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Case # 4993

File # 147

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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 _____
5/1 1981
Margaret J. Hampton CLERK
DEPUTY

VOLUME 40
Morning Session
Monday, April 20, 1981

ORIGINAL

APPEARANCES

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WYOMING:

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Denver, CO 80202

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BY: MR. JAMES MERRILL, Special
Assistant Attorney General,
and MR. STUART RIFKIN and
MR. SCOTT KROB

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FOR THE UNITED STATES
OF AMERICA:

MR. JAMES CLEAR
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MR. JOSEPH MEMBRINO
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FOR THE SHOSHONE
TRIBE:

SONOSKY, CHAMBERS & SACHSE
200 M. Street, N.W.
Washington, DC 20006
BY: MR. HARRY SACHSE

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1 THE SPECIAL MASTER: United States of
2 America ready to proceed?

3 MR. ECHOHAWK; We're ready, Your Honor.

4 THE SPECIAL MASTER: And the State of
5 Wyoming's present?

6 MR. MERRILL: Yes, ready to go.

7 THE SPECIAL MASTER: Are there any new
8 counsel to make appearances? Mr. Sachse?

9 MR. SACHSE: I'm here for both Tribes this
10 week.

11 THE SPECIAL MASTER: Mr. Clear, any other
12 counsel for the United States?

13 MR. CLEAR: Mr. Membrino is here again.

14 MR. ECHOHAWK: Mr. Membrino will be here
15 shortly. We can start without him.

16 THE SPECIAL MASTER: Mr. Echohawk, Mr. Clear,
17 Mr. Merrill and the witness is here, so let's resume,
18 or we'll be glad to wait, if you wish, to wait for
19 Mr. Membrino.

20 MR. ECHOHAWK: No, we can go ahead and start.

21 THE SPECIAL MASTER: Before you do, I received
22 in the mail this morning the State of Wyoming's eleventh
23 request for production to the United States. I am
24 inclined to leave and refer to it in ten days from now.
25 Is that what you wish, Mr. Merrill?

1 MR. MERRILL: That would be fine, Your
2 Honor. Our intention is not to make a motion out
3 of it at this point, but to wait and see what the
4 United States' response is. Under the rules they
5 have 30 days.

6 THE SPECIAL MASTER: It's in the mail to
7 all parties, so we'll refer to it in ten days from
8 now.

9 Mr. Echohawk.

10 MR. MERRILL: Your Honor, before we begin
11 this morning, I'd like to make a request on the
12 record. As we began last Tuesday over in hearing
13 room 302, Mr. Echohawk stated that he had with him
14 several of the documents to satisfy one of the
15 State of Wyoming's earlier requests for production,
16 and that upon reviewing those he was going to hand us
17 copies. I just want to point it out we have not as
18 yet received copies of those documents, now a week
19 later. And I would like to request that those be
20 turned over to the State today because I believe they
21 contain some materials which would be vital to the
22 State's preparation for cross-examination of the next
23 witness who is Mr. Bob Toedter, the drainage engineer
24 from HKM.

25 MR. ECHOHAWK: I'll make those available to

1 Mr. Merrill hopefully tonight. I left them in my
2 briefcase in my office in Denver and they're being
3 flown up this morning.

4 THE SPECIAL MASTER: Very well.

5 MR. MERRILL: The second preliminary
6 matter I'd like to raise, Your Honor, concerns the
7 schedule of witnesses, and understanding the Court's
8 desire to continue expediting these proceedings, I
9 expect my cross-examination of Mr. Waples will
10 probably conclude sometime tomorrow, and I simply
11 wanted to go on record as advising the United States
12 that the next witness would probably be available
13 tomorrow, should be available tomorrow. In any
14 event I intend to finish with Mr. Waples and also
15 the second witness, Mr. Bob Toedter, who is present
16 in the courtroom, we would anticipate concluding his
17 cross-examination sometime Wednesday afternoon
18 although I understand we're quitting at two o'clock
19 or perhaps Thursday morning, just so that they know
20 and have time to get their witnesses lined up ahead
21 of time.

22 THE SPECIAL MASTER: Very well.

23 MR. MERRILL: The third point was that we
24 held over from last week our objection to the
25 introduction into evidence of Exhibit C-224 and 224-A

1 based on the ten-day rule. Having reviewed those
2 exhibits this weekend, the State of Wyoming has no
3 objection to their admission into evidence. We have
4 some questions about those documents, which I'm
5 not sure technically whether they're voir dire or
6 cross-examination, but I thought I would just save
7 it for cross for the convenience of the Court and
8 Counsel.

9 THE SPECIAL MASTER: Very well.

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1 THE SPECIAL MASTER: Exhibits WRIR SE-224 --
2 no, C-224 and 224-A are hereby admitted into evidence
3 because they were qualifiably admitted last week,
4 and they will hereby be admitted into evidence.

5 (Whereupon Exhibits WRIR
6 (C-224 and C-224-A were
7 (admitted into evidence.

8 You may proceed, Mr. Merrill.

9 MR. MERRILL: Thank you, Your Honor.

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. MERRILL:

12 Q Mr. Waples, would you please take out Exhibit
13 C-226, which I believe is a copy of your
14 report, and return to the land classification
15 standards in table 1 which begins on page 5 of
16 that report.

17 THE SPECIAL MASTER: Which page of that
18 report?

19 MR. MERRILL: Page 5, Your Honor.

20 Q (By Mr. Merrill) Mr. Waples, what are the bases
21 upon which you developed the land classifications
22 standards in table 1 as they applied to the
23 project lands described in your testimony?

