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Trial Transcript, Vol. 61, Afternoon Session

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case # 4993

File # 168

4419

File 168
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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, STATE OF WYOMING

IN RE:)
)
THE GENERAL ADJUDICATION OF)
ALL RIGHTS TO USE WATER IN)
THE BIG HORN RIVER SYSTEM,) Civil No. 4993
AND ALL OTHER SOURCES, STATE)
OF WYOMING.)

FILED
5/20 1981
Margaret V. Hampton CLERK
DEPUTY

VOLUME 61

Afternoon Session

Wednesday, May 13, 1981

ORIGINAL



1 THE SPECIAL MASTER: Is everybody ready? Come to
2 order, please.

3 MR. WHITE: What's your pleasure, Your Honor, on
4 the certificated water rights outside the Reservation?
5 Do you want me to make an offer of proof or go ahead?

6 THE SPECIAL MASTER: If you will give me --

7 THE REPORTER: I'm sorry, I can't hear you.

8 THE SPECIAL MASTER: Disregard it anyway.

9 We will please come to order. I have the 15-page
10 stipulation. Somebody asked about it earlier today. Does
11 anyone wish to see it?

12 MR. ROGERS: We have it, Your Honor. Let us advise
13 you of our status on this.

14 Actually, the stipulation does not address the
15 issue. The stipulation defines the boundaries of the
16 Reservation by reference to the United States' Statement
17 of Geographic Boundary that has been filed previously in
18 late September of 1979, and as it is worded, the exterior
19 boundaries are stated to be as the treaty defined them
20 in its principal sessions in the late 1800s, as you will
21 note.

22 In addition, the Statement of Geographic Boundaries
23 filed by the Government referred to four tracts located
24 outside the above exterior boundaries, but which are
25 held in trust status and administered in the same manner



1 as the Wind River Indian Reservation and that they be re-
2 tained for the Arapahoe and Shoshone Tribes.

3 The legal descriptions of those four tracts were fol-
4 lowed, and they are, in essence, the boundaries of Arapahoe
5 Ranch, which is outside the exterior boundaries but held
6 in trust.

7 The Government is proceeding to file or to prove up
8 its claim as to reserved rights for that trust land.

9 THE SPECIAL MASTER: How is the Government doing that?

10 MR. ROGERS: Well, partly through the testimony of Mr.
11 Stetson because some of these adjudicated rights that he has
12 testified to are on those lands.

13 THE SPECIAL MASTER: That may be proving up your right
14 to the water that you are using on those lands, but you
15 said you are in the process of proving up your rights to
16 a reserved water right?

17 MR. ROGERS: As a first step, Your Honor.

18 THE SPECIAL MASTER: Do you maintain that --

19 MR. ROGERS: In the alternative, they are adjudicated
20 rights and to those acreages as we know as to the testimony
21 of Mr. Stetson.

22 The current question turns around proof in the record
23 as to the land status or the ownership status of those par-
24 ticular lands.

25 At the boundaries and dates trial last summer, through



1 the testimony of Elsie Kolstad, who was qualified as an
2 expert witness, the Tribes, as you know, introduced their
3 Exhibit M-1 in which Ms. Kolstad had prepared, she testi-
4 fied, through her work in the Billings area office of
5 Bureau of Indian Affairs Title Plan Office, and the map
6 was prepared under her direction and through her own work,
7 showing the ownership of the Reservation by color, tribal
8 trust being colored in yellow -- tribal trust land being
9 colored in yellow -- and that does include certain of the
10 land in the Arapahoe Ranch area. They are shown to be on
11 the BIA Title Plan records, tribal trust lands, though
12 exterior to the Reservation.

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1 THE SPECIAL MASTER: These are precisely what this
2 witness used in his calculation.

3 MR. ROGERS: That's right, Your Honor.

4 THE SPECIAL MASTER: All right.

5 MR. ROGERS: I do have to say, with respect to the
6 lands involved in State's Exhibit -- what was it, GC --

7 MR. CLEAR: 92.

8 MR. ROGERS: 92, this particular tract of land lies
9 yet outside the colored area on Tribes' Exhibit M-1,
10 even beyond that portion north of the reservation. It's
11 a few miles even further north.

12 THE SPECIAL MASTER: What is this land generally
13 referred to as?

14 MR. WHITE: Outside the reservation, Your Honor.

15 THE SPECIAL MASTER: I know. No, I think it has
16 a name, some kind of an acquisition.

17 MR. ROGERS: Excuse me, Your Honor, one moment.

18 (Brief pause.

19 MR. ROGERS: It in fact, Your Honor, may even be
20 on the map, but at this point we have not been able to
21 confirm, as we come back into the court at this moment,
22 that in fact there was proof in the record of the trust
23 status at the moment. However, should it not be in the
24 record, it will be presented during the course of the
25 United States' case. And should it not be, obviously



1 Mr. White may strike any testimony with respect to it.

2 MR. MEMBRINO: We should be clear, Your Honor, that
3 we are claiming a reserved right for all lands held in
4 trust for the benefit of the Tribes and -- or individual
5 Indians, and if it happens to be reacquired lands, we
6 have an issue of priority not of whether there is a
7 right in the first place. That's the government's
8 position.

9 THE SPECIAL MASTER: Well, if it's reacquired lands
10 that have passed into the hands of non-Indians, I've
11 ruled that your right to a reserved water right has been
12 cut, then severed. Your question then merely is one of
13 what date, if reacquired, or what rights did you acquire
14 at the time you reacquired the land itself. I do not
15 believe that a reserved right to the Tribes, to the
16 Indians is citable, hypothecatable, willable and as
17 merchandise that you can bargain and grant and sell and
18 recover and repossess and convey away again.

19 MR. MEMBRINO: That's an issue that the Court's
20 have been grappling with, just what can be conveyed
21 in a reserved right, but I think we are dealing with a
22 different situation, and if we assume for the sake of
23 argument that the reserved right, priority date was
24 cut when the land passed out of the Indian ownership,
25 the issue we are faced with is what -- what consists of



1 the bundles of rights associated with the lands once
2 it's reacquired? Does it include a reserved water
3 right? And it's the reserved -- And it's the govern-
4 ment's position that there is a reserved water right
5 associated with those lands, its priority dates from
6 the date of reacquisition, and if that is a late
7 priority, so be it. But we do take issue with the argu-
8 ment that once lost it can never be revived, a reserved
9 right.

10 THE SPECIAL MASTER: Very well.

11 MR. WHITE: Your Honor, can I address -- Well, I'll
12 let everybody have their say.

13 MR. ROGERS: I wanted to clarify that, in fact,
14 that is a final ruling on your part, Your Honor, that
15 you had indicated something along that line the other
16 day but I didn't realize you had quite made it final
17 from your statement.

18 THE SPECIAL MASTER: This is as fine as it can
19 be in a proceeding that requires me to keep an open
20 mind till I issue a decree -- until we file the report
21 and recommend a decree. I can't be doing that step by
22 step without first letting you know what that decision
23 is and sending it up to the judge, but that is my
24 thinking as of this time.

25 I suppose it is inherent in the proceedings that



1 if asked to be reheard you can file a motion on rehearing;
2 I'll be glad to grant it to you. I want to keep an open
3 mind on any of my conclusions, but that is how I feel
4 about that.

5 MR. ROGERS: Because that particular ruling may well
6 bear on what -- some additional evidence that might
7 need to be presented.

8 THE SPECIAL MASTER: I think that ruling right now
9 is quite firm. I think I have precedent for it, I
10 think it's equitable and I think it's fair to a reser-
11 vation that has, that will be treated very fairly in
12 all the natures of its claims, I hope.

13 MR. MEMBRINO: Your Honor, does that ruling extend
14 to undisposed of lands that were subject to the 1905
15 agreement?

16 THE SPECIAL MASTER: No. Good Lord, no.

17 MR. MEMBRINO: Thank you, Your Honor.

18 THE SPECIAL MASTER: If it were to go to undisposed
19 lands in the 1905 cession, you'd have to scrub North
20 Crowheart and areas of that, and I don't intend to have
21 you appeal quite that abruptly. You'll appeal soon
22 enough. The answer is no to that.

23 Now, if you want to spend some time on the discussion
24 of what limitations there might be on 1868 dates in
25 particular cessions, we can go into some of that,



1 should there be some limitation, but my thinking in
2 that regard is that the -- that the land -- Does the
3 Sheep, Ash Sheep Case and its precedents ought to
4 prevail, that the Moss and the other case ought not
5 to prevail, because I can distinguish them on their
6 facts so glaringly. I forget, it's about as firm in
7 that direction as in the fact that once your land has
8 been severed you don't get a reserved water right, as
9 in your direction.

