

4-16-1981

Trial Transcript, Vol. 39, Afternoon Session

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case # 4993

File # 146

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

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

FILED _____
5/1 19 81
Margaret V. Hampton CLERK
DEPUTY

VOLUME 39

Afternoon Session

Thursday, April 16, 1981

ORIGINAL

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

3 Q (By Mr. Echohawk) Mr. Waples, before our lunch-
4 eon break I believe we were discussing your
5 exhibits, C-158 through C-221, the maps that
6 depict the results of your study.

7 Does C-158 and the similar maps reflect the
8 location of the parcels which you found to be
9 arable?

10 A Yes, they do.

11 Q Mr. Waples, would you explain for us how the
12 acreage is depicted on each map, and within the
13 acreage tables that have been identified so far,
14 could you tell us how that acreage was determined?

15 A Yes, sir. If the Court will turn to Exhibit 225,
16 the portion of that that reads, "Table 10-B" --
17 it's the second half of the report, the very first
18 page of Table 10-B -- on the table, Exhibit 158,
19 the table corresponds with Exhibit 158 here, and
20 the acreage figure of 42.1 acres in gravity,
21 Class 4 column, which corresponds to the 41.2
22 acres, this piece of ground (indicating).

23 You will note that there's no sprinkler
24 acreage given, which means that this land is

25 waples-direct-echohawk

1 arable only from a gravity method. It's not
2 arable from a sprinkler method.

3 On every exhibit you will see an acreage
4 figure for a tract that can be tied directly to
5 the tables in WRIR C-225.

6 Q Mr. Waples, how were these acreage totals derived
7 from your initial work to be transferred onto
8 these exhibits?

9 A The acreage totals --

10 Q Per parcel? How did you determine how many acres
11 were in a parcel?

12 A Oh, all right. The base from which these exhibits
13 were prepared were the hydrographic photographs
14 that Mr. Billstein introduced as evidence. Out-
15 lines were made of the parcels -- the idle
16 parcels -- and those were made into overlay forms
17 from which these exhibits were made.

18 The acreages were planimetered from the
19 hydrographic photos. They are the same acreages
20 as the idle lands that Mr. Billstein testified to.

21 Q I need to clear up that point. Mr. Billstein had
22 testified and gave his opinion as to the acreage
23 that is currently in use.

24 Now, is the acreage that you are testifying

25 waples-direct-echohawk

1 about here today the same or different than the
2 acreage that Mr. Billstein testified to?
3 A. Yes, that wasn't clear. The hydrographic program
4 mapped all the lands. Some of them were in use.
5 Some of them were not in use.

6 The ones in use Mr. Billstein testified to.
7 The ones not in use are covered in my testimony
8 and show up on these exhibits.

9 Q. When you refer to this hydrographic program, is
10 this the program that assigned land types to
11 certain parcels?

12 A. That's correct.

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waples-direct-echohawk

1 Q (By Mr. Echohawk) Those be types one through
2 eight?

3 A That's correct.

4 Q Just to make sure I get this point clarified,
5 Mr. Waples, I show you what's been entered
6 into evidence as United States Exhibit WRIR C-137-A,
7 which contain Mr. Billstein's -- the acreage that
8 Mr. Billstein testified to that were currently
9 in use in the historic program. Out of the
10 12,138 acres that you have rendered your opinion
11 on here today, is there any overlap between your
12 12,000 and Mr. Billstein's 34,000?

13 THE SPECIAL MASTER: I would like that
14 question clarified. What do you mean overlap?
15 Does the figure total of one include acreage
16 figures in the other?

17 MR. ECHOHAWK: That's correct.

18 Q (By Mr. Echohawk) Is there any inclusion of
19 the same acreage?

20 A No, sir. The 12,000 odd acres are in addition
21 to this 34,000 acres that Mr. Billstein
22 testified to.

23 Q None of the same acreage is included in each
24 total?

25 waples-direct-echohawk

- 1 A None of the same acreages in each total.
- 2 Q Mr. Waples, have you prepared a report as a
- 3 result of the land classification work you've
- 4 discussed here today?
- 5 A Yes, sir, I have.
- 6 Q I show you what has been marked as United
- 7 States Exhibit WRIR.C-226. Would you please
- 8 identify 226 for us.
- 9 A Yes. Two·twenty-six is a report entitled
- 10 Historic Land Study, Land Classification of
- 11 Project and Nonproject Idle Lands.
- 12 Q Now, in the title, when you refer to project,
- 13 those would be what projects, what is meant by
- 14 that portion of the title?
- 15 A Those include the Federal Irrigation Projects
- 16 as well as the trust lands in the LeClair,
- 17 Riverton and Midvale Projects.
- 18 Q Is this report prepared by you or under your
- 19 direction?
- 20 A Yes, it was.
- 21 Q Does it contain a discussion of the work performed
- 22 by you and that was reviewed by you?
- 23 A Yes, it does.
- 24 Q Does it contain copies of the land classification.
- 25 waples-direct-echohawk

1 standards upon -- under which the lands were
2 classified?

3 A Yes. There are two sets of standards; the
4 project standards and the nonproject standards.

5 Q Does it contain acreage totals as a result of the
6 land classification work on the historic idle
7 lands?

8 A Yes, it does.

9 MR. ECHOHAWK: Your Honor, at this time I
10 would like to offer into evidence what has been
11 previously identified as Exhibit C-36-A, which
12 is the project land classification standards;
13 Exhibit 156, which are the nonproject land
14 classification standards; Exhibit 157, which is
15 Mr. Waples' resume; Exhibit C-158 through C-222,
16 which are the -- excuse me, 221, which are the
17 large maps depicting the location of Mr. Waples'
18 historic arable lands; Exhibit 222, which is the
19 index number sheet which gives the number per --
20 either number or drainage or major project;

21 Exhibit 223, which gives the historic arable
22 lands totals; Exhibit 224, which gives the total
23 by major projects; Exhibit 224-A, which gives the
24 acreage total for nonproject areas; Exhibit C-225,
25 waples-direct-echohawk

1 which is a compilation of the project and non-
2 project acreages by photo number with corresponding
3 exhibit number, corresponds to the exhibit numbers
4 158 through 221; and finally Exhibit C-226,
5 which is the report prepared by Mr. Waples.

6 THE SPECIAL MASTER: Mr. Echohawk, aren't
7 virtually all -- aren't some of these contained
8 in 226 so there might be some duplication,
9 although not necessarily?

10 MR. ECHOHAWK: Yes, that's right, Your Honor.

11 THE SPECIAL MASTER: Mr. Merrill.

12 MR. MERRILL: Your Honor, if I could have
13 just a couple of moments to gather my notes.
14 As to some of these we have objections, some we
15 won't, and I could probably make my voir dire a
16 little less painful for everyone.

17 THE SPECIAL MASTER: Fine, take a few
18 minutes.

19 MR. ECHOHAWK: Your Honor, before we go on,
20 I have -- Mr. Waples prepared a reduced version
21 of the Exhibits 158 through 221 in sort of a
22 booklet form. With Mr. Merrill's permission,
23 I'd like to give you a copy so you could keep
24 track because some parcels are small to see, and

25 waples-direct-echohawk

1 also provide Mr. Merrill with a copy.

2 THE SPECIAL MASTER: You will provide Mr.
3 Merrill with a copy?

4 MR. ECHOHAWK: Yes, I will.

5 MR. MERRILL: Your Honor, before I complete
6 preparation of my voir dire, may I ask Mr.
7 Echohawk the purpose of the offer of all these
8 exhibits?

9 MR. ECHOHAWK: Offered to reflect the
10 results of Mr. Waples' land classification work
11 that he has rendered an opinion on. The large
12 maps are offered to show the location and the
13 acreages, and other items that are shown on there.
14 Generally, Your Honor, for the truth of their
15 contents.

16 THE SPECIAL MASTER: And to support the claim?

17 MR. ECHOHAWK: And generally for all purposes.

18 (Off-the-record.

19 THE SPECIAL MASTER: Mr. Waples, I'm looking
20 at 175. Can you tell me how I can tell whether
21 this parcel of land, No. 13, is classified as
22 4, 3, 2 or 1?

23 THE WITNESS: Yes, sir. The first number
24 means it's a Class 3 for gravity, and the second

25 waples-direct-echohawk

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number means it's Class 2 for sprinkler.

If there is a six in one of these places
it's nonarable for gravity.

(Off-the-record.

* * * * *

waples-direct-echohawk

1 THE SPECIAL MASTER: All right. Let's
2 convene. Mr. Merrill, proceed.

3 MR. MERRILL: Your Honor, I'll try to deal
4 with these in roughly the order of exhibit
5 number. There are quite a few, and there are
6 some that I would like to voir dire, and I will
7 try to go through them in a somewhat rational
8 fashion.

9 We have no objection to the admission of
10 United States Exhibit WRIR C-36-A, which is a
11 copy of the project land classification study.

12 I do have a few questions on voir dire with
13 respect to Exhibit C-156, the non-project standards.

14 VOIR DIRE EXAMINATION

15 BY MR. MERRILL:

16 Q Ross, would you please take a look at US Exhibit
17 WRIR C-156?

18 A Yes, sir.

19 Q I notice that in the caption to that exhibit it
20 has the words "Non-project Irrigated Lands."

21 Are the lands which you classified according
22 to the standards in this exhibit actually irrigated
23 lands?

24 A No, they are not.

25 waples-voir dire-merrill

- 1 Q Why does that word appear in the caption?
- 2 A It should read "Non-project Historically Irri-
3 gated Lands," to be more precise.
- 4 Q Are you saying then that all of the lands class-
5 ified according to the standards on Exhibit C-156
6 were historically irrigated?
- 7 A They met the definition of historically irrigated
8 lands, yes.
- 9 Q What is the definition of historically irrigated
10 lands?
- 11 A I would refer you to Mr. Billstein's report. I
12 don't remember the exhibit number nor do I have
13 one -- yes, I do.
- 14 I'm quoting from WRIR C-138, page 2. It's
15 what I read into the record earlier this morning.
- 16 We are talking about lands that were formerly
17 served, or those lands that could be served from
18 historic irrigation facilities.
- 19 Q So the second part of your definition of historic-
20 ally irrigated lands is lands that could be served
21 from existing irrigation facilities; is that right?
- 22 A That's correct.
- 23 Q With respect to those lands, isn't it true that
24 lands in the latter category that could be
25 waples-voir dire-merrill

1 served have, in fact, never been irrigated?

2 MR. ECHOHAWK: Objection, Your Honor. This
3 is improper voir dire. He's getting into cross-
4 examination right off.

5 THE SPECIAL MASTER: Read the question to me,
6 please.

7 (Thereupon the following
8 question was read back as
9 follows: "Q With respect to
10 those lands, isn't it true
11 that lands in the latter
12 category that could be served
13 have, in fact, never been
14 irrigated?")

12 THE SPECIAL MASTER: He may answer.

13 A. (By the witness) Yes, that's true. Some lands
14 that lay below existing or historic facilities
15 or -- and lands that lay within, for instance,
16 the major projects, if they lay within the major
17 project boundaries and would have ultimately been
18 served to complete those projects, even though
19 they lay above the major canals, were considered
20 to be -- were classified under this program.

21 Q But, in fact, some of those lands have never been
22 irrigated; isn't that correct?

23 MR. ECHOHAWK: Objection, Your Honor. The
24 question is irrelevant.

25 waples-voir dire-merrill

1 MR. MERRILL: I don't think so, Your Honor.
2 All of these documents are coming in at one time,
3 and I want the record to be clear as to the types
4 of lands that were classified according to each
5 of these standards and whether the names that are
6 applied to these various categories are, in fact,
7 accurate or maybe a little misleading.

8 THE SPECIAL MASTER: I will overrule the
9 objection. I would also like to have a distinction
10 between the lands you have testified to this
11 morning that have never been irrigated from those
12 lands in the six projects that have never been
13 irrigated. If you can help make that distinction,
14 I would be grateful to you, too.

15 THE WITNESS: Okay.

16 THE SPECIAL MASTER: Maybe that's what Mr.
17 Merrill has in mind too. I'm not sure.

18 MR. MERRILL: The only point I was trying to
19 make with that question is it's a misnomer to
20 call lands that have never been irrigated -- to
21 call them historically irrigated, which is what
22 this report does.

23 MR. ECHOHAWK: Again, it's irrelevant. The
24 only thing we are concerned about is the arability

25 waples-voir dire-merrill

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of these lands.

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We have given names to different programs.

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The names assigned have nothing to do with --

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the question is whether or not they are arable

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in relation to Mr. Waples' testimony.

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THE SPECIAL MASTER: What we are back again

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to is a rose is a rose is a rose. Lands that

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are called historically irrigable lands ought

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to be lands that, through the history of the

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Reservation, have been irrigated at one time or

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other, I would think.

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Now, if I am to find they include lands that

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were never irrigated, I would like to know what

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reasons, if any, experts would include such

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lands in lands designated and defined as historic-

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ally irrigated facilities upon which there are

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many reasons that lands which were historically

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irrigated are no longer in use.

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It's all clear except for one thing. Why

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does it include lands that have never been irri-

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gated?

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MR. MERRILL: That's exactly the thrust of

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the question, Your Honor, and since these are

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listed as historically irrigated, I think there

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waples-voir dire-merrill

1 is implicit in that that they have been
2 irrigated.

3 THE SPECIAL MASTER: If a name has no
4 relevance -- I know what Mr. Echohawk is saying.
5 It makes no difference. If the land has been
6 tested and can grow something, then it's arable.

7 MR. ECHOHAWK: And refer to Exhibit C-138,
8 Mr. Billstein's report, the first page, the very
9 first paragraph, where he sets forward in the
10 introduction historic lands are trust lands
11 which are currently or historically have been
12 irrigated or which can be served from historic
13 irrigation facilities.

14 There we have set the parameters of our
15 definition. The lands that we are talking about
16 fall within that.

17 THE SPECIAL MASTER: That's very helpful and
18 beneficial. Then the lands that have never been
19 irrigated is land that can be served from present
20 or historic irrigation facilities whereas the
21 lands that Mr. Kersich has spent so much time
22 with in the six units are lands that would require
23 new facilities?

24 MR. ECHOHAWK: That's correct, Your Honor.

25 waples-voir dire-merrill

1 THE SPECIAL MASTER: All right. We have
2 cleared up something that helps me, in any event.

3 MR. ECHOHAWK: So, again, I would object
4 to Mr. Merrill's continuing line of questioning.
5 It's irrelevant. We have set our definition,
6 and Mr. Waples has testified that his lands fall
7 within that.

