

5-21-1981

## Trial Transcript, Vol. 70, Afternoon Session

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Case # 4993

File # 177

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

WASHAKIE COUNTY, STATE OF WYOMING

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

Civil No. 4993

FILED \_\_\_\_\_  
6/23 1981  
Margaret V. Hampton CLERK  
\_\_\_\_\_ DEPUTY

VOLUME 70

Thursday, May 21, 1981

Afternoon Session

**ORIGINAL**



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(The following proceedings  
(were continued at 1:30 p.m.,  
(to wit:

THE SPECIAL MASTER: Let's go on record, ladies  
and gentlemen.

MR. ECHOHAWK: Your Honor, before Mr. Merrill  
begins, placed on the table here is our partial  
response to Wyoming's Tenth Request For Production  
of Documents, and as soon as the rest of the  
information becomes available, we will supply it  
to them.

THE SPECIAL MASTER: Thank you, Mr. Echohawk.  
Will the record show there is a massive paper on  
his desk three feet high, and that is now Mr.  
Merrill's, is it --

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

THE SPECIAL MASTER: -- to worry about it?

MR. ECHOHAWK: Do you want to take them now?

MR. MERRILL: Do you want to take a break?

MR. ROGERS: He may not be able to see the  
Witness.

THE SPECIAL MASTER: Off the record.

(Off-the-record discussion.

THE SPECIAL MASTER: Back on the record.

MR. MERRILL: Your Honor, the record should  
reflect I'm handing out copies of the permanently



1 marked Exhibits ED-51 and 52.

2 THE SPECIAL MASTER: All right.

3 THE WITNESS: Have these (indicating) been  
4 copied already, Mr. Merrill?

5 MR. MERRILL: No, they have not.

6 THE SPECIAL MASTER: I would still like an  
7 answer to yesterday's question on Rocky Boy. Did  
8 anybody find out what Tribe that is?

9 MR. ROGERS: It's Chippewa Cree, isn't it?

10 THE SPECIAL MASTER: Okay, thank you.

11 MR. ROGERS: I can throw no light on where  
12 the name came from, however.

13 THE SPECIAL MASTER: Fifty-two I have, Mr.  
14 Merrill. Did you bring around 51 also?

15 MR. MERRILL: Yes, I did, Your Honor. It's that  
16 one-page chart.

17 THE SPECIAL MASTER: All right. Thank you.

18 Q (By Mr. Merrill) Mr. Dornbusch, I direct your  
19 attention to Table 18 on Page 39 of Exhibit C-278.

20 A All right.

21 Q All set?

22 A Uh-huh.

23 Q Would you please, beginning with returns, describe  
24 to the Court how you determined the per acre

25 dornbusch-cross-merrill



1 returns shown on Pages 39, 40 and 41?

2 A Yes. These are the average returns per acre for  
3 each of the units -- well, for each of the -- yes,  
4 for each of the units shown in the left column.  
5 It is a weighted average of the returns for those  
6 units.

7 Q How did you determine a weighted average for the  
8 lands within each of the drainages or projects in  
9 the left-hand column?

10 A By analyzing each of the fields within that unit  
11 that would be irrigated.

12 Q Do I understand you to say you did a field-by-field  
13 analysis of these lands?

14 A That's right.

15 MR. ECHOHAWK: Your Honor, just so the record  
16 is correct, the items listed down the left-hand  
17 column are drainages, not the units.

18 THE SPECIAL MASTER: The description I find  
19 on Table 18, Page 39 gives them by project rather  
20 than drainage basins.

21 MR. ECHOHAWK: The first ones are the projects,  
22 the following two pages list the drainages.

23 THE SPECIAL MASTER: They do, indeed, they are  
24 listed by basin. I see that and I'm happy for the

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1 notation. Thank you.

2 Q (By Mr. Merrill) Mr. Dornbusch, using the Ray Unit  
3 of the Little Wind River as an example, would you  
4 describe to the Court how you compiled the return  
5 information for the various fields within that unit  
6 into an average per acre return shown on Table 18?

7 A Well, to start backwards to tell you how we got the  
8 returns, as I said, the weighted average returns,  
9 they are the returns weighted by the size of each of  
10 the fields. The returns for each field are  
11 calculated as presented in my report on Type VII  
12 arable lands.

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- 1 Q (By Mr. Merrill) Are you speaking of some report  
2 concerning Type VII lands other than Exhibit 278?
- 3 A Well, I thought you asked the process for determining  
4 the returns, and the process for determining the  
5 returns are developed in those tables, in this  
6 exhibit.
- 7 Q Perhaps I misstated the question. What I intended  
8 to ask was how you got from the returns for each  
9 particular field to the per acre return shown on  
10 Table 18, and I think you answered it, and as I  
11 understand your answer, it's by weighting the returns  
12 for each field by the number of acres in that field;  
13 is that correct?
- 14 A That's right, yes.
- 15 Q Did you do the same with respect to costs?
- 16 A Yes, we did, that's right.
- 17 Q Do the costs and returns shown on Table 18 also --  
18 are they also weighted with respect to whether  
19 Type VII lands receive full or partial surface  
20 irrigation?
- 21 A Well, that's worked into it. Some of the fields  
22 have partial service. Part of the fields have full  
23 service, and it's dependent upon which fields  
24 comprise the units or the -- within the drainages  
25 dornbusch-cross-merrill





1 as presented in the table.

2 Q Is the benefit cost ratio shown in the right-hand  
3 column of Table 18 simply the returns divided by  
4 the costs shown in the second column?

5 A That's right; it is.

6 Q Mr. Dornbusch, I note some remarkably high benefit-  
7 cost ratios. On Page 40 there is one that exceeds  
8 ten. On Page 41 there is a benefit-cost ratio of  
9 greater than 15.

10 A Yes.

11 Q In evaluating the feasibility of these lands, and  
12 particularly those which you determined to have  
13 such a high benefit-cost ratio, did you make any  
14 investigation as to why these lands are not being  
15 irrigated today?

