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Trial Transcript, Vol. 50, Afternoon Session

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File 157
4408
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Case # 4993

File # 157

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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)
WYOMING.)

Civil No. 4993

FILED _____

5/20

1981

Margaret V. Hampton CLERK

DEPUTY

VOLUME 50

Afternoon Session

Tuesday, May 5, 1981

ORIGINAL

1 THE SPECIAL MASTER: Are you ready to go?

2 MR. WHITE: Yes.

3 THE SPECIAL MASTER: We will come to order,
4 please, ladies and gentlemen.

5 Q (By Mr. White) Dr. Mesghinna, before the break
6 you were asked to look at what was admitted as
7 U.S. Exhibit WRIR-C-50, which is the gravity line
8 classification map for Riverton east in order to
9 determine whether or not the north portion of
10 two parcels -- excuse me, two fields, 41 and 48,
11 on Exhibit FM-1255-A included lands classified
12 as class 6 by HKM.

13 Having reviewed WRIR-C-50, are you now able
14 to state that the northern portion of those two
15 tracts, 41 and 48, are each located on land that
16 appears in white on Exhibit C-50 and 51?

17 A It's hard to say about 41 from these exhibits
18 because they are quite approximate, and 41 might
19 be included there as gravity, but I can make
20 further checks later on.

21 Q Let me ask you this, except for the areas which
22 we have discussed this morning, being those areas
23 on Exhibit 1255-A in the northeast portion of the
24 Riverton east unit, do you know, of your own

25 mesghinna-cross-white

1 personal knowledge, that the irrigable land
2 base shaded on your Exhibits C-249 through 255
3 is exactly the same irrigable land base which
4 was testified to by Mr. Kersich and shown on
5 U.S. Exhibits C-44 through 54?

6 A All that I can say is that the lands that are
7 shaded in our exhibits are from the mylars,
8 in the aerial photos they gave us. And that
9 program was done in 1979; the classification
10 program was done in 1979.

11 Q So, to the extent Mr. Kersich testified about
12 additional field work in 1980 and 1981 which
13 resulted in further changes to his irrigable
14 land base, those changes would not necessarily
15 be reflected in your exhibits; is that correct?

16 A Let me say -- let me clarify my point here. The
17 lump sum is a 1979 problem, but --

18 Q Would you start again? I didn't understand the
19 first several words.

20 MR. CLEAR: I don't think the microphone
21 is working again, Your Honor.

22 A The microphone isn't working.

23 MR. WHITE: I'm sorry, Wold, something happened
24 and I couldn't hear you.

25 mesghinna-cross-white

1 MR. CLEAR: Yours isn't working either.

2 A I'm plugged in now.

3 THE SPECIAL MASTER: Now, we are plugged in.

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1 MR. WHITE: Off the record.

2 (Off-the-record discussion.)

3 Q (By Mr. White) Okay, back on the record.

4 A The program would be 1979 land classification,
5 the update goes, I believe, up to 1980,
6 September of our mylars. So our mylars reflect
7 up to 1980, September. So that's what we have
8 used.

9 Q Let me ask you it this way then. Isn't it
10 true that you do not know with reasonable
11 certainty of your personal knowledge that the
12 land base, arable land base shown on your
13 Exhibits C-249 through 255 is the same arable
14 land base which was testified to by Mr. Kersich
15 and which is shown on what have already been
16 admitted as U.S. Exhibits C-44 through 54?
17 And I have those exhibits right here if you
18 want to look at them.

19 A Well, what I would say at this point is Mr.
20 Kersich must have testified on the areas that
21 he has given us.

22 Q The question is do you know of your personal
23 knowledge that the areas shown on C-44 through
24 54 are the same arable areas shown on your

25 mesghinna-cross-white

1 Exhibits C-249 through 255? If you don't know,
2 say you don't know.

3 A Well, I don't think I have checked it, the
4 final exhibits of Mr. Kersich. I believe they
5 are the ones that they gave us, that's what
6 my belief is.

7 Q Is it true then that of your personal knowledge
8 you know of no discrepancy between the arable
9 land base on your Exhibits C-249 through 255
10 and the arable land base included on Mr.
11 Kersich's Exhibit C-44 through C-54?

12 A All what I can say is we have used an arable
13 base that they have submitted to us for our
14 system design study, and my belief is that they
15 have those exhibits, the exhibits they have
16 submitted here should be those.

17 Q But do you know that?

18 A I don't know that for a fact, 100 percent.

19 Q Are you aware of any other fields aside from
20 Fields 46 -- 49 through 56 on Exhibit FM-1255-A
21 where the fields are laid out on lands
22 classified as nonarable, Class 6 by HKM and
23 are not shown in red on Exhibits FM-1249
24 through 1255-A?

25 mesghinna-cross-white

1 A All what I can say is what we have shown here
2 is what we have received.

3 Q I understand that and I understand you're off
4 the hook. What I'm trying to find out is the
5 relationship between the arable land base that
6 Mr. Kersich put into evidence and the arable
7 land base you've relied on.

8 THE SPECIAL MASTER: He has said to you,
9 Mr. White, he doesn't know whether there have
10 been discrepancies. There could have been some
11 discrepancies. He believes what he did was
12 from the same basis that the other one was.

13 MR. WHITE: Well, Your Honor, with that
14 in mind, I would move to strike Dr. Mesghinna's
15 testimony concerning the lands in these five
16 units as well as the water requirements there-
17 fore, on the basis not of a lousy job by him
18 because he's a very well qualified competent
19 person, but because the raw data that was provided
20 to him has not been shown to be the same data
21 on which Mr. Kersich rendered his expert
22 opinion, as to arable land base earlier in this
23 trial. It's not the same data, it's not the
24 same arable land base that's in evidence. We've

25 mesghinna-cross-white

1 shown that with respect to , I don't know, five
2 or six hundred acres, and the witness is unable
3 to state of his personal knowledge that the
4 arable land bases which he used that was pro-
5 vided to him in 1979 is the same arable land
6 base that Mr. Kersich has testified to.

7 THE SPECIAL MASTER: I will deny that
8 motion. To grant it would be shockingly unjust.
9 I have no doubt that there are going to be
10 many, many discrepancies in acreages and totals
11 in this lawsuit. You did an excellent job this
12 morning in finding some.. I don't know whether
13 the sum this morning is going to end up in the
14 468 acres or something like it, but I know one
15 thing from this morning's evidence, Mr. White
16 and Counsel, you can hardly grant a reserved
17 water right for acreage for which the Indians
18 were paid and which could be conceivably flooded
19 some day by a reservoir for which the land was
20 sold. And I find it very difficult for some-
21 body to quarrel with that. Possession of the
22 surface, you bet they keep that under the deed,
23 but can you put it into a system? I don't think
24 so. This sort of thing, Mr. White, has been an
25 mesghinna-cross-white

1 excellent piece of cross-examination, but to
2 deny everything that Dr. Mesghinna put in
3 there over this would be consummately wrong,
4 so the motion is denied.

5 Q (By Mr. White) Dr. Mesghinna.--

6 THE SPECIAL MASTER: Did you get a
7 different figure? I see you punching it out.

8 MR. WHITE: I was going to ask the expert,
9 Your Honor.

10 THE SPECIAL MASTER: Was my 468 fairly
11 close?

12 MR. WHITE: I came up with 478.9, and I
13 was going to ask Dr. Mesghinna to be the finder
14 of fact here on the total amount of acreage in
15 Fields 46 and 49 through 56, which you gave
16 us as being shown as Class 6 or nonarable on
17 United States' Exhibits C-50 and 51.

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mesghinna-cross-white

1 MR. SACHSE: Your Honor, I object to the form
2 of that question, in that Mr. White has said that
3 that land is shown to be nonirrigable, and I think
4 the testimony so far would show the only thing that
5 has been shown about it is the dispute as to the
6 nature of the title.

7 THE SPECIAL MASTER: The nature of the title,
8 that's understood.

9 MR. WHITE: That's not true, Your Honor. Mr.
10 Sachse hasn't been listening.

11 THE SPECIAL MASTER: It is true there is a dis-
12 pute as to the nature of the title. And on one set
13 of maps it's shown as 6, nonirrigable land.

14 MR. WHITE: Mr. Kersich testified it was 6.

15 THE SPECIAL MASTER: And you asked if that is
16 nonirrigable land. Some else says it is perfectly
17 irrigable land.

18 MR. WHITE: The United States offered them for
19 the truth of the contents, not the State of Wyoming.

20 MR. SACHSE: The Tribes did not, and we have a
21 right to object to the form of a question that
22 presupposes something that is not proved.

23 MR. WHITE: Well, I'll admit the Tribes have
24 not proved it, Your Honor.

25 THE WITNESS: Yes, 478.

1 THE SPECIAL MASTER: Are you both exactly
2 correct? All right, I wish we could agree more
3 often to other things as we did on this.

4 Next, Mr. White?

5 Q (By Mr. White) Dr. Mesghinna, on the bottom of
6 Page 42 of your report, Table 24, which is Exhibit
7 C-245, you show 3814 net acres for Riverton East;
8 is that correct?

9 A Yes.

10 Q Isn't it true that the 478 acres which you just
11 described are included within the 3814 acres on
12 Page 42 of C-245?

13 A Ninety-five percent of those is included.

14 Q So, you multiply the 478 times .95; is that correct?

15 A Yes. Let me check that number again. I think I
16 have it on the other page. Field 41 was included
17 in it.

18 Q You said you couldn't tell without checking, so I
19 did not include Fields 41 or 48 within my total.
20 We will come back to those.

21 A Okay. So, 478 times .95 is 454. It is minus 454.

22 Q So, 3814 includes then 454 acres?

23 A Yes.

24 Q And that would reduce that to 3360?

25 mesghinna - cross - white

1 A. Yes.

2 Q. Dr. Mesghinna, what does the reduction of a net
3 acreage for Riverton East do to the diversion re-
4 quirement of 17,536 acres?

5 A. I have to check that.

6 MR. WHITE: While he is checking that, I
7 don't want to lead the court and counsel into
8 thinking we are not going to come back to this
9 type of cross-examination, although I am finished
10 with this particular area for the day.

11 This problem just came to our attention last
12 night. We haven't checked it out, and we will pro-
13 bably have additional cross and other discrepancies
14 between the two irrigable land bases.

15 A. If that is true --

16 Q. (By Mr. White) I thought you would take a couple
17 more minutes. I'm sorry, Wold.

18 A. If that is true, if those lands are really Class 6
19 lands, it would be 15,366, instead of 17,566.

20 Q. Was that 15,366?

21 A. Yes.

22 Q. How did you determine that? It wasn't a straight
23 percentage reduction, was it?

24 A. It was not.

25 mesghinna - cross - white

1 Q Would you explain it?

2 THE SPECIAL MASTER: Was it a proportionate
3 reduction?

4 THE WITNESS: No. You see, as I have mentioned
5 before, there are three diversions.

6 THE SPECIAL MASTER: Diversions?

7 THE WITNESS: And the two diversions are pump
8 stations and they have high efficiency, so they have
9 different water yields.

10 But this area received its water from the canal
11 and the canal has lower efficiencies, so it will
12 have higher water needs.

13 Q (By Mr. White) If you reduce the number of acres
14 to 3360, isn't it true that your per acre cost
15 shown under Riverton East on Table 24 will also
16 change?

17 A. Well, for this part it will change for the good.

18 Q Well, tell us how it will change. Let's get the
19 full and complete story. What will happen to your
20 on-farm system cost?

21 A. Our on-farm system costs, unless I have to go through
22 it, because just from the outset, you see, the canal
23 goes for a long distance. If I can step up there and
24 show --

25 mesghinna - cross - white

1 Q What happens is the land dropped off at the end of
2 the canal; is that right?

3 A Yes. This is a long canal here, you know, that
4 goes this way just to serve this land. And if
5 all this canal is out and if the siphon is out
6 here, the wastewater is out here, and I believe
7 there is a drop structure somewhere here, that
8 drop structure is out, you know, the cost will be
9 very, very low.