8 THE SPECIAL MASTER: Well, I would like the
9 answer, and I may sustain further objections if
10 the point isn't clear.

11 MR. MERRILL: Your Honor, before this collo-
12 quy I forgot if there was a question outstanding
13 or not.

14 THE SPECIAL MASTER: Yes, there was, and if
15 you want an answer as to why was it included --
16 and I think in the dialogue between counsel and
17 me we have touched upon it, and the reference made
18 to the page 1 definition in 138, I believe, made
19 your question moot.

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waples-voir dire-merrill

1 MR. MERRILL: In that case, Your Honor, I'll
2 withdraw the question.

3 THE SPECIAL MASTER: All right.

4 MR. MERRILL: We do not have any objection,
5 incidentally, to the introduction of United
6 States Exhibit WRIR C-156. I simply wanted to
7 clarify that point for the record. We have no
8 objection to the admission of Exhibit C-157, which
9 I believe is a copy of Mr. Waples' resume.

10 THE SPECIAL MASTER: Right.

11 MR. MERRILL: At this point, I will jump
12 to Exhibit C-222 and come back to the other
13 intervening exhibits, which are the 64 or so
14 maps, at the conclusion.

15 We also have no objection to the introduction
16 of Exhibit C-222, which is a description of the
17 drainage code numbers that have been used for
18 purposes of identification.

19 THE SPECIAL MASTER: How is that to be
20 defined if it's admitted? Is it an indexed
21 number sheet?

22 MR. ECHOHAWK: Yes, sir.

23 THE SPECIAL MASTER: Or just what Mr. Merrill
24 called it. If you two will agree what it's to
25 be called we'll be glad to call it that in our

1 index.

2 MR. CLEAR: Drainage code index.

3 MR. MERRILL: Drainage code index. It's

4 Mr. Echohawk's exhibit, and I'll agree to

5 call it whatever he wants.

6 MR. ECHOHAWK: Drainage code index number

7 sheet.

8 MR. MERRILL: Since we've learned the name

9 of these things don't mean anything anyhow.

10 THE SPECIAL MASTER: Drainage code index

11 number sheet.

12 MR. MERRILL: Exhibit C-223 is a copy of

13 table 8, which is also contained in the report

14 which has been identified as Exhibit C-226. It's

15 repetitive, but we have no objection to its

16 introduction.

17 With the remainder of the exhibits, beginning

18 with 224, C-224-A, 225 and 226, with respect to

19 all of those we have technical ten-day objections

20 on the grounds that the exhibit.--

21 THE SPECIAL MASTER: Technical what kind?

22 MR. MERRILL: Ten-day rule objections on

23 the grounds that the exhibits were not supplied

24 to us in their final form ten days before today.

25 With respect to Exhibit C-225 and C-226 I

1 will waive those objections. The reason I'm
2 waiving them is because during the couple of
3 weeks before these proceedings today, Mr.
4 Echohawk has made a very intense and good faith
5 effort to keep us updated with the inevitable
6 updated revisions of these reports. We under-
7 stand these things keep going until the night
8 before. As long as there is an attempt made to
9 keep us posted on the revisions there's no
10 problem. As to those, C-225 and 226 we have no
11 objection.

12 With respect to the ten-day rule, I have a
13 little bit of voir dire for 226, which I will
14 get to in a moment.

15 With respect to Exhibit C-224 and C-224-A,
16 I must observe the ten-day objection. The
17 grounds are that we have never, until being
18 handed copies before the lunch break today, have
19 never seen these exhibits. As such, our experts
20 were not able to evaluate them and I am not able
21 to voir dire on them, to test their truthfulness
22 since they are being offered for the truth of
23 their contents. And based on that I must assert
24 the ten-day rule and object to their admission
25 into evidence.

1 THE SPECIAL MASTER: The objection will be
2 sustained, and ten days from now I expect Mr.
3 Echohawk to renew his motion, his offer of proof
4 and admit them into evidence at that time.

5 MR. ECHOHAWK: Could I have a word on it
6 before you rule?

7 THE SPECIAL MASTER: Before you're summarily
8 ruled or drummed out.

9 MR. ECHOHAWK: All these are, again are
10 tabulations in a different form. There's -- there's
11 really not much difference between these and --

12 THE SPECIAL MASTER: The totals?

13 MR. ECHOHAWK: And the totals.

14 THE SPECIAL MASTER: Of 228?

15 MR. ECHOHAWK: Exhibit 223.

16 THE SPECIAL MASTER: Two twenty-three.

17 MR. ECHOHAWK: Essentially they're all
18 talking about this small table, labeled table 8.

19 THE SPECIAL MASTER: Very well. What
20 you're saying is all that 224 and 224-A do is
21 break down the totals of 223?

22 MR. ECHOHAWK: That's correct, Your Honor.
23 If Mr. Merrill would like to have perhaps the
24 weekend, we have a long weekend, to review these
25 and perhaps he could continue his voir dire on

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Monday.

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MR. MERRILL: Your Honor, I can't agree to that, and the reason that I can't is because as you can tell from the total numbers of acres described on these two exhibits, we're talking about a fairly large amount of land.

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I think it's unfair to the State's experts to ask them to put in the Easter weekend preparing me to voir dire exhibits that should have been served on us ten days ago.

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Now, the purpose of the ten-day rule is to give our experts or any party's experts a chance to review the exhibit ten days before they are to be offered so that I have a chance here today to do the voir dire of those exhibits. Now, if we let them in ten days down the road, Mr. Waples may not be here unless we make him available subject to recall, in which case he has to travel back --

THE SPECIAL MASTER: You need not explain further. I'm happy to -- I feel I have no alternative but to recognize your objection and to exclude them from admission now and to ask that they be reoffered ten days from now, not counting the holidays that are intervening.

1 MR. ECHOHAWK: Your Honor, do I understand
2 that I am to reoffer them again in ten days?

3 THE SPECIAL MASTER: Just those two so far.

4 MR. MERRILL: Could I then request, at the
5 time of reoffering, Mr. Waples be made available
6 for voir dire should it become necessary? I will
7 do my best to check these out, advise Mr.
8 Echohawk whether we can stipulate to their
9 admissibility, and if we can, certainly we will,
10 but if they're offered ten days down the road
11 and I have problems with them, I have -- I think
12 I have the right to voir dire the exhibit.

13 THE SPECIAL MASTER: I have no alternative
14 but to grant that.

15 MR. ECHOHAWK: My point is I don't think it
16 will take ten days to do that. Mr. Waples will
17 probably be long gone by that time. We're
18 talking now about ten days --

19 THE SPECIAL MASTER: May 5th, May 6th.

20 MR. ECHOHAWK: May 5th, May 6th sort of
21 thing. It seems to be --

22 THE SPECIAL MASTER: Well --

23 MR. ECHOHAWK: -- overly expensive to have
24 Mr. Waples travel all the way again to Cheyenne
25 from Montana.

1 THE SPECIAL MASTER: Well, depending on
2 what Mr. Merrill finds it may not be necessary,
3 it may be admitted, but he wants the time to
4 look them over. If he has some objection, maybe
5 you two can discuss them before the court time
6 and you can remove his objections or meet them,
7 but I don't think I can do anything else but to
8 exclude them under the ten-day rule. It's the
9 rule we've been living by a good long while, and
10 you have already in evidence what these two
11 portend anyway. All this is is a breakdown of
12 where each acreage, you know -- to which each
13 area is attributed.

14 MR. ECHOHAWK: That's my point exactly.
15 Generally the information is already there.
16 Wyoming has had a chance to check it out. I
17 think it would really take just a matter of a
18 few hours to check it out.

19 THE SPECIAL MASTER: I'd like to think
20 you're right, and maybe it will only take a
21 few hours, and maybe you may hear by Monday in
22 court that these are acceptable. I'll make it
23 a point to ask Mr. Merrill each day if they're
24 accepted.

25 MR. MERRILL: We'll do our best, Your

1 Honor. I'm sure I'm going to hear about it.

2 THE SPECIAL MASTER: But I can't avoid
3 the consequence of the ten-day intervention.

4 MR. MERRILL: Your Honor, I do have some
5 questions about 225 and 226. I think in
6 anticipating the Court's ruling for whatever
7 they may be worth, I will save those questions
8 for cross-examination.

9 THE SPECIAL MASTER: All right. Two
10 twenty-five and 226 join the stack when we admit,
11 we will admit them.

12 MR. ECHOHAWK: I understand, Mr. Merrill,
13 there's no objection to 225 and 226?

14 MR. MERRILL: That's correct. Your Honor,
15 I have procedural objections also to seven of
16 the large maps of the historic arable lands, and
17 the basis of the objection is that we have never
18 received from the United States or their experts
19 the photographs on which those --

20 THE SPECIAL MASTER: They're based?

21 MR. MERRILL: On which they are based.

22 THE SPECIAL MASTER: Would you be kind
23 enough in the interest of amity, friendship,
24 mutual search of justice to waive your objection
25 to them?

1 MR. MERRILL: Your Honor, if I could hold
2 my objections subject to the same ten-day rule
3 as you ruled on 224 and 224-A, perhaps we can
4 resolve it that way, that might be the best of
5 all.

6 MR. ECHOHAWK; It's the position of the
7 United States that the photos don't have any --
8 they don't have to go in with these.

9 THE SPECIAL MASTER: That's true they're
10 not being offered with these. His point is that
11 the photos which are the basis for seven of them,
12 you have not had an opportunity to look at.

13 MR. MERRILL: That's correct, Your Honor.

14 MR. ECHOHAWK: Your Honor, I beg to differ
15 with Mr. Merrill. I believe those come off the
16 hydrographic copies, which the State of Wyoming
17 has received during discovery.

18 THE SPECIAL MASTER: Well, is it your point,
19 Mr. Merrill, that seven of them were missing
20 from those that you had produced -- were given
21 to you during discovery?

22 MR. MERRILL: That's what my experts are
23 telling me. I have the list -- I beg your pardon,
24 six aerial photographs, and I also have the
25 corresponding exhibit numbers to this series.

1 THE SPECIAL MASTER: Why don't we list
2 those six that are missing and see if we can't
3 have those also perhaps by Monday or Tuesday
4 if they can be found, and the objection thereby
5 removed; that the others can be admitted or
6 they can be admitted pending reconsideration of
7 these six.

8 MR. MERRILL: If we can get copies, Your
9 Honor, we'll do our best to check each of them
10 out as quickly as possible.

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1 MR. ECHOHAWK: Your Honor, previously I
2 discussed this with Mr. Krob, and it was my
3 understanding that the problem was that you
4 recall we introduced certain hydrographic copies
5 with Mr. Billstein. Those correspond to his
6 exhibits.

7 THE SPECIAL MASTER: Yes.

8 MR. ECHOHAWK: And there are certain other
9 hydrographic photos that weren't introduced, but
10 my understanding is that the United States pro-
11 vided copies of all of our hydrographic copies
12 through discovery, and I thought that was their
13 objection.

14 MR. KROB: If I may address that, Your
15 Honor. Those that do not apply to Mr. Billstein
16 are the ones that the problem arises around.
17 These six that we have never received are ones
18 that Mr. Billstein did not testify to and which
19 we didn't receive copies of at the end of the last
20 session.

21 I have checked with our experts, and I've
22 requested from the United States that we receive
23 those copies. We checked and we've never received
24 them.

25 waples-voir dire-merrill

1 MR. ECHOHAWK: You've never received them
2 through the discovery requests?

3 MR. KROB: No, with regard to those six
4 aerial photos --

5 THE SPECIAL MASTER: Can you list the six
6 aerial photographs?

7 MR. KROB: Yes, I believe Mr. Merrill has
8 the list with him.

9 MR. MERRILL: Excuse me, Your Honor.

10 MR. ECHOHAWK: If that is the case, that
11 they were never provided through discovery, I
12 would apologize, and we would make great efforts
13 to get that done right away. I wasn't aware of
14 that.

15 THE SPECIAL MASTER: I would merely observe
16 that that group contains a total of 64 exhibits,
17 and you have complied with all but six of them,
18 that is a pretty good batting average.

19 MR. ECHOHAWK: Furthermore, Your Honor, I
20 would again state that I don't see how that
21 affects the 10-day rule. These exhibits were all
22 given to the State ten days ahead of time. That
23 meets the 10-day rule technically.

24 The exhibits that are being provided were --
25 we are talking about backup data.

1 MR. MERRILL: We asked for these exhibits
2 through discovery, and the witness has already
3 testified that the exhibits being offered were
4 based on those exhibits.

5 Through no fault of Mr. Echohawk or anybody
6 else, I suspect, six of them we didn't get.

7 I think we are entitled to have them, not on
8 the basis of the 10-day rule, but simply on the
9 basis that without the exhibits that we were
10 promised and didn't get through discovery, we
11 don't have an adequate ability to voir dire.

12 If we can get them, right away, I will be
13 glad to proceed and do the best I can.

14 THE SPECIAL MASTER: I think it's a valid
15 point, and if you wish to offer all of these
16 except the six to which Mr. Merrill objects, I'll
17 certainly admit them into evidence, and I think
18 I'll admit the other six, too, in about a week or
19 so after you have made a search to at least find
20 the hydrographs on which they are based.

21 MR. MERRILL: I also have a little bit of
22 voir dire with respect to these, but if you would
23 like, I would be glad to read the photograph
24 number and the exhibit number to which the
25 photograph numbers correspond into the record.

1 THE SPECIAL MASTER: Yes, I would like that.

2 MR. MERRILL: The first one is photograph
3 number 11-164, which corresponds to Exhibit C-174.

4 And the second one is photograph number
5 8-190, corresponding to Exhibit C-165.

6 The third exhibit is photo -- excuse me --
7 the photograph is 11-166, which corresponds to
8 Exhibit C-175.

9 The fourth photograph is number 20-235,
10 corresponding to Exhibit C-212.

11 The fifth photograph is H4-15 --

12 THE SPECIAL MASTER: Four hyphen sixty?

13 MR. MERRILL: Four hyphen fifteen. I'm
14 sorry, Your Honor. Corresponding to Exhibit
15 C-216, and the last photograph is H4-286, which
16 is the basis for Exhibit C-219.