10 MR. ROGERS: May I ask what, if any, ruling you
11 have made, how does the statement you just made affect
12 the issue of land on the reservation clearly within
13 the reservation that is owned by Indians today but is
14 owned in fee by --

15 THE SPECIAL MASTER: And that has been served from
16 Indian ownership since the creation of the reservation?

17 MR. ROGERS: Well, it's owned by Indians today.

18 THE SPECIAL MASTER: You didn't answer my question.
19 Was there a severance of the ownership, between the
20 United States as trustees for the Tribe or the Tribes
21 themselves or the Indians themselves who owns the fee?

22 MR. ROGERS: Well, there will be different cate-
23 gories of it.

24 THE SPECIAL MASTER: There's also another category,
25 while we are talking about it. There are those who are



1 non-Indians living on the reservation who have title
2 in fee simple for the land which they acquired from some
3 Indians and they have written to me and said are you
4 defending our rights and interests.

5 MR. ROGERS: These are not Indians?

6 Well, then is the effect of your ruling with respect
7 to Indians owning the land on the reservation, that it --
8 that they can claim a reserved right with respect to their
9 fee land unless there was a break in title through a non-
10 Indian someplace?

11 THE SPECIAL MASTER: I am not as firm in having made
12 that definite conclusion, and the reason I'm not is I
13 just simply haven't been given enough time to studying
14 that issue and its points yet. It is one of the lesser
15 important issues, speaking in terms of acreage and of
16 people.

17 MR. ROGERS: Well, it is an issue of some importance
18 to a large number of people and will be part of the
19 Tribes' case.

20 THE SPECIAL MASTER: Oh, sure.

21 MR. ROGERS: And I wanted some clarification on
22 it now.

23 THE SPECIAL MASTER: We can't give you clarification
24 on that now because we have something in front of us
25 that's a little bit older.



1 MR. WHITE: Has everybody had their say?

2 THE SPECIAL MASTER: You may proceed.

3 MR. WHITE: I'd like to proceed to inquire of the
4 witness with respect to around 2650 acres of lands
5 which are adjudicated lands asserted but not yet proved
6 to be trust lands by the United States, which are located
7 outside of those lands described in the stipulation to
8 which you've just referred. If you don't want me to do
9 that, won't let me do it, I'm prepared to make an offer
10 of proof.

11 THE SPECIAL MASTER: I'm sure going to let you
12 do it someplace in the lawsuit, but the question is is
13 this the witness who shall be burdened with the responsi-
14 bility of having to answer your question? And I'm not
15 sure that he is because if the -- if your inquiries to
16 him in that regard would go beyond what can be called
17 the scope of his direct examination, I ought not permit
18 you to ask them.

19 MR. WHITE: I think the fair implication or in-
20 ference to be drawn from the testimony of the witness
21 is that these acres, which he's described --

22 THE SPECIAL MASTER: He included them, there's
23 no question about that.

24 MR. WHITE: -- our lands which are claimed on be-
25 half, water rights claimed on behalf of the Indian.



1 Reservation. In the second paragraph of the stipulation
 2 it says: For the purposes of determining a reserved or
 3 other rights to the use of water if any, which may exist
 4 with respect to the Wind River Indian Reservation, the
 5 exterior boundaries of the Wind River Indian Reservation
 6 are set forth in the United States' statement of
 7 geographical boundaries filed herein and agreed to,
 8 include the following described lands. And then it des-
 9 cribes lands. You may remember the large controversy
 10 that led up to this.

11 THE SPECIAL MASTER: Yes. We spent a good deal of
 12 time doing that --

13 MR. WHITE: Describing --

14 THE SPECIAL MASTER: That 16 page document.

15 MR. WHITE: Describes lands solely within the Wind
 16 River Indian Reservation.

17 THE SPECIAL MASTER: Involved with descriptions,
 18 that was the reason for the exercise.

19 MR. WHITE: The reason that I think it is appropri-
 20 ate to question this witness, Your Honor, is that as I
 21 said, the fair implication of his testimony is that
 22 these are lands and water requirements associated with
 23 the Indian Reservation, and I think that we are entitled
 24 to make that.

25 THE SPECIAL MASTER: I am ready to rule.



1 MR. WHITE: Fine, I'm ready to listen, Your Honor.

2 THE SPECIAL MASTER: I will deny you the offer to
3 overrule your request to make those questions of this
4 witness at this time. I presume after your cross-exam-
5 ination, Mr. White, that there will be some redirect.
6 Is that a fact?

7 MR. CLEAR: I haven't decided yet, Your Honor.

8 THE SPECIAL MASTER: Oh ho, that modifies my rul-
9 ing.

10 Well, all right. In any event, whether there's
11 redirect or not, we will reconsider my ruling at the
12 end of your cross-examination. If there's redirect, I
13 have a suspicion it will be on this subject matter, in
14 which case your cross-examination will be in order.

15 MR. WHITE: I can pick it up on recross.

16 THE SPECIAL MASTER: That's right.

17 MR. WHITE: Let me make my offer of proof so we
18 all know what we are talking about.

19 If allowed to question this witness through the
20 use of Exhibit HS-1 as well as Exhibit GC-92, as well
21 as exhibits similar to GS-92, being certified copies
22 of the adjudicated water rights or certificates, proofs
23 for those certificates that are described in the offer
24 of proof, the witness would testify as follows: With
25 respect to the lands or acreages shown on HS-3 for the



1 South Fork Owl Creek, the witness would testify that
2 a total of 91 acres of the acreage listed is located
3 on lands not contained in the stipulation to which
4 we have been referring, and that it would be appropri-
5 ate to Permit Number 11707, Proof Number 14032, which
6 was GC-92, as well as Permit Number 6221, Proof Number
7 14024, which was 427 acres.

8 THE SPECIAL MASTER: Is that in evidence too?

9 MR. WHITE: No, sir, you have been asked to take
10 judicial notice of it, and I have the documents here.

11 THE SPECIAL MASTER: I will judicial notice and
12 total the 91 and 64 that's here.

13 MR. WHITE: Then moving on to the mainstem of
14 Owl Creek, Your Honor, there are several -- more than
15 several certificated water rights there that fall in
16 the category we've been discussing, namely that include
17 lands, number of acres which I will give that fall out-
18 side the lands described in the stipulation. First
19 would be a territorial water right, Proof Number 3526
20 for 123 acres -- excuse me, 122.63 acres. Another
21 territorial water right, Proof Number 3537.

22 THE SPECIAL MASTER: Do you have the dates on those
23 like 1870, '71, '72?

24 MR. WHITE: If you'll give me just a minute, Your
25 Honor.



12-1 V-1

1 MR. WHITE: On the first territorial I gave you,
2 Your Honor, 3526, it was given as October, 1894.

3 On the second territorial I gave you, Proof No. 3527,
4 which, if I didn't say so, was for 722.63 acres -- that's
5 October, 1884.

6 Third would be the Permit 2306, Proof No. 6271.
7 Do you want the dates for on all these, Your
8 Honor?

9 THE SPECIAL MASTER: No.

10 MR. WHITE: Just let me know when you do.

11 2306, Proof No. 2681, for 17 acres.

12 Permit No. 4038, Proof No. 8350, for 160 acres.

13 The same permit number, but another proof number,
14 8351, 160 acres.

15 Permit No. 2125-E, Proof No. 15,024, 318 acres.

16 Territorial Right with a Proof No. 3533, 252 acres.

17 Another Territorial Right, 3534, 41 acres.

18 Permit No. 2187-E, Proof No. 15,388, for 312.28
19 acres.

20 Same permit number, Proof No. 2409, for 20.3
21 acres.

22 Territorial Right, 3534, for 285.44 acres.

23 Territorial Water Right, Proof No. 3526, for 32
24 acres.

25 Territorial Water Right, 3534, for another 224.35



1 acres, for a total for the main stem Owl Creek of
2 2667.76 acres.

3 THE SPECIAL MASTER: You are making an offer of
4 proof even though I have given you -- virtually assured
5 you an opportunity to return to questioning this witness
6 on this subject matter?

7 MR. WHITE: The reason I wanted to do that, Your
8 Honor, is so that the United States couldn't claim
9 surprise about what I would do on recross.

10 THE SPECIAL MASTER: All right. These water rights
11 are very, very old and are probably as good as 1868
12 actually when you get looking back as far as they go,
13 and I wouldn't think it would make a great deal of
14 difference to the gentlemen at the United States table,
15 including the client, as well as well as attorneys --
16 I wouldn't think it would make a great difference if
17 you could keep the territorials at 1885 and save a
18 hassle on them and go up on the point that much in
19 issue regarding this technical point that actually
20 you left this land out of the Stipulation, and I would
21 like to know, Mr. Clear, if the United States and the
22 Tribes would give some thought that, "We will accept
23 the Decree that these rights will stay where they are
24 in the State Engineer's Office and be administered as
25 they are now, and not be part of the Decree for the Tribes."



