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File 109
4360
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Case # 4993

File # 109

4360

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

WASHAKIE COUNTY, STATE OF WYOMING

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

Civil No. 4993

FILED

2/6 19 81

Margaret V. Haughton CLERK

DEPUTY

VOLUME II

Afternoon Session

Monday, January 26, 1981

ORIGINAL

(The following proceedings were continued at 1:40 p.m.)

THE SPECIAL MASTER: Come to order, please.

Regina, I thought that your Exhibit C-6 was a roadless area map? Is it, that one there (indicating)?

MS. SLEATER: Exhibit 6, Your Honor, was the CSR regulations relative to the roadless area which you have in your hand.

THE SPECIAL MASTER: I see. And 7 is the map?

MS. SLEATER: Seven is the map with the beige markings which Mr. Harbour is going to explain, hopefully.

THE SPECIAL MASTER: Thank you.

MS. SLEATER: If I might request that Mr. Harbour be given permission to leave the stand, it might help things.

THE SPECIAL MASTER: Sure.

Q (By Ms. Sleater) Mr. Harbour, I see you standing next to U.S. Exhibit marked for identification as WRIR C-7. Can you identify that, please?

A Yes, ma'am. It is the base map of the Reservation, as the previous one, with the outline of the aesthetic area and the roadless area.

Q Will you please indicate for the Court where the outline for the roadless area is?

A The roadless area is south and west, thusly (indicating) of this dashed orange line.

Q Were you personally responsible for the placement of that line?

A Yes, ma'am, I was.

Q Is that the same -- does that line correspond with the legal description as stated in the CSR Exhibit of the United States?

A Yes, ma'am, it does.

Q What do the beige areas represent?

A The beige areas are those areas we have defined as aesthetic that contain the areas -- they are just of the aesthetic area.

Q Were you personally responsible for that?

A Yes, ma'am.

Q Do you know who prepared this exhibit and placed the beige areas upon it?

A This exhibit was also prepared by Stetson Engineers.

Q Does that exhibit fairly and accurately represent the information portrayed as the boundary of the aesthetics areas and boundary of the roadless areas?

A Yes, ma'am.

MS. SLEATER: At this time I would move WRIR Exhibit C-7 be admitted into evidence.

MR. DONNELL: Your Honor, I would like to object. We have absolutely no foundation as to how aesthetics areas, whatever that is, were determined, or by who, using what means or what study, nothing. I would object until we have some foundation.

THE SPECIAL MASTER: I am inclined to agree with the objection, Regina. What is the purpose of the map showing the aesthetic area?

MS. SLEATER: Your Honor, it is my understanding of the Rules of Evidence that before a witness can testify concerning the background information on a map, that the map should be in evidence properly admitted as fairly and accurately representing the information that he placed or caused to have placed thereon.

THE SPECIAL MASTER: Who designated this as an aesthetic area?

MS. SLEATER: Mr. Harbour did. He previously testified to this.

THE SPECIAL MASTER: He did this himself?

THE WITNESS: Yes, sir.

THE SPECIAL MASTER: These are areas you feel have aesthetic value, in your opinion?

THE WITNESS: That is right, Your Honor.

MR. DONNELL: Perhaps he could tell us why that was before this map is admitted in evidence?

MS. SLEATER: Your Honor, I feel that Mr. Donnell should more fully state his objection with his support therefore.

THE SPECIAL MASTER: We will overrule the objection, and I feel sufficient foundation has been laid for it. We will admit it for what it is worth.

MS. SLEATER: Thank you.

(Whereupon, the witness was seated at the witness stand.)

(The instrument received hereinbefore U.S. Exhibit WRIR C-7 was admitted into evidence.)

Q (By Ms. Sleater) Mr. Harbour, I believe you said you were responsible for the delineation of what has been called the aesthetic areas?

A That is correct.

Q Could you describe these areas generally?

A These areas that are delineated and colored in a tan color are those areas of the Reservation that are the high mountain areas containing lakes,

streams, and primarily the timber resources on the Reservation. They are very, very colorful and pretty and remain in, you know, a limited-use status. There is very little -- well, the proper word is there is very little of the amount of buildings and roads and that type of thing that are in there. There are some roads, but they are not -- those areas that are maintained, there is not a whole lot of use by man in these areas other than they are used for grazing cattle and that type of thing.

Q What is the land status in these areas?

A Primarily the land status in these areas is Tribal. However, in the Owl Creek delineation, which is the northern one on the map, there are three pieces of see land which we feel that by making a claim in this area will have no affect on their future use and water.

Q Is there any wildlife on these areas?

A The big game species that frequent these areas are bighorn sheep, deer and elk.

Q You said there was limited use. What use is there made of these areas today?

A This --

THE SPECIAL MASTER: I believe he answered

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just grazing, I believe the answer was. Is that correct?

THE WITNESS: There is some timbering on these areas on occasion.

Q (By Ms. Sleater) Is there any timbering going on there now?

A No, ma'am, not at the present time.

Q Are these areas available for fishing?

A With the Tribal permit, yes, ma'am.

Q In your professional opinion what water is necessary for these areas?

MR. MERRILL: Objection, Your Honor. There is no foundation that he can form a professional opinion as to the water requirements for these areas.

THE SPECIAL MASTER: I am inclined to agree with the objection, but I am going to overrule it.

THE WITNESS: In my opinion, it would take all of the water that is in these areas to maintain it in the state that it presently is.

Q (By Ms. Sleater) Why is that?

A Anytime that you would remove water from an area like that, then it would not be in the state that it is today, it would be in a deteriorated

condition.

Q I believe you stated that you do not feel that these areas would affect the use of water by fee owners within the Owl Creek area. Could you explain what affect you would think the granting of a right, such as you in your professional opinion think is necessary for these areas, would have?

MR. MERRILL: Objection. Based on what, Your Honor?

THE SPECIAL MASTER: I am inclined to agree with that objection.

MR. MERRILL: There is no foundation at all when the effect might be. The man is not a hydrologist.

THE SPECIAL MASTER: I would agree with that. He testified it would take away water which is valuable.

Q (By Ms. Sleater) Mr. Harbour, is this, the water which you feel is necessary for that area, is it to be consumed in any way in the areas?

A The only consumption that I can envision in that area would be the consumption of water by livestock that would happen to be grazing there and the wildlife. Other than that, you know, as an

ultimate consumption, no.

MS. SLEATER: Thank you. That is all.

THE SPECIAL MASTER: Is there some provision for firefighting if there is a fire in the forest?

THE WITNESS: Yes, but usually that has been by slurry bombers and not a whole lot of water is used anymore.

MS. SLEATER: That's all I have, Your Honor. Thank you.

THE SPECIAL MASTER: Any questions by the State of Wyoming?

MR. WHITE: What?

THE SPECIAL MASTER: Questions by the State?

MR. WHITE: Is this cross-examination, Your Honor? I think the appropriate schedule would be to let the Tribes go first. They are aligned with the United States in this matter.

MR. SACHSE: We have no cross-examination, Your Honor.

MR. ROGERS: None, Your Honor.

THE SPECIAL MASTER: Do you wish other defendants to go first, too, Mr. White?

Are there any other defendants -- attorneys for defendants?

(No response.)

THE SPECIAL MASTER: The State of Wyoming?

MR. WHITE: I believe Ms. Yonkee wanted to go ahead, Your Honor.

MS. YONKEE: Do you want me to go ahead before the State of Wyoming?

THE SPECIAL MASTER: It doesn't make any difference.

MS. YONKEE: I just had a question or two.

CROSS-EXAMINATION

BY MS. YONKEE:

Q I was wondering about the Arapahoe Ranch. Wasn't that obtained through a corporation? I thought at the time that there was a great deal of publicity about the Arapahoe Ranch being obtained through a corporation somehow. Is this true?

A I don't understand your question, Ms. Yonkee, but I have no knowledge that that is the case. Corporate involvement is something that I have no knowledge of.

MS. YONKEE: I see.

* * * * *

Q. (By Ms. Yonkee) I see. Is it your understanding that the Arapahoe Ranch is a part of the Indian reservation itself?

A. Yes, ma'am.

Q. And you stated something about where the Shoshone live and where the Arapahoe Indians live. The Shoshones live on the west part, you said; the Arapahoes, for the most part, on the right, but wasn't that generally in the southern part of the reservation rather than in the norther?

A. I said the majority, Ms. Yonkee, and that doesn't include all of the people who live on the reservation, but that is the general areas that they live in. There are other people residing on the reservation outside of those areas that fit in those tribes --

Q. But I meant wasn't that more in the southern part of the reservation?

A. Yes, ma'am, it is.

Q. It isn't that way in the northern part or around the Owl Creek area?

A. Well, primarily, to answer your question, if I may, most of the people who live in the Owl Creek area or in Thermopolis are Arapahoes, but we don't consider them the majority of the population. Now,

there are not that many of them over there, and that's why --

Q. It's a small part of the people who live in the Owl Creek area?

A. Yes, ma'am, that's why I didn't elaborate on that.

Q. I see and understand that the consumption in the ten colored areas was mostly for wildlife and animals. There is some domestic, isn't there, with people who keep summer camps and such?

A. Well, yes, ma'am, there would be if they had a cow camp up there in the summertime. Certainly there would be some.

MS. YONKEE: Thank you. That's all.

CROSS-EXAMINATION

BY MR. MERRILL:

Q. Rich, would you describe in a little more detail the management of the Arapahoe Ranch?

A. Well, from my earlier testimony, the Arapahoe Ranch is an Arapahoe tribal enterprise operated by the Arapahoe Tribe for the benefit of the Arapahoe people. They hire a manager and all of the help, the majority of their help being Arapahoe tribal members, and the operation is a cow-calf yearling operation. In a nutshell, you know that's what the operation consists of.

Q. Who is the manager of the ranch?

A. Currently the manager's name is Ron Hoffman.

Q. Is he an Indian?

A. No, sir, he is not.

Q. Approximately how many people does the ranch employ?

A. Well, it depends on the time of year, but right now I'd say they have in the neighborhood of -- I can't give you an exact figure because, you know, I haven't been over there to count them, but I'd say in the neighborhood of 20 right now.

Q. And of those 20 folks, how many are Indians, enrolled members of one of the two tribes?

A. I would venture to say 17 of them.

Q. What types of positions do the Indians hold in the management of the ranch?

A. The cow foreman and the ranch foreman are both Indians. All except one of the cowboys are Indians, and then the farm help are all Indians.

Q. Do you know how much acquired land there is in the Arapahoe Ranch?

A. In acres?

Q. Yes.

A. No, I can't off of the top of my head tell you how much of those acres was bought.

Q. Do you know how much reserve land there is in the Arapahoe Ranch?

A. Well, are you talking about the ranch as a total entity?

Q. Yes.

A. That's approximately 3,000 acres.

Q. Of reserve land?

A. It's all reserve land. I'm assuming you are using the term "reserve" as we use it analogously with trust.

Q. No, I'm using it as reserved, meaning that land has been reserved from the public domain and is part of the Wind River Indian Reservation.

A. All right. Fine.

Q. Is your answer still the same?

A. It's still the same.

Q. Rich, as a resource manager, resource planner, would you say that there is a need for common definitions to be used in resource management?

A. It makes it much easier to work with if that is the case, yes.

Q. So, for example, we might define grazing capacities in terms of AUM's?

A. Yes, sir.

Q. And is that a fairly widely accepted definition

or a term so that if you go talk to somebody in New Mexico about AUM's, they know what you are talking about?

A. If they are technicians in the field, yes.

Q. Does the same hold true, for example, with respect to soil composition?

A. Yes.

Q. Percentage of sand and loam and clay?

A. Right.

Q. Would the same be true of the SCS system called the Range Site Index that is used to determine natural vegetation?

A. Yes.

Q. So that you have some common ground of definitions with which to communicate?

A. That is correct.

Q. Do you think, as a natural resource planner, it would create a problem if all natural resource planners were to establish their own standards and definitions?

A. It would cause a communication problem, yes.

Q. Do you think it would cause a management problem, or could cause?

A. Are you talking about interagency?

Q. Yes, I'm talking about various management people

trying to communicate with one another about how to attempt to manage a piece of ground or a resource.

A. I think that's a real probability. It could cause come problems, communication problems, if you couldn't talk it out among yourselves.

Q. Rich, is it true you did not use the United States Forest Service visual management system to delineate the area that's shown or the two areas shown as aesthetic areas on Exhibit C-7?

A. That is right.

Q. Is it true that you are not familiar with the Forest Service visual management system?

A. Well, I know it exists, but I'm not familiar with it.

Q. I take it then that you don't know that the system has been used by the Forest Service to classify millions of acres of land under its jurisdiction?

A. Well, yeah, we know that it's been used by other people, but I don't know enough about the system to use it myself.

Q. Are you aware that the visual management system that's been adopted by the Forest Service is a commonly accepted technique within the Forest Service for talking about forest lands?

A. No, I have not communicated with the Forest Service

on any of this type of thing, so what you are telling me is something that is new to me. I'm assuming that's the case, but I don't know that as a fact.

Q. Rich, is it true that you didn't use any other systematic approach in determining the two aesthetic areas shown on Exhibit C-7?

A. Well, the approach that I used, I think, was systematic, but it is not within the definition of the system that you were speaking of.

Q. And the system that you used was essentially to take the steep, high, wooded areas and try to include those in your areas; is that correct?

A. Plus the visual management, the visual thing, too. The visual thing enters into this also, but I did not use that other approach, the formal approach.

Q. Rich, is it true that in determining the two aesthetic areas you made no determination of the aesthetic qualities of those areas as they would vary with different levels of stream flow?

A. Well, I relied upon my judgment and knowledge of the area over the time that I have been around here. But, in answer to your question, you know, we used it on basically a year-around type of judgment, not specifically any time of year, whether it be low

water or high water, that type thing.

* * * * *

Q (By Mr. Merrill) (Continued) Is it true that you didn't make a determination of what the aesthetic qualities of those areas or any other area would be with, say, fifty percent of the natural stream flow?

A That is correct, because we looked at it in an overall viewpoint, and not in a specific viewpoint.

Q Is it true that you didn't make any determination of the flow requirements of the streams in those two areas based on the streambed shape, whether it was shallow, bowl or a flat bed with rigid walls?

A The streambed conformation was not taken into consideration, no.

Q Okay. Did you make any determination of the bearing flow requirements based on the natural vegetation in those areas?

A No.

Q Or change with altitude?

A Yes. That was taken into consideration, in that we think those streams should maintain their natural flows in order to sustain the vegetation as it is today.

Q Did you make any determination as to what the effect on the vegetation would be if the natural

flows were not preserved at any specific level of natural flow percentage?

A Specifically it is no, but if the streams were less than full, the vegetation would not sustain itself, you know, as it is.

Q Did you make any determination of the amount of wildlife habitats that would be available in these areas at different levels of stream flow?

A Yeah, that was taken into consideration under the same, as the previous question. If the habitat is not as desirable, species will not be in there -- in the same abundance as it is in its optimum level.

Q Rich, is it true that you define an aesthetic area one which is beautiful and pristine.

