

5-13-1981

## Trial Transcript, Vol. 60, Morning Session

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File 167  
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case # 4993

File # 167

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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 60

Morning Session

Wednesday, May 13, 1981

**ORIGINAL**



1 APPEARANCES

2  
3 FOR THE STATE  
4 OF WYOMING:

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6 MR. MICHAEL D. WHITE, Special  
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7 MR. SCOTT KROB

8 FOR THE UNITED STATES  
9 OF AMERICA:

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12 and

13 MR. THOMAS ECHOHAWK  
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16 FOR THE SHOSHONE  
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1735 New York Ave., N.W.  
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18 BY: MR. R. ANTHONY ROGERS

19 CLERK TO THE  
20 SPECIAL MASTER:

MR. LEO SALAZAR  
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THE SPECIAL MASTER: Okay. Are you ready, Mr. Clear, United States are ready?

MR. ROGERS: My apologies for being late.

THE SPECIAL MASTER: That's all right.

(Brief pause.)

THE SPECIAL MASTER: We'll come to order, please, Ladies and Gentlemen.

Mr. White.

MR. MERRILL: Your Honor, before we begin, you recall that several weeks ago you had asked if we had ever resolved the conflict between Indian, Federal and State awarded water rights through more agreeable means than litigation, and I mentioned to you at that time that I believed that a compact had been signed between the Ute or the Uintah tribe -- No, it is the Ute tribe in Utah and the Utah -- the State of Utah. I have copies of the compact with me, and I will hand out copies to the Court and counsel.

THE SPECIAL MASTER: Would you give one to counsel?

MR. MERRILL: Yes, I will. Unfortunately, I believe that the Ute tribe is now trying to get out of the compact. I think there is some litigation ongoing in the Federal District Court in Utah, essentially on the grounds that the Secretary of



1 Interior abused his trust responsibilities to the tribe  
 2 by negotiating and entering into the compact, but I  
 3 give it to the Court and counsel as an example of the  
 4 agreement that had been reached.

5 THE SPECIAL MASTER: In other words, they're  
 6 getting along about like the rest of us in the Rocky  
 7 Mountain West.

8 MR. MERRILL: I'm afraid so, Your Honor.

9 THE SPECIAL MASTER: All right, thank you very  
 10 much.

11 Okay, Mr. White.

12 CROSS-EXAMINATION (CONTINUED)

13 BY MR WHITE:

14 Q. Mr. Stetson, would you please get out Exhibit HS-10.  
 15 During your testimony yesterday when you were referring  
 16 to the values in the right hand column, beginning with  
 17 5.32 and going through 5.48, you described those as  
 18 duty of water.

19 A. Yes, sir.

20 Q. Is a duty of water the same thing as diversion  
 21 requirement?

22 A. Diversion requirement can be expressed in acre-feet  
 23 per year or duty simply means acre-feet per acre.

24 Q. Okay. So duty of water in your, the way you've used  
 25 stetson - cross - white



1 it here is really sort of a unit diversion requirement?

2 A. It's a unit requirement, it can be a diversion duty,  
3 it can be comsumptive use duty, but in this respect  
4 it's a diversion duty in acre-feet per acre diverted.

5 Q. Do you also have before you what was marked informally  
6 and now has been copied and marked with an exhibit  
7 sticker as HS-9?

8 A. Yes.

9 Q. I think you will find that that reproduces your  
10 folder with the exception that the page numbers have  
11 been placed in circles in the lower right hand corner  
12 of each page?

13 A. Yes.

14 Q. And you indicated yesterday that to come up with the  
15 diversion duty of 5.32 acre-feet for the Ray Unit,  
16 you divided 35,160 by 6611; is that correct?

17 A. Yes, sir.

18 Q. Just for that Ray Unit, would you please explain and  
19 show me how you made the determination based on the  
20 information which you gave me in HS-9, of the two  
21 values for the Ray Unit of 6611 acres for average  
22 acres irrigated and 35,160 average acre-feet diverted?

23 A. For the Ray Unit?

24 Q. For the Ray Unit.

25 stetson - cross - white



1 A We took the acreage irrigated in 1938, 1939, 1940,  
2 1942, 1943, 1946, 1948 and 1949, and totaled those.  
3 We took the diversion in acre-feet for the same  
4 years and totaled those, and then averaged them  
5 and then divided the average diversion by the  
6 average acres.

7 Q Where did you find the number of acres irrigated  
8 for 1941, for example?

9 A We didn't use 1941. We didn't have any acres for  
10 that year.

11 If you'll look at footnote 4, we don't list  
12 1941.

13 Q Okay.

14 A It was one of the missing years, we didn't have  
15 complete data on both acre-feet and acres, so we  
16 didn't use those years that we didn't have complete  
17 data.

18 Q Then where did you get the values for each of those  
19 years for acre-feet diverted?

20 A I have to first find the Ray Unit in this stack of --

21 Q You might want to start, I think you started with  
22 page 8, but I'd like to go through the calculation  
23 to make sure I understand how you did it.

24 A Page 8, Ray System, crops irrigated, 7,039. And  
25 below that is a tabulation of monthly diversions  
stetson - cross - white





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which total 33,319 acre-feet.

Q So for 1938 you used 33,319 acre-feet?

A Yes, sir.

Q Would that mean that for 1939 then you used 29,957,  
the bottom of that page?

A That's correct. And for that year we used 6,554  
acres irrigated.

\* \* \* \* \*



- 1 Q (By Mr. White) Now, on Page 8 it says that those are crops  
2 irrigated at 4 acre-feet for both years?
- 3 A I see that.
- 4 Q What does that mean?
- 5 A I don't know what that means. Perhaps that was their ob-  
6 jective, but they diverted more than 4 acre-feet per acre  
7 according to the tabulated data. Irrigation districts fre-  
8 quently use round numbers as objectives, but when it comes  
9 to the end of the season, if they are paying for the water,  
10 they count it down to the acre-foot.
- 11 Q How about for 1942?
- 12 A 1942 --
- 13 Q Would you have been on Page 33?
- 14 A Well, there's a figure on Page 43, but I don't believe  
15 that's --
- 16 Q I'm sorry, I meant to say '33.
- 17 A '33, there's a figure on Page 33, but I believe that is not  
18 the figure we used. I'll have to check that.
- 19 If you will turn to the next page, 34, for example --  
20 or, excuse me, That's not right.
- 21 I'm just trying to check this figure. I'll have to  
22 check the monthly figures.
- 23 The figures on Page 33 are called acre-feet used, but  
24 if you look at Page 34, they show 24 -- for the Ray Unit,  
25 stetson - cross - white



- 1 24.6 acre-feet used, and 1,316 acre-feet wasted.
- 2 Q Yes.
- 3 A And I believe these diversion figures include waste.
- 4 Q Would you check that, please --
- 5 A No, I'm sorry, that's not the answer. I see that on the
- 6 next page that's not the answer.
- 7 Okay. There's apparently some -- if you look at Page
- 8 38, for example, acre-feet diverted for July is shown as
- 9 12,016; acre-feet used, 9,656; acre-feet wasted, 2,360.
- 10 Q And the acre-feet diverted is the sum of those two values?
- 11 A Right, and I believe our calculation considers the acre-
- 12 feet diverted whether it's wasted or not. Because that's
- 13 the historic operation of the system.
- 14 Q What value did you use for 1942?
- 15 A In 1942 for diversion for the year for the season?
- 16 Q Yes.
- 17 A 35,571 acre-feet, and I believe that is taken from the
- 18 monthly sheets and summed up.
- 19 Q That would be taken off the --
- 20 A That's on the sheets following Page 33.
- 21 Q And that would be adding acre-feet wasted to acre-feet
- 22 used for each month to get the total diverted?
- 23 A Yes. In some months the records show -- for example, in
- 24 August, 173 to reservoir in the same column as wasted and
- 25 stetson - cross - white



1 then 2,076 under that, but we are using the acre-feet  
2 diverted. That's the way the system was operated.

3 Q Would the same type of approach be used for years 1943, '46,  
4 '48 and '49?

5 A Yes.

6 Q Isn't it true, Mr. Stetson, that if you excluded the amount  
7 of water wasted for the years 1942, '43, '46, '48 and '49,  
8 that 5.32 acre-feet per acre for the Ray Unit in the right-  
9 hand column of HS-10 would drop to about 3.8 acre-feet per  
10 acre?

11 A I don't know.

12 Q Isn't it true that the waste included in those records  
13 isn't waste from seepage out of the canals, but is waste  
14 that's turned out the tail of the canals or through waste  
15 waste?

16 A I couldn't tell you where that waste occurred. It occurred  
17 back in 1942. I wasn't there and I don't know. It's the  
18 way the system was operated.

19 Q Do you have any feel for the amount of your average diver-  
20 sion shown on HS-10 that's attributable to waste?

21 A No, I have not calculated that separately.

22 There's waste in every irrigation system.

23 Q Isn't it true, however, that if the waste involved in the  
24 Ray Unit, for example, is out of waste waste or out of the

25 stetson - cross - white



1 tail of the canal, it is not that water which is normally  
2 included in the category of operational waste?