24 A These standards, and Mr. Kersich testified, were
25 based upon Bureau of Reclamation standards used

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1 in the area for various land classification
2 programs. The basis is the same.

3 Q Are they based substantively on the Bureau of
4 Reclamation standards, or were they developed
5 procedurally like the Bureau's standards are
6 developed?

7 A They're based -- perhaps the answer is some of
8 both. They are based largely on standards that
9 were used in the area previously.

10 Q Which standards were those?

11 A The standards that were used in the 1961 semi-
12 detailed, the Muddy Ridge standards, the general
13 Bureau standards.

14 Q When you say "General Bureau standards," are you
15 referring to those set forth in some particular
16 document or study?

17 A Well, all or most, I should say, standards are
18 based on a general format as put forth in the
19 Bureau of Reclamation land classification
20 manuals.

21 Q Would you please describe the process by which
22 you developed these standards for their
23 application to the project areas, the FIP's and
24 the LeClair, I believe, and the Midvale?

25 waples-cross-merrill

- 1 A I'm not sure exactly what you're getting at.
- 2 Q Well, I don't want you to answer an ambiguous
3 question. Let me try rephrasing it. Would
4 you explain to the Court how you developed the
5 parameters that are set forth in table 1, and
6 specifically how you determined that these
7 standards should apply to the project lands that
8 you classified as part of the historic lands?
- 9 A Okay. They're based very, very strongly on the
10 1961 standards. Now, the reason they -- the
11 reason we were able to use them for the project
12 type work we are discussing here, is because
13 they were used originally for that type of work,
14 and while economic conditions do change, the
15 relative values in the given classes should stay
16 approximately equal.
- 17 Q In developing the standards, did you follow the
18 general guidelines of the Bureau of Reclamation,
19 in other words, the process that they advocate
20 using when developing land classification
21 standards?
- 22 A Not exactly, sir. You have to remember that we
23 are not doing a Bureau study here, we are -- our
24 beginning point, the definition of arable lands
25 waples-cross-merrill

1 differs from the Bureau, and we have certain
2 procedures that we followed that do not necessarily
3 follow that of the Bureau. We used things where
4 it was logical to do so in this process. We did
5 not try to follow the Bureau process.

6 Q Isn't it true, however, that the Bureau standards
7 are the best standards available for the type
8 of work that you did, which is classifying lands
9 as arable or nonarable?

10 MR. ECHOHAWK: Could I have the question
11 read back?

12 (Whereupon, the Reporter
13 (read back, "Q Isn't it
14 (true, however, that the
15 (Bureau standards are the
16 (best standards available
17 (for the type of work that
18 (you did, which is classifying
19 (lands as arable or non-
20 (arable?"

21 THE WITNESS: That is somewhat of a
22 subjective statement. There are several ways of
23 going about delineating arable from nonarable
24 lands. The Bureau method is certainly one of
25 the best methods.

26 Q Haven't you stated before in your professional
27 opinion that the Bureau standards are the best
28 standards available for this type of work?

29 waples-cross-merrill

1 A Very possibly.

2 Q And haven't you also stated that the Bureau of
3 Reclamation has developed the most widely
4 accepted standards from a practical land
5 classification standpoint?

6 A Yes, but we are mixing the apples and oranges
7 a little bit here. The delineation of arable
8 from nonarable lands is not necessarily the
9 same thing as doing a land classification.

10 Q Are you saying, then, that the Bureau standards
11 do not apply at all to this kind of work?

12 A No, no.

13 Q Well, I don't understand your response in saying
14 that the land classification the way the Bureau
15 provides that you set it up and do it, is
16 different from the land classification you did
17 for this case. Can you please explain the
18 distinctions?

19 A I will try, yes. As I stated before, our --
20 we started from a little bit different
21 beginning. Our definition of arable lands are
22 those lands that can sustain long-term irrigation
23 while the Bureau definition is somewhat
24 different. We -- our primary concern is the

25 waples-cross-merrill

1 delineation of arable from nonarable lands.
2 The Bureau of Reclamation in a land classification
3 program, one of the major thrusts of that
4 program is to develop farm-sized units that
5 have the same type payment capacity; hence the
6 great amount of detail spent with degrading the
7 economics and land classification prior to the
8 beginning of the actual field work. We are
9 developing with a separate premise to begin
10 with, and we have a separate end point. We are
11 dealing with what will be large scale farm
12 development rather than individual units. So we
13 weren't nearly as interested in -- excuse me --
14 the very explicit and precise breakdowns of
15 Class 1, 2 and 3. The economics -- there are
16 economics inherent in the standards as was stated
17 before. Its been stated many times. And the
18 further economics will or were done after the
19 arable land base was delineated.

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25 waples-cross-merrill

1 Q (By Mr. Merrill) Can you describe what level
2 of economics were developed into these standards
3 for their use in the project historic lands?

4 A As I said, these standards are based upon the
5 Bureau standards that were developed in the
6 area, and the economics that were inherent in
7 those standards are reflected in these standards.

8 Q Isn't it true that according to the Bureau of
9 Reclamation, the fundamental consideration,
10 in land classification standards are one, the
11 productive capacity of the land; two, the costs
12 associated with crop production and land
13 development, which are a result of soils topography
14 and drainage?

15 A That's correct.

16 Q To what extent did you consider the productive
17 capacity of the land in determining the standards
18 in table 1 as they apply to project lands?

19 MR. ECHOHAWK; Objection, Your Honor, this
20 line of questioning is irrelevant. I believe we
21 also covered this with Mr. Kersich. I think it's
22 redundant and irrelevant. HKM did their own land
23 classification standards and did not follow the
24 Bureau of Reclamation.

