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Trial Transcript, Vol. 57, Afternoon Session

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File 164
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case # 4993

File # 164

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

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

Civil No. 4993

FILED _____
5/20 1981
Margaret V. Hampton CLERK
DEPUTY

VOLUME 57
Afternoon Session
Monday, May 11, 1981

ORIGINAL

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THE SPECIAL MASTER: Come to order, please, ladies and gentlemen.

Yes, Mr. Echohawk.

MR. ECHOHAWK: Your Honor, there is one point that I think needs to be cleared up before we go any farther; that's the question of whether Mr. Merrill is going to continue his cross-examination this afternoon. I think he's demonstrated to us today that he certainly can deal with questions on cross-examination that relate specifically to the future lands, and we feel it is appropriate now. Let's get those out of the way on cross. On the theoretical basis that may overlap between the two, future and historic when he wants to come back at a later time, but we think it is appropriate and he's demonstrated he's certainly able to continue on with the future lands right now.

THE SPECIAL MASTER: Well, I don't think there is a question. I think he's asked and has been granted -- asked for and was granted the permission to include questions on the historic that might involve some methodology that was used in the future also, and I have granted that. I have let him have that reservation. I suspect with these exhibits that he has used up pretty much what he might have had on

1 the future, but I don't want to limit --

2 MR. ECHOHAWK: When we broke for lunch, he
3 indicated to me he could have as much as several
4 weeks on this sort of thing.

5 THE SPECIAL MASTER: Well, he assured me this
6 morning that he would not have more than three
7 quarters of a day.

8 MR. ECHOHAWK: I think he has quite a bit to
9 go on specifically relating to the future lands. I
10 think if that's the case, then we should proceed on
11 that now.

12 THE SPECIAL MASTER: Well, I'll leave it up to
13 him. He can proceed as he wishes or he may carry on
14 as we made an arrangement this morning - whichever
15 you prefer, Mr. Merrill.

16 MR. MERRILL: Your Honor, I would prefer, as
17 you allowed this morning, to defer the rest of my
18 cross-examination, and the reason is this: At some
19 time in the future Mr. Dornbusch will return to tes-
20 tify about the feasibility in the historic lands.
21 These are the historic lands. I believe, but I do
22 not know, that his analysis will be similar. Right
23 now, all of these details that we are getting into
24 on cross-examination are addressed to the future
25 lands. I don't see any reason to go over the same

1 road twice with respect to the historic lands if we
 2 can avoid doing so by deferring the cross-examination.

3 THE SPECIAL MASTER: All right, you take the
 4 deference at your own risk.

5 MR. MERRILL: I understand that, Your Honor.

6 THE SPECIAL MASTER: If he should not come back,
 7 your cross-examination is over. If you delve into
 8 questions on the cross-examination that are redundant,
 9 you will be, you know, questioned on them.

10 MR. MERRILL: I understand, Your Honor, that I
 11 have some limited amount of time in which to do my
 12 cross concerning the future areas.

13 I would point out to the Court that much of the
 14 cross-examination will probably be applied to both
 15 areas and can be categorized as conceptual cross-
 16 examination and as to the overall methodologies and
 17 assumptions employed by Mr. Dornbusch. I think it
 18 would be much more economical of the Court and
 19 counsel's time to combine that cross-examination and
 20 at that time point out what distinctions there may
 21 be as to how the concept applies to the future lands
 22 and how they differ with respect to the historic
 23 lands.

24 THE SPECIAL MASTER: We granted you that route.

25 Okay, Mr. Echohawk.

1 MR. ECHOHAWK: Just to make sure that Mr. Merrill
2 is completely clear and there will be no misconcept
3 about this, should Mr. Dornbusch not return to the
4 stand and should another economist testify as to the
5 historic economics, Mr. Merrill is through --

6 THE SPECIAL MASTER: We just crossed that bridge.

7 MR. ECHOHAWK: Right.

8 THE SPECIAL MASTER: I think he understands
9 that.

10 MR. ECHOHAWK: It is perfectly understood.

11 THE SPECIAL MASTER: I think he understands
12 that.

13 MR. MERRILL: Your Honor, I would ask that
14 Mr. Dornbusch be excused subject to the same restric-
15 tions all federal witnesses have been; that he is
16 subject to recall as part of our case in chief for
17 cross-examination.

18 THE SPECIAL MASTER: Yeah, okay.

19 (Witness excused.)

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1 MR. ECHOHAWK: The next point to be --

2 THE SPECIAL MASTER: All right, Mr. Dornbusch,
3 thank you very much for your cooperation and patience
4 and testimony. We'll be hearing from you again in
5 the future, I think.

6 MR. ECHOHAWK: The next point to be raised,
7 Your Honor, is the question of the United States'
8 amended motion to take a judicial notice that was
9 argued the morning of March 16th.

10 THE SPECIAL MASTER: It was argued the morning
11 of March 16th?

12 MR. ECHOHAWK: That's correct, Your Honor.
13 United States filed --

14 THE SPECIAL MASTER: I thought I disposed
15 of that.

16 MR. ECHOHAWK: I thought you did too, but
17 there seems to be a misunderstanding with Wyoming
18 as to what your ruling was that day. As you recall,
19 the United States filed the motion to take judicial
20 notice of certain information contained in the
21 State Engineer's office relating to the adjudicated
22 rights on the reservation.

23 THE SPECIAL MASTER: Right.

24 MR. ECHOHAWK: And as such, as Ms. Sleater
25 pointed out in her argument, those were admissions

1 against the party and to be taken as a prima
2 facie case as to irrigability of the lands. And
3 as you recall in the discussion, if I can get my
4 notes, on page 2450 of the transcript Ms. Sleater
5 stated that the information in and of itself was
6 sufficient to present a prima facie case, that
7 the land covered by the certificates are entitled
8 to a water right in this action. And then there
9 was considerable discussion back and forth about
10 differing the standards back and forth and so forth
11 and so on. And at -- let's see, I think it's
12 page 2469 Your Honor granted that motion, says,
13 I'm going to grant this motion and take judicial
14 notice. I think it's altogether appropriate that
15 it be granted and so forth, and --

16 THE SPECIAL MASTER: That doesn't mean I
17 concur with her argument, that doesn't mean I'm
18 going to buy the proposition, that's prima facie
19 evidence of anything. I happen to believe that
20 not even a certificated, adjudicated water right
21 for 320 acres anyplace is prima facie evidence
22 for 320 acres as to find the permit is being
23 watered every year. I don't accept that as a
24 prima facie case and that that's the case at all.
25 This is an adjudication of water rights, and it's

1 what comes up as evidence before me that shall
2 receive my attention, not what is a matter of
3 record someplace.

4 Short of that degree of confirmation, which
5 went into the stipulation of parties at Worland,
6 Wyoming regarding what a confirmation contains
7 and what it doesn't contain, you see, but I'm
8 not going to agree with Regina Sleater's observations
9 that this constitutes a prima facie case because
10 permits were granted by a State engineer in 1906,
11 that area to which they apply is arable land. The
12 proof of arability and irrigability rests with the
13 United States or the Tribes to be shown in these
14 proceedings.

15 Now, you may certainly cite it as a case in
16 point, you may show it was intended to irrigate
17 it at the time and we'll draw our conclusions from
18 that and give it what probative value we think
19 it's worth.

20 MR. ECHOHAWK: Your Honor, on page 2453
21 Ms. Sleater stated, "What I'm saying is
22 if these rights weren't held by the Indians in
23 trust for the Indians they would be absolutely
24 good in the State of Wyoming and that's the vio-
25 lation that" -- excuse me, I'm on the wrong page.

1 Oh, page 2453. Your Honor said -- excuse
2 me, 2452 Ms. Sleater said, "If the land has an
3 adjudicated water right, the State of Wyoming
4 has already admitted that the land then is
5 entitled to a water right. We think it establishes a
6 prima facie case as to all parties and to such
7 land is entitled to a water right, and that is suf-
8 ficient proof for those lands and no other proof is
9 necessary at this time until someone would over-
10 come the presumption raised."

11 And then Your Honor stated, "What other proof,
12 such as arability and irrigability and economic
13 validity and so forth?"

14 And Ms. Sleater said, "That's right, sir."
15 And then Your Honor said, "I don't think that's
16 what I was requiring you to do."

