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Trial Transcript, Vol. 16, Afternoon Session

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File 123
#374
Box 10

case # 4993
File # 123
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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
DEPUT

VOLUME 16
Afternoon Session
Thursday, February 12, 1981

ORIGINAL

- 1 THE SPECIAL MASTER: We are resumed. Mr. White.
- 2 Q (By Mr. White) Mr. Kersich, could you tell me again
- 3 the people who actually did the field investigation
- 4 as part of your classification effort?
- 5 A Yes. I had five land classifiers in the field.
- 6 One of them was Chick Smith, Mr. Ross Waples,
- 7 Reed Hansen and Lynn Olsen.
- 8 THE SPECIAL MASTER: R-i-e-d?
- 9 THE WITNESS: R-e-e-d.
- 10 THE SPECIAL MASTER: H-a-n-s-e-n?
- 11 THE WITNESS: I believe it's e-n.
- 12 Q (By Mr. White) Was it Mr. Olsen?
- 13 A Lynn Olsen, and Mr. Oper, .O-p-e-r.
- 14 Q Did Mr. Smith act as the field supervisor or
- 15 chief of party?
- 16 A He was basically in that position most of the time,
- 17 yes.
- 18 Q And he reported to you?
- 19 A He reported to me, yes.
- 20 Q The other four, Waples, Hansen, Olsen and
- 21 reported to Mr. Smith?
- 22 A Not all the time. Many times I'd be out in the
- 23 field and visited with them or I would talk with
- 24 Ross in particular on items that were coming up,
- 25 Kersich - cross - white

1 work that he felt should be accomplished, things
2 of this nature.

3 Q What was the normal arrangement; they report to
4 Mr. Smith or they report to you?

5 A Mr. Smith spent some time in reviewing their work in
6 the field, and I still took the time to visit with
7 most of them.

8 Q So Mr. Smith really wasn't the chief of party?

9 A It's very difficult to say in our firm, because
10 I'm in a situation where I like to know what's
11 going on and sometimes I don't go through Mr. Smith,
12 I just talk to the particular person that I need
13 to get information from.

14 Q Can you find SK-5 in that group of exhibits there,
15 please, Mr. Kersich. It should be the 1980
16 edition.

17 THE SPECIAL MASTER: You want to get another
18 one? It looks like this.

19 THE WITNESS: I didn't get one. I just have
20 the Court's copy, sir.

21 THE SPECIAL MASTER: Do you have SK-5?

22 THE WITNESS: No, sir.

23 THE SPECIAL MASTER: He can use mine.

24 MR. WHITE: Let's see if we can find another one.

25 kersich - cross - white

1 THE SPECIAL MASTER: You want me to read my
2 own, Mr. White?

3 MR. WHITE: Sure do, Your Honor.

4 THE SPECIAL MASTER: There must be one some
5 place.

6 THE WITNESS: This is mine here.

7 THE SPECIAL MASTER: Under the map?

8 MR. WHITE: We don't have an SK-5 with a
9 clerk sticker on it?

10 THE WITNESS: Well, I didn't take it home.

11 MR. WHITE: I wasn't accusing you; I was just
12 concerned.

13 THE SPECIAL MASTER: No, I don't have two
14 copies.

15 MR. WHITE: I've got an extra one, Your Honor,
16 that I can give to the witness.

17 This has SK-5 written in pen in the upper
18 right-hand corner, but it's the same document.

19 Q (By Mr. White) Would you turn to page 115.3.2 C-5.

20 A. 115.3.2 C --

21 Q. 115.3.2 C-5.

22 THE SPECIAL MASTER: It's about one-third of
23 the way down. It begins with the chapter Three
24 Principles and Scope of Irrigation Suitability.

25 kersich - cross - white

1 MR. WHITE: That's --

2 THE SPECIAL MASTER: I was just trying to
3 save a little time.

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

5 Q (By Mr. White) At the top of the page is a carry-over
6 section from the previous page dealing with
7 drainage, and I'd like to direct your attention
8 to the first full paragraph that I gave you the
9 page number for, 115.3.2 C-5 and ask you if you
10 would read that paragraph to yourself.

(Witness complied.)

11
12 A Okay.

13 Q Isn't it true that that paragraph says that
14 adequate drainage can never be assumed?

15 MR. ECHOHAWK: Your Honor, the document speaks
16 for itself.

17 MR. WHITE: I'll have him read it outloud.

18 THE SPECIAL MASTER: The document wasn't
19 read outloud so he can answer. I was about to
20 look up and see if somebody wanted it read outloud
21 but no one said so.

22 Q (By Mr. White) Why don't you go ahead and read
23 the paragraph.

24 A "Arable land must be drainable land. The selection
25 kersich - cross - white

1 of arable land shall therefore encompass drainability
2 and evaluation. This includes investigating the
3 substrata as well as the soil. Some lands are
4 endowed with adequate natural drainage to sustain
5 irrigation. This, however, needs to be derived from
6 investigations and never simply assumed. Unfortunately,
7 areas which are drained naturally occupy but a minor
8 portion of the landscape, therefore, requirements
9 for engineering works to remove excess water and
10 salts will be needed in most irrigated areas.

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kersich - cross - white

1 Q (By Mr. White) Did you or did you not ever
2 assume that adequate drainage was available?

3 A THE SPECIAL MASTER: Could I ask you to
4 have that sentence a little less general? It's
5 pretty vast and vague.

6 Q (By Mr. White) In the course of your determination
7 of arable lands which you've testified about
8 during direct and cross-examination, did you or
9 did you not ever assume that adequate drainage
10 was available for the lands which you classified
11 as arable?

12 A We investigated the drainage -- let me start over
13 again.

14 I cannot recall of any instance where we
15 just assumed that adequate drainage was available.

16 Q How did you make the empirical determination that
17 your drainage standard of six foot to barrier
18 was met without a logged hole?

19 A The drainage engineer reviewed the entire area.
20 He was actually the same person that was in-
21 volved in the design or the review of the soils
22 with respect to drainage, was also involved with
23 the drilling.

24 The holes were put down at his direction.

25 kersich-cross-white

1 He felt that he had adequate data to determine
2 barrier levels and review the soils.

3 Q So it was a judgment made by the land classifier
4 that the six foot to barrier requirement was
5 met?

6 A I don't recall -- wait a minute. I don't under-
7 stand that question. In my answer previously
8 I told you we did the work as far as determining
9 depth to barrier, and now you are saying that
10 the land classifier determined the distance to
11 barrier?

12 Q I'm referring to those parcels where you had
13 no logged hole which would tell you empirically
14 that there was six foot to barrier beneath that
15 parcel. Was it then simply a judgment call by
16 the land classifier that the six foot to barrier
17 minimum was met?

18 A No, those lands were reviewed by the drainage
19 engineer and reviewed in the total context of
20 his program.

21 Q So is the drainage engineer Mr. Toedter?

22 A That's correct.

23 Q And he reviewed all the lands?

24 A Yes.

25 kersich-cross-white

1 Q And he formed an opinion then in the absence
2 of a logged hole that that six foot barrier
3 requirement was met?

4 A He worked with the information that he had
5 developed, and there was an opinion formed,
6 yes.

7 Q It was his opinion that the six foot to barrier
8 was met where there were no holes?

9 THE SPECIAL MASTER: It's been answered.

10 MR. WHITE: I wasn't sure whose opinion
11 he was talking about, his own or Mr. Toedter's,
12 Your Honor.

13 A (By The Witness) Mr. Toedter made an opinion
14 predicated on the information he had.

15 Q (By Mr. White) And you relied on his opinion
16 in reaching your opinion?

17 A Yes, I did.

18 MR. WHITE: Your Honor, I know it's early,
19 but the Attorney General just walked in, and I
20 wanted to talk to him about something. Could we
21 take about a three-minute break?

22 THE SPECIAL MASTER: Right. I would like to
23 ask a few questions of you while they are visiting,
24 unless that would be distracting.

25 kersich-cross-white

1 MR. WHITE: That's all right, Your Honor.

2 THE SPECIAL MASTER: I'm referring to C-43,
3 and I would like to know, Mr. Kersich, why, on
4 page 7 thereof, the land capability criteria
5 shows the range of limiting factors of a depth
6 of barrier greater than 36 inches, yet throughout
7 the exhibits like 36 and others, six feet is used
8 for criteria.