1 MR. CLEAR: I think the position on these rights
2 is well known to you, but I think we have an obligation
3 to put on our evidence as the case goes along. I don't
4 think we can say, "Well, perhaps we will reach agreement
5 with the State on these somewhere along the line and
6 let's forget about putting on evidence."

7 THE SPECIAL MASTER: I know what you are talking
8 about. I have been through bargaining and settling and
9 tribulations for myself.

10 What is your total acreage?

11 MR. WHITE: The grand total is 2756.76.

12 THE SPECIAL MASTER: 2758.76... Is this all north
13 of the boundaries of the Stipulation in that one Owl
14 Creek area?

15 MR. WHITE: Yes, sir. I might say --

16 THE SPECIAL MASTER: Does anyone know what the name
17 of this land is? Does it have a designation when it was
18 acquired, or something like that? Somebody's ranch?

19 MR. WHITE: No, sir, Your Honor. In fact, out
20 of candor, I believe that many of these certificates
21 if not these exact ones are the ones that can be described,
22 may well, in fact, be on fee lands, and we'll get to that
23 sometime later, I guess.

24 THE SPECIAL MASTER: All right. Thank you for that,
25 and go ahead, Mr. White, with your cross-examination.



CROSS-EXAMINATION (CONTINUED)

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BY MR. WHITE:

Q Mr. Stetson, would you turn back just a moment to HS-10?

Is it true that the diversion duty of water in the right-hand column is for full service irrigation?

A. It's for whatever the service was on those lands during that historic period. Some of them were full service, probably most of them, but some of them were also probably partial service.

Q Would you please check your addition under total values in the middle of that exhibit and see if the total average acres irrigated should not be 24,719, that average annual diverted should not be 175,417, and that the average diversion duty water should not be 6.89?

THE SPECIAL MASTER: A 15-acre difference?

MR. WHITE: Well, not in the diversion, Your Honor.

THE SPECIAL MASTER: Well, yeah, the first ones.

MR. WHITE: The first ones.

A. You want me to check the average of each of the columns? Is that what you are saying?

THE SPECIAL MASTER: The total.

Q (By Mr. White) No, it would be the total. That's what stetson - cross - white



1 you have got -- do you see where you have got 24,704?

2 Would you check everything in that row?

3 A. 24,719 is what I get.

4 Q. Yes, sir.

5 THE SPECIAL MASTER: I'll make a change on it
6 if that's all right.

7 MR. WHITE: I believe the witness has the original,
8 Your Honor, and I would ask him to change it.

9 THE WITNESS: I would like to check the numbers
10 though to see if there hasn't been a transcription or
11 a typing --

12 Q. (By Mr. White) That might explain some other problems
13 we have had.

14 A. The numbers seem to be okay.

15 Q. Would you check the addition in the next column and see
16 if that should be 170413?

17 A. 170,413?

18 Q. Yes, sir.

19 A. That's what I get.

20 Q. And would you check your diversion duty of water and
21 see if that wouldn't come out to be 6.89?

22 A. 6.89?

23 Q. Yes, sir.

24 THE SPECIAL MASTER: That figure, however, may be
25 stetson -- cross - white



1 the average of the six figures in that column, but it
2 can't really be called the average of the duty of water
3 in these areas because some of them have much more
4 acreage than others. Is that not a fact?

5 THE WITNESS: No, sir, it's a weighted average.

6 MR. WHITE: The weighted average works out pretty
7 closely.

8 THE SPECIAL MASTER: We don't use that weighted
9 average figure.

10 Q (By Mr. White) Would you also take a look at HS-4,
11 which is your table on irrigable lands?

12 A Yes. I have a correction to make to that table.

13 Q Is that the correction of the annual diversion require-
14 ment for the FIPs of 28,536 to 27,536?

15 A No, that's not the one I had.

16 Q Why don't you give me yours first?

17 A In checking over some of the stuff last night on the
18 summary sheet, there were three parcels of land entered
19 in the feasible column that should have been in the
20 if feasible column.

21 Q Were those the ones on the first page where the costs
22 exceeded benefits?

23 I'm sorry. Strike the question.

24 Please tell me which parcels those are.

25 stetson - cross - white



1 A. Those are on the first page under photo number 8-185,
2 actual.

3 THE SPECIAL MASTER: You are on HS-4?

4 THE WITNESS: Dinwoody Creek.

5 MR. WHITE: We are on HS-11 now, Your Honor.

6 Q (By Mr. White) Are those parcels 11-1-X and 11-2-X and
7 11-3-X?

8 A. Yes.

9 Q And what would the deletion of those parcels do to HS-4?

10 A. On the second sheet of HS-4, it would -- you would delete
11 the line opposite Dinwoody Creek, and then reduce the
12 subtotals on that page accordingly, and reduce the
13 subtotals and grand totals on the third page accordingly.

14 Q Before we do that, let me ask you to check mine because
15 that may affect the subtotals and the grand totals.

16 Would you check the 28,536 value which is the
17 subtotal for the FIPs on Page 1 right at the middle
18 of the page and see if that isn't a thousand high?

19 A. It should be 27,536.

20 Q Yes. And would that change the last line in that
21 column from 29,084 to 28,084?

22 A. It should, yes.

23 Q That's still on Page 1?

24 A. Yes.

25 stetson - cross - white



1 Q Now, how do we put those corrections together on the --

2 A Well, let's first take out Dinwoody Creek and correct
3 those subtotals. That changes for the previously
4 corrected subtotal of 851 acres to 824, would change --

5 Q That's on Page 2?

6 A Yes. It would change the previous annual diversion
7 requirement from 4470 to 4320. It would change the
8 annual net irrigation requirement from 1565 to 1512.

9 THE SPECIAL MASTER: Would you be good enough to
10 go over the last two again, please?

11 THE WITNESS: The diversion requirement?

12 Q On Page 2.

13 A Page 2 of that exhibit would be 4320 instead of 4470.

14 It's the subtotal in the middle of the page there.

15 Q 4470 changes again?

16 A Yes, to 4320.

17 THE SPECIAL MASTER: All right.

18 THE WITNESS: And then to the right of that, the
19 1565 of net irrigation requirement changes to 1512.

20 THE SPECIAL MASTER: Very good. Thank you.

21 THE WITNESS: On the last page, the non-project
22 subtotal would change from 3498 to 3471. The non-project
23 subtotal or diversion requirement would change from
24 19,296 to 19,146, and the annual net irrigation

25 stetson - cross - white



1 requirement would change from 6754 to 67 -- let me
2 check that one.

3 01.

4 Q (By Mr. White) Mr. Stetson, are you annotating the
5 original copy of the exhibit as you go along?

6 A No.

7 Q Would you --

8 A What is the original copy of the exhibit?

9 Q It should be the one that's on your desk with a sticker
10 on it.

11 A No, I was not. I was doing it on my work sheet. I will
12 do it when I get through.

13 THE SPECIAL MASTER: Does that bring the grand totals
14 up from the 8,000 --

15 THE WITNESS: It should bring the grand total on
16 acreage to 7,975.

17 THE SPECIAL MASTER: And the grand total on annual
18 diversion requirement of --

19 THE WITNESS: I think I want to check that in view
20 of the other error that Mr. White pointed out.

21 THE SPECIAL MASTER: Okay.

22 * * * * *

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stetson - cross - white



1 MR. WHITE: He was checking that, Your Honor.

2 THE WITNESS: So now, I get 47,153, if I did it cor-
3 rectly. Is anybody else checking this?

4 THE SPECIAL MASTER: I have one here you're welcome
5 to borrow, Dr. Mesghinna. It's Leo's, I give it away
6 freely.

7 (Brief pause.

8 THE WITNESS: I think that should be 47229.

9 THE SPECIAL MASTER: Does 47229 sound better?

10 THE WITNESS: And the total, grand total, of net
11 irrigation requirements should be 15094.

12 THE SPECIAL MASTER: Okay.

13 Q (By Mr. White) Mr. Stetson, would you please make the
14 same changes which you've just read into the record on the
15 original copy of HS-4, which is at your table?

16 (Brief pause.

17 A Okay, I've done that.

18 Q Okay. Let's turn to a new and different area, the unadju-
19 dicated lands, and I ask you whether or not you've included
20 within the total number of acres as shown on HS-5 of 34,427
21 -- Let's strike that and start again.

22 THE SPECIAL MASTER: Do you want to start again with
23 that question? I'll keep up to you this time.

24 Q (By Mr. White) Mr. Stetson, did you include within the
25 stetson - cross - white



1 grand total the 34,427 on the third page of Exhibit HS-5,
2 what Mr. Billstein described as his tract numbers 34-1, 34-2
3 and 34-3 on Exhibit 132, which is on the easel?