17 THE WITNESS: Your Honor, could we have two
18 minutes here?

19 THE SPECIAL MASTER: Yes, we will take a --
20 not a break, but we will just move around for
21 two minutes while I total up this acreage that's
22 involved.

23 One of these involves three and two-tenths
24 acres, so I may do something about changing my
25 ruling if I find they are all in two- and three-

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acre parcels.

2

Two sixteen involves -- this has quite a

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few acres, which is a total of -- this is off

4

the record.

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(Whereupon an off-the-record
discussion was held.)

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THE SPECIAL MASTER: Let's take a 10- or

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15-minute break.

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(Recess.

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1 THE SPECIAL MASTER: All right. As I
2 understand, you and Mr. Echohawk made a deal
3 that will permit them to be accepted into
4 evidence now subject to the fact that you may
5 pull one or two of these if you cannot find
6 what you're looking for.

7 MR. MERRILL: I don't think a deal is
8 necessary, and I owe an apology especially to
9 Mr. Echohawk, but also to the Court. It turns
10 out that we have had copies of these six
11 photographs since February of this year. And
12 I accept the full blame and apologize to Tom
13 and the Court about that.

14 Q (By Mr. Merrill) Ross, with respect to the
15 historic arable land maps which are marked
16 Exhibits C-158 through C-221, are the section
17 corners indicated on those maps actually the
18 same section corners that are on the ground in
19 those areas?

20 A I do not know if there have been sections located
21 on this particular exhibit.

22 Q I'm not talking about --

23 A You mean -- oh, they're located as close as
24 possible. They weren't surveyed, they were

25 waples-voir dire-merrill

1 located in the office.

2 I believe Mr. Billstein went over this
3 ground previously.

4 Q Now, I'm talking about with respect to Exhibits
5 158 through 221. Let me rephrase the question.

6 How do you know that the section corners
7 marked on Exhibits C-158 through 221 accurately
8 reflect the locations of those section corners
9 on the ground?

10 A The section corners on the aforementioned
11 exhibits reflect the section corners that were
12 marked on the hydrographic photos. As I said
13 before, these, I believe the sectionizing was
14 covered by Mr. Billstein on the hydrographic
15 corners.

16 Q So, in other words, you're saying these exhibits
17 are based on some other exhibits which were
18 then verified somehow?

19 A These exhibits are based on the hydrographic
20 photos that have been previously admitted into
21 evidence.

22 Q Do you know what steps were taken to verify
23 that the hydrographic photos on which these
24 exhibits were based fully and accurately

25 waples-voir dire-merrill

1 represent the locations of the section corners
2 on the ground?

3 MR. ECHOHAWK: Objection, Your Honor. As
4 Mr. Waples has pointed out, this ground has
5 been covered with Mr. Billstein as to sectionizing
6 processes and location of section corners on those
7 hydrographic photos.

8 MR. MERRILL: Your Honor, what we have here
9 is an exhibit based on another exhibit. I think
10 I'm entitled, before these are admitted into
11 evidence for the truth of their contents, to
12 inquire as to the basis and means that were taken
13 to verify the contents are indeed accurate.

14 THE SPECIAL MASTER: Well, the section
15 corners are not the substantive contents of these
16 exhibits, the acreage and land classifications
17 of the acreage is what's important. I'll let
18 the question be answered if the witness can
19 answer it, if he can.

20 THE WITNESS: I can answer it only in a
21 very general way. The photos were carefully
22 sectionized in our office with quad sheets, USGS
23 quad sheets. As far as -- as how the sections
24 lie on the ground, no surveying has been done.

25 waples-voir dire-merrill

1 Q (By Mr. Merrill) Was any other type of ground
2 verification work done?

3 THE SPECIAL MASTER: That answers your
4 question.

5 I think whether or not the corner markings
6 of the township corners on the exhibits was
7 based upon the actual location of one on the
8 ground or one on the hydrographs, which he
9 testified, is not really very relevant, Mr.
10 Merrill.

11 Q (By Mr. Merrill) Mr. Waples, did you testify
12 earlier that these exhibits are based on the
13 scale of one inch to 1,000 feet?

14 A Yes, I did.

15 Q Did you take any steps to verify that the
16 distances in the areas displaced on these exhibits
17 are accurate?

18 A These exhibits were traced from the boundaries
19 that were on the hydrographic photos, which
20 scale is one inch equals 1,000 feet.

21 Q So you're saying if we measure off a mile on
22 one of these exhibits it ought to be roughly
23 five and one quarter inches long?

24 A It should be.

25 waples-voir dire-merrill

1 MR. ECHOHAWK: Objection, Your Honor.
2 Again, it's irrelevant, it's the same sort of
3 line of questioning he's been pursuing.

4 MR. MERRILL: Your Honor.

5 THE SPECIAL MASTER: I'm inclined --

6 MR. MERRILL: Could I speak to that? If
7 permitted to ask a couple more questions, I'm
8 going to show that in fact that is not the scale
9 of these exhibits and that if a mile is not the
10 length of line that it ought to be on these
11 exhibits, it sure makes one wonder about the other
12 areas and acreages that are planimetered off of
13 it.

14 THE SPECIAL MASTER: You would prove that
15 the planimeter would be in error on the totals
16 of each parcel?

17 MR. ECHOHAWK: Your Honor, may I speak to
18 that?

19 THE SPECIAL MASTER: Yes, you may.

20 MR. ECHOHAWK: The acreage --

21 THE SPECIAL MASTER: If it supports your
22 objection.

23 MR. ECHOHAWK: The acres were not planimetered
24 off of these maps. Acreages were planimetered

25 waples-voir dire-merrill

1 off of the aerial photographs, the hydrographic
2 copies, the same way Mr. Billstein's acreages
3 were off his hydrographic copies.

4 THE SPECIAL MASTER: We have that in mind,
5 and that's in the record, but proceed, Mr.
6 Merrill, with your question here. I'll overrule
7 the objection.

8 THE WITNESS: Could you repeat the question,
9 please?

10 Q (By Mr. Merrill) Surely. The question was if
11 these photos -- excuse me, these maps are to be
12 a scale of one inch to 1,000 feet, shouldn't a
13 mile be roughly five and a quarter inches long
14 on one of these maps?

15 A Yes, that's correct. But as Mr. Echohawk said,
16 and critical information was derived from the
17 hydrographic photos rather than from this exhibit,
18 from these exhibits.

19 Q I'll hand you a rule and ask you to approach
20 what's been marked as Exhibit C-161, and measure
21 between the two crosses on that exhibit, immediately
22 to the north of the 6.7 acre tract displayed
23 there and tell the Court what is the distance
24 between those two crosses.

25 waples-voir dire-merrill

1 MR. ECHOHAWK: Which two crosses?

2 MR. MERRILL: The two to the northwest
3 and northeast of the 6.7 acre tract.

4 THE WITNESS: I'm looking at Exhibit
5 C-161. The measurement is approximately four
6 and three quarters inches.

7 Now, there's nothing, without seeing the
8 USGS quadrangle, I do not know whether that
9 is in fact a government size section. We all
10 know that most sections are not 640 acres.

11 As I say, I would have to look at the --
12 at the actual photo and relevant quadrangle
13 sheet to give a determination.

14 THE SPECIAL MASTER: Does the fact that
15 those particular sections cross the bottom
16 of one township bordering on the top of the
17 next township also result in parcels along the
18 boundaries and perhaps a lessening of other
19 acreage?

20 THE WITNESS: It may.

21 Q (By Mr. Merrill) Did you say that was roughly
22 four and three quarter inches?

23 A Yes, sir.

24 Q So your testimony is that the areas and the
25 waples-voir dire-merrill

1 acreages associated with the areas shown on
2 Exhibit C-158 through 221 were not in fact
3 measured off of these exhibits; is that correct?

4 A Yes, that's correct.

5 Q Ross, I direct your attention to what's been
6 marked U.S. Exhibit C-181 for identification.
7 Would you please approach that exhibit.

8 (Witness complied.)

9 Q Do you know in the southwest portion of the
10 tract shown in that exhibit, do you find two
11 tracts that are respectively .64 and 1.1 acre
12 in size?

13 A Yes, I do.

14 Q Isn't it true that the tract labeled -- having
15 an area of .64 acres appears physically larger
16 than the tract having a 1.1 acre area?

17 A They're close. It appears -- it means -- it's
18 irrelevant. The information is off the hydrographic
19 photos, no planimentering was done from these.
20 They are -- The information was not derived from
21 these exhibits.

22 Q Is it your testimony then that the size of the
23 tracts of arable land displayed on these
24 exhibits does not necessarily reflect the size

25 waples-voir dire-merrill

1 of those tracts as they occur on the ground?

2 A When one gets down to around an acre, comparing
3 a half an acre to an acre is a relatively small
4 drafting error, to make a mistake, of 50 percent.
5 For a half an acre it's a small, small drafting
6 error.

7 Q You can resume your seat, Ross. Thank you.

8 (Witness complied.)

9 MR. MERRILL: Your Honor, I object to the
10 admission of C-158 through 221 on the grounds
11 that the information displayed on these exhibits
12 was derived from another set of exhibits, and
13 through the testimony of the witness, is clear
14 that these exhibits don't necessarily fully
15 and accurately reflect the situation on the
16 ground with respect to section corners which were
17 not verified. And more importantly, the size
18 and also the location of the tracts of supposedly
19 arable land that are indicated on these exhibits.

20 Now, if they're offered for illustrative
21 purposes we don't have those problems with them,
22 but the offer was offered for the truth of the
23 contents of these particular exhibits and as long
24 as they're made for that offer, then I have to

25 wapes-voir dire-merrill

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object on the grounds that they are not at all

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accurate.

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1 THE SPECIAL MASTER: I'll overrule the
2 objection and admit into evidence Exhibits 158
3 through 221, even though they do, in fact, fall
4 guilty of many of the observations just made by
5 you, Merrill, and my reasons for that are that
6 their contents more accurately is reflected in
7 the hydrograph on which the planimetry was done
8 to identify the amount of land in each parcel
9 and that they are also contained in 225, broken
10 down by the photo number from which they are
11 taken, the tract number and the class of gravity
12 or sprinkler lands to which they may apply.

13 I suppose the only probative value they have
14 for me may be merely a guide in order to place
15 that particular area within a particular section,
16 and for that reason they will be admitted for
17 whatever probative value they may have, and I may
18 not look at them again, so there is not going to
19 be any great damage one way or the other.

20 MR. MERRILL: I believe that I have addressed
21 all the exhibits that were encompassed in Mr.
22 Echohawk's offer.

23 If I'm wrong -- that's all I have on these
24 exhibits, Your Honor.

25 THE SPECIAL MASTER: All right. Have all the

1 exhibits that you have identified and offered
2 for admission into evidence been admitted, Mr.
3 Echohawk?

4 MR. ECHOHAWK: Your Honor, I don't believe
5 you have formally made a ruling on them. I think
6 you have just excluded those two. I don't think
7 you formally received them.

8 THE SPECIAL MASTER: Very well. There are
9 excluded from the exhibits heretofore today
10 offered by Mr. Echohawk and identified and offer-
11 ed for evidence -- there is excluded from that
12 group WRIR C-224 and WRIR C-224-A.

13 I expect that they should be reoffered, if
14 not sooner than, ten work days following today,
15 at which time they will be considered, unless
16 the objection is removed before such time.

17 MR. ECHOHAWK: All right. Your Honor, could
18 we amend how that sits to have the offer outstand-
19 ing and you just reserve your ruling until Mr.
20 Merrill has a chance to voir dire on them?
21 Perhaps that's one way --

22 THE SPECIAL MASTER: Is that all right with
23 you?

24 MR. MERRILL: That will be fine.

25 MR. ECHOHAWK: That way we don't have --

1 also, as I understand it, Mr. Merrill will make
2 an attempt to look at those exhibits and hope-
3 fully we can take care of them before Mr. Waples
4 has to return to Montana.

5 THE SPECIAL MASTER: Mr. Salazar would like
6 to have it in the way we had planned, for the six,
7 which we didn't need when the correction came in,
8 which would be to allow them to be admitted now
9 so they can be catalogued and identified in our
10 own tabulations of exhibits, subject to your
11 continuing voir dire and possible striking of
12 them in the future.

13 MR. MERRILL: That would be fine. If they
14 are admitted subject to a motion to strike, that
15 would be fine.

16 THE SPECIAL MASTER: That helps us in our
17 work.

18 Then these two, 224 and 224-A will be
19 admitted subject to the limitations just provided.

20 MR. ECHOHAWK: Your Honor, I understand
21 exhibits 36-A and then 156 through 226 are
22 admitted, is that correct?

23 THE SPECIAL MASTER: That is true.

24 MR. ECHOHAWK: Thank you.

25

1

(Whereupon Exhibits US WRIR
C-158 through C-221 were
admitted into evidence.)

2

3

(FURTHER) EXAMINATION

4

BY MR. ECHOHAWK:

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Q Mr. Waples, I notice in reviewing Exhibits C-158
through 221 that there are certain parcels that
show up to be very small acreages.

6

7

8

A That's correct.

9

Q Are those always parcels that are entirely
isolated from any other agricultural production?

10

11

A No, that isn't the case at all. In our standards
-- well, perhaps -- I will get it out and refer
to it -- in Exhibit C-156 we have some minimum
size standards for tracts of land, for isolated
tracts of land, under the topography section,
so where small acreages -- for instance, a 1.1
acre over there that shows up on these exhibits,
it is adjacent to another tract of land such as
-- well, lands in use, such land, in fact, be
managed as a larger field.

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It just happens to be that a portion of it
is not being irrigated at this time. They are
not isolated tracts as would appear on the exhibit.

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Q So then would these bear some relationship per-

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haps to those lands testified to by Mr. Billstein,

waples-direct-echohawk

1 the historic in-use acres?

2 A. Yes, the two put together would form contiguous
3 blocks of land.

4 MR. ECHOHAWK: That concludes the direct
5 examination by the United States.

6 THE SPECIAL MASTER: All right. Thank you.

7 Mr. Echohawk and Mr. Merrill, at what point
8 in the proceedings are we to hear evidence re-
9 garding the duty of water on Class 1, 2, 3, and
10 4 lands?

11 MR. ECHOHAWK: Your Honor, the United States,
12 the witness after next -- Mr. Waples will testify
13 and then we will have Mr. Toedter testify con-
14 cerning depth to barrier, and then the witness
15 following him, Dr. Mesghinna, will address
16 engineering and water duties.