9 THE WITNESS: Because the information that
10 we had in the original range and soils inventory
11 only talked about parcels that had -- 36 inches
12 was the depth that was listed there, so that's
13 all the screening information we had at that time.
14 We didn't know whether the barrier was greater
15 than that or not.

16 THE SPECIAL MASTER: Am I deterring you
17 from your conference?

18 MR. WHITE: No, Your Honor. I got my
19 answer real quickly.

20 THE SPECIAL MASTER: Oh, all right.

21 If six feet is, as we noticed in Exhibit
22 C-36, at least six feet is the soil depth to
23 barrier and was your criteria for all of your
24 work, how come reference is made to so many

25 kersich-cross-white

1 five-foot holes and why were only five-foot
2 holes drilled so many times as carried forth
3 on pages 14 and 15 of 43?

4 THE WITNESS: Well, the drainage investigation
5 and the land classification investigation are
6 somewhat separated.

7 THE SPECIAL MASTER: The which is somewhat
8 separated?

9 THE WITNESS: Drainage investigation and
10 the land classification program.

11 THE SPECIAL MASTER: Yes.

12 THE WITNESS: They occur together in the
13 field, but the land classifier -- he's worried
14 about depth to barrier all right, but he's also
15 worried about the textures of the soils and so
16 forth, so he logs a lot of holes to determine
17 that kind of information. Every once in a while
18 he will put down a ten-foot hole or a deeper
19 hole, depending on the formation that he's in and
20 things of this nature.

21 The drainage engineer reviews the geology
22 and tries to determine what the depth to barrier
23 is, again going back to our definition of barrier,
24 and then he drills the necessary holes to go ahead

25 kersich-cross-white

1 and decide where the average depth is and what
2 we can expect from a design standpoint in that
3 eventuality.

4 THE SPECIAL MASTER: All right. I just
5 have one more question.

6 On page 16 your exhibit mentions that the
7 arable developed lands on the Reservation lie
8 in three different settings and these include
9 the weathered Wind River Formation and terraces
10 and alluvial flood plains. If you were to use
11 sprinkler irrigation from deep wells on the
12 weathered Wind River Formation, does that mean
13 that that water would not be coming from alluvial
14 flood plain of the Big Horn -- of the Wind River
15 and be coming from deeper strata?

16 THE WITNESS: It would be coming from some
17 different formation, but I don't know enough
18 about the geology to be able to answer that.

19 THE SPECIAL MASTER: All right then I won't
20 ask anymore on that.

21 You testified -- I'm still on that same page,
22 16 -- earlier this week that 671 holes were
23 drilled?

24 THE WITNESS: Yes, sir.

25 kersich-cross-white

1 THE SPECIAL MASTER: On page 15 a
 2 discussion begins with the number of five-
 3 footers, ten-footers, 357 bores of five feet
 4 or less, and 197 borings of five to ten feet.

5 THE WITNESS: Yes.

6 THE SPECIAL MASTER: I have trouble with
 7 totals there.

8 THE WITNESS: Okay. I don't have --

9 MR. WHITE: Do you want a calculator, Al?

10 THE WITNESS: No, I just need a pencil.

11 THE SPECIAL MASTER: I get 554 as a total --
 12 oh, 117 more. I see. I got the 671.

13 THE WITNESS: Yes, okay.

14 THE SPECIAL MASTER: And that's where you
 15 get your 671 is on page 16?

16 THE WITNESS: Yes.

17 THE SPECIAL MASTER: Thank you, Mr. White.

18 MR. WHITE: Your Honor, before we move
 19 into the next area of cross-examination, I'd like
 20 to make a motion to produce with respect to the
 21 United States.

22 You may recall that the land classification
 23 standards on the Crow Reservation caused a great
 24 hubbub a couple of days ago. The more I thought

25 kersich-cross-white

1 about it, the more I realized that there must
2 be something more to that report than I already
3 knew about, and since the Crow Reservation lies
4 on the Wind River just above the Montana line --

5 THE SPECIAL MASTER: On the Wind River?

6 MR. WHITE: Excuse me. The Big Horn, Your
7 Honor. -- just above the Montana line, it
8 seemed to me that a report dealing with that
9 Reservation would be very relevant to an analysis
10 of the Reservation that we are dealing with now
11 in the headwaters of the Big Horn.

12 At this time I would like to move that the
13 United States produce the entirety of the report
14 on the Crow Reservation so that it may be examined
15 by the parties and by the Master to determine
16 whether or not the findings there are inconsistent
17 or consistent with the findings suggested by the
18 Case in Chief of the United States with respect
19 to this Reservation.

20 THE SPECIAL MASTER: I would deny the motion
21 unless you can show, Mr. White, some closer
22 relationship to the topography, land, or other
23 physical features of the two Reservations. The
24 juxtaposition being at the headwaters of the

25 kersich-cross-white

1 Wind and coming around and finding themselves
2 1,000 miles downstream doesn't justify granting
3 the motion.

4 MR. WHITE: Perhaps we can make that
5 showing at a later time and we will come in and
6 move for production, then.

7 THE SPECIAL MASTER: I have a copy of that
8 in my papers, and I'm using that. I want you
9 both to know that.

10 MS. SLEATER: I would like to make a state-
11 ment concerning this report. It's something we
12 have been meaning to bring up with Mr. White.

13 We do not know how Mr. White obtained this
14 information. However, we do know that the
15 information obtained is confidential information
16 that is the property of the United States
17 Government and was only used by experts for the
18 United States in the preparation of the case
19 that is now pending and that negotiations are
20 going on with.

21 We wanted to advise Mr. White that since
22 he has it, however he got it, it was an unauthorized
23 or perhaps a stolen bit of federal property that
24 he is using and that at some time in the future

25 kersich-cross-white

1 if this is tracked down and any liabilities,
 2 probably civil liability attached to whatever
 3 party in this unauthorized manner released this
 4 information, Mr. White may, through use of this,
 5 get himself dragged in, and we don't want that
 6 to happen, and we want to be clear and up front
 7 about it.

8 That is confidential federal property
 9 dealing with a totally different case and no
 10 release has been authorized of that material.

11 MR. WHITE: I want the record to reflect,
 12 Your Honor, that I'm not going to be scared off
 13 from searching for relevant information that
 14 should be presented in this case by the threats
 15 of Counsel from the Justice Department that I
 16 may be dragged into some civil or criminal
 17 proceedings, and we will come back to obtain that
 18 by motion upon the proper showing that you
 19 suggested because we believe it's relevant, and
 20 if there wasn't something significant in that
 21 report in addition to the soils standards that
 22 the United States wished to hide in this case,
 23 they would be more than happy to provide it.

END 12

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THE SPECIAL MASTER: Well, I believe

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it's already in the record that the glaring

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difference between that report and this work

4

was the difference in the -- in the surface

5

to barrier depth. Now, that's what I think

6

is about the only thing that's different from

7

that report. And I've -- I let that in evidence

8

and I felt it had a place in evidence.

9

MS. SLEATER: Your Honor, at this

10

time I'd like to reask a question that was

11

asked of Mr. White previously. We would like

12

him to please tell us where he got that. This

13

is something that deals with another case and

14

federal property, and we feel this is a very

15

serious matter, and we also feel that since

16

Mr. White has injected this into the trial we

17

are entitled to know where he got it.

18

THE SPECIAL MASTER: Let me interject

19

now. Heaven forbid that anyone except the

20

Special Master shall have his credentials examined

21

so closely as to ethics or not. If you have

22

ought, o-u-g-h-t with Mr. White on matters like

23

that, I direct that you settle those outside the

24

province of this case and this record. That has

25

nothing to do, in my opinion, with the furtherance

1 of this case and this record. This is already
2 in the evidence. The fact that a criteria
3 was set for that reservation of surface to
4 20 feet -- does my memory serve me right -- for
5 surface to barrier for drainage, and that is in
6 the evidence, that is in the evidence in this
7 case.

8 I have denied the motion, and if there is
9 other activity that will result from evidence
10 having been improperly obtained, I believe those
11 actions would be brought outside the province
12 of this case, either with federal authorities,
13 with Judge Joffe, if you wish, but I'm proceeding
14 only on the evidence to determine my assigned
15 duty and that does not include that.