25 waples-cross-merrill

1 MR. MERRILL: That's not the testimony.

2 THE SPECIAL MASTER: The objection is

3 overruled; he may answer.

4 Do you want that question read to you again?

5 THE WITNESS: Yes, please.

6 THE SPECIAL MASTER: Would you do that?

7 (Thereupon the following
8 (question was read back
9 (as follows: "Q To what
10 (extent did you consider
11 (the productive capacity
12 (of the land in determining
13 (the standards in table 1
14 (as they apply to project
15 (lands?"

12 THE WITNESS: These, as I -- I guess I'm
13 not getting it across. We used standards that
14 were similar for most of the quantities, for
15 many of the quantities that were originated by
16 USBR, and we -- we used the economics that were
17 inherent in those standards, modified them as
18 we felt was necessary, but the majority of the
19 economics is done after the land classification
20 was finished in this program.

21 Q (By Mr. Merrill) You testified a moment earlier,
22 I believe, that your standards were to some extent
23 based on the Bureau standards, is that a fair
24 summary?

25 waples-cross-merrill

1 A Yes, it is.

2 Q Okay. What I'm wondering is, did you adopt
3 the Bureau's standards and thus the economics
4 inherent in the Bureau standards or did you
5 do an independent economic analysis to determine
6 whether those standards were appropriate to use
7 on the project historic lands here?

8 A We did no independent economic analysis.

9 Q Isn't it true that in the Bureau studies and
10 the Bureau process they require the integration
11 of the economic analysis into the development
12 of land classification standards?

13 A Yes, it is.

14 Q And you didn't follow that procedure in this
15 work, is that correct?

16 A We based our standards on the economics that
17 were inherent in the standards.

18 Q But did you do -- What I'm asking is did you do
19 an independent analysis to determine whether
20 those standards were appropriate, the Bureau
21 Reclamation standards were appropriate to use
22 in the project historic lands that you classified?

23 THE SPECIAL MASTER: He's answered that, he
24 said no.

25 waples-cross-merrill

1 Q (By Mr. Merrill) Would you please turn to
2 page 41 of your report, and I direct your
3 attention to your definition of land class at
4 the bottom of the page. Doesn't that definition
5 speak in terms of similar physical and economic
6 characteristics?

7 A Yes, it does.

8 Q What determinations did you make that the
9 classification standards take into account
10 economic and physical characteristics which are
11 similar between the classes of arable land that
12 you use?

13 A Because the Bureau of Reclamation standards on
14 which these -- excuse me, the standards were
15 based, break out the classes by -- by similar
16 physical and economic characteristics.

17 Q In adopting or making the decision to adopt the
18 Bureau of Reclamation standards for use here,
19 did you consider the similarity between the
20 land bases which you were classifying here and
21 in which the Bureau standards had been applied
22 in the past?

23 A They were, in a large part, the same land base.

24 Q Did you make any analysis, in adopting these
25 waples-cross-merrill

1 standards, of the probable influence of the
2 specific physical factors in the area you
3 classified and how they would affect the economics
4 of production?

5 A Could I have that once more, please?

6 (Thereupon the following
7 (question was read back
8 (as follows: "Q Did you
9 (make any analysis, in
10 (adopting these standards,
11 (of the probable influence
12 (of the specific physical
13 (factors in the area you
14 (classified and how they would
15 (affect the economics of
16 (production?"

17 THE WITNESS: I'm sorry, but I don't under-
18 stand the question.

19 Q (By Mr. Merrill) Let me try it again.

20 THE SPECIAL MASTER: I don't either, so
21 maybe you can attempt it again.

22 MR. MERRILL: All right, Your Honor, I'll
23 try it again.

24 Q (By Mr. Merrill) Isn't it true that the land
25 classification standards take into account various
physical factors which will affect the cost of
production and the returns from crops?

A Yes.

Q I'm wondering what analysis you did of those

waples-cross-merrill

1 specific factors as they exist in the historic
2 project lands.

3 A Okay. The land classes as we used them are
4 relative land classes, as a point of determining --
5 determining arability of land. The specific
6 engineering economics are very specific, is done
7 after the arable base has been formulated, its
8 been delineated.

9 Q Are you saying then that the engineering economic
10 analysis should take into account the specific
11 physical factors associated with each tract of
12 land?

13 A Well, in all cases it isn't necessary to look at
14 an individual tract of land. We're interested
15 in similar land with similar characteristics.

16 Q Isn't it true that the land classification
17 standards set forth in table 1 of your report
18 on page 5 vary from the standards that have been
19 used by the Bureau of Reclamation in classifying
20 the same lands?

21 A Somewhat, yes.

22 Q Would you describe the variations between the
23 Bureau's standards and the standards set forth
24 in table 1, please?

25 waples-cross-merrill

- 1 A These are somewhat of a composite set of
2 standards. I -- because of that, it makes it
3 very difficult to go through in the individual
4 differences.
- 5 Q Can you describe them by general category then
6 rather than specifics?
- 7 A Okay. The major -- Well, the standards that form
8 the most basis for our standards were used in
9 1961 study. They, at that time, did not involve
10 sprinkler irrigation for one thing. So we --
11 we have a sprinkler set of criteria. There were
12 a few differences such as depth to lime zone.
13 There was nothing that we felt we left out that
14 was reasonable -- that was not reasonable to leave
15 out.
- 16 Q Did you adopt the Bureau's standards for soil
17 texture?
- 18 A Without having the various standards in front of
19 me I wouldn't want to make an estimate on that.
- 20 Q Do you have a copy of the Bureau standards?
- 21 A Not with me, no.
- 22 Q Are they available in the courtroom?
- 23 A Perhaps.
- 24 Q Why don't we go off the record for a moment and
25 waples-cross-merrill

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you can take a look, if that's all right with
the Court.