A Well, in my deposition I used the word "pristine", but I qualify that definition considerably. Pristine is a word that is very hard to use and not use it in the context of a wilderness area and this definitely is not a wilderness area.

Q Could it be that ninety percent of the entire flow of the streams would be sufficient then to maintain the aesthetic qualities?

A No, that is not my judgment. My judgment is it would take one hundred percent.

Q Only a hundred percent will do?

A Well, that's all of it.

Q Okay.

MR. MERRILL: Just one moment, please, Your Honor.

(Brief pause.

Q (By Mr. Merrill) Rich, directing your attention back to the United States Exhibit WRIR C-3, which I will turn around so you and the Court can both look at it, did you state in your direct testimony that that is a color infrared photograph of the area included within the Wind River Indian Reservation?

A I believe that's correct.

Q Isn't it true that with color infrared photography, you can determine the stress levels of vegetation by the intensity of the red coloring that shows up?

A Since I'm not an expert in color infrared photography, I've heard that said, but I can't testify to that. I don't know that that's the case.

Q Could you approach Exhibit C-3 and show the Master in the areas of vegetation on that photograph which are shown as being under stress because of that color?

A Under stress?

Q Yes.

A Well, the only thing I can assume that you mean by stress, and I'll try to answer your question as best I can, but I'm not sure I fully understand it. And by stress, I'm assuming you mean that there are not other waters than the natural flowing waters out of streams.

Q I mean that there is some constriction of the plant's needs, either water or nutrients that are preventing it from reaching its optimum growthage.

A Then I would say that would be primarily the areas that are the range areas where there are low rainfall, which would be -- these areas and some of the areas along the foothills (indicating).

Q Are there any such areas in the areas you have designated as aesthetic areas?

A There very probably are. However, I'm not able to identify them on this map.

Q That's fine, thank you.

(Brief pause.

MR. MERRILL: Your Honor, before closing with Mr. Harbour, I would ask the Master to take judicial notice of the fact that in the Boundary Statement filed by the United States in September

of 1979, there were deeds attached to that Boundary Statement which show that the Arapaho Ranch portion of the Indian reservation was acquired by deed and was not reserved by the United States for the Indian tribes.

Also, Your Honor, I would move to strike the United States WRIR C-3 on the grounds that the witness is unable to define what the colors in that photograph mean, he has testified that they do not depict the true colors that would be seen by an observer looking at that piece of land from out in space, and yet he is unable to say for himself what various shadings of red mean. He's not sure what evidence can be aduced off that map, and therefore it's not probative.

THE SPECIAL MASTER: Maybe it has virtually no probative value, you may be correct, but I don't think I want to strike it.

As to your first observation, I'm happy to make that if you -- do you recall the page on which the United States statement was referred to, the Arapahoe Ranch was referred to, was it in the --

MR. MERRILL: I'm afraid I'm not at this time, Your Honor, but I can sure go find it.

THE SPECIAL MASTER: If you can let me

know later, I'd appreciate it.

MR. MERRILL: Thank you, Your Honor, I have no further questions.

MR. SACHSE: Your Honor, I want to register an objection to the form of Mr. Merrill's objection. I think it's confusing when he states then land that was purchased to become part of the Arapahoe Ranch is not reserved land. I think there's a mistake in law there, at least a confusion in terms, because land can be purchased and then held in trust by the United States for the tribes, and in that sense it is still land reserved.

THE SPECIAL MASTER: That is true, Mr. Sachse, but is it your contention or that of the United States that lands so purchased will benefit by a reserved doctrine of Winters Doctrine regarding its water?

MR. SACHSE: If the land was never reserved land, part of the reservation before it was purchased from a private individual, it would be the, it's our position, I think it's also the law is clear that we would have a reserve water right dating from the date of its purchase. It would be a very late reserve water right, that would be different than land that had once been

reserved within the reservation and then been reacquired.

THE SPECIAL MASTER: Thank you.

MR. MERRILL: Your Honor, we obviously disagree with Mr. Sachse on that point, and I expect you'll see it again in closing briefs.

THE SPECIAL MASTER: Oh, yes.

MR. ROGERS: One more point, Your Honor, in that I agree with what Mr. Sachse said, but it is also true that portions of the Arapahoe Ranch area lie within the exterior boundaries of the reservation that the State has stipulated to.

MR. MERRILL: Your Honor, it's all well and good for Mr. Rogers to say that, but as you very well know, the statements of counsel are not evidence. There's been no showing on the record that that's been the case.

THE SPECIAL MASTER: All right. Next --

MR. DONNELL: Could I ask just a couple of questions?

THE SPECIAL MASTER: Yes, Mr. Donnell.

CROSS-EXAMINATION

BY MR. DONNELL:

Q Rich, did you conduct any public surveys to determine what aesthetic values the public placed

on these areas?

A By definition of public, do you mean, are the Indians public?

Q No. I mean only the public in general.

A No.

Q Did you conduct any such surveys among the Indian public?

A No. I didn't even conduct a survey of my own Indian people. I talked to them, but I didn't conduct a survey in the definition of a survey.

Q So you don't even know or have any evidence to know what the Indians think about this area?

A Yes, I think I do.

Q That isn't what I asked you. You don't have any survey to indicate that, do you?

A No, I don't have the surveys, no.

Q Now, you said, and I'm trying to understand the standard, apparently you didn't use accepted standards, forest service standards in determining these areas, right?

A I didn't use the standards that Mr. Merrill was talking about, no.

Q Well, what standards did you use?

A I used the standards that I have in on my own from my experience in living. They are not published

standards.

Q In other words, you decided what you liked and that's what's on the map?

A Essentially.

Q And that is, that's a subjective judgment, isn't it?

A Yes, but I don't think it will differ very much from any of the others, even though they were conducted under the standards that are acceptable.

Q And not based on any scientific standard, in fact, isn't it?

A Well, I wouldn't go so far as to say that. There's scientific standards that I use in my daily operation that would fit into that category.

Q Well, did you use scientific standards, forest service standards in making these delineations?

A By forest service standards, which ones are you talking about?

Q The ones Mr. Merrill talked about.

A As I stated earlier, I did not use those.

Q And you stated you used your own experience in life in making these judgments; is that right?

A Some of the scientific knowledge that I have, yes.

MR. DONNELL: That's all I have.

THE SPECIAL MASTER: Mr. Webster.

MR. WEBSTER: Just a question or two, Your Honor.

CROSS-EXAMINATION

BY MR. WEBSTER:

Q Mr. Harbour, I was interested in your responses just a minute ago. What scientific standards are we talking about?

A We can talk about soil and range inventories, that type of thing that are used in there; the management standards that are used to manage areas such as these or the utilization of resources which are available in those areas.

Q As I recall your prior testimony, you referred to those areas as being beautiful, and in your deposition apparently you refer to them as being pristine. You apparently construct that part of it, but have you used scientific standards to determine that the areas were beautiful?

A No, no. That's a visual observation.

Q So that's something else you did besides, in order to determine that these were aesthetic areas, you made a determination of scientific standards as well as beauty; is that correct?

A That's correct.

Q (By Mr, Webster) And are those types of determinations, were those a part of a study of some major? I don't -- I mean, did you actually go out there and study the aesthetic areas and apply those scientific standards to them?

A Not specifically at the time I did this. I did this from my memory and knowledge of the area, and it was not done as a specific project going out and doing the study itself. It was done from recollection and knowledge.

Q Is that kind of information available?

A No, it is not. It is something I have in my head.

MR. WEBSTER: I don't believe I have any further questions, Jim.

THE SPECIAL MASTER: Mr. Fillerup?

CROSS-EXAMINATION

BY MR. FILLERUP:

Q Mr. Harbour, I'm not sure I understand the significance of these aesthetic areas and the water you are saying should remain there. Would you explain it to me just what you are getting at with that?

A What we're after, is what we are asking in this case is that we would like for all of the water to -- that's in those areas to be not claimed and let it

flow out the bottom of those areas, out of the bottom downstream, in order for that to remain in its present state. If there were claims filed on that water and it was diverted out of there, then this area would not remain in its pilgrim state.

Q Is there any diversion proposed at the present time?

A Not to my knowledge.

Q What you are really asking, then, is that it remain as is, the natural rainfall or snowfall, that lands in those areas have its natural process of -- as a watershed and flow naturally from those areas?

A Correct.

Q Unimpeded and unreserved in any way?

A Well, I wouldn't say unreserved because I would like for those waters to be reserved for the use of the tribes, but they will go out the bottom. You know, the downstream users, we are asking for those waters to belong to the Indian people. But they will not be consumed in that area unless there is something in the future that would happen up there that I have no way of knowing that.

Q Well, is it your position, then, that those waters somehow will be used on the other portions of the reservation just because they happen to be within

that watershed?

A They do flow to the other portions of the reservation and into the Big Horn, which is a part of the Big Horn system, and there is an awfully good chance that some of that water will be used anywhere, you know, it's hard to say what water will end up where, but it could be used on the reservation.

Q Are you claiming that you have a vested interest in that water on the reservation at the present time?

A I would say the tribes have a vested interest in it, yes. It's water that lies on lands that belong to the Indian tribes.

Q Other than a natural watershed, what beneficial use is being made of that particular water?

A At the present time? It just maintains, you know, the area as it is, because it does flow out.

MR. FILLERUP: No further questions.

THE SPECIAL MASTER: All right, thank you. I would like to ask a few questions.

THE WITNESS: Certainly.

THE SPECIAL MASTER: Do you have figures regarding annual moisture requirements or annual snowpack that gives you the optimum years in this area, or have you some experience of record keeping

of low annual snowpack areas and can make -- submit to the Court some records regarding highs and lows, high altitude, high country?

THE WITNESS: Yes, Your Honor, we do have those records available.

THE SPECIAL MASTER: You haven't prepared them for this hearing, however?

THE WITNESS: No, sir.

THE SPECIAL MASTER: If I were to say to you that a United States Supreme Court decision in the last several years held that the United States of America doesn't even have a reserved right to feed in the forests in the high country the birds and the wildlife in that area, you would not feel that that type of a decision would apply either to the high forest or to the Indian lands in the high countries of Wyoming?

THE WITNESS: Well, I know what you are talking about, but my position is thus, that due to the Treaty of 1868, we feel that the Indians should have the water to sustain a homeland for them.

THE SPECIAL MASTER: Let me ask you a reasonable question as a manager of land and one who knows something about grazing: If a law were

to be attempted or a decision that said the grazer of livestock in the high country mustn't allow his cattle to drink the water in the high country stream, he has to take it out of their lower appropriation, how could grazing continue in the forest in the high country?

THE WITNESS: It could not.

THE SPECIAL MASTER: If there's one thing in this lawsuit that everybody agrees on, Indian and non-Indian, that's it. I'm glad you helped me bring it out. I have no further questions.

Did you have an additional question?

MS. YONKEE: I would like to ask one more.

(FURTHER) CROSS-EXAMINATION

BY MS. YONKEE:

Q I notice your area goes up along the Big Horn River, a certain area along the Big Horn River there, and there are --

THE SPECIAL MASTER: Are you referring to the wetting of the waters in the canyon?

MS. YONKEE: Yes, above that. I mean, it would be south of that. There are certain areas in there that are owned by individual people. They have various -- there have been homes built in there,

and yet that is all in the colored area.

THE WITNESS: Ms. Yonkee, the bottom part of that canyon has been eliminated from this area in the bottom of the canyon where the roads, the railroads and the river run. That is not part of the claimed area.

Q (By Ms. Yonkee) Where these homesites are is not part of the claimed area?

A No, unless they are way back up in the canyon, which they are not, then they are not included in this area, no, ma'am.

MS. YONKEE: Thank you.

THE SPECIAL MASTER: Well, I thank you.

THE WITNESS: You're welcome, sir.

THE SPECIAL MASTER: Regina?

MR. GRAVES: May it please the Court --

THE SPECIAL MASTER: Mr. Graves, I beg your pardon.

MR. GRAVES: Before we go on to the next witness -- Mr. Harbour can be excused -- but before we go on to the next witness, the United States would like to request the Court or advise the Court that we believe that Rule Sixteen of the -- Rule 615 of the Wyoming Rules of Evidence, Subsection 3, provides that we are entitled to have expert

witnesses in the case on the United States side whose presence is shown by a party to be essential to the presentation of his case.. The United States asserts that the expert witnesses that we are going to call are essential to the presentation of our case and will be essential to be in the courtroom to assist in managing the case when the State's experts are testifying. We feel that, of course, under those circumstances the State should have the same right.

THE SPECIAL MASTER: Do you feel the exclusion of these witnesses, then, should not take place?

MR. GRAVES: We are saying as far as the expert witnesses are concerned, we think -- not fact witnesses, but expert witnesses under the Rules and under the cases which you have construed the rule, and we will be glad to give you those cases, that the rule does not apply to expert witnesses because experts do not testify as to facts; and that Rule 615 is designed solely to prevent some kind of collusion between fact witnesses as opposed to expert, and so we would ask Your Honor that our expert witnesses be allowed to remain in the courtroom.

THE SPECIAL MASTER: I would like to hear from Mr. White.

MR. WHITE: Your Honor, we would object to that for several reasons: First of all, the rule did not expressly exclude experts from the exclusionary provisions. Second of all, I believe there is a certain ancient legal maxim that says what's sauce for the goose is sauce for the gander.

You may recall the rule was invoked earlier when we had hearings in Senate chambers and that that rule was invoked by the United States and the Tribes against Wyoming's experts.

MS. SLEATER: That's not so.

MR. WHITE: Wait, wait. There was no suggestion that it wouldn't apply to experts. The attempt was made and successful to exclude our experts from the courtroom.

More importantly, if the Court rules that experts may be part of this grand show here, if they may be present in the courtroom, then I think we have to start from ground zero with Mr. Harbour. We have an aesthetics expert who was excluded from the courtroom during Mr. Harbour's testimony. He was not here, and if the rules of the game change in midstream, then the State would be prejudiced

and we would ask the Court to require Mr. Harbour's testimony and all exhibits entered through him to be stricken, and we will start again and have our experts here while the United States' experts testify.

* * * * *

MR. WHITE: (Continuing) Finally, Your Honor, I would like to say that one of the reasons we asked for the witnesses to be excluded was that our experience during depositions showed that many of the experts endorsed by the United States were unable really to stand on their own two feet and give an expert opinion. They were looking to either counsel or other sort of super experts, managing experts, to help them with their answers, and we thought it would be appropriate for the Court to hear from the experts themselves and not from them having been coached one way or the other by counsel or the other expert witnesses.

So, in general, I have got three points: First, the rule has already been used against us and our experts in this action when we were in the Senate Chambers.

Secondly, it's already been used against us this morning. The United States was quite happy to see our experts leave while they put on an expert, and now they run back in and suggest their experts ought to be allowed to participate in the trial. I think that -- I just don't know quite what to say about it.

And, finally, Your Honor, I think you are

entitled to see what experts say themselves and not what other experts may encourage them to say by their presence in the courtroom.

