find this. I discussed this particular formation.

16 THE SPECIAL MASTER: You have time and  
17 time again, but it leaves me in the same --  
18 with a reasonable doubt of not having knowledge  
19 of his basis for doing that. Had there been crops  
20 grown there before?

21 THE WITNESS: No, there were no  
22 cropping patterns.

23 THE SPECIAL MASTER: Was there something  
24 about the terrace that he could conclude that  
25 kersich-cross-white



1 that was an arable piece of land? The fact that  
2 the Bureau put that in that land class, again  
3 had a basis --

4 THE WITNESS: I don't know whether the  
5 Bureau of Reclamation thought the conclusions  
6 would have any direct effect on those. We  
7 certainly checked those as we went through here,  
8 but he did -- this is attached to another portion  
9 of land here that there were deeper holes in,  
10 The lay of the land in that is such that in his  
11 professional opinion he was able to substantiate  
12 it, and that's what he reported.

13 THE SPECIAL MASTER: Okay.

14 Q (By Mr. White) And you relied on his opinion  
15 in forming your own?

16 A I relied on his opinion in this sense because I  
17 had checked his opinion in other circumstances  
18 and found it to be professional and in keeping  
19 with the standards of the profession.

20 Q Would you please turn to 1 North, 2 East, in  
21 Section 5? In approximately NW of the NW 1/4,  
22 do you find a 44-acre parcel that is classified  
23 3 gravity, 2 sprinkler?

24 A Yes, I find it.

25 kersich-cross-white

1 Q Is that parcel on the edge of some rough terrain?

2 A It's up against some rough terrain, yes. It  
3 comes out on a bench that appears above the river  
4 here.

5 Q Isn't it true that there is a Bureau hole and  
6 only a Bureau hole numbered 16 in that parcel?

7 A It appears to be true, yes. I can't find any  
8 other hole.

9 Q Isn't it true that the Bureau hole only goes  
10 to 60 inches or 5 feet?

11 A That could be true, yes. Could I look at the log?

12 Q Sure. You can take a look at anything you want  
13 to.

14 A Excuse me.

15 THE SPECIAL MASTER: I think you have  
16 answered that that could be true. That should  
17 be all right.

18 MR. WHITE: That's fine with me.

19 THE WITNESS: I would like to look at  
20 the hole.

21 MR. WHITE: Off the record.

22 (Off-the-record discussion.  
23

24 \* \* \* \* \*

25 kersich-cross-white

1 (Thereupon a 15 minute  
2 (recess was taken.

3 THE SPECIAL MASTER: Mr. White.

4 Q (By Mr. White) Okay. Mr. Kersich, on Township --  
5 within Township 1 North, 2 East, do you have --  
6 find a tract of land of 44 acres in Section 5,  
7 NW 1/4, classified 3 gravity 2 sprinkler?

8 A Yes.

9 Q And do you find a parcel of land of 58 acres  
10 in Section 32 in the NE 1/4 classified 3 gravity,  
11 1 sprinkler?

12 A Which section was that, please?

13 Q Thirty-two.

14 A Thirty-two. We're still on the same Township?

15 Q Yes, should be 1 North, 2 East.

16 A 1 North, 2 East.

17 Fifty-eight acres, yes, I find that.

18 Q Is it true that while there may be holes in those  
19 two parcels no hole is greater than 60 inches or  
20 five feet?

21 A All of the Bureau holes in those parcels are  
22 60 inches deep, and end in loams or other types  
23 of soils like this. I should refer to this  
24 particular parcel, 44-acre parcel that's located

25 kersich-cross-white

1 in Section 5. That is part of a much larger.  
2 parcel that was reviewed as part of the FIP's,  
3 and I think those logs were furnished to you,  
4 but as I recall, there are logs in that total  
5 parcel which are deeper than five feet. Un-  
6 fortunately, that's part of our aid program,  
7 I don't have those on this sheet, and I believe  
8 copies of those logs were furnished to you.

9 THE SPECIAL MASTER: What's an "FIP"?

10 A Federal Irrigation Project.

11 THE SPECIAL MASTER: All right.

12 Q (By Mr. White) Sometimes called Federal Indian  
13 Project?

14 A Federal Indian Project, yeah. I will review my  
15 logs on that.

16 Q Okay.

17 A And bring those, and I think you will find that  
18 there are holes deeper than 60 inches in that  
19 parcel.

20 Q Right next to that 44-acre parcel on the west  
21 is a 25-acre parcel, do you find that?

22 A Yes, I do.

23 Q Is there a hole in that?

24 A I'm not sure that the hole is directly in that

25 kersich-cross-white



1 parcel, but it is one particular large parcel  
2 and we're dealing with small delineations  
3 of that parcel.

4 Q Also to the east of the 44-acre parcel is a  
5 13-acre parcel. Is there any hole in that? I  
6 don't want to mislead the record, these are in  
7 the FIPs, these parcels.

8 A These are in fee lands, yes, but these lands  
9 are primarily all the same, same parcel of land,  
10 even though there might be a boundary that  
11 crosses through there, and I will furnish you  
12 the logs of those holes immediately.

13 THE SPECIAL MASTER: Is there on-going  
14 irrigation on the fee lands?

15 THE WITNESS: Yes, there is on-going  
16 irrigation in the other portions of that area,  
17 not on the particular parcel that Mr. White's  
18 referring to.

19 Q (By Mr. White) The 44 acres is upgrade from the  
20 lands that are presently being irrigated; isn't  
21 that correct?

22 A That's correct, that's correct.

23 Q Did you rely on anything but someone else's  
24 opinion in the formulation of your opinion that

25 kersich-cross-white

1 these two tracts in Township 1 North, 2 East  
2 were arable?

3 A I formed my opinion based on the opinion of the  
4 land classifier who was there.

5 THE SPECIAL MASTER: He asked you in addition  
6 to that. Anything else? Would you read the  
7 question again, please, and listen a little  
8 closer to it.

9 (Thereupon the following  
10 question was read back as  
11 follows: "Q Did you rely  
12 (on anything but someone  
13 else's opinion in the form-  
14 ation of your opinion that  
15 (these two tracts in Township 1  
16 (North, 2 East were arable?")

17 THE WITNESS: No, I just relied on the  
18 opinion of the land classifier in this instance.

19 Q (By Mr. White) Would you turn to Township 1 North,  
20 1 East; put a finger in 2 North, 1 East and 1 North,  
21 2 East; I'd like to look at the full view area  
22 in general.

23 A Okay. Yes, I have both of them.

24 Q In Section 13 of 1 North, 1 East do you find a  
25 152-acre parcel classified 6 gravity, 2 sprinkler?

A Yes, I do.

Q Is it true that there is one hole in that parcel

kersich-cross-white

1 of 40 inches in depth?

2 A Yes.

3 Q Did you rely on anything other than someone  
4 else's opinion in forming your opinion with  
5 respect to that parcel?

6 A This parcel was discussed in detail with the  
7 drainage engineer and the land classifier.  
8 There's a hole about a half mile to the west that's  
9 96 inches deep. It was hand augered.

10 There's a hole about a half mile to the  
11 east of 72 inches in depth, and the opinion of  
12 the three of the folks that were involved, is  
13 that we had found a little rock butte there,  
14 which is not uncommon occasionally, but -- oh,  
15 there's another one, excuse me, which is a sample  
16 hole, which is about a half mile south, shows  
17 62 inches to barrier, and it's in Class 6 lands,  
18 non-arable lands.

19 And in the opinion of the people, and I  
20 concurred, is that we had found an isolated rock  
21 upthrust or a little rise in the shale area  
22 there, but that the rest of the parcel did have  
23 sufficient barrier to warrant further study.

24 Q The 40-inch hole though is the only hole in the  
25 kersich-cross-white

1 parcel that's in almost precisely in the middle  
2 of the parcel, isn't it?

3 A That's correct, but you can't evaluate it on  
4 the basis of one hole.

5 THE SPECIAL MASTER: Why was it drilled only  
6 to 40 inches?

7 THE WITNESS: Because there we hit hard  
8 material.

9 THE SPECIAL MASTER: What was the hard  
10 material that you hit?

11 THE WITNESS: I'd have to look at my logs.

12 THE SPECIAL MASTER: Was it sufficient to  
13 be ten times more than a hydraulic -- go ahead,  
14 you know what I'm asking, go ahead.

15 THE WITNESS: Yes, it would be, but again,  
16 one must understand that you are going to find  
17 those little areas within areas that have the  
18 sufficient barrier depth to rise up, and then if  
19 you go ahead and put your rock or cut through  
20 your rock, put your drain in, put your gravel  
21 envelope in, you'll get sufficient drainage.

22 THE SPECIAL MASTER: But in an area of 152  
23 acres, wouldn't the better part of prudence  
24 warrant one more hole just to prove yourself right

25 kersich-cross-white



1 as to this upthrust of rock?

2 THE WITNESS: Well, sir, we had -- may I  
3 show you on the map?

4 THE SPECIAL MASTER: Sure.

5 THE WITNESS: Within this section what  
6 amounts to be about a section, we had four holes  
7 and we only found the one hole which was -- we  
8 found one outside that we threw out completely,  
9 but the other two holes were six foot, and eight  
10 foot, sir, and those were hand augered.

11 THE SPECIAL MASTER: The other three holes,  
12 the 96 inch, 82 inch and 72 inch, you felt  
13 answered your professional question?

14 THE WITNESS: They were answering our  
15 questions, that's what I wanted to know.

16 THE SPECIAL MASTER: Okay.

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20 END 3

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1 Q (By Mr. White) Mr. Kersich, I hand you a document  
2 that's entitled "Drainage Manual," from the  
3 Department of Interior, Bureau of Reclamation,  
4 and ask you whether or not you are familiar with  
5 that document?

6 A Yes, I am.

7 Q Is it true that your definition of barrier in  
8 this study was a layer that had a hydraulic  
9 conductivity one-tenth or less than the weighted  
10 hydraulic conductivity of the strata above it?

11 A Yes, it is.

12 Q Do you know whether or not that is the Bureau's  
13 standard?

14 A It is in many instances. It is not in this manual.

15 Q Would you turn to Page 118, please?

16 A Yes, I would.

17 Q And would you read paragraph 4-6?

18 A The complete paragraph, right?

19 Q Yes.

20 A "By definition, as used by the Bureau of  
21 Reclamation, a barrier zone is a layer which has  
22 a hydraulic conductivity one-fifth or less of  
23 the weighted hydraulic conductivity" --

24 THE SPECIAL MASTER: Hydraulic conductivity.

25 kersich-cross-white

1 A (By The Witness) -- "hydraulic conductivity of  
2 the strata above it. Although this is a somewhat  
3 arbitrary standard, it has worked out satisfactorily  
4 in practice."