17 THE SPECIAL MASTER: Well, --

18 MR. KROB: Objection, Your Honor, Mr. Echo-
19 hawk leaves out an entire paragraph when he said,
20 "I don't think that's what you're required to do."
21 If you recall, that was the discussion you had
22 with Ms. Sleater about whether it was a denial
23 of civil rights and whether you were applying
24 a different standard to the Indians.

25 THE SPECIAL MASTER: Read the paragraph that

1 was not read.

2 MR. KROB: "Ms. Sleater: That's right, sir.
3 What I'm saying is if these rights weren't held by
4 the United States in trust for the Indians they
5 would be absolutely good in the State of Wyoming,
6 and that it's an invasion of due process and
7 civil rights of the Tribes and anything else
8 to say that we have to go through five or six
9 more steps when anyone else in the Basin would
10 have a perfectly good water right at this point
11 in time."

12 "The Special Master: I didn't think I was
13 requiring you to do that."

14 THE SPECIAL MASTER: Yes.

15 MR. ECHOHAWK: That's her point.

16 THE SPECIAL MASTER: If you're willing to
17 settle for an adjudication for a right to water
18 as defined in volume and area by all of the
19 rights now filed with the State Engineer, I'll
20 be glad to dismiss this case and report to Judge
21 Joffe tomorrow. Now, if that's what you want, that's
22 fine, you don't have to put on all this evidence
23 you're putting on, I'm not going to force you
24 to. If the only water you want on the Wind River
25 Indian Reservation is that water which is in those

1 rights given to you by the State permits from
2 1905 to 1908, I'll be glad to close the case
3 tomorrow and admit that's the water you have
4 a right to and that's your quantification of
5 water. Is that what you're trying to tell me
6 you want me to do?

7 MR. ECHOHAWK: That's not what we want at
8 all.

9 THE SPECIAL MASTER: What's the purpose or
10 point of our discussion?

11 MR. ECHOHAWK: There are -- Okay, there's a
12 lot of land on the reservation --

13 THE SPECIAL MASTER: Yes.

14 MR. ECHOHAWK: -- that we think is irrigable
15 and for a certain portion of it we have, that's
16 unadjudicated, we've undertaken this --

17 THE SPECIAL MASTER: Right.

18 MR. ECHOHAWK: -- detailed process of arable
19 lands, --

20 THE SPECIAL MASTER: Right.

21 MR. ECHOHAWK: -- and engineering and economics.
22 As to the other lands --

23 THE SPECIAL MASTER: Yes.

24 MR. ECHOHAWK: Covered by certificates --

25 THE SPECIAL MASTER: Yes.

1 MR. ECHOHAWK: -- the United States' position
2 is that Wyoming has gone out and certified that
3 land is being applied -- water's being applied
4 to that land and there's a system there to deliver
5 water to that land, and as such that is an admission
6 that that land is irrigable, and rather than go
7 through and put on all this other proof that we've
8 done for these other lands, we think that we should
9 be treated the same as anyone else in the case and
10 that that land should be established to be irri-
11 gable.

12 THE SPECIAL MASTER: In the Billstein testi-
13 mony, didn't he make a clear distinction as to
14 those lands that are historic, those that are
15 certificated water and those without certificated
16 water, he called them adjudicated acreages and
17 unadjudicated acreage?

18 MR. ECHOHAWK: His testimony did not deal
19 with adjudicated acreages because we dealt with
20 that in the motion.

21 MR. KROB: He did discuss the distinction
22 and --

23 THE SPECIAL MASTER: He did what?

24 MR. KROB: He did discuss the distinction,
25 He said, I'm not talking about the adjudicated.

1 lands because those are all different.

2 THE SPECIAL MASTER: That's what Mr. Echo-
3 hawk is saying.

4 MR. ECHOHAWK: That's right. He did not
5 address the irrigability question or anything
6 as related to the adjudicated rights. He said
7 those would be taken care of by the amended
8 motion.

9 THE SPECIAL MASTER: What is the issue,
10 gentlemen? Are you afraid that I will not include
11 in the decree that water that is already used each
12 year by virtue of State permits or that I will
13 exclude that land on which those permits apply?

14 MR. MERRILL: Your Honor, I think the issue
15 is that the United States is trying to use the
16 State Certificates of Appropriation to prove
17 that land is practicably irrigable for purposes
18 of a reserved right with an 1868 priority date.
19 The State is more than willing to recognize the
20 permits and the certificates granted to the United
21 States as being valid State Water Rights just like
22 anyone else.

23 THE SPECIAL MASTER: As of any given year like
24 any other water right.

25 MR. MERRILL: That's right.

1 THE SPECIAL MASTER: 1905, that's what
2 that land carries, 1905.

3 MR. MERRILL: That's right.

4 THE SPECIAL MASTER: Not a reserved right.
5 You're maintaining, Mr. Echohawk, that that
6 land should have an 1868 date and not the right
7 that was given to it in 1905 by State permit.

8 MR. ECHOHAWK: Exactly, and that issue was
9 raised during our argument and was made very
10 clear by Ms. Sleater that we weren't dealing with
11 priority dates. We were dealing only with the
12 question of irrigability to establish prima
13 facie case as to irrigability; the priorities
14 would be dealt with at a later time through the
15 briefs.

16 MR. ROGERS: Your Honor, may I say some-
17 thing at this point? The problem of proof
18 with a reserved water right is to show that it
19 can come at some point, that it can become per-
20 fected. That is what the United States has
21 sought to do by these adjudicated certificates.
22 To show that, in fact, although there's certain
23 land owned by Indians, is in fact irrigable,
24 proved by the certificate because the State at
25 one time recognized that it was being irrigated.

1 Now, that perfects a reserved water right.
2 The fact that the State Certificate may also
3 say 1905 or 1920 or whatever it may do, the
4 fact is it's Indian lands and Indians using it,
5 members of a tribe.

6 THE SPECIAL MASTER: You feel it is exempt
7 from State administration?

8 MR. ROGERS: Well, that's another issue.

9 MR. ECHOHAWK: That's another issue.

10 MR. ROGERS: Our position is, yes, it is, but
11 that's another issue. This goes to what proof
12 the government must put on to deal with the irriga-
13 bility of that particular parcel of land that has
14 an adjudicated certificate. All the United States
15 is saying and the Tribes support this is that
16 Wyoming had admitted, State Engineer has admitted
17 and the Board of Control has admitted at whatever
18 time that certificate was adjudicated, that that
19 land was being irrigated, that water was being --
20 water was serving it and there was a system there
21 to serve it. That fact alone under the Reserved
22 Rights Doctrine protects that right for that
23 particular Indian and gives him an 1868 priority
24 date assuming something else hasn't happened to
25 that particular land. And it's irrelevant that

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the certificates may say 1905, it doesn't, --
the fact that an Indian went into the State and
that particular year, got an adjudicated permit,
does not deprive him of a reserved water right.

MR. KROB: May I respond?

* * * * *

1 MR. KROB: Your Honor, our motion is --

2 MR. ROGERS: The problem here is, Your Honor,
3 that it needs to be clarified, and we thought was
4 clarified, is what the obligation now of the Govern-
5 ment is. We had understood you had ruled that these
6 adjudicated permits were prima facie showing that
7 the United States would not have to put any further
8 proof on in its case in chief in order to show irri-
9 gability. Obviously, it is a rebuttable situation.
10 The State may in its case in chief come back and
11 try to show that that's not what, in fact, is going
12 on there now.

13 THE SPECIAL MASTER: Were some of these permits
14 on land that -- weren't nearly all of these, three
15 fourths of them or so, on the land that was in the
16 diminished portion and about one fourth that was
17 under the Session of 1905?

18 MR. MERRILL: I believe that's correct.

19 MR. ECHOHAWK: I don't know for a fact, Your
20 Honor.

21 THE SPECIAL MASTER: And what you're saying
22 now, for purposes of these proceedings only, and the
23 matter of moving forward, you were assuming that
24 there was nothing more having to be put into the
25 record regarding arability or irrigability in regard

1 to those lands inasmuch as they have permits back
2 at a given time --

3 MR. ROGERS: That's right. The Government
4 wouldn't have to in its case in chief put forth
5 any evidence further to show that land was irrigable.