(Off-the-record.)

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waples-cross-merrill

1 THE WITNESS: Well, I can't lay my hands
2 on them right now. It's possible at noon or
3 something we might be able to round them up.
4 Our standards more or less stand on their own.

5 Q (By Mr. Merrill) Would you please take a look
6 during the lunch break and see if you can find
7 a copy of those to use this afternoon?

8 A Yes.

9 Q Thank you.

10 Would you please turn to page 6 of your
11 report, just the second page of table 1, and
12 review particularly the irrigation pattern and
13 the field size standards. These are for the
14 project areas, if I'm looking at the right
15 table.

16 A Uh-huh.

17 Q I believe you testified last Thursday that the
18 minimum size requirements for the various classes
19 of land for both gravity and sprinkler were not
20 hard and fast minimums, but more guidelines;
21 is that correct?

22 A Well, we tried to stick pretty close with them,
23 but as in this soils business in general, there
24 are always exceptions to the rule that should we

25 waples-cross-merrill

1 take them into account rather than just
2 approaching things from a strictly structured
3 standpoint.

4 Q Isn't it true that in the project lands you
5 classified six tracts of land as arable Class 2
6 gravity, totaling 37.6 acres, which do not meet
7 the literal requirements of the classification
8 standards?

9 A I don't know that that's a fact without seeing
10 the tracts.

11 Q Do you have any knowledge of the amount of land
12 that you classified as arable that does not meet
13 the minimum field size requirements in table 1?

14 A No, I do not. I should say one thing, oftentimes
15 a piece of arable land, if it's -- I stated this
16 Friday -- is adjacent to irrigated land or other
17 parcels of arable land, it will allow these
18 tracts to be included in the arable base because
19 the field that would be used is a much larger
20 field than the two acres, or whatever.

21 Q Are those the tracts of land to which footnote 2
22 on page 7 would be applicable?

23 A What this is talking about is -- one moment.

24 (Brief pause.

25 waples-cross-merrill

1 THE WITNESS: There again, this is a --
2 it's an attempt to keep from putting lands that
3 are, say an acre in size or two or three or five
4 that are totally isolated that were not -- it
5 would be difficult to serve that type of thing.
6 It's just a -- and there again, it's not a hard
7 and fast rule. As I said, these are all guidelines.
8 It allows -- if you have a smaller piece than
9 that and there is some probability that the
10 agriculturally engineering economics were done,
11 it might fall out, but there is still a possibility
12 the ag engineer and the economist could make a
13 small tract work. Now, if that's the case, it
14 certainly is not up to me to say that land isn't
15 arable.

16 Q Are you speaking of at least 40 acres requirement
17 in footnote 2, or are you speaking of the entire
18 footnote generally?

19 A Speaking of the entire footnote.

20 Q How did you determine for those standards that
21 the parent tract, if you will, the larger tract
22 to which a small one under consideration is
23 adjacent, how did you determine that the parent
24 tract should be at least 40 acres in size?

25 waples-cross-merrill

1 A If that is a -- well, here again, it's just a
2 guideline. The 40 acre tract is a fair sized
3 field. It just is a -- these things you have to
4 have -- you have to put some numbers in these
5 things, and, you know, you could put in 100 acres,
6 you could put in 20 acres, you could put in 60
7 acres, a determination is just made that that is
8 a reasonable unit that may be farmed. Now, as
9 I said, the agricultural engineering and economics
10 will go into this before that land is determined
11 to be arable or not. We are looking at -- this
12 is just the starting point of this thing. We are
13 looking at a great deal more work that will be
14 done on these lands. The arability is merely a
15 starting point.

16 Q Let me rephrase the question, perhaps I didn't
17 state it very well, and that is, how did you
18 determine the tract size of the parent tract
19 should be at least 40 acres as opposed to 10
20 acres or 100 acres?

21 MR. SACHSE: Objection, Your Honor. He
22 just answered that question.

23 THE SPECIAL MASTER: Well, I thought he did,
24 but if you think you can help him more, you may

25 waples-cross-merrill

1 help him.

2 THE WITNESS: Okay. The 40 acres was
3 merely a reasonable size acreage from which to
4 form a base, a parent size land, a parent piece,
5 if you will.

6 Q I take it in actually classifying the land, you
7 weren't strictly bound then by the 40 acre
8 requirement for a parent tract?

9 A That's correct.

10 Q How small could a parent tract be that you
11 would still include an adjacent tract as
12 arable?

13 A It would depend on the individual situation.

14 (Brief pause.)

15 MR. MERRILL: Your Honor, apparently
16 in moving over the large exhibits, we got them
17 a little bit out of order. I ask the Court's
18 indulgence.

19 THE SPECIAL MASTER: I have a small pack
20 of them, of the same thing here, if you want
21 to use them.

22 MR. MERRILL: That might be a better way
23 to follow along.

24 THE SPECIAL MASTER: The witness has a set,
25 waples-cross-merrill

1 too. Either way. You can use these, if you
2 wish.