10 THE SPECIAL MASTER: You have an effective
11 savings?

12 THE WITNESS: You have an effective savings
13 just from the outset.

14 Q (By Mr. White) How about the other costs that are
15 shown on that column? Before you answer that, you
16 are saying that the on-farm system costs would drop?

17 A No, I didn't say that.

18 Q You didn't? Okay, I misunderstood.

19 A It would be hard for me to say about the on-farm
20 system, but I don't think it would make much of a
21 difference, because -- I can give you how it looks
22 without going too far.

23 The on-farm system of those areas towards the
24 end is lower than the other on-farm system of the

25 mesghinna - cross - white

1 overall Riverton East. Let's say, for example, it's
2 about \$134 per acre for that pump station.

3 Q So, then the average on-farm system for Riverton
4 East would then increase; is that correct?

5 A It would increase, but since the acreage you are
6 talking about is small compared to the rest, it
7 might increase probably five thousand something.

8 Q How about the pipe network cost; what would happen
9 to it?

10 A That cost may not change because you have pipes
11 going towards the fields. So you develop those
12 fields and it doesn't change very much.

13 Q What would your average per-acre cost for pumps and
14 pumping do?

15 A I can check. Okay. Just from Pump No. 9, the pump
16 and pumping costs might increase a little bit.

17 Q Increase a little bit?

18 A Yes, it might increase a little bit.

19 Q Did you have idea of the order of magnitude of that
20 increase?

21 A If you give me about ten minutes, I'll be able to
22 calculate this.

23 MR. WHITE: Your Honor, I would like to ask
24 the witness what is going to happen to all of his

25 mesghinna - cross - white

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2 about \$134 per acre for that pump station.

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20 increase?

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22 calculate this.

23 MR. WHITE: Your Honor, I would like to ask
24 the witness what is going to happen to all of his

25 mesghinna - cross - white

1 plots.

2 THE SPECIAL MASTER: I thought he had already
3 answered that question. I guess this is one excep-
4 tion to it. He said a little bit increase in pumps
5 and pumping; otherwise, it would be a general reduc-
6 tion, an amount of reduction.

7 MR. WHITE: I don't think that was his testi-
8 mony, Your Honor.

9 THE SPECIAL MASTER: Well, let's go on. What
10 about drainage?

11 MR. WHITE: What I was going to ask, Your Honor,
12 is that the witness could have the ten minutes he
13 asked and be able to answer the question.

14 THE SPECIAL MASTER: I don't think your question
15 is very important, but I will grant you the ten
16 minutes.

17 MR. WHITE: Thank you, Your Honor.

18 (Whereupon a recess was taken
19 (at 2:00 p.m.

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1 THE SPECIAL MASTER: We will come to
2 order, please.

3 Q (By Mr. White) What happens to the \$310 per
4 acre for pipe network, Dr. Mesghinna?

5 A It will become \$298.

6 THE SPECIAL MASTER: It becomes what?

7 THE WITNESS: Two nine eight.

8 THE SPECIAL MASTER: All right.

9 Q (By Mr. White) And for pumps and pumping,
10 the \$366?

11 A It will become \$383.

12 Q What would happen to canals and related
13 structures?

14 A Well, that will be extremely hard to go over
15 it, but all what I can say is just from the
16 outset I can see that it will be less expensive,
17 it will be lower than this for sure.

18 Q Drainage costs \$477 an acre?

19 A I think it will be extremely hard to do it now
20 here.

21 THE SPECIAL MASTER: Is it fair --

22 THE WITNESS: Let's assume it will be the
23 same.

24 THE SPECIAL MASTER: Is it a fair assumption

25 mesghinna-cross-white

1 to say that it will be somewhat lower,
2 negligibly lower?

3 THE WITNESS: It will be the same as it
4 is now, really, we can say that.

5 Q (By Mr. White) Engineering and contingencies,
6 \$363 per acre.

7 A That one is 25 percent of the pipe network plus
8 pumps and pumping plants, plus canals and
9 related structure, plus drainage. That's 25
10 percent of those items.

11 Q What would happen to your total investment,
12 \$2,006?

13 ((Brief pause.

14 A Okay. From what we have just determined, the
15 cost will be \$5 over without considering canal
16 and drainage.

17 Q So it would be \$2,001; is that correct?

18 A Yeah.

19 Q Now, will the reduction of some 450 acres in
20 Riverton East have any effect on the O and M
21 energy demand and total operation cost?

22 A Yeah, it will have.

23 Q What will those effects be?

24 THE SPECIAL MASTER: Would you just state
25 mesghinna-cross-white

1 that generally. We needn't go into all these
2 details on these points.

3 THE WITNESS: We are talking very
4 insignificant things in general, but it is
5 better to check it.

6 By the way, in doing this, I am assuming
7 that Pump No. 8 and Pump No. 9 are out, just
8 to clarify something.

9 MR. WHITE: Okay.

10 (Brief pause.

11 A The engineering cost will be exactly \$2 higher
12 than what it is now.

13 Q How about O and M demand costs?

14 (Brief pause..

15 A Okay. The demand cost will be \$4.79 against
16 \$4.45.

17 Q And O and M?

18 A That will take quite some time.

19 THE SPECIAL MASTER: Why don't we forsake
20 the O and M knowing it will probably be up
21 also.

22 THE WITNESS: We can assume that.

23 THE SPECIAL MASTER: What's that?

24 THE WITNESS: We can assume that the same

25 mesghinna-cross-white

1 proportion as the energy cost.

2 THE SPECIAL MASTER: Tell me why it costs
3 more money for operation and maintenance for
4 energy to move around 15,266 acre-feet of water
5 over 3,300 than it does to move 17,500 feet
6 of water over 38 acres? Is that because you're
7 taking off the gravity flow acreage?

8 THE WITNESS: Yeah, that's exactly true,
9 because we have higher heads on the others,
10 higher lifts.

11 THE SPECIAL MASTER: Okay. All right. I
12 think we can take that, answer that question,
13 Mr. White, on the O and M.

14 MR. WHITE: Excuse me, Your Honor, for the
15 delay, I've lost my place in my notes.

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mesghinna-cross-white

1 Q Dr. Mesghinna, on direct I believe --

2 MR. WHITE: I'm sorry, I thought you were
3 holding up your hand for me to stop.

4 THE SPECIAL MASTER: No.

5 Q On direct you testified, I believe, that some of
6 the lands in your projects lay north of the Wind
7 River and east of the Popo Agie. Do you recall
8 any testimony about that?

9 THE SPECIAL MASTER: If I may refresh your
10 memory, I think I asked the question, didn't I?

11 MR. WHITE: You did, Your Honor.

12 THE SPECIAL MASTER: Which one was north of
13 the river, and you said which was north of the
14 Wind. Do you remember it now?

15 THE WITNESS: Yes, something like that.

16 THE SPECIAL MASTER: Yes. And east of the
17 other. There was a little kicker on that. I
18 don't think I asked east of Popo Agie. Just
19 north of the Wind River.

20 MR. WHITE: Let me start again.

21 Q Dr. Mesghinna, isn't it true that the north Crow-
22 heart unit and the Riverton east unit are either
23 north of the Wind, the big Wind, or east of the
24 Popo Agie?

25 mesghinna-cross-white

1 A The north Crowheart unit is north of the Big Wind.

2 Q Yes.

3 A You can say that.

4 Q And how about the Riverton east? Is that east
5 of the Popo Agie?

6 A It's quite parallel to it.

7 Q Is it on the right bank or on the east side of
8 the Popo Agie?

9 A The Popo Agie finishes or terminates before it comes
10 to Riverton east.

11 Q I see. Is it east of the line drawn through the
12 Popo Agie?

13 A Yes, you can say that.

14 Q Would that mean that on the total diversion require-
15 ments shown on table 24, only roughly 44,000 acre
16 feet are for lands south of the Wind and west of
17 the Popo Agie?

18 A Would you restate your question, please?

19 THE SPECIAL MASTER: I doubt if it's a proper
20 question on this witness's cross examination.

21 It might be on some of them, but it really didn't
22 have much to do with his direct. I'm going to
23 say I really feel it really doesn't have much
24 place in the cross examination for him. Whether

25 mesghinna-cross-white

1 it is north or south or east or west of the Wind
2 has no bearing on what he testifies to.

3 Q Dr. Mesghinna, do you know where these projects
4 are located?

5 THE SPECIAL MASTER: Well, that's a -- Mr.
6 White that's an offending question.

7 MR. WHITE: Well, I would like to make an
8 offer of proof then, Your Honor, that if allowed
9 to inquire of this witness, Dr. Mesghinna --

10 A Of course, I know.

11 THE SPECIAL MASTER: He doesn't have to
12 bring out the fact that 52,000 of what we call
13 the open area is in there, since he has already
14 brought it out and it is already in the record.
15 I did it myself, Mr. White. I did it a couple
16 of weeks ago, clearly.

17 MR. WHITE: My offer of proof is, Your Honor,
18 that if allowed to testify in response to my
19 questions, Dr. Mesghinna would indicate that of
20 the five units he testified about, 44,069 acre
21 feet are attributable to projects attributable
22 to the diversion requirements for projects which
23 are south of the Wind and west of the Popo Agie,
24 and 165,303 acre feet would be attributable --

25 mesghinna-cross-white

1 THE SPECIAL MASTER: You may make that offer
2 of proof. I doubt if your figures are accurate,
3 even if I allowed it and changed my mind. But
4 go ahead and make it. Does your offer -- are you
5 aware Dr. Mesghinna put the Arapahoe into the con-
6 sideration? Are you including it in the figures?

7 MR. WHITE: I am not including it in my figures,
8 Your Honor.

9 THE SPECIAL MASTER: Go ahead with your offer
10 of proof.

11 A To make things clear, why don't I give you from
12 where each unit is getting water? I think that
13 will make things easier.

14 Q I appreciate that, Dr. Mesghinna. What I was
15 trying to correct was the diversion requirement,
16 the number of acre feet to be diverted, with the
17 location of the lands.

18 A I've already stated that.

19 Q I understand. I'm trying to make a record --

20 MR. SACHSE: I object to the further question-
21 ing along this line. All this is already in the
22 record, as we all know. The maps speak for
23 themselves as to where the projects are. The
24 sources of the water has been testified to. This

25 mesghinna-cross-white

1 is in the nature of an argument being made by Mr.
2 White. He can say this to the end of the case.

3 MR. WHITE: All right, Your Honor. Let me
4 make my offer of proof.

5 THE SPECIAL MASTER: I thought you had finished
6 it. Go ahead.

7 MR. WHITE: No, I didn't. If allowed to
8 testify in response to my questions, Dr. Mesghinna
9 would indicate that the diversion requirement for
10 those lands in the portion of the reservation
11 north of the Wind and west of the Popo Agie is
12 approximately 165,303 acre feet. For those units
13 south of the Wind and west of the Popo Agie, the
14 amount would be 44,069 acre feet.

15 Q Dr. Mesghinna, I'll hand you what has already
16 been admitted -- go ahead and finish.

17 THE SPECIAL MASTER: Do you need some clips
18 for that?

19 MR. WHITE: Why don't I show it to him for
20 the time being like it is.

21 THE SPECIAL MASTER: You can use this as a
22 back rest. Use the clips on that.

23 Q Dr. Mesghinna, I'll direct your attention to what
24 has already been admitted as Tribe's Exhibit M-1.

25 mesghinna-cross-white

1 Have you had an opportunity to examine that map
2 before?

3 MR. SACHSE: Your Honor, I'll object to this
4 question. The mapping question is an ownership
5 map of land on the reservation. Dr. Mesghinna's
6 testimony has been as to the engineering of pro-
7 jects. He has already stated he took the land
8 base for the projects from land information that was
9 supplied to him by HKM.