5 Now, I think that needs to be explained.  
6 That's not always what the Bureau uses. We have  
7 had direct communications with the Bureau  
8 engineer on that.

9 THE SPECIAL MASTER: Give me the fly  
10 page on that and see what year it was published  
11 and how long --

12 (The document was handed to  
13 (the Special Master by Mr.  
14 (White.

15 THE SPECIAL MASTER: Okay. Thank you.

16 THE WITNESS: Might I refer to a  
17 telephone conversation with Jack Christopherson,  
18 who is the Bureau of Drainage Engineer?

19 Q (By Mr. White) Before you do, let me make sure  
20 that is identified for the record and ask you  
21 whether or not this is entitled, "Drainage Manual,  
22 A Water Resources Technical Publication, A guide  
23 to integrating plant, soil, and water relationships  
24 for drainage of irrigated lands, First Edition, 1978,  
25 United States Department of the Interior, Bureau

kersich-cross-white

1 of Reclamation."

2 A You read that correctly.

3 Q And that is the publication from which you read  
4 the language on Page 118, paragraph 4-6?

5 A That's correct. That is dated 1978, isn't it?

6 Q Yes.

7 A This is a quote from Mr. Jack Christopherson --  
8 do you want to look at this, Tom?

9 MR. ECHOHAWK: I have a copy of it.

10 THE WITNESS: Okay. Now, this is a  
11 phone call that Bob Toedter made at my personal  
12 instructions to Mr. Christopherson on 2-2-81:  
13 "The barrier being defined as  $1/5$  the  
14 weighted average of the materials above it  
15 was arrived at by the Water and Power Resource  
16 Service after running laboratory studies of  
17 water movement into drains. Previously based  
18 on some work in Yuma Area they found that  $1/10$   
19 had defined the situation and it was used as a  
20 rule of thumb for a long time. The Dutch are  
21 still using  $1/10$  in their work." This is  
22 the people in Holland.

23 "The WPRS people presently feel, if a  
24 drainage engineer prefers using  $1/10$  that they

25 kersich-cross-white



1 will go along with it. There are several more  
2 fundamental considerations that may influence  
3 drain spacing more than this will, such as  
4 irrigation management, the nature of the land  
5 form," and so on.

6 "Another point he brought out is that if  
7 the permeability of the material starts decreasing  
8 with depth, that the drain spacing estimates  
9 start decreasing also. Therefore, the drain  
10 spacing used should be the greater value with a  
11 shallower depth to barrier. Conveyance needs  
12 to be considered within this analysis."

13 Q (By Mr. White) May I see the memo, please?

14 A Certainly. I'm sorry.

15 Q Did you rely on the information contained in  
16 this memo in arriving at your one-tenth standard?

17 A Arriving at the one-tenth standard when the  
18 standard drawn up was pretty much the standard  
19 in the industry.

20 Q Is it correct that this memo indicates that  
21 one-tenth had defined the situation in the  
22 Yuma Area?

23 A That's where the original studies were made and  
24 that's where the original work was done by the

25 kersich-cross-white

1 Bureau on drains.

2 THE SPECIAL MASTER: Draining salt or  
3 draining water? A little of both?

4 THE WITNESS: Both, sir, that's correct.

5 The point is that there are many other  
6 factors besides that definition that enter  
7 into it. All of them have to be taken into  
8 consideration.

9 Q (By Mr. White) Doesn't the last paragraph indicate  
10 that with decreasing permeability with depth you  
11 should have a greater depth to barrier?

12 A I believe I read what it said, sir.

13 Q What does that mean then?

14 A It says that the drain spacing estimates start  
15 decreasing also.

16 Q The drain spacing has nothing to do with depth  
17 to barrier?

18 A As I have said again and again, you have the  
19 three functions. You have the depth to barrier;  
20 you have the hydraulic conductivity; and you  
21 have the drain spacing. And they interrelate.

22 As your barrier gets closer to the surface,  
23 even if your hydraulic conductivities are good,  
24 your spacing will begin to decrease.

25 kersich-cross-white

1 Q Let's take a quick look at something you  
2 provided for me previously, and that's been  
3 marked for identification as SK-10.

4 A Can I put this up?

5 THE SPECIAL MASTER: This brings back  
6 memories of the first few months of this lawsuit,  
7 "Get me a copy I can read." Remember those days?

8 MR. WHITE: This is the copy we got,  
9 Your Honor.

10 THE SPECIAL MASTER: You are going to  
11 make do?

12 THE WITNESS: I can't read this very  
13 well.

14 THE SPECIAL MASTER: It's pretty  
15 difficult, but go ahead.

16 MR. WHITE: I'm sorry, Your Honor.  
17 We made the copy of Mr. Kersich's, and this is  
18 the best we can do.

19 Q (By Mr. White) Is it true that SK-10 represents  
20 the land classification standards for the Muddy  
21 Ridge project, third division in the Big Horn  
22 District?

23 A That's to the best of my knowledge, yes.

24 Q In fact, these were standards which you provided  
25 kersich-cross-white

1 me when I asked you for the Muddy Ridge standards  
2 that you relied on; is that correct?

3 A Yes.

4 Q Isn't it true that about one-fifth of the way  
5 from the bottom of the page the standards  
6 provide that the general depth to very slowly  
7 permeable or impermeable material that is a  
8 barrier to subsurface water movement shall be  
9 7 feet or greater?

10 A That's correct. That's what it says.

11 Q Are these standards that were developed and  
12 used in an area near and similar to the project  
13 areas which you studied?

14 A These are standards that were used on the Muddy  
15 Ridge land classification project.

16 Q Do you know where Muddy Ridge is located?

17 A Yes, I do. It's within -- it's close to the  
18 area --

19 Q Could you generally describe it for the Court,  
20 the Muddy Ridge location?

21 A I have got a map that shows Muddy Ridge and the  
22 Cottonwood and the rest of them. I think if  
23 I could get it out --

24 THE SPECIAL MASTER: Doesn't it adjoin

25 kersich-cross-white



1 one of the land classifications you have been  
2 working with, sir?

3 THE WITNESS: It's to the east of that.

4 THE SPECIAL MASTER: East of what?

5 THE WITNESS: It's out by Muddy Creek,  
6 and if I could just have thirty seconds --

7 THE SPECIAL MASTER: All right.

8 THE WITNESS: Muddy Ridge would be  
9 basically in Township 1 North, and Range 2 East.

10 Q (By Mr. White) Is it true that SK-10 represents  
11 land classification standards for both sprinkler  
12 and gravity such as your C-36?

13 A Yes, it does.

14 Q What was the basis for your changing from  
15 7 foot to barrier to 6 foot to barrier?

16 A Well, what's the basis for the 7 foot barrier,  
17 first of all?

18 Q I don't know.

19 A Let me answer your question -- our basis for the  
20 6 foot barrier was predicated on certain hydraulic  
21 conductivity, the soils we expected to find within  
22 the area and the cost of the drainage programs,  
23 the potential costs of the drainage programs,  
24 and to that we wound up setting a minimum drain

25 kersich-cross-white

1 spacing at 200 feet. Now, I don't recall on  
2 this 7 feet what hydraulic conductivities  
3 were that went into the establishment of the  
4 7 feet, nor do I recall the drain spacing,  
5 so they may have taken a different drain  
6 spacing. They may have taken a different  
7 hydraulic conductivity and utilized it in their  
8 standards.

9 Q Do you know whether or not --

10 A The point --

11 Q I'm sorry.

12 A Let me just say one thing. The point about the  
13 depth to barrier is not as important as the  
14 cost -- well, it's important, but it's not  
15 as important as the cost of the economics because  
16 what it costs you to drain that will determine  
17 whether you can irrigate those soils. If you  
18 have depth to barrier, say, 6 feet or 7 feet,  
19 you have a high hydraulic conductivity, where  
20 hydraulic conductivity is very tight. You  
21 still can't afford to put those drains in.

22 THE SPECIAL MASTER: And the cost of  
23 putting the draining facilities in was considered  
24 by you in the final decision of what is arable

25 kersich-cross-white

1 and what is not?

2 THE WITNESS: We had the three criteria,  
3 sir. It was considered in this sense: If it  
4 could meet a minimum drain spacing of 200 feet,  
5 which was the minimum spacing that we would have,  
6 we kept it in to allow the agricultural  
7 engineer to look at those soils so that when  
8 he actually designed the drains, he could make  
9 the final economic determination.

10 The soils were kept in the program, but he  
11 still had to design the drains predicated on the  
12 information we gave him and his cropping pattern  
13 and his method of irrigating because the design  
14 of drains is a function of the cropping pattern  
15 and the amount of water that gets away from you  
16 during the irrigation season and the amount of  
17 natural precipitation you have and the manner  
18 in which you apply the water, so those are  
19 beyond the scope here.

20 All we tried to do is screen the soils so  
21 that soils that were obviously too tight we would  
22 throw out.

23 Now, if the depth to barrier was less than  
24 6 feet, as a general rule, within the area, that  
25 kersich-cross-white

1 would have been one criteria. If you ran into  
2 hydraulic conductivities that were below a  
3 tenth of an inch per foot, that was another  
4 criteria, and then the final criteria was taking  
5 and checking in various places for depth to  
6 barrier, hydraulic conductivity, then going  
7 ahead and checking the drain spacing.

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1 Q (By Mr. White) (Continued) Mr. Kersich, what  
2 costs did you use for 200 foot spacing?

3 A I think we figured about \$7.00 a linear foot  
4 for drains installed. I forget what that comes  
5 out to an acre, but it starts getting pretty  
6 expensive.

7 Q How many linear feet would you have in an acre?

8 A If they're spaced at 200 feet apiece; I'd have  
9 to sit down and work that out.

10 Q All I want to know is did you use the value  
11 in basing your, developing your standards?

12 A Well, the 200 feet came, as I testified previously,  
13 that it's been the experience of the Bureau that  
14 you could not have drainage closer than 200 feet  
15 together in this area and afford it from an  
16 economical standpoint. And then what you do is  
17 you set the soils up and you review it on that  
18 basis, and then the actual drain spacing dictates  
19 the economics.

20 Q What was your source of information that the  
21 Bureau of Reclamation in the Riverton area used  
22 200 feet spacing?

23 A Well, we didn't say it was a Riverton area.

24 THE SPECIAL MASTER: Minimum.

25 kersich-cross-white

1 Q (By Mr. White) Minimum. I'm sorry, I thought  
2 you said it was in this area. You said it was  
3 in the Riverton area not this area.