17 THE SPECIAL MASTER: And water duty?

18 MR. ECHOHAWK: Yes.

19 THE SPECIAL MASTER: But he will address
20 water duty on all lands regardless of whether it
21 falls as Kersich-classified land or the Billstein-
22 classified land in use or the Waples land
23 historic?

24 MR. ECHOHAWK: Your Honor, what we have
25 waples-direct-echohawk

1 chosen to do is we have chosen, since this is
2 a rather complex and large area when you start
3 putting this stuff together, we have chosen to
4 break it up into the future parcels to be address-
5 ed first.

6 Dr. Mesghinna will testify as to engineering
7 water duty there, and then Mr. Dornbusch, who is
8 the economist, will testify as to that portion,
9 and that portion will be done. The future lands
10 will be finished.

11 Then we go back to historic lands, similar
12 testimony, and the engineering and water duty
13 for the historic lands will be addressed, and then
14 economics for historic lands will be addressed,
15 and that portion will be done, and then the United
16 States will go on --

17 THE SPECIAL MASTER: Is any preparation being
18 made of the total acreage of future lands that
19 rest in the open area as distinguished from that
20 which rests in the closed area and the percentage
21 of totals of lands historic and in-use that lay in
22 the various different --

23 MR. ECHOHAWK: No, Your Honor. Of course,
24 the position of the United States is that we get
25 the early priority date for all. We are not making

1 that distinction in our presentation.

2 THE SPECIAL MASTER: All right. I would
3 ask that totals be rendered with that distinction
4 just in case it becomes my duty to know.

5 MR. ECHOHAWK: Yes, Your Honor.

6 MR. MERRILL: Your Honor, since it's the
7 State's position that part of the Reservation
8 was, indeed, disestablished, as part of the State's
9 case, we will be presenting a breakdown of what
10 we feel are the appropriate acreages and amounts
11 of water by priority date.

12 MR. ROGERS: Your Honor, I'm not quite clear
13 what you have asked me to be broken down, what
14 specific pieces of information.

15 THE SPECIAL MASTER: Totals of acreage in
16 each of the categories that lie on the open area,
17 the area that was put into a ceded status in 1905
18 as distinguished from areas similarly in class --

19 MR. ROGERS: You are just talking about
20 acreages now?

21 THE SPECIAL MASTER: That's right, just
22 acreages.

23 MR. ROGERS: Wasn't that presented through
24 the testimony of Mr. Kersich?

25 THE SPECIAL MASTER: It was only the Kersich

1 -- not on the other two. It was presented to
2 me with regard to the six planned units, but
3 not to the in-use or historic, and I was asking
4 that I would like to have it for the other two
5 also.

6 MR. ECHOHAWK: Would you like a final
7 claimed totals that the United States is assert-
8 ing a water rights claim for in a final analysis?

9 THE SPECIAL MASTER: We will get into that
10 down the road, yes, but I want to keep a
11 distinction of the areas they fall into as to
12 the ceded portion in 1905.

13 MR. MEMBRINO: There's a bit of confusion,
14 Your Honor, in that the lands that are being
15 discussed now are not, more than probably, the
16 final claim of the United States, and we don't
17 want to give the impression that there is an area
18 of land that's within the area that was owned by
19 the 1905 Act or in the area that wasn't open and
20 have you concerned with figures that are much
21 larger than you will ultimately have to consider.

22 THE SPECIAL MASTER: I appreciate that.

23 MR. MEMBRINO: So Mr. Echohawk's question
24 was addressed to the point of giving you what
25 will be the government's final claim, and if you

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wish, we can break that out for your convenience.

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Obviously that's not our --

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THE SPECIAL MASTER: You intend to do that

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when?

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1 MR. ECHOHAWK: We had not intended to do
2 that at all, Your Honor, but if Your Honor so
3 requests we will start on those calculations.

4 THE SPECIAL MASTER: Well, you hold that
5 in abeyance for the time being. We'll see if
6 that's to come up. We're touching right at the
7 very heart of the lawsuit now and I hope we can
8 do so without any fatal slips of the scalpel, so
9 to speak.

10 All right. Does that conclude this witness?

11 MR. ECHOHAWK: That concludes the direct
12 examination of the United States.

13 THE SPECIAL MASTER: Mr. Merrill, would you
14 like to begin your cross-examination now?

15 MR. MERRILL: Your Honor, I think the order
16 of the case has always been if the Tribes have
17 any cross-examination that --

18 THE SPECIAL MASTER: I beg your pardon. I
19 knew that. Do the Tribes --

20 MR. PERRY: We have no questions.

21 THE SPECIAL MASTER: Mr. Rogers?

22 MR. ROGERS: We have no cross, Your Honor.

23 THE SPECIAL MASTER: Okay, Mr. Merrill.

24 MR. MERRILL: In that case I'll get started.
25

CROSS-EXAMINATION

1

2

BY MR. MERRILL:

3

Q Ross, would you pull out your copy of C-226

4

which is your report.

5

A Yes, sir.

6

Q I believe you testified on direct examination

7

that the only differences between table 1 and

8

table 5, which are the project and nonproject

9

land classification standards respectively,

10

concern the requirement of good free-working

11

soil and the second difference concerns drainage;

12

is that correct?

13

A Yes. That should be the only differences that

14

are substantial.

15

Q Would you arrange your exhibits so you can flip

16

back and forth between table 1 and table 5

17

because I'm going to be asking you some questions

18

that compare the provisions in each of the two,

19

and I'll go back and forth from them.

20

I direct your attention first to page 1

21

of table 1 which is page 5 of the exhibit, to

22

the alkalinity of soil under Class 3. Would you

23

please compare that provision with the

24

requirement on table 5 for alkalinity of soil

25

waples-cross-merrill

- 1 under Class 3.
- 2 A Yes, sir.
- 3 Q And tell the Court whether they are the same.
- 4 A No, they're not. There is a typographical
5 error in table 5.
- 6 Q What's that error?
- 7 A The sentence says: There must be at least two
8 inches per hour permeability in the top two
9 feet when SAR exceeds 20. This was removed
10 during my deposition in May, 1980. It should
11 not appear in this table 5.
- 12 Q Did we discuss the nonproject standards in May
13 of 1980 in your deposition or did we just
14 discuss project standards?
- 15 A No, the base for these standards were the
16 project standards. As I say it's simply a
17 typographic error.
- 18 Q So you're saying the last sentence on table 5,
19 alkalinity of soil, Class 3, the last sentence
20 should not appear?
- 21 A That's correct.
- 22 MR. MERRILL: Your Honor, based on the
23 witness' testimony, I would move that the
24 Court's original copy be modified so that the
25 waples-cross-merrill

1 last sentence on table 5, alkalinity of soil,
2 Class 3, be stricken from that exhibit.

3 THE SPECIAL MASTER: Are there any
4 objections?

5 MR. ECHOHAWK: No objections, Your Honor.

6 THE SPECIAL MASTER: So ordered. I'll
7 strike it now.

8 MR. ECHOHAWK: Could we have the witness
9 make that adjustment on the original?

10 THE WITNESS: Okay. Looking at WRIR C-226,
11 table 5, under alkalinity of soil, Class 3, the
12 last sentence there: Must be at least two inches
13 per hour permeability in the top two feet when
14 SAR exceeds 20, should be stricken from the
15 standards.

16 MR. ECHOHAWK: Could we also have that
17 adjustment made to Exhibit C-156?

18 THE SPECIAL MASTER: It has been done.

19 MR. MERRILL: I forgot about that one, Your
20 Honor. I thank Mr. Echohawk.

21 Q (By Mr. Merrill) Ross, would you please turn
22 back to table 1, the second page of table 1,
23 which is page 6 of Exhibit C-226. I direct your
24 attention to, under topography, to the surface

25 waples-cross-merrill

1 portion of that under Class 4, and would ask
2 you to compare it to its counterpart in table 5,
3 which appears on page 16 of Exhibit C-226,
4 and tell the Court whether those provisions
5 are the same?

6 A They are the same, yes -- let me clarify that.
7 They do not read the same, they mean the same.
8 We were discussing tillability of land. As
9 testified earlier, the nonproject standards
10 allow much more cobble -- cobble, gravel, that
11 type of thing, allowing the lands to be
12 essentially very difficult to till.

13 THE SPECIAL MASTER: My memory tells me
14 that we've been down this road before, and I
15 hit a lot of these cobbles with Mr. Kersich about
16 a month ago.

17 MR. MERRILL: I don't believe we have,
18 Your Honor, because I don't think Mr. Kersich
19 discussed nonproject standards which are
20 contained in table 5.

21 THE SPECIAL MASTER: That is correct. I
22 beg your pardon. That was in a different area.

23 Q (By Mr. Merrill) So it's your testimony, Ross,
24 that the table 1 standards include the provisions

25 waples-cross-merrill

- 1 shown in Class 4 for table 5?
- 2 A No, sir. No, sir. My testimony is the non-
- 3 project lands as was discussed during my
- 4 direct examination are much less stringent
- 5 in the terms of tillability, if you will.
- 6 We're saying that one of the large differentiations
- 7 between the project and the nonproject lands
- 8 was the fact that some nonproject lands may
- 9 be so cobbly, may be so gravely, whatever,
- 10 so as to have great difficulty in tillage.
- 11 Q So it's your testimony then that these standards
- 12 are not the same between project and nonproject
- 13 lands; is that correct?
- 14 A They do not read the same. The intent at the
- 15 end result is the same.
- 16 Q Well, let's assume for a moment that we have two
- 17 pieces of land, one within a project and one
- 18 without a project and the lands are identical,
- 19 and both lands are too cobbly and too shallow
- 20 to allow leveling. Would those lands be
- 21 classified as Class 4 arable under the table 1
- 22 standards?
- 23 THE SPECIAL MASTER: In both areas?
- 24 MR. MERRILL: No, just within the project,
- 25 waples-cross-merrill

1 Your Honor.

2 THE WITNESS: No, sir, they would not.

3 Q (By Mr. Merrill) They would be classified
4 nonarable under nonproject?

5 A Yes, they would.

6 Q So there is a difference in standards?

7 A Yeah, that's been discussed in my direct
8 testimony.

9 THE SPECIAL MASTER: This was a reference
10 you made to hit it with some water in the
11 spring and let your horses graze in the summer
12 and have some value, that it could be called
13 arable.

14 THE WITNESS: That's correct.

15 THE SPECIAL MASTER: I see.

16 Q (By Mr. Merrill) Ross, would you please turn
17 back to page 6, which is the second page of
18 table 1 in your report, and examine the gravity
19 specifications under irrigation pattern and
20 field size, Classes 1 through 4. Compare those
21 with their counterparts on page 16 of your
22 report in table 5.

23 A Yes. There are no 500-foot runs, 300-foot runs
24 etcetera, that's an error.

25 waples-cross-merrill

- 1 Q Should those runs be included in the require-
2 ments on table 5?
- 3 A No, no. No, the error was in the fact that I
4 did not say they were omitted from table --
5 from table 5.
- 6 Q So the fact that they are different is correct?
- 7 A Yes.
- 8 Q Okay. With respect to the minimum field size
9 provisions on table 1 for gravity --
- 10 A Yes.
- 11 Q -- are those the minimums that you used in
12 classifying all of the project lands which you
13 say are arable?
- 14 A No. That is not correct. As we discussed a
15 few minutes ago, lands may be smaller than
16 these minimum sizes, if it is possible to
17 operate these lands as part of a larger field.
- 18 Q Are you saying then that according to the
19 standards on table 1 you can irrigate any size
20 parcel of land no matter how small as long as
21 it's in conjunction with a larger field?
- 22 A If -- if it was classified as being arable, it
23 was classified with the understanding -- I'm
24 speaking of small parcels -- that it could be
25 waples-cross-merrill

1 operated in conjunction with another piece of
2 ground, sort of act as one unit.

3 Q Did it matter what size piece of ground it's
4 adjacent to?

5 A I would say in practice, no, because if the
6 land that it was adjacent to is being irrigated,
7 adding another acre or whatever is not -- is not
8 really relevant.

9 Q What's your definition of adjacent to, separated
10 by a road, for example, the two tracts?

11 A It depends. Not by a highway. By a farm road
12 or something, it's possible.

13 Q Okay, How about by a gully?

14 A No, not necessarily. Oftentimes -- oftentimes
15 a field will have a gully through it. That
16 land may not be arable, but it still receives
17 water, and therefore, it's operated as one unit,
18 one field.

19 THE SPECIAL MASTER: Shall we ask how about
20 a ravine since we spent so much time on gulleys
21 and ravines?

22 MR. MERRILL: Well, since you asked it,
23 Your Honor, I won't.

24 THE SPECIAL MASTER: Obviously elevation

25 waples-cross-merrill

1 is the difference, whether it can or not, not
2 just contiguity at this time but elevation.

3 THE WITNESS: Of course.

4 Q (By Mr. Merrill) Ross, how far apart can two
5 tracts of land be and be considered adjacent
6 for purposes of this discussion we're having
7 now?

8 A That would have to be addressed on a case by
9 case basis. I wouldn't hazard an answer to it,
10 you'd have to look at things on a tract by
11 tract basis.

12 Q We'll be doing that a little later on.

13 I direct your attention to the same
14 provisions on table 1, irrigation pattern and
15 field size, gravity, Classes 3 and 4. Are
16 those standards modified by footnote 2?

17 THE SPECIAL MASTER: Are they what?

18 MR. MERRILL: Modified by footnote 2, Your
19 Honor.

20 THE WITNESS: Yes, they are. Now, there
21 again in practice if fields aren't close to the
22 40 acres, whatever, I -- I'm not inclined to
23 say land is not arable if -- if the combination
24 of pieces approaches 40 acres, approaches a

25 waples-cross-merrill

1 manageable -- a manageable type unit. This
2 thing -- this thing that -- that must be
3 remembered in regard to the standards, in
4 reference to Mr. Kersich's standards, Mr.
5 Kersich's testimony also, is that these --
6 these standards are guidelines, they're not --
7 they're not followed necessarily to the very
8 letter.

9 We've discussed earlier today that land
10 classification involves a certain amount of
11 judgment. Take for instance depth to barrier.
12 Now, if you have a land that is say six, seven
13 feet deep, everyone knows that that land is
14 not going to be consistently -- isn't homogenous
15 throughout the area. There's going to be high
16 spots and low spots. You take what you feel is --
17 is a reasonable number. These are guidelines,
18 they have to be looked upon as such. Nothing
19 is engraved in stone that says if a piece of land,
20 that for some reason does not follow these
21 standards to the absolute letter will not be
22 arable by the classifier's judgment.