16 MR. ROGERS: I would like to ask Mr.
17 White a question, which I think is in the province
18 of this Court's concern relating to that document.
19 I have concern for the Tribes as to whether or
20 not Mr. White has already in his possession,
21 because of rather unusual circumstances by which
22 he wound up with the soil classification table he
23 produced the other day, whether now he has in
24 fact in his possession, and I ask him now, any
25 of the material relating to HKM's work on the

1 Crow Reservation that he is going to and
2 already has moved to produce?

3 MR. WHITE: Your Honor, it's simply
4 none of Mr. Rogers' business what information --

5 MR. ROGERS: It is my business, Your
6 Honor. He has moved to produce it, it is an
7 unnecessary step if in fact Mr. White already
8 possesses that information.

9 MR. WHITE: That's a dilemma that
10 Mr. Rogers is going to have to live with, Your
11 Honor, because I'm simply not going to disclose
12 that material which I may have developed in
13 preparation for this case.

14 THE SPECIAL MASTER: Are you inferring
15 that Mr. White would be asking to produce
16 something that he already has?

17 MR. ROGERS: I am.

18 THE SPECIAL MASTER: You're all inferring
19 that?

20 MR. ROGERS: I'm not inferring, I'm
21 asking the question and Mr. White is refusing to
22 answer, which puts a burden on the Court because
23 he's asking the Court to consider a motion that
24 may be unnecessary, and he refuses, as an
25 attorney of record in this case, to answer the

1 question.

2 MR. WHITE: Your Honor, Mr. Rogers
3 well knows that I'm not required to answer that
4 question, especially since you denied my
5 motion.

6 Now, if he wishes to raise this issue and
7 give the Court probable cause to believe that I
8 have a copy of that document at the time I
9 reinstate my motion, then I will be glad to
10 disclose that to the Court. But to respond
11 to sort of an off-the-wall suggestion that I'm
12 asking the Court to produce something that I
13 don't have, I'm not about to do that, Your
14 Honor.

15 MR. ROGERS: Your Honor, Mr. White has
16 indicated to the Court that he will in fact
17 renew his motion again, and I think it will be
18 an imposition on the Court at that time if he
19 has in fact got this information already. I
20 point out to more than just an implication that
21 Mr. White got this from a more -- a fuller
22 document because as you will see from the xerox
23 of this, this is --

24 MR. WHITE: That's not it. Let me
25 say for the record, Your Honor, if counsel

1 for the Tribes and the United States will
 2 state in fact that that set of soil standards
 3 comes from that report, then I'll be glad to
 4 disclose whether or not I have the report.

5 MR. ECHOHAWK: What was that?

6 MR. WHITE: You want to read it back
 7 to him, Merissa?

8 (Thereupon the following
 9 (statement was read back as
 10 (follows: " Let me say for
 11 (the record, Your Honor, if
 12 (counsel for the Tribes and
 13 (the United States will state
 14 (in fact that that set of soil
 15 (standards comes from that
 16 (report, then I'll be glad to
 17 (disclose whether or not I
 18 (have the report."

14 MR. ROGERS: Your Honor, the document
 15 proffered by the State is listed as WRIR Sk-7.
 16 If the Court will observe, this is my copy of the
 17 document, you will see what appears to be at the
 18 top of that, plastic bindings indicating that
 19 it does in fact come from a more complete
 20 document, it being unusual to have a three-page
 21 document in a binding of that sort.

22 MR. WHITE: I've already told or said
 23 for the record, Your Honor, the position that
 24 I take. If counsel for the Tribes and the United
 25 States will stipulate that came from the report

1 that Mr. Kersich described which has been
 2 described by counsel, then I will gladly
 3 disclose whether or not I have a copy of the
 4 report, but I'm not required to do so, protected,
 5 if by anything, an attorney/client privilege.
 6 And I will make that report only upon that
 7 representation by the counsel for the Tribes
 8 and the United States.

9 MR. ECHOHAWK: I wasn't aware Mr.
 10 White's client was the Crow Tribe.

11 MR. ROGERS: I wasn't either, Your
 12 Honor. I happen to be an attorney of record
 13 for the Crow Tribe.

14 MR. WHITE: No, I didn't say I was.
 15 That was the representation, apparently made
 16 by counsel for the United States.

17 Let me ask counsel for the Tribes and
 18 the United States, will you stipulate that
 19 Wyoming's Exhibit WRIR SK-7 is in fact a copy
 20 of the soils standards contained in the report
 21 rendered for the Crow Reservation?

22 MS. SLEATER: Your Honor, if he's got
 23 a copy of the report so we could compare them,
 24 we'd be most happy to see whether or not we
 25 could join in a stipulation. We are not here

1 to try the Crow Reservation case and we don't
2 have that report here.

3 MR. WHITE: Well, then --

4 THE SPECIAL MASTER: Do you want to
5 let them see your copy of it?

6 MR. WHITE: Well, I'm not going to
7 say whether I have a copy or not until they
8 tell me whether it came out of that.

9 MR. ROGERS: I think the record is
10 clear, Your Honor, Mr. White is refusing to
11 answer my question, and I will let it go at that.
12 But I think the record will speak for itself
13 when Mr. White renews his motion that he has
14 in fact refused to answer this.

15 MR. WHITE: And I think the record
16 ought to disclose, although the matter was
17 brought up by counsel for the Tribes and the
18 United States, they're unwilling to stipulate
19 that that document came from the report.

20 MR. ROGERS: Mr. White, I have not had
21 the opportunity to go back and check the report.
22 You asked the question; you brought it up.

23 MR. WHITE: Perhaps when you have a
24 chance to check the report you can advise the
25 Court, and then I'll be happy to make the disclosure.

1 MR. ROGERS: Well --

2 THE SPECIAL MASTER: Okay, carry on.

3 Q (By Mr. White) Okay. Mr. Kersich, let's go
4 into a new area.

5 THE SPECIAL MASTER: I've got a
6 small problem before you do. I had a copy
7 of that Monday, whenever we introduced it,
8 and we don't now.

9 MR. WHITE: That's the trouble with
10 confidential material.

11 THE SPECIAL MASTER: I'd like to know
12 who's been looking over the Master's files.

13 MR. WHITE: I have an extra copy.

14 THE SPECIAL MASTER: Do you know where
15 that might be, Leo?

16 MR. SALAZAR: I sure don't have it.

17 (Off-the-record discussion.)

18 THE SPECIAL MASTER: I'll take a copy
19 from whoever has it.

20 MR. WHITE: Here's one, Your Honor.

21 THE SPECIAL MASTER: All right.

22 (Off-the-record discussion.)

23 THE SPECIAL MASTER: All right, go
24 ahead, Mr. White.

25 MR. ROGERS: Your Honor, this document

1 has not been offered in evidence.

2 THE SPECIAL MASTER: That is correct,
3 that is right.

4 MR. ROGERS: Do you have a copy now?

5 THE SPECIAL MASTER: I do indeed.

6 Q (By Mr. White) Mr. Kersich, all cross-examination
7 so far has concentrated on those parcels where
8 you had no holes. Now I'd like to change to
9 those areas which you have holes, in which you
10 have holes, and ask you to get out your workbook
11 for Township 3 North, 2 West in the Big Horn
12 Flats area.

13 THE SPECIAL MASTER: What township?

14 MR. WHITE: 3 North, 2 West, Your Honor.

15 Q (By Mr. White) Could you also put your finger
16 in the plate for 3 North, 3 West.

17 Do you find a large parcel of land classified
18 3 gravity, 2 sprinkler lying between Section 12
19 in 3 North, 3 West, and 18 and 17 in 3 North,
20 2 West?

21 THE SPECIAL MASTER: Acreage total?

22 MR. WHITE: In 3 North, 2 West, Your
23 Honor, there are, I believe 167 acres. I'll
24 check my notes for sure, and in 3 North, 3 West

25 kersich-cross-white

1 there are 152 acres.

2 I'm sorry, it was 351 acres and that would
3 be in the west half of Section 7 in 3 North,
4 2 West. 252 acres in Section 12, 3 North, 3 West.

5 THE SPECIAL MASTER: Your first total
6 again is -- she'll tell me. Would you read that
7 answer to me, please.

8 (Thereupon the following
9 (sentence was read back as
10 (follows: "It was 351 acres
11 (and that would be in the
12 (west half of Section 7 in
13 (3 North, 2 West. 252 acres in
14 (Section 12, 3 North, 3 West."

12 Q (By Mr. White) Have you found that parcel, A?

13 A I believe so, yes, right here on this particular
14 position here.

15 Q Isn't it true that you have one 36 inch probe
16 in the eastern portion of that parcel and one
17 36 inch hole in the western portion of that parcel?