3 A. I don't know.

4 Q. Isn't it true with respect to HS-10 that if you excluded  
5 waste from your diversion values, you drop the 4.95 acre-  
6 feet per acre for the Coolidge Unit to 3.2 acre-feet per  
7 acre?

8 A. I don't know.

9 THE SPECIAL MASTER: He already answered. He  
10 answered almost the same question. You just slipped the  
11 unit down on here.

12 Q. (By Mr. White) Isn't it true that the value for the Sub-  
13 agency Unit, if you excluded the waste from your diversion  
14 values, would be 5.26 acre-feet per acre --

15 THE SPECIAL MASTER: I will object to the question on  
16 the basis that if he doesn't know the first two, he will  
17 probably not know the remaining nine.

18 If that is not correct, please correct me.

19 THE WITNESS: That is correct.

20 Q. (By Mr. White) Why didn't you make a determination as to  
21 the waste involved before you reached a professional opin-  
22 ion as to the unit, to the diversion unit of duty?

23 A. We had a hard time finding diversion records at all that  
24 went back that far, and I'm sure we couldn't have found out

25 stetson - cross - white



1 what happened in 1942 as far as waste is concerned. This  
2 is the way the system was operated. It's the way most  
3 systems were operated in the West in those days, and a lot  
4 of them still are.

5 Q Would your answers with respect to waste which you have  
6 given for the Little Wind Unit on HS-10 also be applicable  
7 to the Upper Wind Unit on HS-10?

8 A Yes, we tabulated the diversion data. We did not tabulate  
9 separately the waste data.

10 THE SPECIAL MASTER: I would like to ask a question  
11 on those, Mr. White.

12 Back to that 1,206 that you answered yesterday  
13 morning, that is quite high?

14 THE WITNESS: Yes.

15 THE SPECIAL MASTER: And you noticed it.

16 THE WITNESS: Yes, sir.

17 THE SPECIAL MASTER: In the light of your experience  
18 with feasible, acceptable reclamation projects, is that  
19 figure an acceptable figure in regard to growing crops --

20 THE WITNESS: It would depend on where it was located  
21 and what impact it had on the remaining water supply.

22 As an example, on the Colorado River, Palo Verde  
23 Irrigation District, which is on the California side, they  
24 are charged under the Supreme Court Decree with what they

25 stetson - cross - white



1 divert less what they return to the river, so they run  
2 their canals full on a year-around basis because they  
3 measure what goes back in the river and they are charged  
4 for the difference. So their duty would be a very high  
5 duty if you looked at it from that point.

6 Obviously, that's a very high duty of water, but being  
7 up higher in the watershed where they run it through the  
8 system and it goes right back in the system, it's probably  
9 a less costly, easier way to operate.

10 THE SPECIAL MASTER: Philosophically, that water goes  
11 back in to feed the aquifer?

12 THE WITNESS: A lot of it goes right back in the  
13 stream.

14 THE SPECIAL MASTER: And into the stream itself?

15 THE WITNESS: Yes, sir. And, in effect, by diverting  
16 that water through their system, there's a time delay. So  
17 when they are diverting high flows -- when there is high  
18 flow season in May, June, July, by delaying that a few days  
19 or a few weeks, there might be some benefit by delaying the  
20 flow coming downstream.

21  
22  
23 \* \* \* \* \*



1

THE SPECIAL MASTER: Okay.

2

THE WITNESS: But there's no question it's a high

3

duty.

4

THE SPECIAL MASTER: Thank you, Mr. Stetson. All

5

right, Mr. White. I didn't want to interrupt you, but

6

I thought that this had a bearing.

7

Q (By Mr. White) Let's go to the Upper Wind Unit, Mr.

8

Stetson.

9

MR. WHITE: Off the record for a minute.

10

(Off the record discussion.

11

Q (By Mr. White) Let me ask it again, I blanked it out

12

then, Your Honor.

13

Would your answers in general with respect to

14

waste, which you gave for the Little Wind Unit also

15

apply to the Upper Wind Unit on HS-10?

16

A I'd have to look at the Upper Wind records to see how

17

they were tabulated. Do you mind if I use my own file?

18

Q Not at all just so long as you can give us a page number

19

that refers to it.

20

MR. WHITE: Your Honor, you have a copy of that on

21

your desk.

22

THE SPECIAL MASTER: Yeah, I do. I'm reluctant to

23

tear into them.

24

(Brief pause.

25

stetson - cross - white





1 THE WITNESS: Well, I can't tell from this because  
2 I don't have -- If the records were maintained in the  
3 same format, that is diversion, use, wasted, yes, we would  
4 have taken the diversion and the acres irrigated and we  
5 would have ignored the waste column.

6 Q (By Mr. White) Well, beginning on page 33, isn't the  
7 Upper Wind tabulated in the same way?

8 A Yeah, I was looking and where I had my Upper Wind indexed  
9 and all was the summary of it, sorry about that. Yes,  
10 it is the same format, that's true, yes. My answer is  
11 yes.

12 Q Would you turn to page 45, please.

13 A 45?

14 Q Um-hum. Let's talk about the Ray Unit for a second,  
15 that's for May, 1943. Isn't it true that there are  
16 roughly 1300 more acre-feet wasted than actually used  
17 for the Ray Unit in 1933 according to page 45?

18 A Yeah, practically 1300.

19 Q Isn't it true that there are roughly 450 acre-feet,  
20 more acre-feet wasted than actually used for the Coolidge  
21 Unit according to page 45?

22 A Maybe 375.

23 Q Okay. Is it true that there are roughly 400 acre-feet more  
24 water wasted than actually used for the Left-Hand Unit?

25 stetson - cross - white



- 1 A Yes. But less than used for both Johnstown and Upper  
2 Wind.
- 3 Q You see where there's a value of 997.3 --
- 4 A Yes.
- 5 Q -- acre-feet appears to be for the Upper Wind --
- 6 A Yes, sir.
- 7 Q -- for water wasted?
- 8 A Yes, sir.
- 9 Q Would you turn to page 46. Doesn't that report on page  
10 46 indicate that the water that was actually wasted on  
11 the Upper Wind System was the amount spilled on the  
12 end laterals, total 997.3 acre-feet?
- 13 A Yes, it does. I assume that went back into the stream  
14 system.
- 15 Q Do you know that that goes back into the stream system?
- 16 A No, I said I assumed it would.
- 17 Q Now, could you show me how you came up with the diversion  
18 values for Midvale and LeClair?
- 19 A For LeClair we took the acre-feet diverted off of the  
20 basic data sheet which you copied.
- 21 Q What page would that be in the Exhibit HS-9?
- 22 A Depends upon which year you're looking for.
- 23 Q Well, let's --
- 24 A You take it off --
- 25 stetson - cross - white



1 Q For Midvale, let's just do it for 1969.

2 A For which one?

3 Q 1969.

4 A For which unit?

5 Q Midvale.

6 A Midvale, I was on LeClair.

7 For 1969?

8 Q Yes.

9 A The acres irrigated were 43,584. It appears on the form,  
10 on the bottom half of the sheet.

11 Q Is there a page number?

12 A I'm looking at my file. It should be the last page of  
13 your exhibit.

14 Q The last page.

15 A Well, it isn't either, it's the next to the last page,  
16 163.

17 Q Okay.

18 A And we took the figure of net supply, which is the 1, 2,  
19 3, 4th column of figures, the bottom of that table. In  
20 other words, there was a diversion and then an in-flow  
21 from reservoirs and other sources, and then delivered to  
22 reservoirs, so we took -- you add column 1 to column 2  
23 and subtract column 3, I believe it is, to get --  
24 Part of that water goes to a power plant, as I recall.

25 stetson - cross - white



- 1 Q Okay. Subtract column 2 from column 3?
- 2 A No.
- 3 Q I'm sorry, tell me again.
- 4 A Well, I'm not going to tell you again until I make the  
5 calculation to make sure I'm right.
- 6 (Brief pause.)
- 7 A You add column 1 and column 2 and then subtract column  
8 3 to get net supply.
- 9 Q And you used the net supply value for your diversion  
10 amount; is that correct?
- 11 A Yes, sir. As the net supply to the project, the irriga-  
12 tion project.
- 13 Q Does the net supply value include values in the 5th  
14 and 8th columns, main canal waste and lateral waste, res-  
15 pectively?
- 16 A Let me check it. Which column were you asking about?
- 17 Q The main canal waste column and the lateral waste column,  
18 which I believe if diverted from streams, column 1, would  
19 be columns 5 and 8.
- 20 A Well, your main canal waste would be subtracted from the  
21 310,000 in column 3. Your main canal losses would be  
22 subtracted from that, which would give you the next  
23 column, which is delivered to laterals. Then you've  
24 got lateral wastes and lateral losses, and a small item  
25 stetson - cross - white



1 of nonirrigation delivery. And then you get down to  
2 delivered to farms. In other words, out of the diver--  
3 sion of 310,550 acre-feet, 148,264 acre-feet of it got  
4 to the farms.

5 Q Are these lateral and main canal waste values included  
6 in the amount of diversion which you used for the year  
7 1969?