THE SPECIAL MASTER: Mr. Graves, that's an awfully hard objection for me to take issue with, and I welcome your presentation of your side of this one more time.

MR. GRAVES: All right, Your Honor. As far as Mr. Harbour is concerned, I think if there is any problem, Mr. White has ordered a daily transcript, and we see no problem with Mr. White's experts reading the testimony of Mr. Harbour.

As Mr. Harbour himself indicates that although he has a background in the areas that he has testified to, that his testimony is principally what he observed onsite in the performance of his duties.

Number two, I don't believe that there is any basis in the law that says that -- and I wasn't present at the time that the United States, if it did call the rule -- I merely heard co-counsel screaming that that's not quite what happened, and Mr. White has a way of flavoring the facts to favor his argument.

MR. WHITE: Maybe one or two others do the same.

THE SPECIAL MASTER: I think the Attorney General alluded to the fact that we are all advocating a little advocacy these days.

MR. GRAVES: Number three, Your Honor, I would suspect that the State, inasmuch as they are reluctant to have their concern about our experts as opposed to their experts -- the inference from Mr. White was that our experts would be coached, and I think the fact remains that our experts and no expert is going to have to stand -- all experts are going to have to stand on the merits of their own testimony, and I think that's an erroneous and fallacious statement.

And, finally, I would like to read to the Court from the Federal Court case that has decided this issue, a 6th Circuit case, which was submitted to the United States Supreme Court and cert was denied on it, and I quote: "Plaintiff claims the trial court" -- this is on 570 Fed. 2d, 626, Morvant vs. Construction Aggregates Corporation, a 1978 decision, which took place after the adoption of the Wyoming Rules of Evidence which are identical to the Federal Rules of Evidence.

"Plaintiff claims the trial court erred in excluding from the courtroom her expert on marine

surveying. Although she intended to call the expert as a witness, she nevertheless claimed he was exempt from sequestration under subsection (3) of Rule 615, Federal Rules of Evidence. Rule 615 provides" -- and it's identical to the Wyoming Rules -- "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of the party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause."

"Judge Weinstein recognizes that exception 3 of the Rule 615 will be most frequently invoked in the case of expert witnesses, but observes that 'the responsibility for demonstrating that a given witness is essential lies with the parties.'"

"In support of her position, plaintiff now urges on appeal:

"The complicated and unusual circumstances surrounding the facts of this case and the highly technical nature of the unseaworthiness issue made

the advice of an expert, on the spot, essential to the presentation of plaintiff's cause. The record clearly substantiates this contention."

And I submit, Your Honor, that this is clearly a complicated and unusual circumstance with facts in this case that are of a highly technical nature. And we feel that the presence of expert witnesses in the courtroom during the time when the State's experts are testifying is essential to the presentation of its case.

THE SPECIAL MASTER: State to me the comparable rule, will you, please?

MR. GRAVES: Yes, it's Rule 15 of the Wyoming Rules of Evidence.

THE SPECIAL MASTER: And we will take about five minutes for a break on this.

MR. ROGERS: Your Honor, may we say something on it?

THE SPECIAL MASTER: Well, you had better do it now, Mr. Rogers, so you can have a few minutes now if you wish.

MR. WHITE: I would also like to say something, and it probably ought to be before Mr. Rogers or the other folks.

THE SPECIAL MASTER: Would you be the last to

speak from your side?

MR. SACHSE: It depends on what he says.

THE SPECIAL MASTER: Why don't you let Mr. White go ahead?

MR. WHITE: I would like to say that I believe, furthermore, that the United States has waived its right to invoke the third subportion of this rule --

THE SPECIAL MASTER: I'm awfully much inclined to agree with Mr. White, my friends from the U.S. Government. You saw the rule invoked. You saw the witnesses leave. I asked time and again if there were any other witnesses. But you saw three of your witnesses sworn and the other two leave and then we put a witness on the stand, and then you say to me let's keep our man in court.

MR. GRAVES: Well, Your Honor --

THE SPECIAL MASTER: And that strikes me as having a little bit of --

MR. WHITE: The second point I would like to make, Your Honor --

THE SPECIAL MASTER: Mr. White?

MR. WHITE: That is that the rule that Mr. Graves read, 615(3) -- the rule doesn't apply to a person whose presence is shown by a party to be

essential to the presentation of his cause. The operative words are "is shown to be by a party."

In other words, there has to be a showing that these people are absolutely necessary to the presentation of their cause, not to reviewing what another expert says, but reviewing something which is required for them to be there in order to have the cause presented.

There's been no such factual showing. It requires that, and the Court can make a determination. So, in addition to waiver, we say there has been no factual showing, Your Honor, and I think it would require the taking of evidence and the demonstration of why trial counsel for the United States is not adequately prepared to cross-examine our experts.

MR. GRAVES: May it please the Court? Now, may I respond?

THE SPECIAL MASTER: Yeah.

MR. GRAVES: I think it would be absolutely and totally inequitable, Your Honor, for the Court to take the position that the United States has waived this subsection (3) of these Rules after the first witness who testifies who is essentially a fact witness.

Number one, the reason is that we don't need to have any other witness in the courtroom during the time that Mr. Harbour is testifying.

Number two, we have no problem in going through Mr. Harbour's all over again or having the court reporter read back all of the testimony that Mr. Harbour makes and have their experts sit in here.

Number four, I don't believe they have an expert who is going to counter Mr. Harbour.

And, number five, I think that if the Court reads the case, it will find that the statement -- the Court in that case said that a representation by counsel should be accepted on its face that the presence of an expert witness is mecessary and essential to the presentation of his cause.

And under all those reasons it seems to me that -- I agree we should have raised the issue earlier.

Unfortunately, Mr. White, in his expertise as a trial lawyer, caught us a little surprised. We didn't think of the ramifications of the objection until we'd thought about it for a moment.

The fact remains that I think it would deprive us of due process for the Court to now

deny the request. And, under the circumstances, where certainly it may be remedied by either reading the transcripts or we would be glad to redo Mr. Harbour, and I think our representation should stand on its face based on that case and the other cases which have dealt with this issue.

THE SPECIAL MASTER: Mr. Rogers.

MR. ROGERS: Your Honor, I just wanted to point out that the particular circumstances of this case -- it seems to be the concern about Mr. Harbour's testimony is a di minimus factor in view of the recognition that there are going to be probably scores of expert witnesses over weeks of time, and we're talking about the importance of this rule in the context of the case based on the fact that the witness has only been on the stand for a couple of hours, which is going to rule what happens in the rest of the case. But the real fact of it seems to me to be that since it is within the discretion of the Court to rule on this, to recognize the fact that the State has ordered daily transcripts. And, unless they were to change that, that daily transcript is, in fact, going to be available to all of their experts,who will have a chance to see it.

It may not be that all of the parties are going to be able to afford a daily transcript in this case. And it's far more convenient for the Tribes to have what experts they may want of their own to hear this, and we also have an interese in the experts of the United States being able to hear it, too.

It's a matter of some convenience to be able to hear it when it's presented, rather than having to read through it. But the fact is the State will have a transcript available, I assume, overnight, so that their other experts can be well aware of what the witnesses have said here in court the same day. So that the real purpose of the rule is, in fact, obviated by the ordering of a daily transcript.

MR. GRAVES: Your Honor, finally, I would like to point out to the Court that Weinstein suggests that if the rule is called, that the witnesses may not review the testimony of witnesses who have testified previously because that would be a total violation of the rule.

In this case where daily transcripts have been asked for, I think there is no way in the world that we can equitably enforce that situation. And, under the circumstances, this request should be

recognized.

THE SPECIAL MASTER: Mr. Sachse.

MR. SACHSE: I don't care very much what we do one way or the other about experts listening to Mr. Harbour's testimony, but we are at the very beginning of what appears to be a long case involving expert witnesses. and I don't want some rule to be made now that's going to be a problem for all of us later on.

As to Mr. White's point that you thought had a good deal of equity to it, the first thing is I don't recall any State experts ever previously having been excluded.

If they were, perhaps Mr. White can point to the pages in the record where it was done because he has the whole thing apparently on some computer that should spit that out. I may not simply have been there the day it was done. I'm only stating I don't recall it.

Secondly, Mr. White has no grounds to complain about his experts leaving the room because it's he who invoked the rule to everyone's surprise and in a fashion far broader than the rule goes. And what happened is it took lunch time and a few people looking up some law to see how wrong he was.

When I stood up just on instinct and general experience to say that my clients couldn't be excluded from the room, Mr. White says, "We'll let them stay, but they could be excluded under the rule." And yet the rule says officers or employees of the party which is not a natural person designated as its representative by its attorneys cannot be excluded. So he's wrong on that, you see. And it seems to me that you shouldn't fall into a trap here just because we didn't react immediately to what Mr. White was doing.

It's going to be important in this case when the witnesses who are really going to be talking about practicably irrigable acreage and so forth for other experts to be listening to them.

I can tell you one example, for instance, that when both the Government's economists and the State's economists are talking about economic tests for this, the Tribes are going to want to have their economists in here listening to it because what the Government and the State are applying is too rigid a test. So I think there does have to be a large -- I think the purpose of Rule 615 is to keep an automobile accident -- one witness from saying what the next witness says. I don't think

it has any legitimate application to expert witnesses who are going to be testing what the other expert witnesses have testified to.

MR. GRAVES: Your Honor, finally --

MR. WHITE: Do I get to say something at any time?

MR. GRAVES: Go ahead.

THE SPECIAL MASTER: I'm ready to deliberate on this without any additional argument from anybody if I may have the citations on it, and give me about ten or fifteen minutes to do so.

MR. GRAVES: We would be glad to provide you with a variety of citations, Your Honor.

MR. WHITE: We would like to have copies of whatever they provide you.

MR. GRAVES: We would be glad to go Xerox them while the Special Master waits.

THE SPECIAL MASTER: Let's take a fifteen-minute recess while we take this question under advisement.

(Whereupon a recess was had,

* * * * *

THE SPECIAL MASTER: We'll come to order, please, Mr. Graves, I've examined the authority that's been brought to the bench on this matter, and I find that under the rule the discretion of the judge as to that exclusion 3 under 6-15 is still pretty much one of discretion, and I'm also going to come down on the side of denying you the exception you asked for because the key word to me is "essential", and I don't believe that this witness -- where is he -- that this witness's testimony was essential to establishing this area of aesthetics on the reservation. He testified as an individual without particular scientific training, using nationally accepted standards. He testified as to what his, in his mind is the beauty of this area, beautiful. He even -- I don't believe that such testimony is so much the testimony of an expert whose essentiality defeats the purpose you're trying to set.

Now, you gentlemen and ladies have been living with these witnesses for weeks and weeks on depositions, and you're much closer to them in what you're doing, but I believe the exception that calls for the rule was made, there was no

position at the time about that, and to wait two or three hours and then invoke it, I think is not proper and then I believe that, if my memory doesn't serve me correctly, I believe in the Senate chambers somebody was excluded, whether they were an expert, I don't remember, frankly.

MR. WHITE: I can clear that up.

THE SPECIAL MASTER: And I can take and look back at that again, but that's how I want to rule, Mr. Graves. It just makes better equity, better justice to me.

MR. GRAVES: May it please the Court, and I want to refer to the rest of the witnesses, the economic witnesses who are coming on next, the agricultural experts, none of whom have any factual connection with the reservation except in the course of the studies they've done for the United States. I believe that the Court's decision, as it relates to Mr. Harbour, may be appropriate. As it applies to our other witnesses, we are not concerned with having our experts in the courtroom when our other experts on our side are testifying. We're mostly concerned with having our experts in the courtroom when the State's experts are testifying, so they may assist in the management of the case and in the

cross examination. And --

THE SPECIAL MASTER: Why don't we cross that bridge when we get to it. If at that time you have witnesses that you feel should be present at the time, raise your point. If you think the essentiality would justify it. I don't think it does with this witness.

MR. GRAVES: The point that I want to make, and the reason why we brought it up now rather than waiting until our side, until we wanted to have our experts in the room was because we perceived that Mr. White would immediately say, well, if that's the case, then I should have been able to have my experts in the courtroom when their experts testified. Our next witness is a man who is an expert economist, and if Mr. White doesn't, isn't given the opportunity to have his experts in the courtroom while our expert is testifying, then we're precluded from having our expert in the courtroom when his expert is testifying and that's where we think --

THE SPECIAL MASTER: Does Mr. White request that his expert be in the courtroom?

MR. GRAVES: I would like to request that his expert be in the courtroom when my experts

are testifying so that turnabout is fair play, Your Honor, and I don't see any reason why Mr. White in his most equitable activities and his approach, which is always that way shouldn't agree to that.

THE SPECIAL MASTER: That's between you and Mr. White. I can see some strong arguments for it.

MR. WHITE: Your Honor --

THE SPECIAL MASTER: Let Mr. White speak.

MR. WHITE: We invoked the rule, and you ruled in our favor. Do you want to reopen this for reargument?

THE SPECIAL MASTER: I'll reopen it if the facts regarding other witnesses prove that stronger case of their essentiality towards what's been proved. I'll listen again, but I won't on this witness, on the matter of aesthetics in the reservation.

MR. WHITE: Let me say then, Your Honor, if you are to rule that the federal experts may be in attendance while my experts are testifying, I'd like to know that now so that I can recall my experts from Denver and Laramie before the federal experts start.

THE SPECIAL MASTER: I believe it would be proper, and I believe the exclusion would prevail on the matters of quantities and practicably irrigable land, not on aesthetics.

MR. WHITE: Okay.

THE SPECIAL MASTER: And not on some of the other factors, not on trans-evaporation, and not on -- you sure don't need them on parameters.

MR. GRAVES: Your Honor, we don't want any experts to hear any questions or hear any --

THE SPECIAL MASTER: I've answered your question, Mr. White, haven't I?

MR. WHITE: I'm not sure.

THE SPECIAL MASTER: We will reconsider the rule and be inclined to grant the permission of witnesses in the court if it deals with practicably irrigable acreage.

MR. WHITE: Let's get it decided now.

MR. ROGERS: Yes, Your Honor, I agree with what you've decided now, because the Tribes, we have our own economists. As Mr. Sachse said, they're not here today. We wouldn't have asked that they be here. If they were here, we would ask that they be here during the next witness who is an economist, but for Mr. White's sake and

everybody else's, I think we should decide now. It seems to be clear that the purpose of the rule of excluding witnesses is not defeated when you don't have experts from your own side in a room when people from their side are on the stand. That's -- that's the jimmying and coaching that is the concern of the rule.

THE SPECIAL MASTER: Well now, the rule isn't all that bad. The rule says it even may help another witness to refresh and recollect his memory by hearing what others have to say in a given instance. It's not all that bad.

MR. ROGERS: I am not an expert.

MR. WHITE: Your Honor --

THE SPECIAL MASTER: Gentlemen, may we have one at a time. Mr. Rogers.

MR. ROGERS: I am not an expert economist, I'm not an expert soils scientist or anything else. I need the help of the experts that we've had available to us when the State's counterpart witnesses are on the stand. I cannot possibly sit here and prepare all the questions on cross-examination of those witnesses without the help of my experts. It's essential, I think, that our experts be in the room when --

THE SPECIAL MASTER: If they are essential, as you say.