24 * * * * *

25 waples-cross-merrill

1 Q (By Mr. Merrill) Let me ask you a specific
2 question then in relation to footnote 2.

3 Let's assume that you have a piece of land
4 which appears to be arable and looks like it
5 would be Class 3, so footnote 2 applies, but
6 let's say that piece of land is only two acres.

7 According to the terms of footnote 2, would
8 you classify that land as arable, Class 3, if
9 it's adjacent to 40 acres of land?

10 A If it was adjacent to 40 acres of land?

11 Q Yes, of arable land.

12 A Can I have the question once more, please?

13 Q Let me try to rephrase it rather than having it
14 read back.

15 Assume that you have 40 acres of otherwise
16 arable land and that immediately adjacent to
17 that you have a 2-acre tract of land which meets
18 all of the other standards for Class 3 gravity.

19 Will you classify that 2-acre tract of land
20 as arable, even though it does not meet the
21 literal requirements of footnote 2? That is,
22 being five to ten acres in size?

23 A It's possible. There again, you know, we are
24 talking about things that have to be evaluated on

25 wapes- cross -merrill

1 a case-by-case basis. That's the way they are
2 evaluated in the field.

3 Q So what you are telling me then is that the
4 standards set forth in Table 4 are not a literal
5 definition of the standards by which you classified
6 the project lands; is that correct?

7 A No, that is not the case. I'm saying these are
8 guidelines that there's a certain amount of
9 interpretation.

10 Q Then why do you have an acreage range at all in
11 footnote 2 which talks about tracts between five
12 and ten acres?

13 THE SPECIAL MASTER: I think he's answered
14 that, Mr. Merrill. It's a guide, guidelines or
15 parameters in which to work, something of that
16 kind is the reason he has the footnote there, I
17 think. I think he's answered that.

18 MR. MERRILL: My concern is that this docu-
19 ment is in evidence for the truth of its contents
20 and also based on the witness' testimony that
21 these are the standards by which the project lands
22 that he looked at and testified to were classified.

23 Now, if, in fact, these are not the standards
24 or there was no range of tolerance that's not
25 reflected on these standards, then I think that

waples- CROSS -merrill

1 needs to be brought out in evidence.

2 THE SPECIAL MASTER: That is the question.
3 Were there examples where there was some departure
4 from footnotes in your work on the Reservation?
5 Do you know of some?

6 THE WITNESS: I can't recall any specific
7 times. Now, there may -- as a for instance, if
8 there were several small fields under one ditch --
9 if the ditch was there, the historic facility
10 was there, if there was a piece of ground, say,
11 4.5 acres or, you know, four acres, something of
12 this nature, that was good arable lands in other
13 respects, this type of parcel may have been in-
14 cluded.

15 THE SPECIAL MASTER: Or if you found that the
16 parcel was a little less than five and the land
17 adjacent to it was a little less than forty,
18 there might have been --

19 THE WITNESS: Yes, sir, that's correct.

20 Q (By Mr. Merrill) Ross, would footnote 2 also
21 apply to Class 4 lands in Table 1? In other words,
22 does the same as Class 3 also incorporate the
23 footnote?

24 A No, it doesn't.

25 waples- cross -merrill

1 Q How small could a tract of Class 1 land be and
2 still be classified as Class 1 land? The standards
3 say fifteen acres, and I'm wondering what was
4 actually used.

5 A There again, the size of the actual arable piece
6 of property is irrelevant if it can be operated
7 as part of a larger field.

8 Q So the 15-acre minimum size under gravity is
9 simply a guideline, but not a hard and fast
10 standard?

11 A There again, it has to be looked at on a case-
12 by-case basis.

13 Q So the same holds true with respect to the other
14 minimum acreages on Table 1, gravity?

15 A Yes.

16 Q I direct your attention then to Table 5, to the
17 same provisions that we have been talking with,
18 which are irrigation pattern and field size,
19 gravity, for Class 3 and Class 4.

20 Isn't it true that there is no footnote 2 to
21 modify the Class 3 land?

22 A Yes.

23 Q So that represents another difference between
24 the standards set forth in Table 1 and Table 5?

25 waples-cross-merrill

1 A Yes, you're right.

2 THE SPECIAL MASTER: Aren't these distinct-
3 ions really of rather minor substantive value in
4 the land classification science? Unless you can
5 show an awful lot of them showing acreage totals
6 that are thoroughly included.

7 MR. MERRILL: Later on in the cross-examina-
8 tion I intend to do that, and the acreage totals
9 will be very substantial.

10 THE SPECIAL MASTER: Very good.

11 Q (By Mr. Merrill) Ross, I direct your attention
12 to the third page of the Table 1 standards which
13 appear on page 7 of your report, and specifically
14 the standards for subsurface hydrologic conduct-
15 ivity.

16 Does the footnote 3 which appears next to
17 the legend there intend to modify the minimum
18 requirements for all four classes of land?

19 A No, sir, footnote 4 supersedes footnote 3.

20 Q Only for Class 4?

21 A Yes.

22 Q That's the same provision as appears in Table 5
23 for subsurface hydrologic conductivity, isn't it?

24 A That's correct. That was discussed earlier in

25 waples-cross-merrill

1 direct testimony.

2 Q With respect to footnote 3 on Table 1, which talks
3 about drain spacing should be at least 200 feet,
4 does that mean that the drain should be spaced
5 at least 200 feet if not closer to or at least
6 200 feet if not further apart?

7 A These are minimum spacings.

8 Q What do you mean by that?

9 A It means that the 200-foot spacing is the minimum
10 allowable under these standards.

11 Q Well, I'm still not sure I understand your answer.
12 Does that mean you couldn't have a drain spacing
13 of 190 feet with these standards or that -- or
14 let's use --

15 THE SPECIAL MASTER: Maybe 140.

16 MR. MERRILL: Let's make it 100 and 300.

17 A If the standards say that the drain spacing on
18 lands will be at least 200 feet, they could be
19 above 200 feet. They will be above 200 feet.

20 Q (By Mr. Merrill) So there will be no drains
21 closer than roughly 200 feet apart; is that correct?

22 A In substance it's correct, but it may be misleading.

23 Mr. Toedter, the drainage engineer, will
24 testify as to drainage, but it's possible in some

25 waples-cross-merrill

1 cases that Class 6 land might be drained for
2 some reason, to protect other lands.

3 In that case you could have drain spacings
4 of less than 200 feet.

5 Q Ross, I skipped one in going through Table 1 a
6 little earlier.

7 Would you please turn back to page 1 of
8 Table 1 and take a look at the notation, "Irri-
9 gation Pattern and Field Size," and particularly
10 footnote 1 which modifies that standard?

11 THE SPECIAL MASTER: Page 1 of Table 1?

12 MR. MERRILL: I'm sorry, Your Honor, Page
13 2 of Table 1. My mistake.

14 Q (By Mr. Merrill) And compare it with its counter-
15 part on Table 5 and also footnote 1 of Table 2.

16 Isn't it true that footnote 1 on Table 2 is
17 different than footnote 1 on Table 5?

18 A. Yes, it is.

19 Q Is that distinction intentional, or should we
20 modify one or the other?

21 A. In the first place, it isn't significant. We
22 could easily enough add to Table 1 the sentence
23 that is not there.

24 I think Mr. Kersich -- I think Mr. Kersich

25 waples-cross-merrill

1 in a discussion of these standards testified
2 that the fields are too small or irregular in
3 shape, could be irrigated with hand move or
4 solid set type sprinklers. I think that's been
5 quite clear in the record.

6 Q Well, now, he testified that with respect to the
7 six future project areas, and I'm asking you
8 about how these standards were used with respect
9 to the historic areas within the major project.

10 A Yes, the standards are the same in substance.

11 Q So footnote 1 should be modified by adding that
12 sentence; is that correct?

13 A That's correct.

14 Q Why don't we go ahead and do that to the original
15 and also to the separate exhibit which encompasses
16 Exhibit 1.

17 THE SPECIAL MASTER: 36-A.

18 MR. MERRILL: Thank you, Your Honor.

19 THE SPECIAL MASTER: What specifically are
20 you adding, Mr. Waples?

21 THE WITNESS: This sentence here (indicating).

22 THE SPECIAL MASTER: Say it aloud, the full
23 sentence.

24 THE WITNESS: Yes, the sentence reads:

25 waples-cross-merrill

1 Fields that are too small or irregular in shape
2 for intermittent or continuous move sprinkler
3 and irrigated with hand move or solid set systems.

4 THE SPECIAL MASTER: And on what page does
5 that appear in 226?

6 THE WITNESS: Page 17.

7 THE SPECIAL MASTER: So I take it from 17
8 and add it to page 7; is that correct?

9 THE WITNESS: That's correct.

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waples-cross-merrill

1 Q (By Mr. Merrill) Ross, would you please come
2 back to table 1, page 5 of Exhibit C-226.

3 A One moment.

4 Q I'm sorry.

5 A All right, sir.

6 MR. PERRY: Your Honor, I was wondering
7 if we might take a couple minutes' break.

8 THE SPECIAL MASTER: You need it, certainly.

9 MR. MERRILL: Why don't we make it ten
10 minutes.

11 THE SPECIAL MASTER: We'll take a ten
12 minute recess.

13 (Thereupon a ten minute
14 recess was taken.)

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waples-cross-merrill

1 MR. MERRILL: Before we resume the cross-
2 examination, Mr. Waples, Mr. Rifkin is here and
3 has the new request for entry onto the Reserva-
4 tion which we discussed earlier this week, and
5 I'll give him the floor for a moment.

6 THE SPECIAL MASTER: I knew there was some-
7 thing we had to have before we could have a
8 pleasant weekend, so go ahead.

9 MR. RIFKIN: I think I will still be able
10 to let you do that. I really don't have anything
11 to say, but I will hand deliver some copies.

12 MR. MERRILL: However, he does have one
13 final point, Your Honor.

14 (Pause.

15 THE SPECIAL MASTER: That should be all
16 right.

17 MR. ECHOHAWK: Question?

18 THE SPECIAL MASTER: Let me finish reading
19 it.

20 Is there a question regarding the April 27
21 date and descriptions?

22 MR. ECHOHAWK: Yes, I have a question.

23 THE SPECIAL MASTER: Okay. I was reading the
24 April 15 in this.

25 waples-cross-merrill

1 MR. ECHOHAWK: The tract number. What
2 tract number does that correspond to?

3 MR. RIFKIN: Are you referring to the --

4 MR. ECHOHAWK: 1,001 through 1,027.

5 MR. RIFKIN: Okay. These are numbers that
6 have been formulated by our experts.

7 MR. ECHOHAWK: So how am I supposed to --

8 THE SPECIAL MASTER: How is he supposed to
9 know what they mean?

10 MR. RIFKIN: Okay. The tract number is
11 really meaningless. The description is --

12 THE SPECIAL MASTER: In the section, town-
13 ship and range?

14 MR. RIFKIN: Right. That's the description.
15 The tract number is just basically for the pur-
16 poses of delineating how many tracts there are,
17 and it's just an administrative procedure that
18 we're using.

19 MR. ECHOHAWK: Your Honor, I hate to be
20 obstinant --

21 THE SPECIAL MASTER: I understand the problem.

22 Mr. Rifkin, there's two square miles in that
23 first North Crowheart area and in those two square
24 miles there may be eight or ten -- I don't know

25 waples-cross-merrill

1 how many people there may be there.

2 How are we to know where Mr. Sommers wants
3 to go in those two square miles of North Crow-
4 heart that is called 1,001?

5 MR. RIFKIN: In the township and range that
6 you just mentioned, he would be confined to the
7 two sections listed, Section 10 and Section 15.

8 THE SPECIAL MASTER: Naturally, that's a
9 description, but that's an awful lot of area for
10 one visit.

11 What if there are eight or nine different
12 people living in that area, or do we know whether
13 it's one place or eight or nine different people?

14 MR. ECHOHAWK: That's my objection exactly.

15 MR. ROGERS: And ours.

16 MR. RIFKIN: This particular area, I have
17 been informed, is mostly comprised of vacant land
18 and nobody living on this land. Basically all the
19 tracts on the land are non-allotted trust lands.

20 MR. ECHOHAWK: Your Honor, basically that's
21 the point. Until we know exactly what it is, we
22 would like some specificity.

23 MR. ROGERS: The letter states that entry
24 will be only on to non-alloted trust lands. Now
25 he states basically.

1 And as Your Honor has also observed, some
2 of these sections are even more than two square
3 miles. Some of them include as much as five
4 square miles.

5 MR. ECHOHAWK: Your Honor, I thought the
6 agreement was that -- if I could get an exhibit,
7 I will illustrate what I thought the agreement
8 was.

9 With reference to Exhibit C-45, I thought
10 that the State of Wyoming was to designate, say,
11 for instance, a parcel such as this and give us
12 that legal description and a parcel number or a
13 map that locates the parcel they want to go drill
14 on.

15 I thought they were going to give us a list
16 of, say, 20 or 25 of those so we would know
17 exactly where they are going and we could check
18 the title, land ownership, and see if somebody
19 was occupying that land, and that's what I thought
20 the agreement was.

21 MR. RIFKIN: The problem with that, Your
22 Honor, is that we are just not able to do that
23 because this particular area -- basically these
24 are the lands that Mr. Kersich testified to, and
25 the only tract numbers that we could have provided

1 are the tract numbers that come from the Billstein
2 exhibits, which are the ones we've provided in
3 the other letter, in the second letter.

4 MR. ECHOHAWK: We could assign parcel
5 numbers to each of these, which I guess is what
6 Wyoming has done for their own bookkeeping
7 practices. Just because they don't have a parcel
8 number now doesn't mean that we can't assign them
9 one.

10 Again, we would rely on the order that was
11 signed in that it requires specificity.

12 THE SPECIAL MASTER: Why the difference in
13 the two incursions, I guess is what they are
14 fast becoming -- are the conditions of the first
15 to be carried over into the second also even
16 though they are not set forth in the second letter?

17 Both letters are dated April 15, one dealing
18 with the April 22 trip, and states that there
19 will not be studies other than those confined on
20 non-allotted trust lands and there will be no
21 entry onto other lands unless necessary to cross
22 them, but the second one of April 27 primarily
23 says that entry will be only onto non-allotted
24 trust lands. I suppose that's self-explanatory.