4 A Let me look at that.

5 (Brief pause.)

6 A Okay. We talked to Mr. Christopherson again on  
7 12-7-78. And I might just read the whole memo  
8 in the record if you want me to, sir.

9 This is a personal phone call to Mr.  
10 Christopherson from Mr. Toedter at my direction.  
11 "The drainage purposes of the Bureau of  
12 Reclamation has been" -- "For drainage purposes  
13 the Bureau of Reclamation has been classifying  
14 lands purposed for irrigation development either  
15 as arable or non-arable and it does not down-  
16 grade on the basis of on-farm development costs.  
17 The costs are incurred instead as a portion of  
18 the overall project development costs. They are  
19 utilizing the following standards to establish  
20 minimum levels for drainage criteria" -- and this  
21 again was again in 12 of '78 -- "A minimum depth  
22 to barrier of eight feet which in some cases it  
23 was relaxed to six feet. He was hesitant to set  
24 a lower limit for permeability but indicated that

25 kersich-cross-white

1 a tenth of an inch two-tenths of an inch an  
2 hour was low. And three that a minimum drain  
3 spacing of 200 feet was as low as could be  
4 justified on the basis of project economics  
5 except in California where 100 feet is sometimes  
6 used. On those Bureau projects before doing  
7 an intensive field investigation they do enough  
8 field work to determine average hydraulic  
9 conductivities and depth to barrier. Utilizing  
10 this information in forming drainage spacing  
11 analysis, they determine whether a drainage  
12 spacing analysis, they determine whether a drain  
13 spacing graded on 200 feet is obtainable. If so,  
14 they continue the investigation. Drainage of an  
15 O and M cost basically is the same for open  
16 drainage as for canals. In the south they can  
17 justify as much as \$5,000 per mile. The Bureau  
18 has commonly used \$20.00 per mile per year as  
19 an O and M estimate for pipe drains. This figure  
20 is cheaper than that actually encountered because  
21 pipe drain usually requires little maintenance  
22 after construction."

23 Mr. Toedter had worked for Mr. Christopherson  
24 and had knowledge of his expertise.

25 kersich-cross-white

1 Q Can I take a look at that, please.

2 (Brief pause.

3 Q Thank you.

4 THE WITNESS: Could we take a short break?

5 THE SPECIAL MASTER: We'll take a five  
6 minute break.

7 (Thereupon a five minute  
8 recess was called.

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1 THE SPECIAL MASTER: Back on the  
2 record.

3 Q (By Mr. White) Okay, Mr. Kersich. Let's go  
4 to that parcel that overlaps three townships,  
5 1 North, 1 East; 2 North, 1 East; and 1 North,  
6 2 East. And I think the easiest place to start  
7 would be in Section 1 of 1 North, 1 East.

8 A Yes.

9 Q Do you find a parcel of I think it's 207 acres  
10 there classified 2 gravity, 2 sprinkler?

11 A Yes, and there's another classification on that  
12 parcel that should be made a matter of the record.

13 Q What is that?

14 A That's 6H and that's a distinguishment to the  
15 agricultural engineer that that parcel is  
16 very high and could conceivably be nonarable  
17 lands, and that was done specifically on this  
18 sheet to inform the ag engineer that while this  
19 land has the arable characteristics of 2 and 2,  
20 that was included for review, he was to be  
21 concerned about the problems of height here,  
22 and so I believe that particular classification,  
23 6H then -- yes, it shows on my particular  
24 photograph here on 1 North, 2 East, that portion  
25 kersich-cross-white

- 1 also in Section 6, and I'm not sure whether.  
2 we got it in the one -- I'm sorry -- 2 North,  
3 1 East.
- 4 Q I think you did. Take a look at Section 36  
5 in 2 North, 1 East.
- 6 A Okay, sir.
- 7 Q I notice some places you have got HK. What  
8 does the K mean?
- 9 A You've got me.
- 10 Q Don't you have an HK in Township 1 North, 1 East,  
11 Section 1?
- 12 A That could be a couple of things, height and  
13 gravel is the first thing. I would have to  
14 check that.
- 15 Q Height and gravel?
- 16 A I would have to check that. Yes, we have the  
17 6H designation there shown on a 36-acre parcel.
- 18 Q Okay. That parcel runs through three townships  
19 and has 36 acres in Section 36 and 35, Township  
20 2 North, 1 East?
- 21 A Yes, I believe so.
- 22 Q It has 207 acres in Section 1 of 1 North, 1 East?
- 23 A That's correct.
- 24 Q And how many acres in Section 6 of 1 North, 2 East?
- 25 kersich-cross-white

- 1 A I can't read it off my map, sir.
- 2 Q I couldn't either.
- 3 A It is included in there and with the 6H
- 4 also designation.
- 5 Q That's approximately 70 acres, perhaps, just
- 6 looking at the size of it?
- 7 A 50 to 70 acres I think would be a fair estimate.
- 8 Q Within the entire parcel which has roughly
- 9 300 acres, how many holes do you have?
- 10 A There is just one Bureau hole. There are some
- 11 areas there where it can be -- the barrier was
- 12 viewed. This particular parcel was discussed
- 13 with me personally. It was my concurrence
- 14 in the decision to go ahead and send it to the
- 15 agricultural engineer for preliminary review.
- 16 Q The Bureau hole was 28 inches deep; is that correct?
- 17 A That's conceivably correct, sir.
- 18 Q And that was in the far eastern portion of the
- 19 parcel?
- 20 A Yes.
- 21 Q Okay.
- 22 A In reviewing that area it's adequate that there
- 23 were sufficient soils depth to support a
- 24 classification of 2. The barrier is not within
- 25 kersich-cross-white

1 6 feet. The primary problem there is the  
2 fact of services or availability of water.

3 Q And you said you personally viewed this area?

4 A No, I discussed this with the land classifier  
5 and the engineer.

6 Q So you relied rather than on the hole, the  
7 opinion of others in reaching that conclusion?

8 A Well, it's my final opinion in this particular  
9 parcel and they report information to me.

10 We discussed it and we made the designations  
11 of 6 H R for further review.

12 Q While you have 2 North, 1 East there, why don't  
13 you keep that out and look in Sections 15 and 16  
14 for a 110-acre parcel classified 6 gravity, 2  
15 sprinkler?

16 A 2 North, 2 East --

17 Q 2 North, 1 East.

18 THE SPECIAL MASTER: While you are  
19 looking, I hate to, but let me ask, on that  
20 last parcel we just left, even though you had  
21 the 6H added to the classification, you never-  
22 theless added its totals into the totals for  
23 arability?

24 THE WITNESS: That's correct, sir.

25 kersich-cross-white



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THE SPECIAL MASTER: There's no separate category of those kind?

THE WITNESS: No, we didn't have a separate category, but the arable determination was --

THE SPECIAL MASTER: Down the road.

THE WITNESS: That's right.

THE SPECIAL MASTER: All right. I'm sorry. Now let's go to 15 and 16.

Q (By Mr. White) Do you find that 110-acre parcel?

A I'm sorry. Would you give me the section again?

THE SPECIAL MASTER: 15 and 16.

A (By The Witness) 2 North, 1 East, Sections 15 and 16. Okay. Here we go.

I find a 110-acre parcel.

Q (By Mr. White) Okay. Does it have one hole in it, 42 inches deep?

A Is that a Bureau hole you are referring to?

Q Yes, Bureau hole 10.

A That could be, sir, yes.

Q Do you want to look it up, or is 42 inches all right with you?

THE SPECIAL MASTER: You have got to trust somebody.

kersich-cross-white

1 MR. WHITE: He doesn't trust me,  
2 Your Honor,

3 THE WITNESS: All right. Before this  
4 starts again I'm going to go put the depth of  
5 every Bureau hole on here too and maybe we  
6 can speed it up.

7 I would still like to look it up.

8 THE SPECIAL MASTER: Go ahead. I  
9 wasn't trying to dissuade you. I'm searching  
10 for the truth, or verifying the truth.

11 A (By The Witness) 2 North, 1 East, there is a  
12 Bureau hole 10 in Section 15, the way my map  
13 reads here, and Bureau hole 10 --

14 Q (By Mr. White) That should be right, yes, Section  
15 15.

16 A And Bureau hole 10 is 42 inches deep, and it  
17 shows that it stopped at gravel.

18 Q How did you determine that the depth to barrier  
19 for that parcel was at least 6 feet?

20 While you are looking at that, let me  
21 include in my question the 98-acre parcel  
22 above it, which I believe has -- and you can  
23 verify -- has no hole and the 62-acre parcel  
24 below it which similarly has no hole and the

25 kersich-cross-white

1 46-acre parcel to the northeast and immediately  
2 adjacent which has no hole.

3 So the question would go to all four of  
4 those parcels, 110 with a hole and 98 and 62  
5 and 46 without a hole, and if I have misstated  
6 the situation there, please correct me.

7 A Okay. This has all been mapped as one large  
8 parcel of land that extends to the SW 1/4 of  
9 Township 2 North, 1 East. Within that large  
10 parcel of land there are numerous holes from 6  
11 feet in depth to 10 feet in depth -- let me  
12 apologize and back up a minute. I won't say  
13 numerous, but there are one, two, three, four  
14 holes that are hand augered to -- five holes  
15 that are hand augered to 72 inches depth.

16 There are other holes that are hand augered  
17 to 120 inches in depth. There's a pit that was  
18 dug about a mile to the south and east of this  
19 particular area that you are talking about,  
20 the 110-acre, the 62-acre tract -- the 62-acre  
21 tract was closer that was dug to 90 inches  
22 with the exposed root zones, things of this  
23 nature.

24 A half mile from the area that you are  
25 kersich-cross-white

1 referring to, the 110-acre tract and the 62-acre  
2 tract, there's a deep hole that was dug to 32  
3 feet, and it stopped on cobbles.

4 Q Isn't it true that those four tracts or parcels  
5 which I believe comprise 336 acres, are on  
6 the upslope and the western edge of that larger  
7 area which you described?

8 A That's true, but again the 62-acre parcel is  
9 less than -- it's about a half mile or less  
10 to the largest or the weighted mass center of  
11 that parcel and that hole that I'm referring to  
12 there is 32 feet to cobbles. We never hit any  
13 barrier 32 feet. All of these can be interrelated.

14 Q Isn't the western edge of the 98-acre parcel  
15 approximately a mile away from that hole?

16 A The western edge?

17 Q Yes.

18 A Yes, but here again, the drainage engineer was  
19 there. He drilled the holes that he needed for  
20 his study. His holes along with those of the  
21 land classifier's holes gave him a reasonable  
22 evaluation of that area.