8 A The main canal losses and main canal wastes?

9 Q No, main canal wastes and the lateral wastes.

10 A Yes, they are.

11 Q Okay. Would that be true for the other years during  
12 your study. For Midvale, being 1970 through '78?

13 A Yes, sir.

14 THE SPECIAL MASTER: Can I inject a question at  
15 this point? I don't want to interrupt your thinking.

16 HS-10 uses the term Midvale Irrigation District.  
17 Often your answers regard Midvale Project. The Midvale  
18 Irrigation District, which I'm familiar, contains many,  
19 many Indians, many, many non-Indians, much trust lands,  
20 much fee land, and it's a huge on-going project. Are  
21 you sure in your mind, in your testimony, that when  
22 you refer to these figures on your exhibits and you  
23 talk about Midvale Irrigation District, that 100 per-  
24 cent of all the water you're referring to goes to trust

25 stetson - cross - white



1

lands and Indian consumption?

2

THE WITNESS: No, it doesn't, sir. There are some trust land within that district. We are using the district records to derive what the average unit diversion is for that district. Then we apply that unit diversion to the 500 and 600 acres of trust land that's within the district.

3

4

5

6

7

8

THE SPECIAL MASTER: I see.

9

10

THE WITNESS: It's because the land is within the district.

11

12

13

THE SPECIAL MASTER: So when you have an acreage acre-foot diversion of 317,000 feet over a ten year period, that's for the entire district?

14

THE WITNESS: That's for the entire district.

15

THE SPECIAL MASTER: But not for the project?

16

17

18

THE WITNESS: It's sort of an anomaly in that we are using such huge figures to derive a unit diversion requirement for only about 550 acres, as I recall.

19

THE SPECIAL MASTER: I see.

20

THE WITNESS: 569 acres of trust lands.

21

22

\* \* \* \* \*

23

24

25

stetson - cross - white



1 THE SPECIAL MASTER: But you do it by mathematical  
2 application of what they diverted --

3 THE WITNESS: That's the operation and the practice  
4 in that district where the lands are located, and we are  
5 assuming it's an average unit diversion per acre.

6 THE SPECIAL MASTER: All right. Thank you.

7 Thank you, Mr. White.

8 Q (By Mr. White) With respect to the LeClair District as  
9 shown on HS-10 for which you used the period 1950 through  
10 1978, could you please explain how you determined the diver-  
11 sion for the year 1978 by reference to HS-9?

12 A HS-9 -- All right.

13 Q That's the copy of your notes --

14 A All right.

15 Q -- Xeroxed and paginated.

16 A Well, that's on the top page of the sheets that were  
17 stapled together for LeClair, whatever page number that is.  
18 You've got a copy. Maybe you can find it.

19 What we took was the total acre-feet diverted shown at  
20 the bottom of that page --

21 Q Wait, wait. Let's see if we can find it first, please.

22 A It should be the first sheet of the LeClair tabulations.

23 Q Would you check Page 118 as to whether or not that's the  
24 page?

25 stetson - cross - white



1 THE SPECIAL MASTER: The first sheet of LeClair before  
2 the staples were removed.

3 THE WITNESS: That's very possible.

4 A. Yeah, that's 1978.

5 Q (By Mr. White) Okay.

6 A. We took the 59,771 acre-feet, which is total acre-feet,  
7 diverted and the 1,262 total acres irrigated. Divide that  
8 out and you get 4.72 acre-feet per acre for that year.

9 Q Does that show that there are 1211 acres of Indian land  
10 within the total acres irrigated?

11 A. It shows 11,451 plus 1211 Indian lands equal 12,662 total.  
12 I don't know what they mean by their term "Indian lands".  
13 I don't know whether that means trust land, fee lands, or  
14 what.

15 Q Do you know whether or not your diversion values for your  
16 period of study for the LeClair Irrigation District include  
17 the same types of wastes which we have previously discussed  
18 for the other units and Midvale?

19 A. This is the diversion into the canal; and if there were  
20 wastes from their system, they would be reflected in this  
21 figure.

22 Q Mr. Stetson, on the very last page, HS-10, Page 164 --

23 A. HS-10 is only one page.

24 Q I'm sorry. On Page 164.

25 stetson - cross - white





1 A. Of what?

2 Q. Of HS-9. Could you please describe what those values are?

3 A. Well, my very last page would be the 1969 record for Mid-  
4 vale Irrigation District.

5 Q. Well, let's see. It looks like the same pattern from here  
6 as the back cover of your folder.

7 THE SPECIAL MASTER: It's the one he's pointing to,  
8 Mr. Stetson, I think.

9 THE WITNESS: Oh, you copied the file folder.

10 Q. (By Mr. White) I didn't know where it came from. What is  
11 that?

12 A. Well, it says, "Phone, 5-4-81; Midvale Irrigation District."  
13 What do you want me to do with it?

14 MR. ROGERS: Your Honor, a correction for the record,  
15 the copies of HS-9 that we were furnished don't have any  
16 writing other than numbers on it. If you are referring to  
17 this last page marked 164, is this a legal-size document  
18 that got copied on a letter-size page?

19 MR. WHITE: I think that's what happened, but I'm  
20 trying to rectify that now.

21 THE WITNESS: It's not a copy of the whole page.

22 Q. (By Mr. White) What information is missing from that page?

23 A. Well, the file number, 1282 Ag. Water Duty Historic Lands.  
24 I don't know -- Did the phone number show up? The phone

25 stetson - cross - white



1 number didn't show up. Midvale Irrigation District. It  
 2 cut off all the captions to the columns. What it is --  
 3 I'll tell you -- it's a summary from this record here  
 4 (indicating) of the annual diversions and annual acreages  
 5 irrigated and the annual diversion and the water duties.  
 6 It's the basic figures that went into the figures shown under  
 7 Midvale Irrigation District on Exhibit HS-10. It's the ten  
 8 years of record summarized.

9 Q So the first column is year -- Well, excuse me. The second  
 10 column is irrigation?

11 A It's I-R-R, period, A-C, period.

12 The next one is D-I-V, period, R-E-Q, period. And the  
 13 next one is W-T-R, period, D-T-Y, period, which means water  
 14 duty. And above that it says, "Midvale Irrigation District."

15 Q Was the information which is shown on Page 164 of HS-9 fur-  
 16 nished as a result of a telephone call, or was it informa-  
 17 tion or conclusions derived by calculations on waste and on  
 18 other data in HS-9?

19 A It was taken out of the data of the monthly water tables,  
 20 monthly water distribution, the sheets that are Pages 154  
 21 through 163. It's simply a summary of that.

22 (Pause.)

23 THE SPECIAL MASTER: Is that it for this witness, Mr.  
 24 White?

25 stetson - cross - white



1 MR. WHITE: I wish it were.

2 THE SPECIAL MASTER: Well, let's move it on, if we may.

3 MR. WHITE: Your Honor, yesterday you indicated that I  
4 should make an offer of proof with respect to the number of  
5 Type VII acres within the certificated lands or adjudicated  
6 lands, and we have prepared such an offer. It is based on  
7 the HB-137 series of exhibits, which we previously refer-  
8 red to, which, as the Court will probably recall, did not  
9 cover all of the areas included in Exhibit HS-3, which is  
10 the adjudicated trust lands. And, therefore, the offer of  
11 proof will be limited to those areas where we do have data,  
12 and I will describe those in the offer of proof.

13 And the offer of proof is as follows: If the State  
14 were allowed to inquire --

15 THE SPECIAL MASTER: The State has not been denied the  
16 right to inquire.

17 MR. WHITE: I'm sorry.

18 THE SPECIAL MASTER: What you are offering, as far as  
19 I am concerned, is evidence, and I will accept it. I'm not  
20 denying it, but you go ahead. It's proof.

21 MR. ROGERS: We won't accept an offer of proof as  
22 evidence.

23 THE SPECIAL MASTER: That's why I made the correction.  
24 He said if allowed -- I'm not disallowing the opportunity --  
25 I'm not disallowing Mr. White the opportunity for you -- I



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had it at ten minutes to 9:00 this morning.

MR. WHITE: Well, if your ruling is I can go ahead with the witness, I will go ahead.

THE SPECIAL MASTER: No, my ruling isn't that because that will take another day or a half a day. My ruling was, if you will bear with me now for a minute, please -- Let's take a minute off the record.

We have been at it for about an hour. Let's take a ten-minute break.

(Whereupon a ten minute recess  
(was taken.

\* \* \* \* \*



1 THE SPECIAL MASTER: Mr. White, I think in the recess,  
2 that one way to work this out maybe is a stipulation between  
3 Mr. Rodgers, Mr. Echohawk and Mr. Clear, that they would  
4 stipulate with you that the exhibits already in evidence  
5 that speak for themselves do contain the record that would  
6 show what you have compiled as the number of Type VII  
7 acres within each of the lands which contain idle -- I mean  
8 the number of idle lands within each of the trust areas.