25 I believe your descriptions attached to the

1 first one are much less objectionable, Mr.
2 Echohawk, than the ones attached to the second
3 one. At least you have the parcels identified
4 very, very closely to where you can find out
5 where people are.

6 MR. ECHOHAWK: Is that the surveying request
7 that you are speaking of that --

8 MR. RIFKIN: The April 22 visit.

9 MR. ECHOHAWK: Which is the April 22 -- do
10 I not have a completed copy because mine only
11 has some parcel numbers and some photo numbers
12 on it.

13 THE SPECIAL MASTER: So does mine.

14 MR. RIFKIN: No. Let me explain that. The
15 parcel numbers -- basically these parcel numbers
16 just appear within the section, township and
17 range listed. It's not necessary for us to have
18 access onto the entire section, so where there
19 was a parcel number that we could give you, we
20 have, and our experts will confine themselves only
21 to the area represented by the parcel numbers
22 within that section, township, and range.

23 MR. ECHOHAWK: What about the ones that don't
24 have a parcel number?

25 MR. RIFKIN: Basically the ones without a

1 parcel number they wish to verify the section
2 lines or the corners, and it just doesn't
3 correspond to a parcel number that we would have.

4 MR. ECHOHAWK: Would you verify all four
5 section lines for each section listed?

6 MR. RIFKIN: Yes. It might not be necessary
7 for them to do all four. It might work out that
8 they only verify two or three of the four, but
9 they have the opportunity to verify all four
10 section corners.

11 MR. PERRY: And in those sections where you
12 have listed no particular parcel, those are all
13 Tribal trust lands for the entire section?

14 MR. RIFKIN: Yes.

15 THE SPECIAL MASTER: In view of the fact
16 that all of them are in the six land classifi-
17 cations for future arables, I hope you can go
18 along with this, Mr. Echohawk. It certainly
19 shouldn't have to be intruding on any irrigation
20 land in use, and if they are, I think my admon-
21 itions have already been made, and I know Mr.
22 Sommers will stop and let them know why he is
23 there.

24 MR. ECHOHAWK: Perhaps I didn't understand.
25 You said they won't be intruding on any parcels

1 being irrigated?

2 THE SPECIAL MASTER: There would be a minimum
3 intrusion, obviously, in having to go by some-
4 body's road maybe to get to the proposed potential.

5 MR. ECHOHAWK: This says that they are going
6 to determine the size of the irrigated parcels,
7 which means that they would --

8 THE SPECIAL MASTER: They are going to verify
9 -- where does it say something about determining
10 the size of the parcels?

11 MR. ROGERS: Paragraph 1, the letter dealing
12 with --

13 THE SPECIAL MASTER: Then they are verifying
14 Mr. Billstein's testimony too while they are at it?

15 MR. ECHOHAWK: That's correct. Will they
16 be doing that in more than six instances where
17 you are verifying parcels and do the rest of the
18 verifying corners?

19 MR. RIFKIN: I'm not certain, but I think
20 where the parcels aren't listed, it's just to
21 verify the actual section line and the corner
22 itself. I think it's only the six tracts that we
23 have listed that they are going to actually
24 verify the entire acreage of the tract.

25 MR. ECHOHAWK: Are we certain about that?

1 THE SPECIAL MASTER: Well, Mr. Rifkin said
2 he thinks so.

3 MR. ECHOHAWK: If we could have an absolute
4 guarantee --

5 THE SPECIAL MASTER: If we could have an
6 assurance of that, certainly that would be
7 acceptable.

8 MR. PERRY: One minor matter on this. It
9 says beginning April 26 and until the completion
10 of their studies.

11 I would object to that on the basis that you
12 ruled that this should be for a limited time
13 period up until I think you said, May 15.

14 MR. MERRILL: I think we are bound by that
15 anyway. MBI is a pretty fast crew.

16 THE SPECIAL MASTER: Is he going to go see
17 if that is an assurance?

18 MR. RIFKIN: An assurance that that would be
19 completed within the May 15 --

20 MR. ECHOHAWK: No, the assurance that the
21 parcels you have listed --

22 MR. RIFKIN: We are going to check on that
23 right now, and maybe we can get back into this
24 in a few minutes.

25 MR. ECHOHAWK: And you have made a search

1 that these are Tribal trust lands and not
2 allotted lands?

3 MR. RIFKIN: Yes, using the Tribes' exhibits.

4 MR. ROGERS: M-1?

5 MR. RIFKIN: M-1 or M-2, whichever.

6 MR. ROGERS: I'm concerned about a matter,
7 and I don't know what to do about it, and it is
8 the crossing of other persons' land to get to
9 these tracts without their being aware of --

10 THE SPECIAL MASTER: Fee lands of Indians
11 and non-Indians alike?

12 MR. ROGERS: Fee lands and possibly some
13 allotted lands as well.

14 I realize there is a burden on the State in
15 trying to identify these tracts, but nonetheless,
16 there is the fact that they are going without
17 authorization on some lands that perhaps even the
18 Court doesn't have jurisdiction over if they
19 don't have water rights at least involved in the
20 suit.

21 As I say, I don't know what to do, I point
22 it out for the difficulty it is, and perhaps we
23 may expect some comment back from those persons
24 involved and will have to deal with it then.

25 MR. RIFKIN: If I could address that, Your

1 Honor, I'm not certain that this is the case,
2 but one of our surveyors informed us that there
3 is a general rule in surveying that there is a
4 right to cross lands in order to conduct survey-
5 ing.

6 MR. ECHOHAWK: No, there is not.

7 MR. CLEAR: You talk to a cadestrial (phoen.)
8 surveyor.

9 THE SPECIAL MASTER: You let him keep working
10 and the facts of life will dawn on him.

11 MR. MERRILL: We could proceed on verifying,
12 but it's implicit that you are going to have one
13 leg of your tripod sitting in different sections,
14 so there is going to be a minimal intrusion, so
15 if someone appears and represents themselves to
16 be a fee owner, our people will leave peacefully
17 and move on to the next tract.

18 To saddle us with the burden of searching
19 the current title, which is sometimes not avail-
20 able in the BIA title plan in Billings and
21 ascertaining every owner -- and there may be
22 literally hundreds of owners -- is an impossible
23 requirement to saddle the State with.

24

25

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1 MR. ECHOHAWK: We can't consent to that.

2 THE SPECIAL MASTER: Let's see what Mr.

3 Sostrom comes back with, minimum.

4 MR. ECHOHAWK: I'd like to raise another
5 point concerning the April 22nd visitation,
6 the survey. There'll be one crew of surveyors
7 working together as a group, at any one time
8 the group will be composed of four or five people
9 of the below named persons and they list quite
10 a few people there. To me that's not quite
11 clear. Is there going to be this group of
12 approximately 25 people shuffling in and out on
13 the Reservation or are they going to be in
14 groups of five people going on and doing the
15 survey?

16 MR. RIFKIN: I assume there will be some
17 continuity. The only reason we done that,
18 there might be some conflicts, somebody might
19 have to leave and somebody might very well take
20 their place. The basic reason that I worded that
21 the way it was, the way it is is so you would
22 know that you need to provide only one escort
23 and no more, because they'll be together all the
24 time. They won't be working separately in
25 different groups.

1 MR. ECHOHAWK: Are these people -- Well,
2 the very nature of surveying, there's going to
3 be a separation of people, especially if you're
4 surveying section lines and section corners.

5 MR. RIFKIN: Well, maybe within a couple
6 hundred feet or whatever, no more than that.

7 MR. ECHOHAWK: In my experience in surveying
8 in the past, there's quite a distance from other
9 people.

10 MR. RIFKIN: I assume at any one point
11 they'll be in the same section.

12 MR. ECHOHAWK: Well, that's quite a distance.

13 MR. MERRILL: Your Honor, I appreciate the
14 United States' and Tribes' concern about our
15 folks going out on what is the Indian home and
16 surveying lands, walking around irrigated tracts
17 and so forth, but I think we just about reached
18 the point of picking it apart beyond all reason
19 to require that we know exactly who the five
20 surveyors will be for the entire time, to require
21 that they not stray apart more than a certain
22 distance and so forth; puts these folks under a
23 restriction that makes it impossible to do what
24 they're out there to try to do.

25 MR. ECHOHAWK: What we'll do, Your Honor, is

1 send two escorts. I think that will probably
2 hopefully take care of the matter.

3 MR. MERRILL: We certainly have no problem
4 with that.

5 MR. ECHOHAWK: Take two escorts together

6 MR. ROGERS: Then we still have to resolve
7 the question about the identification of tracts
8 with respect to the April 27th series of entries.

9 THE SPECIAL MASTER: Can you give to the
10 United States what the meaning is of your tract
11 designations from 1,001 to 1,027?

12 MR. RIFKIN: As far as I can determine,
13 using all the data that our experts have, they're
14 basically areas of -- the tract basically has
15 certain characteristics that allow the areas
16 within the sections that are listed to be grouped
17 together for the purposes of the study that
18 our experts would like to conduct.

19 THE SPECIAL MASTER: Well, there can't
20 possibly be 27 different disputes with evidence
21 in the case in chief that are all tied to 27
22 specific plots of ground that have to be
23 investigated. What is the rationale behind the
24 identity of these tract numbers, and if there's
25 a way to help you find it, then the United States

1 ought to know too so they can know where you're
2 going. That's all they want to know.

3 MR. RIFKIN: I believe from our discussion
4 Tuesday we decided that we could come back with
5 a list where we would limit it to 25 or 30
6 different tracts.

7 MR. ECHOHAWK: With specificity.

8 THE SPECIAL MASTER: Right, but you haven't
9 identified the tract. You come up with a group
10 of numbers. Here's our numbers, and it's like
11 shooting dice out of a bottle, I don't know what
12 those numbers mean.

13 MR. RIFKIN: The problem is on these study
14 areas we had no tract numbers.

15 THE SPECIAL MASTER: What do these numbers
16 mean?

17 MR. RIFKIN: These are just administrative
18 numbers that we assigned.

19 MR. ROGERS: Your Honor, can't the State
20 provide mapping to show what the perimeters of
21 these tracts --

22 MR. ECHOHAWK: If they just want to circle
23 the parcel they're going to dig in that helps
24 us immensely.

25 THE SPECIAL MASTER: Why don't -- while we

1 continue this case, why don't you go to the
2 exhibit for the specific area? For example,
3 North Crowheart is on the board now, and pick
4 Township 5 North, Range 2 East, Section 10 or
5 15 and put a big circle around them.

6 MR. MERRILL: Your Honor, I have started
7 examining the tracts in the North Crowheart
8 study area and everywhere I looked at a legal
9 description it is clearly apparent which tracts
10 are sought to be entered. Let's start with the
11 first one which is Section 10 and 15. If I'm
12 counting right, Mr. Rogers, correct me if I'm
13 wrong, this is Section 10 here, so they're
14 obviously interested in this tract.

15 Going to the next one, Section 12, that
16 would involve this tract of land up here in the
17 corner. When we go over to 5 North, 3 East --

18 THE SPECIAL MASTER: How about 28, 29, 30,
19 32 and 33?

20 MR. MERRILL: Take me a minute to find them.

21 THE SPECIAL MASTER: Because they're in the
22 same township and range.

23 MR. MERRILL: Your Honor, that's the
24 general area in the southwest corner of that
25 particular township. It's encompassed by several

1 pieces there, and there's one tract that cuts
2 through all of those sections. That's probably
3 the one that's intended.

4 THE SPECIAL MASTER: I see.

5 MR. MERRILL: Moving on to Sections 18, 19
6 and 20, that's again a portion of this large
7 green tract, that's obviously one they're
8 interested in. We've named every --

9 MR. RIFKIN: We had a number that was
10 assigned to that tract. The last three separate
11 ones we described would all be consumed by one
12 tract number.

13 THE SPECIAL MASTER: I think --

14 MR. ROGERS: Your Honor, with respect to
15 the identification of the tracts, if it is in
16 fact the case that the -- they will restrict
17 themselves to taking soils samples within the
18 perimeters of the areas delineated on these
19 exhibits, these series of C Exhibits 45 through
20 whatever, I think I would be satisfied with
21 that.

22 THE SPECIAL MASTER: I should think that
23 that ought to meet with -- meet the criteria,
24 Mr. Echohawk.

25 MR. ECHOHAWK: Are they limited to 20 or 25

1 samples, Your Honor?

2 THE SPECIAL MASTER: Twenty-five I thought
3 I said.

4 MR. ROGERS: That was another matter.

5 THE SPECIAL MASTER: Twenty to 25.

6 MR. ECHOHAWK: Twenty to 25 samples?

7 THE SPECIAL MASTER: Yes. You understand,
8 don't you, Mr. Rifkin?

9 MR. RIFKIN: Yes.

10 THE SPECIAL MASTER: The limitation is to
11 20, 25 samples.

12 MR. ECHOHAWK: Does that mean that each --
13 wait a minute.

14 MR. ROGERS: This is samples now, not areas?
15 In other words --

16 THE SPECIAL MASTER: You take 18 samples
17 from one area, you'll have seven left, not 20,
18 not the 24 more areas that you can go to.

19 MR. RIFKIN: That was our understanding.

20 MR. ROGERS: He can --

21 MR. ECHOHAWK: So some of these areas are
22 not going to be sampled.

23 MR. RIFKIN: It's possible. Certainly, if
24 it's like the Special Master stated, if we --
25 obviously if we take 15 samples from one, that

1 only leaves us 10 and we won't be able to take
2 a sample from every section, if that's the case.

3 THE SPECIAL MASTER: So that should be
4 understandable, shouldn't it?

5 MR. MERRILL: Your Honor, we'll live with
6 the restriction that we won't take more than 25
7 samples, where we chose to get them off of
8 these lands.

9 THE SPECIAL MASTER: You might decide to
10 take half of them in one particular section.

11 MR. MERRILL: That's exactly what we want.

12 THE SPECIAL MASTER: If it's got what you
13 want.

14 MR. MERRILL: We won't take any more than
15 that.

16 THE SPECIAL MASTER: All right. Let's hope
17 that this is agreeable, and proceed with them.

18 MR. ECHOHAWK: Your Honor, before I make
19 an absolute commitment, could I have until Monday
20 to have my experts check this and also check the
21 work that Wyoming has done previously to see that
22 they have actually been on this?