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24 kersich-cross-white  
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1 Q (By Mr. White) Did you rely on any information  
2 other than other person's opinions in making  
3 your determination that the four parcels which  
4 I've described were arable?

5 A My opinions are based on the opinions of the  
6 work that was done within the area, the manner  
7 in which it was covered and the final decision  
8 was based on an accumulation of all the data  
9 within the area and personal discussions and  
10 observations including my own professional  
11 observations.

12 Q What professional and personal observations did  
13 you make on that 336-acre tract or those four  
14 parcels that accumulate to 336 acres?

15 A Well, as I said, we had a deep hole less than  
16 half a mile away, 32 feet deep to cobbles.

17 Q What personal observations did you make on that  
18 tract, made up of those four parcels?

19 A I reviewed all the data that was transmitted  
20 to me prior to any discussion with anyone else.

21 Q But the only hole that you had for the 336  
22 acres was 42 inches deep; is that correct?

23 A That's correct, yes. But that hole stopped in  
24 small gravel.

25 kersich-cross-white

1 Q Are there any other facts or data or opinions  
2 upon which you relied in determining that  
3 classification which you've not described?

4 A The facts and data, there are one particular  
5 land mass that's been reviewed. All the holes  
6 have been put in this. A number of the holes  
7 are extensive, they're deep, and we do have one  
8 extremely deep hole within that area. This is  
9 adequate, it meets the standard of the profession,  
10 it exceeds the number of holes that one would  
11 normally expect to find in those areas. Not every  
12 tract of land is going to have a hole in it nor  
13 is it necessary to have a hole in every tract.  
14 If you did that you wouldn't be able to ever get  
15 done.

16 THE SPECIAL MASTER: Mr. White, I totalled this --

17 MR. WHITE: Maybe I added them up wrong.

18 THE SPECIAL MASTER: I get 316. I don't  
19 know that I'm right, but I want to make a note  
20 of that in case we start reducing and adding  
21 and subtracting that closely. I get 316.

22 MR. WHITE: I had values 98, 46, 110 and 62,  
23 Your Honor.

24 THE SPECIAL MASTER: Sixty-two, 98, 110 and 46.

25 kersich-cross-white

1 MR. WHITE: If you say it's 316, I'll take  
2 your word for it.

3 THE SPECIAL MASTER: All right. That's fine;  
4 very unanimous and gracious of you.

5 Q (By Mr. White) You indicated that there were  
6 plenty of holes surrounding that particular area  
7 that, in your opinion, would be required to make  
8 a classification of arable lands; is that correct?

9 THE SPECIAL MASTER: I think he said numerous  
10 and he changed his mind. I think it's repetitious  
11 He went down to four back up to five. It's in  
12 my notes.

13 Q (By Mr. White) What was the total acreage of  
14 that area in which your four or five holes were  
15 located?

16 A I'd have to add those all up.

17 Q Can you give us an approximation?

18 (Brief pause.)

19 A About 3,000 acres, I'd guess.

20 Q What are the standards of your profession in terms  
21 of intensity of boring for an area comprising  
22 3,000 acres?

23 A As I recall they're in my report. May I refer  
24 to my report?

25 kersich-cross-white

1 Q That's C-43, A1.

2 A I've got a copy of it here.

3 (Brief pause.)

4 A Deep holes are 10 foot or more per Township,  
5 two; boring or pits per square mile, four. So  
6 roughly four of them per square mile and this is  
7 much less than half a Township, but it's -- but  
8 anyway the deep holes for Township of ten feet  
9 or more would be two.

10 Q Does the Bureau use the five foot hole limit  
11 for the depth to barrier or the depth to the  
12 barrier requirement is six feet or is that five  
13 feet per hole requirement or standard apply when  
14 the depth to barrier is shallower or at five  
15 feet?

16 A I'm not sure how they apply that particularly,  
17 but you do have the drainage investigation that  
18 goes on concurrently with the soils investigation.  
19 And here again, you're in a situation where you  
20 don't necessarily need a hole if you can find  
21 other evidence at the time. You can replace one  
22 of the holes with the other evidence, so long as  
23 you have reasonable justification for the  
24 determinations of the depth.

25 kersich-cross-white



1 Q What's meant by a semi-detailed drainage  
2 investigation as opposed to a land classification  
3 investigation?

4 A I believe -- to me, I'm not familiar with the  
5 detail of level for drainage investigation..

6 MR. WHITE: Excuse me for one minute.

7 (Brief pause.

8 Q (By Mr. White) Mr. Kersich, I direct your  
9 attention to what has been marked for identification  
10 as Plaintiff's Exhibit SK-30 and ask you if you  
11 could read the legend in the lower right-hand  
12 corner. I'd put it in front of you so you can  
13 see it a little better.

14 A Wind River Division, Wyoming, semi-detailed  
15 drainage investigation, NE 1/4 to Township 4  
16 North, Range 1 East.

17 Q Did you review that semi-detailed drainage  
18 determination or investigation done by the  
19 Bureau of Reclamation --

20 A Yes.

21 Q -- in doing your drainage work?

22 A We reviewed some of this work.

23 Q Would you please look in Section 9 of that  
24 exhibit.

25 kersich-cross-white

1 A Okay.

2 Q And see whether or not the land that's outlined  
3 in Section 9 is included within a larger 395-  
4 acre tract that you classified as arable, Class  
5 2 sprinkler, Class 1 gravity in Township 4 North,  
6 1 East.

7 A Township 4 North, 1 East.

8 THE SPECIAL MASTER: This is a new parcel,  
9 is it not?

10 MR. WHITE: Yes, sir.

11 THE SPECIAL MASTER: Not already on record.

12 MR. WHITE: Sort of went off on a tangent  
13 here, Your Honor.

14 THE SPECIAL MASTER: That's all right.

15 MR. WHITE: I was reminded by something  
16 Mr. Kersich said.

17 MR. ROGERS: Your Honor, does the State have  
18 a copy of this exhibit for the Tribes?

19 MR. WHITE: We will get you a copy, Tony.

20 MR. ECHOHAWK: What's the number on this  
21 exhibit?

22 THE SPECIAL MASTER: SK-30, 30.

23 MR. ECHOHAWK: Thirty?

24 THE WITNESS: I have a parcel that's similar  
25 kersich-cross-white

1 to that, yes.

2 Q (By Mr. White) Don't you have a larger parcel  
3 that includes not only the left parcel but also  
4 most of the right parcel that's shaded in  
5 Section 9 in SK-30?

6 A Yes.

7 Q Isn't it true that from SK-30 it appears that  
8 the depth to barrier in the left or western  
9 parcel is at four feet at D-1, five feet at D-4,  
10 four feet at D-5 and again hard shale at four  
11 feet at D-3?

12 A Are you telling me?

13 THE SPECIAL MASTER: No, he's asking you.

14 MR. WHITE: I'm asking you.

15 THE SPECIAL MASTER: He just asked you. It's  
16 easy to say yes or no or maybe or whatever you  
17 wish.

18 Q (By Mr. White) Can't you tell that from looking  
19 at the logs in the left-hand side of the exhibit?

20 A Right.

21 D-5 is seven foot five, right? Is that what --  
22 didn't you tell me that --

23 Q No, I told you four foot, so I'm glad you checked  
24 it. Do you want to circle that in green. That's

25 kersich-cross-white

1 got more than six feet; is that correct?

2 A That's correct.

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end 7

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THE SPECIAL MASTER: D-5 is not 4 feet,  
is that correct, as you were asked?

2

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THE WITNESS: That's correct, sir.

4

THE SPECIAL MASTER: And what is it?

5

THE WITNESS: It's 7 feet 5, 7 1/2,

6

sir.

7

THE SPECIAL MASTER: All right.

8

THE WITNESS: 5 feet at D-4.

9

Q (By Mr. White) Put a circle around D-4 and  
a 5 there. Will that accurately represent  
the depth to barrier?

10

11

12

A Green shale at 4 feet to 8 feet at D-3, yeah.

13

Q That would be 4 feet at D-3?

14

THE SPECIAL MASTER: 4 feet to 8 feet,

15

I thought he said.

16

Q (By Mr. White) Well, it begins at 4 feet; is  
that correct?

17

18

A Yeah.

19

Q And what was D-1?

20

A 5 feet.

21

Q Would you check the annotations I made in red  
and green on SK-30 and see whether or not --  
would you check D-1 again? Is that 4 feet or  
5 feet?

22

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kersich-cross-white

1 A D-1, it appears to be 4 feet -- 5 feet, I'm  
2 sorry.

3 Q -- see whether they correctly represent the  
4 depth to barrier as indicated by the boring  
5 holes on the left side of the exhibit?

6 A Yes.

7 Q Isn't it true that the shaded area on the  
8 right-hand side of SK-30 was classified by  
9 the Bureau as Class 6?

10 A Yes.

11 Q Isn't it true that those shaded areas are  
12 included within the larger tract that you  
13 classified as Class 2 gravity, Class 1 sprinkler?

14 A That's correct, but --

15 Q Isn't it true that --

16 MR. ECHOHAWK: Your Honor --

17 THE SPECIAL MASTER: Do you want to  
18 finish your answer?

19 A (By The Witness) But I think before we keep  
20 going here we will have to review all the Bureau  
21 work because, as I recall, part of the Bureau  
22 study was suspect and, as a matter of fact,  
23 we did have contact with the Bureau about  
24 problems like hydraulic conductivities and the  
25 kersich-cross-white

1 identifications of the drill logs because of the  
2 information that was logged, and, frankly, we  
3 used the Bureau information only to get some  
4 idea how deep they drilled their holes, but  
5 I've got information in my office -- I'll bring  
6 it at the next session -- but I suspect that  
7 there will be great differences between the  
8 Bureau work and instances and ours.

9 THE SPECIAL MASTER: I must say --  
10 excuse me -- your answer -- when you are trying  
11 a water case, in any water case, nearly all  
12 evidence is suspect. When you are trying a  
13 water case of this magnitude and this precedence  
14 in the Western United States, it's obvious that  
15 everybody's evidence is suspect, so you must  
16 appreciate why these questions have to be asked  
17 because --

18 THE WITNESS: I don't have any problem  
19 with the questions. I think they are fair and  
20 correct questions, but I also point out that  
21 that is one of the reasons we went and spent  
22 so much time and money on our own, rather than  
23 using somebody else's results.

24 THE SPECIAL MASTER: The Court realizes  
25 kersich-cross-white

1 that, and I realize that's why we have experts and  
2 we have experts and we have lawyers and lawyers.