MR. GRAVES: Yes, Your Honor, may we --

MR. ROGERS: Any counterpart witness.

MR. GRAVES: May we then, Your Honor, and I quote from the case, may we then adjourn this matter and -- for the -- to give us an opportunity to present testimony from our lead counsel and from our expert who is up next as to why it's important for him to be in the Courtroom when Mr. White's expert witness testifies?

THE SPECIAL MASTER: The answer to your question is yes.

MR. GRAVES: May we do that?

THE SPECIAL MASTER: You want to do that 9:00 in the morning or now?

MR. GRAVES: We can do this now, we can do it now.

THE SPECIAL MASTER: All right, let's proceed. Make your offer of proof.

MR. GRAVES: May it please the Court --

(Brief pause.)

MR. GRAVES: Your Honor, we'll proceed with putting Ms. Sleater on the stand and then verify her testimony by the testimony of our next witness,

I would hope that if the State has sent their experts back to Laramie that we're not in a position, if the Court decides that we made a substanciated representation which is what the case requires, that the expert, the availability of the expert, when their experts are testifying is essential to our case, that we're not in the position that we're going to sit and wait for Mr. White's witnesses to come back the rest of the afternoon, because if we are, we might as well adjourn right now.

MR. WHITE: Well, Your Honor, I think with about an hour's lead time I can get my witnesses over here. I expect it's going to take awhile because I'll have some cross-examination, and I think if they're going to have their people available, I'm going to have mine available too.

THE SPECIAL MASTER: Gentlemen, does it seem that --

MR. WHITE: I'm anxious to hear the testimony.

THE SPECIAL MASTER: We're anxious to go too, but if you drag it on for two hours tonight before we can get to them, wouldn't the proper thing to do would be to start at nine o'clock in the morning?

MR. WHITE: Let me suggest this. If you should

determine that it is not -- that experts may be present --

THE SPECIAL MASTER: Yes.

MR. WHITE: If that's the eventual conclusion after hearing the testimony, then we will waive that right for the rest of the day, we'll get our expert over here tomorrow.

THE SPECIAL MASTER: All right. Have you heard that? I do believe if you can make a stronger case of essentiality I will grant what you're asking, but until then I'm inclined to go on with my ruling.

MR. GRAVES: Your Honor, I think we can make a strong case of essentiality --

THE SPECIAL MASTER: Not because justice requires it, but because the motion was made and it was granted.

MR. GRAVES: And the problem is if we proceed without getting this matter finally decided and we don't get another opportunity to present the essential nature of the presence of witnesses we're immediately locked out because we have another expert witness who has testified, and the State has been prevented from having their expert present.

DIRECT EXAMINATION

BY MR. GRAVES:

Q Would you state your name, address and occupation, please.

A My name is Regina Sleater, my address is 1958 Garrett, Cheyenne, Wyoming. I'm an attorney for the U.S. Department of Justice.

Q And in the course of your duties as an attorney for the United States Department of Justice, have you worked in preparation of this case?

A Yes, sir, I have.

Q And to the extent that the strategy of your case requires and in the course of that, have you developed a trial strategy?

A Yes, sir, I have.

Q And does that involve the use of expert witnesses?

A Yes, sir, it does.

Q And are you able to make a representation to the Master as to whether the expert witnesses are necessary to the trial strategy, the presence of expert witnesses in the Courtroom when you're presenting your case, are they necessary to your trial strategy?

A In the trial strategy that has been developed, which in my opinion is in the best interest of

the United States to pursue in this matter, it is crucial and essential that experts for the United States relating to the subject matter of the testimony of Wyoming's experts be available during the cross-examination of the experts for the State of Wyoming, and in order to assist me in the preparation and adequate asking of questions for which reason it is also necessary that those experts be present during the direct examination of Wyoming's experts in their respective subject matter.

THE SPECIAL MASTER: Mr. White, the word essential was used. And that's what I was looking for. I'm not so much concerned about strategy, but I am about essentiality.

MR. GRAVES: I'm not sure whether she said essential, Your Honor.

THE SPECIAL MASTER: She did.

MR. WHITE: She said necessary and she did say essential. Saved by your witness.

CROSS-EXAMINATION

BY MR. WHITE:

Q Ms. Sleater, could you explain in detail why it is crucial, essential and/or necessary for you to have your expert witnesses available in the

Courtroom for consultation as you described?

MR. GRAVES: Your Honor, I would object.

THE SPECIAL MASTER: Objection's overruled.

MR. GRAVES: May I just make the objection. I object to any portion of that question which relates to divulgence of trial strategy.

MR. WHITE: I suppose she opened it up, but I will not inquire.

THE SPECIAL MASTER: Proceed with the question; overruled.

THE WITNESS: The main reason that I think it is essential for the United States to have these experts present during the presentation of the respective parties of Wyoming's case is because I myself am not a qualified soils scientist and I'm not an agricultural engineer, I am not a minerals engineer, what I am is a lawyer. Now, as a lawyer I've learned to work with experts, to take their guidance and direction and to funnel the information they give me into hopefully legal channels that are proper for cross-examination. However, I do not have the specific knowledge necessary to adequately cross-examine someone with detailed technical knowledge, and for that reason I feel that it is essential to the

presentation of the United State's case, which includes the adequate cross-examination of witnesses of the State of Wyoming, that I have the witnesses, the experts that we have hired in these areas there to assist me.

Q (By Mr. White) Ms. Sleater, isn't it true that one of the ways the trial lawyer prepares for cross-examination is through depositions?

A That's one of my ways.

Q And have you used depositions to their full advantage to prepare for cross-examination or for the direct examination of your own witnesses? Have you utilized depositions or other discovery to prepare for cross-examination?

A The United States deposed witnesses for the State of Wyoming, all of whom uniformly stated that they would start their work on this case after hearing the basic work of the United States, that they had just done ground basic work and literature reviews, and that the bulk of their work will be done after the presentation of the United State's case, in which case I do not see adequate time for the preparation necessary through depositions.

Q Isn't it true that during depositions you engaged

in the practice of knitting?

A No.

Q It is not true? What was it, cruelling or what?

THE SPECIAL MASTER: That's --

MR. WHITE: Your Honor, let me --

THE SPECIAL MASTER: That's a little harsh?

MR. WHITE: Ms. Sleater attended depositions and didn't take notes in many cases, brought her knitting, cruel or needlepoint with her and the point is, the reason they're not ready is because the depositions were not used --

MR. GRAVES: Objection, Your Honor, there is no evidence that we're not ready, and I object to the argumentative nature of the question.

MR. WHITE: Well, I asked the Plaintiff a simple question; the witness can answer.

THE SPECIAL MASTER: She did, she did answer it.

* * * * *

MR. WHITE: I think she wanted to expand her answer, Your Honor.

MR. GRAVES: Mr. White, the objection has been ruled on. Would you mind moving so you are not in my line of vision?

THE SPECIAL MASTER: Oh, sit down, Chuck. We will proceed with the -- I think whether she was knitting during a deposition, this kind of thing, it is irrelevant now on cross-examination.

MR. WHITE: Okay, Your Honor. I have no further questions.

THE SPECIAL MASTER: I think the ruling is proper, because in the case of the witness just excluded, there was nothing essential about his testimony that would require departure from the rule that I granted this morning to the State of Wyoming. Now, obviously there is going to be additional witnesses, and I believe you can appreciate that, Mr. White, that I respect your proffer that you state that was to be the case **with this witness**, that you would waive any objections to this arrangement.

MR. WHITE: That's true, Your Honor.

THE SPECIAL MASTER: All right. Let's proceed

with the case.

MR. GRAVES: So, Your Honor, we can have this witness this afternoon, anyway --

THE SPECIAL MASTER: That's correct.

MR. GRAVES: -- in the Courtroom when their economics --

THE SPECIAL MASTER: That's correct, thanks to the waiver of Mr. White. This is during the hearing of essential witnesses.

MR. WHITE: Your Honor, I didn't understand about what happened with Mr. Harbour. Did the United States waive redirect examination, is that what happened? Is he excused now? I'm not sure what happened.

THE SPECIAL MASTER: There was a mention was this witness excused? Does Wyoming desire he not be excused?

MR. WHITE: Well, I would like to ask that he not be excused if the Rules have --

THE SPECIAL MASTER: Yes, I think he better stay here.

MR. WHITE: I would like to ask permission to recall him for cross-examination after I have had a chance --

THE SPECIAL MASTER: And that will include to

stand by to be recalled for cross-examination.

MR. GRAVES: May it please the Court, are we then in a position where we have to make this motion on every witness as we go along, or is this a --

THE SPECIAL MASTER: I think we better set the rule that yes, you better ask it in each case, and I can review the essentiality of that witness. I don't mean to put Regina on the stand every time. Then we can get to the crux of this lawsuit, which is the irrigable acreage and the water, those kinds of things that we have, and that I think it is an essential matter.

MR. WHITE: I think if you ruled on this one, you ought to rule on all of them.

THE SPECIAL MASTER: Then our rule on 615 will prevail in the case of an acceptable essential expert witness, and I reserve the right to "Essential" or not.

MR. GRAVES: Only on experts and not fact witnesses, and we understand the rule on fact witnesses.

THE SPECIAL MASTER: All right, proceed with the next witness.

MS. SLEATER: Your Honor, I hate to do this,

but we have some exhibits out in the hall.

THE SPECIAL MASTER: Would you like a five minute break?

MS. SLEATER: Five or ten so we could lug them in.

THE SPECIAL MASTER: Then I think a break is in order. We will resume at 3:30.

(Whereupon a recess was held.)

* * * * *

(Stipulation read in the
(presence of Mr. White,
(Mr. Graves, Ms. Sleater
(and Mr. Membrino, to wit:

MR. GRAVES: It's hereby stipulated by and between counsel for the United States and counsel for the State that all expert witnesses on both sides may participate and be in the courtroom during all stages of the progress henceforth. Is that so stipulated?

MR. WHITE: That's fair. That's right. Agreed to.

MR. MEMBRINO: So when your own case is on?

MR. GRAVES: Yes, at all times.

(The following proceedings were
(again had in open court, to wit:

MS. SLEATER: Before I call this witness, one thing I would like to have clarified,if I could, or a point of information: Does Your Honor have any definite time for breaking because I would like to see if we come to a cutoff point close to when you plan to break for the evening?

THE SPECIAL MASTER: The reporters have also asked that because of the burden of preparing daily transcript. The reporters would like a ten or fifteen-minute break every hour.

I will try tomorrow to conscientiously give a

fifteen-minute break every hour, to begin at 9:15 and to adjourn at what time, Regina and Mr. White? Five?

MR. WHITE: That's fine with us, Your Honor. Anything you like. In fact, it might be a little more efficient,if we take some breaks, to go a little bit later, maybe 5:00 or 6:00 and break for the evening.

THE SPECIAL MASTER: And avoid the evening sessions?

MR. WHITE: I think evening sessions quickly exhaust everybody and we don't operate as efficiently.

THE SPECIAL MASTER: We will then take a fifteen-minute break every hour, 9:15 to 5:30, which is what I will try to adhere to, five days a week, and with the grace of God, five more months.

MS. SLEATER: Will we be going to 5:30 this evening?

THE SPECIAL MASTER: I don't care. If you want to --

MS. SLEATER: My problem is I have so much material, I'm trying to decide what is the best way to give a clear picture here. This witness is going to be testifying in three totally separate subject matters.

THE SPECIAL MASTER: Can the first subject matter take two hours?

MS. SLEATER: Oh, yes.

THE SPECIAL MASTER: Can you do it in two hours or an hour and a half?

MS. SLEATER: I think I need at least two hours or probably more, but what I was going to request is perhaps as a technique we could adopt for this witness or perhaps other witnesses who are testifying in totally distinct multiple areas that what we could do is put him on for the first section that he did, have the cross of that section so it's out of the way as a block, and put him on again for the next section.

MR. WHITE: We'll wait until it's all over to have cross.

THE SPECIAL MASTER: The conventional precedure, I think, is to complete the three units and then let the cross begin of each of the three units.

MS. SLEATER: Okay. Fine.

THE SPECIAL MASTER: Has this witness been sworn?

MS. SLEATER: Yes, sir, he has.

The United States calls as its second witness, Mr. Merchant.

JAMES PHILIP MERCHANT

was called as a witness by the United States and, having been previously duly sworn, testified as follows, to wit:

DIRECT EXAMINATION

BY MS. SLEATER:

Q. Have you been previously sworn, Mr. Merchant?

A. Yes, I have.

THE SPECIAL MASTER: Your name is Mr. Merchant?

THE WITNESS: James Merchant, Your Honor.

Q. (By Ms. Sleater) Please state your name and address.

A. James Philip Merchant, 133 Cazneau Avenue, California.

Q. Where are you employed, Mr. Merchant?

A. At David Dornbusch & Company in San Francisco.

Q. What is your position with David Dornbusch & Company?

A. I'm an economist there, a principal of the company.

Q. And what does being a principal mean?

A. It means I share in the management decisions of the company.

Q. As an economist, are you also personally involved in a professional capacity with the work of the company?

A. Very much, yes.

Q. How long have you been with David Dornbusch & Company?

A. A bit over eight years now.

Q. Could you describe briefly the work of the company?

A. Yes, we analyze economic issues pertaining to feasibility studies, impact studies and planning studies generally.

Q. I'm going to hand you a copy that has been marked for identification U.S. Exhibit WRIR C-8 and ask you if you can identify this exhibit.

A. This is a description of our firm, and it contains a description of the major projects we've conducted over the past seven or eight years.

Q. Could you describe some of those projects, please?

A. Yes, we've conducted feasibility studies of agricultural and nonagricultural development on several Indian reservations throughout the West.

We've analyzed the feasibility of expanding irrigation in the Columbian Northwest for the Corps of Engineers.

* * * * *

MR. WHITE: Excuse me, Mr. Dornbush. Your Honor, I'd like to object ot the question unless this is work that Mr. -- excuse me, Mr. Merchant, that Mr. Merchant himself has done. The company isn't being qualified as an expert, Mr. Merchant is being qualified as an expert, and if he's able to describe what work he's done as part of the company projects, that seems to be more appropriate.

THE SPECIAL MASTER: That would be desirable, with that point in mind.

THE WITNESS: Yes, Your Honor. I was directly involved in the project I've already mentioned, and I have been involved in all the other type we'll continue to mention.

We analyzed the feasibility of developing a slew on the Columbia River for navigation. This was for the Corp of Engineers, and I directed that study.

We have conducted many urban planning, urban and regional planning studies. One was in San Francisco to analyze the impacts of continued development of high-rise buildings in San Francisco. We looked at economics, social and environmental effects of high-rise development.

In the Tahoe Basin in Nevada we analyzed the effect of continued development in that basin and developed for the Tahoe Region and Planning Authority, a model from which to evaluate the impacts of different developments scenarios associated with different planning guidelines or restrictions in the basin.