9 MR. WHITE: Well, that would be fine, in part, Your  
10 Honor, because it is partially true. The problem is that  
11 the stipulation is not entirely true because there are some  
12 areas where instead of -- We found in those first few  
13 areas we went through, units, drainage areas, instead of  
14 being 100 percent of Class 7 lands for particular permit  
15 and proof numbers, you may have under fifty percent. You  
16 may have a hundred acres included of adjudicated lands and  
17 only 50 acres shown on the Billstein exhibits as being  
18 within the Class 7 category. So while that stipulation is  
19 fine as far as it goes, Your Honor, the problem is that  
20 we're going to end up with total percentages of -- for  
21 example, 22.8 percent of the lands for Meadow Creek --

22 THE SPECIAL MASTER: Well --

23 MR. WHITE: The percentages are --

24 THE SPECIAL MASTER: In that case, why don't you go  
25 stetson - cross - white



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ahead and make your offer of proof.

MR. CLEAR: Your Honor, what I was suggesting during the break was that if these documents are in evidence, which I guess they are, we're not sure, but when it comes down to writing proposed findings of fact, I don't see why Mr. White can't add these up and say our proposed finding of fact No. 10 is that Billstein Exhibit HB goes such and such and -- which, you know -- and total it up. I don't see why Mr. Stetson has to add them up. I mean he hasn't seen these. Everybody here can add as well as Mr. Stetson can, and I think if the documents are in evidence the addition is a matter of judicial notice almost.

MR. WHITE: I think the record ought to show that the witness has a calculator with him but hasn't been even required to use it once during the proceedings, Your Honor.

MR. RODGERS: Your Honor, I'd also like to clarify, I wasn't necessarily referring to a stipulation. If the documents were in evidence they would speak for themselves, and in his proposed findings he could make whatever calculations or contrasts he wishes to.

THE SPECIAL MASTER: Recognizing another one of those incidents in this trial where I have not succeeded in bringing the parties together, so proceed with your offer of proof.

stetson - cross - white



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MR. ROGERS: I should add this, Your Honor, to the extent that Mr. White is not able to do that, that he should either be left with a choice of an offer of proof or to continue with the witness within the limits of this witness' knowledge and expertise.

THE SPECIAL MASTER: All right, Mr. White, proceed with the offer of proof. And excuse me for having tried to do otherwise.

MR. WHITE: I appreciate the effort, Your Honor. Your Honor, this offer of proof will be structured around the values shown under the acres column on Exhibit HS-3. Also, Your Honor, I believe that we have already -- Strike that.

We do not have HB-137 series exhibits for any of the values shown on page 1 of HS-3, so the offer of proof will begin on page 2 of HS-3.

As the Court will recall yesterday, with respect to east fork of the Wind River and the Dinwoody Creek, examination of the witness demonstrated that all of those acres fell within Class 7 -- or Type VII categorization based on HB-137-10 and 11. If allowed to continue to examine the witness with respect to the comparison between the exhibit marked as HS-1 and the HB-137 series exhibits --

MR. CLEAR: HS-3.

stetson - cross - white



5-4-MR-vlb

1 THE SPECIAL MASTER: Three.

2 MR. WHITE: The comparison would be between HS-1, which  
3 is his detailed breakdown, Your Honor.

4 THE SPECIAL MASTER: Adjudicated lands by location.  
5 If permitted to continue with these questions -- Try it  
6 again. I'm sorry.

7 MR. WHITE: I'm sorry, Your Honor. If the State were  
8 permitted to continue with this line of inquiry with Mr.  
9 Stetson, he would testify in comparing HS-1 and HB-137  
10 series exhibits, that the following values on HS-3 would be  
11 affected as described: First, with respect to Meadow  
12 Creek, for 166 acres as shown on HS-3, the witness would  
13 testify that of those 166 acres, 37.8 acres are shown  
14 to be Type VII land in Exhibit HB-137-14, resulting in  
15 22.8 percent of the 166 acres being Type VII lands.

16 With respect to Crow Creek, which is item 1-G on  
17 Exhibit HS-3 showing 2927 acres, if the witness compared the  
18 acreages shown in HS-1 with Exhibit HB-137-16, he would  
19 testify that 1870 acres of the 2927 acres were Type VII or  
20 63.9 percent were Type VII.

21 With respect to Willow Creek, if asked to compare  
22 HS-1 with HB-137-17, he would testify that of the 60 acres  
23 listed, roughly 20 acres are Type VII for a percentage of  
24 roughly 33 percent Type VII.

25 stetson - cross - white





1 With respect to the Wind River main stem for which  
2 1338 acres are listed, if allowed to compare HS-1 with  
3 HB-137-19, the witness would testify that approximately 75  
4 acres of those lands are Type VII, yielding a percentage  
5 of 5.6 percent Type VII.

6 With respect to the North Fork of the Little Wind and  
7 South Fork of the Little Wind, if the witness were allowed  
8 to compare HS-1 with HB-137-22 and 23, he would testify that  
9 roughly 23.2 percent -- excuse me, 23.2 acres or roughly  
10 four percent were Type IV, -- excuse me, Type VII.

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stetson - cross - white



1 Q (By Mr. White) With respect to Sage Creek, which has 207  
2 acres listed, if allowed to compare HS-1 with HB-137-25,  
3 the witness would testify that 98.6 acres were Type VII  
4 comprised of 46.6 percent.

5 On the third page of HS-3, with respect to Main Stem  
6 of Big Horn River, for which a hundred acres is listed, if  
7 allowed to compare HS-1 with HB-137-30, the witness would  
8 testify that 87 of those acres or 87 percent of those acres  
9 are Type VII as shown on the Billstein exhibits.

10 With respect to Cottonwood Creek, comparison with  
11 HS-1 with HB-137-18 would demonstrate roughly 421 1/2  
12 acres being Type VII, or 83.5 percent being Type VII.

13 With respect to Muddy Creek, which is listed for 2901  
14 acres on HS-3, if allowed to compare HS-1 with Exhibit  
15 HB-137-20, the witness would testify that 2,080 of those  
16 acres or 71.7 percent of those --

17 THE SPECIAL MASTER: 71.7 percent?

18 MR. WHITE: Yes, are Type VII.

19 With respect to Five Mile Creek, if allowed to com-  
20 pare HS-1 with HB-137-21, the witness would testify that  
21 roughly 4 acres are Type VII comprising roughly 2 percent.

22 With respect to the Popo Agie, if allowed -- and this  
23 is combined Popo Agie, both North Fork and the Main Stem --  
24 if allowed to compare HS-1 with HB-137-22, the witness  
25 would testify that roughly 87 acres are Type VII or 24



1 percent.

2 On the Owl Creek Basin, with respect to the South Fork  
3 of Owl Creek, for which 1620 acra are listed, if allowed  
4 to compare HS-1 with HB-137-33, the witness would testify  
5 that 785 acres, or 48.5 percent of the 1,620 acres, are  
6 Type VII.

7 With respect to the Main Stem of the Owl Creek, for  
8 which 2265 acres are listed, if allowed to compare HS-1  
9 with HB-137-34, the witness would testify that roughly  
10 569 acres, or 25 percent of the total, are Type VII.

11 With respect to Mud Creek, if allowed to compare  
12 HS-1 with HB-137-35, the witness would testify that of the  
13 754 acres listed on HS-3, 351 1/2 of those acres are Type  
14 VII, or 46.6 percent.

15 I think I missed one, Your Honor.

16 THE SPECIAL MASTER: Do you have a figure of what the  
17 total would be of the 17,411 acres of HS-3 that would be  
18 Type VII lands?

19 MR. WHITE: No, sir, I don't, because I just have --  
20 the HB-137 series exhibits didn't cover it all, and I think  
21 I need to add one more.

22 (Pause.

23 MR. WHITE: That's it, Your Honor.

24 With respect to all of the areas surveyed, which I  
25 have described, roughly 56 percent of the land was Type VII.



6-3 vlb

1 That's not applicable --

2 THE SPECIAL MASTER: That's the percentage, but you  
3 didn't survey them all?

4 MR. WHITE: No, but just as to those areas that we  
5 had series HB-137 exhibits.

6 THE SPECIAL MASTER: Very well.

7 MR. WHITE: Your Honor, can I have just a minute to  
8 put these --

9 (Pause.

10 Q. (By Mr. White): Mr. Stetson, staying with the adjudicated  
11 lands for a while, did you make a determination of which  
12 climatic zone each parcel of adjudicated land found itself?

13 A. Yes.

14 Q. So you did locate those parcels of adjudicated lands  
15 on a map?

16 A. To the extent that -- for example, if they were all up  
17 on the East fork Wind, we would know automatically what  
18 climatic zone they were in, but yes, we did check them out.

19 Q. Did you check them out on the aerial photographs  
20 which are contained in the box behind you that are generally  
21 numbered -- and I think there may be some extra ones  
22 in there -- but numbered C-56 through 136, all with  
23 a suffix A?

24 A. What does the C-56 stand for?

25 stetson - cross - white



6-4

1 Q. That's the exhibit number. I'm sorry.

2 A. I didn't have the exhibits.

3 Q. Did you look at these photographs?

4 A. Those aren't mine.

5 THE SPECIAL MASTER: Mr. White, I'm strongly inclined  
6 to feel that you passed over this area yesterday and in the  
7 interest of avoiding that which is repetitious or  
8 unnecessarily burdensome, I'm constrained to ask if maybe  
9 we haven't covered climatic zones.