6 THE SPECIAL MASTER: Didn't I go along with that
7 general concept?

8 MR. ECHOHAWK: That's what I understood.

9 THE SPECIAL MASTER: When you say it is a prima
10 facie case --

11 MR. ROGERS: A prima facie case is rebuttable.

12 THE SPECIAL MASTER: I don't want to grant any
13 more than what that evidence concludes, and if is
14 strong evidence towards a conclusion there is that
15 irrigable land there, but you just mentioned it is
16 rebuttable, and I don't want to preclude the fact
17 it can be overcome with clear and convincing evidence.

18 MR. ECHOHAWK: That's our understanding.

19 THE SPECIAL MASTER: Some peremptory right of
20 a proper disposition of that without an opportunity
21 to be heard.

22 MR. ECHOHAWK: I believe --

23 MR. ROGERS: The Government and the Tribes
24 don't want to be in a position that at the conclu-
25 sion of their case in chief it would lose a Motion

1 to Dismiss for failure to have proven those rights,
2 and we had understood that your -- the Master's
3 rulings, in fact, solved that problem for us.

4 THE SPECIAL MASTER: All right. Now, Mr.
5 Merrill, how do you respond to that?

6 MR. MERRILL: Your Honor, we will make such
7 motion, regardless of proof, that the United States
8 puts on or doesn't put on. I think the issue here,
9 as Mr. Rogers said, is what kind of proof you have
10 to put on. But the second question you look at,
11 what kind of proof you have to put on is what kind
12 of water right are you trying to get from the Special
13 Master. If they want those certificates as their
14 water rights with the terms stated in the certifi-
15 cates and the restrictions of state law, then they
16 would be treated as all other certificate holders.
17 What they are trying to do is convert a water right
18 granted under state law into a reserved right with
19 a priority date forty years beforehand. If they
20 want a reserved right with an 1968 date, they should
21 put on the same proof that they are putting on with
22 respect to all the other lands that they are seeking
23 a reserved right. If they care to rest on the record
24 they have made so far with their Motion for Judicial
25 Notice, that's fine.

1 MR. ROGERS: Your Honor, you don't need to
2 prove that water was being used in 1868 to preserve
3 a water right.

4 THE SPECIAL MASTER: He didn't say that.

5 MR. ROGERS: He's making more of an issue of
6 it than is, in fact, the case. The fact is that the
7 State of Wyoming looked at that land, they certified
8 it, they said it was being irrigated, and that's an
9 admission by the principal antagonistic party in the
10 case to the Tribes and the United States that that
11 land was irrigable.

12 MR. MERRILL: No, it isn't, Your Honor. It is
13 an admission that the land was being irrigated at
14 some point in 1905 or whenever the certificate was
15 granted. It is not an admission that the land is
16 irrigable or arable. In fact, as Your Honor is well
17 aware, there are many certificates and state-awarded
18 water rights in that area that have been abandoned,
19 and I think some question would be raised on the
20 record as to why somebody left land that was sup-
21 posedly so irrigable.

22 MR. KROB: Additionally, Your Honor, if you
23 will recall the testimony of Mr. Christopoulos, he
24 stated on the record that the State makes no deter-
25 mination as to the physical or chemical nature of

1 the lands, it makes no determination as to the irri-
2 gability or arability of those lands to which it
3 issues certificates or permits on. It's simply no
4 probative evidence or very little probative evidence
5 of whether or not the lands involved are irrigable
6 or arable, and it is certainly no prima facie show-
7 ing of arability which would entitle them to a re-
8 served right. It is additionally in question as to
9 whether one can, even judicially noticed evidence is
10 or isn't prima facie, that's an evidentiary matter.
11 Judicial notice is limited to indisputable adjudi-
12 cative facts; that's what the rule limits it to.
13 That's what all courts limit it to. Its probative
14 facts or its prima facie showing is simply not pro-
15 per for judicial notice.

16 MR. ECHOHAWK: We get back to the same question
17 as to whether or not the Indians on the Reservation
18 are going to be held to a different standard. I
19 believe we discussed this at a later time in Mr.
20 Billstein's testimony as to whether or not you are
21 held to a different degree of proof or whether you
22 are an Indian or a non-Indian, and I think the
23 Master was quite clear in his ruling that there
24 would be no difference in the proof required.

25 THE SPECIAL MASTER: The proof that a man has

1 put water to lands for five years without interrup-
2 tion is sufficient to get him a certificate, to get
3 him a confirmed adjudicated water right, and that
4 carries with it almost beyond dispute the fact that
5 it must be irrigable land.

6 Now, some is abandoned, God knows under what
7 circumstances, drought, bad prices, bad land, and
8 they are abandoned over the decades. But the --
9 the United States has a point in that if you rule
10 that a white water rights holder downstream on this
11 area in Water Division 3 can get confirmed water
12 rights by five years of uninterrupted use, what is
13 to deny that an Indian has a water right at least
14 finding that the land is irrigable.

15 Then let's assume we go along that far with my
16 argument, then the case becomes, okay, he has a
17 water right, but isn't it of the date which is on
18 record in Cheyenne in the office, or does he have
19 to go back to a reserved date? That's the real
20 nub of this discussion, I think. We won't question
21 your irrigability --

22 MR. MERRILL: Well, Your Honor, we don't think,
23 as Mr. Christopulos testified, the question of irri-
24 gability is not at issue when the Board of Control
25 determines whether or not it is going to issue a

1 certificate. The question is: Did the applicant
2 apply water to the lands and beneficially use it?
3 That's the question before the Board of Control, and
4 they don't consider anything beyond that point.

5 The other distinction here is, as Your Honor
6 has correctly pointed out, are we talking about a
7 1905 water right or are we talking about trying to
8 jump back forty years in time to a new date?

9 THE SPECIAL MASTER: How many acres are in-
10 volved in this category? Have you got that?

11 MR. ECHOHAWK: 17,411.

12 THE SPECIAL MASTER: Let me see the document
13 from which you pulled that. Is that in evidence?

14 MR. ECHOHAWK: No, this is the --

15 MR. ROGERS: Your Honor, I would --

16 MR. ECHOHAWK: Do you have objection, Jim, if
17 I give this to him?

18 MR. MERRILL: Are you moving it into evidence?

19 THE SPECIAL MASTER: No.

20 MR. ECHOHAWK: Not yet.

21 MR. MERRILL: No, I have no objection to his
22 seeing it.

23 MR. ROGERS: Sir, I would like to request that
24 we have an opportunity to see a couple of things
25 that I don't happen to have with me, and I doubt

1 very much if anybody else does unless the State has,
2 and that's the order that Your Honor entered down in
3 the basement of the Hathaway Building about two years
4 ago about the legal effect and the certificates of
5 appropriation for the whatever it was, 9,000 or so,
6 adjudicated permits, and also the stipulation that
7 was entered into.

8 THE SPECIAL MASTER: Well, the stipulation,
9 all of you should have copies of that, I think.

10 MR. ROGERS: Well, I do, Your Honor, back in
11 my office, just not with me. And it may take some
12 time to dig it out. But it was my recollection that
13 that order gave a prima facie status to permits or
14 the certificates of all of the others.

15 THE SPECIAL MASTER: All right. Here you are,
16 gentlemen. This order was made two years ago in
17 October. Are you ready? You asked about-- Mr.
18 Rogers, there is a part of the order of October 1,
19 1979: All properly identified and certified copies
20 of certificates issued by the Wyoming Board of Con-
21 trol which may be offered by the State or other
22 parties will be admitted into evidence; said copies
23 shall create a rebuttable presumption as to the cor-
24 rectness of their contents. So that doesn't get us
25 -- nothing in the contents says it's irrigable land,

1 I don't think.

2 MR. KROB: Exactly, Your Honor.

3 MR. ROGERS: Well --

4 THE SPECIAL MASTER: Now, what else comes out
5 down at the bottom of the Hathaway Building?

6 MR. ROGERS: The other one was the stipulation.

7 THE SPECIAL MASTER: That came out of Worland
8 after a tough week.

9 MR. ROGERS: Yeah.

10 THE SPECIAL MASTER: And that's here, too. I
11 can find that for you.

12 That was your work more than mine. I merely
13 approved what all of you had stipulated to, and it
14 was read into the record by Mr. Sachse at Worland,
15 Wyoming, and it was up there on the last day of our
16 proceedings.

17 MR. MERRILL: That's correct, Your Honor. The
18 stipulation essentially said two things: First, that
19 all of the certificates of appropriation presented
20 by the State would be provisionally confirmed by
21 the Master subject to challenge at a later time in
22 the proceedings; and, secondly, that we would defer
23 proceedings about the certificates until this portion
24 of the case was dispensed with with the water right
25 for the Indian Reservation.