16 MR. ECHOHAWK: Objection, Your Honor. Irrelevant.

17 THE SPECIAL MASTER: Oh, that's a good question,  
18 and it's a good objection.

19 That reminds me of the fellow that said that  
20 some of his friends were for the question and some  
21 were for the objection, and he was for his friends.

22 I have just got to have the answer to that  
23 question. That's been in my mind several times, and  
24 I have got to overrule the objection at the risk of

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1 some possible error.

2 If this Witness knows, he may answer. If he  
3 doesn't, he doesn't.

4 THE WITNESS: I do not know.

5 THE SPECIAL MASTER: I suspect that is going  
6 to get asked several more times before the trial  
7 is over.

8 MR. MERRILL: I expect we are going to get the  
9 same answer, Your Honor.

10 THE SPECIAL MASTER: Not with you working, Mr.  
11 Merrill, we won't.

12 We will ask -- if necessary, I'll have to do  
13 it on my own motion -- we'll make some inquiries  
14 as to whether it's policy if they have the right  
15 not to irrigate certain lands. That's policy, and  
16 there may be some reasons, but we have a right to  
17 inquire into them.

18 Q (By Mr. Merrill) Mr. Dornbusch, do you have the  
19 number of acres in each of the units and drainages  
20 shown in Table 18 which receive full service and  
21 the number of acres that receive partial service  
22 irrigation so that we can know the figures by which  
23 you weighted your costs and benefits?

24 A Well, I haven't calculated that directly, no, but --  
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I haven't added up the particular acres that have full service and the particular acres that have partial service within each one, I don't believe.

\* \* \* \* \*

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1 Q Do you have some listing of fields that shows whether  
2 each field will receive full or partial service?

3 A Yes, I do, Mr. Merrill.

4 Q May I see your list, please?

5 MR. ECHOHAWK: What's the question? Can I have  
6 the question read back?

7 (Whereupon the reporter read  
8 (back the above questions" "Q Do  
9 (you have some listing of fields  
10 (that shows whether each field will  
11 (receive full or partial service?  
12 (A Yes, I do, Mr. Merrill.  
13 (Q May I see your list, please?"

14 MR. ECHOHAWK: Objection, Your Honor, he's not en-  
15 titled to see it unless the witness refers to it.

16 THE SPECIAL MASTER: Unless the what?

17 MR. ECHOHAWK: Unless the witness refers to it.

18 THE SPECIAL MASTER: I just assumed that the witness  
19 has been referring to all the papers that he has with  
20 him, and I just assume that the papers that he has with  
21 him that he's been asked about now were used in the  
22 computations on table 18, Mr. Echohawk, so I'm going to  
23 overrule.

24 MR. ECHOHAWK: He hasn't testified from them, Your  
25 Honor.

THE SPECIAL MASTER: He just answered a question on  
them saying that he cranked them into his weighted totals,  
dornbusch - cross - merrill



1 I thought.

2 MR. ECHOHAWK: The fact that he relies upon a paper  
3 doing his work is one thing. The question is whether or  
4 not the witness must refer to it during his answer to  
5 remember.

6 THE SPECIAL MASTER: I would love to sustain the  
7 objection.

8 MR. ROGERS: I would like to add that unless he  
9 refers to it while he is on the witness stand under oath,  
10 it need not be shown.

11 MR. ECHOHAWK: I believe it's rule 803.

12 MR. MERRILL: It can't possibly be 803.

13 MR. ECHOHAWK: 603.

14 THE SPECIAL MASTER: Let's take a minute and have  
15 a look at it.

16 The reason we have been most liberal on that is  
17 that I assumed you would have gotten that in depositions.

18 MR. CLEAR: The State was in charge of scheduling  
19 the depositions.

20 THE SPECIAL MASTER: I can't win this afternoon.  
21 Okay.

22 MR. MERRILL: Well, Your Honor, I'll state for the  
23 record --

24 THE SPECIAL MASTER: No problem. Let's see what  
25 the ruling is on it.



1 How many pages is the document that Mr. Merrill  
2 wants to see?

3 THE WITNESS: Do I have to refer to it?

4 MR. ROGERS: I think he will have to refer to it  
5 to tell you. I think that's the problem. If he may  
6 look at it under a protective order --

7 THE SPECIAL MASTER: Off the record.

8 (Off the record discussion.

9 THE SPECIAL MASTER: On the record, please.

10 Mr. Echohawk?

11 MR. ECHOHAWK: Still searching, Your Honor.

12 THE SPECIAL MASTER: Let me know when you get it.

13 MR. MERRILL: Why don't you try 612?

14 MR. ECHOHAWK: 612, Your Honor.

15 THE SPECIAL MASTER: 612?

16 MR. ECHOHAWK: Yes, Your Honor. "...if a witness  
17 uses a writing to refresh his memory ... either ... while  
18 testifying ... an adverse party is entitled to have the  
19 writing produced at the hearing ..."

20 The witness hasn't referred to it as yet.

21 THE SPECIAL MASTER: I think I fractured that rule  
22 25 times, haven't I?

23 MR. MERRILL: I can force the witness with one ques-  
24 tion and get by all of this.

25 THE SPECIAL MASTER: I suspect you can, and I will



1           overrule that objection, but we will be more careful about  
2           that on that particular point.

3           MR. ECHOHAWK: I just hope that we keep this in  
4           mind when Mr. Merrill's witnesses take the stand.

5           THE SPECIAL MASTER: We will try to keep that in  
6           mind and be fair about it.

7           You may answer.

8           MR. MERRILL: The last question, I believe, Your  
9           Honor, was may I see the document, and that's when all  
10          the objections started roaring in.

11          THE SPECIAL MASTER: You may answer. May he see  
12          the document? I believe he has a right to see the docu-  
13          ment.

14          THE WITNESS: If you are directing me to show the  
15          document --

16          THE SPECIAL MASTER: I'm directing you to show it  
17          unless it shows proprietary material, workpapers of a  
18          nature that would be to a disadvantage competitively  
19          of your firm.

20          Now, if you raise that objection to it, we will do  
21          otherwise in our ruling, or reconsider the ruling.