10 There has been nothing in his direct testi-
11 mony about the land ownership of any piece of
12 land, and to get into land ownership now with
13 Dr. Mesghinna is, first, to go beyond the scope
14 of his direct examination and, secondly, to go
15 beyond the scope of his work.

16 MR. WHITE: Your Honor --

17 MR. SACHSE: And is an inadmissible set of
18 questions.

19 MR. WHITE: Let me respond to that. You
20 can always tell when we're starting to get close
21 to pay dirt.

22 THE SPECIAL MASTER: Oh, no. We can always
23 tell when we get an exhibit which wasn't used on
24 direct, however.

25 mesghinna-cross-white

1 Have you had an opportunity to examine that map
2 before?

3 MR. SACHSE: Your Honor, I'll object to this
4 question. The mapping question is an ownership
5 map of land on the reservation. Dr. Mesghinna's
6 testimony has been as to the engineering of pro-
7 jects. He has already stated he took the land
8 base for the projects from land information that was
9 supplied to him by HKM.

10 There has been nothing in his direct testi-
11 mony about the land ownership of any piece of
12 land, and to get into land ownership now with
13 Dr. Mesghinna is, first, to go beyond the scope
14 of his direct examination and, secondly, to go
15 beyond the scope of his work.

16 MR. WHITE: Your Honor --

17 MR. SACHSE: And is an inadmissible set of
18 questions.

19 MR. WHITE: Let me respond to that. You
20 can always tell when we're starting to get close
21 to pay dirt.

22 THE SPECIAL MASTER: Oh, no. We can always
23 tell when we get an exhibit which wasn't used on
24 direct, however.

25 mesghinna-cross-white

1 MR. WHITE: And the reason it is so exciting
2 to Mr. Sachse is that many of the lands for which
3 Dr. Mesghinna has laid out fields aren't trust lands.
4 They are not trust lands.

5 THE SPECIAL MASTER: You can show that, but
6 I'm not sure he is the man to show it with.

7 MR. WHITE: I would point out in his own
8 exhibit, Your Honor, it purports to show that
9 these lands are trust lands.

10 THE SPECIAL MASTER: It says irrigable lands,
11 trust, and makes a distinction between irrigable
12 lands, fee.

13 MR. WHITE: I believe in his report it also
14 indicates it.

15 THE SPECIAL MASTER: Yes, but this witness
16 made no direct testimony regarding the status
17 of the title of the lands on which he was working.
18 He was handed work materials and given potential
19 irrigable lands and went to work designing systems
20 for them.

21 I think that the objection is a good one,
22 because, in the first place, Tribe's Exhibit 1
23 was not used for anything approximating this use,
24 and the substance was not used on direct.

25 mesghinna-cross-white

1 It would seem to me your question goes out-
 2 side the scope of the direct examination. And
 3 it clearly shows, if the State wishes to prove
 4 that some of the lands included in his system
 5 design is not trust lands and has no place in
 6 the case, it certainly may do so, but you will
 7 have to run your own side of the case.

8 MR. WHITE: I would like to make it clear
 9 on the record, are you saying I cannot cross
 10 examine this witness as to whether or not the
 11 lands included in his fields are trust lands,
 12 as indicated on his exhibit?

13 THE SPECIAL MASTER: I am saying you should
 14 not be permitted to cross examine the witness on
 15 matters that are clearly outside the scope of
 16 his direct testimony.

17 Now, you show me where he testified directly
 18 on the ownership of some land and I'll have to
 19 abide by my decision and let you tender the ques-
 20 tions.

21
 22
 23 * * * * *

24
 25 mesghinna-cross-white

1 MR. WHITE: Could I have just a minute?

2 THE SPECIAL MASTER: You bet, Mr. White.

3 I'm trying emphatically to be fair, and I
4 think you've found another material for --

5 MR. SACHSE: Your Honor, while Mr. White's
6 having his few minutes, I'd like to point out
7 also that Mr. White did cross-examine Mr.
8 Kersich about lands classified as arable or not
9 arable, that may or may not be fee land, did
10 use this exhibit in testing the land base
11 testified to by Mr. Kersich and has had his
12 bite at the apple with a witness who actually
13 was involved in this. And he's thus had his
14 cross-examination on this point, and anything
15 further on this should be in his direct case
16 to come in with proof of title that land that
17 we claim is fee land is not, if he can prove it.

18 MR. WHITE: Well, Your Honor, it's a great
19 economy that the Court would allow this witness
20 to testify in support of the United States' case
21 in chief, which by the United States' own
22 representation of counsel, is limited to trust
23 lands, and not allow this witness to be cross-
24 examined to see whether or not his irrigation
25 projects do apply to trust lands.

1 THE SPECIAL MASTER: Mr. White, if this
2 witness were a lawyer, this witness had
3 worked in setting the parameters or the
4 delineation, tract delineation that went here-
5 tofore in this scientific work, I'd permit
6 you to ask your questions, but he didn't.

7 MR. WHITE: Well, the question I seek to
8 ask --

9 THE SPECIAL MASTER: He testified to ten
10 points that deal with -- or was it 11, I forget
11 now.

12 THE WITNESS: Eleven.

13 THE SPECIAL MASTER: Let me find that.
14 Eleven factors in the system, designing of
15 systems for the irrigation of land to grow crops
16 for consumption of humans and animals, not to
17 do with trust title land, fee land. You sure
18 got a right to see if there's land that shouldn't
19 be in there, but I'm not sure it's proper cross-
20 examination.

21 MR. WHITE: Well, I'd refer the Court to
22 Page 24 of Exhibit C-245.

23 THE SPECIAL MASTER: All right.

24 MR. WHITE: Which is Dr. Mesghinna's report.
25 First sentence on that page says: In this

1 section a proposed conceptual irrigation
2 development plan for the future irrigation
3 of trust lands is discussed. This is an
4 exhibit that was offered through Dr. Mesghinna,
5 it was offered and admitted over the objection
6 of the State as to the truth of its contents.

7 MR. CLEAR: Your Honor, it was offered as
8 a summary of his testimony and was not offered
9 over the objection of the State.

10 MR. WHITE: I think it was offered over
11 the objection of the State.

12 THE SPECIAL MASTER: It's irrelevant whether
13 it was or was not, gentlemen, I ruled, and I
14 think the ruling is a fair one.

15 MR. WHITE: You told me if I could show
16 you where he testified to trust, that these
17 were trust lands, you'd let me inquire.

18 THE SPECIAL MASTER: Something to say
19 whether -- if he testified as to the designation
20 of a description of a title or a deed or of a
21 restriction of covenant running with the land,
22 something in our territory of professionalism,
23 but I clearly believe my ruling is correct, Mr.
24 White.

25 MR. WHITE: Let me make an offer of proof.

1 THE SPECIAL MASTER: All right, make your
2 offer of proof.

3 MR. WHITE: If this witness were allowed
4 to testify, he would testify that based on
5 Tribes' Exhibit M-1, which is already admitted
6 for the truth of its contents, and which shows
7 land status and therefore without having to
8 reach any legal conclusions as to land status,
9 this witness would testify that contrary to the
10 statements that the lands involved in his study
11 are trust lands as contained on, for example,
12 Page 24 of his report, Exhibit 245, C-245, some
13 of these lands are in fact not trust lands.

14 THE SPECIAL MASTER: Now, Mr. White, if
15 the total of all the lands that he worked on
16 and testified to come to about 53,760 acres
17 and it is found that 214 acres are not trust,
18 does this officiate all of his evidence?

19 MR. WHITE: It doesn't officiate it, but
20 it helps. And the reason it helps, what we're
21 talking about here is in terms of both stakes
22 of this lawsuit, are roughly \$1,000 an acre ---

23 THE SPECIAL MASTER: Can't you show that
24 there is land included here in error and should
25 not be included without having to proceed with

1 this witness?

2 MR. WHITE: I think this witness ought
3 to defend his own work.

4 THE SPECIAL MASTER: This is not his work.
5 This work was handed to him when he began his
6 work. That's what I'm trying to get across to
7 you and I'm sorry I can't.

8 MR. WHITE: We're back to the old problem,
9 the pipeline opinion then.

10 THE SPECIAL MASTER: No, not at all. We're
11 back trying to keep some order and arrangement
12 in this lawsuit so we might avoid needless
13 consumption of time and human life and expense.
14 That's what we're here for, and the ruling has
15 been made.

16 MR. WHITE: Let me see if I can complete
17 my offer of proof then, Your Honor.

18 I'm not sure where I was. Merissa, can you
19 read back the offer of proof, please.

20 (Thereupon the following
21 offer of proof was read
22 back as follows: " If
23 (this witness were allowed
24 (to testify, he would testify
25 (that based on Tribes'
(Exhibit M-1, which is
(already admitted for the
(truth of its contents,
(and which shows land status
(and therefore without
(having to reach any legal

1 (conclusions as to land
2 (status, this witness would
3 (testify that contrary
4 (to the statements that
5 (the lands involved in his
6 (study are trust lands as
7 (contained on, for example,
8 (Page 24 of his report,
9 (Exhibit 245, C-245, some
10 (of these lands are in fact
11 (not trust lands."

12 MR. WHITE: Those lands would include but
13 not be limited to --

14 MR. CLEAR: Your Honor, I think that's
15 an improper offer because the exhibit, Dr.
16 Mesghinna would have to adopt this exhibit
17 as his own, since these show the trust lands
18 and that is for him to fulfill Mr. White's offer
19 of proof, he would have to testify that he
20 knows which lands on this are actually trust
21 land and which are not. He would have to
22 adopt that exhibit as his own.

23 THE SPECIAL MASTER: Yes, go ahead.

24 MR. WHITE: That with respect to the
25 Riverton East Unit only, he would testify that
Field No. 10 -- excuse me, Field 40, 41, 46, 47,
48, 50, 51, 52, 53, 54, 55 and 56 are not held
in trust by the United States.

THE SPECIAL MASTER: Aren't these the
exact acreages we went through this morning?

1 MR. WHITE: No, there are some of them
2 that are different.

3 THE SPECIAL MASTER: Don't they include
4 the ones we talked about this morning?

5 MR. WHITE: I would say there's probably
6 a 75 percent overlap.

7 THE SPECIAL MASTER: Then your offer is
8 duplicative and my ruling is further correct.

9 MR. WHITE: It may be duplicative in some
10 respects, Your Honor, but I think I'm entitled
11 to make it.

12 That those fields are not held by the
13 United States in trust for the Tribes but are
14 otherwise owned not in trust by the United States.

15 THE SPECIAL MASTER: In all honesty,
16 shouldn't your offer include that there are
17 some conditions attached to the deed that give
18 the surface to the Indians in perpetuity, even
19 though it may be flooded from time to time?

20 MR. WHITE: In all honesty, no, Your Honor,
21 because I don't believe that to be true.

22 THE SPECIAL MASTER: Well, I think Counsel
23 discussed that this morning and --

24 MR. CLEAR: I think -- To clarify that, I
25 don't think it was all of those fields were

1 included in, you know, from 41, 46, I believe
2 it was just the fields in the 50s because
3 that's where Mr. White started, and I think
4 it's just 55, 53 -- 52, 53, 54, 55.

5 THE SPECIAL MASTER: All right. The ones
6 furthestmost to the east?

7 MR. CLEAR: And 56?

8 THE WITNESS: I think so.

9 MR. CLEAR: And 56 are in that intake area.

10 THE SPECIAL MASTER: But you are correct,
11 they are not trust lands.

12 MR. WHITE: I made an offer of proof.

13 THE SPECIAL MASTER: Enmeshed with the
14 lesser trust than other trust lands, Mr.
15 White, let's put it that way.

16 MR. WHITE: I think the record should be
17 clear, Your Honor, that although there's no
18 evidence before you, the representation of
19 Counsel for the United States as to the peculiar
20 status of those lands only went to, I believe,
21 four of the 13 parcels.

22 THE SPECIAL MASTER: Very well. You have
23 certainly opened a road to prove the rest of
24 them being properly included when your case
25 comes on.