10 MR. WHITE: It's just a lead-in into a different area,  
11 and I would like to be able to go ahead and proceed very  
12 quickly with where I'm going.

13 THE SPECIAL MASTER: All right.

14 Q. (By Mr. White) Mr. Stetson, did you use these aerial  
15 photographs or copies of these aerial photographs in your  
16 work?

17 A. We may have, or we may have used the overlays for them.  
18 I'm not sure. I know we would have at least used the  
19 overlays for the historic lands series.

20 On Exhibit HS-2 we have indicated which climatic  
21 zone each of the blocks of adjudicated lands are located  
22 in.

23 Q. Would you turn to HS-1, please, page 6? Do you find  
24 permit No. 6632 listed on page 6?

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stetson - cross - white



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A. Yes, it's listed about eight times.

Q. Did you make any determination of whether the lands or part of the lands included within 6632 were Class 6 lands?

A. Were Class 6 lands?

Q. Class 6, non-arable.

A. No.

Q. I hand you what's been admitted as U.S. Exhibit C-94-A and ask you if in Section 32, Township 1 North, Range 1 East in the southeast quarter of the northwest quarter and the north half of the southwest quarter of that section there isn't a parcel of land which is indicated as adjudicated 6632 of 99 acres?

A. Yes, that's what it says on the aerial photographs, yes.

\* \* \* \* \*

stetson - cross - white



1 Q (By Mr. White) Isn't it true that that same parcel is  
2 shown as 6-SD?

3 A Yes, sir, it is.

4 Q Did you receive any instructions at all to exclude lands  
5 classified as Class 6 or nonarable lands --

6 A No, sir.

7 Q -- from your adjudicated lands from which you developed  
8 diversion requirements?

9 A No, sir.

10 MR. ECHOHAWK: Objection, Your Honor. This line of  
11 questioning, he's asking about something that was not dis-  
12 cussed by Mr Waples or Mr. Kersich. There's absolutely no  
13 testimony in the record relating to land classification done  
14 on anything other than the acreage that we've put forward,  
15 and the adjudicated acreage is not within any totals pre-  
16 sently by the United States as arable acreage.

17 MR. WHITE: The problem is that --

18 THE SPECIAL MASTER: Just one minute. Read that back  
19 to me, that objection.

20 I can save you the trouble. Did you say that the  
21 adjudicated land is not within any totals of land for which  
22 the United States is making a claim for water?

23 MR. ECHOHAWK: No, it is not within any acreage totals  
24 that the United States has presented as arable acreage

25 stetson - cross - white



1 either through Mr. Waples or through Mr. Kersich.

2 THE SPECIAL MASTER: If the type -- If the Class 6  
3 lands are not within any totals of arable acreage presented  
4 by neither of them, I will sustain your objection, but are  
5 you sure of what you were saying?

6 MR. ECHOHAWK: I'm absolutely sure. Mr. Waples testi-  
7 fied as to the arability on Type VII and Type VIII lands.  
8 Mr. Kersich testified as to the future lands, and that's  
9 the only testimony that has gone in and that is the only  
10 acreage figures that are in the record.

11 What Mr. White is attempting to do is bring out some  
12 land classification on lands that no one has testified to.

13 THE SPECIAL MASTER: I will sustain the objection, Mr.  
14 White, and I assume you can get to showing the inclusion,  
15 if there is any, of nonarable lands in the claims and basis  
16 for water that is -- that has been made. You can do that  
17 on your own case rather than --

18 MR. WHITE: Well, Your Honor, I'd like to be able to  
19 explain to you what's happening here because I don't think  
20 a full and accurate picture has been given.

21 MR. ECHOHAWK: I think a full picture has been given.

22 MR. WHITE: What I'm placing on the bench now is an  
23 exhibit which Mr. Echohawk offered for the truth of its  
24 contents. It's a United States exhibit.

25 THE SPECIAL MASTER: C-94-A.





1 MR. WHITE: Yes, sir.

2 THE SPECIAL MASTER: In evidence.

3 MR. WHITE: It's already in evidence for the truth of  
4 its contents.

5 MR. ECHOHAWK: For the truth --

6 MR. WHITE: Wait, wait, let's --

7 MR. ECHOHAWK: I think I'm --

8 THE SPECIAL MASTER: Let him make his point and you  
9 make your following, Mr. Echohawk.

10 MR. WHITE: And on that area photograph, as on many  
11 others, there's the result of land classification work on  
12 the adjudicated land is depicted, and the example I just  
13 showed Mr. Stetson was this area right here, which is  
14 shown as being adjudicated. It's 6632, has 99 acres.  
15 This is lands which are included within those given to Mr.  
16 Stetson, and it's classified 6,, and I can show you time  
17 and time again. This happens to be not the entire parcel  
18 classified 6, but I can show you time and time again where  
19 the entire parcels are classified 6.

20 For example, on Exhibit 126-A, C-126-A, admitted for  
21 the truth of its contents, there are 100 percenters that  
22 line up one by one where lands within the United States'  
23 claim for adjudicated acres that Mr. Stetson is putting on,  
24 have been classified by HKM as Type VI or nonarable --  
25 Class 6 or nonarable, and that's what I'm trying to show,



1 Your Honor. First, we show that there were Type VII lands --  
2 THE SPECIAL MASTER: Certainly, you have the right to  
3 show that in your case. You've done a beginning job of  
4 showing it on cross-examination.

5 MR. ECHOHAWK: But my point is, Your Honor, Mr. Stetson  
6 has no idea about the land classification work done by HKM.  
7 HKM, when they testified either through Mr. Kersich or Mr.  
8 Waples, did not address any land classification work done  
9 on adjudicated lands. Furthermore, you'll recall through  
10 Mr. Billstein's testimony, he said that there are a lot of  
11 non-Indian lands that would not be found to be arable under  
12 any sort of circumstances. I think I cited the Wind Divi-  
13 sion Report that showed there were large amounts of acreage  
14 within certain projects that were found to be nonarable that  
15 the non-Indians were certainly receiving water for.

16 My point on this is that there is absolutely no  
17 foundation in the record for any cross-examination of Mr.  
18 Stetson or anyone else on this particular parcel of land.  
19 The acreage totals presented by the United States deal only  
20 with the future lands and the Type VII and Type VIII.  
21 There's no testimony in the record as to this parcel or  
22 any other adjudicated parcel, of the land classification  
23 work done. Therefore, it's entirely improper for Mr. White  
24 to do those.

25 MR. WHITE: Well, I want to say, Your Honor, that



1 what's happening here, much to the discomfort of the United  
2 States, that they're being hoisted on their own chart.

3 MR. ECHOHAWK: Well, I don't think --

4 THE SPECIAL MASTER: Gentlemen, I have a suspicion  
5 you're arguing the lawsuit, but go ahead.

6 MR. WHITE: No. I think I have a right to ininterrupted-  
7 tedly respond to Mr. Echohawk the same courtesy which I've  
8 afforded him.

9 What's happening is the United States is seeking to  
10 slide in the adjudicated lands by saying -- which we don't  
11 agree with, but let's assume that it's true, there's prima  
12 facie evidence that they're irrigable, not only irrigable  
13 but arable, if they're irrigable. What happened was that  
14 the United States' experts went out and checked most of  
15 the arable land, they didn't tell you that they checked it --

16 MR. ECHOHAWK: Well, Your Honor, there's absolutely  
17 no testimony --

18 THE SPECIAL MASTER: Please don't interrupt, Mr. Echo-  
19 hawk.

20 MR. WHITE: But the exhibits which they admitted in-  
21 advertently included the results of their work and they  
22 were admitted for the truth of their contents, and they  
23 showed time and time again that lands which Mr. Stetson --  
24 which is being claimed through Mr. Stetson's testimony as  
25 adjudicated lands, include lands which HKM classified as



1 Type VI. And the point is -- or Class 6, excuse me. The  
2 point is that there's a little shell game going on here, and  
3 the United States is allowing you to see only that evidence  
4 that they want you to see. And what's happened is one of  
5 the peas has popped out of the shell because they have  
6 offered and gotten admitted, for the truth of their con-  
7 tents, the land classification work which shows that the  
8 certificated or adjudicated land is, in large part, Class  
9 6, nonarable, just like they did, they let the cat out of  
10 the bag on the Type VII through Billstein exhibits.

11 THE SPECIAL MASTER: All right. I'm ready to rule.

12 MR. ROGERS: Your Honor, may I say --

13 THE SPECIAL MASTER: Go ahead, Mr. Rogers, if you want  
14 to be heard on this.

15 MR. ROGERS: I think your ruling was precise, it was  
16 made clear the other day that you're going to treat the  
17 certificates as -- give them judicial notice of proof of  
18 the irrigability of the lands covered by those certificates.