22          MR. MERRILL: Your Honor, I believe the record should  
23          reflect the appearance of Mr. George Radosevich who  
24          just walked into the room.

25          THE WITNESS: Just so I'm clear of what you are



1 requesting, could you ask me again what it is you are  
2 seeking?

3 MR. MERRILL: Yes.

4 Q (By Mr. Merrill) I would like to see a listing of each  
5 of the Type VII fields that has an indication on it  
6 whether each particular field received full or partial  
7 service irrigation.

8 And while we are at it, I'll add the second request,  
9 and that is whether the fields that are served by sprinkler  
10 irrigation are served by a hand-move or side-roll. If  
11 that happens to be reflected on the same paper, perhaps  
12 we can save some time.

13 A I don't have a listing that shows that.

14 THE SPECIAL MASTER: Of the latter part? But do  
15 you have the former as to which fields were designated  
16 as water-short in arriving at your table 18 computations?

17 THE WITNESS: I have worksheets that indicate on  
18 the worksheets for a particular field whether it received  
19 full or partial water.

20 MR. MERRILL: That would be fine, Your Honor.

21 Q (By Mr. Merrill) May I see those worksheets, please?

22 (The witness handed Mr. Merrill  
23 the document.)

24 \* \* \* \* \*

25 dornbusch - cross - merrill





1 THE SPECIAL MASTER: I notice and should note  
2 in the record that the swathe of documents handed  
3 by the Witness to Mr. Merrill constitutes what looks  
4 like 100 and more pages of legalized tabulations and  
5 work papers.

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

7 THE SPECIAL MASTER: Are we sure this is not a  
8 duplication of some of the material that Tom Stetson  
9 produced for Mr. White?

10 MR. MERRILL: It is, indeed, Your Honor. It is  
11 the same material Mr. Stetson produced last Wednesday  
12 in response to one of my questions on cross-examination.  
13 I didn't know until Mr. Dornbusch produced the  
14 document that it was the same one. I do not intend  
15 to mark it as an exhibit, but I will ask him to  
16 identify the document so we have a good record on it.

17 THE SPECIAL MASTER: Right. Thank you very much,  
18 Mr. Merrill. Does anybody remember what the number  
19 was we gave for that when it was admitted?

20 MR. ECHOHAWK: I don't remember.

21 THE WITNESS: Fifty-six, perhaps?

22 Q (By Mr. Merrill) Mr. Dornbusch, in response to my  
23 request you handed me a stack of legal sheets, looks  
24 like approximately 100 or so pages that say on the

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1 top of each one "Type VII lands" and have an aerial  
2 photograph number and then have various columns  
3 indicating field numbers, acreages, soil classes,  
4 and then the on-farm costs and system costs  
5 associated with each field; is that correct?

6 A It has the investment cost and the annual costs.

7 Q Did you receive that document from Stetson Engineers?

8 A Yes, we did.

9 Q In determining whether each field was served by full  
10 or partial surface irrigation, did you rely on the  
11 notations in the upper right-hand corner of each  
12 sheet concerning whether a field is water short?

13 A Yes, we did.

14 Q So if it said water short and "Yes" was circled,  
15 you assumed that field would only get partial  
16 surface irrigation, is that correct?

17 A That's right.

18 Q That's all the questions I have about that stack  
19 of documents, if you want to put them away.

20 Mr. Dornbusch, would you please take out your  
21 copy of ED-7, which is the 1980 Water Resource  
22 Council Water Reference Handbook?

23 A What year, please?

24 Q 1980. Got it?

25 dornbusch-cross-merrill



1 A Yes.

2 Q Would you also take out your copy of Exhibit ED-14,  
3 which is your crop budgets and economic feasibility  
4 analysis at a discount rate of seven and one-eighth  
5 percent?

(Witness complies.)

6  
7 Q Okay. Will you please turn in the Water Resource  
8 Council Handbook, Exhibit ED-7, to Page I-IV?

9 MR. MERRILL: Roman Numeral I-IV, Your Honor.  
10 It's in the first three or four pages of the handbook,  
11 at least for the ones that are printed on both sides.  
12 It may not be, in your copy. You should be looking  
13 at a page that says "Conversion Factors for  
14 Selected Discount Rates" at the top.

15 Q (By Mr. Merrill) Mr. Dornbusch, would you please  
16 turn in Exhibit ED-14 to Table 4, which is the  
17 second to the last page of that exhibit?

18 A Which is Table 4?

19 Q Net benefits of irrigated agriculture by project  
20 area per acre.

21 THE SPECIAL MASTER: It should be your next to  
22 the last page.

23 THE WITNESS: I thought you were referring to  
24 the crop budgets. That was table which, please?

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1 MR. MERRILL: Table 4.

2 THE WITNESS: Okay.

3 Q (By Mr. Merrill) Will you please describe to the  
4 Court the numerical calculation you used on Table 4  
5 to get from the annual project net benefit per acre  
6 to the present value of the project area net benefit  
7 per acre?

8 A The process we used to get from the annual to the  
9 present value?

10 Q That's correct.

11 A Oh, we just multiplied by the factor converting the  
12 annual -- the stream of annual returns to a net  
13 present value.

14 Q What factor did you use for seven and one-eighth percent?

15 A Well, I'm actually not sure because I think we just  
16 used a calculator computer to do that.

17 Q Do you have a calculator with you?

18 A I could divide and see what it comes to.

19 (Brief pause, Witness does so.)

20 A 14.52.

21 Q I direct your attention to Page 1-4 of Exhibit  
22 ED-7, and ask you if according to the WRC Reference  
23 Handbook that is the correct conversion factor to  
24 use for a discount rate of seven and one-eighth percent

25 dornbusch-cross-merrill



1 assuming a 100-year life?

2 A According to that table, it's not, it's for six and  
3 seven-eighths.

4 Q I'direct your attention --

5 THE SPECIAL MASTER: Well, they are both 14,  
6 were they not? You used 14.52, did you say, and it  
7 goes for six and seven-eighths instead of seven and  
8 one-eighth. Go ahead, Mr. Merrill.