18 A That's correct.

19 Q So within that parcel that's approximately 600
20 acres you have, two 36 inch holes; is that correct?

21 A That's correct.

22 Q Isn't it true that --

23 THE SPECIAL MASTER: Is there 600 acres
24 of arable land in the two portions just described

25 kersich-cross-white

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or is there 403 acres of arable land?

THE WITNESS: I think it's total.

THE SPECIAL MASTER: Well, I've got the total, 151 and 252.

MR. WHITE: It's 351, Your Honor; is that correct?

THE SPECIAL MASTER: Would you read back and see what the statement was on how many acres there are, please, Merissa.

(Thereupon the sentence was read back as follows: "It was 351 acres and that would be in the west half of Section 7 in 3 North, 2 West. 252 acres in Section 12, 3 North, 3 West."

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THE SPECIAL MASTER: This is 603 acres. I heard it twice the other way.

MR. WHITE: I apologize, Your Honor. I probably gave you the wrong number.

THE SPECIAL MASTER: My hearing is probably bad.

Q (By Mr. White) How did you determine from those two 36-inch holes that depth to barrier for that approximately 600 acres was six feet?

A You'll note this lies on top of that bank up here and drops down to the north. I was on the parcel last Friday with Mr. Waples who went ahead and classified that parcel.

Mr. Waples went down over the bank -- went over the bank previously and determined barrier depth. I can't remember the exact figures he gave me now, but he was able to see barrier in a cut slope.

Now, we drilled a hole in this particular area to make sure that we had sufficient topsoil to classify it as the classification showed, and we ran into some of these small gravels that make it difficult to put a hand auger down.

THE SPECIAL MASTER: I think the witness kersich - cross - white

1 would be more comfortable if you stayed at the
2 podium.

3 MR. WHITE: I apologize.

4 A. (By the Witness) But there's no question in my
5 mind that the classifier did not go over and review
6 the exposed edges of those slopes to determine
7 where barrier might be. That was talked about
8 very specifically while we were there.

9 MR. ECHOHAWK: I would like to object to this
10 line of question. It sounds terribly familiar
11 from this morning. It's the same process.

12 THE SPECIAL MASTER: It's the exact same
13 process, but I'm going to allow it because it deals
14 with a different test within the exterior boundaries
15 of the parcels, so I will overrule the objection.

16 If this goes on three weeks from now and
17 you make the same objection, I'd sustain it for
18 redundancy, but right now I believe it's proper
19 here.

20 MR. WHITE: I won't do that.

21 Q (By Mr. White) What was the depth to barrier for
22 that parcel?

23 A. Mr. White, I can't recall. Like I said, I have looked
24 at a million parcels here, but I know the person that
25 kersich - cross - white

1 did it. He understands the problems and he
2 discussed his problems with the drainage engineer.
3 I don't have any problems in accepting that opinion
4 and making it my own.

5 Q Where was the cut bank to which you referred?

6 A I'm not sure I know which cut bank he went over
7 exactly, but he points out a number of them where
8 it's possible to visualize or to observe in this
9 particular area.

10 Q And that field classifier was Mr. Waples?

11 A Mr. Waples.

12 Q Directly to the north of that parcel is a 118-acre
13 parcel, is it not?

14 A Wait a minute. That 118-acre parcel that you
15 referred to, sir, is all part of this one large
16 parcel. It's just an interdelineation of a
17 large parcel.

18 Q May I look at your map, please?

19 A Yes.

20 Q So the 252 acres includes 118 acres?

21 A No, as I said before, this is one basic shape
22 here that he classified and then he changed the
23 classification of this 118-acre parcel from, I
24 believe, 3 gravity, 2 sprinkler, to 3 gravity,

25 kersich - cross - white

1 3 sprinkler, and that's why he delineated the two
2 parcels.

3 Q So there's a total of about 720 acres then in
4 that parcel?

5 A Yes.

6 Q And in the entire 720-acre parcel there was no hole
7 over three feet deep, is that correct?

8 A There was no hole over three feet deep, but there
9 was a highway going through the middle of the parcel
10 and the cut banks and then changes in elevation
11 which allowed him to see what was going on in the
12 substrata.

13 Q Was that also the basis for the determination of
14 the arability of the parcel immediately to the
15 northwest, the 41-acre parcel?

16 A Are we back on 3 now, sir?

17 Q Three North, 3 West, yes.

18 THE SPECIAL MASTER: Forty-one acres?

19 MR. WHITE: Forty-one-acre parcel.

20 Q (By Mr. White) That's an adjoining parcel that
21 has no hole in it; is that correct?

22 A That's correct, but it looks -- it's in the same
23 relative position, and there appears to be a
24 terrace edge around it -- there is a terrace

25 kersich - cross - white

- 1 edge around it, and from that he was able to
2 ascertain barrier.
- 3 Q Do you know of your personal knowledge the depth
4 to barrier for that parcel?
- 5 A I do not, but I do know from Mr. Waples' knowledge
6 that that parcel met the limits.
- 7 Q Immediately to the northwest of the 41-acre parcel
8 is a 25-acre parcel. Do you know the depth to
9 barrier for that parcel?
- 10 A I personally have not measured the depth of that,
11 but again I know the person that classified it,
12 and I know the method that he used, and I have no
13 doubt that he was able to ascertain the depth or
14 that would not have been declared arable.
- 15 Q So you based your opinion with respect to both
16 the 41- and the 25-acre parcel as well as the
17 roughly 720-acre parcel on Mr. Waples' analysis
18 or his opinion?
- 19 A I based my opinion on his analysis as well as his
20 undergoing the cross-examination I gave him with
21 regards to those parcels.
- 22 Q Did you ask him what the depth to barrier for
23 those parcels were --
- 24 A I asked him whether the depths to barrier met
25 kersich - cross - white

- 1 the six-foot limitation or not, and he said there
2 was no problem there.
- 3 Q Would you please direct your attention to
4 Township 1 North, 3 East?
- 5 A Very good.
- 6 Q Did you find a 63-acre tract in the southwest
7 quarter of Section 31?
- 8 A Yes, I do.
- 9 Q Is that adjoined to the south in Township 1 South,
10 3 East, Section 6, by a 17-acre tract?
- 11 A A 17-acre tract? Yes, it does.
- 12 Q Is there, in fact, a hole, a logged hole within
13 the northern portion of that 80-acre tract?
- 14 A Eighty-acre tract?
- 15 Q Well, 63 plus 17.
- 16 A Oh, yes, there is.
- 17 Q Now --
- 18 A Hole No. 3.
- 19 Q Do you know the depth to barrier based on the
20 soil profile log for Hole No. 3?
- 21 A Not based on the log of Hole No. 3, sir. I do
22 have some other information in the area. It says
23 84 inches of sandstone, but it's not sandstone.
24 It's actually a limestone. That's located slightly
25 kersich - cross - white

1 to the east of that, and I don't have the exact
2 location of the hole on here, but I do have that
3 information.

4 Q So it was your conclusion that there were 84 inches
5 to sandstone in that parcel?

6 A What was the question again, sir?

7 Q So your determination was that it was 84 inches
8 to sandstone in that parcel?

9 A No, I didn't say that. When the hole was dug,
10 it says 84 inches of sandstone, but it's actually --
11 but really a lime zone.

12 THE SPECIAL MASTER: Eighty-four inches of
13 limestone, or does it say 84 inches to?

14 THE WITNESS: When I referred to it, sir,
15 it's 84 inches to the zone that he hit, and that
16 actually turned out to be a lime zone, not a sandstone.

17 Q (By Mr. White) Do you have the log for Hole No. 3
18 in the courtroom?

19 A I'm not sure -- for the Hole No. 3?

20 Q Yes.

21 A Yes, I have that log.

22 Q Would you check that log, please?

23 A Sure. Yes, I have a log here.

24 Q What is the depth of that hole?

25 kersich - cross - white

1 A. This particular hole only went six inches because
2 he hit cobbles and gravel.

3 Q. In the southern portion of that parcel in Township 1
4 South, 3 East, there's another logged hole, is
5 there not?

6 A. Hole 4, log 4.

7 Q. I believe it's Log 27, isn't it, in the northern
8 portion of 1 South, 3 East?

9 A. I'm going to have to take a few minutes to get
10 fixed up.

11 THE SPECIAL MASTER: One South, 3 East?

12 MR. WHITE: Yes, Your Honor.

13 A. (By the Witness) Yes, there is a hole 27.

14 Q. (By Mr. White) Would you please get out the log
15 for Hole 27?

16 A. Log 27, that's correct.

17 Q. Does that show that sandstone was encountered after
18 12 inches?

19 A. I'm -- I must have a different log.

20 Q. May I look at the log that you're looking at?
21 Maybe I have the wrong one.

22 A. You are in 1 South, 3 East.

23 THE SPECIAL MASTER: One South, 3 East?

24 MR. WHITE: Yes, sir. I believe there's a

25 kersich - cross - white

1 Hole 27 in that 17-acre portion.

2 Q (By Mr. White) Is that what is shown on your map?

3 A Yes, right here (indicating).

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1 A (Continued) Well, a log at 27 I have shows it
2 being in Section 3, 1 South, 3 East.