23 THE SPECIAL MASTER: I can, but I would want
24 you to have a response Monday morning.

25 MR. ECHOHAWK: Monday morning, I will, Your

1 Honor.

2 THE SPECIAL MASTER: Mr. Rifkin, we'll
3 have a final response Monday morning, and in
4 the meantime we'll have a special Easter service
5 to see that they'll be approved.

6 MR. RIFKIN: If Mr. Echohawk's experts
7 do have any specific other objections, and
8 additional objections that he's going to raise,
9 we would appreciate it if he could delineate the
10 areas where, specifically where those arise
11 also. rather than just saying that in general
12 terms that there are some other objections.

13 MR. ECHOHAWK: I'll do that, Your Honor.

14 THE SPECIAL MASTER: All right. Let's
15 proceed with the case. Thank you both.
16 We're on tables --

17 MR. ECHOHAWK: As I understand on this
18 matter, one final point, as I understand it,
19 Wyoming's experts will report to the BIA to pick
20 up their escorts; is that right?

21 MR. RIFKIN: That's fine.

22 THE SPECIAL MASTER: Oh, yes.

23 MR. MERRILL: It's been standard procedure,
24 Your Honor.

25 THE SPECIAL MASTER: For a minute I thought

1 an old familiar voice was in the courtroom
2 and everything was all settled, "Just a minute,
3 Mr. Special Master."

4 MR. MERRILL: Just that understandable
5 tendency to get in the last word, Your Honor.

6 MR. ROGERS: Your Honor, I will say one
7 other thing. I can't speak for the United
8 States on this, but I will be reasonable to
9 this point. As far as the Arapahoe Tribe is
10 concerned, and at the risk of being fired by
11 my clients in saying so, I don't object if the
12 State also -- if they are within reasonable
13 proximity of the delineated areas and wish to
14 take a soil sample outside, within a reasonable
15 distance of it for whatever purpose, I would
16 think there's no objection to that so long as
17 it is on Tribal trust lands and not -- not
18 another person.

19 THE SEPCIAL MASTER: Land --

20 MR. ECHOHAWK: I would oppose the Tribes --

21 THE SPECIAL MASTER: Land being what it is,
22 I would have to sustain a request of the State
23 to do so providing it's contiguous in structure.

24 MR. ROGERS: Yes.

25 THE SPECIAL MASTER: And I think that's

1 appropriate. And I think the Tribes would have
2 to probably go along. That doesn't give you
3 the right to go two or three miles down.

4 MR. ECHOHAWK: That's the point, Your Honor.
5 That's a fairly broad variance. He said you
6 can take a sample in the parcel or somewhere
7 outside of it.

8 MR. ROGERS: A reasonable --

9 THE SPECIAL MASTER: This witness has
10 expressed and so has his predecessors as
11 witnesses, each area or parcel has to -- its
12 characteristics are the final judge of what we
13 mean by this. We can't be arbitrary and say
14 its got to be a given number of feet in each
15 case. If you're on a shelf it may be one thing,
16 if you are in a deeper river alluvium it might
17 be quite another to see if the land goes out.
18 If you're looking for soil samples it's one
19 thing, if you're looking for depth to barrier
20 it's another, but with an escort with them that
21 should be no problem.

22 MR. ECHOHAWK: But the only matters in
23 issue are the various parcels that are delineated
24 on the maps.

25 THE SPECIAL MASTER: Yes, but sometimes to

1 identify the characteristics of land within
2 some of these, it is necessary to show if --
3 especially if you have -- I know this is true
4 in surface mine reclamation problems, you have
5 a shale or subsurface rock characteristic and
6 it extends because you can show it's a particular --
7 what am I trying to say?

8 THE WITNESS: Particular parent material.

9 THE SPECIAL MASTER: Parent material,
10 strata; in larger terms, faults. So a little
11 of that would be appropriate, and I think -- but
12 I bet you it won't come up.

13 MR. ROGERS: I doubt it will. I doubt
14 the State's going to want to waste its limited
15 samples and go too far away. We're not talking
16 about Crowheart Butte, five miles away.

17 THE SPECIAL MASTER: They would know if they
18 go too far how I'll rule on it.

19 MR. ECHOHAWK: Does this deal only with the
20 future lands in relation to their digging holes
21 because once we start in historic --

22 THE SPECIAL MASTER: Irrigated lands also.
23 They intend --

24 MR. MERRILL: Only tracts listed in the
25 request; we're limited by those already.

1 THE SPECIAL MASTER: They wanted about 75
2 to 100 of these and I got them down to 25. I
3 see none of the papers came down -- they all
4 came with 25, but that's all right.

5 MR. ECHOHAWK: The problem I can see, they're
6 going to be out in the field, how is there going
7 to be a determination made whether or not this
8 is allotted land?

9 MR. MERRILL: Your Honor, our experts will
10 operate in good faith not to push what is clearly
11 the intent of your ruling here, and to stay
12 within reasonable distance. Should they venture
13 off a particular tract a few feet I'm sure --

14 THE SPECIAL MASTER: Mr. Echohawk, we're
15 going to trust that they got enough faith and
16 respect for their own professional positions
17 that if they stray from what has been said in
18 both letters -- it will be trust land only, that
19 we think we're going to live up to that. Not
20 trust lands only -- made only onto nonallotted
21 trust lands, nonallotted trust lands in both
22 letters.

23 MR. RIFKIN: Right.

24 MR. ECHOHAWK: The Bureau of Indian Affairs
25 escort would be able to make that judgment once

1 they're out there?

2 THE SPECIAL MASTER: Surely between the
3 escorts and the engineers I think the right
4 decisions will be arrived at.

5 MR. RIFKIN: We would be glad to assist
6 them in making that determination, using the
7 Tribes' exhibit.

8 THE SPECIAL MASTER: Okay, let's proceed
9 with the case, gentlemen.

10 MR. MERRILL: I rather think Mr. Waples
11 might like it if we continue with this particular
12 problem, Your Honor.

13 Q (By Mr. Merrill) Ross, would you please turn
14 to table 1 of your report on page 5. I'm going
15 to ask you first about how alkalinity of soil.
16 In Class 1 requirements you speak of -- or the
17 standards, excuse me, speak of adequate drainage
18 and under Class 2 and 3, and by reference Class
19 4 as well, talk about optimum drainage conditions.
20 Can you be a little more specific as to what
21 those terms adequate drainage and optimum
22 drainage mean? Is there any way to quantify
23 them?

24 THE SPECIAL MASTER: Are you, gentlemen, on
25 waples-cross-merrill

1 table 1, page 5?

2 MR. MERRILL: Yes, Your Honor.

3 THE SPECIAL MASTER: Class 4, optimum?

4 MR. MERRILL: Class 4, Your Honor, is
5 the same as Class 3 and Class 3 in the
6 very last line of optimum drainage conditions.
7 Am I on the wrong page?

8 MR. ECHOHAWK: You're right.

9 THE SPECIAL MASTER: I have it. You're
10 right, I beg your pardon. Under alkalinity.

11 THE WITNESS: Perhaps I can answer it in
12 a little broader context. As I stated before,
13 these standards are guidelines. On direct this
14 morning we hit the major differences between
15 the standards, and the other differences aren't
16 exceedingly, you know, they're not relevant.
17 The classifier in the field needs some guideline
18 to make an initial evaluation as to the drain-
19 ability of that land. That's all that these --
20 these are just to allow, to help the classifier
21 make some judgment.

22 Now, as I say beyond that there's not---
23 there's no quantitative rule that would take
24 care of this type of thing.

25 waples-cross-merrill

1 Q (By Mr. Merrill) Can you distinguish optimum
2 from adequate drainage conditions in a non-
3 quantitative way?

4 A The classifier in the field, he looks at the
5 textures, he looks at the soil depths, and this
6 type of thing. These things go into the judg-
7 ment as to whether -- how drainable the land is,
8 but the primary job here is that of the drainage
9 engineer to make the ultimate decision.

10 Q Did you have a drainage engineer evaluate those
11 tracts in which the FAR approached the limits
12 described in each of these standards to determine
13 that the prerequisite drainage conditions, in
14 fact, existed?

15 MR. ECHOHAWK: May I have that question read
16 back?

17 (Thereupon the following
18 question was read back as
19 follows: "Q Did you have a
20 drainage engineer evaluate
21 those tracts in which the
22 FAR approached the limits
23 described in each of these
24 standards to determine that
25 the prerequisite drainage
conditions, in fact, existed?")

A (By the witness) The lands in the major project
areas were subject to a drainage investigation,
as Mr. Toedter will testify to.

1 The non-project lands with the drainage
2 being the responsibility of the operator, it is
3 less of a problem. We did look at the chemical
4 properties of the soil, and if it appeared to be
5 questionable to the classifier or the drainage
6 engineer, those lands were evaluated as such.

7 Q Well, my question went only to the project lands,
8 not the non-project lands.

9 A Pardon me.

10 Q And the question is did your drainage engineer
11 evaluate, for example, in Class 1 tracts accord-
12 ing to these standards the FAR must be less than
13 12 in the upper twelve inches, but it may be as
14 high as 15 under 12 inches under optimum drainage
15 conditions?

16 My question is let's assume we have a tract
17 that has a FAR of 15. Given such a tract, did
18 your drainage engineer go out and examine that
19 tract or by some other means determine that that
20 tract had what you call optimum drainage condi-
21 tions?

22 A I misunderstood, Mr. Merrill. All the lands in
23 the project areas were subject to a drainage
24 analysis.

25 waples-cross-merrill

1 Q Of the type I just asked you about?

2 A Of the type that was required to make an arable
3 evaluation.

4 THE SPECIAL MASTER: Regarding alkalinity
5 of soil?

6 THE WITNESS: If I may expand on that a
7 little bit, the alkalinity in soil does not
8 present much of a problem as long as the drainage
9 conditions are such that it can be handled.

10 Heavy clay soils with high alkalinity
11 probably cannot be drained. The drainage engineer
12 evaluates everything at his disposal and makes
13 an evaluation as to the drainability of the land.

14 Q (By Mr. Merrill) Would the same general answer
15 that you have given hold true with respect to
16 the distinction between good and adequate leaching
17 and drainage conditions under salinity?

18 A Yes, here again, as I've tried to stress several
19 times, these things are guidelines, and to have
20 guidelines, it does very little good to put a
21 number that the classifier in the field cannot --
22 does not have any way of confirming.

23 Through experience, the land classifiers
24 have an idea as to what is adequate drainage or

25 waples-cross-merrill

1 adequate leaching or whatever. It's a combina-
2 tion of judgment and experience.

3 Q Would you please turn to page 6 of your report
4 and take a look at the requirements for sprinkler
5 irrigation pattern and field size?

6 Now, as I understand it, land classifications,
7 part of the idea behind a land classification is
8 to send signals and provide information for a
9 project engineer and a project economist; is that
10 correct?

11 A It provides basic information from which the
12 engineer and economist work.

13 Q With respect to the projects that are proposed
14 to irrigate the lands that you classified as part
15 of this program, can the engineer and economist
16 assume that there will be no side-roll sprinklers
17 irrigating tracts less than 40 acres in size?

18 MR. ECHOHAWK: Could I have the question read
19 back?

20 (Thereupon the following
21 question was read back as
22 follows: "Q With respect
23 to the projects that are
24 proposed to irrigate the lands
25 that you classified as part
 of this program, can the
 engineer and economist assume
 that there will be no side roll
 sprinklers irrigating tracts

25 waples-cross-merrill

1 less than 40 acres in size?")
2 A. (By the witness) Would you rephrase your question,
3 please, Mr. Merrill?

4 MR. MERRILL: I'll give it a try.

5 THE SPECIAL MASTER: I think it's a rather
6 clear question. Would you read it one more time
7 and see if you can't just answer it?

8 (Thereupon the following
9 question was read back as
10 follows: "Q. With respect
11 to the projects that are
12 proposed to irrigate the lands
13 that you classified as part
14 of this program, can the
15 engineer and economist assume
16 that there will be no side roll
17 sprinklers irrigating tracts
18 less than 40 acres in size?")

19 MR. ECHOHAWK: Your Honor, I would object to
20 the question. It's ambiguous. The lands that
21 Mr. Waples is testifying to in the historic
22 category are historic projects which is LeClair,
23 Midvale, and the FIPs, historic, but there are
24 really no proposed projects to be built. They are
25 existing.

Mr. Waples is merely going through and picking
up the bits and pieces of the remaining portions
that are idle in those projects.

THE SPECIAL MASTER: But the question asks
waples-cross-merrill

1 can the engineer and the economist assume that
2 there will be no areas to be irrigated by side-
3 roll that are less than 40 acres in size, and I
4 think that's an imminently fair question.

5 MR. MERRILL: Certainly in light of the
6 standards that are set forth in this exhibit,
7 Your Honor.

8 MR. ECHOHAWK: My objection goes to the way
9 the question was phrased.

10 THE SPECIAL MASTER: Do you want to try to
11 rephrase it?

12 MR. ECHOHAWK: It sounded like he was phras-
13 ing it in regard to something like the North
14 Crowheart area, and Mr. Kersich had proposed
15 large projects that could possibly be built in
16 the future. As I say, these are going back and
17 picking up bits and pieces.

18 THE SPECIAL MASTER: These are land classi-
19 fication standards in which the evidence admitted
20 they are applicable without distinction to
21 virtually all of the lands that's been classified
22 on the Reservation, are they not?

23 MR. MERRILL: With the exception of the land
24 outside the major projects. These standards only

25 waples-cross-merrill

1 apply, as I understand it, to the future projects
2 testified to by Mr. Kersich, and my question does
3 not go to those.

4 My question goes to the lands classified by
5 Mr. Waples within the federal irrigation projects
6 and the LeClair and Midvale areas.

7 THE SPECIAL MASTER: Okay.

8 MR. ECHOHAWK: It must be understood that
9 the standards are designed merely to determine
10 arability within that type of situation.

11 THE SPECIAL MASTER: Yes, but in testing
12 the totals of acreage that the witness has testi-
13 fied to, Mr. Merrill wants to know if the
14 criteria have been applied.

15 MR. MERRILL: That's precisely correct.

16 THE SPECIAL MASTER: If the witness' answer
17 is going to bring out one thing, it will show
18 that the standards to which he testified were,
19 in fact, not applied. Therefore, he can raise
20 a question about the accuracy or the validity of
21 the acreage totals.