3 MR. MERRILL: Thank you very much.

4 Q (By Mr. Merrill) Ross, I direct your attention
5 to what has been previously admitted into
6 evidence as United States Exhibit WRIR C-188,
7 and particularly to tract no. 2-34X, which is
8 up toward the northeast corner --

9 A Yes.

10 Q -- lumped together with several tracts. Isn't
11 it true that you classified that land as Class 2
12 arable gravity lands,

13 A Yes, it is.

14 Q Isn't it true that that piece of land does not
15 meet the literal requirements of table 1 in that
16 it's not at least ten acres in size?

17 A Yes, it does. But perhaps -- perhaps we should
18 look at the aerial photo. These do not tell
19 the whole story.

20 Q Do you have those photos here?

21 A Yes, I do.

22 MR. ECHOHAWK: Jim, what tract number was
23 that?

24 MR. MERRILL: 2-34X.

end 4

25 waples-cross-merrill

- 1 Q (By Mr. Merrill) You have that photo, Ross?
- 2 A Yes, I do.
- 3 Q Is that one which has been previously admitted
- 4 into evidence, if you know?
- 5 MR. ECHOHAWK: I don't believe so.
- 6 THE WITNESS: I don't think it has.
- 7 Q (By Mr. Merrill) Isn't it true that according
- 8 to Exhibit C-188, tract 2-34X is adjacent to
- 9 three other tracts of land, those being 2-33X,
- 10 2-35X and 2-37X?
- 11 A That's correct.
- 12 Q Isn't it true that those adjacent tracts of
- 13 land only totaled 36.1 acres.
- 14 A Yes, it is and that was considered to be close
- 15 enough.
- 16 Q Okay. On the same exhibit would you please take
- 17 a look at tract 2-35X.
- 18 A Yes.
- 19 Q Did you classify that land as Class 2 gravity?
- 20 A Yes.
- 21 Q Even though it also does not meet the literal
- 22 ten-acre requirement minimum size?
- 23 A That's correct. Now, these three tracts are
- 24 merely divided by a farm road lane. These
- 25 waples-cross-merrill

1 tracts could be managed quite easily together
2 from a gravity standpoint.

3 Q In making that determination, did you consider
4 the physical work necessary to transport water
5 across that farm road?

6 A One more thing we have to remember here is we're
7 discussing arable lands. Now, there is no reason
8 to necessarily believe that land will be there in
9 another 20 years.

10 Q Isn't it true that the three tracts adjacent to
11 tract 2-35X total only 29.1 acres of arable
12 land?

13 A I haven't added them up, but I'll take your word
14 for it.

15 As I said, these three or four fields, four
16 fields to the north of the highway were considered
17 to be manageable as one, essentially one tract
18 of land for the 40-acre determination. For 36
19 acres that was close enough.

20 Q And I take it 29.1 acres was also close enough?

21 A It depends on the circumstance. Now, if that --
22 Well, let me explain it this way. The Coolidge
23 Canal runs right at the south end of those tracts.
24 The water is very available. The management of

25 waples-cross-merrill

1 those tracts is not that big a problem. Now,
2 that's, as I've explained before, these are
3 guidelines and we look at everything on a site
4 by site basis rather than using dogmatic hard
5 and fast rules that -- that cannot be applied
6 too well -- Well, are not flexible enough to
7 be used in the field practically.

8 Q Would you please direct your attention to tract
9 no. 2-36X, which is also on C-188, which is
10 the photograph you pulled.

11 A Yes.. That is one of the four tracts of land
12 that affects this field that we are discussing.

13 Q Isn't it true that that tract is only 4.9 acres?

14 A Yes.

15 Q Isn't it true that the adjoining tract 2-35X and
16 2-38X total only 23.4 acres?

17 A What we are talking about is managing 2-34X, 2-35X --
18 excuse me, 2-33X plus 2-36X as essentially one
19 arable unit.

20 Q Are those tracts all adjacent to one another?

21 A They're separated by farm lanes.

22 Q Is there any distance between any of those tracts
23 other than a farm road?

24 A There may be a waste-way or some other type by

25 waples-cross-merrill

1 irrigation facility that is no hinderance to
2 management.

3 Q Isn't it true that tract 2-36X is separated
4 from tract 2-38X, which is the 14.9 acre tract
5 immediately to the south, is separated by a
6 fenced paved county road?

7 A Between 2-35 and 2-36?

8 Q No, excuse me, between 2-36 and 2-38?

9 A Yes, that's correct. We weren't discussing 2-38,
10 if I did, I was in error. We weren't discussing
11 2-38 as being part --

12 THE SPECIAL MASTER: He didn't ask you
13 about that. You answered his question all right.
14 What is between 2-38X and 2-36X, is it a fenced
15 county road, and you said yes.

16 THE WITNESS: Yes, it is.

17 Q (By Mr. Merrill) Ross, would you please turn
18 to Exhibit C-200.

19 A Two hundred?

20 Q Yes, which is also one of your maps.

21 A What is the photo number for that one?

22 Q "16" -379-110.

23 A May I get the aerial photo?

24 Q You bet. If I can look at your map for a minute.

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1 THE SPECIAL MASTER: I'm hoping, Mr.
2 Merrill, that your questions don't involve
3 three and four tenths acres on this exhibit,
4 that they're a little more than that.

5 MR. MERRILL: I'm afraid they do, Your
6 Honor.

7 THE SPECIAL MASTER: Then that would go to
8 my objection of them being diminimus.

9 MR. MERRILL: Your Honor, I understand that
10 the acreage involved in these particular examples
11 may seem to be quite small. I'm trying to make
12 two, essentially two points to the Court. One,
13 that the standards were not applied as rigidly
14 as on their face might seem to be the case, and
15 secondly, when added up, all of these small
16 tracts in fact constitute a fairly major amount
17 of land.