3 Q Isn't that log 25 that's in Section 3?

4 A I'm looking at my log sheet here.

5 Q I'm sorry.

6 A That's what it says on the log sheet.

7 This book does not appear to have a Section
8 6 log. I don't appear to have that log here.

9 MR. ECHOHAWK: Mr. White, do you have
10 a copy of that log?

11 MR. WHITE: I have the same log he has,
12 Section 27 -- excuse me, Hole 27, Section 3.

13 THE WITNESS: Could we take a short
14 break so I could get that?

15 THE SPECIAL MASTER: All right. We'll
16 take a ten minute recess.

17 (Thereupon a 10 minute recess
18 was taken.)

19 THE SPECIAL MASTER: Would you please
20 come to order. Mr. White.

21 Q (By Mr. White) Did you find the log, Mr. Kersich?

22 A Yes, I did.

23 Q May I look at it, please?

24 A Yes.

25 kersich-cross-white

1 Q Does the log indicate that sandstone was
2 encountered after 36 inches?

3 A That's what the log says, but it should go into the
4 record that that hole was drilled by hand to
5 84 inches. When the drainage engineer was
6 working in the field and drilled the area,
7 it was determined that that was a lime zone, is
8 what it was called actually, and put on the
9 worksheet here, and no barrier was encountered
10 at less than 6 feet. Barrier is much deeper
11 there.

12 Q I'm not sure I understand how you said the
13 barrier was much deeper when the log shows
14 sandstone was encountered after 36 inches.

15 A It was discussed with the person that worked
16 there, the question was raised and the point
17 was made that while he had filled this log
18 out as soft sandstone, for one thing he was
19 wondering how he was able to take a hand auger
20 and just drill down through it. That's the
21 determination that was made, that this was an
22 area with some lime concentration which had
23 given him some difficulty in augering down,
24 drilling down, but not enough to stop him,

25 kersich-cross-white

- 1 certainly. That could be leached out with
2 proper water application.
- 3 Q And may I see that log again?
- 4 A Yes, sir.
- 5 Q I was looking at it almost upside down.
- 6 (Brief pause.)
- 7 Q Mr. Kersich, isn't this the log for hole no. 28
8 in Section 8 rather than the log for hole no. 27
9 in Section 6?
- 10 A Well, I'm looking at hole no., Section --
- 11 Q I'm sorry, I thought you handed me the one below,
12 I apologize.
- 13 A No, they're just set up so.
- 14 Q Is that -- I'm sorry, you're going to have to
15 help me interpret this. I see the hole no. 27,
16 but it's in Section 31, isn't it, on the log?
- 17 A Yes. And that would be in, that hole is right
18 on the edge. You can see the tape right there
19 where it's right on the edge of the two sections.
20 We got the two townships coming together there.
- 21 Q And the log shows that there's soft sandstone
22 after 60 inches, soft sandstone after 84 inches,
23 hard pink sandstone.
- 24 A That's correct. The classifier went back and
25 kersich-cross-white

1 checked that and he found that was a lime zone
2 and I discovered this myself, looking through the
3 logs. I discussed that, he said that that's
4 a lime zone. I made a note right here on my
5 work sheet saying "84 inches but really lime zone".

6 Q As I recall you said that up in Township 1 North,
7 3 East for the remainder of that, where the
8 remainder of that parcel is located in Section --
9 I guess 31 again, you had a logged hole no. 3
10 that went to 6 inches?

11 A That's correct.

12 Q What did you find in 6 inches?

13 A We found cobble.

14 Q What is the standard for good free workable soil
15 for Class 3 and Class 2?

16 A It's whatever it says; I don't remember exactly.

17 Q I'm sorry, I'll get it out. I thought you'd
18 know it off the top of your head.

19 A I've looked at so many numbers lately.

20 Q I hand you a copy of WRIR 36 and ask you
21 whether or not the standard for Class 2 is
22 24 inches and the standard for Class 3 is 18 inches?

23 A That's correct, yes.

24 Q Having encountered --

25 kersich-cross-white

1 A I might point out though again there's
2 another hole which shows 20 inches to gravel.
3 All he's trying to ascertain is how much matrix
4 is there and if there's enough to be able to
5 insure that it meets the class, that's all
6 he'll do.

7 Q So hitting gravel after 6 inches would meet the
8 standard of 24 or 18 inches of good free working
9 soil?

10 A The normal process, if you put the hole down,
11 is to log where it went in, show what you found.
12 You look for other evidence if you have trouble
13 with a hand auger.

14 Q Well --

15 A And, you know, it's to the point where I've --
16 I'm perfectly confident that this man determined
17 there was a soil depth there in sufficient depth
18 to meet the classification standards. You can
19 be stopped on a stone or a cobble or small, small
20 piece of gravel, but you can also reach in and
21 find out what the soil matrix is. You can also
22 look at various other physical evidence there
23 to determine what the depth would be.

24 Q Particle size of cobble is 3 to 10 inches, is
25 kersich-cross-white

1 it not?

2 A That's correct.

3 Q Does the inclusion of cobble after 6 inches allow
4 you to say the standard of 18 inches of Class 3
5 and 24 inches for Class 2 are of good free working
6 soil are met?

7 A As I said, the classifier takes every bit of
8 evidence we can find to determine the depth of
9 soil. When he has enough to put it into a
10 classification he puts it in a classification.
11 On the other end of that tract he does have an
12 auger hole to 20 inches where he hit small
13 gravel.

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1 Q (By Mr. White) You must be remembering my
2 questions. I apologize if I asked the same
3 question again.

4 A Okay. How did you determine that this land
5 was arable Class 3 gravity, 2 sprinkler, with
6 cobbles of between three to ten inches up to
7 six inches?

8 A One of the things I did on this job was go out
9 in the field in a place where I would see
10 situations like that.

11 I have been out a number of times. I have
12 actually put a hole down and checked the depth of
13 clean free-working soil myself. The classifier --
14 what I'm doing is checking the classifier's
15 judgment.

16 I didn't check every hole, but I don't
17 feel I have to check every hole. If I go to
18 an area, do what I have to do to determine that
19 there's enough top soil, even though he didn't
20 show the actual log or have an actual log in
21 that area, that's what I'm doing. I'm checking
22 his professional judgment and then making that
23 part of my professional judgment.

24 It's a very common thing in the industry.

25 kersich-cross-white

1 It's not new. It's done by everyone. There.
2 is no question that sometimes you get in a
3 situation where the particular auger hole you
4 put down does not show that depth, but there is
5 other evidence in the area to confirm that
6 depth, and you make that all part of your total
7 overall judgment for the classification of that
8 parcel.

9 Q I'm sorry. Did you say that you visited this
10 site, or were you talking generally?

11 A No, I said I couldn't remember if I visited
12 that site, but I said I visited other sites to
13 check places like this where we might have a
14 shallow hole and actually dig down through to
15 to see what was there.

16 Q So again you based your opinion on the field
17 classifier's opinion?

18 THE SPECIAL MASTER: I think the question
19 is redundant. I would like to remove it. I think
20 he has answered that time and time again.

21 Q (By Mr. White) Who was the field classifier for
22 this parcel?

23 A On this particular parcel?

24 Q Yes.

25 kersich-cross-white

1 A It appears like it was Ross Waples from the
2 logs.

3 Q Staying in Township 1 North, 3 East, do you
4 find a 122-acre parcel classified 2 gravity,
5 1 sprinkler, between Sections 31 and 32 lying
6 immediately to the east of the 63-acre parcel
7 we just discussed?

8 A Immediately east?

9 Q Yes.

10 A 122 acres?

11 Q Right.

12 A Yes, I do.

13 Q There's a hole on that parcel, is there not?

14 A There is a hole there, yes.

15 Q How deep is that hole?

16 A That one shows 20 inches to gravel.

17 Q If the hole for that parcel went only 20 inches
18 deep, how did you determine that the depth
19 to barrier was six feet?