1 THE SPECIAL MASTER: And if the water rights
2 of the Indian Reservation were to be given a date
3 of 1868, that the United States and the Tribes
4 would have no objection to a confirmation of all
5 existing water rights in Water Division 3?

6 MR. MERRILL: That's correct, Your Honor.
7 It didn't say anything about converting those
8 certificates of appropriation into some sort of
9 a reserved right that had a new date.

10 MR. ROGERS: I would like to see what the
11 document says.

12 THE SPECIAL MASTER: Well, you will have to
13 dig up the order -- I mean, the transcript of that
14 day. Maybe Leo can tell me.

15 Yes, we did, indeed, on November 16, 1979,
16 there was placed in a long order a paragraph:
17 "After much discussion on geographic boundaries
18 and work on the descriptions, the following sti-
19 pulation was agreed upon --" Well, that's not --
20 that's boundaries is all.

21 MR. ROGERS: Yeah, that's the boundaries.
22 This would be like April of 1980, I think. It
23 may have been June.

24 THE SPECIAL MASTER: Let's see if it isn't
25 in this one, October 1st. That's a scheduled

1 motion to set aside established procedure, requests
2 for production --

3 (Off-the-record discussion.)

4 THE SPECIAL MASTER: No, that's not it either.

5 MR. ROGERS: Well, Your Honor, I would ask you,
6 I hate to have to ask you to do all this looking for
7 us. Perhaps, in view of the fact that we are having
8 to somewhat reargue this motion, perhaps we can bring
9 it up as the first item in the morning.

10 THE SPECIAL MASTER: Well, I've got a problem
11 with what's before us now. I've got to dispose of
12 whether or not the United States is required to
13 prove up the irrigability of those 17,000 acres as
14 much as it has the other lands on which it claims
15 reserved water.

16 MR. MERRILL: Your Honor, I think that's a
17 decision that they are going to have to make.

18 MR. ROGERS: We can defer until in the morning
19 and we have had a chance to do a bit more digging
20 since we are rearguing --

21 THE SPECIAL MASTER: Yeah, but you're going to
22 do some digging on this, I suppose. I could ask for
23 a little brief to help me, but --

24 MR. MERRILL: Your Honor, we would be happy to
25 brief the issue which, it seems to me, is the legal

1 effect of the certificates of appropriation and what
2 probative value, if any, they have with respect to
3 the existence of a reserved right.

4 MR. ECHOHAWK: It pertains as to any water
5 right because the Indians and the non-Indians are
6 entitled to be dealt with evenhandedly..

7 THE SPECIAL MASTER: Well, Mr. Echohawk, they
8 are. There's no question about their right to the
9 existence of a water right which has been contained
10 on that document. There is no question about that,
11 so the Indian is being treated the same as a non-
12 Indian in Water Division No. 3. He has a 1905 for
13 so many second feet. He's got the right to that,
14 and I think his rights have gone almost without
15 intervention over the decades. So it hasn't been
16 too strict. I don't know about that, but I suppose
17 Mr. George Christopulos hasn't been that close to it,
18 knowing that that used to be a congressional domain.

19 MR. ECHOHAWK: The question is, in that case,
20 just what is the priority date. If that is enough
21 to establish the water rights, that's all we're
22 seeking. We want a water right the same as any
23 non-Indian wants a water right. The question is
24 what date do you get.

25 THE SPECIAL MASTER: Mr. Merrill will not

1 accept that. He wants you to prove it is irrigable.

2 MR. ECHOHAWK: Your Honor, if the United States
3 is required to prove the arability, engineering and
4 economics of any of the lands dealt with in those
5 certificates, then it is only appropriate that every
6 non-Indian in Water Division 3 must be put to the
7 same proof. You can't treat the Indian differently.

8 THE SPECIAL MASTER: I'm trying to avoid that
9 with a passion, but it may yet come to that.

10 MR. MERRILL: Your Honor, the non-Indians in
11 Water Division 3 aren't seeking any reserved rights
12 with an 1868 priority water date.

13 MR. ECHOHAWK: There should be no difference
14 between reserved rights and non-reserved rights.

15 THE SPECIAL MASTER: Well, there is.

16 MR. MERRILL: We'll start with abandonment,
17 Your Honor.

18 MR. ECHOHAWK: Well, there shouldn't be.

19 MR. ROGERS: Your Honor, we are --

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1 MR. ROGERS: Your Honor, we are doing it with
2 much of the case because much of the land we are
3 talking about is not developed or there's no certi-
4 ficates.

5 THE SPECIAL MASTER: While we're discussing this,
6 let me interrupt you all, gentlemen, and ask you why
7 wasn't it developed?? If the -- If the total here of
8 some 80, if the total of some 84,469 acres is such
9 land of unique irrigable, arable, valuable land with
10 cost-benefit ratios as high as represented, why
11 weren't they converted into irrigation decades ago
12 when money was so cheap and the project much more
13 readily built and less expensive than today?

14 MR. ROGERS: Your Honor, why is the Central
15 Arizona Project just coming into existence now?

16 THE SPECIAL MASTER: Because they can't rob
17 any more water, that's why. And they've taken all
18 they can get, and they can get a little bit more,
19 so they're pushing for some more if the Colorado
20 River States will permit it and the pressure, and
21 I don't think, I do not believe, Mr. Rogers, that's
22 an analogous situation because that is pure political
23 pressure. When the votes are lined up, Arizona gets
24 its way; and when they're not, they don't quite get
25 their way, California predominates. And always

1 dragging up with the headquarters are the Upper
2 Colorado River states.

3 MR. ROGERS: Well, it may be true, Your Honor,
4 but the point is that not every irrigation project
5 is developed at the first, in year one. I mean,
6 things develop over time, population trends change,
7 other things change.

8 MR. MEMBRINO: We are also talking about water
9 that was developed.

10 MR. ROGERS: And besides that, it's a test that
11 the United States Supreme Court has declared is one
12 of the ways that you determined reserved water rights
13 for Indians.

14 THE SPECIAL MASTER: Well, I think we are at a
15 position in the case that requires a brief from
16 both sides regarding these 17,000 acres of adjudi-
17 cated lands, and the claim of lands, on the trust
18 lands of the Reservation. There is no question
19 but what they're entitled to a water right. You
20 are not content to let them take the rights that
21 are on them now in an adjudicated fashion. and as
22 to the reserve found on the history and on the
23 historic and on the future.

24 MR. ECHOHAWK: Not -- not with regard to --

25 THE SPECIAL MASTER: You intend to put the

1 17,000 acres also back to 1860 even though they
2 don't need it now for water they have on them
3 now?

4 MR. ECHOHAWK: Most of them, they'll be dealt
5 with on an individual basis. If they were re-
6 aquired, or whatever, then we would give them --

7 THE SPECIAL MASTER: If they've been reacquired
8 by the Indians from non-Indian owners, they are cut
9 off, and your date and water on them will be the
10 date they are reacquired unless you've kept your
11 state right alive under the state laws of Wyoming.
12 That's the law.

13 MR. ECHOHAWK: I think that's --

14 THE SPECIAL MASTER: And that's what I'm
15 ordering.

16 MR. ROGERS: That's the United States' posi-
17 tion, that's not the Tribes' position.

18 THE SPECIAL MASTER: That's what?

19 MR. ROGERS: The Tribes do not agree with that
20 position.

21 THE SPECIAL MASTER: I say that's what's going
22 to be in the report, gentlemen, that's already de-
23 termined.

24 MR. ROGERS: That's the first ruling I've
25 heard from Your Honor on that.

1 THE SPECIAL MASTER: That's the second, that's
2 all right. If these lands in this adjudicated
3 acreage have been conveyed away to non-Indian owner-
4 ship or entity and then have been reacquired, they
5 are cut off from any reserved water right period.
6 That is my -- That will be in my report.

7 Now, that takes care of 16,000 or 17,000 acres,
8 I hope.

9 MR. ECHOHAWK: No. I think it's only appropriate
10 to let the parties brief those issues before --

11 THE SPECIAL MASTER: Before making the ruling?

12 MR. ECHOHAWK: Right.

13 THE SPECIAL MASTER: All right. Make your
14 brief then applicable, seriously, gentlemen, to
15 one thing, if you would maintain that the land that
16 has been conveyed to non-Indian ownership and then
17 reacquired, so stipulated. If your -- the reserved
18 right goes to that, stipulate it.