3 Q (By Mr. White) How much money did you spend on  
4 your drainage investigation?

5 A On the entire program that HKM did we have spent  
6 well over a million dollars, and the portion  
7 to drainage and the soils, I can't break that  
8 out, but that would be the greatest portion.

9 You know, it would be the largest portion of the  
10 total 1.2 or 3 million.

11 Q Of the 1.2 or 3 million, are you able to give an  
12 approximate proportion that should be allocated  
13 to the land classification and drainage studies?

14 A Not at this time, but I could --

15 Q Okay. You'll be able to do that?

16 A It will be the substantial portion. It's --

17 THE SPECIAL MASTER: What does that  
18 have to do with the lawsuit? We must be getting  
19 tired when a roomfull of lawyers won't object  
20 to that.

21 MR. WHITE: Well, it's a proper question.

22 MR. ECHOHAWK: If Mr. White thinks it's  
23 important --

24 THE WITNESS: Could we have a five-  
25 kersich-cross-white



1 minute break?

2 THE SPECIAL MASTER: Go ahead.

3 We have to take a five-minute break.

4 (Thereupon a 5 minute  
5 (recess was taken.)

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1 THE SPECIAL MASTER: Before we resume,  
2 ladies and gentlemen, I want to ask the witness  
3 when you have testified earlier about the auger  
4 or hole went to so many inches and then hit  
5 gravel, what is the engineering significance of  
6 that statement?

7 THE WITNESS: Okay, sir. Within any layer  
8 of soils you're liable to find some -- find some  
9 small stone in the hole. The auger, the auger  
10 that we're dealing with is about three inches  
11 in diameter. The mouth is closed down for a  
12 double blade effect so you can dig into the  
13 material. If you hit a little rock and it can  
14 maybe be two inches long and one inch across  
15 and it gets right in the blade, you can't go down  
16 any further.

17 THE SPECIAL MASTER: Is gravel therefore  
18 synonymous with small cobble?

19 THE WITNESS: Gravel is defined in this  
20 business as from about -- it's up to about three  
21 inches in size, down to what we call sand fraction,  
22 and I'd have to look that up right now, but the  
23 point is it's rock that does not exceed three  
24 inches.

25 kersich-crosswhite

1 THE SPECIAL MASTER: Does it make it,  
2 constitute a barrier?

3 THE WITNESS: No, sir. This isn't gravel,  
4 clean gravel like in a gravel pit or gravel  
5 operation that we used for sand and gravel, but  
6 these are isolated rocks with a good matrix  
7 between them.

8 THE SPECIAL MASTER: Okay, thank you very  
9 much.

10 Mr. White:

11 THE WITNESS: Mr. White, may I bring some-  
12 thing to your attention about this parcel?

13 Q (By Mr. White) Sure.

14 A There are two holes by H.K.M. very close to where  
15 the Bureau had them. One is the hole that you  
16 have five foot on there. I can't read the  
17 designation on that from here, sir.

18 Q D-4?

19 A Yes. That hole says that he hit shale.

20 Q Says hard sandy shale, doesn't it?

21 A Yeah, at five feet. Well, almost right next  
22 to that hole we hand augered a hole down to 64  
23 inches and we had a land classifier say he was  
24 stopped by gravel, and you can sure tell the

25 kersich-cross-white

1 difference between gravel and shale when you  
2 hand auger.

3 Q That was about 1,000 feet away, wasn't it?

4 A Well, not according to the map you're showing  
5 me up there. See, here's Log 14.

6 Q Isn't Log -- the hole 14 right on the edge of  
7 the six?

8 A Well, I thought the log, your log, drill log  
9 and this log were almost in the same position.  
10 Well, let's measure it.

11 That's not a big difference.

12 Q What's the scale of the photograph off of which  
13 you were measuring? That's one to four inches,  
14 isn't it?

15 A That's fine -- No, that's quad-size scale.

16 Q What is the scale?

17 A Wait a minute, you could be right.

18 MR. ROGERS: The record should reflect what  
19 is quad-size scale.

20 THE WITNESS: One to 24,000.

21 THE SPECIAL MASTER: It isn't necessary  
22 because he said it wasn't quad-size.

23 MR. ROGERS: The document he's referring to,  
24 it should be clear in the record.

25 kersich-cross-white



1 Q (By Mr. White) You're referring to your work-  
2 book photographs?

3 A That's correct.

4 Q What is your scale, how many inches to the mile  
5 in your workbook photograph?

6 A 2.6 inches to the mile.

7 Q Isn't it almost six inches to the mile here?

8 A Six inches, it could be -- no, five inches to  
9 the mile.

10 Q Five inches to the mile.

11 A There could be a difference there, I'll grant  
12 you that.

13 Q So it wasn't in the same place?

14 A Right, but one of the problems that came up when  
15 we found that we could hand auger things like  
16 that, we did then talk to the Bureau of  
17 Reclamation on 11/30 of '78 about their study,  
18 and if I could I'd like to read that memo.

19 Q Wait a minute. Does the memo have to do with  
20 these particular drainage borings?

21 A It has to do with the entire North Crowheart  
22 study.

23 MR. ECHOHAWK; I think it's relevant.

24 THE WITNESS: And it certainly covers this

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area.

THE SPECIAL MASTER: Let the record show  
laughter.

Go ahead and read it.

MR. WHITE: Your Honor, I'd like to say  
again for the record this is appropriate for  
redirect, but seems to be the practice to let  
him talk on and on.

THE SPECIAL MASTER: I appreciate that.

MR. ECHOHAWK: Your Honor, he's just merely  
explaining.

THE WITNESS: Right. This is 11/30/78.  
Bureau of Reclamation was called, Ardent Matheson  
was called. "After completing most of the  
field work for drainage investigation of the  
North Crowheart area, in comparing the results  
with those obtained by USBR in their investigation  
in 1963, the hydraulic conductivity that we  
obtained were considerably higher, nearly a factor  
of ten than those obtained by the Bureau. Ardent  
stated that this difference was probably due to  
the type of casing utilized, letting the barrels  
run dry" -- this is during off-shift hours --

"And human error in texturing, since no lab was  
kersich-cross-white

1 available to run mechanical analysis at Riverton.  
2 The casing probably had the greatest effect  
3 because the irrigation pipe utilized had very  
4 small diameter holes placed in it and nearly  
5 sealed during the testing. He also stated that  
6 several field technicians who were logging  
7 profiles were relieved of their duties and moved  
8 into other Bureau work. They were relieved  
9 because they had not been given adequate training  
10 to log during previous assignments. This happened  
11 after several drainage engineers were assigned  
12 to the job and found the work did not conform to  
13 Bureau standards."

14 Q (By Mr. White) How hard is it to identify hard  
15 sandstone? Is that difficult to identify, does  
16 that take any texturing analysis?

17 A Well, my friend, sometimes when you're drilling  
18 a hole and you get into a limestone, you can  
19 pull out of it and say it's in the sandstone.  
20 You'd be surprised how difficult sometimes it is  
21 to identify the various textures. It takes  
22 experience, it takes constant cross checking, and  
23 that's the reason that all the places that we  
24 ran hydraulic conductivity tests we had the

25 kersich-cross-white

1 gentleman texture the soils in the field but  
2 he had to take a sample and that sample was  
3 taken to the lab and it was cross checked by a  
4 complete mechanical analysis so we could  
5 determine whether or not he had assigned the  
6 proper MA to it or texture to it.

7 Q Have you formed a professional opinion then that  
8 the information contained on drainage borings  
9 1, 4, and 3 on SK-30 are inaccurate?

10 A That's what the Bureau had, I'm not going to  
11 report on it. We went and did our own work  
12 independently of it, and that's our decision.

13 Q Is it correct that you drilled a hole close to  
14 the figure 68 in Section 9 on SK-30, the hole  
15 you were just telling me about, Log 14?

16 A Well, it's about a quarter of a mile in.

17 Q Is that correct?

18 A Yes, that is close to it.

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end 9

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- 1 Q (By Mr. White) And that hole was less than 60?
- 2 A That hole went 54 inches and was stopped by
- 3 gravel, and it was in loamy sand.
- 4 Q Mr. Kersich, have you ever discovered thin
- 5 smears of gravel over the area when the backhoe
- 6 pit was dug?
- 7 A Certainly.
- 8 Q On the Wind River Reservation; isn't that correct?
- 9 A I'm sure that that's come up, yes, in our investigations.
- 10 Q Isn't it true that within the 395-acre parcel
- 11 which you classified as Class 2 gravity and Class
- 12 1 sprinkler, the Bureau classified only 68 acres
- 13 as Class 3 gravity?
- 14 A Well, our 395 acres takes a much larger area.
- 15 Q That's right. It's area that's in white on
- 16 this map for Class 6; isn't that correct?
- 17 A Yes, but we do have a deep hole in that of 21
- 18 feet.
- 19 Q Well, I understand, but the deep hole is within
- 20 this white area, the 68 acres that they classified
- 21 as arable, isn't it?
- 22 A Yes.
- 23 Q Mr. Kersich, let's go back to going through the
- 24 parcels for which you had a hole but it was
- 25 kersich-cross-white

1 less than 6 feet deep.

2 MR. ROGERS: Your Honor --

3 THE SPECIAL MASTER: All right. I  
4 would -- a little self-serving statement now  
5 and then is in order. That's pretty obvious,  
6 Mr. White. Some may be more; some may be less.

7 MR. ROGERS: At this time, and with  
8 that comment, the Tribes would move to cut off  
9 any further cross-examination of Mr. Kersich  
10 on this area.

11 I haven't kept a running track of the  
12 totals of the number of examples we've gone  
13 through on these holes, but I believe it has  
14 been sufficiently established at this point  
15 for the purpose that Mr. White needs to for  
16 cross-examination in the same manner that they  
17 were speaking about the land classification holes  
18 in previous days, and I would move on behalf of  
19 the Tribes at this time that we terminate cross-  
20 examination on this aspect of Mr. White's inquiry.

21 THE SPECIAL MASTER: Yes, in the  
22 previous days of this hearing we had about twenty  
23 so-called parcels where there were no probes within  
24 the exterior boundaries thereof, and then we had  
25 kersich-cross-white

1 cut off additional examples on the basis that  
2 they were superfluous or redundant, and my  
3 notes show we are up to about eighteen of  
4 these right now, Mr. White, on this example of  
5 parcels where there are probe holes more or less  
6 than 6 feet, and so I think I'll grant the  
7 motion and allow an offer of proof at this time  
8 as we did with the prior instances.

9 MR. ROGERS; Thank you, Your Honor.

10 MR. WHITE: Okay.

11 THE SPECIAL MASTER: I'm almost about  
12 to conclude that this will be an agreement of  
13 all concerned. I don't suppose I would have  
14 all of you come on record and say it is.

