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Trial Transcript, Vol. 17, Morning Session

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File 124
4375
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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
Land and Natural Resources
Division

Federal Building
Cheyenne, WY 82002

and

MR. TOM ECHOHAWK
Attorney at Law
Land and Natural Resources
Division

1961 Stout Street
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

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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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end 5

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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

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

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

6 THE SPECIAL MASTER: Down the road.

7 THE WITNESS: That's right.

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

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

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

12 THE SPECIAL MASTER: 15 and 16.

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

15 I find a 110-acre parcel.

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

18 A Is that a Bureau hole you are referring to?

19 Q Yes, Bureau hole 10.

20 A That could be, sir, yes.

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

23 THE SPECIAL MASTER: You have got to
24 trust somebody.

25 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.

23 * * * * *

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25 kersich-cross-white

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

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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?

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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

23

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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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- 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;

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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;

25 kersich-cross-white

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
kersich-cross-white

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

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

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

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

MR. ECHOHAWK: My point is they were

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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end 13

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