4 A. I'd have to check that by photo number.

5 Q. Okay.

6 (Brief pause.

7 A. Which parcel are you talking about?

8 Q. What Mr. Billstein marked as 34-1, 34-2 and 34-3.

9 THE SPECIAL MASTER: Mr. White, how many acres in
10 those three parcels?

11 MR. WHITE: Twenty-four, 12 and 3, respectively, Your
12 Honor.

13 THE WITNESS: I have to -- I probably have to look at
14 some maps, maps of the unadjudicated trust over there.

15 (Brief pause.

16 THE WITNESS: Which are the parcel numbers you're
17 asking me about?

18 Q. (By Mr. White) 34-1, 34-2 and 34-3.

19 A. Yes, those are included.

20 Q. Did you include 34-4 on Exhibit C-135?

21 THE SPECIAL MASTER: A parcel of what size?

22 MR. WHITE: Six acres, Your Honor.

23 THE WITNESS: 34-4?

24 Q. (By Mr. White) Yes, sir.

25 stetson - cross - white



1 A. Yes, that's included.

2 Q Did you include 34-5 on C-136?

3 This is the famous one acre parcel, Your Honor.

4 THE SPECIAL MASTER: I knew I was going to get that
5 one pretty soon.

6 THE WITNESS: Yes.

7 MR. WHITE: Your Honor, I would refer the Court to
8 Pages 2186 and 2187 of the transcript where Mr. Billstein
9 described location of these lands as being outside the
10 lands described in the stipulation with respect to the
11 boundary of the Indian Reservation -- excuse me, those
12 2186 and 2187 refer to Tracts 34-1, -2, -3. Pages 2202
13 and 2203 refer to Parcel 34-4, and Page 2205 refers to
14 Parcel 34-5. Those five parcels total 46 acres.

15 THE SPECIAL MASTER: Forty-six acres?

16 MR. WHITE: Yes, sir.

17 THE COURT: Very well.

18 Q (By Mr. White) Mr. Stetson, did you include in your HS-5
19 totals for unadjudicated lands Parcels 33-3, 33-3A, 33-4,
20 as shown on Exhibit C-133?

21 A. I don't have these by exhibit numbers or parcel numbers;
22 that's why I have to chase back through the aerial photos.

23 Q You've got photo numbers.

24 THE SPECIAL MASTER: Acreage size?

25 stetson - cross - white



1 MR. WHITE: I'm not sure, I'm afraid to tell. It's
2 around 40 acres, but I'm not certain, and I'd have to look
3 up in something that's in evidence to tell you for sure.

4 THE WITNESS: Is this South Fork Owl?

5 MR. WHITE: Yes. Well, it's right where South Fork
6 and the North Fork come together.

7 A. 33-4, 33-3 and 33-5, is that what you're asking?

8 Q. (By Mr. White) No, I'm not asking about 33-5, only 33-3
9 and 33-4.

10 A. Yes. Excuse me, 33-4 is included.

11 Q. Is included?

12 A. Is included.

13 Q. How about 33-3?

14 A. 33-3, this map indicates it has been changed to adjudicated
15 as part of another tract.

16 Q. So does that -- That is not included within yours; is that
17 right?

18 A. Apparently not.

19 Q. Okay.

20 A. The mark : here, marked outside, Court Order, 31891, and
21 there's a triangle put on there.

22 Q. Would you make sure that it's out of your total? Is there
23 any way you can do that quickly and conveniently?

24 A. I would like to see the map and the Court Order.

25 stetson - cross - white



1 A. There's no way I can do it quickly, obviously.

2 MR. WHITE: Your Honor --

3 THE SPECIAL MASTER: Look it up and have it for us in
4 the morning --

5 MR. WHITE: Could you do that?

6 THE SPECIAL MASTER: Could you do that?

7 THE WITNESS: Yes. Give me a description of the other
8 parcel number so I can write it down.

9 Q (By Mr. White) Just 33-3.

10 A. 33-3, all right. Photo 8-266.

11 MR. WHITE: Assuming 33-3 has gone to adjudicated
12 status, the acreage on 33-4 is only 13 acres, and I would
13 point out to the Court that Exhibit C-133 clearly shows
14 Parcel 33-4 to be outside of those lands contained within
15 the stipulation as to the boundaries of the Reservation.

16 THE SPECIAL MASTER: If you wish to give me a total on
17 it -- Well, let's go ahead.

18 MR. WHITE: I think I'll wait to see what happens on
19 33-4.

20 THE SPECIAL MASTER: Yeah.

21 MR. WHITE: Or 33-3, excuse me.

22

23

24

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* * * * *



1 THE SPECIAL MASTER: You are welcome to put some of
2 that up here, if you want to, unless it's easier for you to
3 reach it back there.

4 THE WITNESS: It's just as easy. Thank you.

5 THE SPECIAL MASTER: Gentlemen, we have been at it an
6 hour. Shall we take a break for ten minutes?

7 MR. WHITE: I wanted to ask a favor. I need to get my
8 other glasses fixed. I am wearing my twelve-year-old
9 glasses, and I'm wondering if we could either stop for the
10 day shortly after 4:00 or let me run out and deal with my
11 glasses and see if I can get Mr. Merrill --

12 THE SPECIAL MASTER: Either way is possible.. I'll be
13 happy to adjourn at 4:00. Neither one would hurt my feel-
14 ings a bit.

15 (Recess.

16 THE SPECIAL MASTER: Come to order, ladies and gentle-
17 men.

18 Q (By Mr. White) Mr. Stetson, from the calculations that
19 appear on HS-6, it would appear that you did not develop
20 any costs for the unadjudicated lands; is that correct?

21 A HS-6?

22 Q Yes, sir.

23 A This is net consumptive use data.

24 Q Well, let me ask it this way: Did you develop cost data

25 stetson - cross - white



1 for unadjudicated lands similar to that which appears on
2 HS-11 for the Type VII lands?

3 A. No, no, we did not.

4 Q. Why did you not develop cost data for the unadjudicated
5 lands?

6 A. We were not asked to. We were asked to determine the water
7 requirements for those unadjudicated lands now in use.

8 Q. Did anyone specifically direct you not to develop cost
9 values for those lands?

10 A. Nobody directed me not to, but nobody requested that I do.

11 Q. We were not asked to. We were asked to develop the water
12 requirements.

13 THE SPECIAL MASTER: The answer was, "We were not
14 asked." He did not say we were asked not to. He said,
15 "We were not asked to."

16 Q. (By Mr. White) Are the 34,427 acres of unadjudicated lands
17 the same lands that were the subject of Mr. Billstein's
18 testimony?

19 A. That's my understanding, that he originally, as I recall,
20 from the first data we got on that, he said 34,850 acres or
21 something like that.

22 Q. And then went up to --

23 A. After his testimony or during his testimony there were
24 some changes made, and the latest figure we got was about

25 stetson - cross - white



1 34,427, which is supposed to represent the correct number
2 of acres of unadjudicated in-use land per his testimony.

3 Q That's the same grand total that appears on Exhibit C-137-A?

4 A That's the same figure, yes.

5 Q In developing your diversion duty requirements on HS-5, did
6 you assume full service irrigation?

7 A Let me get back to HS-5. We were just on HS-6.

8 THE SPECIAL MASTER: I think you have asked the ques-
9 tion on this and --

10 MR. WHITE: I was on --

11 THE SPECIAL MASTER: It was on a limited area, but I
12 suspect the answer is going to be the same.

13 THE WITNESS: Could I have the question read back?

14 (The pending question was read
15 (back by the repreter as follows:
16 ("Q: In developing your diversion
17 (duty requirements on HS-5, did
18 (you assume full service irriga-
19 (tion?"

20 A Not insofar as the project lands are concerned to the ex-
21 tent those lands that were irrigated historically did not
22 receive full service.

23 In other words, our unit diversions for the project
24 lands were based upon the total acres irrigated and the
25 total water diverted for those acres. Most of which re-
ceived full service, some of which did not, so there is

stetson - cross - white



1 some weighting in there, so when we use those unit diversion
2 requirements, then that means we are using the same ratio as
3 full service to partial service during that historic
4 period.

5 Q. (By Mr. White) How about for the non-project lands?

6 A. For the non-project lands, since we used the net irrigation
7 requirements and the overall efficiency to derive the
8 unit diversion requirement, we are assuming full service.