9 Q (By Mr. Merrill) Mr. Dornbusch, would you refer to  
10 ED-13, Table 4, and tell the Court what conversion  
11 factor you used at six percent?

12 A I used 17.12.

13 Q Would you please examine the conversion factors in  
14 ED-7 and tell the Court if that is the correct  
15 discount rate to use for six percent, 100-year  
16 project life?

17 A Well, according to that table, it's not.

18 Q Isn't it true that if you use the conversion factor  
19 shown in the Water Resource Council 1980 Handbook,  
20 that the present values of the project area net  
21 benefits per acre will be lower?

22 A If we use the discount factors in that handbook,  
23 yes.

24 Q If the project area net benefits present value is  
25 dornbusch-cross-merrill



1 lower, isn't it true that the benefit-cost ratio  
2 as shown on Table 5 of Exhibit ED-14 will also be  
3 lower?

4 A If those were the correct ones to be used in this case.

5 THE SPECIAL MASTER: Well, as a matter of fact,  
6 though, aren't all your benefit cost ratios on Table 5  
7 of ED-14 below unity?

8 THE WITNESS: On Table --

9 THE SPECIAL MASTER: Five, the last page.

10 THE WITNESS: Yes.

11 THE SPECIAL MASTER: Of your Exhibit ED-14, are  
12 they not all below unity?

13 THE WITNESS: They are.

14 THE SPECIAL MASTER: So if they would be less  
15 than that, there would be no difference in their  
16 value in these proceedings, would there?

17 THE WITNESS: That's right.

18 Q (By Mr. Merrill) Mr. Dornbusch, how did you arrive  
19 at the conversion factors you used to convert annual  
20 benefits to a present value of benefits?

21 A We used the discount rate that should be applied if  
22 that stream of benefits occurs at the midpoint of  
23 the year. And what you have here is a difficulty  
24 in aligning all of your costs and returns to exactly

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1 the same point times zero. The returns that are  
2 expressed in these tables have been calculated  
3 as of a point in time of September 1. The times  
4 zero that we have used to calculate all of the  
5 returns and costs as a times zero is a March 1 date.  
6 So what you have is a stream of benefits that occur  
7 at the midpoint of each year, and what we are doing  
8 is discounting that stream of benefits at the  
9 appropriate discount rate at the midpoint of the year.  
10 The costs are incurred and converted to a zero  
11 point in time as of March 1, and you have to compare  
12 the benefits to the cost as of that time.

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1 Q. (By Mr. Merrill) As of March 1?

2 A. As of March, that's right.

3 THE SPECIAL MASTER: Let me ask a question, please,  
4 Mr. Merrill.

5 MR. MERRILL: Sure, Your Honor.

6 THE SPECIAL MASTER: Your Table 5 that we have been  
7 referring to, the last page of ED-14, used as to the  
8 rest of the tables used the seven and one-eighth percent  
9 factor, as your interest, rather.

10 Your Table 5 of the testimony you gave last week,  
11 Dornbusch future lands at C-268 uses four percent and arrives  
12 at benefit-cost ratios for the entire projects just as does  
13 the one on 5. Will you again explain for my benefit or  
14 to refresh my memory, in any event, of the difference  
15 between Table 5 in the one exhibit and Table 5 in the  
16 other?

17 THE WITNESS: Okay. The only difference between  
18 the Table Fives in the different exhibits is the discount  
19 rate that's used to compute the net benefits.

20 THE SPECIAL MASTER: Okay.

21 THE WITNESS: And these tables are the basis for  
22 preparing the graph that I gave to you and which Mr.  
23 Merrill prepared here.

24 THE SPECIAL MASTER: Yes, I understand that.

25 dornbusch - cross - merrill





1 THE WITNESS: Okay.

2 THE SPECIAL MASTER: So it's seven and one-eighth.

3 What is a net return for North Crowheart at \$1,986.00  
4 per acre per year? It becomes an additional \$1700.00  
5 if you use the four percent factor. How can the net  
6 returns on North Crowheart be worth \$3600.00 under a  
7 four percent computation and only worth \$1,986.00 an  
8 acre under a seven and one-eighth percent calculation?

9 THE WITNESS: The effect is simply this: As you  
10 increase the rate that you use to discount a future  
11 stream of benefits back to the present value, the higher  
12 the rate, the more it weights the early years relative  
13 to the later years.

14 In other words, the later years become much less  
15 important and, in fact, the stream of benefits is consider-  
16 ably lower as a result of that.

17 You can see it if there was a zero discount rate,  
18 you would just add up the stream of benefits. It would  
19 equal the sum total of the hundred-year benefits, and as  
20 the discount rate moves up, the effect of bringing back  
21 the future benefits to the present is less and less until,  
22 if you had infinite rate, you'd only account for the first  
23 year benefits.

24 THE SPECIAL MASTER: And is that explanation also  
25 applicable to the system costs difference between 2474 --



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THE WITNESS: It is exactly.

THE SPECIAL MASTER: -- and four percent as to \$2,094 at seven and an eighth?

THE WITNESS: That's really the reason you have to use the same benefit. It's to discount the future stream of benefits and costs using the same discount rate, and the higher the rate, the less it benefits the future benefits.

THE SPECIAL MASTER: I thank you very much for that.

Thank you, Mr. Merrill.

Q (By Mr. Merrill) Mr. Dornbusch, in explaining the distinctions between the conversion factors you used and those shown in the WRC Handbook --

A. Yes.

Q -- I didn't understand your explanation about timing of costs and benefits.

Are you saying that the timing of costs and benefits assumed in your analysis are different from those suggested by the Water Resources Council in using these conversion factors?

A. Oh, no. The timing of our costs and benefits is exactly in conformance with the WRC and everybody else that does benefit-cost analysis, and the principle is you must compare those benefits and costs as of the same point

dornbusch - cross - merrill



16-4

1 in time, okay?