For the Metropolitian Transportation Commission in the San Francisco area, we analyzed the effects of the Bay Area Rapid Transit System on land use in urban development in the Bay Area. I directed several aspects of that study.

I'm sure there are others, that's what comes to mind now.

Q (By Ms. Sleater) Okay. Could I ask you to please describe, you mentioned you had done some work for irrigation and feasibility studies on a number of Indian Reservations. Could you please enumerate those Indian Reservations.

A Yes. As a research study for the Department of Interior's Office of Water Research and Technology, we evaluated the feasibility of expanding irrigation and other types of development on the Rosebud Sioux and Fort Berthal Reservations. We have analyzed the effect of the Tribes not

having water for irrigation on the Mitchenbands lands near San Diego, California.

We also looked at the feasibility of expanding irrigation on the Northern Cheyenne Reservation next door in Montana. We did -- we are doing some work on the Jiciralla Apache Reservation as well.

Q Would you please describe your educational background.

A I attended the University of Kansas, receiving a Bachelor's Degree in economics; then went on to Stanford University where I received an MBA in business administration and a law degree.

Q Have you ever practiced law?

A No, I have not.

Q Do you belong to any professional organizations?

A I belong to the American Agricultural Economics Association.

Q Are you a member of any bar?

A Yes, I'm a member of the California bar.

Q Are you responsible for any publication?

A Most of the projects I mentioned had publications as a result of our work, and I either authored those or contributed to those publications.

Q Were you hired by the United States?

A Yes.

Q And could you briefly describe the areas for which you have done work?

A Yes. I personally have worked in the areas of livestock, mineral and -- livestock development, mineral development and municipal water requirements.

Q Well, let's start with the livestock. Briefly, can you give us an overview of what you did with respect to livestock?

A Yes, we reviewed information pertaining to the livestock industry on and around the Reservation, both currently and what it's likely to be in the future.

We chose a model to use as a basis for our analysis of future livestock conditions on the Reservation, and then developed that model to analyze the livestock industry on the Reservation.

Q Okay. You said you developed a model. How did you go about developing a model?

A We reviewed information that we could find on livestock operations on and around the Reservation, and this included both talking to knowledgeable people about livestock operations and reviewed written material studies of livestock operations. And we chose, as a basis of our model, a Gordon

Kearl, 1978 study on mountain valley cattle ranching in Wyoming.

Q How did you determine knowledgeable people in the area?

A We spoke to people whose positions afforded them a great degree of knowledge. People such as the land operations officer or the range operations officer and cattle operators on the Reservation.

Q What type of written material did you review?

A Primarily cooperative extensive service publications. Also we looked at some U.S. Department of Agriculture publications.

Q Is this a standard technique that you had used on other projects in developing economic analysis?

A Yes, it is.

Q Could you describe briefly the Kearl work you just alluded to?

A Yes. The Kearl work is an evaluation and composite of several previous documents that were developed by his predecessor at the Extension Service in Laramie, Stevens, and these previous documents were based on interviews with ranchers in the mountain valley cattle operations area in Wyoming.

The Kearl study compared the results of these

interviews over time and derived what he thought was a normal or typical cattle operations model for the mountain valley cattle area in Wyoming.

Q What is the "Mountain valley cattle area" as used by Mr. Kearl?

A Well, Dr. Kearl distinquishes two areas for ranching in Wyoming; the plains ranching area and mountain valley area. And the Wind River Reservation clearly falls within his meaning for mountain valley cattle ranching.

Q Did you accept all of Dr. Kearl's work as the basis for your report as a whole document and just pushed it into your analysis?

A No, we didn't. We reviewed his work, particularly the parameters with respect to livestock rates, cabin rates, death rates, and we determined that those were suitable for use in the Wind River Reservation. So we did, after some review with cattle operators and other people on the Reservation who were knowledgeable about the operations, determined that those were -- those parameters were suitable for adoption without modification. However, ee reviewed his costs and returns information and decided that that was inappropriate for adoption as it stood in the report,

Q (By Ms. Sleater) Have you or members of your staff talked to Dr. Kearl about his report?

A Yes, we have.

Q And why did you talk to him?

A We discussed several aspects of his study to insure that we fully understood his model, and to discuss problems or issues that we encountered in applying his model to a forecasting situation.

Q Was Dr. Kearl's model a forecasting model?

A No, it's based on actual operations in the mountain valley ranching area.

Q What is the difference between actual operations and a forecasting model?

A In --

THE SPECIAL MASTER: Could I hear that question again? I'm sorry.

Q (By Ms. Sleater) What is the difference between actual operations and a fore-casting model?

A There are several differences. One might be that one might expect some aspects of cattle operations to change over time, so current operations may not completely accurately reflect those aspects. Another example is -- particularly in the area of cost and prices, current operations are subject to very wide year-to-year

fluctuations, and when we are forecasting a cattle operation into the long-term future, we want to eliminate those annual variations.

Q Which operations can change over time?

A I beg your pardon, which operations? Which aspects of the operation?

Q Yes.

A Well, practices in feeding could change over time, waste could change over time, calving rates have changed over time, just about any aspect of the operation could change somewhat over time.

Q Did you investigate Dr. Kearl's report to determine which of these aspects had changed or could change and which were reasonable to rely on in your model?

A We satisfied ourselves from the parameters in his model, such as the cattle weights, were either -- well, were reasonable to use in our model of what cattle operations on the operation could look like.

Q You mentioned that you used Dr. Kearl's cattle rates as part of your model?

A Yes, we did.

Q What rate did you use?

A It's about 89 percent.

Q Perhaps it would be easier at this point if you can tell me the specifics of the parameters that you adapted from Dr. Kearl's study?

A Sure. The sale weights we used were 410 pounds for steer cows, 380 pounds for heifer calves, 660 for heifer yearlings, and I believe it was 730 for steer yearlings, 1,015 for cull cows, and 1,345 for bulls.

The calving rate, as I said, was just under 89 percent. The death rates were generally in the one to two percent range with the exception of bulls, for which we used six percent. These are annual death rates.

Q Did you compare the sales weights with any other information regarding sales weights to determine --

A Well, yes. We discussed these weights with operators and other knowledgeable people on the Reservation to insure that they were reasonable for the area.

Q And you did the same thing with the calving and death rates?

A Yes.

Q What parameters did you develop on your own, or did you not adopt exactly from Dr. Kearl's work?

A Well, the physical parameters are adopted pretty much exactly from Gordon Kearl. The cost in parameters are either authorizations of Dr. Kearl's to adjust them for the change in time and for other reasons, which I can get into, or because we felt they were inappropriate and we had a better number to substitute.

Q Other than the physical parameters that you have already mentioned, are there any others?

A I don't remember any. There could be. I think that pretty much determines the characteristics of the livestock operation.

Q How did you go about developing your model? You said you took Dr. Kearl's work as a source. What was the next step?

A Well, the next step, as I have gone over a little bit, was to review all of the aspects of his work and determine to our satisfaction that they were reasonable for the area on the Reservation. After that we -- well, there is a physical parameter that I suppose I haven't talked about, and that's feed rations. I'm not sure that's what you meant by parameter, but that's something that was changed somewhat from the Kearl study. But apart from that, our other --

our next step was to address the costs and returns associated with that operation.

Q Which costs are included in your model -- well, first, what is the basic size of the model of your cattle operation?

A It is a 250-cow ranch.

Q Does that mean that there are only 250 animals in the group you are dealing with?

A No, there are 250 cows and then associated yearlings, bulls and calves. Of course, this changes at different times of the year.

Q How did you determine the feed rations necessary for this size operation?

A Well, this was an area that after reviewing Kearl we decided that we would prefer a better basis for determining the appropriate feed rations, so we contacted Dr. Yates at the University of Wyoming, and he ran feed rations for us through his computer model for determining the feed requirements for various types and weights of animals.

MS. SLEATER: Excuse me for a second, Your Honor.

(Brief pause.)

Q (By Ms. Sleater) Continue, please. I'm sorry for

the interruption.

A Well, we gave him a set of weights for different types of animals, and he ran rations given those weights, given different feeding possibilities and given average daily gains; or in the case of cows and heifers, at different stages in their pregnancy.

Q I show you what has been marked as U.S. Exhibit WRIR C-9, marked for identification purposes, and ask you if you can indentify that, please?

A Yes, that is a summary of two of the feed rations pertaining to 450 pound cows with a one pound average daily gain.

* * * * *

Q (By Ms. Sleater) Are these the two rations which you incorporated into your analysis?

A. Yes, they are.

Q. Would you explain the ration for us?

A. Yes, I can start with Ration No. 1. That isn't precisely ... the ration that Dr. Yates provided us. We took his basic ration and increased the amount of barley straw by a sufficient amount to satisfy a requirement for filling up the animals because the basic feed ration was formulated only to satisfy the nutruitional requirement of the animal. So we supplemented that in order to add a little more bulk to the ration.

In addition, we changed his feed ration by adding another 10 percent for cold windy days because a normal feed ration is based upon average winter conditions and not extreme winter conditions. And, in addition, we added another 5 percent to account for some waste in feeding during the winter.

Then with those two adjustments, those feed rations reflect the rations that Dr. Yates provided us.

Q. Why do you have two rations?

A. One is an alfalfa hay base ration. The other is a corn silage base ration. Alfalfa hay is a

predominent means of feeding livestock in the Wind River Reservation area currently. Corn silage is also -- is an alternative means of feeding livestock, and the costs of a corn silage feed ration are slightly less. So we felt it reasonable to include both feed rations or a mix of the two feed rations for the total operation on the reservation.

MS. SLEATER: At this time, Your Honor, I would like to move U.S. Exhibit WRIR C-9 into evidence.

THE SPECIAL MASTER: Before we go to a voir dire, I only have one question I would like to ask at this time because I think it's appropriate.

Were you just saying, Mr. Merchant, that a 46-pound per day ration of corn silage is cheaper than a 14-pound ration of alfalfa hay?

THE WITNESS: Yes, Your Honor.

THE SPECIAL MASTER: All right. Voir dire is in order, Mr. Merrill.

VOIR DIRE EXAMINATION

BY MR. MERRILL:

Q. Jim, did you say earlier that you were supplied with basic feed rations by Mr. Yates and you modified those?

A. Yes, I did.

Q. Did the feed ration supplied you by Mr. Yates constitute his professional opinion as to the rations to be used?

A. Not to be used. The rations he supplied us constituted his opinion as to the rations necessary to maintain the animal or to provide an average daily gain. It's the nutritional requirements necessary for the animals.

Q. So you took Mr. Yates' opinions and then further modified them yourself, and the results appear on Exhibit C-9; is that correct?

A. Yes.

MR. MERRILL: Your Honor, I would object to the admission of C-9 on two grounds: First that it is a well-settled rule of evidence that an expert or a witness may not rely on the opinions of another person in forming your own opinions because opinions of fellow experts do not constitute facts and data on which they can be relied.

The second objection would be that there is no basis in the record thus far for Mr. Merchant's expertise to determine the proper feed rations for a livestock operation. He hasn't been qualified as an expert of this sort.

THE SPECIAL MASTER: Well, your first

objection is the stronger of the two. I think his background would qualify him. If the other gentleman thought his opinions were such that the other gentleman is the best to testify rather than you, and that's understandable.

Still, in all, I think we will overrule the objection and admit it for whatever it may be worth.

(The instrument hereinbefore identified as U.S. Exhibit WRIR C-9 was received in evidence.

MR. WHITE: Your Honor, could I inquire whether this witness is being offered as an expert and, if so --

THE SPECIAL MASTER: Well, he hasn't yet, but I suspect he's going to be before long.

Q (By Ms. Sleater) Mr. Merchant, were you responsible for determining the rations shown on Exhibit 9?

A. Yes.

Q. I show you what is marked for identification as U.S. Exhibit WRIR C-10 and ask you if you can identify that, please?

A. Yes, that's a pair of feed rations for a 1000-pound pregnant cow on her last one-third of pregnancy.

Q. Would you please explain those rations to us?

A. Yes, they are basically derived in the same manner as I explained before. On the corn silage ration, however, there is one difference. For the supplemental feed on cold windy days we didn't have to supplement the corn silage by as much as the alfalfa hay ration, and the reason is that there are two basic requirements that are met in these feed rations.

There's an accrued protein requirement and a total digestible nutrient requirement. The hay rations are balanced on the TDN requirement, whereas the silage rations typically balance on the protein requirement.

The cold windy day -- the reason for supplementing the ration on a cold windy day is to add more TDN, total digestible nutrients. So it's more important to supplement the alfalfa hay ration than the corn silage ration.

So the amount by which the corn silage rations are supplemented --

THE SPECIAL MASTER: Is less.

THE WITNESS: Is less, that's right, than the amounts by which the hay rations are supplemented.

Q. (By Ms. Sleater) I note that the heading has the last one-third. Would you explain that to us?

A. Yes, the nutritional requirements of a pregnant cow vary over the course of her pregnancy, and this is the trimester of pregnancy that most closely matches our feeding perios so this is the period of pregnancy that we use for our feed rations.

Q. Okay. I show you what's been marked for identification in evidence as U.S. Exhibit WRIR C-11 and ask you if you can please explain that?

A. That's also a pair of feed rations on an 825-pound pregnant heifer in her last one-third or three to four months of pregnancy, also providing for a 1.3 pound average daily gain.

Q. What is the difference between Exhibit 10 and Exhibit 11?

A. Well, there are basically two differences. The pregnant heifers are lighter than the cows, so in one sense their nutritional requirement is less, but they are also growing animals, whereas the cows are mature animals. So, in that sense, they require more nutrition, and you can see by comparing the two exhibits that they balance fairly closely, but there are some differences in the makeup of the ration.

Q. Would you please state those differences for the

record?

A. I believe the difference is that the growing animal requires more protein and the mature animal requires more total digestible nutrients.

Q. And that's why on your second ration you have added more corn grain and soybean meal to the mix?

A. Yes.

I might also note that the bottom line of these exhibits shows mineral supplements that are added to -- mainly to complement the phosphorous intake in the animal's diet. The Wyoming high phosphorous supplement is a mixture of salt, soybean meal tripolyphosphate, and its purpose is to add phosporous to the diet of the animals.

MR. MERRILL: Your Honor, at this point I'm going to object and ask that all of Mr. Merchant testimony concerning feed rations that's been delivered into the record be stricken.

The grounds of the objection are two: Number one, Mr. Merchant still has not been qualified as an expert of any sort to develop feed rations for any type of cattle ranching operation.

Second, is that he has relied on apparently

a model or something connected with some Mr. Yates in Laramie. But he has not disclosed any of the underlying facts and data which went into that data or came out of it. He has not shown that the model is one that is generally accepted in the scientific community. He has not shown that the operation of that model was verified by any comparison with any empirical data.

He is a nonexpert testifying based on hearsay and a model for which no foundation has been laid thus far.

THE SPECIAL MASTER: There may be some objections and observations about these exhibits that would warrant your criticisms of them, but I doubt if the total makes them inadmissible, Mr. Merrill, but I appreciate the points that you raised. I'm going to overrule the objection that they be denied admission. They haven't been offered yet either.