9 Q. Isn't it true that approximately 1,925 or 1,930 acres
10 of the 34,427 acres are non-arable lands?

11 A. I don't know.

12 MR. WHITE: Your Honor, I would --

13 THE SPECIAL MASTER: Could I hear the figure again,
14 Mr. White?

15 MR. WHITE: I said 1,925 and 1,930. I think the exact
16 figure is 1,929, as shown by Mr. Billstein's testimony
17 at pages 2826 and 2827 of the transcript in which, while
18 he was referring to HB-62, which was identified but not
19 admitted, he testified that there were 1672.1 non-arable
20 acres, and the FIPs and outside of the FIPs based
21 on calculations which he made from HB-63 and based on
22 HB-63 there were 257 circle 5 non-arable lands outside of
23 the reservation -- excuse me -- outside of the FIPs.

24 HB-63 was identified, but not admitted. It contained
25 stetson - cross - white



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the excerpts from exhibits which have been previously
admitted.

statson - cross - white



1 Q (By Mr. White) Mr. Stetson, I hand you a copy of what
2 was admitted as HB-61 during Mr. Billstein's testimony.
3 On the last page of his HB-61, indicates that 18.15
4 percent of his unadjudicated lands were Type IV. Do
5 you find that?

6 A Yes. That was when he had a total of 34,850.

7 Q Right. I hand you a copy of what was admitted as HB-8,
8 which contains a definition of the various lands, land
9 types, and ask you if it isn't true that Type IV lands
10 are not full service lands but instead are irrigated
11 sporadically or irregularly?

12 A Well, it says sporadically or irregularly. The title
13 is, Partial Service, Occasionally Irrigated.

14 Q In establishing your diversion duty of water in the
15 second column on the pages, let's start with pages
16 2 and 3 of Exhibit HB-5, why did you determine or con-
17 clude that you would develop a full service duty of
18 water for those lands when it would appear from HB-61
19 that many of those lands have historically received
20 less than full service?

21 A Because this is -- We were asked to determine the water
22 requirements for those lands, we were not asked to deter-
23 mine the water supply available for those lands. That
24 will be done by HKM because they are the water resources --
25 the water supply contractors.

stetson-cross-white



1 Q Isn't it true that if Type IV lands received full service
2 irrigation, it would receive more water than they have
3 historically received?

4 A I don't know how much they historically received.

5 Q Well, if they received partial service historically
6 and they received full service under your calculations,
7 isn't it true that they would receive more water under
8 full service irrigation?

9 A Are we talking about project or nonproject now?

10 Q I'm talking about nonproject, second two pages on HS-5.

11 A On the nonproject, if they were only partially served
12 historically, if they received the water requirements
13 we say they're required to have, they would receive
14 more water in the future.

15 That would depend upon the water supply that's
16 available.

17 Q Is it true that you're unable to state whether or not
18 these values of the diversion duty of water on page 1
19 of HS-5 accurately reflects the historical service of
20 Type IV lands within the projects?

21 A I think it reflects accurately what they got because
22 they were part of the acres, some of which got full
23 service, some partial service and some indirect service.

24 They were all acres included in the area that was
25 stetson - cross - white



1 irrigated by the diverted quantities, so the average
2 represents a unit diversion, represents the average
3 for all those lands.

4 Q Isn't it true that to reach that conclusion you must
5 assume that the unadjudicated lands within the FIPs,
6 which are described on HS-5, are under exactly the same
7 type of irrigation service as all the lands within the
8 FIPs?

9 A No, I don't think that's true. Explain to me what you
10 mean by that.

11 Q As I understand it, on the first page of HS-5 you've
12 developed average values for all lands within the FIPs,
13 trust and nontrust.

14 A But it wasn't an average of just the trust lands.

15 Q I understand.

16 A It was an average of all lands irrigated in the FIPs.

17 Q And in order to assume that that historical pattern is
18 applicable to only the unadjudicated trust lands, don't
19 you have to assume that the unadjudicated trust lands
20 were treated exactly the same way as all lands within
21 the FIPs?

22 A I don't know that that is necessarily so because the
23 other than trust lands may have all received partial
24 service or may have all received full service, I don't

25 stetson - cross - white



1 know that.

2 And the trust lands, if they were in different
3 types, some got full service, some partial service
4 and some indirect service.

5 Q Isn't it true then that your diversion duties of water
6 are simply estimates of what the unadjudicated trust
7 lands would have received had they received the average
8 amount of water delivered or diverted for the benefit
9 of all lands within the FIPs?

10 A Within the FIPs during those period of years, yes, that
11 would be true. If that was your question the first
12 time, I'm sorry I didn't understand you.

13 Q It's late in the afternoon for me, I'm sorry.

14 Is there any way we can determine from HB-61
15 the land types which are found in each of the line
16 entries or acre values on HS-5?

17 MR. CLEAR: Could we have the question back
18 again, we got lost.

19 (Thereupon the following question
20 (was read back as follows: "Is
21 (there any way we can determine
22 (from HB-61 the land types which
23 (are found in each of the line
24 (entries or acre values on HS-5?

23 THE WITNESS: The various types of what I presume
24 are the services to these lands on HB-61 are listed
25 by photo number. We have the acres in use listed by
stetson - cross - white



1 photo number on --

2 Q (By Mr. White) Is that HS-2?

3 A No, it's WRIR C-141 that somebody sent to me. We would
4 have to go back to the photos and go back from the
5 photos to the calculations that we've made in what is
6 now Exhibit HS-2 and see if we can back track all that.
7 It could be done, it would be quite a chore.

8 Q It would be quite short, you say?

9 THE SPECIAL MASTER: Quite a chore.

10 THE WITNESS: I said quite a chore. For example,
11 aerial photo 7209, the first one on the list on HB-61
12 says three acres of Type II, seven acres of Type IV
13 and that total of ten matches the ten acres on, where
14 aerial photo 7209 on Exhibit C-141.

15 Q (By Mr. White) Let's turn to the second page, East
16 Fork of the Wind River where it shows ten acres,

17 A Second page of what?

18 THE SPECIAL MASTER: Second page of what?

19 Q (By Mr. White) HS-5, I'm sorry. How would you determine
20 what the land type for those ten acres is based on the
21 three exhibits that you described?

22 THE SPECIAL MASTER: I --

23 A I have to go back to Exhibit HS-2 first.

24 Q Okay.

25 stetson - cross - white



1 A Is that what you're asking me to do?

2 THE SPECIAL MASTER: I'm going to object to any
3 further questioning along this line, even though the
4 United States doesn't, because this witness has no duty
5 to describe the types of land within the areas that he
6 has applied his duty of water. That is direct evidence
7 that was gone into in detail by other witnesses. So
8 I think if there's something that can be critical about
9 the types within this area, it's up to the other wit-
10 nesses to answer to that to you, Mr. White.

11 MR. WHITE: Here's my reason, Your Honor. These
12 unadjudicated trust lands are Mr. Billstein's lands,
13 and he testified that they came in all sorts of different
14 types of irrigation service.

15 THE SPECIAL MASTER: And gave us the pictures of
16 them and gave us the types and broke down by acre for
17 you.

18 MR. WHITE: Right. And now Mr. Stetson is telling
19 us what the water requirement, the diversion requirement
20 or diversion duty of water is for those lands, but with
21 respect to the lands, the nonproject lands, at least,
22 Mr. Stetson has developed full service diversion duties
23 of water and yet historically we know that not all these
24 lands were for full service duties of water. Now, it

25 stetson - cross - white



1 may be that the witness' --

2 THE SPECIAL MASTER: I permitted him to go into
3 that and to give his reasons why the Type IV was reckoned
4 with or not reckoned with, and that must be permitted.
5 But to let this witness go on, have to go to each of
6 the photos to analyze how many acres is Type II and
7 how many Type IV and how many Type V and probably Type
8 VI, and whether he made adjustments in his calculations
9 of assessing the duty of water, I think has already
10 been answered.

11 MR. WHITE: I just want to ask him about one, a
12 real short one, ten acres, Your Honor.

13 THE SPECIAL MASTER: All right. Make it a short
14 one.

15 Q (By Mr. White) With respect to the ten acres at the
16 top of page 2 of HS-5 for the East Fork of the Wind
17 River --

18 A Yes, what's the question?

19 Q How do we find out what type of land is contained within
20 the ten acres?

21 A In the East Fork of the Wind River?

22 Q Yes.

23 A East Fork Wind River, the ten acres was from photo 7209.
24 We have photo 7209 at the top of HB-61, which says three
25 stetson - cross - white



1 acres Type II and seven acres Type IV.

2 Q And you found out --

3 THE SPECIAL MASTER: Mr. White, you told me you
4 had one question.

5 MR. WHITE: Well, let me ask just one little more.

6 Q (By Mr. White) You told me that -- Did you find out, that
7 you looked at 7 -- Photo 7209 by referring to HS-2?

8 THE SPECIAL MASTER: No.

9 Q (By Mr. White) Or C-141?

10 A No, I have the reference to photo 7209 on my worksheets,
11 which says ten acres, East Fork Wind River. You had
12 these last night.