19 THE SPECIAL MASTER: I'm certainly going to if  
20 they're already classified as nonarable.

21 MR. ROGERS: And that's a prima facie case, and the  
22 State --

23 THE SPECIAL MASTER: But --

24 MR. ROGERS: -- is entitled to rebut that when it  
25 presents its own case.



1 THE SPECIAL MASTER: Right.

2 MR. ROGERS: But it's inappropriate to do it through  
3 this witness.

4 THE SPECIAL MASTER: It may be, it may be.

5 MR. WHITE: I don't think it is, Your Honor.

6 MR. ROGERS: Your Honor --

7 THE SPECIAL MASTER: Let me make my ruling, gentlemen;  
8 I'm ready to rule if you're ready to listen.

9 MR. WHITE: Let me say one more thing, if I might.  
10 Just because this witness hasn't seen this material doesn't  
11 mean he can't be examined on it. One of the problems with  
12 any expert witness is he may not have had the opportunity  
13 to examine information, which, once he hits the stand, kind  
14 of wishes that he had, the information that he should have  
15 examined which may have been withheld from him artificially.  
16 This, just like the Type VIIs are --

17 THE SPECIAL MASTER: With the possible exception of  
18 the fields of religious philosophy or exploratory medicine,  
19 I know of no other field that the law, with complexities in  
20 class lawsuits or in lawsuits of this type, and I think this  
21 witness is solemnly up against this situation of using and  
22 having to move ahead on the professionalism, within engineer-  
23 ing, based upon some of his colleagues' findings.

24 I do not believe it's in error for him to have refer-  
25 red to -- for this witness to have referred to C-94-A in



1           answering that question. However, I do not believe that he  
2           is the proper witness to proceed to show the improper in-  
3           clusion of lands that are not irrigable or arable in lands  
4           that already have a permit on them for water and that are  
5           presumed to be prima facie on some of this material in this  
6           lawsuit already irrigable.

7           Therefore, I will accept what's in so far, but ask  
8           that this witness not continue to be cross-examined into an  
9           area that I believe was within the scope of his direct, but  
10          was not his work, and, therefore, more properly belongs  
11          with Wyoming in its case in chief when it brings those  
12          witnesses back and asks them specifically about the pre-  
13          paration of C-94-A with which Stetson has nothing to do,  
14          and their inclusions of -- designations of lands within  
15          those areas.

16          I have ruled.

17          MR. ECHOHAWK: Your Honor, just so the record's clear  
18          and Mr. White is clear on this, you recall when HKM testi-  
19          fied as to --

20          THE SPECIAL MASTER: Who from HKM?

21          MR. ECHOHAWK: Either Mr. Waples or Mr. Kersich, both  
22          the process of how they finalized land classification work  
23          and review process and so forth, and changing back and  
24          forth. There's been absolutely none of that work done on  
25          this particular parcel that Mr. Waples -- that Mr. White



1 pointed out or any other adjudicated lands.

2 THE SPECIAL MASTER: I think it's fair for me to ob-  
3 serve that if we, you know, it's a two-edged sword. If  
4 you're going to use a test, Mr. White --

5 MR. WHITE: I'm sorry, I wasn't listening.

6 THE SPECIAL MASTER: If you're going to use a test,  
7 Mr. White, on the Reservation of the absolute requirement  
8 that every given acre on every permit shall be proven to  
9 be having been irrigated five years in a row in a case of  
10 a state permit that wants to be continued without challenge  
11 for forfeiture or that this has been irrigated or that it  
12 is arable according to our definitions, irrigable or part  
13 of an economic feasible unit, you stand to set a precedent  
14 which in turn could come back to haunt you if my predecessor,  
15 one of these decades in Wyoming, continues this adjudica-  
16 tion of the right to use water in Water Division 3, to an  
17 examination of all state water rights as so and exhausting  
18 as that to which you put the Indian claims today. So it's  
19 something to think about.

20 MR. WHITE: I understand that, Your Honor. We've  
21 given it great thought, talked about it with the previous  
22 Attorney General and with the State Engineer and the con-  
23 clusion, quite frankly, is that we are comfortable that  
24 under state law, as opposed to the reserved right doctrine,  
25 under state law --



1 proof; and if it's not complete, perhaps by the time the  
2 witness gets off the stand, it will be complete.

3 To give the Court a flavor of the testimony which I  
4 sought to elicit from this witness --

5 MR. ECHOHAWK: Your Honor, if Mr. White's going to  
6 come back and supplement his proof, perhaps he should do it  
7 all at once.

8 MR. WHITE: I'm the captain of my offer of proof. If  
9 the United States wants to make a supplementary one, they  
10 can. I may or may not decide to come back, and I'd like  
11 to give my offer of proof now.

12 THE SPECIAL MASTER: State your offer as simply as you  
13 can.

14 MR. WHITE: The offer of proof is with respect to  
15 several specific examples, which I will give in addition  
16 to the 99-acre parcel on Exhibit 94 -- C-94-A. Turning to  
17 Exhibit C-126-A, there is a tract of land having Permit No.  
18 8913, having 100 acres of trust in it, according to Page 5  
19 of Exhibit HS-1. And the Exhibit 126-A shows that a portion  
20 of that 100 acres, in excess of 20 acres, is Class 6. And  
21 the -- another portion it simply says "out".

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1 THE SPECIAL MASTER: This is a new direction.

2 MR. WHITE: There's no problem. You don't have to  
3 show that.

4 THE SPECIAL MASTER: I appreciate that, and I kind of  
5 sense that myself and see what it portends for Wyoming and  
6 its water users in the decades to come.

7 All right. The ruling's made, gentlemen.

8 MR. ROGERS: I think Mr. Court -- Mr. White owes the  
9 Court and Mr. Echohawk an apology for an accusation of the  
10 deliberate misrepresentation on this, in his statement he made  
11 earlier in his colloquy, that I don't think is justified in  
12 what your Master has seen, and the Master has the situation  
13 fully before him. And I don't think there's any justifi-  
14 cation for a remark as Mr. White made it.

15 MR. WHITE: I don't owe anybody an apology. If --

16 THE SPECIAL MASTER: Well --

17 MR. WHITE: -- anybody owes an apology --

18 THE SPECIAL MASTER: Well, we may all apologize to  
19 each other down through the months, but so far we've been  
20 doing a pretty good job of abstaining from those inevit-  
21 able conflicts that go into a hearing of this kind.

22 Let's proceed, Mr. White --

23 MR. WHITE: I'd like to make a short offer of proof.

24 THE SPECIAL MASTER: -- onto the next subject matter.

25 MR. WHITE: I'd like to make the following offer of



1 MR. WHITE: (Continuing) Turning to page 23 of  
2 HS-1, Permit Number 12,447, Proof Number 18,388, which  
3 shows 168 acres trust, referring to Exhibit 98-A would  
4 show that that parcel of land is entirely classified  
5 as Class 6 on Exhibit 98-A and that parcel is in Sections  
6 29 and 20, Township 6 North, 2 East, in the Southwest  
7 Quarter or the Northeast Quarter.

8 On page 23 again, Permit 7675, Proof Number 11,675  
9 shows 64.5 acres of trust. On Exhibit 99-A -- C-99-A,  
10 all 164.5 acres are shown as classified as Class 6.

11 Page 23 again, HS-1 indicates that Permit Number  
12 8,062, Proof Number 13,537 contains 123 acres of trust,  
13 of which 30 is shown as Class 6 lands on Exhibit 110-A.

14 With respect to page 27 of HS-1, Permit Number  
15 12,363, Proof Number 16,838, of which 90 acres is known  
16 as trust, adjudicated, Exhibit 70-A shows that approxi-  
17 mately 60 acres of those are Class 6 lands.

18 The same page, 27, Permit 3272, Proof Number 18,911  
19 shows 77 acres of adjudicated trust. Approximately 40  
20 acres of those are shown on Exhibit 71-A as being Class  
21 6.

22 MR. ROGERS: Your Honor --

23 THE SPECIAL MASTER: Just a minute, please, Mr.  
24 Rogers.  
25 Go ahead, Mr. White.



1 MR. WHITE: I think those are all I want to include  
2 at the moment. I do want to go into the Class 9 lands.

3 THE SPECIAL MASTER: You have a total of Class 6  
4 acreage of adjudicated lands?

5 MR. WHITE: No, Your Honor, but if I develop it --

6 MR. ROGERS: I would object -- the Tribes object  
7 to the offer of proof as inappropriate because of your  
8 ruling that it is inappropriate to extract this sort --  
9 would be inappropriate to extract this sort of testimony  
10 from this witness anyway. The offer of proof may be  
11 appropriate at another point in the trial, but not as  
12 a result of your ruling on this witness' testimony.

13 THE SPECIAL MASTER: Proceed, Mr. White.

14 MR. WHITE: I would like to ask the witness a  
15 question. I hope you will allow it.

16 THE SPECIAL MASTER: Providing they are not on  
17 these exhibits, you may.

18 MR. WHITE: I'm going to ask him a general question.

19 Q (By Mr. White) Mr. Stetson, if you had been told that  
20 lands contained within the adjudicated trust lands on  
21 Exhibit HS-1 had been previously classified as Class 6,  
22 would you have reached a professional opinion that those  
23 adjudicated trust lands contained on HS-1 are irrigable?