20 A Because in that particular parcel there are two
21 deep holes, and there again this is a delineation
22 of a larger parcel. Within this larger parcel
23 there are two deep holes. One of them is 58 foot --
24 I'm sorry -- 58, not 58 foot -- and 57. Those were

25 kersich-cross-white

1 drilled to cobble. That's at various depths,
2 and if you examine the logs of those, the log
3 of 58 says the hole went to six feet, terrace
4 deposits, slight slope adjacent to the area
5 shows cobble material, 15 to 25 feet deep, good
6 permeability.

7 The log for Hole 57 ends at seven feet,
8 but says hit cobble. Side slopes adjacent to
9 area show this terrace is approximately 25 feet
10 deep. The hydraulic conductivity of area is
11 very fast.

12 So the drainage engineer had been on that
13 particular large parcel, had drilled some holes
14 and substantiated what he found in the hole with
15 a view of the side slope to determine where the
16 depth to barrier would be.

17 Q Isn't it true that the deep Hole 57 to which
18 you just referred is 2 miles away from the parcel
19 that we are discussing?

20 A No. As a matter of fact, it might be two miles
21 to the very westerly edge, but I don't perceive
22 it as being two miles to the parcel, sir.

23 Q Well, Hole Number 57 is in Section 3, is it not?

24 A Section 4, isn't it? Hole Number 58 is in

25 kersich-cross-white

1 Section 4.

2 Q Let's start with 57.

3 A Fine.

4 Q That's in Section 3, is it not?

5 A That's correct.

6 Q And this parcel that we have referred to, the
7 122-acre parcel, lays in the next township north,
8 in Section 32; is that correct:

9 A Yes, but isn't it true that this is all one
10 parcel of ground that's being examined here?

11 Q I asked you about the 122-acre parcel which has
12 a different classification, and I'm asking you
13 whether or not Hole 57 is two miles away from
14 the parcel of 122 acres that we are discussing.

15 A Yes, Hole 57 does lie some distance from the
16 parcel that we're discussing.

17 Q And Hole 58 lies approximately one mile from
18 that parcel, does it not?

19 A Approximately, sir.

20 But it is obvious from the drainage
21 engineer's investigations that there were cut
22 slopes that were all exposed up and down that
23 bank that he could go ahead and utilize these
24 holes to determine that barrier would be in excess

25 kersich-cross-white

1 of six feet in that particular area.

2 THE SPECIAL MASTER: Are the Holes 57 and 58
3 in the same land form as the 122-acre tract?

4 THE WITNESS: They are in the same parcel,
5 yes, the same land.

6 Q (By Mr. White) What specific land form are they
7 in?

8 A I can't tell you right now because I would have
9 to go back and check, but if you'll look at the
10 log form again, it says that he hit cobble in
11 this terrace, so he identified it as land form
12 for purposes of his investigation.

13 Q And this terrace, that was in Hole 57 or Hole 58?

14 A Hole 57 and Hole 58, he identifies both as a
15 terrace deposit.

16 Q Is it your conclusion then that the barrier is
17 at a constant depth within that terrace?

18 A Barrier is never at a constant depth at any
19 terrace, but there are many ways to determine
20 where the barrier is. Obviously he was using
21 good judgment, making proper engineering
22 approach to the solution of this problem.

23 Q Would you please take a look at the log, soil
24 profile log, for Hole No. 6 in Section 32 which
25 kersich-cross-white

1 is in that parcel, 122-acre parcel?

2 A Hole No. 6?

3 Q Yes, sir. Would you read the remarks or the --

4 THE SPECIAL MASTER: He's got one question.

5 MR. WHITE: I'm sorry.

6 Q (By Mr. White) Did you find the log?

7 A Yes, I found the log.

8 THE SPECIAL MASTER: Didn't you ask to

9 read it?

10 MR. WHITE: No, I'm sorry, Your Honor.

11 Q (By Mr. White) Would you read the remarks
12 which are written in the right-hand column of
13 the log for Hole No. 6?

14 A Well, the Hole No. 6 for 1 South, 3 East, that
15 I have is -- wait a minute. Just a minute, please.

16 Q You should be at Hole No. 6 in 1 North, 3 East
17 there, Mr. Kersich.

18 A Again I'm just --

19 Q I have a copy, I believe, if you would like to
20 look at it. I can show it to your Counsel first
21 if you would like to see it.

22 A I think I have Log No. 6.

23 Q Oh, you do. Okay.

24 Isn't it true that the remark column says

25 kersich-cross-white

1 don't know where barrier is; lime at 14 inches?
2 A That's what the remark column says. It shows
3 he drilled the hole to 20 inches, gravel and
4 cobble.

5 Here again this is the reason you coordinate
6 the work of the drainage engineer and the land
7 classifier to develop this data. It was
8 obvious when he hit the gravel and cobble that
9 he wasn't going to be able to hand auger much
10 further and he had to sit down with the drainage
11 engineer to get a determination as to the
12 approximate location of the barrier.

13 Q Upon what information or whose opinion did you
14 base your conclusion that there is at least
15 six foot to barrier in a parcel where the land
16 classifier remarked that he did not know where
17 the barrier was located?

18 A In this particular instance I based my opinion
19 on that of the drainage engineer that was
20 involved in the field work and the determination
21 of depth to barrier of Mr. Waples, and I have
22 no reason to be concerned about it. I feel that
23 they have looked at it. They made a good decision.
24 We have no evidence to the contrary.

25 kersich-cross-white

1 Q The drainage engineer was Mr. Toedter?

2 A That's correct.

3 Q And what did Mr. Toedter tell you about this
4 parcel?

5 A I can't remember the exact conversation because
6 we went over a bunch of them, but he had went
7 and looked at that parcel; he went over the cut
8 banks and he found the barrier there. He put
9 two particular holes in that particular parcel.
10 He got down to seven feet in one and six feet
11 in the other before the cobble got heavy enough
12 to stop the drill, and yet he was able to
13 determine that the barrier was a considerable
14 distance beyond that.

15 It was his considered judgment, based on
16 his field observations and my review of his
17 field observations, that barrier is beyond six
18 feet in that particular parcel.

19 Q You say Mr. Toedter put two holes in that parcel
20 in the 122-acre parcel?

21 A I'm talking about the entire parcel.

22 Q Those are the holes that are over a mile and two
23 miles away, respectively?

24 A That's correct, but while they are two miles away,
25 kersich-cross-white

1 it's still all part of the same parcel.

2 Q And the depth to barrier remains constant
3 underneath that parcel?

4 A I believe I testified --

5 THE SPECIAL MASTER: He answered that
6 already. He doesn't need to answer it again.

7 Q (By Mr. White) Let's go to Section 18, 19,
8 and 20, the same Township, and I ask you to
9 look for a 227-acre --

10 THE SPECIAL MASTER: How many acres?

11 Q (By Mr. White) -- 227-acre tract that overlaps
12 those two sections.

13 A A 227-acre tract?

14 Q Do you find one like that?

15 A Yes, I do.

16 Q And it's classified 3 gravity, 2 sprinkler?

17 A Yes.

18 MR. WHITE: I apologize to the Court and
19 the witness for sniffing so much.

20 THE SPECIAL MASTER: Don't worry about that.

21 Q (By Mr. White) Is it true that there are three
22 holes on that parcel -- excuse me -- four holes
23 on that parcel?

24 A Are you referring to the probe holes, sir, as well
25 kersich-cross-white

1 as the sample hole and drill Hole No. 1?

2 Q Yes -- no, I'm referring to Holes No. 12, 51 and
3 the two probes.

4 A There are Bureau Hole 51 and Bureau Hole 12 on
5 the particular parcel, and there are two probe
6 holes there, and there is part of that parcel
7 actually, even though it's not fee land, there
8 was another hole that we drilled, hand auger.

9 Q Okay. Isn't it true that the log for Hole 51
10 which is within the 227-acre parcel went to 30
11 inches?

12 A I don't recall the depth of that Bureau logs,
13 and that is a Bureau hole.

14 Q Do you have that with you?

15 A Do I have them here with me?

16 Q Yes.

17 A I'm sure we do. I'll take a minute to get them.

18 Q While Ross is looking for that, perhaps I could
19 ask you -- well, let's just wait and deal with
20 all of them at once.