13 Q Okay. I'm asking you are those worksheets HS-2?

14 A I beg your pardon?

15 Q I'm asking you if those worksheets are Exhibit HS-2
16 or some other exhibits?

17 A No, it's Exhibit HS-2, that's where we started.

18 Q Right.

19 A Right. We are together then.

20 THE SPECIAL MASTER: I might drag along by saying
21 also obtainable by HB-61, which I was following and
22 it's the first one on the top of that page, on that
23 particular ten acres.

24 Q (By Mr. White) Mr. Stetson, if I ask you the same
25 stetson - cross - white



15-9

1 questions that I've just asked you about Type IV,
2 but with respect to Type V lands, would the answers
3 be the same?

4 MR. CLEAR: Your same questions, the question was
5 how did you determine the type. When he says, the
6 same question about Type IV or Type V --

7 THE SPECIAL MASTER: Would you read the question
8 again, please, for me. It is getting late.

9 (Whereupon the following question
10 (was read back as follows: "Mr.
11 (Stetson, if I ask you the same
12 (questions that I've just asked
13 (you about Type IV, but with
14 (respect to Type V lands, would
15 (the answers be the same?"

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stetson - cross - white



1 Q. (By Mr. White) With the exception of ten acres?

2 A. I'm sorry, but --

3 THE SPECIAL MASTER: I sustain the objection.

4 THE WITNESS: I would ask you what you meant by

5 Type IV?

6 Q. (By Mr. White) If the questions I asked you concerning
7 HB-61 and HS-5 were related to how you determined whether
8 or not the lands in HS-5 were Type IV lands if those
9 same questions were asked about Type IV --

10 THE SPECIAL MASTER: I object to the question because
11 this witness has nothing to do about determining the classes.

12 A. I didn't determine these. I didn't see these types until
13 you gave them to me about five minutes ago.

14 MR. WHITE: That's not my fault.

15 THE SPECIAL MASTER: But the question remains to be
16 an improper one.

17 MR. WHITE: Let me ask it again in a different --

18 THE SPECIAL MASTER: All right.

19 Q. (By Mr. White) Isn't it true that according to HB-61
20 there are roughly 11 percent of Type V lands within
21 the unadjudicated lands which you described on HS-5?

22 MR. CLEAR: Your Honor, I object on the grounds of
23 relevancy.

24 THE SPECIAL MASTER: The questions are quite easy to
25 stetson - cross - white



16-2-V-vlb

1 find objection to, Mr. White, and it comes naturally to my
2 mind to object to your questions, and I sustain the
3 objections to them. There are six --

4 MR. WHITE: I understand that, Your Honor, and that's
5 the problem, but we have sort of the mirror game here where
6 I can't get--

7 THE SPECIAL MASTER: I think I have given you, in all
8 candor, the widest latitude. I understand you have the
9 right to cross-examine this witness on virtually everything
10 he said, but you are going way beyond that.

11 MR. WHITE: I think I am also entitled to cross-examine
12 him on the important things which were not said that were
13 relative and germane to the things that were said.

14 THE SPECIAL MASTER: With which he worked.

15 MR. WHITE: No, I think it's proper and it's
16 absolutely permissible, Your Honor, for me to inquire
17 into matters for which he may not have worked but with
18 which he should have worked, and this is one of those
19 areas, where full-service diversion requirements are being
20 established for lands for which the previous testimony
21 indicates were not a hundred percent full-service lands.

22 THE SPECIAL MASTER: If you wish to impeach this witness
23 or seek to with questions regarding his professionalism,
24 his judgment, please feel free. You have the right to do

25 stetson - cross - white



16-3 vlb

1 that, but I don't believe you've got the right to go far
2 beyond the scope of direct testimony regarding other
3 exhibits.

4 MR. WHITE: At this time, Your Honor, let me put the
5 fat in the fire here, and I'll move to strike Mr. Stetson's
6 testimony on the grounds of no foundation since the lands
7 relating to the unadjudicated lands contained on HS-5 are
8 lands which Mr. Billstein testified to and in his testimony
9 said were not all served -- were not all the subject of
10 full-service irrigation.

11 Yet, this witness' testimony assumes that at least
12 with respect to the non-project lands, those lands are
13 full-service irrigation lands for the purposes of his
14 exhibit. There is no foundation that would indicate that
15 either historically or in the future they are full-service
16 lands.

17 MR. CLEAR: May I speak --

18 MR. WHITE: And, as a result, I would move to strike
19 those portions of Mr. Stetson's testimony dealing with
20 unadjudicated lands on the second two pages of HS-5.

21 THE SPECIAL MASTER: You may --

22 MR. CLEAR: Your Honor, the question here, the whole
23 point of this case is which acres on the Indian -- Wind
24 River Indian Reservation can the State show are not
25 stetson - cross - white



16-4 v1b

1 practicably irrigable. These lands from Type I to Type VI
 2 are currently under irrigation. They are practicably
 3 irrigable. Whether they are irrigated sporadically or
 4 occasionally or all the time, they are practicably irrigable,
 5 and the question now is, assuming these lands are
 6 practicably irrigable, how much water can be applied to
 7 them? What's their water duty, and that's what Mr.
 8 Stetson is testifying to, and as he said, he did not go
 9 into the question of water availability. That's the next
 10 part of our case, but the irrigable nature of the lands
 11 has been established, and he's just testifying, "We know
 12 they are irrigable, and here is the water duty for these
 13 lands," and I don't think the types really fall into it at
 14 this point.

15 THE SPECIAL MASTER: I will sustain the objections,
 16 and I believe the objections are very valid, Mr. White.

17 MR. WHITE: Could I have a ruling on the motion,
 18 Your Honor?

19 THE SPECIAL MASTER: Yes, the motion is overruled.

20 Q. (By Mr. White) Mr. Stetson, are you aware of any
 21 economic analysis which has been applied to the lands
 22 described in HS-5?

23 A. No, I'm not.

24 Q. Mr. Stetson, if lands are served by incidental irrigation,
 25 stetson - cross - white



1 subirrigation, isn't it true that in order to bring those
2 lands into full-service irrigation, certain improvements
3 or amendments must be made to the lands?

4 A. It depends on the conditions in each case. Some lands are
5 permanently sub-irrigated. Others are not.

6 Some lands that are sporadically or occasionally
7 irrigated have the facilities to be irrigated, but they
8 don't have the water supply.

9 The water supply may dwindle off in late June or
10 early July, but they get some water early in the season,
11 but the facilities could be there to serve it. It's just
12 that they don't have the water.

13 MR. WHITE: Your Honor, I would refer the Court to
14 page 2044 of the transcript in this proceeding where
15 Mr. Billstein --

16 THE SPECIAL MASTER: How long ago?

17 Two weeks ago?

18 MR. WHITE: It's a long time ago. -- discussed
19 the general area -- within several pages on either side
20 of that citation -- where he discusses the general area
21 that we are discussing now, the difficulties of bringing --
22 or the necessity perhaps of making certain amendments to
23 the land to bring lands from Type IV and I believe Type V
24 or VI status into full-service irrigation.

25 stetson - cross - white



16-6 vlb

1 THE SPECIAL MASTER: I recall the discussions regarding
2 sour lands and lands with alkali and inability to move
3 salts as we like and the methods of amendment to such lands,
4 but I'm not sure it has one iota of bearing in cross-
5 examining this witness.

6 MR. WHITE: The point I want to make, Your Honor,
7 is according to Mr. Billstein, certain things may have
8 been done to Class 4, 6, and perhaps 5 lands, to bring
9 them into full-service irrigation such as projected by
10 this witness, that there is no evidence in the record
11 indicating that such steps have either been analyzed,
12 yet alone evaluated, in terms of costs, and without the
13 analyzation of costs, such as in the other areas, such
14 as Dr. Meghinna did --

15 THE SPECIAL MASTER: You may ask him whether this
16 witness took into consideration or made analysis of
17 particular lands that would require amendment or
18 additional work or additional costs. I think that's what
19 you are getting at.

20 MR. WHITE: That's what I would like to do.

21 Q. (By Mr. White) Mr. Stetson, did you take into
22 consideration whether any of the lands described on
23 HB-5 would require amendments or any type of physical
24 improvements or drainage in order to make them suitable

25 stetson - cross - white



16-7 vlb

1 susceptible --

2 A. No.

3 Q. -- to full-service irrigation?

4 A. No, we did not for the unadjudicated trust lands now in
5 service. We simply determined the water requirements,
6 if they had a full water supply available to them.