2 The way it was done is simply this: When we set up  
3 our analysis of the benefits, we were looking at crops  
4 that were being cultivated and irrigated and harvested,  
5 okay.

6 In all of our crop budgets, you will notice that we  
7 have not moved in time the harvest costs. We have moved  
8 in time all of the costs that occurred prior to harvest  
9 to the harvest date which, just for working purposes, is  
10 assumed at the point of September 1, and all of the returns,  
11 all of the returns that we get from the crops and all of  
12 the costs that are incurred in the farm budget, come at  
13 that September 1 point.

14 Now, if we were to use a September 1 zero point, okay,  
15 and if we were to weight an entire year for the next  
16 returns, it would be correct to use the discount rates that  
17 you showed me in the WRC publication.

18 The zero point, however, was March 1. We obtained  
19 our benefits and we incurred the crop costs, moved to  
20 time zero September 1.

21 The appropriate rate to discount that stream of  
22 benefits, that's six months out from the time zero period  
23 is precisely the rate that I have used here, and to ease  
24 your burden in conceptualizing it, you can simply see that  
25 dornbusch - cross - merrill



1 if you were to take the discount rate that should be  
2 applied, assuming the stream came exactly at the end of  
3 that period, a full year later, okay, the difference  
4 between that discount rate and a stream of benefits that  
5 had the benefits starting right at the beginning point in  
6 the period -- in other words, if you have a stream of a  
7 hundred year benefits, one stream the benefits start a  
8 year later, the other stream the benefits start right at  
9 the zero point -- we are midway in between, so the discount  
10 rate is in between that infinite stream using the first  
11 payment in the year zero and the first payment in year end,  
12 at the end of year one, and we have simply used exactly the  
13 proper discount rate for discounting that stream.

14 Q But you did not use the discount rate that the Water  
15 Resources Council suggested in their guidelines for the  
16 conversion factor, did you?

17 A No, it would be clearly wrong in our case. You would have  
18 incurred benefits six months earlier than the benefits  
19 -- than the timing of the benefits assumed in the WRC  
20 discount rate, and we clearly -- if we have the benefit  
21 six months earlier than the benefits for that rate, clearly  
22 the proper rate to use is the one that recognizes that  
23 fact and not that rate in WRC. (indicating).

24 MR. MERRILL: Your Honor, could I have just a moment  
25 dornbusch - cross - merrill



1 to confer --

2 THE SPECIAL MASTER: Sure. Do you want a little  
3 break?

4 MR. MERRILL: If we could take five minutes, Your  
5 Honor.

6 THE SPECIAL MASTER: Okay. We will take a five-  
7 minute break.

8 (Recess.

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THE SPECIAL MASTER: We will come to order, please.  
Take what time you need, Mr. Merrill.

MR. MERRILL: Thank you, Your Honor. I'm still  
trying to get straightened out here because they don't  
go in order.

(Brief pause.)

MR. ROGERS: Your Honor, while we are waiting, where  
will the hearing be held the week of June 2nd, or do we  
know that yet?

THE SPECIAL MASTER: I do, but it's in the pocket  
of the man who usually works here, and he is gone. I  
am certain that week of hearing will be here in Room 302.  
If not, it will be directly downstairs because we have  
used that room. That is the week -- off the record, please.

(Off the record discussion.)

MR. ECHOHAWK: Your Honor, that raises one point I  
forgot to bring up earlier. Earlier you had requested  
briefs regarding the State rights and proof of irrigable  
acreage. You mentioned that you would like those briefs  
due at the end of May, which I think would be next Friday.  
I was wondering whether or not we could extend that three  
days and have those due on the day we come back to trial  
on the second?

THE SPECIAL MASTER: Yes, of course. So ordered.

MR. ECHOHAWK: Thank you.



- 1 THE SPECIAL MASTER: You bet.
- 2 Q (By Mr. Merrill) Mr. Dornbusch, would you please take out  
3 your materials concerning the discount rate?
- 4 A. The materials --
- 5 Q. Concerning the discount rate that we were discussing  
6 yesterday afternoon when we broke up for the day.
- 7 A. Okay.
- 8 Q. You got them?
- 9 A. Got them.
- 10 Q. Okay. I believe that yesterday afternoon I had handed  
11 you a copy of Exhibit ED-22, but did not have an oppor-  
12 tunity to identify that exhibit before we quit for the day.  
13 Would you please identify Exhibit ED-22?
- 14 A. ED-22. consists of three pages from a Primer for Policy  
15 Analysis by Edith Stokey, S-t-o-k-e-y, and Richard  
16 Zeckhauser, Z-e-c-k-h-a-u-s-e-r.
- 17 Q. I direct your attention to the second full paragraph  
18 of Page 171 in Exhibit ED-22. Have you had an oppor-  
19 tunity to review that paragraph overnight?
- 20 A. Let me refresh my memory, please.
- 21 THE SPECIAL MASTER: Where it begins, "We saw  
22 earlier ..."
- 23 MR. MERRILL: No, Your Honor, begins, "While this  
24 opportunity cost ..." The second full paragraph, I'm sorry.  
25 dornbusch - cross - merrill



1 THE WITNESS: Thank you.

2 (Brief pause.

3 THE WITNESS: Yes, I recall now.

4 Q (By Mr. Merrill) Okay. Did you have an opportunity to  
5 review the full text of Stokey and Zeckhauser over the  
6 evening last night?

7 A Well, not the full text, but I read some of the parts  
8 that I was interested in, as well. I had too many texts  
9 to read the full text of each one.

10 Q Would you please read into the record the first two  
11 sentences and the last sentence of the second full para-  
12 graph?

13 MR. ECHOHAWK: Your Honor, the document speaks for  
14 itself.

15 THE SPECIAL MASTER: I would think the document  
16 speaks for itself. You can reread anything you wish to  
17 stress for the record's benefit, Mr. Merrill. I want to  
18 point out the last sentence, and I will be glad to read  
19 it, it's so valuable, it says, "Needless to say, the  
20 correct rates are extremely difficult to determine  
21 in practice." Hallelujah. You don't want an emphasis  
22 on the one beginning with, "We saw earlier ..." Is that  
23 right?