MS. SLEATER: I thought I would simplify things and offer them in one fell swoop.

MR. MERRILL: It wasn't a motion to keep them out of evidence. It was a motion to strike testimony.

THE SPECIAL MASTER: I beg your pardon.

Q (By Ms. Sleater) Mr. Merchant, if you will note,

on the stand is an exhibit that's been marked for identification U.S. Exhibit WRIR C-12. Could you please identify that exhibit?

A. Yes, it's the single feed ration for bulls that we use in our analysis of the livestock industry.

The reason that there's only one is that the alternative ration was more expensive than this one, and this reflects the common practice on the reservation.

Q. You say this reflects common practice on the reservation. What's your basis for so saying?

A. Discussions with operators and BIA officials on the reservation.

MR. MERRILL: Again, the type of information that Mr. Merchant has stated he relied on is rank hearsay and until he's been qualified as an expert, he may not rely on hearsay evidence when he comes into court to testify today.

THE SPECIAL MASTER: Well, Mr. Merchant, would you like to tell us how you went about obtaining the information that was contained in Exhibit No. 12?

THE WITNESS: Yes, Your Honor. That's based on feed rations that were run by a nutritionist at the University of Wyoming, and these rations were

designed to meet the requirements of, in this case, an 1800-pound bull to meet their protein TDN, phosphorous and calcium requirements, and then supplemented by the means that I have explained already, a 10 percent increase for extreme winter conditions and an additional 5 percent increase for wastage over the winter feeding period.

This is the least cost alternative that was formulated by Mr. Yates, and it also reflects the common practice on the reservation, which is predominantly alfalfa hay feeding.

THE SPECIAL MASTER: Do you know that as a fact?

THE WITNESS: Yes.

THE SPECIAL MASTER: Were these exhibits prepared under your direction or under your counsel?

THE WITNESS: Yes.

THE SPECIAL MASTER: I'm going to sustain the admission of 12.

MS. SLEATER: Your Honor, I would like to move 10, 11 and 12 at this time.

MR. WHITE: Your Honor, I would like to say something here, and that is that what's happening

is that the United States is getting opinion evidence in without qualifying an expert, and getting opinion evidence in in an area where there's been no opportunity to voir dire about the expert's qualifications.

THE SPECIAL MASTER: That's true. Would you qualify the witness first and then we can have the voir dire on his qualifications, Regina? I think you probably intended to anyway, but do you want to include 9, 10, 11 and 12?

MS. SLEATER: Your Honor, I think 9 is already in. Nine was the 450-pound calf operation that Mr. Merrill inquired of earlier, and I believe you admitted that earlier, but if you haven't, I want to admit 9, 10, 11 and 12.

THE SPECIAL MASTER: I didn't notice I did yet, but I don't -- Do you think it was admitted?

MR. WHITE: It was admitted.

THE SPECIAL MASTER: Thank you both. All right. Then this is on 10, 11 and 12. Do you now offer that Mr. Merchant be admitted as an expert in the field to which he has testified?

MS. SLEATER: Well, I at this point feel it's highly inappropriate that the strategy of this case be directed by the State of Wyoming,

So far, Mr. Merchant has been testifying concerning rations which he personally determined and which he used in building a development model. He has not yet gotten to any area that is requiring professional expertise.

He has stated that these were the bases that he used in building this development model. I feel, when it is appropriate, I will qualify Mr. Merchant, when and if it is appropriate.

* * * * *

MR. WHITE: Your Honor, the problem is that he's testified that these are the rations required for these particular types of livestock, and there are certain conditions, that these exhibits are being offered for the truth of their contents, and that requires someone who either has personal knowledge or is an expert as to cow or livestock rations. He's not been offered as an expert in that area. We've not had a chance to voir dire him in that area in terms of determining livestock rationing, and these are based on the rankest kind of hearsay, relied on by a non-expert.

THE SPECIAL MASTER: Well, it's not quite that bad. He said he prepared them and had some knowledge of their contents, but--

MR. WHITE: Prepared them based on computer run by someone who's not in the courtroom and we have no opportunity to cross-examine them.

THE SPECIAL MASTER: I'm constrained to admit them for what they may be worth, but there's not too much that's going to be proved by them; I don't know how it could be much better except with the exception that he be qualified, but I don't want to impose upon Ms. Sleater's--the State's upsetting her strategy and progess. I'm going to qualify the witness--

MR. WHITE: It's not the State, it's the rules

of evidence.

MS. SLEATER: Your Honor, my co-counsel just had what might be an opportune time, he said it's now time for the fifteen minute break and maybe if we took--

THE SPECIAL MASTER: Very well, we'll take a fifteen minute break and we'll adjourn at 4:30, by the clock on the wall.

(Thereupon a fifteen minute
(recess was taken.

THE SPECIAL MASTER: May we come to order, please, if we can find Regina?

(Brief pause.)

THE SPECIAL MASTER: All right.

MR. MERRILL: Your Honor, I believe we were resuming with the voir dire of Ms. Sleater's offer of Exhibits C-9, C-10, C-11 and C-12 concerning feed rations.

MS. SLEATER: Your Honor, I believe C-9 is already in evidence.

MR. MERRILL: In that case, Your Honor, I will confine the voir dire to the other three.

THE SPECIAL MASTER: All right. Without objection, C-9 is admitted into --

MR. WHITE: It wasn't without objection, it was over an objection. It was admitted, Your Honor, but it was over objection.

THE SPECIAL MASTER: I see. Thank you.

VOIR DIRE

BY MR. MERRILL:

Q Mr. Merchant, you testified that you obtained your basic feed rations from Mr. Yates, is that correct?

A Yes.

Q What information did you supply to Mr. Yates in

asking that he determined feed rations for you?

A I supplied animal weights, a series of average daily gains, the available feeds and the types of animals we were considering.

Q Only those four factors?

A Well, I discussed these with him for about an hour, and there may be other aspects of the discussion, but I think those are the four factors that he used in developing feed rations.

Q To the best of your knowledge, then, there aren't any factors other than those four that he used to develop the rations for you?

A I don't think so.

Q Where did you get the information that you gave Mr. Yates concerning weights?

A Those weights were consistent with the Kearl model that we have adapted.

Q Also the average daily gain?

A Yes.

Q How about the available feeds?

A Those are the feeds that are available now on the Reservation and will be given new irrigation development on the Reservation.

Q How did you make that determination first that those are the available feeds?

A There are several sources for that information. There are published documents by the Bureau of Indian Affairs showing the cropping pattern in the FIPs, the Federal Indian Projects, irrigation projects.

Q Is that the only document you relied on?

A I don't recall other documents. I also discussed feed availability with Rich Harbour and other people on the Reservation, Don Crook.

Q So you had discussions with Rich Harbour and Don Crook and you looked at a BIA report concerning cropping patterns within the Federal Indian Projects, is that right?

A Yes.

Q Any other sources of information upon which you relied in determining the availability of feeds at the present time?

A Of types of feed?

Q Yes.

A There is -- I have discussed that with Lynn Merrick, I believe, and then in discussions with individual farmers and ranchers we ascertained that these types of feed were available.

Q How did you determine what types of animals would need these various rations that you got from

Mr. Yates?

A Those are the animals that are contained in the model that we adapted for our analysis.

Q So you took those straight out of the Kearl model?

A Those are in the Kearl model, yes.

Q Why did you decide to depart from the Kearl model for purposes of determining feed availability?

A Well, the feed, winter feed is the single most significant cost in the cattle operations budget, or the year-around budget on an operation. We felt it was important to be as accurate as possible on that amount because it was so significant in the overall budget, and we felt that it was we should have something that was specific to the Reservation area.

Q So you gave these four different types of information to Mr. Yates and chatted with him for an hour and he came back with some feed rations, is that right?

A The basic rations that we adjusted, yes.

Q Were those basic rations developed by a computer model that Mr. Yates has?

A In part.

Q Did you ascertain whether Mr. Yates' model is

generally accepted within the community of cattle nutritionists for purposes of determining feed rations?

A Well, the requirements of that model, these nutritional requirements are in a nationally recognized publication.

Q But did you make any determination as to whether it is accepted in the society of nutritionists in this area, whether that model proves out to be an accurate model?

A Well, the State Extension Service holds him out as an expert in his field to develop feed rations for ranchers throughout the State, and my determination of his acceptability was based on that and on the fact that I know he used the nutritional requirements given in the National Academy of Science Publication on nutritional requirements for livestock.

Q Did you make any determination whether the rations that Mr. Yates' model provided you are rations that are actually being used or would empirically be sufficient to sustain the types of animals described on Exhibits 10, 11 and 12?

A No, these are similar to rations he has provided other ranchers on the Reservation.

Q How did you make that determination?

A Through discussions with Lynn Merrick and examination of some sample rations that he had.

Q Did you make any investigation as to whether Mr. Yates ran his model correctly and with the correct parameters in the times that he operated it to provide feed rations to you?

A I did some spot checking of calculations to ascertain that the amount of feed contained in his budget actually met the requirements that were stated for the various types of animals.

Q Did you discuss with Mr. Yates the time of year that this feed ration would be used?

A Yes.

Q Did he take that into account in his calculations?

A Well, he provided me with rations for different periods and the pregnancy of a cow, and told me that that was the only animal whose feeding requirement varied substantially over different periods of the winter feed period.

Q So it was then his opinion to you that the base rations he gave you would be sufficient to sustain these types of animals, is that correct?

A I believe that's -- yes, that's part of his work, was his opinion that these would be adequate to

sustain the various types of animals.

Q Do you regard Mr. Yates as an expert in animal nutrition or cattle nutrition?

A Yes.

Q Why did you see fit to modify the basic rations that were given to you by an acclaimed expert in the field?

A Because his feed rations came with the caveat that they were based on average conditions and not extreme winter conditions, so I concluded that some adjustment was necessary to account for extreme winter conditions, and also it is just common sense there should be some wastage involved, that the amount of feed that an operator puts out on the ground or in feed troughs won't all be consumed, that there will be some wastage involved.

Q Is it true that you made a ten percent addition to adjust for severe winter weather conditions?

A Yes.

Q And what facts and data did you rely on in determining ten percent was an appropriate adjustment?

A Well, to be frank, I started to adjust all my budgets by that ten percent and then decided that

I should call David Yates to discuss that with him; that he concurred in the ten percent factor.

Q How did you determine that a five percent factor for wastage wasn't an appropriate and realistic factor to use?

A David Yates also provided that factor in our discussion and that seemed reasonable to me, so I adopted it for our use.

Q So you relied, then, both on the basic rations supplied to you by Mr. Yates, as well as the adjustment factors for the severe winter weather conditions and the adjustment factor for wastage all from Mr. Yates, is that correct?

A Yes. Mr. Yates, Dr. Yates provided that information.

Q Now, were -- the ration that Mr. Yates supplied to you did not contain the mineral supplements that are shown on Exhibits 10, 11 and 12, did they?

A Yes, they did. He recommended adding mineral supplements to the diet.

Q So are you telling me, then, that the rations reflected on Exhibits C-10, C-11 and C-12 are precisely those recommended to you by Dr. Yates?

A No. The one recommended originally didn't contain the adjustments for wastage and extreme winter conditions, so I made those adjustments

myself.

Q Other than that, those two adjustments then, these are exactly the rations given you by Dr. Yates?

A Yes, I believe so.

Q And you relied on the rations that Dr. Yates provided you, is that correct?

A I did in determining the cost for winter feeding in our livestock model.

Q That was both for establishing the ration and determining the cost?

A Well, the cost is determined, first of all, from the ration used. That is a basic element in formulating the cost of feeding.

Q I understand, but what I am getting at now is just the ration and whether or not you relied on anything other than Mr. Yates and his model and his concurrence in your modifications in establishing the rations shown on these three exhibits?

A Well, as I said, I reviewed other feed rations that were formulated by Dr. Yates and determined that those were similar, and through discussions with operators on the Reservation, determined that these were within the range of experience on the Reservation as well. So no, I didn't just rely on Dr. Yates'feeding rations, I also relied on other factors.

MR. MERRILL: One moment, please, Your Honor.

(Pause.)

Q (By Mr. Merrill) Do you have with you a copy of the facts and data that you supplied to Mr. Yates in developing the nutrition rations?

A I don't have them with me. I could tell you today.

Q Why don't you go ahead and tell me exactly what you told Mr. Yates?

A Well, I could tell you by going to the telephone and calling to my office where those are contained. There were about 75 or possibly a hundred different feed rations run, and I certainly don't remember all of those.

Q So you are unable to tell me right now what facts and data you relied on or Mr. Yates relied on in developing the rations shown on Exhibits C-10 and C-11 and C-12?

A I have told you the basic facts and --

Q I'm talking about the specific figures and information that you provided to Mr. Yates. You don't have the specific figures and information?

A That I provided to Mr. Yates? Oh, yes, I can tell you that. I misunderstood your question. I'm sorry.

I told Mr. Yates that we were interested in cows, pregnant heifers, pregnant cows, and bulls,

and we wanted feed rations determined for those type of animals. I gave him the weights, the approximate weights, for each type of animal. I provided him with the different feeds that I thought could constitute the feed rations or that were available for consumption on the Reservation, and I gave him several average daily gain categories as well: .5, 1.0, and 1.5 pounds per day for the calves.

Q On what did you base those average daily gain assumptions?

A Well, the one I chose for use in our model, the 1.0 pounds per day, was based on the weight progressions contained in the model that we used.

Q Is that the Kearl model?

A Yes.

Q Do you know what facts and data Mr. Yates relied on other than the information you gave him?

A Yes, he relied on the nutritional requirements of these various types of animals that are contained in the National Academy of Sciences publication on nutritional requirements for livestock, and I believe --

Q Do you know --

A -- he relied on analysis of the feed value of the different types of feed that we said were available

on the Reservation.

Q Do you know specifically what nutritional requirements he calculated would be necessary for each of these classes of animals?

A I don't know that offhand, no.

Q Do you know what feed contents or nutritional contents he used; for example, how much protein there is in a certain amount of alfalfa?

A No, I don't remember that offhand.

Q So you don't know then the intermediate calculations by which he computed the nutritional requirements or the ability of these various feeds to fulfill those nutritional requirements in developing the feed rations for the year; is that correct?

A I reviewed those calculations. I can't tell you all the specific numbers right now.

Q Now, you got the weights and average daily gain figures and types of animals out of the Kearl model; is that correct?

A Yes.

Q Did you take those straight out of the Kearl model?

A Those are exactly the ones contained in the Kearl model, the ones we used in our analysis.

Q Do you know what facts or data Mr. Kearl used in developing those parameters within his model?

A Yes, those were based on interviews with operators in the Mountain Valley cattle ranching area.

Q Did you make any independent determination on your own as to the reasonableness of those factors?

A Yes, I did.

Q Would you describe what you did?

A Yes. I discussed those parameters with operators on the Reservation and with Rich Harbour and Bob Robertson on the Reservation and determined that the weights contained in the Kearl model were reasonable to use for a model in determining the feasibility of expanding the livestock industry on the Reservation.

Q How did you determine that those weights were reasonable?