7 Q. On HS-5, Mr. Stetson, did you develop the period of
8 irrigation associated with the diversion duty in the
9 second -- diversion duties shown in the second column of
10 the three pages of that exhibit?

11 A. I'm sorry. I didn't get the first part of your question.
12 Did we derive the what?

13 Q. The irrigation period, the first day of irrigation, the
14 last day of irrigation. Did you make any assumptions
15 in your determination?

16 A. Well, what appears in the second column, the annual
17 diversion -- average annual diversion acre-feet per acre
18 came from the records that we talked about this morning,
19 Exhibit HS-9, and they are monthly records for which
20 they show very low diversions in April or May and higher
21 diversions in June, July and August and lower again in
22 September, but we did not go beyond that.

23 Q. So the pattern of the annual diversion requirements,
24 the monthly pattern of the annual diversion requirements,
25 stetson - cross - white



16-8- v1b

1 shown in the third column of page one of HS-5 would be the
2 same pattern as found in your data, HS-9, I believe?

3 A. First you said second column, and now you are saying
4 third column. Do you still mean the diversion --

5 THE SPECIAL MASTER: You are talking about in acre-feet?

6 MR. WHITE: I was trying to go from that to the third
7 column.

8 THE WITNESS: Okay.

9 MR. WHITE: I understood your answer about the
10 second column. Now I would like to know about the third
11 column.

12 THE SPECIAL MASTER: We are all getting a little
13 weary, I think.

14 You are talking about the third column of figures.

15 MR. WHITE: The one that says, annual diversion
16 requirements.

17 Q. (By Mr. White) The question is do those annual diversion
18 requirements as you have them set out on the first page
19 of HS-5 follow the same monthly distributions as shown
20 in your basic data in HS-9?

21 A. Well, I presume they would because they were taken from
22 whatever the historic record was for all the Aprils,
23 all the Mays, and Junes and Julys, so forth.

24 Q. Let's turn to --

25 stetson - cross - white



16-9 vlb

1 A. But we are not using them on a monthly basis here. We
2 are using them on an annual basis.

3 Q. Let's turn to the second and third pages of HS-5 where you
4 did not use the historical data that you had available in
5 HS-9, I assume, but used some other source; is that correct?

6 A. That's correct.

7 THE SPECIAL MASTER: Non-project source.

8 THE WITNESS: Excuse me, We used the historical data
9 to a degree to develop some of the data that went into
10 this.

11 Q. (By Mr. White) Let me ask you a general question with
12 respect to the annual diversion requirements, the third
13 column, on pages two and three of HS-5, and that question
14 is, what irrigation period or irrigation season did you
15 assume in terms of beginning and end of irrigation?

16 A. It would be --

17 Q. I'm sorry -- go ahead.

18 A. It would be the season for the crops and the crop mix.
19 in the climatic season of the data we gave you yesterday
20 which you made an exhibit out of, I believe.

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22
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25 stetson - cross - white



1 Q (By Mr. White) Dr. Mesghinna indicated the diversion
2 periods for his diversions by such as the middle of
3 April to the end of September, that sort of time . .
4 Are you able to do so with respect to the values on
5 Pages 2 and 3 of Exhibit HS-5?

6 A. Yes. I thought that that was one of the things we
7 gave you yesterday. It was, it's Exhibit HS-7.

8 Q Let me look over your shoulder. I've lost --

9 A. It's your exhibit.

10 Q HS-7 gives a planting date, date of the effective cover
11 and the harvest to date.

12 A. Right.

13 Q Would you please explain for the benefit of the record
14 how you determine the first day of irrigation and
15 the last day of irrigation from those three dates.

16 A. I got those from Dr. Mesghinna. He prepared these
17 sometime last year.

18 Q But how do you determine the first day of irrigation?

19 THE SPECIAL MASTER: I object to the question. He
20 totally and completely answered it. He got those from
21 Dr. Mesghinna. That's how he determined them.

22 I know you'll have him back on the stand in a
23 couple of weeks, and you can get your answer.

24 Q (By Mr. White) Based on the information in HS-7, what
25 stetson - cross - white .



1 is the first day of irrigation for the East Fork of the
2 Wind River, on the second page of HS-5?

3 THE SPECIAL MASTER: I really think you ought
4 to ask the man whose exhibit you're asking him to
5 look at.

6 THE WITNESS: What was the question, for which crop?
7 Q (By Mr. White) I'm asking you for the annual diversion
8 requirement that you show for East Fork of the Wind River
9 of 51 acre-feet. What's the first day of diversion and
10 what's the last day?

11 THE SPECIAL MASTER: Mr. White, I'm going to take
12 exception to your question. I don't think it's a proper
13 one. It's improper, it's improper cross-examination.

14 MR. WHITE: I'm not aware of the ground, Your
15 Honor. Could you tell me the ground, maybe I can
16 avoid the problem?

17 THE SPECIAL MASTER: The ground is that you have
18 asked, handed the witness HS-7. He has testified that
19 HS-7 was prepared by Dr. Mesghinna, it contains his
20 material on which he relied regarding the planting date,
21 and therefore, I think questions regarding planting date
22 are improperly asked of this witness.

23 MR. WHITE: I do not mean to inquire about planting
24 date, Your Honor. I'm asking about the first day of
25 stetson - cross - white



1 irrigation, which isn't shown on HS-7, and I'm asking,
2 that the witness says I can determine it somehow from
3 HS-7, and I'm now asking him how can I determine that
4 from HS-7 for the value, the annual diversion
5 requirement which he gave for the east fork of the
6 Wind River. I'm not asking for the planting date.

7 THE SPECIAL MASTER: All right. I stand corrected.
8 If you can, answer it, please answer it.

9 THE WITNESS: Well, let me try to explain. This
10 HS-7 gives the planting dates for various crops under
11 the various climatic zones, so you'd have different
12 irrigation dates, whether you irrigated alfalfa, or
13 whether you irrigated grain. For example, you would
14 probably irrigate late April unless you'd pre-irrigated
15 for the grain, which sometimes you do. But as far as
16 what day in April you'd start irrigating, it would
17 depend on the climatic conditions of that particular
18 year.

19 MR. WHITE: I'd like to point out -- Strike that.

20 Your Honor, I think I better defer to Mr.
21 Merrill. I'm at a point where I would switch into a
22 new area. He's got an area that I don't plan to cover.

23 THE SPECIAL MASTER: Very good.

24 MR. WHITE: So there won't be any overlap for the
25 two of us.



1 THE SPECIAL MASTER: Very good. Mr. Merrill, you
2 can carry on.

3 MR. MERRILL: Thank you, Your Honor.

4 THE SPECIAL MASTER: I intend to adjourn at 4:00
5 o'clock today, gentlemen.

6 MR. CLEAR: I think Mr. Stetson has been on the
7 stand another hour.

8 THE SPECIAL MASTER: You want a break, Mr. Stetson?

9 THE WITNESS: I don't care.

10 THE SPECIAL MASTER: We got about 30 more minutes,
11 I'll be glad to take five minutes if you want.

12 You have redirect for tomorrow, Mr. Clear?

13 MR. CLEAR: Your Honor, I understand that Mr.
14 White intends to be done at noon tomorrow with Mr.
15 Stetson, and we'll review the transcripts tonight
16 and see where we are.

17 MR. WHITE: Your Honor, could I be excused for
18 the afternoon?

19 THE SPECIAL MASTER: Yes, sir. See you tomorrow,
20 Mr. White.

21 CROSS-EXAMINATION (CONTINUED)

22 BY MR. MERRILL

23 Q Mr. Stetson, would you please take out your copy of
24 HS-11, which is your spread sheet concerning Type VII lands.
25 stetson - cross - merrill



1 Would you please tell the Court how you determined the
2 present values of the returns which are stated in
3 dollars per acre on the fourth column of that
4 exhibit?

5 A. Those were determined by the agricultural economist,
6 Mr. Dornbusch's office.

7 Q. Did Mr. Dornbushch's office give you the figures for
8 each field as you've stated it on HS-11?

9 A. For each field, for what column?

10 Q. I'm talking about the fourth column, present value of
11 returns.

12 A. Present value of returns?

13 Q. Um-hum.

14 A. He gave us all of those, yes.

15 Q. Did you make any modifications to those numbers at all?

16 A. Not that I know of, no.

17 Q. Okay. Were you involved in determining the crop mix
18 on which the present value returns in column 4 are based?

19 A. The only thing we did with crop patterns was in determining
20 water requirements.

21 Q. Did you make any determinations as to yields of crop
22 mixes?

23 A. No.

24 THE SPECIAL MASTER: Yield of crop mixes?

25 stetson - cross - merrill



1 MR. MERRILL: It should be yield of crops, Your
2 Honor, I'm sorry.

3 THE WITNESS: We didn't do either one of them.

4 Q (By Mr. Merrill) Did the agricultural economist determine
5 the yield as far as you know?

6 A We didn't. I mean they gave us the crop, present value
7 of the returns. I can't tell you who did it.

8 Q Okay. Did you do any work with respect to prices?

9 A Prices?

10 Q Of crops. Prices of crops, I'm sorry.

11 A Prices of crops?

12 Q Um-hum.

13 A No.

14 Q Okay. I direct your attention to the fifth column of
15 Exhibit HS-11, the present value of costs. Would you
16 please tell the Court what costs are included in each
17 figure for present value of costs.