24 MR. MERRILL: No, Your Honor. I will leave this  
25 dornbusch - cross - merrill





1 document as it is.

2 THE SPECIAL MASTER: All right.

3 Q (By Mr. Merrill) Mr. Dornbusch, would you take out  
4 your copy of the Exhibit ED-28, which I believe I gave  
5 you last night? It is that (indicating).

6 (Brief pause.

7 A. Excuse me, are you asking me a question on this?

8 Q (By Mr. Merrill) No, I have not.

9 THE SPECIAL MASTER: I didn't mean to circumvent  
10 you. If you have one you want to ask, ask it.

11 MR. MERRILL: No, Your Honor. I'll get to it. All  
12 of these materials go together.

13 Q (By Mr. Merrill) Do you have a copy of ED-28, Mr.  
14 Dornbusch?

15 A. Yes, I have it.

16 Q Okay. Would you please identify that document for the  
17 record?

18 A. This consists of three pages excerpted from apparently a  
19 book entitled, Public Investment, the Rate of Return and  
20 Optimal Fiscal Policy, by Kenneth J. Arrow, A-r-r-o-w,  
21 and Mordecai, M-o-r-d-e-c-a-i, Kurz, K-u-r-z.

22 Q I direct your attention to Page 117 in Exhibit ED-28,  
23 and ask you to consider the first paragraph under,  
24 "Marked Conditions."

25 dornbusch - cross - merrill



1 A. What is your question?

2 Q. There is no question, I simply asked you to consider that  
3 paragraph.

4 THE SPECIAL MASTER: A little louder, please, Mr.  
5 Merrill, and face the reporter.

6 MR. MERRILL: I'm sorry, Your Honor.

7 THE SPECIAL MASTER: That's okay.

8 MR. MERRILL: There was no question outstanding,  
9 I simply asked Mr. Dornbusch to consider that paragraph.

10 (Brief pause.)

11 Q. (By Mr. Merrill) Mr. Dornbusch, in light of the authorities  
12 that you have reviewed today, Exhibits ED-28, ED-22 and  
13 the exhibits that you reviewed yesterday, ED-25 and 26,  
14 would you agree with those authorities that there is  
15 sharp disagreement amongst economists concerning the real  
16 discount rate and what that rate is?

17 A. Based upon the exhibits that you have given me, I don't  
18 think that conclusion is valid.

19 Q. I direct your attention to Exhibit ED-21, Page 11.

20 MR. ECHOHAWK: What is ED-21?

21 MR. MERRILL: It is the WRC publication entitled,  
22 Options for the Discount Rate.

23 THE SPECIAL MASTER: Page 11, Mr. Merrill?

24 MR. MERRILL: Yes, Your Honor.

25 dornbusch - cross - merrill



1 Q (By Mr. Merrill) Isn't it true you cited this document  
2 in your memorandum concerning rate, Exhibit C-278?

3 A Yes, I did cite this document, Pages 4 and 5 and 15, I  
4 believe.

5 Q I direct your attention to the first full paragraph on  
6 Page 11 under, "Concepts of the Interest Rate", and  
7 ask you to read the first sentence aloud.

8 MR. ECHOHAWK: Objection, Your Honor. The document  
9 speaks for itself.

10 THE SPECIAL MASTER: This time I'm going to accede  
11 to it.

12 THE WITNESS: It says, "There are different theories  
13 regarding the appropriate discount rate for use in water  
14 resource planning."

15 Q (By Mr. Merrill) Do you agree with that statement?

16 A I think that is true, that there are different approaches,  
17 and you might call them theories, but I think on the basic  
18 principles most of the economists are in agreement, and  
19 I will be specific: We cited these two sources by Howe,  
20 and we cite the source -- oh, the one I'm holding now,  
21 Options for the Discount Rate, and the first principle to  
22 start with is which rate to use, a nominal or a real rate.  
23 Just to try to make my terms clear once again, the nominal  
24 rate is the rate of interest which is fully inflated, has

25 dornbusch - cross - merrill



1 full inflation in it; the real rate is the rate if you  
2 remove that inflation.

3 Now, from that --

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dornbusch - cross - merrill

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201 Midwest Building  
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1 THE SPECIAL MASTER: Aren't you sure that's  
2 not just exactly the other way around?

3 THE WITNESS: I beg your pardon?

4 THE SPECIAL MASTER: Aren't you sure that's not  
5 just exactly the other way around?

6 THE WITNESS: Did I misstate it?

7 THE SPECIAL MASTER: You may not have. The real  
8 rate I thought was the rate you paid that includes  
9 inflation or everything else cranked into it, and  
10 that's the rate you pay. The nominal rate may be  
11 somewhat less than that, less inflation.

12 THE WITNESS: Forgive me, Your Honor, but I  
13 think it might -- that might be true to certain  
14 people's definitions, unfortunately.

15 THE SPECIAL MASTER: It's the economist --

16 THE WITNESS: The economists have not chosen  
17 those terms. They have chosen the nominal rate as  
18 the fully inflated rate and the real rate as the net  
19 rate of inflation.

20 Now, Howe and this document are in complete  
21 agreement about the fact that if you do a benefit-  
22 cost analysis that projects costs and returns into  
23 the future, with inflation, including inflation, you  
24 should use the nominal rate. That's the fully inflated

25 dornbusch-cross-merrill



1 rate.

2 If you were to use an analysis, benefit-cost  
3 analysis, which discounts benefits and costs back  
4 to the present but assumes no inflation into the  
5 future, you should then use the real rate, which is  
6 also net of inflation, and I believe that both Howe  
7 and the publication by the Water Resources Council  
8 concur in that, and I refer you to Pages 4 and 5 and  
9 to Pages 15, and if you wish, I could read the  
10 excerpts from those pages which state very clearly  
11 just what I've stated now.