18 THE SPECIAL MASTER: That reminds me when Mr.
19 Dickerson said a billion here and a billion there
20 and pretty soon you have real money. All right.

21 Q (By Mr. Merrill) Ross, I direct your attention
22 to tract no. 2-28X, which is a 3.4 acre tract
23 classified 3 gravity.

24 A Yes, just one moment. Let me -- Yes, okay.

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1 Q Okay. What tracts did you consider to be
2 adjacent tracts or parent tracts for purposes
3 of classifying that land as arable?

4 A The -- There are two. There's -- There's an
5 irrigated piece of ground immediately to the
6 west.

7 Q Is that 2-42?

8 A 2-42?

9 Q I'm sorry, 2-29X?

10 A No, sir.

11 Q I'm not looking at the right one. Well, tell
12 me which tract you're looking at so I can find
13 it.

14 A Well, we started with 2-28. It's adjacent to
15 an irrigated piece of ground which does not show
16 on this. We're dealing only with nonirrigated
17 piece of ground on these exhibits. It lies
18 immediately to the west of 2-28X.

19 THE SPECIAL MASTER: Does it lie between the
20 edge of 2-27X?

21 THE WITNESS: Yes, it does, Your Honor.

22 Q (By Mr. Merrill) Did you say there were two
23 tracts that you consider to be adjacent?

24 A Well, let's see. Yes, there's the irrigated piece
25 waples-cross-merrill

1 that we just discussed and the one west of it,
2 adjacent and west of it.

3 Q So you're talking about a unit of 2-28X and the
4 irrigated piece adjacent to that and then 2-27X?

5 A Well, a portion of 2-27, yes.

6 Q Would you please turn to Exhibit C-207 which
7 corresponds to photo no. "18" -379-34.

8 A Okay.

(Brief pause.)

9
10 A All right.

11 Q Ross, did you put away the earlier photo you
12 were using?

13 A Yes, I did.

14 Q Well, we'll come back to it later on.

15 Do you have a tract 3-3X on C-207?

16 A Yes, I do.

17 Q What tracts did you consider to be adjacent
18 parent tracts for purposes of classifying 3-3X
19 as arable land?

20 A Okay. Here again we are faced with a situation
21 that isn't obvious from these, from these exhibits.
22 That's a tract of land that is bounded to the
23 south by the Subagency Canal and bounded on the
24 north by the boundary of the Federal Irrigation

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1 Project. Now, it is true that this land --
2 excuse me, this, this piece of land, this parcel
3 is 8.5 acres. However, it lies adjacent to
4 arable lands that are found in the future program
5 that Mr. Kersich testified to. There's no reason
6 to say that a piece, a parcel is nonarable just
7 because it's separated from other arable lands
8 by the Federal Irrigation Project boundaries.
9 These are in fact all trust lands and it is
10 certainly possible to manage them as a unit.

11 THE SPECIAL MASTER: Can we take a break
12 there for about ten minutes?

13 MR. MERRILL: That would be fine, Your
14 Honor.

15 (Whereupon a ten minute
16 recess was taken.)

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1 THE SPECIAL MASTER: Okay, shall we come to
2 order?

3 Q (By Mr. Merrill) Ross, would you please turn to
4 Page 9 of your report, Exhibit C-226? Are the
5 minimum requirements set forth in the table on
6 Page 9 those that HKM had used in its land classi-
7 fication program or those that are specified by the
8 Water and Power Resources Service?

9 A. Specified for the Water and Power Resources Service?

10 Q Would you please go through the table on Page 9 for
11 the items in the left-hand and tell the Court what
12 are the minimum requirements used in HKM's study?

13 A. We are not really comparing the same thing exactly.
14 As I said before, we are dealing with two different
15 types of study here. I can -- I can go through the
16 ones that we defined certainly.

17 Q Okay, why don't you do that?

18 A. Okay. The land classes recognized are the same in
19 the WPRS standards, HKM's. The scale of base maps,
20 which is 1 to 12,000, is the same. The accuracy
21 and the percent, this is somewhat of a difficult
22 thing to define. What 90 percent accuracy means
23 is that this is a quite accurate study. We feel
24 that ours is accurate also to about the same level.

25 waples - cross - merrill

1 Q So I should put in 90 percent for HKM?

2 A No, I didn't say that.

3 Q You shouldn't put in anything because we didn't
4 define things in terms of percentage accuracy.

5 Q Did you define accuracy at all for purposes of your
6 studies of minimum requirements?

7 A We consider the study to be an accurate reflection of
8 arable lands within the study area.

9 Q Did you consider it to be more or less accurate than
10 a WPRS semi-detailed study?

11 A On the historic lands, the parameters that a person
12 is interested in are somewhat different than the
13 typical semi-detailed study that would be done by
14 a WPRS. The accuracy -- let me just say that we
15 consider this an accurate determination of arability.

16 Q Well, I can't let you get by with just saying that.

17 THE SPECIAL MASTER: If you don't know, you are
18 more accurate or less accurate than a conventional
19 semi-detailed study, just say so if you haven't got
20 something else to compare it to. Unless you have
21 some knowledge, how can you tell if you are more
22 accurate or less accurate?

23 THE WITNESS: I don't have a percentage I can
24 say is more or less.

25 waples - cross - merrill

1 Q (By Mr. Merrill) So you have no opinion then as to
2 how it compares with a Bureau of Reclamation semi-
3 detailed?

4 A No. The determinant of accuracy in a semi-detailed
5 means that with a 100 acres of land that are called
6 arable, 90 acres will, in fact, be arable. We just
7 did not go through that type of accuracy analysis,
8 we just did not do it. We have determined an
9 arable acreage and we will stand by that acreage.