18 A These present value of costs were derived by the
19 economist from construction costs including administration
20 and engineering and contingencies. I should say plus
21 operation and maintenance and replacement costs, which
22 we furnished to them.

23 In other words, they took the capital costs and
24 the annual costs and derived the present value of costs.

25 stetson - cross - merrill



1 Q As I understand it, then you supplied information
2 concerning both construction costs and operation
3 and maintenance and repair costs?

4 A Yes.

5 Q Okay. Let's start with the construction costs.
6 What construction costs did you supply the economist
7 for Field No. 10-1X, first one listed on HS-11, Page 1?

8 A Well, we supplied them whatever our costs -- our estimate
9 was of the cost of the facilities that were needed
10 to bring that land under service. That could have
11 been head works, main ditches, head ditches, turnouts.
12 In some instances, it required, some lands require
13 drainage. If it was a pump diversion, it would have
14 required a pumping plant. Under annual costs, it would
15 have been maintenance, annual maintenance costs. For
16 ditches and headgates and turnouts, it would have been
17 annual energy cost and demand cost, if it was a pumping
18 type of operation.

19 So we'd supplied them the cost on those types of
20 facilities for the parcels.

21 THE SPECIAL MASTER: Including on-farm systems?

22 THE WITNESS: No, unless it was a sprinkler system.

23 The only on-farm we would put in would be the head ditch.

24 They supply the other, whatever costs went into amendments,

25 stetson - cross - merrill



1 temporary on-farm ditches, and that sort of thing.

2 Q (By Mr. Merrill) Mr. Stetson, do you have some listing
3 of the particular line item costs and the values that
4 you supplied to Stetson for the first tracts shown on
5 HS-11?

6 MR. CLEAR: Objection, Your Honor; he testified
7 that the values were derived by Mr. Dornbusch, he supplied
8 the cost.

9 MR. MERRILL: The question addressed cost, Your
10 Honor.

11 MR. CLEAR: Included values, Your Honor.

12 THE SPECIAL MASTER: May I hear the question again,
13 Mr. Merrill?

14 MR. MERRILL: I'll withdraw the question and rephrase
15 it, hopefully to avoid the objection.

16 Q (By Mr. Merrill) Mr. Stetson, do you have the, some sort
17 of tabular listing of the costs you supplied to Mr. Dornbusch,
18 both construction and O and M and R for each tract listed in
19 HS-11?

20 A We have our work calculations.

21 Q May I see those, please.

22 THE SPECIAL MASTER: A little tough to get ahold of,
23 are they long and complicated?

24 THE WITNESS: There's about 340 or so sheets in here.

25 stetson - cross - merrill



1 THE SPECIAL MASTER: You want to look them over,
2 Mr. Merrill, and hopefully not feel that it's necessary
3 to copy them all, maybe you can ask a question or two
4 on the subject matter, do it justice.

5 MR. MERRILL: May I have just a moment to look
6 through them?

7 THE SPECIAL MASTER: Sure.

8 MR. MERRILL: I've never seen them before.

9 THE SPECIAL MASTER: Sure.

10 (Brief pause.)

11 THE SPECIAL MASTER: I thought, don't these get
12 us awfully close to Dr. Mesghinna's work rather than
13 Mr. Stetson's, although he is a superior, he works for
14 you? I suppose the question would be appropriate, a
15 few questions.

16 I'll give you five minutes to look those over while
17 we take a short break, to look those over in the hope
18 they'll be a shortening of need to use them.

19 MR. MERRILL: Your Honor, I promise to quit by
20 four.

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18-1 vlb

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THE SPECIAL MASTER: Did you decide not to ask any other questions on that sheaf of papers?

MR. MERRILL: Your Honor, I have just a couple of questions about it.

Q. (By Mr. Merrill) Mr. Stetson, just before we took a break you handed me a document having about 120-some pages entitled, "Cost Estimates For Type VII Lands In and Out of the FIPs," dated May, 1981.

Is this cost information that was developed by Stetson Engineers?

A. Yes, it is.

Q. Who in Stetson Engineers developed this information?

A. Mainly Mr. DiMaggio and others who assisted him.

Q. Is this the information that was supplied to the agricultural economist?

A. Yes, the results of that were supplied to them.

Q. In the form in which you have handed them to me?

A. I don't -- let me put it this way. They would come in to our office from time to time. They have probably seen that form, but I don't believe that we actually gave them a copy of it.

If you would like to go off the record for a minute, I'll ask Joe DiMaggio, who I'm sure could answer the question.

stetson - cross - merrill



18-2 vlb

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MR. MERRILL: That would be fine.

(Off-the-record discussion.)

A. If we can go back on the record, I'll correct my answer, that we did give them a copy of the same thing.

Q. (By Mr. Merrill) Did you or anyone in your office convert these investments costs and annual costs to a present value and give that information to the agricultural economist?

A. For the present value of costs?

Q. Yes.

A. No, I believe they did that.

Q. Are you aware of any other information concerning installation or annual costs associated with the Type VII lands that your office developed other than the document that you just handed me?

A. No, I believe that reflects all the costs.

Q. Do you have any objection to my borrowing this document and copying it and returning your original to you sometime this evening at your hotel?

A. I win my dollar. No.

THE SPECIAL MASTER: I guess there is no way under the law that can be modified or prohibited.

THE WITNESS: I assume there isn't or there would have been an objection.

stetson - cross - merrill



- 1 Q. (By Mr. Merrill) Mr. Stetson, did you make any
2 determination as to the length of time that would be
3 required to bring the Type VII lands described in Exhibit
4 HS-11 into production?
- 5 A. You mean the length of time to put in these improvements
6 and then start developing --
- 7 Q. Yes.
- 8 A. No, I did not.
- 9 Q. Did anyone in your office make that determination?
- 10 A. No, not that I know of.
- 11 Q. Did you or anyone in your office make any determination for
12 any particular tract or all of these tracts of the timing
13 of the costs and returns associated with the Type VII lands?
- 14 A. No, not that I know of.
- 15 Q. Mr. Stetson, did you or anyone in your office, determine
16 the lifetime of any of the improvements such as
17 head works, turnouts, costs, drainage and so forth for the
18 Type VII lands?
- 19 A. The useful life of structures?
- 20 Q. Yes.
- 21 A. No, we made allowance for annual maintenance of the
22 structures so that the useful life would exceed the life
23 of the project.
- 24 Q. Would that include items such as pumps?
- 25 stetson - cross - merrill



1 A. No, pumps would occasionally have to be -- we allowed for
2 maintenance of the pumps and annual, you know, periodic
3 repairs on the pumps.

4 Q. Did you make any allowance for replacement of the pumps
5 or would the economist do that?

6 A. I would think the economist would make that.

7 MR. MERRILL: Your Honor, that is all of the questions
8 that I have of Mr. Stetson concerning this portion of our
9 cross-examination, if it's all right with the Court to
10 quit for the day.

11 THE SPECIAL MASTER: Why don't we resume at 9:00 in the
12 morning and we will look forward to cross-examination
13 being completed by noon and direct if any to begin at
14 1:30 and the next witness ready after Mr. Stetson.

15 MR. MERRILL: Sounds good, Your Honor.

16 THE SPECIAL MASTER: Do you have another witness
17 backed up tomorrow morning?

18 MR. CLEAR: Dr. Mesghinna is coming back.

19 (Short recess at 3:50 p.m.)
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25 stetson - cross - merrill



REPORTERS' CERTIFICATE

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

4 We, Merissa Racine and Viola J. Lundberg, Registered
5 Professional Reporters and Notaries Public, hereby certify that
6 we did at the time, date and place, as set forth, report the
7 proceedings had before the Honorable Teno Roncalio, Special
8 Master Presiding, in stenotype; that the foregoing pages,
9 numbered 5347-5475, inclusive, constitute a true, correct and
10 complete transcript of our stenographic notes as reduced to
11 typewritten form under our direction.

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

15 Dated this 13th day of May, 1981.

16
17 Merissa Racine
18 MERISSA RACINE
19 Registered Professional
20 Reporter

16
17 Viola J. Lundberg
18 VIOLA J. LUNDBERG
19 Registered Professional
20 Reporter