15 MR. WHITE: I would like to keep going  
16 on over a hundred holes.

17 THE SPECIAL MASTER: I know you would,  
18 but, Mr. White, I'm going to stay with my  
19 conclusion. I think it's reasonable -- what I'm  
20 doing is reasonable and proper and certainly not  
21 reversible error if it is error in my procedures.

22 MS. SLEATER: Your Honor, if I could  
23 suggest, if Mr. White's offer of proof is  
24 going to take the same form as his previous

25 kersich-cross-white

1 offer of proof, perhaps it would be most  
2 efficient for him to submit it in writing with  
3 the tabulation.

4 THE SPECIAL MASTER: I don't care.

5 Do you want to?

6 MR. WHITE: I want to get it out of  
7 the way.

8 THE SPECIAL MASTER: You mean you  
9 want to get it out of the way. Shoot.

10 I didn't mean that. Go ahead.

11 MR. WHITE: Your Honor, the State of  
12 Wyoming would make the following offer of proof:  
13 That if asked, Mr. Kersich would state with  
14 respect to the following parcels of land, about  
15 which he has not yet been questioned on cross-  
16 examination, that within the exterior boundaries  
17 of those parcels there are no logged holes 6  
18 feet or greater in depth and that he relied on  
19 the opinion of others in making his formulates  
20 that those parcels were arable.

21 The first parcel, Your Honor, is in the  
22 South Crowheart area, Township 1 South, 3 East.  
23 Section 11 contains approximately 60 acres. It  
24 is classified as Class 3 gravity, Class 1 sprinkler.

25 kersich-cross-white



1 A maximum depth of a boring in that parcel is  
2 54 inches;

3 The same township, Section 8, a 48-acre  
4 parcel which the entire parcel is classified  
5 3 sprinkler and 37 acres of which were classified --  
6 excuse me -- the entire parcel is classified 3  
7 gravity, 37 acres were classified 2 sprinkler,  
8 in which there were two holes, one to 28 inches,  
9 the other, 36 inches;

10 Section 7 in the same township ---

11 THE SPECIAL MASTER: Do you know if  
12 those holes went to gravel or went --

13 MR. WHITE: Went to cobble, Your Honor,  
14 greater than 3-inch rock.

15 THE SPECIAL MASTER: In that particular  
16 case?

17 MR. WHITE: Yes.

18 MR. ECHOHAWK: Your Honor, once again,  
19 I remind you that the information given by Mr.  
20 White is not evidence, and this merely what he  
21 intends --

22 THE SPECIAL MASTER: I understand  
23 that, and this is not in proof.

24 MR. WHITE: The next would be a 60-acre  
25 kersich-cross-white

1 parcel in Section 7, the same township which is  
2 classified 3 gravity, 2 sprinkler, one hole,  
3 56 inches;

4 The next parcel would be a 75-acre parcel  
5 in Section 5, classified 3 gravity, 1 sprinkler,  
6 one hole at 34 inches;

7 The next parcel in the same township is  
8 32 acres in Section 5, classified 3 gravity, 6  
9 sprinkler, one hole at 60 inches; and moving to  
10 Township 1 North, 3 East, Section 19 is a 15-acre  
11 tract containing -- all of it is classified  
12 6 gravity, 3 sprinkler;

13 Township 1 North, 2 East, a 44-acre tract,  
14 Section 5, classified 3 gravity, 2 sprinkler,  
15 with one hole 60 inches;

16 Township --

17 THE SPECIAL MASTER: 60 inches?

18 MR. WHITE: Yes, sir.

19 THE SPECIAL MASTER: All right.

20 MR. WHITE: Township 1 North, 1 East,  
21 Section 1 contains -- I'm sorry, Your Honor.  
22 I already covered that one on cross.

23 Township 2 North, 1 East, 30-acre parcel,  
24 Sections 25 and 35, classified 2 gravity, 2

25 kersich-cross-white

1 sprinkler, one hole less than 6 feet;

2 Same township, Sections 15 and 16, a  
3 110-acre parcel with one hole, 42 inches,  
4 classified as 6 gravity, 2 sprinkler;

5 Still in the same township, 2 North, 1 East,  
6 Section 15, 63-acre tract, classified 6 gravity,  
7 4 sprinkler, with one hole at 30 inches;

8 Same township, Section 14, a 12-acre parcel,  
9 classified 3 gravity, 3 sprinkler, one hole 30  
10 inches;

11 Same township, Sections 22 and 23, an 86-acre  
12 tract classified 3 gravity, 2 sprinkler, one hole,  
13 32 inches --

14 THE SPECIAL MASTER: How many acres in  
15 that one?

16 MR. WHITE: 86, Your Honor.

17 THE SPECIAL MASTER: Thank you.

18 MR. WHITE: Still in 2 North, 1 East,  
19 Section 26, parcel of 39 acres, classified 2  
20 gravity, 2 sprinkler, one hole at 60 inches;

21 A parcel, same township, in Sections 23  
22 and 26, being made up of 28 acres in 23 and  
23 118 acres in 26, classified 2 gravity, 1 sprinkler,  
24 of which there were three holes, each of 60 inches;

25 kersich-cross-white

1 And what I have read so far would be for  
2 the South Crowheart area.

3 Big Horn Flats area, Your Honor, Township  
4 2 North, 1 East, Section 18, a parcel of land  
5 63 acres, which is all classified 3 gravity and  
6 2 sprinkler, Section 12 is contiguous to that  
7 with 150-acre parcel --

8 THE SPECIAL MASTER: How deep in  
9 Section 18 on the hole, or none?

10 MR. WHITE: It's 60 inches or less,  
11 Your Honor. It's a Bureau of Reclamation hole,  
12 and I can't tell you the number.

13 THE SPECIAL MASTER: All right.

14 MR. WHITE: In Section 12 immediately  
15 in the same area, a 150-acre parcel classified  
16 3 gravity, 2 sprinkler, Section 29, a 147-acre  
17 parcel, classified 6 gravity, 2 sprinkler, and  
18 all of these just have Bureau of Reclamation  
19 holes unless I mention otherwise, and they are  
20 60 inches or less;

21 Township 2 North, 3 West, Section 33,  
22 NW 1/4 contains 47 acres classified 2 gravity,  
23 2 sprinkler;

24  
25 kersich-cross-white



1 MR. WHITE: (Continued) Township 2 North,  
2 2 West, Section 9, 82 acres classified 3 gravity,  
3 3 sprinkler;

4 Same Township, Section 21, 96 acres of  
5 which the entire parcel is classified 2 sprinkler,  
6 and 85 -- excuse me, 2 gravity, and 85 acres are  
7 classified as 1 sprinkler.

8 Township 2 North, 3 West, 139-acre parcel  
9 in Section 14, classified 2 gravity, 1 sprinkler;

10 2 North, 3 West, again, Section 17, 160-acre  
11 parcel, classified 3 gravity, 2 sprinkler.

12 In Section 2 of Township 2 North, 1 West,  
13 260-acre parcel --

14 THE SPECIAL MASTER: Two hundred and sixty-six  
15 acres?

16 MR. WHITE: Yes, sir. Classified 2 gravity,  
17 2 sprinkler, and it has one hole on it of 36  
18 inches. That's the H.K.M. folder.

19 Turning to the Arapahoe area, Your Honor,  
20 Township 1 South, 3 East, Section 28 contains  
21 128-acre parcel classified 3 gravity, 2 sprinkler  
22 with two Bureau of Reclamation holes of 36 inches  
23 in depth, one H.K.M. hole, 48 inches in depth.

24 Same Township, 1 South, 3 East, Section 28,

25 kersich-cross-white

1 67-acre parcel, classified 2 gravity, 1 sprinkler,  
2 with one H.K.M. hole of 18 inches.

3 THE SPECIAL MASTER: What section is that  
4 in, please, Sandy?

5 MR. WHITE: Section 28, Your Honor, NE of  
6 the SE.

7 Section or Township 1 South, 3 East,  
8 Section 29, 49-acre parcel classified 3 gravity,  
9 2 sprinkler, one H.K.M. hole, 60 inches;

10 Section 33, same Township, 4-acre parcel  
11 2 gravity, 1 sprinkler one 36 inch hole;

12 Sections 31 and 32, a 33-acre parcel  
13 classified 2 gravity, 1 sprinkler, and one hole  
14 five feet deep;

15 Section -- Township 2 South, 3 East,  
16 Section 6, 30-acre parcel, classified 6 gravity,  
17 2 sprinkler.

18 THE SPECIAL MASTER: Twonship 2, 3 East?

19 MR. WHITE: Yes, sir.

20 THE SPECIAL MASTER: What was before that?

21 MR. WHITE: 1 South, 3 East, Your Honor.

22 Then we went to 2 South, 3 East, Section 6.

23 In Sections -- Township 2 South, 3 East, 38 acres,  
24 classified 6 gravity, 2 sprinkler, one hole at

25 kersich-cross-white

1 five feet.

2 Township 1 South, 3 East -- I got it out  
3 of order, I'm sorry, Your Honor.-- 54 acres  
4 located in Sections -- in Section 32, classified  
5 3 gravity, 1 sprinkler, one hole five feet.

6 Same Township, Sections 19 and 20, a parcel  
7 of 26 acres, classified 2 gravity, 6 sprinkler,  
8 one hole five feet;

9 The same Township, Section 15, parcel of  
10 56 acres, classified 2 gravity, 1 sprinkler,  
11 three holes, two of which are three feet deep,  
12 one of which is five feet deep;

13 Section 20, same Township, 158-acre parcel,  
14 classified 6 gravity, 3 sprinkler, one hole  
15 that's five feet six inches.

16 Township, same Township, Section 3, 19 acres  
17 classified 3 gravity, 3 sprinkler, one hole five  
18 feet;

19 Section 22, 24 acres, same classification,  
20 one hole five feet.

21 Again, Section 22, 47 acres, classification  
22 3 gravity, 1 sprinkler, one hole five feet;

23 Section 21, same Township, 16 acres,  
24 classified 2 gravity, 1 sprinkler, one hole five  
25 kersich-cross-white

1 feet. That does the Arapahoe, Your Honor.  
2 Riverton East. Township 1 North, 5 East,  
3 Sections 17 and 18, 226 acres, classified 2  
4 gravity. That's a smaller parcel of a 233-acre  
5 parcel, classified 2 sprinkler.

6 1 South, 4 East --

7 THE SPECIAL MASTER: Any probes, any holes?

8 MR. WHITE: I'm sorry, there's one at 36  
9 inches, one at 48 inches, three feet, four feet.

10 Township 1 South, 4 East, Section 1, 111-acre  
11 parcel, classified 3 gravity, 2 sprinkler, one  
12 48 inch hole, and there are -- well, those are  
13 outside.