19 If you claim that lands still under trust
20 ownership with a water right granted to it within
21 dates from 1905 to 1910 are entitled to more than
22 just that right, but entitled to a 1868 date and
23 should be accepted as irrigable, that's one thing
24 and so state it. If you feel those lands should
25 be accepted as irrigable and keep the right they

1 have on it, but should not be maintained, Mr.
2 Merrill, to an 1868 date, so then state it and
3 give your reasons or cases or equities and argument
4 in that position.

5 MR. MERRILL: We certainly will.

6 THE SPECIAL MASTER: Does that cover it?

7 MR. ECHOHAWK: Perhaps the first item that
8 you mentioned, lands that were conveyed away, per-
9 haps that could be reserved until the end of the
10 case. It's really not -- It's not really germane
11 to the specific issue we are talking about.

12 THE SPECIAL MASTER: It's not as important
13 as the others, I appreciate that.

14 MR. ROGERS: And --

15 THE SPECIAL MASTER: Most of this land is
16 still in Indian ownership and has never been
17 interrupted.

18 MR. ECHOHAWK: Right.

19 THE SPECIAL MASTER: From trust ownership.

20 MR. ROGERS: And with respect to Your Honor,
21 we've argued this at least once pretty much in
22 this very same room, a full day in October, on
23 various legal issues, and I assume that we're at
24 that point -- I understand what Your Honor's think-
25 ing is, but that would be resolved at the end of the --

1 after the trial.

2 THE SPECIAL MASTER: What percentage of these
3 lands are owned by allottees in fee simple and was
4 conveyed to Indian families.

5 MR. ECHOHAWK: Fee simple?

6 THE SPECIAL MASTER: When an allottee receives
7 land --

8 MR. ECHOHAWK: None of them.

9 THE SPECIAL MASTER: -- they all stay in trust
10 ownership?

11 MR. ECHOHAWK: These are trust lands.

12 MR. ROGERS: Now, I understand, Your Honor,
13 that the Tribes, as part of their case, are going
14 to present, through witnesses, the irrigability of
15 land that is owned by Indians in fee, but the United
16 States is not presenting that as part of its case and
17 that does not involve --

18 THE SPECIAL MASTER: I see.

19 MR. ROGERS: No fee land is involved in any of
20 these 17,400 acres.

21 THE SPECIAL MASTER: All right. Well, get your
22 briefs ready. I should like to think this is not a
23 difficult issue as you just suddenly made it out to
24 be.

25 MR. ECHOHAWK: We didn't think it was either,

1 we thought it was resolved.

2 MR. ROGERS: I think, Your Honor, if we
3 could restrict the rebriefing on it to just the
4 issue of whether these things enjoy a prima facie
5 status or not for proof of an 1868 priority date
6 and of irrigability, that's really what we hope to
7 clarify.

8 MR. MERRILL: That would be fine with the
9 State, Your Honor.

10 MR. ROGERS: Is that fine with you?

11 THE SPECIAL MASTER: There has to be a
12 limitation of conscience on what is requested,
13 Mr. Echohawk. You simply cannot, in good con-
14 science, say that Congress, in 1908, intended
15 that every acre of land be irrigated in 1905
16 shall have an 1868 date. Every acre of land as
17 viewed by the science of systems, agricultural
18 construction in 1980, shall be given an 1868 date.
19 Every right of every kind on every drop of water
20 passing through that Reservation shall be for
21 Indian purposes exclusively because that's what
22 the doctrine meant in the 1908 case, that is a
23 limitation of conscience on some of this that
24 you have to recognize, you just have to recognize.

25 MR. ECHOHAWK: Your Honor --

1 THE SPECIAL MASTER: And I hope you will.

2 MR. ECHOHAWK: What it's good for is the
3 Indians are entitled to water and the methods set
4 up for quantification in Arizona vs. California
5 was practicably irrigable acreage. The appropriate
6 water to be applied to that practicably irrigable
7 acreage is what we are here to do. And what we are
8 setting out to do is determine what acreage is
9 irrigable, and we've chosen to put on certain
10 types of evidence for a majority of it, and for
11 this portion, this 17,000 acres, all we're asking
12 is to be treated like any other non-Indian.

13 THE SPECIAL MASTER: If you're going to be
14 treated like any other non-Indian, you're going to
15 get the rights you've got, that's how the non-
16 Indians are treated. No non-Indian has a right to
17 claim an earlier right, so that argument doesn't
18 strike home like it might have thirty, forty years
19 ago when there was glaring inequities in the way
20 people were treated in the Rocky Mountain area,
21 whether Indian or non-Indian, and I don't think it
22 would harm -- Well, I'll wait and tell you what I
23 think when I read your briefs.

24 MR. ECHOHAWK: Part of what is going to happen
25 here is if this land, which has already been irrigated

1 and the Indians are putting to use, which in, I
2 guess your intimations would be the best land --

3 THE SPECIAL MASTER: This is what Mr. Merrill
4 would like to know. If you're claiming that these
5 17,000 acres have had water put on them, virtually
6 uninterruptedly, you can't be perfect, 99.5 percent,
7 since the permit was granted, I find it pretty hard
8 to overcome that as an almost irrebuttable presump-
9 tion that this is irrigable land.

10 MR. ECHOHAWK: That's the point we want to
11 make.

12 THE SPECIAL MASTER: But to come in with no
13 figures on water duty on this land, no figures on
14 crops, no figures on, you know, what the demand of
15 water is, is a stout, big order.

16 MR. ECHOHAWK: What we are attempting to do
17 by this motion is to just establish the irrigability.
18 The very next witness, which will be on tomorrow,
19 which is Mr. Stetson, is going to address those very
20 questions; water duty, the crops and all the other
21 considerations that go with those. Water duty will
22 be addressed for these lands tomorrow.

23 THE SPECIAL MASTER: Why don't I do this:
24 Subject to reconsidering this ruling, subject to
25 reconsidering this ruling, I will rule, and in

1 line with my order of last March 23rd, was it?

2 MR. ECHOHAWK: March 16th.

3 THE SPECIAL MASTER: March 16th --

4 MR. KROB: Your Honor, before you refer to
5 that order of March 16th, I think you ought to at
6 least be informed of the rest of the order that you
7 stated on the record. Mr. Echohawk read it to you
8 the way you originally stated it, then you came back
9 to Ms. Sleater and restated what your order was in
10 the next page.

11 On the next page the United States had asked --
12 or the State of Wyoming had asked if it would be
13 allowed to object to the specifics, in other words,
14 if they got the permit numbers right and acreage
15 numbers right within the motion. You responded by
16 saying, "You certainly have leave to make further
17 inquiry. I don't propose to enter an order today
18 granting this as to the specifics, but I will grant
19 the motion to take judicial notice of the appropriate
20 and proper state water rights that are on the Reser-
21 vation. I think I have a duty to do that."

22 THE SPECIAL MASTER: That's about all I
23 granted you.

24 MR. ECHOHAWK: Right.

25 THE SPECIAL MASTER: To take judicial notice

1 of those water rights that are on the Reservation.

2 MR. ECHOHAWK: All we're asking you to do is
3 to recognize the irrigability the same as we put
4 on this other evidence; and when the United States
5 rests its direct case, then Wyoming is going to
6 come in and presumably attack the irrigability of
7 the lands that we've established, and in that part
8 of the case, that's when they would attack the
9 irrigability of these.

10 THE SPECIAL MASTER: You would feel the burden
11 of duty, of moving forth with a burden of proof
12 would shift from the United States to the State,
13 that is not entitled to a water right?

14 MR. ECHOHAWK: That the land is not irrigable.

15 THE SPECIAL MASTER: That the land is not ir-
16 rigable?

17 MR. ECHOHAWK: The same as Big Horn Flats,
18 North Crowheart and --

19 THE SPECIAL MASTER: I see.

20 MR. ROGERS: Just as the order that you read
21 earlier, whatever the date was, the Hathaway Build-
22 ing order.

23 THE SPECIAL MASTER: Is it your feeling that
24 sooner or later --

25 MR. ROGERS: It's rebuttal presumption.

1 THE SPECIAL MASTER: Is it your feeling that
2 30 gallons per minute of water under an 1868 right
3 is as good as 60 gallons of water in a 1905 right?
4 Are we going into some of this kind of discussion?