1 Q (By Mr. White) Dr. Mesghinna, isn't it true
2 that you developed water holding capacities
3 for a number of soil textures?

4 A Yes.

5 Q Where did you obtain those water holding
6 capacity types?

7 A You mean the basic datas, where did I obtain
8 them?

9 Q Yes.

10 A I obtained them from several sources. One of
11 the sources is the Ames Irrigation Handbook,
12 the second part is from the Riverton area,
13 which soil survey was made, and another place
14 where I have got them is from textbooks.

15 Q Where did you obtain the water holding capacity
16 for coarse loamy sand and what value did you
17 assign to that?

18 A I can't say offhand. I have to look for it.

19 (Brief pause.)

20 A Did you say coarse loamy sand?

21 Q Yes, C-o-l-s.

22 A I used about 1.75.

23 Q That's inches per foot?

24 A Yeah.

25

mesghinna-cross-white

1 Q What was the source of that?

2 A Well, you know, there is no exact source
3 for each kind of soil, for each texture of
4 soil. They give you just for the heavy soils
5 and then they go to the light soils and then
6 they go to the -- first they give you the
7 heavy soils, meaning clay soils, silt and so on,
8 and then they go to the light soils which are
9 loamy soils and so on, and then they go to the
10 light soils, sandy soils. From that onward it
11 is up to the engineer to make his estimation.

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mesghinna-cross-white

1 Q Upon what factors did you base your estimate that
2 the water capacity for loamy sand was 1.75 inches
3 per foot?

4 A As I have indicated before, there are datas from
5 different handbooks and so on. Based on that, I
6 made my estimation.

7 Q Do you know what handbook included coarse, loamy
8 sand?

9 A I don't think there would be any handbook that
10 coarse, loamy sand would be in. You have to --

11 THE SPECIAL MASTER: Make a composite?

12 A -- make a compisite. In fact, the water-holding
13 capacity was a composite.

14 Q (By Mr. White) For loamy sand did you use 1 inch
15 per foot pursuant to Ames?

16 A For loamy sand?

17 Q Yes.

18 A I used about 1.75. It is very hard, you know, to
19 differentiate the gravity between loamy sand, you
20 know, sandy loam, gravity loam, coarse loamy sand,
21 loamy sand and so on.

22 Q Why don't you give me the values for each of these
23 textures you used. Fine loamy sand, is that FLS?

24 A Fine? If I give you fine sandy loam -- I'm sorry.

25 mesghinna - cross - white

1 I was giving you the intake rates. I'm sorry. Let
2 me go look. I was reading another column.

3 Q The loamy sands really ought to be 1 inch per foot,
4 shouldn't it?

5 A Yes. Loamy sand is about 1.05.

6 Q THE SPECIAL MASTER: 1.05?

7 THE WITNESS: Yes.

8 THE SPECIAL MASTER: All right.

9 Q (By Mr. White) Okay. Fine loamy sand, FLS?

10 A How about if I give you fine sandy loam? It
11 would be 1.6.

12 Q If you had used the texture of fine loamy sand, it
13 would also have a 1.6 value?

14 A It would be in that neighborhood, you know. You
15 can't exactly say this is it. I wish we knew this.
16 I mean, I wish everybody in the world knows this.
17 We are estimating.

18 Q And what did you use for coarse sandy loam?

19 A 1.15.

20 Q Gravelly sandy loam?

21 A About 1.05.

22 Q You used the symbol somewhere in your work, SLGR.
23 Is that sandy loam gravelly? Is that the same
24 thing as gravelly sandy loam?

25 mesghinna - cross - white

- 1 A. Sandy loam and gravelly might fit.
- 2 Q. Would it have the same water-holding capacity of
- 3 1.05?
- 4 A. About the same; 1.0 I have it here.
- 5 Q. How about sandy loam as opposed to loamy sand?
- 6 A. Sandy loam, 1.25.
- 7 Q. Back to your coarse sandy loam and gravelly sandy
- 8 loam -- excuse me, for gravelly sandy loam and sandy
- 9 loam gravel you have 1.05 and 1.0 respectively.
- 10 What difference in percent of gravel did you assume?
- 11 A. I just took the soil texture as it is.
- 12 Q. For fine sandy loam why did you assume 1.6, which
- 13 is higher than the values given in Ames?
- 14 A. You see, it is not -- I don't only depend on Ames,
- 15 I depend also on other facts that are given. And
- 16 I have developed, you know, through my education and
- 17 my background, I have developed these capacities.
- 18 Once I see a texture, I have something in my mind,
- 19 you know.
- 20 It is not just exactly, you know, this is it
- 21 in this book and then I have to go by that, you
- 22 know. Within a year of time, you start to develop
- 23 your own. You have a feeling in your head.
- 24 Q. How about heavy sandy loam; what did you use for
- 25 mesghinna - cross - white

1 that?

2 A. Heavy sandy loam?

3 Q. HSL?

4 A. Heavy sandy loam?

5 THE SPECIAL MASTER: Is that HSL one of the
6 symbols he used?

7 MR. WHITE: Yes, sir.

8 A. HSL? It must be heavy sandy loam. I don't have
9 it here in my --

10 Q. Do you have a symbol GRL; is that the same as
11 gravelly loam?

12 A. Yes, I have it.

13 Q. What value did you assign to that?

14 A. Just the same as the gravelly sandy loam, 1.05.
15 It is very hard to make distinctions because the
16 differences are very, very slight, or very, very
17 small. And this is for working that we have really
18 gone through all this, but in my textbook or my
19 work that you see, you don't find this much break-
20 down. We break down this for us to use.

21 Q. Do you find a symbol LGR which, I assume, is loamy
22 gravels?

23 A. LGR?

24 Q. Yes.

25 mesghinna - cross - white

- 1 A. Yes.
- 2 Q. What value did you use for that?
- 3 A. One.
- 4 Q. Can you find the symbol LL? Which I assume is
5 light loam?
- 6 A. I don't have this one for LL, but I can give you
7 probably for loamy sand or sandy loam. Sandy loam
8 is 1.25.
- 9 Q. So, LL would be the same as SL, would it?
- 10 A. In that neighborhood.
- 11 Q. Would you have a symbol for L, which, I assume, is
12 loam?
- 13 A. Just loam as it is?
- 14 Q. Yes.
- 15 A. Yes.
- 16 Q. What is that value?
- 17 A. About 1.8.
- 18 Q. 1.8?
- 19 A. Yes.
- 20 Q. HL, which I assume is heavy loam?
- 21 A. It is almost the same; 1.8. You know, these are
22 give and take.
- 23 Q. I just want to find out what you used; that's all.
24 I've got a symbol GRSC, which I assume is gravelly
25 mesghinna - cross - white

1 sandy clay loam?

2 A. SGRSL? I have it.

3 Q. You don't have GRSL? What are you looking at
4 there anyway? Do you have a list of these already
5 prepared?

6 A. Sure.

7 Q. Dr. Mesghinna, you've handed me a page out of your
8 notebook that is entitled "Water-Holding Capacities
9 and Entry Rates for Soils, Wind River Indian Reser-
10 vation."

11 The values that are shown on this sheet, are
12 those the values that you used in your work for the
13 various soil textures which have the abbreviations
14 shown on that sheet?

15 A. Yes, as much as we can. You know, we tried to
16 stick to this, but when the engineer is working on
17 the water-holding capacity, he has also his own es-
18 timation to make. These are basic things there.

19 Q. These are values you used; is that right?

20 A. Yes. These are the starting place. We start from
21 this, you can say, more or less, yes. These are
22 the ones we used.

23 MR. WHITE: Your Honor, we would ask permission
24 to make a copy of this and mark it as Exhibit FM-1.

25 mesghinna - cross - white

1 THE SPECIAL MASTER: You would like to tender
2 -- You've been asking questions for fifteen minutes
3 based on that. You saw him look down every time
4 you asked a question and take some time and find
5 his tabulation and answer your question. You went
6 through that minute after minute and question after
7 question.

8 Then you said to the witness, "What have you
9 got there? A tabulation of them?"

10 It was quite obvious he had been testifying
11 from a tabulation for fifteen minutes. Why do we
12 need a copy now? Everything in it is in the record.

13 MR. WHITE: Your Honor, of the values shown on
14 here, I am approximately one quarter of the way
15 through. I think it would save a remarkable amount
16 of time if we were able to get these in exhibit form.

17 THE SPECIAL MASTER: Is there any objection to
18 that? Do I need to rule on it? Is it agreeable
19 with you, Dr. Mesghinna? Is there any private
20 information on it?

21 THE WITNESS: There is nothing of private
22 information on it.

23 THE SPECIAL MASTER: All right. Just make a
24 copy and get it back in the book and go on with the
25 next subject matter.

1 Q (By Mr. White) Dr. Mesghinna, is it correct
2 that the cropping pattern which you used was
3 established by Mr. Dornbusch after receipt of
4 input from you?

5 A Yes, that's true.

6 Q What specific -- what input did you make in
7 the determination of cropping patterns?

8 A The adaptability of the crops in the different
9 areas of the Reservation.

10 Q Did you make this input in writing or orally?

11 A You know, been working for the same case we
12 meet every now and then and we discuss about
13 this matter.

14 Q Well, I would like --

15 A It's an almost everyday work, really.

16 Q Would you please tell the Court for the benefit
17 of the record, what facts, data, opinion or
18 other information there is with specificity
19 that you provided or submitted to Mr. Dornbusch
20 with respect to cropping patterns?

21 THE SPECIAL MASTER: Mr. White, that
22 question is improper, in my opinion. This
23 witness testified on the second subject last
24 week and the cropping patterns. He discussed

25 mesghinna-cross-white

1 MR. WHITE: Let me put a note on it, Your
2 Honor. We will go out at the break and make a
3 copy.

4 Q (By Mr. White) Wold, I'll hand you back what has
5 been marked for identification, and I believe ad-
6 mitted, as Plaintiff's Exhibit FM-1. Would you
7 put that back in your notebook so you don't lose
8 it, and during the next break I will get it from
9 you and make a copy.

10 A. Okay.

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1 climate, alfalfa, corn, small grains, gross
2 water requirements. He discussed the relation
3 of each to each, he discussed consumptive
4 use of those and ambiance. He discussed the
5 ratios in given areas, elimination of one
6 product or another thoroughly. You have the
7 right to cross-examine on that. You have no
8 right to cross-examine him on what he and Mr.
9 Dornbusch talks about in their concept of
10 getting along on cropping pattern. I believe
11 you have the right to cross-examine him only
12 on those matters on which he testified on direct,
13 and I'm going to object to your question and
14 not permit a continuation of it unless you get
15 your questions directed to matters in evidence
16 in this case on cropping pattern.

17 Q (By Mr. White) Doctor, is it true that the only
18 information you provided Dr. Dornbusch is as
19 you testified on direct, the crop adaptability
20 for the Wind River Indian Reservation?

21 A Yeah. We studied the area very carefully in
22 terms of climate and different crops that grow
23 in the area, and we also discussed with
24 Dornbusch, you know, and both firms became the
25 mesghinna-cross-white

1 same wave length as to the understanding, what
2 is going on. And Dornbusch, Mr. Dornbusch,
3 rather, decided on the percentages of crops that
4 are to be grown in the area.

5 Q Let me ask the question again. Is it true, as
6 you stated on the direct examination that the
7 only information you provided him was information
8 regarding crop adaptability?

9 MR. CLEAR: I think we went into this
10 fairly thoroughly in direct, and I think he's
11 been over it now two or three times on the
12 same question.

13 MR. WHITE: He never answered the question.

14 THE SPECIAL MASTER: I think it was your
15 last question, I think you are repeating it.
16 Maybe you've added a new element to it, I'm not
17 sure. You want to read the last question and
18 you can see if you got it. Will you read the
19 last question, please.