10 Q Are you saying it's 100 percent accurate?

11 A Nothing is 100 percent accurate.

12 Q Can you give the Court any index of confidence which
13 you attached to the classifications you have made as
14 a part of this work?

15 A I stated, I think before, that I cannot, no.

16 Q Would you please continue with the next standard --
17 excuse me, the next requirement?

18 A Yes. The next requirement is field progress, square
19 miles, classifier per day. This is simply a guide
20 for the people in the field. It provides an indica-
21 tion of how much work on an average should be done
22 by a classifier per day. In the historic arable
23 lands program we were not dealing with large blocks
24 of land usually, we did not approach a section at

25 waples - cross - merrill

1 all, we had scattered tracts all over. So, in this
2 regard, it is pretty much irrelevant.

3 Q Do you have an idea of what the average field pro-
4 gress was during the historic land study?

5 A Not in terms of acreage. It would just depend how
6 many small fields, if a person had to put 10 holes
7 in ten 20-acre tracts in a day, he would have cer-
8 tainly less sections. If he had a few larger tracts,
9 he would probably be -- well, you know, I don't know,
10 one or two or even three sections a day.

11 Q How many classifier man-days were spent in the field
12 for this program?

13 A Well, about three man-months.

14 Q Is that three classifier man-months or three man-
15 months for the classifier and his field assistants?

16 A That's classifier man-months.

17 Q Okay, is the field progress set forth by the WPRS
18 standards concerning square miles, is that square
19 miles of land study or square miles of land classify?

20 A I don't know what you mean by "study" as opposed to
21 "classify".

22 Q Let me rephrase the last part of the question to
23 change it to classified as arable land.

24 A Well, it varies. That's why the -- you have the 1

25 waples - cross - merrill

1 to 3 because you can have some days a person might
2 classify three sections of land and only get one
3 arable; some days you might classify, oh, in some
4 areas you could classify five or six sections and
5 come up with three arables. It would tend to be
6 more arable lands. It isn't a hard and fast rule.

7 Q How about the next item, the minimum area of Class
8 6 to be separated out? Did you use the same minimum?

9 A No. Here again, we are dealing with a little bit
10 different set of assumptions than is WPRS. In the
11 first place, a half-acre tract of land shows up
12 exceedingly small on a 1 to 12,000 aerial photo.
13 This is something we aspired to, and we are not
14 exceedingly concerned about it from the standpoint
15 of putting a number on it. If we have delineated
16 -- or if we see a piece of Class 6 that is deemed
17 to be big enough to be delineated, it's delineated.

18 Q How small could a piece of Class 6 land be before
19 you would make the determination that it should be
20 delineated and separated from the arable areas?

21 A Okay, that isn't a cut and dried question either.
22 If there was a rock outcrop as big as this room,
23 say, sticking up above the plain, that would pro-
24 bably be broken out even though on the photo the

25 waples - cross - merrill

1 representation would be larger than the actual form.
2 However, if we had a small piece of land that was
3 technically Class 6 due to low infiltration or some-
4 thing, you know, that wasn't exceedingly critical,
5 that would probably not be broken out. Here again,
6 it depends on the site specific situation. The WPRS
7 is dealing with usually large project type delinea-
8 tions, and they have to have something to hang their
9 hat on. We are not merely -- aren't merely as re-
10 flected to this type of set of guidelines because we
11 are looking at this program, small individual tracts.
12 They're getting a good look at them.

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2 However, if we had a small piece of land that was
3 technically Class 6 due to low infiltration or some-
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9 hat on. We are not merely -- aren't merely as re-
10 flected to this type of set of guidelines because we
11 are looking at this program, small individual tracts.
12 They're getting a good look at them.

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1 Q (By Mr. Merrill) So you're saying then that the
2 minimum requirements set forth on page 9 are
3 not necessarily applicable to the study that you
4 carried out?

5 A Not necessarily in either their entirety or
6 their -- in a straight jacket sense. It's just
7 as in the classification standards, these are
8 guidelines, something that one aspires to, if
9 you will.

10 Q Are there any of the remaining items in the
11 table on page 9 which you did consider applicable
12 to the study you carried out?

13 A I'm not really -- The remaining items are minimum
14 area for change to lower class, minimum area for
15 change to higher arable class and minimum soil
16 borings. These, the classification, the actual
17 change from one class to another, there again,
18 that is much more applicable to a large block
19 of land.

20 Now, if we have a single field on a stream,
21 generally -- generally we will call that one
22 class of land rather than breaking up a 20-acre
23 piece or a 30-acre piece, whatever, into several
24 classes. It just becomes counterproductive after

25 waples-cross-merrill

1 awhile.

2 As far as the minimum holes, there again
3 that is dealing with large tracts of land. Now,
4 if we have a 20, 20-acre parcel, if we put a
5 hole in each one, you know, that's 400 acres
6 with 20 holes. So in that -- in that regard, the
7 minimum borings are not really relevant to this
8 type of study.

9 MR. MERRILL: Your Honor, based on the
10 witness' testimony concerning the applicability
11 of the requirements set forth on page 9 of
12 Exhibit C-226, I would move that those be stricken
13 from Exhibit C-226 as immaterial and irrelevant
14 since the witness has testified that they are
15 not applicable to the study he actually carried
16 out.