5 Isn't there a case of unjust enrichment that throws
6 ~~ath-~~ ~~at-~~ ~~the-~~ ~~face-~~ ~~of-~~ ~~you-~~ ~~in-~~ ~~the-~~ ~~face-~~ when you think you've
7 got 17,000 acres of water rights on it and you ask
8 for every bit of it in an 1868 right when it's a
9 1905 right now?

10 MR. ECHOHAWK: Yeah, that's right.

11 MR. ROGERS: Your Honor --

12 THE SPECIAL MASTER: Don't you --

13 MR. ECHOHAWK: The question is, we're dealing
14 with these adjudicated rights, is the fact that the
15 Indians put the water to use and they're applying
16 water on this land, and, therefore, the land is
17 good. Same as this other land. This is probably
18 a better reason to grant the 1868 date for these
19 lands.

20 MR. KROB: Your Honor --

21 MR. ECHOHAWK: It's the land the Indians
22 have chosen to irrigate first.

23 MR. ROGERS: Let's assume that we had an
24 Indian who didn't get his state adjudicated per-
25 mit. He just went out and started irrigating and

1 he didn't do it until 1911, so we're not confused
2 with the issue, and we could show that he did that.

3 That would, under the law, perfect the reserved
4 water right.

5 THE SPECIAL MASTER: That is correct.

6 MR. ROGERS: All we're saying here is in the
7 same case, same kind of Indian went to the State,
8 got a certificate from the State, that the certificate
9 itself is proof of that land's irrigability and that
10 he perfected his reserved water right in doing so.

11 THE SPECIAL MASTER: We have no quarrel with
12 that, Mr. Rogers.

13 MR. ROGERS: That's all we're saying here.

14 THE SPECIAL MASTER: There was a bonified
15 attempt for a few years, and it was unfortunate that
16 it didn't succeed, frankly. It would have been an
17 amalgamation of people is what it should have been,
18 of saying since the large bulk of this area has been
19 agreed upon to be ceded, not to be conveyed away
20 forever, but to be ceded, put into special category
21 up here, we will hope that our water rights can be
22 given the same consideration as anybody else's.
23 And had it not been for the settlers on the Milk
24 River 300 miles north of there, that might have
25 been a whole new world of amalgamation of Indian

1 and non-Indian, but it wasn't. The case came up in
 2 Montana, had to go to the Supreme Court and be re-
 3 solved. The Supreme Court said, in effect, get off
 4 of Milk River, that water belongs to the Indians.
 5 Congress intended -- Mr. White disagrees with the
 6 word "intended", but

7 MR. WHITE: Oh, I agree, Your Honor.

8 THE SPECIAL MASTER: That the Indians had a
 9 right as of the agreement creating the Reservation,
 10 and I feel that that Reservation would apply to the
 11 man you mentioned in 1911 or 1912, would apply to
 12 a degree of that the United States Supreme Court
 13 had in mind in 1908. What you're saying to me is
 14 that since then Arizona vs. California, a decision
 15 of the United States Supreme Court has so extended
 16 that doctrine that now it means it for every acre
 17 proved practicably irrigable the Indians are entitled
 18 to sufficient water to grow -- for the present type
 19 of crop on it.

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1 MR. ECHOHAWK: That's correct.

2 THE SPECIAL MASTER: And that is too nebulous
3 and too uncertain a field for anybody to come down
4 with a decision because, you know, we heard this
5 morning of the vast array of formuli that mankind
6 can dream up to either refute the economic feasibility
7 of a project or to assure it. We have seen cost-
8 benefit ratios argued to boggle the mind as to what
9 -- and nobody is in agreement as to what is an ad-
10 vantageous cost-benefit ratio filled with rationali-
11 zation, arguments, suppositions, conclusions,
12 hypotheses, and it is just a little too uncertain
13 in my opinion to say that I can come down this line
14 all the way down the total acreages you're going to
15 want to give me.

16 MR. ECHOHAWK: Okay. The matter actually may
17 be resolved before this case ends. As I think you
18 are aware, there are additional proceedings going
19 on in Arizona vs. California. The trial has con-
20 cluded. We are in the process of filing our briefs
21 and the Special Master's Report will be issued in
22 a matter of a few months.

23 THE SPECIAL MASTER: Who is the Special Master
24 there again, the Alabama judge?

25 MR. ECHOHAWK: Judge Tuttle from Atlanta.

1 THE SPECIAL MASTER: Atlanta, Georgia, judge,
2 yeah.

3 MR. ECHOHAWK: It is a very simple issue at
4 stake --

5 THE SPECIAL MASTER: How many writers and
6 helpers does that Special Master have helping him
7 with that report?

8 MR. ECHOHAWK: He has one law clerk.

9 THE SPECIAL MASTER: He has one what?

10 MR. ECHOHAWK: One law clerk.

11 THE SPECIAL MASTER: A remarkable man. I have
12 one law clerk, too.

13 How many did you have, Mr. White?

14 MR. WHITE: I had about three or four by the
15 time it was all over.

16 THE SPECIAL MASTER: Thank you. I need a
17 precedent.

18 MR. WHITE: Your Honor, with respect to these
19 adjudications -- and I apologize, I didn't know I
20 was going to be in court today --

21 THE SPECIAL MASTER: Don't worry about that.

22 MR. WHITE: Perhaps the way to approach the
23 adjudication on the 17,000 acres is for the United
24 States to put on whatever evidence or not to put
25 on whatever evidence they want to. I should say

1 from the standpoint of the State we will file a
2 Motion to Dismiss under Rule 41B with respect to
3 those lands at the conclusion of the United States'
4 case. And if they put on no more evidence than
5 they've put on so far, we will rest under a Rule 41B
6 motion with respect to those lands.

7 THE SPECIAL MASTER: You will maintain there-
8 fore that they were not proved arable or irrigable?

9 MR. WHITE: Either one, Your Honor. And we'll
10 base it on the record that's already been made by
11 Mr. Christopoulos' testimony. I just want to put the
12 United States and the Tribes on notice that we are
13 not going to rebut their case on the adjudicated
14 acreages if they put on no more evidence; if they
15 stand on the certificates, we'll say, fine, you
16 have made your record and we'll let either this
17 judge or some other court decide. And so, I think
18 perhaps the writing of the briefs is a waste of
19 time because the United States and the Tribes are
20 captains of their own ship. They can put on what-
21 ever evidence they want to. And if they put on no
22 more evidence, we will make a Rule 41B motion and
23 rest on it. There will be no rebuttal case with
24 respect to that.

25 MR. ECHOHAWK: All we want from Your Honor is

1 the determination of what we asked for in our motion,
2 that those be accepted.

3 MR. ROGERS: Your Honor, that's --

4 MR. WHITE: I think the Court already ruled
5 on that motion.

6 THE SPECIAL MASTER: Yeah, I ruled.

7 MR. WHITE: You ruled that day.

8 THE SPECIAL MASTER: I ruled that day that they
9 are proof of arability and irrigability, but I cer-
10 tainly didn't rule on any date.

11 MR. ECHOHAWK: Okay, that's exactly -- that's
12 all we asked for was proof or irrigability and no
13 date, and we will attach the dates. We will attach
14 the water duties.

15 THE SPECIAL MASTER: You attach the dates,
16 that's what I'm afraid of.

17 MR. ECHOHAWK: We will attach the water duties
18 to the next witness and we will brief the dates.

19 THE SPECIAL MASTER: Okay, let's take a ten-
20 minute break. I think I've earned it.

21 (Recess, 2:20 p.m.)

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1 THE SPECIAL MASTER: We'll please come to order.
2 Gentlemen, can you have your briefs in by May 30th
3 on this point?

4 MR. MERRILL: Certainly, Your Honor.

5 MR. ROGERS: Yes.

6 MR. ECHOHAWK: Your Honor, just so I'm clear,
7 no ruling has been made?

8 THE SPECIAL MASTER: A ruling was made, it's in
9 the record and that has not been added to or diminished?

10 MR. ECHOHAWK: Could I have a clarification,
11 exactly what the ruling is?

12 THE SPECIAL MASTER: It is in the record, it is
13 in the record verbatim, and if you'll just read all
14 of it, the discussion of March 16th, that stands as
15 in the record.