20 (Thereupon the last
21 (question was read back
22 (as follows: "Q Let
23 (me ask the question again.
24 (Is it true, as you
25 (stated on the direct
(examination that the only
(information you provided
(him was information re-
(garding crop adaptability?"

mesghinna-cross-white

1 THE WITNESS: All what I can say is I did
2 not decide on the percentages of crops that
3 grow in the area.

4 THE SPECIAL MASTER: He didn't ask you that.
5 What did you say, what did you provide him with,
6 anything more than just this? That was his
7 question.

8 THE WITNESS: My -- Okay. To answer the
9 question, in my direct testimony, as I have
10 discussed, I have discussed rather, what goes
11 into cropping pattern and so on. I went into
12 detail in this. In fact, I went into more than
13 was needed, and from that onwards, Mr. Dornbusch
14 decided on the cropping pattern. So it's not
15 only -- I gave him the elevations, you know, I
16 gave him the crops that are grown, you know, all
17 those things that I discussed last time in my
18 direct testimony.

19 Q (By Mr. White) Specifically what information
20 did you give him then including values, if you
21 gave him numbers? I'm not sure what you gave
22 him. Did you just talk about it conceptually
23 or did you give him values?

24 A You know, we have, of course, determined the
25 mesghinna-cross-white

1 most current cropping pattern or, you know,
2 since 1975, '76 or so, what farmers are
3 using and so on. We studied that, you know,
4 the different cropping patterns in the area.

5 Q This is what you did?

6 A Yeah.

7 Q Okay. Now, did you give that information to
8 MR. Dornbusch?

9 A Mr. --

10 THE SPECIAL MASTER: You asked him that
11 about twice now, and he's telling you that's
12 what he gave Dr. Dornbusch, nobody else, unless
13 you want to ask him who else he gave it to.

14 Q (By Mr. White) What cropping patterns did you
15 determine, not Dr. Dornbusch, but you determined?

16 A Well, that cropping pattern has nothing to do
17 with future lands, Mr. White. I mean if it
18 were historic lands, yes, it would apply, but
19 for this matter it has no application at all.

20 Q Well, let me ask you --

21 A I think the proper question might be -- might
22 be --

23 Q I need all the help I can get. I thank the
24 witness.

25 mesghinna-cross-white

1 A What crops are adaptable in the area, what are
2 the crops that are adaptable in the area. That
3 I can answer, really, without anything. I told
4 Mr. Dornbusch alfalfa grows in the area, corn
5 grows in the area, small grain grows in the
6 area, beans, you know, grows in the area,
7 pasture grows in the area. These are really the
8 main crops that grow in the area. However,
9 some of the crops do very well below 5,900
10 elevation and some of them don't do good above
11 5,900 elevation, and I have explained the
12 reason, the scientific reason behind this in
13 my direct testimony, as to why corn is not good
14 above 5,900 elevation although there have been
15 occurrences that corn has grown over 5,900
16 elevation, that would come to Mr. Dornbusch
17 later on. So really, based on this and based
18 on the cropping pattern that were grown before
19 and based on the economic values and so on,
20 which I don't have to say, Mr. Dornbusch will
21 say it later on, they have decided on the final
22 cropping pattern and gave us the final cropping
23 pattern.

24 Q Which of the five crops that you just named did
25 mesghinna-cross-white

1 you indicate do well above 5,900 feet?

2 MR. SACHSE: Objection, Your Honor. He
3 testified to that on direct examination. It's
4 not legitimate cross-examination.

5 THE SPECIAL MASTER: I'll overrule the
6 objection. He may test his memory or test
7 credibility or something like that.

8 THE WITNESS: I say small grains and
9 alfalfa and pasture land.

10 Q (By Mr. White) How did you make that
11 determination?

12 A Based on historic studies.

13 Q What historic studies did you make?

14 THE SPECIAL MASTER: I'm going to object
15 to that question. That's drawing out the
16 cross-examination beyond the realm of reason-
17 ableness. The witness, an expert testified
18 that he made that conclusion on his historic
19 experience, and to go into it further, in my
20 opinion, is unwarranted.

21 THE WITNESS: If necessary I can go
22 through it. I --

23 THE SPECIAL MASTER: You don't have to.
24 He's been overruled.

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1 I'm sure there will be other questions
2 and a lot of subject matter and many more
3 hours of this, so go on.

4 MR. WHITE: I'd like to state for the
5 record that the State of Wyoming is unable
6 to make an offer of proof with respect to
7 this.

8 THE SPECIAL MASTER: What does the State
9 of Wyoming seek to prove in the authorities
10 of this expert with regard to what he thinks
11 grows well at the higher elevations to which
12 he's testified is the result of his experience?

13 MR. WHITE: All I'm asking him, Your
14 Honor, is facts and data upon which he based
15 his opinion. In other words, the investigations
16 he made and if you won't let me inquire into
17 that, well, you won't. The record speaks for
18 itself.

19 THE SPECIAL MASTER: I have permitted you
20 to ask that and he said it was based upon his
21 experience and upon his historic -- result
22 of his years of work in this field.

23 MR. WHITE: All right, Your Honor. I don't
24 think that's what he responded.

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1 THE SPECIAL MASTER: The authorities
2 he uses to tell him what grows well above
3 5,900 feet in Wyoming. I doubt if there's
4 anything better than experience.

5 MR. CLEAR: Your Honor, I do think you
6 have a misunderstanding. He did testify on
7 direct that he looked at the crops growing in
8 the last three years on the Reservation.

9 THE SPECIAL MASTER: Yes, he did.

10 MR. CLEAR: And I think that's -- I think
11 he's gone into it really.

12 THE WITNESS: Let me say -- I can say it.

13 THE SPECIAL MASTER: You want to say it
14 anyway, I know, all right. Go ahead. All
15 right, go ahead and say it.

16 THE WITNESS: Okay. Our data was based --
17 our information, rather, was based mainly, you
18 know, depending on those 5,900 elevation,
19 higher and lower areas, was mainly based on
20 the BIA people.

21 Q (By Mr. White) What facts and data were
22 provided to you by the BIA personnel upon which
23 you based your conclusion?

24 THE SPECIAL MASTER: That one I'm simply
25 mesghinna-cross-white

1 not going to allow you to ask. You got the
2 BIA at your disposal, and you got a battery
3 of lawyers and you got a battery of assistants
4 in the Attorney General's office and you can
5 sure go to the BIA and find out their infor-
6 mation of what grows above 5,900 feet without
7 cross-examining this witness on his credibility
8 or expertise, Mr. White. You can't drill him
9 to death on every point like this ad nauseum
10 and prepare your case on cross-examination.

11 MR. WHITE: I think I'm entitled under
12 the rules, Your Honor, to determine the facts
13 and data upon which Dr. Mesghinna based his
14 opinion.

15 THE SPECIAL MASTER: And that's precisely
16 what you have adduced, and I believe I'm
17 entitled to run this case as a Special Master
18 and make rulings, and I have, and I would
19 appreciate some consideration on that fact.

20 Q (By Mr. White) Who in BIA did you receive
21 the information from?

22 A From a gentleman by the name of Don Crook.

23 Q And was the information he provided you oral
24 or in writing?

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1 Q Who do you mean by "your people"?

2 A People who worked with me, engineers. And also I
3 might add to this, Mr. Dornbusch himself has been
4 in the area and has gone through a lot of work to
5 determine this, to see whether our work was justi-
6 fied, and checked it himself.

7 Q Do you have with you the information you received
8 from Don Crook, the DIA, which you reduced to
9 written form?

10 A No.

11 THE SPECIAL MASTER: I would like to ask you
12 now, Mr. White to proceed off the crop pattern,
13 unless you have some new element within the crop-
14 ping pattern in the area.

15 Q (By Mr. White) Dr. Mesghinna, if you established
16 seven climatic zones, why didn't you establish
17 seven different cropping patterns?

18 MR. CLEAR: Your Honor, he testified Mr. Dorn-
19 busch established the cropping patterns. There
20 were two different zones for the cropping patterns,
21 but Mr. Dornbusch established the cropping patterns.

22 THE SPECIAL MASTER: Why don't we discuss who
23 established the climate zones in Wyoming? We have
24 had them a long time. We will find that it was the

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1 A It was oral, but we have written it up.
 2 Well, let me state the point further. We
 3 have gone ourselves to the area and we have
 4 seen the crops that grow in the area. The
 5 very fact above 5,900 elevation, this is, the
 6 5,900 elevation is not exactly 5,900, you
 7 know, might be higher, might be lower because
 8 there has been actual crops like corn that
 9 have been found to grow above 5,900 elevation.
 10 But to make sure, less than 5,900 corn does
 11 not grow, is not clearly adaptable. We have
 12 seen this ourselves. When I visited the area
 13 I -- I can't say that I have seen every part
 14 above 5,900 elevation. From what I have seen,
 15 from what I gather, most of the crops were
 16 perennial crops like alfalfa and also small
 17 grains. However, below 5,900 elevation, from
 18 what I have seen and what my people have seen,
 19 there has been almost all the crops that I
 20 mentioned before, in fact all the crops that I
 21 mentioned before grow over this area.

* * * * *

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1 Man Upstairs. We ought to talk to Him about this
2 climate. I don't think the question is an appro-
3 priate one, Mr. White.

4 Q (By Mr. White) Dr. Mesghinna, did you provide any
5 information to Mr. Dornbusch which would allow him
6 to develop a cropping pattern for each of the cli-
7 mate zones?

8 THE SPECIAL MASTER: Hasn't that been asked
9 and answered?

10 MR. WHITE: No, Your Honor.

11 A Only those which I have stated in my direct testi-
12 mony and what --

13 Q (By Mr. White) Only above and below 5900?

14 A Yes.

15 Q What were the sources of information, the facts
16 and data, which you used or relied upon to deter-
17 mine the growing season in each of the seven cli-
18 matic zones?

19 A On the lower areas, we received data as to planting
20 dates, effective cutoff dates, and harvest dates
21 from the U.S. Bureau of Reclamation, which mainly
22 their experience is in the Midwest District.

23 The only thing that is very important to an
24 engineer or a planner who works in this kind of

25 mesghinna - cross - white

1 field is the publication called Technicalities,
2 No. 21, by the Soil Conservation Service. There
3 they give some guidelines as to the crops, the
4 planting dates of plants and the approximate har-
5 vest dates of crops.

6 We also have discussed, since we are working
7 for the Tribes, we also have discussed -- I mean,
8 for people in the -- people who are in the irriga-
9 tion, what you call, operation, maintenance and
10 administration of the Federal Indian Project Lands,
11 and these people include Don Crook and Richard Harbour
12 and so on.

13 THE SPECIAL MASTER: You gentlemen want a ten-
14 minute break?

15 MR. WHITE: I think any time, Your Honor.

16 (Whereupon a ten-minute break
17 (was taken, commencing at
18 (approximately 3:15.

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THE SPECIAL MASTER: Okay, we're ready.

Q (By Mr. White) Dr. Mesghinna, have you described completely the sources of information you used to establish the growing season in each climatic zone?

A We have also discussed with Soil Conservation Service people as to planting dates and harvest dates and so on.

Q Which Soil Conservation people were those?

A This is on the telephone discussion, and that was in Lander.

Q Do you remember their names?

A No, I don't really remember.

Q Dr. Mesghinna, I hand you what's been marked for identification as Plaintiff's Exhibit WRIR FM-2, at the top of which it says "Growing Season Program." Are you familiar with that program?

A No, I am not familiar.

THE SPECIAL MASTER: What language is this written in?

THE WITNESS: I think this is basic, B-a-s-i-c.

THE SPECIAL MASTER: I see, this is basic.

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1 THE WITNESS: I think so.

2 Q (By Mr. White) About halfway through or maybe
3 three-eighths away from the top I find a page
4 that has Stetson Engineers on it.