24 THE SPECIAL MASTER: That's too general for me to  
25 stetson - cross - white



1 permit, but if you will make it specific; I will allow  
2 it, and you go back over that and you take some lands  
3 from within all of the adjudicated, would you have  
4 removed those specific lands so found, I'll let the  
5 question --

6 MR. WHITE: Amend the question.

7 THE SPECIAL MASTER: All right. You are using an  
8 elephant gun on a fly.

9 MR. WHITE: I thought we had jumped light years.  
10 I'm sorry.

11 Q (By Mr. White) Mr. Stetson, had you been told that with  
12 respect to specific parcels of land shown in Exhibit HS-1  
13 as adjudicated trust lands, that those same specific  
14 parcels had been previously classified as Class 6 lands,  
15 would you or could you have reached a professional opinion  
16 that those lands are irrigable, those same specific lands?

17 MR. CLEAR: Your Honor, I object. Outside the scope  
18 of direct examination.

19 MR. ROGERS: Also object, Your Honor, in fact it  
20 goes into legal conclusions that would be directions to  
21 give -- inappropriate to give a witness. It goes to  
22 the very heart of the Master's previous ruling on the  
23 prima facie status to be granted certificates.

24 THE SPECIAL MASTER: Let me see if I can't frame a  
25 stetson - cross - white



1 question that I think is going to be something I want  
2 to hear the answer to and that it is proper to hear.

3 Mr. Stetson, if in doing your work it would have come to  
4 your attention that certain portions of the adjudicated  
5 land had been classified by your co-workers for the  
6 United States, HKM, as Class 6 or nonarable lands, would  
7 you have excluded those specific lands from consideration  
8 in your projections and in your totals?

9 THE WITNESS: We would have first --

10 (Whereupon there was a sound in  
11 (the courtroom.

12 THE SPECIAL MASTER: I thought somebody was over-  
13 ruling me from upstairs.

14 Go ahead.

15 THE WITNESS: We would have first questioned why  
16 it was included in adjudicated and what that meant,  
17 number one.

18 Secondly, we would have questioned why it was  
19 classified Class 6 and gone out probably and verified.

20 THE SPECIAL MASTER: Then you may or may not have  
21 included it, depending on your findings?

22 THE WITNESS: That's because of the way you phrased  
23 your question as being adjudicated lands. If you were  
24 asking us if we were to go out to look at future lands  
25 that were not adjudicated --



1 THE SPECIAL MASTER: There would be no question?

2 THE WITNESS: If it was Class 6, it would be in-  
3 cluded, if we knew that it was Class 6.

4 THE SPECIAL MASTER: All right. I think I have  
5 done all right by asking the question I did. If I made  
6 everybody unhappy, then I'm just about right.

7 MR. WHITE: I'm hesitant to say I'm happy, Your  
8 Honor.

9 Your Honor, what I would like to do is to go into  
10 a similar area as we did on Type VII lands, but with  
11 respect to Type IX lands. Type IX lands --

12 THE SPECIAL MASTER: I thought there was so small  
13 an acreage in Type IX that it was so insignificant we  
14 wouldn't want to take another look at it. Was I in  
15 error?

16 MR. WHITE: I'm just looking at a group on Din-  
17 woody Bench, in the Dinwoody Bench area, and I pick up  
18 42 -- about 60 acres. That's the only place we looked.

19 THE SPECIAL MASTER: Why don't we proceed to the  
20 next item?

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

22 THE SPECIAL MASTER: Leave those 60 acres in the  
23 lap of God.

24 Go ahead with your offer of proof. I will object  
25 to it and you can make your offer of proof.



1 MR. CLEAR: We are confused. What is Type IX?

2 MR. WHITE: I was about to explain that, Your  
3 Honor. The United States ought to know. It's their  
4 type.

5 If allowed to inquire of the witness with respect  
6 to Type IX lands, the witness would indicate by reviewing  
7 depositions in this case that Type IX lands are non-  
8 irrigable lands, often dry hillsides, very steep hill-  
9 sides, something like that, and that with respect to the  
10 adjudicated trust lands in the Dinwoody Bench area, for  
11 example, we would find that of the 40 acres listed for  
12 Permit 6628 on page 12 of HS-1, 12 acres are Type IX.  
13 Of the 35 acres listed for Permit 6626 on page 12 of  
14 HS-9, 30 acres are Type IX.

15 With respect to Permit 17203 on page 34 of HS-1 --  
16 I'm sorry -- this is in Willow Creek, moved from Din-  
17 woody Bench -- of the 49 acres of trust land under  
18 that certificate, there would be 27 acres that are Type  
19 IX lands.

20 Okay. Your Honor, can I have a couple of minutes  
21 to get several other exhibits together?

22 (Brief pause.)

23 MR. ROGERS: Your Honor, before Mr. White resumes  
24 I would simply like to note for the record that there  
25 is no evidence in the record from any witnesses presented



1 so far of any such category as Type IX lands. I think  
2 Mr. White's references are to an older system that may  
3 have been used by government experts that came out  
4 through depositions, but those categories have been re-  
5 defined by those experts and the evidence presented in  
6 the case at trial makes no mention of any Type IX lands.

7 MR. WHITE: Well, we have had an opportunity to  
8 explore that, Your Honor, but, unfortunately, that was  
9 an offer of proof. That's the way it shakes out.

10 Q (By Mr. White) Mr. Stetson, to what extent did you  
11 determine, if any --

12 MR. CLEAR: I can't hear you.

13 Q (By Mr. White) To what extent did you determine, if  
14 any, whether the adjudicated trust lands included in  
15 HS-1 and HS-3 were, in fact, located within the Wind  
16 River Indian Reservation?

17 A We did not check parcel by parcel to see if they were.  
18 We took the data in HS-1, which was submitted. We  
19 checked it, as I mentioned before, to see which ones  
20 would be within which climatic zones, but we did not  
21 check that each parcel was within the reservation --  
22 we didn't check the reservation boundary against the  
23 parcels.

24 Q Had you known that parcels provided to you in HS-1 were  
25 stetson - cross - white





1 outside the boundaries of the reservation, would you have  
2 included those in your total of adjudicated trust lands?

3 A We would --

4 MR. CLEAR: Excuse me, Your Honor. That's outside  
5 the scope of direct examination.

6 THE SPECIAL MASTER: The objection is overruled.  
7 He may answer.

8 A (By the witness) We would if we had known and had dis-  
9 cussed it with the attorneys and they said this is some-  
10 how land that's outside the reservation, but it's trust  
11 lands for these Indians -- or for this reservation, I  
12 should say.

13 Q (By Mr. White) Would you please turn to page 33 of HS-1?

14 A Yes.

15 Q Do you find on page 33 a Permit Number 11707?

16 A Yes.

17 Q Proof Number 14032?

18 A Yes.

19 Q For 64 acres trust?

20 A 64 acres, trust, yes, sir.

21 Q Mr. Stetson, I hand you what's been marked for identi-  
22 fication as Plaintiff's Exhibit GC-92 --

23 MR. WHITE: And I should explain, Your Honor, that  
24 these exhibits were numbered for use with Mr. Christopulos,  
25 stetson - cross - white



1 but I think we ought to use them right now, and so that  
2 is what the GC is for, Mr. Christopulos --

3 Q (By Mr. White) -- and tell you that it's a certified  
4 copy of Proof Number 14032 for Permit Number 11707.

5 Turning to that proof, which is on the second page  
6 of Exhibit GC-92, isn't it true that the acreage in that  
7 proof totals up to 64 acres?

8 A It says on it 64 acres.

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stetson - cross - white



1 Q (By Mr. White) Okay. And isn't it true that none of the  
2 legal descriptions for the lands included within that 64  
3 acres is with reference to the Wind River meridian?

4 THE SPECIAL MASTER: I don't think that is a fair ques-  
5 tion for this witness. Nothing in his direct dealt with  
6 the land descriptions and titles and status of ownership of  
7 particular land, Mr. White.

8 MR. WHITE: Well, Your Honor, the United States has  
9 not offered to prove a number of things about land status,  
10 such as reacquisition or whether these are within or without  
11 the Reservation or whether or not --

12 THE SPECIAL MASTER: If the land reacquisition --  
13 If the land is not a part of the Reservation, if it's not  
14 included, that's your main case to show. That isn't to  
15 bring out on this witness. I think --

16 MR. WHITE: I don't think it's our burden of proof to  
17 show. I --

18 THE SPECIAL MASTER: I think it is, Mr. White.

19 MR. WHITE: At any rate, Your Honor --

20 THE SPECIAL MASTER: I think it is, Mr. White.

21 MR. WHITE: -- the stipulation between the parties as  
22 to the boundaries of the Wind River Indian Reservation  
23 indicates that only those lands having, or shows that only  
24 those lands having a Wind River meridian legal description  
25 are lands included within the Reservation.



1           The purpose of this line of inquiry, which will cover  
2 some 2750 acres of adjudicated trust lands is to show that  
3 these certificated or adjudicated water rights for which  
4 the lands are included in HS-1 and HS-3, in the United  
5 States' Statement of Claims, are, in fact, outside the  
6 boundaries of the Wind River Indian Reservation as stipu-  
7 lated by the parties. And it seems to me terribly appro-  
8 priate on cross-examination to find out whether or not  
9 these lands which are being included within the claims of  
10 the United States are on the Indian Reservation or within  
11 the boundaries of the Reservation as stipulated by the  
12 parties.