16 MR. ECHOHAWK: What about just before we took
17 the break here, a few minutes ago?

18 MR. MERRILL: I believe the Court said the ruling
19 hasn't been added to or diminished from.

20 MR. ECHOHAWK: As I understand, just before
21 we took the break, that's prima facie proof that it's
22 irrigable, and the question of how much and what date
23 would be considered later, and I said that's all we
24 requested.

25 THE SPECIAL MASTER: It sure as heck is a prima

1 case in 1905 that some Indian was irrigating some
2 land, and was granted a permit for it in the
3 atmosphere that prevailed right after the cession
4 of the ceded portion. I think you got sufficient
5 to work on that. You will be submitting your
6 briefs to sustain and buttress the Court in its
7 decision, and you will be sustaining a brief trying
8 to overturn what the Court said regarding the--
9 what's in the record.

10 MR. ROGERS: Your Honor, let me ask it this
11 way, because I'm not clear on what, how it stands.
12 I've read the record, although hurriedly today.
13 If the case were to end today and the State filed
14 its Motion to Dismiss under Rule 41, who would win
15 that motion, that's the issue?

16 THE SPECIAL MASTER: IF the State--

17 MR. MERRILL: Your Honor, I think that's an
18 improper way to proceed, to ask the Court predict--

19 THE SPECIAL MASTER: If the case were to end
20 today, I would probably be subject to disbarment
21 for leavin such a massive, poor piece of work in
22 the throws of insolubility after having been paid
23 so many months to complete the case. That's the
24 first thing that would happen if the case were to
25 end today.

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If the case were to end today, none of these issues could be resolved because the evidence isn't all in.

MR. ROGERS: On this issue of how the certificates are treated.

THE SPECIAL MASTER: If the case were to end today, on how these certificates were to be treated?

MR. ROGERS: Yes,

THE SPECIAL MASTER: It is a rebuttable--

MR. ROGERS: Excuse me, the United States has concluded its case on that issue.

THE SPECIAL MASTER: The fact that the--that the water rights were issued in 1905 creates a prima facie fact situation that these are irrigable lands. That is not to say that the State can't refute that, but the burden, in my opinion, is not upon the United States to prove their irrigability or arability. Now, we're having briefs on this because I may be in error.

MR. ROGERS: All right.

THE SPECIAL MASTER: That's where we are.

MR. ROGERS: Thank you, Your Honor.

MR. ECHOHAWK: Thank you.

MR. KROB: Your Honor--

THE SPECIAL MASTER: I think it's like getting

1 tax hedges, I think we deferred the taxes, deferred
2 the point for a few weeks.

3 MR. KROB: Your Honor, should we also defer, I
4 think the time of the March hearing, the State had
5 asked to respond to the specifics contained within
6 the request for judicial notice, whether they are
7 the right permit numbers, etcetera. Do you want
8 to defer that until we get the briefs in too? No
9 order had been made.

10 THE SPECIAL MASTER: I didn't know about this.
11 I thought that the specific numbers that you had
12 listed were accepted pretty much as being accurate.

13 MR. KROB: No, Your Honor.

14 MR. ECHOHAWK: On that point, we filed those
15 and in our estimation we thought those were accurate.
16 Wyoming raised a point that they think some of them
17 aren't. I approached them before we started back up
18 after lunch, and thought maybe one of our representa-
19 tives and one of their representatives could get to-
20 gether and arrive at a joint list so we'll know
21 exactly what we're talking about.

22 THE SPECIAL MASTER: Can this be done?

23 MR. KROB: Sure. I just wanted to be sure that
24 those aren't judicially noticed yet.

25 THE SPECIAL MASTER: All right. You may proceed,

1 Mr. Echohawk.

2 MR. ECHOHAWK: Okay. One other additional item.
3 Earlier Mr. Merrill had asked that the Master visit
4 the Reservation so we could all look some of these
5 lands or whatever. I think he proposed the last
6 week of July. I think we're all fairly aware that
7 we're caught in a very water-short year. I believe
8 I read an item in the paper today there's a record
9 low of stream flows, and I don't think the Master
10 would get a representative picture if you go to the
11 Reservation at the end of July during a drought year
12 and see what lands are receiving water and which
13 aren't. Therefore, I would ask that may we move
14 that up to the first week in June where we have a
15 trial setting in June? Rather than have trial that
16 week, let's go to the Reservation that week.

17 THE SPECIAL MASTER: If you two gentlemen can
18 agree on a few days for that trip I'll be glad to
19 concur in whatever time you pick, if it's out of
20 the schedule of dates we now have for the hearing.
21 If you two can agree on the first week in June, we'll
22 go up on June 2nd, the first week of June begins the
23 2nd. If you want to do it this last full week in
24 June, fine. If you want to do it Frontier week in
25 July, fine. You two agree on it and let me know.

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MR. ECHOHAWK. Okay.

THE SPECIAL MASTER: If you can.

* * * * *

1 MR. ECHOHAWK: Okay. Perhaps, I mean if you
2 can-- Okay. Perhaps we can do it on the record
3 or off the record, but just maybe the logistics
4 of how we are going to do it. I know Mr. Merrill
5 wanted a helicopter trip.

6 THE SPECIAL MASTER: Just a second. We'll load
7 the gun-- Oh, you're going.

8 MR. ECHOHAWK: He's going.

9 THE SPECIAL MASTER: I beg your pardon, I didn't
10 see you.

11 MR. ECHOHAWK: You know, maybe we could do that.

12 THE SPECIAL MASTER: What discussion is there on
13 logistics or making sure one doesn't take an unfair
14 opportunity to get in an ex parte proposition or
15 a view?

16 MR. ECHOHAWK: As I understand it the helicopter
17 firms that we have both been using use a Bell Jet
18 Ranger, and I think you can only put three people in
19 there besides the pilot, but perhaps we could make
20 some kind of arrangement to get a larger helicopter
21 if we need to or go in two helicopters. I don't know
22 how to do it, I was just kind of throwing it open for
23 suggestions.

24 THE SPECIAL MASTER: Well, if you get a larger
25 helicopter, have two people from each side, you pick

1 the two you want and you pick the two you like. If
2 you don't want to use a helicopter and we can do it
3 with a couple jeeps, let's do that. I don't have to
4 be on a chopper all day. We've done this both ways
5 time and time again on these things. I mean we can
6 take a plane from here and land at either Lander or
7 Riverton and have cars and get up to whichever project
8 you want to see first and spend the day on the
9 Reservation that way, or if you can get a helicopter
10 that will take five of us, a pilot and four--a pilot
11 and five--take six of us, a pilot and five, then we
12 have two, two, myself--Well, Leo, do you want to
13 come on this thing or not?

14 MR. SALAZAR: It is up to you.

15 MR. ECHOHAWK: Well, the other way is to just
16 maybe take two helicopters.

17 THE SPECIAL MASTER: Take two helicopters and
18 if something needs to be discussed, we can sit down
19 and have a discussion about it or something like that.

20 MR. ECHOHAWK: I'm not just quite sure how to
21 do it.

22 THE SPECIAL MASTER: I'm not either, but perhaps
23 since we are discussing now, so there isn't any charge
24 later of any irregularity--

25 MR. ECHOHAWK: Do you have any ideas, Jim?

1 MR. MERRILL: Your Honor, I would suggest that
2 Mr. Echohawk and Mr. Rogers and I get together off the
3 record to see what kind of things we can work out
4 as far as the means of transportation and what dates
5 and will feed it back to you.

6 THE SPECIAL MASTER: And acceptance of that is
7 acceptable to you all?

8 MR. MERRILL: Certainly, Your Honor.

9 THE SPECIAL MASTER: I'm not sure why we are
10 doing this except it is probably a good idea to do
11 it once or twice if it's done right and we can get
12 some conception of what we are looking at.

13 I would be more interested, frankly, gentlemen,
14 maybe we can do this again at the close of the case
15 in six months or so or when it's all over and just
16 before the report is out. I would be more interested
17 in seeing the sites that are engineeringly and
18 physically appropriate for additional storage dams;
19 like Bull Lake or at least three of those that will
20 store as much as Bull Lake does. I would just like
21 to see those so I know what acreage I'm talking about
22 when we talk future works that could assure adequate
23 water for everybody's use, Indians, non-Indians,
24 agricultural and everything else.