21 THE SPECIAL MASTER: Mr. White, do you have
22 some evidence of what the depth is of Hole 51?

23 MR. WHITE: Yes, sir. I asked him whether
24 or not it wasn't 30 inches, and he said he didn't

25 kersich-cross-white

1 know. I believe it is 30 inches, but if Mr.
2 Kersich --

3 THE SPECIAL MASTER: Would you be willing
4 to accept his --

5 MR. WHITE: I don't think he ought to.

6 THE SPECIAL MASTER: I know he doesn't have
7 to. I would want to know whether he would care
8 to.

9 THE WITNESS: I would like to check.

10 THE SPECIAL MASTER: I'm amazed at the capacity
11 everyone has for trusting each other in this
12 lawsuit.

13 MS. SLEATER: We've learned.

14 THE SPECIAL MASTER: You have been through
15 years of depositions, lots of work, conferences
16 by the hour, and we are coming near the end of it,
17 and I would think there would be a better way to
18 accept each other's statements based on the
19 Bureau's research, but I don't suppose it's going
20 to work out that way.

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end 16

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- 1 A. (Continued) Okay. This is the northwest 1/4 of the
2 Township 1 North, Range 3 East. There's a Bureau
3 hole logged 51, which is located in arable land
4 according to the Bureau, and as I read the log here,
5 sir, it says that it's 30 inches deep, and that it
6 appears they hit some gravel, according to their
7 legend.
- 8 Q. Would you also check Hole No. 12, which I believe is
9 within the 227 parcel --
- 10 A. I'm going to have to get the Southeast 1/4.
- 11 Q. -- and ask you to confirm that it is 26 inches
12 deep.
- 13 (Brief pause.)
- 14 A. Yes. Log 12 is indicated in Section 19, it's
15 in some arable land, at least land classified as
16 Class 3 by the Bureau, and it's 20 inches deep.
- 17 Q. What was the basis for your conclusion --
- 18 A. We discussed --
- 19 Q. -- where you had no holes as deep as six feet --
- 20 A. Very good --
- 21 Q. -- from depth to barrier here was six feet as
22 required by your standards?
- 23 A. I got a note on my drawing here that I worked --
24 when I was working on these projects, in reviewing
25 kersich - cross - white

1 them, and the note says "Ross checked the terraced
2 bank."

3 If you'll notice, just to the north of logged
4 Hole 51, the Bureau hole is the river stream, there's
5 a bank there, and this was the determination that
6 was made.

7 THE SPECIAL MASTER: What river is that?

8 THE WITNESS: Oh, I'd have to look. I don't
9 have the name here, I'm so confused. Let me get
10 the map out.

11 THE SPECIAL MASTER: Do you know the river,
12 Mr. White?

13 MR. WHITE: No, I don't, Your Honor. I wasn't
14 paying any attention. It says right next to the
15 classified area boundary, if that helps, in the
16 South Crowheart area.

17 THE WITNESS: I'll have to check.

18 MR. WHITE: Maybe we can look at the South
19 Crowheart.

20 THE WITNESS: Yeah.

21 THE SPECIAL MASTER: It would be one of the
22 tributaries, I think.

23 MR. WHITE: Let's look on one of the large
24 maps, Al, where it says classified area boundary.

25 kersich - cross - white

1 THE SPECIAL MASTER: One North, 3 East.

2 THE WITNESS: One North, 3 East.

3 THE SPECIAL MASTER: Around Sections 19 to 29.

4 THE WITNESS: That was probably the Wind River,
5 right there. I'll have to check that out.

6 THE SPECIAL MASTER: No, it lies south.

7 THE WITNESS: Right, south. It's the other
8 quarter, I'm sorry.

9 THE SPECIAL MASTER: This is a terrace that
10 adjoins the river itself?

11 THE WITNESS: Terrace just above the riverbank
12 there, yes.

13 THE SPECIAL MASTER: This is land that the
14 Bureau -- the 227 acres that the Bureau of
15 Reclamation classified as arable on their own
16 before you did your work; is that true?

17 THE WITNESS: Yes, sir, that's correct.
18 It lies in Section 19, 18 and 19.

19 Q (By Mr. White) Mr. Kersich, was the Bureau of
20 Reclamation classification for sprinklers?

21 A. This particular classification was gravity system,
22 as I recall, by the Bureau.

23 Just a moment, while I get that exact location
24 for you.

25 kersich - cross - white

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(Brief pause.)

2

A. This is the Wind River, sir. It would be lying, this is 1 North, 3 East, and it's Section 19, so this is Section 31, 30, 19 and 18. It lies right in here.

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Q. Mr. Kersich, do you know how Mr. Waples determined depth to barrier from the river cut to lead you to believe it was greater than six feet for the entire parcel?

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A. Yes. He used the normal methods that are employed by land classifiers of this type of work, to be able to take an instance where an exposed bank is involved and be able to determine, make a rational professional judgment where the barrier was.

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Q. What techniques would that be, would those include?

16

A. Most of them involve hard work. They involve going out to the bank and determining the number of places. You don't just do this in one spot.

17

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Q. The south end of that classified area, 227 acres must be at least a half a mile or more away from the river; isn't that correct?

20

21

22

A. I don't understand the question because the parcel parallels the river quite well here.

23

24

Q. Let me look at your map.

25

kersich - cross - white

1 THE SPECIAL MASTER: He meant the south
2 end of the whole parcel.

3 THE WITNESS: I'm sorry.

4 Q (By Mr. White) Is that correct?

5 A Yes.

6 Q How would a land classifier determine from the
7 cut the depth of barrier half a mile or more away?

8 THE SPECIAL MASTER: I think he's answered
9 that in his two prior answers, Mr. White. It
10 would be redundant, argumentative.

11 Q (By Mr. White) Immediately to the east of the
12 227-acre parcel that we refer to, do you find
13 an 85-acre parcel that sits on the common corner
14 of Section 19, 18 and 23 and 24 from the other
15 Township to the west?

16 A I do.

17 Q Upon what did you base your determination that
18 the barrier in that 85-acre parcel was at least
19 six feet?

20 A Mr. White, this is all one parcel. It's adequately
21 described on the map here, the boundaries, outlines.
22 It's still located to the same parcel we referred
23 to a moment ago, as far as the parcel is concerned.
24 It's located near the river.

25 kersich - cross - white

1 Mr. Waples made a considered judgment which
2 I respect and feel is completely accurate.

3 Q Is the southwestern end of that 85-acre parcel
4 approximately three-quarters of a mile away from
5 the river?

6 A Yes.

7 Q Isn't it true that you -- I'm sorry, Your Honor.

8 THE SPECIAL MASTER: Is the 85 acres also
9 3G and 2S, 3 gravity and 2 sprinkler?

10 MR. WHITE: The sprinkler classification is
11 blank on my map, Your Honor.

12 THE WITNESS: It is on mine also.

13 THE SPECIAL MASTER: What is the gravity?

14 THE WITNESS: Three, sir.

15 THE SPECIAL MASTER: Okay, go ahead, Mr. White.

16 Q (By Mr. White) Isn't it true that for that entire
17 terrace upon which those two parcels were located
18 you had no deep hole whatsoever?

19 A That's correct. There was no deep hole in there
20 that I could find on this map.

21 Q What is the approximate size of that terrace?

22 A About 400 acres. This might be a great time to
23 talk about the size and number of holes you have
24 there, you know, because you put in it the drainage

25 kersich - cross - white

1 holes, you need to find the barrier, you normally
 2 try to get four holes for a section to determine
 3 the texture. And that, as I recall under a semi-
 4 detailed land classification analysis, why you have
 5 to have two holes deeper than ten feet per Township,
 6 and, of course, the deeper holes sometimes can be
 7 replaced by cut banks or where visual observations
 8 can be made, so you don't drill every particular
 9 acre of the ground, but you do develop enough
 10 information so you can make a professional judgment.

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1 THE SPECIAL MASTER: Go ahead, Mr.
2 White.

3 Q (By Mr. White) Mr. Kersich, do you find, still
4 in Township 1 North, 3 East, in the South
5 Crowheart area, a 44-acre parcel classified
6 3 gravity, 2 sprinkler, overlapping Sections
7 32 and 29?

8 A You are on 1 North, 3 East?

9 Q Yes.

10 A Sections 32 and 39 --

11 Q 29.

12 A Sections 32 and 29. There's a 44-acre parcel
13 there, yes, 2 gravity, 2 sprinkler.

14 Q Is there a Bureau of Reclamation hole that's
15 36 inches deep on that parcel?

16 A May I please get my sheets there?

17 Q I'm sorry. Yes, please go ahead.

18 A It's the SW 1/4 of 1 North, 3 East?

19 Q I thought you had the depths annotated.

20 A I don't. Log hole 9, yes, I find that in Section
21 29 of Bureau plat and it's in the parcel of
22 Class 1 ground, and log no. 9 is 36 inches in
23 depth.