12 Q (By Mr. Merrill) Why don't you go ahead and read  
13 those excerpts?

14 A Okay. I'm reading now from Page 4, U.S. Water  
15 Resources Council, Options for Discount Rate, ED-21:

16 "The first characteristic of the discount rate  
17 is that it is a 'real' rate. The Principles and Stan-  
18 dards require an economic evaluation not a financial  
19 evaluation of projects. An economic evaluation is  
20 the comparison of the 'real' benefits and costs of a  
21 project. That is, the economic benefits in terms of  
22 goods and services received are compared to the economic  
23 costs in terms of goods and services required to pro-  
24 duce the benefits. This is done by measuring the  
25 benefits and costs of projects in constant dollars, e.g.,  
dornsubsh - cross - merrill



1 1975 dollars. Because the effects of inflation (a rise  
2 in the general price level) are excluded from the esti-  
3 mates of project benefits and costs, each dollar of  
4 costs or benefits represents the same purchasing power  
5 regardless of when it occurs. Similarly, the discount  
6 rate used to express future benefits or costs as pre-  
7 sent values should be a real discount (interest) rate,  
8 that is, a discount rate in terms of goods and services  
9 as opposed to money. For this reason, observed market  
10 rates of interest -- that is, nominal rates of interest  
11 -- are not directly applicable to water resource projects."

12 And on Page 15 it says: "It must be recognized that  
13 one inherent difficulty in the current approach is that  
14 the WRC discount rate, which should be a real rate, is  
15 set by a nominal (market) rate."

16 Just to summarize, I think they have laid out  
17 the argument just as I have said, and probably said  
18 it much clearer and more succinctly, but the idea  
19 is that you must use a nominal rate if you project  
20 costs and returns without inflation.

21 Okay. Howe does the same thing.

22

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dornbusch - cross - merrill



1 Q Mr. Dornbusch, I think you said nominal rate, and  
2 my bet is you meant real rate; is that correct?  
3 I think you said you must use a nominal rate, and  
4 I don't want your testimony to be in the record the  
5 way you didn't intend.

6 A If I said that, I didn't intend it.

7 THE SPECIAL MASTER: I garbled that up enough,  
8 so I'm glad you called attention to that.

9 I would like to call attention to one thing  
10 that is timely. The documents that we referred to  
11 as documents are dated 1975, in the case of 21 on  
12 the Water Resources Council. The National Research  
13 Institute document was 1970 out of Washington. The  
14 Primer done by the Resource Council, Resources for  
15 the Future, Inc.,

16 And a 1970 economic statement and a 1974 economic  
17 statement, in my limited abilities, are inapplicable  
18 to a measure in 1981 of whether something is in this  
19 case feasible or not in the real world of 1982 and  
20 1983.

21 THE WITNESS: That may be true in terms of trying  
22 to determine what the nominal rate is for now.

23 However, I think that some economic theories,  
24 and in this case the principles set out, are rather

25 dornbusch-cross-merrill





1 timeless and that just because somebody has a  
2 correct idea five years ago doesn't mean that it's,  
3 to my mind, any less correct today.

4 THE SPECIAL MASTER: You feel that the explosion  
5 in energy costs caused by the Yom Kippur War of  
6 1973 and the problem of crude at that time and  
7 everything that has followed since has not caused --  
8 is not cause to have these economic theories fall  
9 in disrepute?

10 THE WITNESS: In fact, I think that's precisely  
11 the point. You see, in talking with other economists  
12 and in dealing with this issue, up until the late '60s  
13 nobody really had to worry too much about inflation.  
14 We didn't have very much of it.

15 And whether you used the nominal rate or the  
16 real rate, they were so close that it didn't make  
17 a whole lot of difference, and nobody worried about  
18 it.

19 It's interesting that when I was in Brazil  
20 they had inflation like you can't believe. They  
21 had a long history of very high inflation, and I  
22 was down there working on a project and was totally  
23 caught by surprise in having to deal with that  
24 inflation rate.

25 dornbusch-cross-merrill



1 And the economists that I was dealing with  
2 understood very well the rate -- just to give you  
3 an example of how it occurred, if you were to get  
4 a parking ticket, they would not tell you that the  
5 cost of that ticket was \$15. They would put on the  
6 ticket, "The cost of this ticket is" so many times  
7 an index, because they couldn't keep up with inflation,  
8 that the inflation was going up so high that they  
9 had to index it.

10 THE SPECIAL MASTER: We are doing that with our  
11 postage stamps. That's exactly right. We buy a  
12 B stamp now. It's 18 cents.

13 THE WITNESS: So to go back to your point,  
14 when inflation started to grow rampant, we were  
15 caught by surprise, and we had to focus on this issue,  
16 and worry about whether we should use the nominal  
17 or the real rate, and it's relatively recently that  
18 the thinking has come together, and as I go through  
19 my discussions, I think you'll see that the thinking  
20 has really solidified and focused directly on the  
21 fact that the principle of which rate you use is,  
22 I think, clearly understood and accepted, and even  
23 where the real rate falls, is becoming clearer and  
24 clearer to us, and I can get to that.

25 dornbusch-cross-merrill



1 THE SPECIAL MASTER: Okay. Thank you, Mr.  
2 Merrill. I will try to abstain from helping you  
3 with your case.

4 MR. MERRILL: That's quite all right, Your  
5 Honor. If I were you, I would be terrified to  
6 face this issue.

7 THE SPECIAL MASTER: There is a little terror  
8 in the burden, I face, I'll be candid with you.

9 Q (By Mr. Merrill) Mr. Dornbusch, isn't it true --

10 THE SPECIAL MASTER: I beg your pardon, but  
11 the terror I face in this I believe will be readily  
12 communicated to all of you when you realize that  
13 I have got a right to judgment that's going to bind  
14 your client, so you can all start feeling a little  
15 bit of that terror too. Maybe we can all join  
16 in doing something that's right.

17 Okay. I'm sorry.

18 Q (By Mr. Merrill) Mr. Dornbusch, I direct your  
19 attention to Pages 14 and 15 of Exhibit ED-21.  
20 That's the options for the discount rate memo by  
21 Water Resources Council.