13           THE SPECIAL MASTER: If they are not, then it should  
14 be settled out of this litigation and their claim for water  
15 reduced accordingly. And if they are a part of the area  
16 within the stipulated designation of the Reservation, then  
17 it shall stay in. But is Mr. Stetson your man to prove  
18 that? Can't you prove it with surveyors, with the state  
19 engineers, to show that these particular lands are not  
20 within the Wind River Indian Reservation as stipulated?

21           MR. WHITE: I think I'm entitled to attack HS-3,  
22 Your Honor. HS-3 sets forth what I assume is a claim.

23           THE SPECIAL MASTER: You're attacking your own exhibit  
24 if you're doing that.

25           MR. WHITE: It's a tabular representation --



1 THE SPECIAL MASTER: I'm not sure you mean to do that.

2 MR. WHITE: It's a tabular representation of Mr.  
3 Stetson's testimony, that's what it is. And that's, he's  
4 testified that that represents his testimony as to the  
5 amount of unadjudicated trust land.

6 And what I'm now doing is doing what I have every  
7 right to do, and attack those figures. And I can refer to  
8 it by page and by line in the transcript, but it would be  
9 a lot easier to do it by HS-3.

10 THE SPECIAL MASTER: On the South Fork of the Owl  
11 Creek there's 1620 acres that he included by his own  
12 definition.

13 MR. WHITE: Yes.

14 THE SPECIAL MASTER: You've already shown that 785 of  
15 those are classified nonarable.

16 MR. CLEAR: That was an offer of proof, I think.

17 THE SPECIAL MASTER: I mean an offer of proof that they  
18 are, and you now seek to show that 60 acres, at least 64  
19 acres of it in the Owl Creek Basin is not even a part of  
20 that area on which you parties have stipulated is what  
21 this lawsuit's all about.

22 MR. WHITE: That's through this exhibit. I would go  
23 on to add through another exhibit 27 more acres for a total  
24 of 91 acres upon the South Fork of the Owl Creek.

25 Then I would continue the Main Stem Owl Creek and go



1 over 2667.7 acres.

2 MR. MEMBRINO: Your Honor, I don't have the stipulation  
3 as to the boundaries here in the courtroom. We can check  
4 that this afternoon over the break, but I do not believe  
5 that the stipulation says that the Government's claims are  
6 limited to whatever is within the boundaries. The boundary  
7 stipulation that says what the boundaries are.

8 Now, there are some lands on Padlock Ranch that are  
9 acquired pursuant to the Judgment Fund Distribution Act in  
10 1939. They're trust lands, and we do make a claim for  
11 them.

12 I'm not sure this is a productive line of inquiry to  
13 suggest --

14 THE SPECIAL MASTER: But it's terribly important to  
15 the work I'm doing in writing a decree. If the lands now  
16 being discussed, all 64 acres of them, have their origin in  
17 a reacquisition, then the sooner we get it out of the law-  
18 suit, the better, because it's not going to be given a water  
19 right commensurate with 1868 --

20 MR. MEMBRINO: But, Your Honor --

21 THE SPECIAL MASTER: Assuming that any of this land  
22 north of the Wind River gets an 1868 --

23 MR. MEMBRINO: That's true, Your Honor, but it never-  
24 theless may be entitled to a reserved right with some other  
25 priority date.



1 THE SPECIAL MASTER: That is true.

2 MR. MEMBRINO: The reserved right has a bundle of  
3 incidents, only one of which is a priority date, and if it  
4 is a later priority date than 1868, that is not to dis-  
5 qualify it for all purposes from enjoying a reserved  
6 right. This is a trust land and --

7 THE SPECIAL MASTER: All right, all right. Then let's  
8 first determine, let's first determine whether this land --  
9 We know that it is trust land.

10 MR. WHITE: No, we don't know that, Your Honor, it's  
11 not in the record.

12 THE SPECIAL MASTER: That's in issue. Then why don't  
13 we decide whether this 60 acres of land is trust land or  
14 is not trust land. Now, this witness is not competent to  
15 go into that.

16 MR. ECHOHAWK: That's correct.

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

18 THE SPECIAL MASTER: So that answers that question,  
19 Mr. White. So it has got to come out on your own case or  
20 some other witness.

21 MR. WHITE: It's not our burden of proof to show it's  
22 trust lands, Your Honor.

23 What I want to show is it's outside the Reservation  
24 as stipulated by the parties. That's all I'm trying to  
25 do.



1 THE SPECIAL MASTER: You've done a pretty good job of  
2 doing that in my head, but we've got to do it now in the  
3 record so it will survive an examination of my work.

4 MR. WHITE: Your Honor, if this witness says that  
5 HS-3 is a representation of his testimony, which he did,  
6 and HS-3 includes something in excess of 2700 acres of  
7 lands which are outside the boundaries of the Reservation  
8 according to the stipulation --

9 THE SPECIAL MASTER: It remains for you to prove that.

10 MR. WHITE: It doesn't remain for us to prove, Your  
11 Honor. The burden is on the United States to prove their  
12 claim. The burden is on them to show the lands are trust  
13 and that they're within the Reservation, and there's no  
14 evidence of that.

15 THE SPECIAL MASTER: Well, they have made that asser-  
16 tion now and you've questioned it, you see, you have put it  
17 in issue. But I don't believe you can proceed with this  
18 witness on it now in order to remove it from issue, and to  
19 being clearly an issue you will prevail on, but you're on  
20 the road to doing that. I'm going to have to rule that I  
21 really don't believe this is the witness who can give us  
22 evidence necessary to make a lawful conclusion of law.

23 MR. WHITE: Your Honor --

24 THE SPECIAL MASTER: That this acreage must be --

25 MR. WHITE: All this witness -- I'm sorry, Your Honor.





9-7

1 THE SPECIAL MASTER: -- stricken.

2 MR. WHITE: All this witness has to do is look at the  
3 description. If it's not a Wind River meridian on there,  
4 it's outside the boundaries of the Reservation.

5 MR. CLEAR: There's no meridian on there.

6 MR. WHITE: Pursuant to the stipulation of parties,  
7 I know the United States and Tribes, they're unhappy they  
8 made the stipulation, Your Honor.

9 MR. CLEAR: Your Honor, there's no meridian on this.  
10 This is not a certified copy. It's a copy of a certified  
11 copy.

12 MR. WHITE: Wait a minute, Your Honor. He misstates  
13 the record. If counsel would take the time and courtesy  
14 to examine the exhibit with which the witness had in his  
15 hand and which he is now complaining, he will find it is a  
16 certified copy. And the second thing is that there is no-  
17 body in the world familiar with the Wind River Indian Res-  
18 ervation or the area around it that would contend that  
19 Township 43 North, 99 West is a Wind River meridian town-  
20 ship. And it's clear, not only from the exhibit which is  
21 up on the podium now, but also from the exhibits which are  
22 stacked against the wall, to show that that township is not  
23 in the Wind River, is not a Wind River meridian township,  
24 but instead is a Sixth Principal Meridian township.

25 Now, the Sixth Meridian townships go along the north,



1 they start way over here in Nebraska or someplace, and it  
2 goes to 99 where on Exhibit GC-92, in Township 99 West,  
3 43 North, there's located the 64 acres.

4 THE SPECIAL MASTER: I still say this is not the wit-  
5 ness to bring that out. You have a State Engineer who can  
6 show that. You have others that can do a better job and  
7 are more familiar with it than he is.

8 MR. WHITE: Again, Your Honor, it's not our burden to  
9 prove the United States' case for them. They have not  
10 proved their case. There's at least a representation that  
11 when they put on a witness with testimony about lands, that  
12 that land ought to be within the Reservation or at least  
13 ought to be trust lands. And there's no evidence with  
14 respect to either one of those.

15 I think we're entitled to interrogate this witness to  
16 show, and through no fault of his own, it's not his fault,  
17 but nevertheless, these opinions --

18 THE SPECIAL MASTER: Not his fault, of course, and it's  
19 not his work.

20 MR. WHITE: That's the problem, Your Honor. What's  
21 happened here is that --

22 THE SPECIAL MASTER: Others have given to him informa-  
23 tion to which you are attacking.

24 MR. WHITE: That's right. And the others are  
25 sheltered back there, they don't bring them forward, just



1 like the classification, the Class 6 for the adjudicated  
2 lands. Those people aren't brought forward to bring that  
3 information. They're kept in the background, and selected  
4 information is given to this witness and his neck is stuck  
5 way out, through no fault of his own.

6 We ought to be able to go back through that pipeline  
7 and show you what information was kept from the witness  
8 which would significantly change his conclusions. And it's  
9 not Mr. Stetson's fault, he probably didn't even know that  
10 this information existed.

11 I'd be happy to ask him that question.

12 MR. ROGERS: Your Honor, can we resolve this matter  
13 conclusively after lunch when we have had an opportunity  
14 to check the stipulation?

15 THE SPECIAL MASTER: I would prefer you resolve it  
16 during lunch.

17 MR. ROGERS: Well --

18 THE SPECIAL MASTER: We stand in recess until 1:30.

19 MR. WHITE: Thank you, Your Honor.

20 (Thereupon a lunch recess was  
21 taken at 11:35 a.m.)

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