5 A Uh-huh.

6 Q Do you know what that page has to do with --

7 MR. CLEAR: What page?

8 MR. WHITE: There's no number.

9 THE SPECIAL MASTER: You just get it by
10 flipping your fingers through and seeing it.

11 MR. WHITE: In the upper right-hand corner
12 it says Western Sybernet Center.

13 THE WITNESS: Yeah, it says Stetson
14 Engineers. How did it get in here?

15 Q (By Mr. White) Next page has Mesghinna on it.

16 A Yeah.

17 Q What is this?

18 A I don't know. How did you receive this?

19 Q Let me find out what it is first.

20 THE SPECIAL MASTER: Mr. White, could I
21 ask a question? What is S-y-b-u-l-l? It's
22 on that same page, Stetson Engineers.

23 MR. WHITE: S-y-b-u-l-l, I don't know,
24 I'm going to ask Dr. Mesghinna.

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1 THE WITNESS: This is the crop
2 consumptive use determination of Jensen-
3 Haise.

4 Q (By Mr. White) This is the evapotranspiration
5 program that you mentioned this morning?

6 A I hope this is the one. I don't know who got
7 it and --

8 Q Just for your comfort, Dr. Mesghinna, it was
9 provided to us in discovery by HKM. Can you
10 describe --

11 THE SPECIAL MASTER: Do you -- Go ahead
12 with your question on this exhibit.

13 Q (By Mr. White) Can you describe what this is?
14 This is a package that was provided to us. Can
15 you describe if it's a program listing, if it's
16 a program listing several types or what is it?

17 A I can only comment on the one that says Stetson
18 Engineers, Mesghinna, the other part I don't
19 know anything about it.

20 THE SPECIAL MASTER: What are you saying,
21 that the two pages that says Stetson Engineers
22 and Mesghinna, what about them?

23 THE WITNESS: That one I know.

24 THE SPECIAL MASTER: What did you say about
25 mesghinna-cross-white

1 them?

2 THE WITNESS: And that one is the evapo-
3 transpiration determination.

4 Q (By Mr. White) Is that the one that begins
5 with Sybernet Center in the upper right-hand
6 corner?

7 A Yeah. We use their computers.

8 Q Now, there are only two pages that have Stetson
9 Engineers on it and then Mesghinna, and following
10 that there are some pages that begin with Page 1.

11 A Uh-huh.

12 Q Goes through many pages. Is that the listing
13 for your evapotranspiration, your Jensen-
14 Haise ET program?

15 A Yeah.

16 Q Is that writing your writing?

17 A That's not my -- no, that's not my writing at
18 all.

19 Q And in front of the pages that are entitled
20 Stetson Engineers, you know nothing of that
21 particular program; is that correct?

22 A You mean the rest except the Stetson Engineers
23 program?

24 Q Everything above where it says Stetson Engineers?

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A No, I don't know.

MR. WHITE: Well, Your Honor, I'm going to, with the Court and Counsel's permission, remove those pages of which he knows nothing from the exhibit. I'll do it when we get to the next break.

* * * * *

1 Q What about the page in front of that? It has some
2 engineering on it. There is another page that
3 begins with the caption "This is the modified JH
4 program for Stetson Engineering." That is not
5 yours?

6 A That is not mine. The program that I have used
7 in here is the language FORTRAN, but I think
8 the rest of the program is in basic.

9 Q Is it true that following the two pages that have
10 ~~the Stetson~~ Engineering on it, pages 1 through 5
11 has the program listed?

12 A The program -- I mean page 1 through 4.

13 Q 1 through 4?

14 A Yes.

15 Q What does the information on page 5 mean?

16 A This is the characters and so on.

17 Q I'm sorry, I didn't understand. These are the
18 characters?

19 A Yes. This is something you get from the computer
20 user. It is not part of the listing of the program.
21 It is -- when the computer compiles your program,
22 then, you know, it gives you an output where some
23 of your variables were real numbers and some of
24 them were interger numbers, you know, and something

25 mesghinna-cross-white

1 of this sort.

2 THE SPECIAL MASTER: What does the word "array"
3 mean when printed back to you?

4 A An array means -- an array means something that
5 has another dimension. Say, for example, if I have
6 50 things to compile, or 50 things to do something
7 with, say there are 50 data, then, I put them in
8 an array.

9 What the computer does, let's think there
10 are several boxes in the computer where it sticks
11 your data. Then what the computer does, it takes
12 about 50 cases or boxes and sticks your data there.
13 It doesn't put any other data from any other source
14 in that place. So when you call it, the program
15 brings that data and compiles it.

16 Q Okay. After page 5, the pagination starts over
17 with page 1 again. Do you know what that informa-
18 tion is on the new page 1?

19 A Its page 1 has not much bearing.

20 Q Does this contain any of the facts and data which
21 were inputted into the computer and subjected to
22 this particular program?

23 A You see, the computer has -- when they make the
24 computer it has several things in it. Those are

25 mesghinna-cross-white

1 the boxes I gave as an example, and these are the
2 things where it addresses, and so on. It has no
3 bearing really on the calculation.

4 THE SPECIAL MASTER: I may have something to
5 say pretty soon about whether this whole thing
6 has any bearing on the lawsuit or not. I also
7 would like to know, Mr. White, at what time did
8 this come into your possession. You mentioned
9 it came to you from the --

10 MR. WHITE: About 10 minutes ago, Your
11 Honor. It was received apparently during the
12 deposition of Mr. Toedter, and was not marked
13 as a deposition exhibit. It had a notation on
14 the front of it "Growing Season Program," which --

15 THE SPECIAL MASTER: When was that depo-
16 sition taken where this was received?

17 MR. WHITE: Perhaps two and a half weeks ago.

18 THE SPECIAL MASTER: Two and a half weeks
19 ago? And yet, with this in your possession, you
20 folks filed a document demanding production of
21 computer materials and you already had it in
22 your files?

23 MR. WHITE: That is not true.

24 THE SPECIAL MASTER: That is very interesting.

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1 MR. WHITE: For the record, I've got to say
2 that the growing season program, which is the
3 caption of this document, is not one of the pro-
4 grams for which we asked you to compel discovery.
5 I would hope that the record would reflect that
6 we did not know, based on the title of this docu-
7 ment, that it contained the evapotranspiration
8 program.

9 THE SPECIAL MASTER: You can put what you
10 want into the record, Mr. White.

11 Q (By Mr. White) Okay. Dr. Mesghinna, is there
12 any information on FM.2, or within FM 2, beginning
13 with the Stetson Engineering item, that contains
14 either input or output data from this particular
15 program?

16 A There is an output for different crops on page 2.

17 Q Is that the page 2 that also has 13.59.38 at the
18 top; right?

19 A Yes.

20 Q For what crops is the output shown there?

21 A It is showing for, I believe the first one is
22 alfalfa.

23 Q How can you tell it's alfalfa?

24 A I'm just --

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1 Q I'm sorry?

2 A I was trying to read the program. I was trying to
3 read the program from the top.

4 Q Okay.

5 A And I can understand from the program what comes
6 first.

7 MR. SACHSE: May it please the Court, unless
8 Mr. White is prepared to show in the next question
9 or two the relevance of this print-out that he
10 has obtained, to the testimony of Dr. Mesghinna
11 in this case, I think further cross-examination
12 on this print-out should be prohibited.

13 THE SPECIAL MASTER: I will prohibit it in
14 a few more questions if the showing isn't made.

15 MR. SACHSE: Mr. White hasn't asked Dr.
16 Mesghinna the one question, whether any of the
17 information is information he relied upon in
18 forming his conclusion. If he did, then per
19 haps some more point of cross-examination is in
20 order, but if he didn't, we are wasting our time.

21 THE SPECIAL MASTER: Very well. You heard
22 him, Mr. White.

23 MR. WHITE: I have an outstanding question.
24 I asked him which crops he had information on.

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1 The next question will be, did he use that infor-
2 mation in his work.

3 THE SPECIAL MASTER: First, how did you tell
4 this was alfalfa? And what was your answer to that?
5 I failed to follow that. SKFH means alfalfa to
6 you?

7 A No. You see, by reading the program I can understand
8 what crop comes first and what crop comes next.

9 THE SPECIAL MASTER: I see. All right.
10 Go ahead, Mr. White.

11 Q (By Mr. White) What other crops, in addition to
12 alfalfa, are included in the output on page 2?

13 A I believe the second crop is corn.

14 THE SPECIAL MASTER: I have to ask you this
15 question, how can you tell from this document
16 that the second crop is corn? Would you just
17 show me where you concluded the second crop is
18 corn? I'm getting lost and I don't want to plead
19 quite that ignorant.

20 THE WITNESS: You see, the first one is --

21 THE SPECIAL MASTER: You are going down to
22 the drainage figures now for rain or precipitation
23 and it is there you get the crop material?

24 THE WITNESS: Yes.

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1 THE SPECIAL MASTER: You are not giving us an
2 answer from the top material, but from the second
3 part? I see.

4 THE WITNESS: Oh, this is alfalfa.

5 THE SPECIAL MASTER: That is alfalfa?

6 THE WITNESS: Yes. This is the first month;
7 this is January. We started to plant somewhere in
8 May. And in this case it should have been April,
9 because this is an old one. But we have April for
10 the latest one.

11 This is just an example we gave them. It is
12 not what we did. And the second one is, of course,
13 corn.

14 THE SPECIAL MASTER: That tells you it's corn
15 just from the precipitation or the water used?

16 THE WITNESS: From here. You can see from
17 the programing here. I was reading, when he was
18 talking, I was reading the program.

19 THE SPECIAL MASTER: All right.

20 THE WITNESS: And that is corn. And small
21 grains, I believe, is next.

22 THE SPECIAL MASTER: The next one?

23 THE WITNESS: The next one is small grains.

24 And the last is pasture.

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1 THE SPECIAL MASTER: Okay. Thank you.

2 THE WITNESS: However, this may not be the
3 ones that we used or studied; these were just
4 examples.

5 Q (By Mr. White) Do you have the output -- did
6 you receive outputs similar to that which begins
7 on page 2, which you just described for me, which
8 you did rely on in the study?

9 A Do I have output?

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1 THE SPECIAL MASTER: Did you receive
2 output like this on which you relied in your
3 work?

4 THE WITNESS: From who?

5 Q (By Mr. White) From your computer?

6 A Yeah, of course.

7 Q May I see it, please?

8 A I don't think I have it with me, but I have --

9 THE SPECIAL MASTER: We've already ruled
10 that you can't see it, Mr. White.

11 THE WITNESS: I have summaries of that.
12 I have given a summary in my report of that.
13 It's in here.

14 THE SPECIAL MASTER: Dr. Mesghinna, did
15 you rely on this actual report?

16 THE WITNESS: On this one, no.

17 THE SPECIAL MASTER: All right. You relied
18 on something similar?

19 THE WITNESS: Similar.

20 THE SPECIAL MASTER: In form?

21 THE WITNESS: In form.

22 THE SPECIAL MASTER: Different in
23 substance, and you don't have that with you?

24 THE WITNESS: No, I don't have, but I have

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1 given in summary, all output is in here.

2 THE SPECIAL MASTER: Is in where when you
3 say "In here"?

4 THE WITNESS: I'm sorry, in this report.

5 Q (By Mr. White) On what page do you have the
6 output for alfalfa in the same form that's
7 contained in FM-2? Would you please -- I
8 guess I'm just missing it.

9 THE SPECIAL MASTER: He didn't say it was
10 in the same form. It shows where the result
11 is in your Exhibit 245?

12 THE WITNESS: Yes, yeah. For example,
13 if we see Lander on Page 8 of Exhibit C-245,
14 what is of interest to us is the net irrigation
15 requirement, and the net irrigation requirements
16 are shown from April through September, for
17 alfalfa, for corn and small grain on Page 8,
18 for Lander Climatic Zone.

19 Q (By Mr. White) Is that table 3?

20 A Yes, sir. And in table 4 the same kind of
21 information is shown for Fort Washakie. Do
22 I have to go one by one?

23 Q No, that's all right.

24 THE SPECIAL MASTER: Table 5, table 6,
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1 table 7, table 8, table 9 all similar, all
2 through Dubois, all similar?