A Because those were weights that were actually being attained on the Reservation today.

Q How many folks did you speak to on the Reservation?

A Oh, perhaps half a dozen.

Q Did you make any independent determination of your own as to the accuracy of the Kearl model?

A I spot-checked some calculations in the Kearl model, the physical parameters, and by that I mean the weights and calving rates and such were used in our model, but the other calculations in the Kearl model are all based on costs and prices, and because

we have our own costs and prices, we didn't check the ones he used because we substituted our own for those.

Q Did you make any other determinations of the accuracy of the parameters that you took from the Kearl model to determine the feed rations?

A Well, the discussions with the people I told you about were our means of checking the accuracy of the model or the appropriateness of using that model for looking at expansion of the livestock industry on the Reservation.

Q Any other verification other than half a dozen phone calls to ranchers?

A Well, not phone calls, but personal visits in some cases.

Q So as I understand it, you sat down with Mr. Yates and gave him some, I assume, parameters you got from the Kearl model --

MR. GRAVES: Dr. Yates.

MR. MERRILL: Excuse me. Dr. Yates.

Q (By Mr. Merrill) -- which Mr. Yates then plugged into his model along with some nutritional requirements and nutrition contents information which you don't have with you and then he gave you back feed rations for these various animals and then you selected rations from amongst that group; is that

correct?

A Selected and adjusted, yes.

Q And your selection was based on what you felt would be the predominant feeds now and in the future in the Wind River Indian Reservation; is that correct?

A Basically we chose two rations for each type of animal for three of the four types. One was based on predominant feeding patterns today, and the other was based on the fact it was the cheapest of the alternative feed rations that was presented to us.

Q Then you adjusted each of these rations by ten percent to account for severe cold weather and another five percent to account for wastage and the results are what appear on these three exhibits; is that correct?

end-27

THE SPECIAL MASTER: You asked that twice.

THE WITNESS: Well, I think I described the only exception to that for corn silage, a full ten percent adjustment was sometimes not necessary because it was balanced on protein and not on energy, and it's the energy that needs to be supplemented for extreme winter conditions.

Q (By Mr. Merrill) On what information did you rely in determining that a ten percent adjustment was not always necessary?

A Discussions with David Yates and my own calculations.

MR. MERRILL: Your Honor, I object to the introduction of these three exhibits on the grounds that they are based on information which come from two different models of reality. The witness did not ascertain that either of the models is generally accepted within the community or was that the models were shown to be reliable as they were actually used to prepare the data upon which he relied of his own computation. There's been no showing that the models that were operated for this information were operated correctly. It's clear from the testimony of the witness that he relied on all

sorts of hearsay, including the opinions of other experts which is specifically prohibited under the Rules of Evidence.

Secondly that he relied on interviews with other folks, none of which are exceptions to the hearsay rule. So he relied on inadmissable evidence as well as these computer models, which there's been no foundation showing that they operated correctly or were produced accurately, and based on those grounds, I would object to their admission into evidence.

THE SPECIAL MASTER: I will observe that the four exhibits being offered into evidence were not gathered together -- the three exhibits were not gathered together totally from hearsay. He explained in some detail several times the procedures into which went the particular material in them. And I would overrule the objections. I want to make clear, however, for the witness there stands the fact that these have been adjusted ten percent upward for extreme winters, and Dr. Yates mode, and five percent factor for waste, and you take, take a winter like this, wouldn't you be about 15, 18 percent higher than normal because --

THE WITNESS: You might on temperature and wind, but the fact is that there is not much snow covered this winter, so there's a lot more winter forage available this winter than --

THE SPECIAL MASTER: So they would be fed that much less?

THE WITNESS: Yes, that's right.

THE SPECIAL MASTER: Less need for the hay and for supplemental feeding.

THE WITNESS: So these are conservative in that respect because our costs are higher than they would be.

THE SPECIAL MASTER: Conservative or they're generous in that respect?

THE WITNESS: Conservative in the sense that we are paying for more feed than might be necessary this winter, and as I'm sure I'll testify to later, the -- one of the purposes of these feed rations is to determine the cost of running the livestock operation. And one of my conclusions will be, is that it will be feasible to expand the livestock industry. And it's conservative in the sense that I'm showing more costs than might be expected this winter.

MR. MERRILL: Your Honor, I don't think the

witness ought to preview what his conclusions are until he's been asked a question. And I request that the response be stricken.

THE SPECIAL MASTER: In any event the objections are overruled, and Exhibits 10 -- Exhibit 10, 11 and 12 are admitted into evidence.

(Thereupon the charts that were marked as Number 10, 11 and 12 were received in evidence.)

THE SPECIAL MASTER: Ms. Sleater?

MS. SLEATER: At this point, Your Honor, I'd like to ask the Court to accept Mr. Merchant as an expert in the field of economics and allow him to so testify.

THE SPECIAL MASTER: Mr. Merchant has acquired a college degree, acquired an MBA and then a law degree. I think you're wasting your time, I wonder if we need to discuss much more of that as far as an expert or do you want to voir dire on that, Mr. Merrill or Mr. White? Or do you want to take a few minutes?

MR. WHITE: Could we have just a minute, Your Honor?

THE SPECIAL MASTER: Surely.

(Brief pause.)

MR. MERRILL: Just a couple of questions,

VOIR DIRE EXAMINATION

BY MR. MERRILL:

Q Mr. Merchant, have you ever been qualified as an expert witness before?

A No, this is my first trial.

Q Have you ever been qualified as an expert of any sort in ruminate nutrition?

A No.

MR. MERRILL: Your Honor, we object to his being qualified as an expert in anything having to do with livestock, nutrition, in determining rations or feed requirements for livestock. I believe the tender was as an economist and I think their nature, economists are not necessarily qualified to do this type of work since he felt compelled himself to obtain the services of another person whom he regards as an expert. I think that has some bearing on whether the Court should accept his abilities to perform this kind of work.

THE SPECIAL MASTER: Oh, goodness.

MS. SLEATER: Your Honor, maybe I could clarify this with a further question.

THE SPECIAL MASTER: Proceed.

EXAMINATION (CONTINUED)

BY MS. SLEATER:

Q Mr. Merchant, would you explain what an economist does and how an economist goes about analyzing the situation?

A Well, an economist generally analyzes the particular issue by inquiring into the basic characteristics of any issue or enterprise or impact that he's analyzing, and learning so much about it, has to be able to understand the workings of the economic system that he is analyzing. And then bringing economic principals to bear in analyzing that system for the purpose for which he's doing so.

I think an economist, I don't build high-rises either, and I feel confident to analyze the effects of high-rises on a city environment, because I've learned enough about the workings of high-rises and their affects on their surroundings to be able to do so.

Q Have you had occasion to previously analyze the economic effects of livestock operations on Indian Reservations?

A Yes, I've done so on three previous Reservations.

MS. SLEATER: I think that should solve the

problem, Your Honor. I again renew my motion to offer Mr. Merchant as an expert in this matter.

THE SPECIAL MASTER: I will admit Mr. Merchant as a qualified economist, and I feel that the degree to which he's acquired knowledge that he would have to have, and it's tied in with those on the scene, the direct interviews and what he's done, would be sufficient to, I think, support his admissibility as a qualified witness, qualify as an expert.

MS. SLEATER: Thank you, Your Honor. And to keep my notes straight, you've admitted then 10, 11 and 12 also, the exhibits that were originally discussed?

MR. MERRILL: I believe we did.

THE SPECIAL MASTER: I believe we've admitted everything up through 12 except 1 and 8, the resume of the projects. I'd like to know what 9 is. Is 9 a chart?

MS. SLEATER: Nine was the 450 calf, 450 pound calf ration.

EXAMINATION (CONTINUED)

BY MS. SLEATER:

Q Once you established the feed ration as presented,

what was the next step in your analysis?

A Well, there were two aspects to the economic analysis that continued from here. One was to analyze the other economic costs entailed in a livestock operation, and the other was to analyze the returns from a livestock operation.

Q How do you go about analyzing returns?

A Well, the model we used and checked with people on the Reservation provides us with the selling weights and number of each type of animal on the livestock operation, so that we have selling weights by type of animal very readily.

The prices, however, obtained for each of those types of animals entailed quite a bit more analysis. As you know, there is a distinct cycle in cattle prices, and we felt it appropriate not to simply take one year's price for cattle, but to take an average of the prices that prevailed over the 12-year cycle, so we determined our prices based on 12-year averages.

Q Which -- Well, first of all, what types of animals did you consider for return purposes?

A Well, there are steer calves, heifer calves, steer yearlings, cull calves, and cull bulls.

Q What is a cull cow?

A A cull cow is a cow that's being removed from the herd because either she's open or she's injured or simply getting old or sometimes has a history of producing light-weight calves. There are lots of reasons.

Q And what is a cull bull?

A Also a bull that's getting on.

THE SPECIAL MASTER: A bull getting on in years.

THE WITNESS: It's becoming ineffective for one reason or another.

* * * * *

Q. (By Ms. Sleater) What was your selling weight for steer calves?

A. Four hundred ten pounds, reduced somewhat to allow for shrinkage during transport to market.

Q. Why did you make the reduction?

A. Well, because the anamals aren't sold on the ranch, they have to be shipped to an auction, and we used the Riverton auction as our selling place and used a 50 mile distance as the average distance that operators might be expected to ship their cattle.

Q. And how much was your reduction for shrinkage?

A. It was two percent reduction with .35 percent fillback. There is a net shrinkage of about 1.4 percent, I guess.

Q. You said there was a two percent reduction. What is fillback?

A. Once the animal is at its destination, it regains some of the weight lost during transit.

Q. How did you develop the percentages which you used for both shrinkage reduction and fillback?

A. These are based on a study done by Dr. St. Clair at the University of Wyoming, and published in a research journal.

Q. What was his study?

A. I believe the title is, "Marketing Cattle in Wyoming."

THE SPECIAL MASTER: What year was that published?

THE WITNESS: I think it's 1974, Your Honor.

Q. (By Ms. Sleater) Did you make any checking of the weights you were assuming for selling weights with any market information other that Dr. St. Clair's work?

A. We talked with operators and other informants on the reservation to determine these are reasonable.

Q. Other informants?

A. Rich Harbour and Bob Robertson, the Land Operation and Range Operations Officers.

Q. What was the selling weights you used for heifers?

A. Heifer calves?

Q. Heifer calves, I'm sorry.

A. Three hundred eighty pounds plus shrinkage,

Q. And for steer yearlings.

A. I believe that's 730 pounds.

Q. For cull cows?

A. One thousand fifteen.

Q. And for cull bulls?

A. One thousand three hundred forty-five, I believe.

All those are without shrink.

Q. Which means you then took two percent of that weight and subtracted it?
A. We took a net of 1.4 percent shrink and subtracted that.
Q.. How many animals are in your total operation?
A. Well, it varies over the course of a year, but at fall inventory there is approximately 375.
Q. When do you sell, under your model?
A. October, November.
Q. In the fall?
A. Yes.
Q. Can you tell me the number of steer calves that you sell, under your model?
A. It might be easier if we refer to the next exhibit, because it has all that information on it.

(Brief pause.

THE WITNESS: Not that one.

That's the one.

(Whereupon, exhibit (WRIR C-13 was marked (for identification.

Q. (By Ms. Sleater) We now have displayed what is being marked for identification as U.S. Exhibit WRIR C-13. I ask you if you can identify that?
A. Yes, that's a table showing the various types of animals sold in fall, the number of each animal,

their weight -- these weights are net shrink -- the total selling weights for the catagory of animal, then the price per hundred weight, and the total weights by type of animal.

Then the bottom right-hand corner is the total gross returns of the livestock operation.

Q. Perhaps it would be easier if you just ran down the numbers for the record here explaining, where necessary, those numbers came from.

A. All right. The first two columns are what I would call parameters contained in the model, and that is the number sold because there is a whole system of progression of animals over time, and some of these are sold at various times or integrated into the heard or retained for another year to be sold at a future date. So these are the type of each animal sold in any particular fall in the first column.

The second column is the weights, the sale weights, net of shrink, and these are the weights contained in our analysis of the livestock operation net of 1.4 percent shrink.

Then the third column is simply the multiple of the first two. The fourth column are the places we computed for each category of animal. I described

that. It was a twelve-year average of prices. And then the last column is a multiple of the fourth and fifth -- I'm sorry, the third and fourth columns. So it is a total return by type of animal.

MR. MERRILL: Your Honor, the witness is testifying based on Exhibit C-13, and I note that none of the -- or some of the columns on C-13 contain information which has not yet been put into evidence, including the number of animals that would be sold, what the weight per animal is upon sale.

Perhaps it would be appropriate if we are going to have testimony regarding these matters, to have the basis of the selection of these numbers into evidence or something to show that they just weren't picked out of the thin air, and we decided all of a sudden we are going to sell thirty yearling heifers per year.

So I would object to any further testimony based on this exhibit, and, of course, later the introduction of the exhibit until some foundation is laid to show how the numbers and the assumptions reflected on this exhibit were derived.

Your number -- Sorry, Your Honor.

Your Honor, I would like to point out that Rule 705 of the Wyoming Rules of Evidence provides -- the heading is, "Disclosure of Facts or Data Underlying Expert Opinion," and I will read the whole thing. It's short.

"An expert may testify in terms of opinion or inference, and give his reasons therefore without prior disclosure of the underlying facts and data, unless the Court requires otherwise. The expert may, in any event, be required to disclose the underlying facts and data on cross-examination."

Therefore, I don't believe Mr. Merrill's objection goes to this exhibit at all.

THE SPECIAL MASTER: I thought the discussion heretofore has been around the basis of a 250-cow -- cow-calf-yearling ranch operation, and I think these figures you might want to state that on an operation of that size you think the norm is that each year you have a sale of about 39 yearling steers and about 30 heifers and so on.

I think that is the objection Mr. Merrill was making. He found no basis for showing you would be selling this particular quantity of the particular kinds of animals.

MR. MERRILL: You are correct, Your Honor. Just where these numbers came from and why.

THE SPECIAL MASTER: I think a little bit about where the numbers came from would be in order.

THE WITNESS: Certainly.

The numbers sold are parameters that are contained in the Gordon Kearl model that we reviewed and then adapted for use in determining feasibility of expanding the livestock industry, and these are simply the -- on a constant cycle so that the ranch stays the same size year after year. These are the numbers of each type of animal that would be produced and sold in that year.

You can see part of the cows are held back and fed over the winter, and then grazed in the next summer, and sold the next fall as yearlings. So it's not a pure cow-calf operation, but a cow-calf-yearling.

THE SPECIAL MASTER: What does Kearl do about your bulls?

THE WITNESS: He handled the bulls another way. We have a line item in our budget for bull depreciation. This is a column of treating that in the budget, and we simply subtract the amount paid each year for 3,000 bulls -- I'm sorry, we subtract the amount received

from the sale of two bulls from the amount paid for three young bulls, and we get a net expense on bulls each year. It's fairly minor, so it's treated in a different way.

The second column is the sale weights, and I think I have described that a little bit. The weights come from the same model, basic weights, and then we subtract 1.4 percent shrink to account for the shrink during transit to the auction.