17 THE SPECIAL MASTER: They may be immaterial
18 and they may be irrelevant, but they're a part
19 of massive amounts of information and material
20 that has some oblique, and possibly remote or
21 tangential inference or reference or use or
22 touching onto the general feel of classification,
23 and I'm going to let it in, Mr. Merrill.

24 Q (By Mr. Merrill) Ross, did you say that you did
25 waples-cross-merrill:

1 not develop your own minimum requirements for
2 borings and pits five feet deep per square mile?

3 A I'm not sure that I said that.

4 Q Well, if you didn't, just tell me if you did
5 develop such a standard.

6 A Okay. We -- If we had blocks of land that were
7 large -- Well, let me start again. We -- We tried
8 to put a hole in each major parcel. Now, if there
9 were, you know, there were places where the hole
10 wasn't deemed necessary due to other information
11 that was available to the land classifier, so
12 that was, I guess you could say that was the
13 standard, that a parcel, each major parcel or
14 most major parcels were studied in some detail.

15 Q I know you're expecting this question, what's a
16 major parcel?

17 A There again, on one drainage it may be a 20-acre
18 piece, on another drainage it may be a 50-acre
19 piece. If -- If on a tributary drainage we have
20 say four, four small pieces of ground, if that's
21 all there is, generally all or most would have a
22 hole in it. It just -- We don't deal in absolutes
23 in this business.

24 Q Okay. How many borings or pits five feet deep did
25 waples-cross-merrill

1 you make in all as a part of the historic lands
2 study program?

3 A Just a moment.

4 MR. ECHOHAWK; Could I have the question
5 read back?

6 (Thereupon the following
7 (question was read back
8 (as follows: "Q Okay..How
9 (many borings or pits five
10 (feet deep did you make in all
11 (as a part of the historic
12 (lands study program?"

13 THE WITNESS: Okay. We augered -- Without
14 the review holes, 371 holes were augered in this
15 program.

16 Q (By Mr. Merrill) Would that include the holes
17 that were used to study the lands to which Mr.
18 Billstein testified last month?

19 A The -- It includes all the holes that were
20 augered in the historic lands. Now, the primary
21 focus of this was on the nonirrigated lands.

22 THE SPECIAL MASTER: Well, did it include
23 then, that Mr. Merrill asked, those holes that
24 were drilled on the in-use acreage that Mr.
25 Billstein testified about?

MR. ECHOHAWK: Your Honor, I would make a
point of clarification, there were no holes that
waples-cross-meriill

1 Mr. Billstein testified about. He did not
2 testify as to any holes that were drilled.
3 His determinations were made by merely visual
4 observations and on the ground verification.

5 MR. MERRILL: Well, Your Honor, this
6 witness has testified a certain number of holes
7 as part of the entire study program. Now, if it's
8 no holes for Mr. Billstein, he can say so.

9 THE SPECIAL MASTER: Yes, he did, but if
10 he's quoting Mr. Billstein, then I see Mr.
11 Echohawk's point.

12 Do you -- Are you able to tell the Court
13 whether this is a total number of holes that
14 were augered to five feet in the work of --
15 both the work of Mr. Kersich and Mr. Billstein
16 and yourself, all your HKM people?

17 THE WITNESS: Okay. It does not include
18 the holes augered from Mr. Kersich's, the
19 future lands program.

20 THE SPECIAL MASTER: In testing the depth
21 to barrier and other work, it does not include
22 that?

23 THE WITNESS: That's correct.

24 THE SPECIAL MASTER: But it does encompass

25 waples-cross-merrill

1 that to which Mr. Billstein testified as well
2 as what you're testifying to.

3 MR. ECHOHAWK: Your Honor, I believe Mr.
4 Waples' testimony only goes to the arable lands,
5 the idle lands in the historic program.

6 THE SPECIAL MASTER: Yes, but 371 augered
7 holes or pits dealt with that land to which
8 Mr. Billstein was also having reference with as
9 historic in-use, acres in-use.

10 THE WITNESS: There were a limited number
11 of holes augered in the in-use lands.

12 Q (By Mr. Merrill) Do you recall approximately
13 how many?

14 A No, I don't.

15 Q Would it have been 10 as opposed to 100?

16 A I can't answer the question. It was a -- I
17 don't know. Perhaps -- I don't know.

18 THE SPECIAL MASTER: Gentlemen, it's noon,
19 do you want to take a break for lunch and
20 convene at 1:30?

21 MR. ECHOHAWK: That's fine with me, Your
22 Honor.

23 MR. MERRILL: That would be fine, Your Honor.

24 THE SPECIAL MASTER: All right. We'll stand
25 waples-cross-merrill

1 in recess until 1:30. And I'm willing to go
2 as late as you wish tonight if we need to if
3 the two o'clock adjournment on Wednesday will
4 disturb the proceedings, either tonight or
5 tomorrow night.

6 MR. MERRILL: Your Honor, I have a favor
7 to ask of the Court, and that is could we break
8 by 4:15 or so? I have to go back to Boulder for
9 childbirth classes.

10 THE SPECIAL MASTER: Do you want to meet
11 at one o'clock? It's in your hands, it's your
12 cross-examination.

13 We will adjourn at 4:30 because we know
14 that you will have your cross-examination done
15 long before that.

16 MR. MERRILL: I suspect it will lap some
17 over into tomorrow and I just can't tell how
18 much, Your Honor.

19 THE SPECIAL MASTER: Four-thirty, remind
20 me of that. We're in recess until 1:30.

21 (Thereupon a lunch recess
22 (was taken at twelve noon
23 (and the proceedings
24 (reconvened at 1:30 p.m.

25 * * * * *

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