25 MR. MERRILL: Your Honor, I think we can certainly

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1 agree to work those into the itinerary of--

2 THE SPECIAL MASTER: I like that very, very
3 much.

4 MR. MERRILL: We'll keep that in mind.

5 THE SPECIAL MASTER: Because if a goal to be
6 sought here is a conservation of water for all of
7 Wyoming's people, the sooner we start building
8 those key dams for storage the better off we're
9 going to be, and if those of you who are very, very
10 anxious to settle could know that the United States
11 might contribute toward the cost of these things in
12 exchange for some considerations of hold-harmless
13 or something without having to give up too many
14 Indian rights, but some configuration of rights, I
15 don't know what that would be, but that's down the
16 road.

17 Okay. The next thing?

18 MR. ECHOHAWK: That's all I have.

19 THE SPECIAL MASTER: Okay. Are we out of
20 witnesses for today?

21 MR. ROGERS: Your Honor, may I --

22 THE SPECIAL MASTER: No law says that we have to
23 go to 5:00, you know.

24 MR. ECHOHAWK: We will be prepared to start with
25 Mr. Stetson in the morning.

1 MR. MERRILL: That would be fine, Your Honor.
2 I neglected to do one thing during Mr.
3 Dornbusch's testimony today which I do now, and that
4 is offer the chart that's over on the easel into
5 evidence as illustrative of the comments that Mr.
6 Dornbuch made while he was making the chart. I
7 would offer the document with the exception of these
8 three marks that were made down in the lower left-hand
9 corner by one of Wyoming's experts actually 'til
10 we jumped all over him for doing it, and we would
11 offer this as illustrative of Mr. Dornbusch's
12 comments and mark it however the Court and counsel
13 deem appropriate.

14 THE SPECIAL MASTER: My first thought to look
15 at it, Mr. Merrill, is that it is totally incomprehense-
16 able. It looks like something that Stern draws on
17 the New Yorker every week--Isn't that what you thought?

18 MR. ROGERS: That's right.

19 THE SPECIAL MASTER: I have no objection to it
20 being in evidence for the purposes you offered it.

21 Is it agreeable with you, counsel?

22 MR. ROGERS: I have no objection, Your Honor.

23 MR. ECHOHAWK: I just don't think it is going to
24 add a whole lot because during Mr. Dornbusch's testi-
25 mony there were references describing-- There was no

1 real tie between his testimony and the marks on that
2 chart. He was saying, "here", "there" and so forth.
3 It is just not going to be very clear.

4 MR. MERRILL: Well, it may be helpful later on
5 and I would like to have a complete record of his
6 remarks and his illustrations. I would propose to
7 mark the document as Exhibit ED-101 and move it into
8 evidence as I do now for illustrative purposes only.

9 THE SPECIAL MASTER: ED-101 is admitted into
10 evidence for illustrative purposes only.

11 (The instrument identified
12 (as Exhibit ED-101 was re-
(ceived in evidence.

13 THE SPECIAL MASTER: Mr. Rogers, you're all
14 through for the day?

15 MR. ROGERS: Can I take a moment to ask the Court
16 a question because it's--we've all been talking about
17 this and maybe we don't have--we probably shouldn't
18 try to resolve it today. The Master refers often to
19 the "Report" being done. Just a moment ago you referred
20 to "in six months or so" he would like to go up and
21 see some of these storage sites and so forth just before
22 the report comes out.

23 I have always had the scenario in my mind that
24 after this trial was concluded there would be a period
25 of time during which counsel for all sides would submit

1 to the Court, to the Master--

2 THE SPECIAL MASTER: Findings of fact?

3 MR. ROGERS: Proposed findings of fact and
4 conclusions of law and briefs.

5 THE SPECIAL MASTER: And a suggested inter-
6 locutory decree?

7 MR. ROGERS: We can do that, yes, but obviously
8 with a trial of this length it will take some time
9 to prepare those and exchange back and forth.

10 This has never quite fit into it as the
11 trial has lengthened and as that task of preparing
12 proposed findings also lengthens alongs with it,
13 it's never quite fit into the schedule of reference
14 that Judge Joffe made to the Master and I, really,
15 it is more of an inquiry or a start of discussion
16 about what that schedule might be after the conclusion
17 of the trial. I would certainly assume that parties
18 would want to submit their own proposed findings
19 before the Court prepared its report.

20 Does the Master think that way? That's what
21 I'm asking.

22 THE SPECIAL MASTER: Yeah, Mr. Rogers. Yes, the
23 Master is thinking that way. I can't deny you the
24 duty, I suppose it is your duty, or certainly I can't
25 deny you the role of submitting to the Court your

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1 proposed findings of fact and conclusions of law,
2 suggested interlocutory decree and briefs in
3 support thereof from all of you when we have con-
4 cluded the case. What I'm saying, however, is that
5 I don't believe that this case should have to go
6 more than about four or five more months, not counting
7 August, to complete the record and have everything in
8 that's necessary. I think we have made some excellent
9 progress, so when I say "in about six months"
10 hopefully the report would be completed. I'm not
11 going to sit around and wait for you. I mean you
12 may want three months to submit your material after
13 the case has ended and I would like to think that
14 I can use that time on report language too, even
15 though I don't have the benefit of your briefs
16 and findings of facts and conclusions of law.

17 How does that sound to you, Mr. Merrill?

18 MR. MERRILL: Your Honor, the State of Wyoming
19 is in the process of proposed findings, and a report
20 now, and I'll state for the record and for notice to
21 the United States and the Tribes that we intend to
22 submit that document almost--

23 THE SPECIAL MASTER: Within a couple of weeks?

24 MR. MERRILL : Yeah, after the case is closed.

25 THE SPECIAL MASTER: I would serve notice. I'm

1 glad you raised this. I would serve notice on the
2 United States of America and on the Tribes that I
3 would--maybe three weeks is a little early, but I
4 would certainly say within six weeks at the end of
5 when this case is closed I would expect the submission
6 of findings, of proposed findings of facts and con-
7 clusions of law and a proposed decree and briefs in
8 support thereof. You see, a lot of your briefs are
9 already in on some points; dates, boundaries, dates
10 on particular other items. I cannot believe that
11 the Forest and BLM potholes are going to take up
12 anywhere near the time the Reservation. I know
13 in the New Mexico case the questions about what was
14 reserved on the forest and for what purpose and so
15 forth, but I'm going to dispose of that in a hurry.
16 I don't mind putting in the record right now my
17 feeling. I'm going to try to find some way around
18 the Rehnquist minority opinion and go with the
19 White majority. There has been the greatest threat
20 from the forest on these cattlemen who own the
21 grazing permit. They can bring their cows in in
22 the spring, but they must not let their cows touch
23 the water. They must get it some way. So they have
24 to have some way to get water for their cows. That
25 is an unacceptable situation in the West and in the

1 Rocky Mountains. One who owns a permit which, of
2 course, is a grazing right, and that carries some
3 type of a right for domestic animals to drink the
4 water. I suppose that they can whack at that when
5 they get ready to whack at it. So, anyway, that
6 shortens up the time to about six weeks, I would
7 think, six weeks from the time this case is closed
8 those briefs will be expected and submission of
9 materials for the benefit of drafting the order.

10 Now, to get to your point about time constraints.
11 The judge said that on or before January 1, 1982, I
12 shall have this report in his hands. Well, let's read
13 that a little more closely --

14 (Off-the-record discussion.)

15 THE SPECIAL MASTER: He didn't say anything
16 about submitted afterward. All right, he's already
17 told me orally that this is subject to an extension
18 of six months if needed and, if more, talk to him,
19 but I'd better get that in the form of an order some
20 day and have him officially give me an order extend-
21 ing the reference paragraph with that date to January
22 1, 1982, submitting that to July 1, '82. Let's shoot
23 for July 1, '82.

24 MR. ROGERS: For your report on this aspect of
25 the case?

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THE SPECIAL MASTER: Right. I mean, all of your stuff would have to be in by, I hope, December of '81, which would give me six months to get the thing in shape. I may or may not get that done in six months.

Okay, let's stand in recess until 9:00 tomorrow morning.

(Off-the-record discussion.)

(Proceedings recessed at 2:56 p.m.)

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8 forth, report the proceedings had before the Honorable
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10 that the foregoing pages, numbered 5059-5204, inclusive,
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12 our stenographic notes as reduced to typewritten form
13 under our direction.

14 We further certify that we are not agents,
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16 are we interested in the outcome thereof.

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22 Reporter

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