So the only other column of new data is the fourth column, and those prices are a result of our averaging of prices from two large auction places, one in Omaha and one in Billings, over a twelve-year period to obtain a relatively stable price, long-term stable price, for livestock.

The other figures there are just multiplications or additions of the ones I have mentioned.

THE SPECIAL MASTER: I think that meets the objection. Proceed.

* * * * * * *

MS. SLEATER: So No. 13 will be admitted, Your Honor?

THE SPECIAL MASTER: Have you offered it yet?

MS. SLEATER: Well, in that case I would move that U.S. Exhibit WRIR C-13 be admitted into evidence.

THE SPECIAL MASTER: Any voir dire, Mr. Merrill or Mr. White?

MR. MERRILL: Yes, Your Honor, just a few questions.

VOIR DIRE EXAMINATION

BY MR. MERRILL:

Q Jim, how did you determine the price per hundredweight? You said you went back and averaged the last twelve years; is that correct?

A Yes, we obtained a twelve-year time series of prices from the Billings and Omaha auctions for each of those categories of animals. Then because there's been a lot of inflation during that time we changed those prices or expressed the historic prices in terms of current dollars, so we moved them all up to 1979 dollars first and then we took a simple average to account for the whole cattle cycle.

Q You said these animals will be sold in Riverton; is

that correct?

A Yes.

Q And yet to determine the prices you relied on market prices from Billings and some other city; is that right?

A Omaha, yes.

Q And Omaha?

A Yes.

Q And with that exception, then these prices are the twelve-year average of the prices paid in Billings and Omaha over the past twelve years?

A With that exception? I'm sorry.

Q Let me start the questionover again. You took the average of prices paid in Billings and Omaha over the last twelve years for each of these categories of animals; is that correct?

A For each year, yes.

Q And didyou make some adjustment to bring those prices to a current value?

A Yes, we did.

Q How did you do that?

A We used U.S. Department of Agriculate Index of Prices Paid by Farmers for Items Used in Production and Living.

Q Why didyou decide to use that particular method

of computing the present value?

A It's not a present value really. It's a current --

Q Current price. Excuse me.

A Price, yeah. Well, we felt that it was important to take into account the whole cattle cycle so that we get all the dips and peaks accounted for instead of just taking any one segment that might either be low or high. Cattle prices are notoriously volatile so for this one particular set of prices we thought it was very important to do so, and because there's been inflation in the intervening period, we also felt it important to express all the prices in the same kind of dollars.

Q What dollars are those?

A 1979 dollars.

Q Did you compare these prices with the actual prices that have been paid in Riverton where these animals are going to be sold?

A No, we didn't because we felt the Riverton prices would be even more volatile and because of the smaller quantity of animals sold in that auction, it would be more subject to fluctuation. We are looking here for a long term stable price to use in evaluating a project or an enterprise over a long period, so we want a very stable price and

not something more subject to fluctuation.

Q So the fact is that the prices that are likely to actually be paid for the animals in the operation that you are projecting are not those prices that are shown on Exhibit C-13; is that correct?

A Well, in the long term average we expect they would be quite similar, yes.

Q For two other cities; isn't that right?

A Well, we have, as I explained, only long term price data based on large quantities of animals sold for those two cities. We tried to use -- what was it -- I think it was a Thermopolis auction price, but the time series wasn't available for a long enough time. We found we had to go to these two cities to get the data we needed for a long term averaging.

MR. MERRILL: Your Honor, the State will object to the admission of Exhibit C-13 on the grounds that while it may reflect the long term average prices and, therefore, the returns that would be paid or have historically been paid in Billings and Omaha, it has nothing to do with the actual cattle operations that's being proposed or discussed in this case which involves the sale of those animals in Riverton.

The witness has admitted there

will be descrepancies between those prices, and based on that, I don't believe that the price per hundredweight for the various categories of animals is necessarily an accurate basis for determining the gross returns.

THE SPECIAL MASTER: What is the exhibit being offered to show or to prove, Regina?

MS. SLEATER: Well, Your Honor, this exhibit is part and parcel of the analysis of the livestock operation that Mr. Merchant has analyzed. This is reflecting various opinions he has made.

THE SPECIAL MASTER: His projections were based upon these sale prices; is that right?

THE WITNESS: Yes.

THE SPECIAL MASTER: What was your reason for using the two markets and not using Torrington or Riverton?

THE WITNESS: Because the data wasn't available for the whole cattle cycle. In Torrington there's only data for the past five years, I believe. We did look up there, and also we felt that the greater volumes of sales through these two markets, Billings and Omaha, would provide a more stable market condition to reflect the long term kind of analysis that we're doing.

THE SPECIAL MASTER: Is that a practice that is general with economists in cranking up projections that you are doing?

THE WITNESS: Yes.

THE SPECIAL MASTER: I suspect it's done along a pattern of professional mode, so I think it will be admitted.

(The instrument hereinbefore identified as WRIR Exhibit C-13 was received in evidence.

MR. MERRILL: Well, Your Honor, my suspicion of the exhibit is that Billings and Omaha are both reasonably distant markets, certainly Omaha is, from the Riverton area, and I sort of suspect that the prices paid in Omaha and perhaps Billings are somewhat higher than those shown in Riverton, and if that's the case, then the gross returns as shown on that exhibit are going to be higher than they are going to be in the real world.

THE SPECIAL MASTER: Your objections would go to the merit or credibility of the exhibit a little bit, but I'm not altogether sure that the cattle prices are really that much different between Denver or Omaha or Omaha or Wyoming markets. I'm not that familiar with it, and there's nothing in the evidence to help me get more familiar with it.

MS. SLEATER: I would like to note at this time, as has been pointed out by counsel for the Attorney General, that statements made by counsel are not evidence, and unless the State of Wyoming has some facts to back up the bold assertion of Mr. Merrill, I don't even think that it's appropriate to be considered in determining the --

THE SPECIAL MASTER: Well, I have ruled on the exhibit.

Mr. White?

MR. WHITE: You have ruled? I'll sit down.

Excuse me.

THE SPECIAL MASTER: Ladies and gentlemen, it's about 5:25. Why don't we call -- Mr. Webster?

MR. WEBSTER: Your Honor, before we close court tonight -- and I think that's what you were going to do --

THE SPECIAL MASTER: I was going to with the exception of how about shifting it to Worland? Is that whatyou had in mind? I promised Mr. Donnell I was going to raise that.

MR. WEBSTER: That's one of the things, and after that I have something else, if I could.

THE SPECIAL MASTER: All right. We have a schedule that will be put in the mail, I hope

tomorrow, with a little from my statement this morning on the Special Master to be added to it for this notice that Mr. Thompson and Mr. Webster mentioned, and if in February the Worland courtroom is available and, Mr. Donnell, I hope you can double-check for me with Judge Joffe to make sure he's going to be gone most all of February, and I think he said he would. See if February --

MR. DONNELL: I'll be sure to check that.

THE SPECIAL MASTER: If February 9 to 19 will be all right, I would like to move the February hearings to Worland because it's going to be a long dry spell without Worland hearings between now and the time that we have scheduled for Worland hearings at the end of these hearings, so I'm going to do that.

I'll give notice of that now unless I hear from you, Jeff, in a few days that that courtroom is not available.

MR. DONNELL: If there's any problem, I'll be sure to let you know, but I don't expect any.

MR. ROGERS: Are we talking about one week, February 9th?

THE SPECIAL MASTER: It's about a week and 3 days, I think it's the 9th to 19th, isn't it ten days?

MR. ROGERS: It sounds too late, but for the record, I would like to enter an objection on the basis that the trial has been-- this issue has been aired before, and we have had it set here. We have boxes of exhibits to deal with and move about. It's basically the private counsel we're not dealing with, and it poses a great inconvenience. We have local counsel here, I'm sure the State won't speak up to this, but I'm sure it will be a great deal more inconvenient to them.

THE SPECILA MASTER: People from the Big Horn Basin said this morning there's no way to do this without having a hardship on somebody.

Would March be a better week than would be February?

MR. ROGERS: No time would be. If we're going to do it, let's do it in February, but I think, as I understood our arrangement before, as the Master previously ruled, we would try all aspects of the case here except for a few days of impact evidence.

to move what has already been moved here for these hearings that were scheduled.

MR. ECHOHAWK: Your Honor, the expense we've had in moving these large exhibits presents a problem because I don't think the larger aircraft that can accommodate these can go into Worland. That may be one problem that would involve bringing a truck and trailer and moving them into there.

MR. SACHSE: I wonder if I might suggest sort of a compromise, that maybe we ought to let the United States finish its case here and then start thinking about moving to Worland either for part of the Tribes' presentation or for part of the State's case in chief.

THE SPECIAL MASTER: Does that sound pretty reasonable, Jeff?

MR. DONNELL: I don't have any problem with that. For purposes of the courtroom, February's probably a better time to do it because the judge is on vacation then.

MR. SACHSE: He's on vacation because you can't tell whether you're going to be able to fly in or out of Worland. in February.

THE SPECIAL MASTER: That's not true.

MR. DONNELL: We can accommodate a 727 there. If you can't accommodate them on a plane that size--

THE SPECIAL MASTER: That is correct, that is correct. I'm only trying to accommodate four or five attorneys for other parties who voiced this morning a hope that we might return to Worland this year for a hearing, and I expect it would make it a lot easier for joint tribes and Hanover Canal people and the irrigation system of the Upper Big Horn Basin, I'm trying to accommodate them.

MR. WHITE: Your Honor, on behalf of the State of Wyoming, we have no objection whatsoever, it's not less convenient for us, it's a difficult time at best of times and we endorse the suggestion.

THE SPECIAL MASTER: If I could arrange for some mode of getting my stuff up there a few days early, I will let you know and you and Harry can pick up your exhibits and I can help you drive them up and back and fly them up and back.

MS. SLEATER: I'd just like to add my voice to this. Mr. Echohawk was going to say something too. As you can see from the size of our exhibits, we have a whole room-full of these, we have more coming in that we've had everybody send here because the hearing was scheduled for here. It's very expensive to move these things around and we're going to have to go to a lot of extra expense, probably involving renting a truck or something or other

THE SPECIAL MASTER: All right. Let's finish the case, let's finish the United States' case in Cheyenne, Wyoming.

Mr. Webster, you see now our problem. And then let's move the remainder of the case of the Tribes to Worland and have a week's hearing up here, I suspect it will be March, even April.

Now, you had something else?

MR. WEBSTER: Your Honor, according to your pre-trial order, opposing counsel were to have been supplied with lists witnesses and a summary of what those witnesses were going to say, and that hasn't been done, and on behalf of the private counsel, at least on my behalf, I would wish that that would be complied with.

Secondly, with regard to some of the matters which were discussed on moving the-- all the monstrous exhibits up to Worland and so forth for one week, it will certainly be an improvement and I hope that at some point right away it would be given an opportunity to have a list of witnesses and the order in which they are intended to be called, and the approximate that is expected for the evidence to be taken.

What we have gotten into is a situation where some private counsel have come down here today to listen to a

full day of testimony at some considerable expense, expense to our clients who are paying us, who are paying the State of Wyoming and, frankly, who are paying the United State also, it's their expense; to listen to some evidence which perhaps isn't as relevant as something down the line. And if we were given an opportunity to know the order in which witnesses were going to be called, and if counsel would comply with the pre-trial order as far as supplying us with a summary of what the evidence will be, we would have the opportunity of picking and choosing what evidence we think is important to hear.

THE SPECIAL MASTER: Mr. Webster, you made some good points. I think it was Paragraph 10 of the pre-trial that said at least 10 days before the trial commences all parties shall submit to opposing counsel and the special master, names, addresses, general testimony of any and all witnesses who will be called. Is that the one you have reference to?

MR. WEBSTER: That's right, Your Honor. In addition I hope that we get a list or an order of what witnesses are called when.

THE SPECIAL MASTER: All right. Do you want to hold up the mailing that's about ready to go now and will be in a couple of days, for a list of witnesses or shall we order that the United States can list their

and give it to us and we'll mail it out some time by the end of the week.

MS. SLEATER: Your Honor, at this time we could certainly give a list of witnesses we plan to call, but as to giving the orders, I'm afraid that's just impossible due to the schedule in this case which was a result of Mr. White having previous commitments. The initial stages of this trial are so broken up that we don't know until we see how long the direct is who we're planning to put on. We obviously didn't want to put ourselves where we'll be extending some witnesses over a period of a week or even a month, as would be happening in February and March.

THE SPECIAL MASTER: Well, Mr. Webster and other counsel like him have received nothing, so if you could give a list of witnesses and a sentence or two of what the witnesses will purport to do, get it to Leo Salazar, we'll get it into the mail as soon as we possibly can.

I hope you can appreciate this, we don't know whether we got 400 lawyers or 450 lawyers or 205. The only way we can get it is 848 mailings of all counsel and pro se, and thats what we'll dc.with this if it isn't more than a couple of pages.

MS. SLEATER: Your Honor, I will give you copies

of the two letters which we provided to Wyoming which listed witnesses and exhibits.

THE SPECIAL MASTER: Will you do that, Leo, and see that it gets out, even if it takes two envelopes or two separate postage things?

MR. DONNELL: Your Honor, if I could make one further request. I appreciate the Unites States' time problem on this as to when they might call them, but surely they must have some idea of that, how they're going to be called in, that would be very important and helpful to us to know at least roughly when they might be called so we can be here if it's going to be important.

THE SPECIAL MASTER: We'll see if we can't do something more, like a weekly resume, projected weekly resume, as best as Regina can supply that information to us.

Yes, Mr. Radosevich.

MR. RADOSEVICH: Of the ascertion that Mr. Webster made, particularly in our client's case, it is costly going to great distances, and I do agree, I think the counsel for the government should be able to provide us at least with the order. There are many tires when I or someone else doesn't have to be here.

I would request a member of our firm be admitted for special purposes to appear before a trial as present

during my absence. I will be gone this Thursday and Friday.

THE SPECIAL MASTER: He is not a member of the Wyoming Bar?

MR. RADOSEVICH: He was a member of the Colorado Bar for four years, and has--is with our firm in Lander, Wyoming.

THE SPECIAL MASTER: I believe that I can move his admission for the purposes of this lawsuit, and if there are any objections, please speak up now.

(No response.

THE SPECIAL MASTER: What is his name?

MR. RADOSEVICH: Greg Parish.

THE SPECIAL MASTER: Very well. And did you make your appearance today, did you file an appearance?

MR. RADOSEVICH: No, I did not. I had it filed previously.

THE SPECIAL MASTER: Mr. George Radosevich, a nice short name like Roncalio.

All right. Let's stand in recess until 9:15 tomorrow morning.

(Thereupon the proceedings were recessed at 5:30 p.m., January 26, 1981.

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U.S. Exhibit WRIR C-4	00038	
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U.S. Exhibit WRIR C-3	00076	00083
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We further certify that we are not agents, attorneys or counsel for any of the parties hereto, nor are we interested in the outcome thereof.

Dated this 26th day of January, 1981.

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