22 If the witness answers another way, then it
23 verifies his figures.

24 I think the witness may answer.

25 waples-cross-merrill

1 MR. ECHOHAWK: Would you rephrase your
2 question, Mr. Merrill?

3 MR. MERRILL: Your Honor, we have gone
4 through the question about four times. I'll see
5 --

6 THE SPECIAL MASTER: Well, let's see if I
7 can't pull us out of this dilemma.

8 Mr. Waples, on all the land on which you
9 did the work to which you have testified today,
10 can your colleagues conclude from your statements
11 in evidence and your work that there will be no
12 sideroll irrigating on parcels of less than 40-
13 acre minimum size?

14 MR. ECHOHAWK: Your Honor, I would respect-
15 fully like to object in that you are asking Mr.
16 Waples to speculate as to what the agricultural
17 engineer is going to do or what the economist is
18 going to do.

19 Mr. Waples took a set of standards. It is
20 designed to determine arability, and he determined
21 arability.

22 What those people may do with the arable
23 land is a question we have not yet addressed.

24 MR. MERRILL: Your Honor, that is not the case.

25 The witness has testified that the land
waples-cross-merrill

1 classification standards do, in fact, convey
2 information, in shorthand, if you will, to the
3 gentlemen who designed the project and the people
4 who evaluate its economic feasibility, and I
5 cannot understand the basis of Mr. Echohawk's
6 objection.

7 If, in fact, they are going to be sideroll
8 irrigating 5-acre tracts, it raises a question
9 as to whether the standards set forth in Table 1
10 were, in fact, applied.

11 THE SPECIAL MASTER: I agree with you, but
12 Mr. Echohawk doesn't -- I would recognize only
13 that Mr. Echohawk doesn't like that part of my
14 question and of your question which deals with
15 whether or not the engineers and the economists
16 can conclude something from what -- that's what
17 Mr. Echohawk's objection is.

18 MR. ECHOHAWK: You recall that when Mr.
19 Kersich addressed this area, he said this raises
20 a flag as we pass it on to the agricultural
21 engineer. It raises a flag and alerts him to a
22 situation, and that's all the land classification
23 standards or arable standards are designed to do.

24 The question whether Dr. Mesghinna is going

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1 to put a sideroll sprinkler on some small portion
2 of land is a question we have not addressed. I
3 think it's improper for Mr. Waples to be asked
4 to conclude that.

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waples-cross-merrill

1 THE SPECIAL MASTER: Well, this is a
2 knotty problem. I can see both sides of what
3 you're saying, but I'm inclined to believe that --
4 that Counsel has a right to pursue a line of
5 questioning that will determine whether Mr.
6 Waples or not intends to see that there is no
7 side rolls sprinkling on parcels less than the
8 40 or so acres that are complied with.

9 MR. ECHOHAWK: Your Honor, it's not up to Mr. Waples to
10 determine whether or not there is going to be
11 a side roll sprinkler put on there. If the
12 engineer can put a side roll sprinkler on there
13 and an economist can justify economically, that
14 is the bottom line test --

15 THE SPECIAL MASTER: That may be the bottom
16 line test, but if that is the bottom line test,
17 then there is a lot more acreage in there than
18 is allowable.

19 MR. MERRILL: You're going to have acreage
20 in here that doesn't meet the standards.

21 MR. ECHOHAWK: Your Honor, the question is --
22 the bottom line question in this case is what
23 land is irrigable, it's not what land is arable.
24 Arable base is merely the beginning point of our
25 case. We've established the arable base under

1 a certain set of land classification standards.

2 THE SPECIAL MASTER: Mr. Echohawk, this is
3 an inquiry to the standards by which we've
4 established that arable base.

5 MR. ECHOHAWK: That's fine, Your Honor,
6 but what Mr. Merrill is attempting to do is go
7 on and have Mr. Waples cut off an irrigability
8 determination.

9 MR. MERRILL: No, I'm not, Your Honor.

10 MR. ECHOHAWK: He's asking whether Mr.
11 Waples can put a side roll sprinkler on this.
12 It's up to the agricultural engineer and the
13 economist to take the base that Mr. Waples has
14 created and make that determination, and we're
15 a long way before that testimony comes.

16 THE SPECIAL MASTER: You must recognize
17 he's got a little bit of a point, Mr. Merrill.

18 MR. MERRILL: Your Honor --

19 THE SPECIAL MASTER: Although I'm inclined
20 to go with you on this, and I've sustained you
21 twice.

22 MR. ECHOHAWK: The point is, Your Honor,
23 we have just gotten into the, actually the very
24 beginning of the United States' case by
25 establishing an arable base. There is a lot of

1 testimony coming as to how the engineer can
2 address these systems, what systems he can
3 put on it, how he can irrigate it and costs
4 associated with it. We're going to have an
5 economist testify as to what --

6 THE SPECIAL MASTER: Can grow.

7 MR. ECHOHAWK: -- benefits can be derived
8 from that land, how much money you're going to
9 get on a return. They're going to balance these
10 off and determine whether or not it's economically
11 feasible. And that's the bottom line question
12 as to the determination of irrigability. And
13 you're asking Mr. Waples to say whether or not
14 you put a side roll sprinkler on it. Mr. Waples
15 is merely testifying what his standards are
16 designed to show.

17 MR. MERRILL: Your Honor, that's not the
18 question.

19 THE SPECIAL MASTER: With all due respect
20 to both of you and I commend you for your depth
21 and knowledge and doggedness on this point.
22 Please allow me to respectfully overrule you,
23 Mr. Echohawk, and please allow me to ask Mr.
24 Merrill to bring out from this witness an answer
25 to the question which was the original question,

1 can the economist and can the engineer who will work
2 with him in this regard conclude from his criteria
3 that there will be -- that there should be no side
4 roll irrigating sprinkler system put on tracts of
5 less than 40 acres, if it's to be classified as Class
6 1. Now, that I want an answer to.

7 THE WITNESS: Okay. For tracts less than 40
8 acres, these guidelines say that side rolls or --
9 well, side rolls will not be allowed. Now, this is
10 based on certain assumptions that may change as -- as
11 things work through to the engineer and to the econo-
12 mist. As I said before, these guidelines are to be
13 used in the field to -- to determine arability, but
14 as Mr. Echohawk says, that's a long ways from being
15 irrigable.

16 If the agricultural engineer and the economist
17 find in their analysis that, in fact, they can put a
18 side roll on a parcel of ground that's less than 40
19 acres due to whatever reasons, low cost, whatever, I
20 don't know, then it would certainly not violate the
21 spirit of these standards to do that.

22 THE SPECIAL MASTER: All right. That's an
23 answer. Thank you.

24 Q (By Mr. Merrill) Does that same answer hold true
25 with respect to center pivot sprinkler irrigation
with tracts of less than 100-acre parcels?

1 A Yes, it does.

2 Q So you're saying that although there are
3 certain standards set forth on table 1
4 concerning land classification, what the
5 classification themselves imply, that the
6 project engineer and the project economist
7 are free to experiment, if you will, for
8 themselves beyond the bounds of these standards
9 to see whether the project can actually go;
10 is that right?

11 MR. ECHOHAWK: Objection, Your Honor,
12 again calls for speculation.

13 THE SPECIAL MASTER: Only one word was
14 objectionable. If the word had been they were
15 free to make judgments in your criteria, I
16 think --

17 MR. ECHOHAWK: Then, Your Honor, it's
18 beyond the competence of this witness to testify
19 what those people might do.

20 THE SPECIAL MASTER: He has already answered
21 those questions. He said, yes, they can make
22 those adjustments.

23 MR. MERRILL: Your Honor, I don't want to
24 flog a dead point, but I think that it's important

25 waples-cross-merrill

1 for the record to reflect that the testimony
2 of this witness is that land classification
3 standards and classifications themselves, as
4 applied to a particular tract of land, are
5 a shorthand method, if you will, of sending
6 information in condensed form to someone else
7 who works with those classifications.

8 My questions don't go to how the economist
9 and the engineer will interpret those standards,
10 my question goes to what is the intent in
11 transmitting those standards as to how they
12 are to be used. When we get to the project
13 engineer and the project economist, we'll be
14 asking a similar line of questions as to how
15 they were received and interpreted. But if I
16 wait until then, I have no opportunity to find
17 out what was the intent in their use in the
18 first place. I think I'm entitled to cross-
19 examine both sides of the communication process.

20 THE SPECIAL MASTER: I agree with you,
21 and I have granted you that entitlement.

22 MR. MERRILL: Thank you, Your Honor.

23 Q (By Mr. Merrill) Ross, would you please turn
24 to page 7 of your report, which is the third page

25 waples-cross-merrill

1 of table 1, the project land classification
2 standards and look at the notations under
3 drainage surface, Class 2 -- let's just start
4 with Class 2. In selecting the words relatively
5 low cost for the cost of improving slight
6 drainage problems, what type of economic analysis
7 did you use?

8 MR. ECHOHAWK: Objection, Your Honor, we've
9 covered this exact same ground with Mr. Kersich
10 on the standards. These standards have been
11 quizzed as to what economic analysis goes in
12 there. Mr. Kersich has already testified
13 no specific analysis, but there's economics
14 inherent in the system.

15 THE SPECIAL MASTER: I'm going to sustain
16 that objection, Mr. Merrill.

17 MR. MERRILL: Your Honor, I'd simply point
18 out that we're talking about a different set of
19 tracts of land, and just a moment ago Mr.
20 Echohawk was pointing out that the distinctions
21 between the lands that we're talking about today
22 and lands we were talking about with Mr. Kersich
23 are different.

24 MR. ECHOHAWK: We're talking about the same
25 waples-cross-merrill

1 classification standards though.

2 THE SPECIAL MASTER: I would answer Mr.
3 Merrill's observation by stating that other
4 factors crank into this, which from year to
5 year can be set mostly by the price of the
6 crops with relation to what is a relatively
7 low cost or not, what is an expensive but still
8 feasible measure. These are all subjective
9 descriptions that can mean different things
10 to different farmers who are doing different
11 crops in different seasons.

12 MR. MERRILL: I agree, Your Honor, that's
13 why I'm trying to get some amplification of
14 what are certainly terms of art to soils
15 scientists and land classifiers, so those of us
16 who are not have a little better understanding.

17 THE SPECIAL MASTER: Do you want to ask
18 him to define what a relatively low cost is,
19 is that what you want to try to find out?

20 MR. MERRILL: Yes, with respect to how the
21 terms are used in that standard.

22 THE SPECIAL MASTER: All right. I'll permit
23 that inquiry.

24 THE WITNESS; I don't have a dollar figure

25 waples-cross-merrill

1 to place on what is a relatively low cost.

2 Q (By Mr. Merrill) Is there any other way you
3 can describe or amplify the term relatively
4 low cost?

5 THE SPECIAL MASTER: Low cost related to
6 what?

7 THE WITNESS: Related to such things as
8 putting in a short shallow drainage ditch from
9 a depression as opposed to a very extensive
10 surface drainage network.

11 Q (By Mr. Merrill) What is meant by the words
12 "Improved by expensive but feasible measures"
13 under Class 3?

14 A There again these are relative terms. If, for
15 instance, the classifier came upon a depression
16 that would act as a collector for water, he's
17 going to make a judgment as to whether that's
18 a slight drainage problem -- excuse me, slight
19 surface drainage problem or one that is quite
20 extensive. A person can look at the ground
21 and make an estimate of whether a little bit
22 of dirt's needed to be moved to correct that
23 or a lot of dirt needs to be moved to correct
24 that.

25 waples-cross-merrill

1 MR. MERRILL: Your Honor, that last
2 question concluded a fairly major segment of
3 my cross-examination. It might be a convenient
4 time to either take a break or break for the
5 weekend, depending on your preference.

6 THE SPECIAL MASTER: Let's break for the
7 weekend. It's nearly five o'clock. And let's
8 announce before we do depart that we will be
9 meeting on Monday morning at 10:30 at the
10 Wyoming State Supreme Court Chambers. This room
11 is occupied, will be occupied by other people.

12 MR. KROB: Your Honor, I believe there is
13 one pending matter regarding the entry onto the
14 Reservation that we were going to check with
15 our experts to see if they were just going to
16 check the section lines on each parcel that
17 doesn't --

18 THE SPECIAL MASTER: The corners, yes.

19 MR. KROB: With regard to the entry on
20 April 22nd, our experts will only be entering
21 parcels of the first six areas to check the
22 parcels themselves. With regard to the remainder
23 of the list, they will only be checking section
24 lines and corners.

25 THE SPECIAL MASTER: That's good news to leave

1 on, so that's an assurance that Mr. Echohawk
 2 and Mr. Rogers wanted. Okay. Please take
 3 your exhibits out of here and whatever else
 4 you want to that you'll need Monday. We're
 5 in recess until Monday morning.

(Thereupon the proceedings
 (were adjourned at 4:45 p.m.)

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11
12
13
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21
22
23
24
25

INDEX TO EXAMINATION

PAGE

WITNESS: ROSS WAPLES

Direct Examination	By Mr. Echohawk	3285
Voir Dire Examination	By Mr. Merrill	3298
Direct Examination	By Mr. Echohawk	3318
Voir Dire Examination	By Mr. Merrill	3367
Further Direct Examination	By Mr. Echohawk	3402
Cross-Examination	By Mr. Merrill	3409

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

IDENTIFIED RECEIVED

U.S. WRIR C-157, C-138	3291	
U.S. WRIR C-55, C-5	3294	
U.S. WRIR C-36-A	3296	
U.S. WRIR C-156	3336	
U.S. WRIR C-223, C-224	3346	
U.S. WRIR C-224-A, C-225	3347	
U.S. WRIR C-158	3348	
U.S. WRIR C-222	3351	
U.S. WRIR C-226	3362	
U.S. WRIR C-158 through C-221		3399

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2 State of Wyoming)
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5 We, Merissa Racine and Viola J. Lundberg,
6 Registered Professional Reporters and Notaries Public,
7 hereby certify that we did at the time, date and place,
8 as set forth, report the proceedings had before the
9 Honorable Teno Roncalio, Special Master Presiding, in
10 stenotype; that the foregoing pages, numbered 3281-3475,
11 inclusive, constitute a true, correct and complete tran-
12 script of our stenographic notes as reduced to typewrit-
13 ten form under our direction.

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

17 Dated this 16th day of April, 1981.

18 Merissa Racine
19 MERISSA RACINE
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21 Reporter

22 Viola J. Lundberg
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24 Registered Professional
25 Reporter