14 2 North, 5 East, Section 26, 25, 263-acre  
15 parcel with a five foot deep hole.

16 One in South 4 East, Section 13, 69-acre  
17 parcel -- I'm sorry, strike that. Your Honor,  
18 we already did it.

19 There are none in Owl Creek.

20 We come to North Crowheart, which is a big  
21 one. These all will have 60 inch holes, five  
22 foot holes unless I indicate differently, Your  
23 Honor.

24 Township 3 North, 1 West, Sections 10 and 11,

25 kersich-cross-white



1 105 acres, gravity 3, sprinkler 6;

2 Sections 2 and 11, 154 acres, gravity 3,

3 sprinkler 3;

4 Section 12, 56 acres, gravity 2, sprinkler 1;

5 Section 1, 250 acres of which all of it's

6 classified 3 gravity, and 241 acres classified

7 1 sprinkler.

8 Either 43 or 41 acres, I couldn't tell on

9 the map, in Section 16, classified 3 gravity,

10 1 sprinkler, and the hole there is 40 inches

11 deep;

12 Section 18 and 17, 192 acres, which all of

13 it's classified 2 gravity, 173 acres classified

14 2 sprinkler, 32 inch deep hole;

15 Section 8 and 17 again, 121-acre parcel,

16 all of which is classified 3 gravity, 3 sprinkler,

17 and there the hole is 70 inches deep.

18 3 North, 2 West, Section 14, 159 acres,

19 Class 2 for both sprinkler and gravity, 21 inch

20 deep hole;

21 Sections 14 and 15, 145-acre parcel,

22 classification 3 and 2 respectfully -- respectively,

23 28 inch hole;

24 Section 6, 158-acre parcel, classified 2 and 2,

25 kersich-cross-white

1 21 inch hole;

2 Section 9, 212 inch -- 212-acre parcel,

3 classified 1 and 1, a 36 inch hole.

4 Township 3 North, 1 West, 75-acre tract

5 in Section 1, classified 3 and 2; In Sections

6 5 and 8, 308-acre tract which is classified

7 2 gravity, 253 acres classified 1 sprinkler.

8 There's a 38 inch hole.

9 4 North, 1 West, Section 14, 4 North,

10 1 West, Section 14, 68 six, 66-acre parcel,

11 classified 3 gravity, 1 sprinkler.

12 In the same Township, Sections 13, 14, 23,

13 24 contain 169-acre parcel, classified 3 gravity,

14 1 sprinkler;

15 Sections 18 and 19 contain a 209-acre

16 parcel, classified 2 gravity, 2 sprinkler, and

17 the 2 sprinkler classification is on 175 acres.

18 4 North, 1 West, Section 15 contains a

19 parcel, 77 acres, classified 3 gravity, 2

20 sprinkler for 64 acres.

21 4 North, 2 West, Sections 29, 32 and 33

22 contain 102-acre tract, classified 2 --

23 THE SPECIAL MASTER: 102-acre tract?

24 MR. WHITE: Yes, sir, one zero two.

25 kersich-cross-white

1 Classified 2 gravity, and 2 sprinkler for 79.  
 2 acres, which there is one 60 inch hole and  
 3 one 40 inch hole.

4 MR. WHITE: (Continued) Sections 28 and  
 5 33, a 66-acre tract, classified 6 gravity, 3  
 6 sprinkler, in which there's one 16 inch hole;

7 Sections 33 and 34 contain a parcel of  
 8 143 acres, classified 3 gravity, 3 sprinkler;

9 Section 28, an 18-acre parcel, classified  
 10 3 gravity, 2 sprinkler with a 20 inch hole;

11 Sections 35 and 36 contain a 295-acre parcel,  
 12 classified 2 gravity, 2 sprinkler, 40 inch hole.

13 Township 4 North, 2 West, Section 17 contains  
 14 113-acre parcel, classified 2 gravity, of which  
 15 98 acres classified 2 sprinkler with a 24 inch  
 16 hole.

17 4 North, 3 West, Sections 16, 21, 22, 116-acre  
 18 parcel, classified 3 gravity, 2 sprinkler.

19 Township 4 North, 1 East, Sections 11 and 14,  
 20 208-acre parcel, classified 3 gravity --

21 THE SPECIAL MASTER: How many size parcel?

22 MR. WHITE: Two hundred and eight.

23 Classified 3 gravity, 2 sprinkler, one 19 inch  
 24 hole;

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1 Sections 14 and 15, 118-acre parcel,  
2 classified 2 gravity, 1 sprinkler;

3 Sections 23 and 24, 124-acre parcel,  
4 classified 3 gravity, 3 sprinkler. There the  
5 hole is 64 inches rather than 60. When it's  
6 60, I'm not saying anything, Your Honor.

7 Sections 35 and 36, 153-acre parcel,  
8 classified 3 gravity, 1 sprinkler.

9 In Sections 27 and 34, 138-acre parcel,  
10 classified 3 gravity, 6 sprinkler;

11 Section 18 and 17, 321-acre parcel,  
12 classified 2 gravity, 1 sprinkler for 296  
13 acres with one 60 inch hole and one 32 inch  
14 hole, Your Honor.

15 Sections 18 and 17, 255 acres, classified  
16 2 and 2.

17 THE SPECIAL MASTER: In addition to the  
18 321 in the same section?

19 MR. WHITE: Yes, sir.

20 THE SPECIAL MASTER: All right. Two hundred --

21 MR. WHITE: I'm sorry, the 321 should be  
22 18 and 17.

23 THE SPECIAL MASTER: Yes.

24 MR. WHITE: And 255 should be 8 and 17.

25 kersich-cross-white



1 MR. WHITE: (Continuing) Section 24,  
2 a 96-acre tract, classified 1 gravity and 1  
3 sprinkler, which is one 52-inch hole.

4 THE SPECIAL MASTER: That was a 96-acre --

5 MR. WHITE: Yes, sir.

6 Section 24 contains another 93-acre parcel  
7 classified 1 and 1 with a 70-inch hole;

8 Township 5 North --

9 THE SPECIAL MASTER: A 70-inch hole?

10 MR. WHITE: Seven zero, Your Honor.

11 Township 5 North, 1 East, Sections 14 and  
12 24, a 112-acre tract classified 2 gravity,  
13 of which 106 are classified 1 sprinkler with  
14 a 66-inch hole;

15 24 and 23 -- or Sections 24 and 23, a  
16 227-acre parcel classified 2 gravity, 1 sprinkler,  
17 with one 52-inch hole;

18 Sections 23 and 26 contain a 368-acre  
19 parcel classified 2 gravity, 1 sprinkler, with  
20 one 60-inch hole and one 46-inch hole;

21 Section 25 contains a 127-acre parcel  
22 classified 2 gravity, 1 sprinkler;

23 Section 35 contains a 74-acre parcel  
24 classified 3 gravity, 6 sprinkler, with a 52-inch

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hole;

Section 36, a 138-acre parcel classified  
2 gravity, 1 sprinkler, with a 44-inch hole;

Township 5 North, 2 East, contains in  
Section 19 a 43-acre parcel classified 2 gravity,  
1 sprinkler, with one 48-inch hole;

Section 19 also contains a 98-acre parcel  
classified 3 gravity, 2 sprinkler, with 66-inch  
hole;

Section 20 contains a 242-acre parcel  
classified 2 gravity, 2 sprinkler, with one  
28-inch hole and one 48-inch hole;

Sections 29 and 30 contain a 106-acre  
parcel classified 2 gravity, 1 sprinkler --  
excuse me, Your Honor, that last parcel goes  
into Sections 31 and 23 as well -- in Section  
31 is an 87-acre parcel classified --

THE SPECIAL MASTER: 87-acre parcel?

MR. WHITE: 87, Your Honor, classified  
1 gravity, 1 sprinkler, and it has one 54-inch  
hole;

In Sections 10 and 15 there is a 329-acre  
parcel classified 2 gravity, 1 sprinkler, with  
two holes, one is 34 inches and the other is

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35 inches;

In Sections 22 and 23 there is a 123-acre parcel classified 2 gravity, of which 118 acres are classified 2 sprinkler, which has one 56-inch hole and one 18-inch hole;

Sections 23 and 26, a 138-acre parcel classified 2 gravity, of which 121 acres are classified 2 sprinkler, it has one 24-inch hole;

Sections 27 and 28 containing a 242-acre parcel classified as 1 gravity, 1 sprinkler, and the one sprinkler applies to only 210 acres, and there is one 48-inch hole;

Sections 31 and 32 contain a 225-acre tract classified 2 gravity, 1 sprinkler;

Township 5 North, 3 East, Section 7 contains a 69-acre tract classified 3 and 3 with one 24-inch hole;

Section 17 contains a 100-acre parcel classified 2 and 2 with one 36-inch hole. It also contains a 111-acre parcel classified 3 gravity, of which 88 acres are classified 3 sprinkler with one 48-inch hole;

And Sections 21, 20 and 28 contain a 251-acre parcel classified 3 gravity, of which  
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1 237 acres are classified 3 sprinkler with one  
2 28-inch hole.

3 The parcels described in the offer of proof  
4 along with those described by Mr. Kersich in his  
5 cross-examination indicate that there are 14,090  
6 acres of land classified as arable for gravity and  
7 14,177 acres of land classified as arable for  
8 sprinkler, with an overlap between the two,  
9 Your Honor, found on lands which have no logged  
10 hole as deep as 6 inches which is the standard  
11 for --

12 THE SPECIAL MASTER: 6 feet.

13 MR. WHITE: I'm sorry. 6 feet, which  
14 is the standard for barrier.

15 That concludes the offer of proof, Your  
16 Honor.

17 THE SPECIAL MASTER: All right. Thank  
18 you, Mr. White.

19 MR. ECHOHAWK: Your Honor?

20 THE SPECIAL MASTER: Yes.

21 MR. ECHOHAWK: Once again, I can't help  
22 but notice that you recorded all the information  
23 contained within Mr. White's offer of proof in  
24 the same notes that you have recorded the other

25 kersich-cross-white



1 information that's been testified about today,  
2 and once again I remind the Court this information  
3 is not evidence and cannot be considered by the  
4 Court.