3 THE WITNESS: Yes, except on Page 10,
4 table 8 and table 9 do not show corn. And on --
5 excuse me, table 8 and table 9 do not show
6 corn. And table 10 shows the summary of
7 everything, weighted by cropping pattern.

8 Q (By Mr. White) Okay. Do the values that are
9 contained in table 3 reflect the values that
10 would be found in the second column on Page 2
11 of that printout, FM-2, or the second column
12 minus the third, ETP minus effective rainfall?

13 A Net irrigation requirement.

14 Yeah, it is the third column, but if you
15 count from the months it would be the fourth
16 column.

17 Q Okay. Which column is net depth of application
18 of FM-2?

19 A Net depth of application is the second column
20 from the right or the fourth column if you
21 count from the left.

22 I would state net depth of irrigation
23 rather than application. It's net irrigation
24 requirement. What I mean by this is when I

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1 say application, you talk mainly applied water
2 during one irrigation, you know, but this is
3 for the month, for each month, you know.

4 Q So the column in the printout from the computer
5 isn't net depth of application?

6 A It is net irrigation. I would call it net
7 irrigation. Some people call it net depth
8 of application, but I call it net irrigation.

9 Q Dr. Mesghinna, it is true then that you have,
10 although perhaps not with you, the input and
11 output data to which you apply the program,
12 which is listed in FM-2 for the Jensen-Saise
13 evapotranspiration; is that correct?

14 A I have given you all the input data.

15 Q How about the output data?

16 A I don't think I have it with me. Well, here it
17 is, that's what I said. It is summarized in
18 here as net depth of application.

19 THE SPECIAL MASTER: When you say "here"
20 you're putting your hand on what?

21 THE WITNESS: I'm sorry, Exhibit WRIR
22 C-245.

23 THE SPECIAL MASTER: Thank you.

24 MR. CLEAR: Your Honor, since it's clear

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1 that the printout in FM-2 was not the printout
2 used in Dr. Mesghinna's report, it was just
3 a sample apparently furnished to HKM, I don't
4 think it's relevant that it be introduced into
5 evidence if it's going to be offered into
6 evidence. Secondly --

7 THE SPECIAL MASTER: Let's wait and see,
8 to see if we cross that bridge.

9 MR. CLEAR: Your Honor, if it's not going
10 to be allowed into evidence, I think these,
11 the computer program listed in this document
12 should be, the copies should be gathered up and
13 returned to Dr. Mesghinna.

14 THE SPECIAL MASTER: Let us see.

15 MR. WHITE: The only thing I'm going to
16 offer, and I will offer it at the end of the
17 cross, Your Honor, is the program listing
18 contained in there. He's identified that as
19 the one he used.

20 THE SPECIAL MASTER: Four pages right
21 after his name?

22 MR. CLEAR: Your Honor, that's the program
23 itself, and that's back to where we were at this
24 morning. Now, they have it --

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1 THE SPECIAL MASTER: They had it all the
2 time.

3 MR. CLEAR: Well, Your Honor, it's still
4 apparent that it was inadvertently given to
5 them. If they keep it or it's made part of
6 this record, a Court record is open to the
7 public.

8 THE SPECIAL MASTER: I don't intend to --
9 I don't intend to reverse my ruling this
10 morning regarding the computer programs. We'll
11 cross that bridge when we get to it at the
12 end of his case. You know, there may be facts
13 that come up between now and the end of the
14 case that may change Mr. White's opinion, so
15 let's wait until we get to it, Mr. Clear.

16 MR. CLEAR: I would like to have from the
17 State some assurance that these will remain,
18 while in their custody, that they will not make
19 this, the computer listing program --

20 THE SPECIAL MASTER: Somebody should have
21 thought of this before it was handed over to
22 them during the deposition. It's a little hard
23 to --

24 MR. CLEAR: I'm not saying that, I'm saying
25 mesghinna-cross-white

1 just to keep it to themselves, that's all
2 I'm saying.

3 MR. WHITE: Well, Your Honor, I will say
4 that we will kepp it to ourselves, but the
5 problem is that everything that was provided
6 during that deposition was copied and
7 distributed to our consultants, and it was
8 only this afternoon that one of the consultants
9 was working through it and saw Stetson Engineers,
10 Mesghinna on those pages and showed it to me.

11 THE SPECIAL MASTER: It's kind of hard
12 for it to be kept from being public. It's
13 already been in the hands of how many employees
14 of their consultants, half a dozen secretaries,
15 four or five lawyers? I would say the matter's
16 already lost its private nature and pretty
17 much made moot my ruling of this morning trying
18 to protect the proprietorial rights of the --
19 I'm not going to change the ruling this morning.
20 I happen to think it's right.

21 MR. CLEAR: Your Honor, I just want some
22 assurance from the State that they will not
23 voluntarily release it beyond those people they
24 know have it now.

25 mesghinna-cross-white

1 MR. WHITE: We're not going to peddle
2 it, Your Honor. We're not going to give it
3 away. We have no reason to use it except to
4 evaluate it now that we know it is Dr.
5 Mesghinna's program listing.

6 THE SPECIAL MASTER: All right, go ahead.

7 MR. WHITE: Your Honor, could I ask that
8 within the next half hour or so I take a
9 break? I'm getting a sore throat and --

10 THE SPECIAL MASTER: Let's break for the
11 day at 4:30. That makes a full day, from
12 9:00 to 4:30.

13 MR. WHITE: I'd be willing to start early.

14 THE SPECIAL MASTER: Do you want to take
15 a break now and then come back in seven or
16 eight minutes?

17 MR. WHITE: I'd love to do that.

18 THE SPECIAL MASTER: All right, let's take
19 a break for ten minutes.

20 (Thereupon a ten minute
21 recess was taken.)

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1 THE SPECIAL MASTER: Let's come to order,
2 please.

3 MR. CLEAR: Your Honor, before Mr. White be-
4 gins, I would like to bring up the matter of FM-2
5 again.

6 There apparently are two computer programs in-
7 volved in there. We believe that what happened is
8 during Mr. Toedter's deposition we furnished the
9 State a very lengthy computer printout, which was
10 about yeh high, to which they were entitled.

11 I think that what happened was that when HKM
12 pushed the button to print it out, this came out
13 with it. And it was inadvertently turned over to
14 the State by the United States. It was not the
15 fault of either Dr. Mesghinna or HKM.

16 THE SPECIAL MASTER: Nor the State.

17 MR. CLEAR: Nor the State, Your Honor. We
18 are not saying they surreptitiously took this.

19 THE SPECIAL MASTER: Sure.

20 MR. CLEAR: But I think the only relevance
21 that this has is an example of the computer print-
22 out which Dr. Mesghinna has testified to. And
23 this is, as we mentioned in our brief, trade
24 secrets of two experts who are acting as witnesses
25 in this case for the benefit of the United States

1 and for the benefit of the Court.

2 We again would request that the Court order
3 the State to return to the United States, or to
4 this Court, all copies it has of these two pro-
5 grams in its possession and a written assurance
6 that their experts have not retained any copies
7 or made extra copies.

8 THE SPECIAL MASTER: I'll be glad to sign
9 such an order protecting the confidentiality of
10 the two documents. And I'm happy Mr. White has
11 given us his assurance they are not being peddled
12 by the State of Wyoming, but it is apparently de-
13 batable they would be used by some other people,
14 as evidenced by the fact they are now part of the
15 record in these proceedings by the question.

16 So, I'm sure that that can be done. If you
17 will prepare it, if you will draft such a protec-
18 tive order, I'll be glad to sign it. And I think
19 Mr. White will be glad to receive it.

20 MR. WHITE: Your Honor, I've got to say,
21 though, I cannot state with any assurance that I
22 can return every copy that has been made of this.

23 THE SPECIAL MASTER: All right. Do the best
24 you can.

25 MR. WHITE: And also I will -- I do plan to

1 ask our experts to analyze the program listing to
2 see if it's correct, and I expect to cross-examine
3 Dr. Mesghinna again about it.

4 MR. CLEAR: Your Honor, I think that's the
5 problem. If their experts look at it and they
6 analyze it, they are going to have it and they
7 are going to use it in other businesses.

8 THE SPECIAL MASTER: I thought I made it
9 clear you were to prepare an order, get it to me
10 and let's look it over and discuss it, and I plan
11 to sign it. If you are asking for something else,
12 we can discuss it at that time. And I may end up
13 drafting the order myself.

14 MR. CLEAR: Thank you, Your Honor.

15 MR. WHITE: I would like to say, Your Honor,
16 I think once the cat is out of the bag, I think it
17 still remains out of the bag. It was through the
18 United States that it got out of the bag, and I
19 think it is now open and we ought to have an oppor-
20 tunity to cross-examine on it.

21 THE SPECIAL MASTER: Certainly, you are doing
22 it. You brought it into the record in your proceed-
23 ing. And I don't intend to make available this
24 similar programming on the other subject matters
25 that are involved, but certainly you've got this

1 one in.

2 MR. CLEAR: Your Honor, could we have an
3 assurance from Mr. White then that the experts
4 will not attempt to utilize this information until
5 we have time to discuss the form and substance of
6 an order which we will submit to you?

7 THE SPECIAL MASTER: You ask Mr. White and he
8 will work something out. You gentlemen are profes-
9 sionals and a part of this court; you are officers
10 of this court.

11 MR. WHITE: Well, we probably ought to get some
12 resolution of that fairly soon, Your Honor, because
13 there are people that are looking at it right now.

14 THE SPECIAL MASTER: We will address it
15 tomorrow morning the first thing.

16 MR. CLEAR: Can we stop them from looking at
17 it until tomorrow morning? That's a problem.

18 THE SPECIAL MASTER: Well, I don't suppose you
19 can stop it. Are you asking questions on it?

20 MR. CLEAR: For right now, Your Honor. I
21 mean, his experts are now analyzing it, Your Honor.
22 That is what he is saying.

23 THE SPECIAL MASTER: Mr. Clear, I don't know
24 any way to prohibit the State from asking questions.

25 MR. CLEAR: They are not asking questions, Your

1 Honor; their experts are now, as he said, analyzing
 2 these programs.

3 THE SPECIAL MASTER: They are analyzing the
 4 programs, not to find fault with the system that
 5 Dr. Mesghinna used. They are analyzing the pro-
 6 grams to see if there are errors in the conclusion
 7 contained in here based upon the computer printouts.

8 And if the experts show there is any error on
 9 the figures, that is what they intend to attack, I
 10 expect, not the computerization and the assistance
 11 given by the computer to their conclusions. They
 12 could care less what the system is; only whether
 13 the data is halfway correct or better.

14 MR. WHITE: No, Your Honor. Out of fairness
 15 to the United States, I've got to say one of the
 16 purposes the State intends to use those few pages
 17 out of FM-2, which Dr. Mesghinna indicated was his
 18 program list, is to see whether the program accur-
 19 ately carries out the methodology that it is sup-
 20 posed to carry out, that you people carried out.

21 MR. CLEAR: They are going to run the computer
 22 program, Your Honor. When they run the computer
 23 program, their computer has the program.

24 THE SPECIAL MASTER: Well, I can't help that,
 25 Mr. Clear.

1 MR. CLEAR: Well, Your Honor, you can order
2 them to cease.

3 THE SPECIAL MASTER: You can make some due
4 showing on it and get your order, as I said, but
5 I'm not going to sit here and discuss it for another
6 twenty minutes.

7 While we are discussing that, I would like to
8 let you know, Mr. White, that this being Tuesday,
9 it's my thought that if you are permitted all of
10 Wednesday and, if necessary, all of Thursday, that
11 you can complete the cross-examination of Dr. Mes-
12 ghinna.

13 You have about 20 to 24 different subjects
14 that might be crammed into those two days.

15 Do you believe that it's the ballpark figure,
16 as we discussed it yesterday a little bit?

17 MR. WHITE: No, sir. I think yesterday I said
18 that I thought that my best guess was that it would
19 be about the middle of next week.