24 Interestingly enough, we have a hole very
25 kersich-cross-white

1 close to that that's also 36 inches in depth.

2 Q Would you please check the log of your hole
3 next to that and see whether or not at
4 36 inches you did not hit hard siltstone?

5 A What's the number of that log that you want
6 me to check there?

7 Q It's the one right next to Bureau log 9. On
8 the map I can't read it because I made another
9 mark over it. I think it's log 2.

10 If you can take a look at my map and see
11 what you think it is, Al.

12 A That's our log right there (indicating).

13 Q Yes.

14 A Very good.

15 Q Would you check your log?

16 A 1 North, 3 East, yes.

17 Yes, that's our log. It says from zero to
18 36 inches. We had loams and silty clay loams,
19 and then the log indicates a weathered -- a
20 hard siltstone, and that particular log, it
21 should be noted is located in Class 6 ground.
22 That is kind of interesting because the Bureau
23 has classified that ground as Class 2.

24 Q The Bureau had classified it for gravity. Now,
25 kersich-cross-white

1 is that correct?

2 A Oh, yes.

3 Q And that hole 2 or log 2 is right next to the
4 western boundary of that 44-acre tract, isn't it?

5 A It's in the tract there somewhere that was
6 classified as 6, yes.

7 Q But it's next to the tract that you classified
8 as 3 gravity, 2 sprinkler, isn't it?

9 A Yes. Here again, the classifier exhibited his
10 judgment, and I think he did a good job because
11 he actually threw out that piece where he had
12 that potential shallow depth to barrier and --

13 Q Well, if the depth to barrier was 3 feet on
14 the eastern edge of that 44-acre parcel and
15 your only other hole in the parcel was a
16 Bureau hole 36 inches deep, how did you determine
17 that the depth to barrier for the 44-acre parcel
18 was 6 feet?

19 A The classifier again classified this as part of
20 the total project. He had reason to make that
21 judgment. He threw out lands even though they
22 have been classified arable by others and
23 developed a different shaped parcel.

24 THE SPECIAL MASTER: Now, let me ask
25 kersich-cross-white

1 you a question: If that same classifier had
2 been working up in the Crow Reservation, and
3 by your own classification standards and his,
4 he had defined a 15-foot minimum to classify
5 that as 2, would he have done that?

6 THE WITNESS: I think you had better
7 check those specifications very closely because
8 under closer -- the depth is 30 inches.

9 THE SPECIAL MASTER: I didn't ask you
10 that. I said if the same classifier and you
11 were working under the land classification
12 standards of SK-7 --

13 A Yes.

14 THE SPECIAL MASTER: -- and classification
15 for Class 2 lands with 15-foot minimum for soil
16 depth to barrier, how would you have classified
17 these 44 acres?

18 MR. ECHOHAWK: Your Honor, I hate to
19 object to your question.

20 THE SPECIAL MASTER: I didn't mean to
21 have all of you hit the floor at the same time.
22 What have I done?

23 MR. ECHOHAWK: There is no foundation
24 to say that, in fact, Plaintiffs' Exhibit SK-7

25 kersich-cross-white

1 is, in fact, the Crow standards. There has
2 been no foundation laid for that.

3 THE SPECIAL MASTER: Well, I remember
4 a rather vigorous exchange about thirty minutes
5 ago involving this document and all sorts of
6 potential activities centered thereon, and I
7 think my question was a pretty fair one, and I
8 would like to have it answered.

9 I don't mind a judgment call for a couple
10 hundred acres, but I just wondered about this
11 particular one when it shows, frankly, two holes
12 bringing out the same hard siltstone at 3 feet,
13 and I would kind of like to know at what point---
14 I would like to know at what point does a
15 professional determination step into the minds
16 of the land classification people that this is
17 not arable land.

18 MR. ECHOHAWK: My only point --

19 THE SPECIAL MASTER: That's all I
20 was trying to get.

21 MR. ECHOHAWK: So far these are
22 statements of Mr. White that these are Crow
23 standards.

24 THE SPECIAL MASTER: Let me withdraw
25 kersich-cross-white

1 that question and let me ask this: If your
2 classification standards for Class 3 standards
3 on this just happened to be 15-foot minimum
4 instead of 6, would you still classify this as
5 Class 3 gravity land?

6 THE WITNESS: On the basis of barrier
7 he would have to classify it, but I would like
8 to add one little thing.

9 THE SPECIAL MASTER: You add whatever
10 you want to. I don't want to badger you. I
11 just want some facts --

12 MR. WHITE: May I interrupt for just
13 one minute? I would like for you not to withdraw
14 your question.

15 THE SPECIAL MASTER: I asked the same
16 question and got my answer.

17 THE WITNESS: There are two things
18 that go on here. Those specifications were
19 predicated without any particular artificial
20 internal drainage, if you understand what I
21 mean. That's putting pipes to the ground, picking
22 up the water, and taking it off, so you may --
23 I can't remember everything because that's been
24 a long time ago, but you have to tie the

25 kersich-cross-white

1 drainage together with the conditions that
2 you're talking about.

3 Here we tie drainage on many factors, a
4 depth to barrier, hydraulic conductivity, and
5 economic drain spacing, and I can't recall
6 whether we did that or not on that, but many
7 times that is the case, so you have to look
8 at the total picture.

9 If you had a specification, however, that
10 did call for drainage -- or depth to barrier,
11 you attempt to get as reasonably close to that
12 as you can.

13 THE SPECIAL MASTER: I'm satisfied
14 with your answer.

15 MR. WHITE: Your Honor, I would just
16 like to say that at page 1482 of the transcript
17 Mr. Kersich did testify that at the time he did
18 the Crow work he used the 20-foot minimum depth
19 for Class 1 lands. That was independent of
20 the exhibit, and I believe the same thing is
21 true with respect to the 15-foot minimum on
22 page 1483. There's no answer there, but I
23 believe the Master will recall the context, and
24 if you would like to read the page --

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THE SPECIAL MASTER: There's no problem on that.

MR. ROGERS: Your Honor, for the record, I would like to note that I realize the Court restated his question so that reference to document SK-7 was unnecessary, but at this point that exhibit has not yet been offered in evidence and I think it would be improper to use it.

I have, frankly, no objection if Mr. White would like to inquire of the witness whether or not it, in fact, is the same standards that they have been used by HKM in their work on the Crow Reservation.

At the time yesterday Mr. Kersich was not able to answer that question, and I don't know whether he is today or not. I have no objection if that question is reposed.

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THE SPECIAL MASTER: I'm sure that Mr. White would be happy to ask it.

Q (By Mr. White) Mr. Kersich, did, in your work, classifying soils, in the Crow Reservation, you use a land classification standard of soil depth to barrier for Class 2 lands of 15 feet?

A My answer to that question is that I've asked for a copy of those standards to be sent to me from our files. They were telefaxed down, and I can't read them. As soon as they are --

THE SPECIAL MASTER: Off the record, please.

(Off-the-record discussion.)

THE SPECIAL MASTER: Back on the record.
Mr. Rogers.

MR. ROGERS: A question I had hoped Mr. White would rephrase from yesterday is whether or not these were the documents that have been marked as SK-7, is the -- are the soil classifications standards that were used by HKM in their land classification work on the Crow Reservation.

THE SPECIAL MASTER: The question that was asked was answered; I sent to get a copy of them and I can't read them.

MR. ROGERS: That was not the question asked.
kersich - cross - white

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Mr. White, however --

2

THE SPECIAL MASTER: Pretty close.

3

MR. ROGERS: I thought we may have a resolution of it myself.

4

5

MR. WHITE: We'll let Mr. Rogers ask the question on his re-cross.

6

7

THE SPECIAL MASTER: He'll cross on your case in chief. In any event, continue, Mr. White, or if you want to break, it won't hurt my feelings.

8

9

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MR. WHITE: I'd like to do it now.

11

THE SPECIAL MASTER: I'm tired too. We stand in recess until 9:15 tomorrow morning.

12

13

What it is, Regina?

14

MS. SLEATER: Never mind.

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THE SPECIAL MASTER: All right. 9:15 in the morning.

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(Whereupon the proceedings
(were recessed.

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