5 THE SPECIAL MASTER: I appreciate that,  
6 MR. WHITE; Your Honor, I probably will --  
7 I should state to the Court that I probably will  
8 in my case in chief with respect to those offer  
9 of proof matters ask our own experts whether or  
10 not the material stated in the offer of proof  
11 is true, so it probably will eventually come in,  
12 but Mr. Echohawk is right, right now it is not,

13 THE SPECIAL MASTER: It's in a nebulous  
14 category. Mr. Echohawk is technically correct  
15 that it is not in evidence right now, but I  
16 think we can all appreciate that there's a  
17 close line between the first twenty examples  
18 in both species that I did permit and the balance  
19 that I didn't. They were not excluded because of  
20 irrelevancy or immateriality. They were excluded  
21 because of a hope that we can avoid redundancy  
22 and repetition and bringing in all things  
23 including this --

24 MR. ECHOHAWK: My point is they were  
25 kersich-cross-white

1 excluded.

2 THE SPECIAL MASTER: Your point is  
3 well taken.

4 Mr. Rogers?

5 MR. ROGERS: Well, to underscore,  
6 Your Honor, the purpose of Rule 103 for an  
7 offer of proof is to provide the Court and the  
8 record with the substance of what the evidence  
9 would have been had it been presented in order  
10 to protect Mr. White's record on appeal, and  
11 it's not really a close question as to those  
12 are facts or not. They are not facts.

13 THE SPECIAL MASTER: That is true.  
14 I want you to know that the reason I have  
15 taken particular minute attention to each detail  
16 is that I want to make sure that there is nothing  
17 in there that I have not improperly excluded,  
18 not because I'm taking it under advisement.  
19 Okay.

20 MR. WHITE: Your Honor, could I ask  
21 three quick questions?

22 THE SPECIAL MASTER: Yes, sir.

23 Q (By Mr. White) Mr. Kersich, may we see the logged  
24 hole information that you did on February 6, 1981?

25 kersich-cross-white

1 A Yes.

2 Q You testified --

3 A Yes, I think --

4 Q If we can get it over --

5 A Well, it's up to counsel, of course.

6 MR. WHITE: It's up to the Judge.

7 MR. ECHOHAWK: We will give it to him.

8 THE SPECIAL MASTER: I assume there is  
9 no objection to that. He testified to that work  
10 done in the field.

11 Q (By Mr. White) Did you consider any other holes  
12 or borings other than those depicted on the maps  
13 in your workbook?

14 A Yes, I had some additional information that I  
15 got in February and other places.

16 Q What is that additional information that's not  
17 in your workbook?

18 A Those are some logs of holes that were put down  
19 at that time.

20 Q Do you know what type of a drill bit was used  
21 when the HKM holes were dug?

22 A No, I don't. I can't recall that.

23 MR. WHITE: Since the maps which we  
24 have and the maps which you referred to in your  
25 kersich-cross-white

1 workbook are different, I would like to ask  
2 the Court for an opportunity to make copies at  
3 State expense of the photographs which are in  
4 the workbook and return them to Mr. Kersich or  
5 his counsel by late this afternoon or early  
6 Monday morning.

7 THE SPECIAL MASTER: I'm not sure they  
8 have to be returned that soon, frankly, but I  
9 see no objection -- do I hear any objection?

10 MR. ECHOHAWK: No objection.

11 THE SPECIAL MASTER: So ordered.

12 MR. WHITE: Okay, Your Honor. This  
13 would probably be a good place to break the  
14 cross-examination of Mr. Kersich.

15 THE SPECIAL MASTER: Do we all under-  
16 stand that the next proceeding will be on the  
17 morning of March the 9th at 9:15? We don't  
18 know where yet, but we hope it will be in a  
19 little larger room from this and a little more  
20 comfortable. We are scheduled for --

21 MR. WHITE: We have discovered that  
22 the Chief Justice of the Supreme Court has no  
23 objection to our case being held over in their  
24 courtroom.

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1 THE SPECIAL MASTER: The whole week?

2 MR. WHITE: It's open the whole week  
3 of March 9. I can give the Master the settings  
4 that they have now.

5 THE SPECIAL MASTER: Why don't you  
6 give them to Leo, Mr. Salazar, and that will  
7 be worked out, and if necessary, we will be  
8 publishing or distributing notice, but if no  
9 change occurs, then we can state that as of now,  
10 that will be 9:15 at the Wyoming Supreme Court  
11 courtroom hearing room.

12 MR. WHITE: I should say, Your Honor,  
13 he's going to check with the other justices,  
14 but no one anticipates a problem, and if I could  
15 ask Leo to give the clerk of the Supreme Court  
16 a list of our setting dates --

17 THE SPECIAL MASTER: Is this Judge Rose  
18 that's been cooperating with you?

19 MR. WHITE: It was made by the Attorney  
20 General, not me, Your Honor, those arrangements.

21 THE SPECIAL MASTER: Thank you very much,  
22 all of you, and I hope we can make some progress  
23 in digesting what we have to do between now and  
24 the next hearing because this is amassing a  
25 tremendous amount of evidence that has to be

1 assimilated and correlated and evaluated in  
2 my work.

3 MR. ROGERS: Your Honor, I would like  
4 to make one point, if I could, as guidance of  
5 counsel during the three-week break coming up.

6 With respect to the depositions that have  
7 now been agreed to between the United States  
8 and State, the Tribes have taken the position  
9 that the experts which the United States is  
10 offering for further deposition are -- we do  
11 not think that should occur. We do not think there  
12 should be further redeposition of those  
13 experts because all three of them -- I refer to  
14 Mr. Stetson, Mr. Keen, and who?

15 MS. SLEATER: Mr. Billstein.

16 MR. ROGERS: Mr. Billstein -- have  
17 all been deposed at great lengths previously.  
18 The State chose to depose them at a time when  
19 their work is not complete, but the rules do  
20 not require that the depositions prior to trial  
21 or during trial have to have the very last word  
22 and the final conclusions of the persons deposed.  
23 So the tribes have objected to this procedure.

24 Nonetheless, the State and the United States  
25 are going forward with that deposition of those

1 three gentlemen during the week of March 2, I  
2 believe it is. That is water under the dam.

3 Nonetheless, on behalf of the Tribes and  
4 for the appropriate preparation of this case,  
5 I would move that the depositions of those  
6 three gentlemen occur only during nine to five  
7 normal working hours, the five days of that week,  
8 and that if the three are not concluded within  
9 that time, that no further redepositions of  
10 them be taken.

11 It will be up to Mr. White or those who  
12 may depose from the State to allocate the time  
13 within those five business days when they may  
14 depose these gentlemen, and I think they can  
15 determine in that time the basic information  
16 they may need to do that.

17 We had the situation during the deposition  
18 of Dr. Mesghinna where he was deposed until  
19 the hour of 1:00 A.M. in the morning on a  
20 Saturday morning with the trial starting the  
21 following Monday. I don't think that that is  
22 appropriate to put any witness through, even  
23 under the circumstances of this case.

24 I think we've exercised a great deal of  
25 cooperation, as much as possible, with the State,

1 and they with us, but I think that was  
2 excessive, and I would ask the Court to order  
3 that the depositions of Mr. Billstein, Mr. Keen  
4 and Stetson be limited to the five-day work  
5 week, nine to five, the week of March 2.

6 THE SPECIAL MASTER: I see nothing  
7 improper about that --

8 MR. WHITE: May I speak to that?

9 THE SPECIAL MASTER: You may speak to  
10 it, but I'm going to grant it, and then you can  
11 speak to it, and the reason I say this is  
12 that I notice more and more in the law journals  
13 and the comments of the Bench and the Bar, this  
14 continuous abuse of depositions and what it's  
15 doing to the judicial system in America. I  
16 mentioned this before and discussed it with Judge  
17 Kerr. Just this week, Judge Brown, Stuart Brown  
18 of western Wyoming, is coming on to the Supreme  
19 Court, and he had the same thing to say, that  
20 the matter of depositions and redepositions is  
21 fast making the judicial system unavailable to  
22 a mass of human beings in our society that can't  
23 afford a trial anymore, so I will grant it.

24 MR. WHITE: I would like to say  
25 two things: First, the fact that the deposition



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went until, I think it was even after one o'clock,  
I'm not sure -- that's when the United States  
wanted to have it held. They wanted to continue  
it through the evening rather than coming back  
the next day.

THE SPECIAL MASTER: It was Saturday  
night before trial?

MR. WHITE: It was a Friday night.

And the second point is --

THE SPECIAL MASTER: This doesn't  
detract that it went pretty late or into the  
weekend, whatever.

MR. WHITE: The second point is we  
have agreed with the United States to make our  
witnesses available, and we would similarly like  
an order indicating that the United States has  
one week to depose them, just as you limited  
the State of Wyoming to one week to depose the  
United States experts. They have had a crack  
at all --

\* \* \* \* \*

1 THE SPECIAL MASTER: I see.

2 MR. WHITE: Sectons 4, 5 and 8, 129 acres,

3 classified 2 gravity, 1 sprinkler;

4 Section 17, 77 acres, classified 2 gravity,

5 6 sprinkler with one 39 inch hole;

6 Sections 16 and 20 and 21, 256 acres,

7 classified 3 gravity, 2 sprinkler with one 8 inch

8 and one 15 inch hole;

9 Sections 10, 11 and 14, 192-acre parcel,

10 classified 2 gravity, 1 sprinkler;

11 Section 22, 169-acre parcel, all of which

12 is classified 2 gravity, 152 acres which is

13 classified 1 sprinkler;

14 In Sections 15, 22, 23, 24 and 25, there's

15 a 663-acre parcel, classified 1 gravity, 1

16 sprinkler, in which there is one 58 inch hole

17 and 50 inch hole, and one 57 inch hole.

end 11

\* \* \* \* \*

1 THE SPECIAL MASTER: Well, the United  
2 States' case is on right now. When your case  
3 is on, you'll have that available for your  
4 protection at that time.

5 So I'll treat you both with an even hand  
6 in that.

7 MR. WHITE: Thank you, Your Honor.

8 MR. ROGERS: The record should also reflect  
9 in that I don't have the total number of days  
10 at my fingertips, that other experts who have  
11 already testified for the United States or will  
12 testify have been deposed twice by the State.  
13 The redeposition we're talking about are three  
14 gentlemen who have not be redeposed, but the  
15 State has already redeposed a number of the  
16 Government's witnesses and obviously it took a  
17 lot more than one week to do that, and the State  
18 is offering us a list of witnesses some 15 or 20  
19 long so that one week would be inappropriate  
20 for that.

21 MR. WHITE: Most of those have been deposed.

22 One answer, I'd just like to make sure the  
23 same rules apply to the State of Wyoming that  
24 apply to the Tribes and the United States.

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THE SPECIAL MASTER: Okay, we'll see you all

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on March 9th. Thank you very much.

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(Whereupon the proceedings  
(were recessed.

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