20 THE SPECIAL MASTER: No, your best guess would
21 be half a day and your worst guess was the middle
22 of next week.

23 MR. WHITE: Well, our recollection is different,
24 Your Honor.

25 THE SPECIAL MASTER: Let's have a look at the

1 transcript and see who is wrong. Have you got
2 yesterday's record somewhere? Monday morning's
3 record? I am capable of misinterpreting things,
4 too, I guess.

5 MR. WHITE: It might have been this morning.
6 I can't remember.

7 THE SPECIAL MASTER: Was it this morning?

8 THE WITNESS: This morning.

9 MR. WHITE: Maybe I can ask Wold if he
10 remembers.

11 THE SPECIAL MASTER: I know what it was week
12 before last. Week before last it was four months;
13 I remember that. I knew that was in jest, but I
14 wasn't too sure at the time I heard it.

15 THE WITNESS: It was half a day.

16 THE SPECIAL MASTER: It was what?

17 THE WITNESS: Half a day.

18 MR. WITNESS: It is still half a day if he
19 answers everything.

20 THE SPECIAL MASTER: It is half a day until
21 next Wednesday? I thought it was stated before we
22 broke up. I have a suspicion you gentlemen are
23 right. I don't find it anywhere. Well, in any
24 event --

25 MR. WHITE: We can find it by tomorrow morning,

1 Your Honor.

2 THE SPECIAL MASTER: I am going to work on;
3 the assumption that you felt the worst case would
4 be it would go until the middle of next week. That
5 is two and a half days next week.

6 I will give you Thursday and Friday. I would
7 ask you, Mr. White, to conduct your cross-examination
8 within the limitations that I am about to impose now,
9 which I believe are necessary, and that is to limit
10 your further cross-examination on Dr. Mesghinna so
11 that by the end of business at 5:00 on Friday next,
12 three full days from now, you will have completed
13 the cross-examination.

14 If that is burdensome, I think at least it does
15 not take you by surprise and you can yourself adopt
16 a measure of the depth of your inquiry into the sub-
17 ject matters in the days you have left to see what
18 is possible in the areas you can get.

19 I've done some research on this, and I believe
20 that's a fair decision. And I hope you can do your
21 best to try to put it into those time constraints.

22 Q (By Mr. White) Dr. Mesghinna, on Page 7 of your
23 Exhibit C-245, let's go back to cropping patterns.
24 Turn to Table 2, Page 7.

25 mesghinna - cross - white

1 A. Yes, sir.

2 Q. Isn't it true that instead of 6 percent for small
3 grain nursing alfalfa in the areas lower than 5900
4 feet, it should be 16 percent?

5 A. I suppose that has been corrected. In my book it
6 says 16. There was a typographical error in there.

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25 mesghinna - cross - white

1 MR. WHITE: I didn't get a replacement page,
2 Your Honor. Does the Court's copy of C-245 show
3 16 percent for areas lower than 5900 feet?

4 THE SPECIAL MASTER: No, it shows 46 -- for
5 grain nursing alfalfa?

6 MR. WHITE: Yes, sir.

7 THE SPECIAL MASTER: Six percent on areas
8 lower and 16 percent on areas higher.

9 Q (By Mr. White) Isn't it true, Dr. Mesghinna, that
10 both of these ought to be 16 percent?

11 A Yeah, on both it ought to be 16.

12 THE SPECIAL MASTER: All right, I'll correct
13 my copy. That's a typographical error, is it?

14 THE WITNESS: Uh-huh, because if you add it,
15 it shows 100.

16 MR. WHITE: It only adds up to 90 otherwise.

17 THE SPECIAL MASTER: Very good.

18 Q (By Mr. White) See, I'm not as bad as they say,
19 Wold.

20 All right. Now, turning to Table 3 through 9
21 in your report, is your small grain nursing alfalfa
22 irrigation consumptive use included in small grain?

23 A Excuse me?

24 Q Why is, in Table 3, for example, why is the small

25 mesghinna - cross - white

1 grain as a nurse crop as opposed to small grain as
2 a cash crop or a fee crop?

3 A. I think that would require a short explanation. As
4 such, there is no crop called small grain nursing
5 alfalfa really. It is a management thing, more or
6 less, to keep, to protect the alfalfa from the wind
7 and other problems. There is no, as such, crop co-
8 efficient for it, I mean, for small grain nursing
9 alfalfa, there is no crop coefficient. So what we
10 do is we use the crop coefficient or the crop con-
11 sumptive use of small grain until the small grain
12 is harvested, and from then onwards we include
13 whatever is left, which is alfalfa. So that's the
14 reason it is not here.

15 But in the -- If we see on Table 10, weighted
16 net irrigation of water requirements for future
17 lands, it is included there. Table 10, Page --
18 Table 10, Page 10, on C-245.

19 Q. I guess I just missed your answer. I'm getting
20 foggy. Is the irrigation consumptive use for small
21 grain as the nursing crop the same as small grain or
22 same as alfalfa?

23 A. It is the same as small grain. It is the harvest.

24 Q. And then you change to alfalfa?

25 mesghinna - cross - white

1 A. And then you change to alfalfa.

2 THE SPECIAL MASTER: Is there much of that
3 done as a matter of actual practice or is that
4 only done on the first initial alfalfa crop?

5 THE WITNESS: Exactly, it's just on the
6 initial stage of the alfalfa crop, the first year.

7 Q. (By Mr. White) And what you're assuming in Table
8 2 then is that you're putting in a new crop of
9 alfalfa on roughly one sixth, one sixth of the land
10 each year; is that right? Where you have a small
11 grain nursing alfalfa or 16 percent.

12 A. Yeah, 16 percent small grain nursing alfalfa every
13 year.

14 Q. Okay. Wold, let me hand you what's been marked as
15 Plaintiff's Exhibit WRIR FM-4, and ask you if you
16 can identify that exhibit which is entitled "Plan
17 for Completion of the Wind River Irrigation Project,
18 June, 1968", and especially Page 7, the first full
19 paragraph under project, which breaks the elevation
20 of 5500 rather than 5900 feet.

21 (Brief pause.

22 Q. Have you seen this before, have you worked with it?

23 THE SPECIAL MASTER: Are you familiar with it?

24 THE WITNESS: I might have seen it, but also I

25 mesghinna - cross - white

1 know -- I believe, I can't be 100 percent sure,
2 there is another report by BIA which uses 5900,
3 too, instead of 5500. It's not -- I can try to
4 find it right now, I think I have the report,
5 probably.

6 THE SPECIAL MASTER: Do you want to leave
7 these for later for offering the whole bunch of
8 them?

9 MR. WHITE: Yes, sir.

10 Q (By Mr. White) Dr. Mesghinna, I hand you what's
11 been marked as Plaintiff's Exhibit FM-3, which is
12 the letter on HKM Associates' letterhead dated
13 October 17, 1980, followed by excerpts from the
14 document entitled "Criteria for Selection of Pro-
15 ject Study Areas, Wind River Indian Reservation",
16 and the specific language which follows Table 2 --
17 excuse me, Table 3. And that refers to the highest
18 elevations for certain types of crops, and in the
19 last sentence, concluding that elevation of 5500
20 was the dividing between the upper and lower areas,
21 can you identify that, have you used that in your
22 work?

23 THE SPECIAL MASTER: You asked him three rapid
24 fire questions in a hurry. Have you seen this?

25 mesghinna - cross - white

1 THE WITNESS: No, I have never seen it.

2 THE SPECIAL MASTER: Are you familiar with it?

3 THE WITNESS: I'm not familiar with it.

4 THE SPECIAL MASTER: Have you ever used it in
5 your work?

6 THE WITNESS: I have never used it in my work.

7 MR. WHITE: Solved that problem.

8 THE SPECIAL MASTER: Do you want to knock off?

9 MR. WHITE: I'd like to knock off.

10 THE SPECIAL MASTER: We will stand in recess
11 until 9:15 tomorrow morning.

12 MR. WHITE: We can start a little early.

13 THE SPECIAL MASTER: If you want to come in
14 a little earlier and start working on the order --

15 MR. CLEAR: We're typing an order up right
16 now.

17 MR. KROB: Your Honor.

18 THE SPECIAL MASTER: Yes, Scotty.

19 MR. KROB: Before we go off the record, I
20 wonder if it would be possible tomorrow to address --
21 the State of Wyoming would like to address the
22 motion for expedited discovery that is now before
23 the Court. I believe there's a very short time
24 period, I believe the United States is already
25 familiar with the materials involved, and it's part

1 of our ongoing --

2 THE SPECIAL MASTER: Why don't you use tonight
3 and a little bit of tomorrow to see what you can
4 work out tomorrow, I don't want to cut in on
5 Sandy's allocated time with it, and see if you can
6 work something out, and we'll address the problem
7 tomorrow.

8 MR. WHITE: Your Honor, I'd like to ask if
9 anyone has Exhibit C-244, which is a climatic zone
10 map.

11 MR. CLEAR: You have it, we gave it to you.

12 THE SPECIAL MASTER: Ladies and gentlemen, we
13 are in recess.

14 (Thereupon a ten-minute recess
15 (was taken.
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(The following proceedings
(began at 4:25 p.m.

THE SPECIAL MASTER: We will call the meeting to order. We are in a special meeting pursuant to the matter just concluded regarding the order for the return of the computer programs now in the possession of Wyoming belonging to the United States.

I am going to go ahead and sign this order that has been prepared by Mr. Echohawk and date it today.

Mr. White?

MR. WHITE: Your Honor, I've got to advise the Court two things:

First, there is no way humanly possible that I can comply with the order because I don't know --

THE SPECIAL MASTER: You have already said you would do the best you could. That's all we can ask of you. You said you're not going to farm out the thing or merchandise it.

MR. WHITE: I'm not going to peddle it or give it away.

THE SPECIAL MASTER: You are not going to peddle it. That's about all they are asking, I think. They are entitled to the order. By the way, do you mind if I change my name on the order

1 so that it complies with my name?

2 MR. ECHOHAWK: We were in a bit of a hurry.

3 THE SPECIAL MASTER: That is the only time
4 the name Roncalio has ever been misspelled.

5 MR. WHITE: Your Honor, I would also indicate
6 I believe I'm entitled, once it has been provided,
7 to the State of Wyoming, to cross-examine Dr. Mes-
8 ghinna with respect to the computer program. The
9 program listing is not what is stated in here; it
10 is an example of the output.

11 I will proceed with respect to the exhibit,
12 which has been identified and made a part of the
13 record, to cross-examine him about that.

14 I will, however, provide to the United States
15 all the copies I can find. And I'm certainly not
16 going to peddle or sell the program. That's not
17 what we need it for; we need it for cross-examination.

18 THE SPECIAL MASTER: I understand. We will
19 convene at 9:15 in the morning. Here is a copy of
20 your signed order.

21 (Proceedings were recessed at
22 4:31 p.m.

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REPORTERS' CERTIFICATE

1
2 State of Wyoming)
3 County of Laramie) : SS

4 We, Merissa Racine and John Boverie, Registered
5 Professional Reporters and Notaries Public, hereby certify
6 that we did at the time, date and place, as set forth,
7 report the proceedings had before the Honorable Teno
8 Roncalio, Special Master Presiding, in stenotype; that
9 the foregoing pages, numbered 4392-4572, inclusive, con-
10 stitute a true, correct and complete transcript of our
11 stenographic notes as reduced to typewritten form under
12 our direction.

13 We further certify that we are not agents,
14 attorneys or counsel to any of the parties hereto, nor
15 are we interested in the outcome thereof.

16 Dated this 5th day of May, 1981.

17
18 Merissa Racine
19 MERISSA RACINE
20 Registered Professional
21 Reporter

17
18 John Boverie
19 JOHN BOVERIE
20 Registered Professional
21 Reporter