22 A Okay.

23 Q Isn't it true that according to that document there  
24 are a variety of theories under which the real

25 dornbusch-cross-merrill



1 discount rate can be determined?

2 A To which are you referring?

3 Q The social time theory, the opportunity cost theory and  
4 the cost of federal borrowing theory.

5 THE SPECIAL MASTER: You are on Page 21 of ED-21?

6 MR. MERRILL: Pages 14 and 15 of ED-21, Your Honor.

7 I'm sorry.

8 A Okay. Now, the issue here is what you are using the dis-  
9 count rate for and --

10 Q (By Mr. Merrill) Mr. Dornbusch, I don't have any problems  
11 with your explaining your answer, but I would appreciate  
12 an affirmative or a negative before you qualify and begin  
13 your discussions, if you don't mind.

14 A I'm trying to get to it, and maybe I will start with the  
15 conclusion, and that in this particular case the type of  
16 project that we are talking about and for the purpose that  
17 we are analyzing the project, I don't think there would be  
18 a great deal of disagreement.

19 What you might find is that some people would argue  
20 that what you should use is the opportunity cost of the  
21 capital that would be put into this project. In other  
22 words, the real cost of that capital.

23 We have talked about opportunity cost before. The  
24 real cost of that capital is the next best use of that

25 dornbusch - cross - merrill



1 capital.

2 There are economists that would argue and I would  
3 agree with this far, and that is if you have a social  
4 betterment in mind, if you have some long-range social  
5 objectives in mind such as an investment for the future  
6 and what you are very concerned about is the preservation  
7 or a value that should be appreciated at some future time,  
8 what these theorists have done in order to do that is  
9 hypothesize that the discount rate you should use should  
10 be lower to increase the values in the future.

11 I have not chosen to do this. I'm adhering to what  
12 I think is the strict understanding of what cost of capital  
13 you should use. And I think that for the most part you may  
14 get the social theorists thinking about one discount theory,  
15 but I think the economists who would look at this project  
16 would be fairly together in their judgment that you should  
17 use an opportunity cost of capital which I have used.

18 There is some merit to the social benefit portion.  
19 That would only increase the benefits, but I think I have  
20 been conservative in using the opportunity cost of  
21 capital. I have used a higher rate.

22 Q Isn't it true that the Exhibit ED-21, which you cite in  
23 your own memorandum, was written in the context of discuss-  
24 ing choices for the discount rate between 3 and 10 percent?

25 dornbusch - cross - merrill



1 A. I think it was written in the context of trying to demon-  
2 strate the dilemma or the problem that analysts who were  
3 following the WRC guidelines must face. And if they are  
4 to use something like a discount rate of 10 percent and  
5 that high, then they are looking at which is more of a  
6 nominal rate, and they perhaps should use inflated costs  
7 and returns. And if they are looking at the 3 percent  
8 rate, then they are looking at more the real rate and  
9 should be using the costs and returns that do not inflate.

10 Q. Isn't it true that the options for the discount rate  
11 memorandum was written considering discount rates of 3 to  
12 10 percent?

13 A. Well, I think I explained the notion of the use of the 3  
14 and the 10 percent.

15 Q. I understood your answer to say that 10 percent was very  
16 loaded with inflation and 3 percent was a better rate.

17 My question was: Wasn't one of the motivations for  
18 the WRC's discussing these issues in Exhibit ED-21 proposals  
19 discussed in that memorandum of setting the WRC discount  
20 rate at 3 percent, 6 percent and 10 percent?

21 MR. ECHOHAWK: Objection, Your Honor. The question  
22 is argumentative.

23 THE SPECIAL MASTER: Let me hear that question,  
24 please.

25 dornbusch - cross - merrill



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(The above question was read back  
(by the reporter as follows:  
("Q: I understood your answer to  
(say that 10 percent was very  
(loaded with inflation and 3 per-  
(cent was a better rate. My  
(question was: Wasn't one of the  
(motivations for the WRC's dis-  
(cussing these issues in Exhibit  
(ED-21 proposals discussed in that  
(memorandum of setting the WRC dis-  
(count rate at 3 percent, 6 percent  
(and 10 percent?"

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THE SPECIAL MASTER: If you know.

MR. ECHOHAWK: I would like to further add to my objection, Your Honor, speculation.

THE SPECIAL MASTER: Well, if he knows he may answer. It is theoretical, certainly.

MR. MERRILL: Your Honor, the Witness cited the document in his own memorandum.

THE SPECIAL MASTER: I know he did.

THE WITNESS: I think, as I said before, the purpose of this document is to try to get at what is the appropriate rate to use, and they discuss various weights and they raise them, and I think you called my attention specifically to Page 19 where the rate of ten percent is noted in the footnote, and I would like to discuss that point. They say in that footnote that the real rate of return on marginal fiscal investments in the nonfederal sector, that's the private sector, is around ten percent. They just make that statement. That is a fact. So they assert, however, the private rate of return in that sector is only one component of the sources of the federal funds, and it's not necessarily the rate to use just from one sector since, as we know, the source of federal funds comes

dornbusch-cross-merrill





1 from many sectors.

2 Q (By Mr. Merrill) I direct your attention to Page 31  
3 of the discount rate memo, Exhibit ED-21; first of all,  
4 the paragraph that begins, "The alternatives of three  
5 and ten percent . . ." Would you please consider  
6 that paragraph?

7 (Brief pause.)

8 A All right.

9 Q Isn't it true that your professional opinion that  
10 the appropriate real discount rate is four percent --

11 A Or less.

12 Q Or less, two to four percent I believe you stated.

13 A Correct.

14 THE SPECIAL MASTER: Or less?

15 THE WITNESS: Or less.

16 MR. MERRILL: Your Honor, I believe the Witness  
17 testified the real rate was somewhere from two to  
18 four percent, but in no event higher.

19 THE SPECIAL MASTER: I recall him saying there  
20 are those who would come down with a two or three  
21 percent, but he thought four was --

22 THE WITNESS: No, that would be the up-side  
23 limit. In my judgment the range is most probably in  
24 the range of two to four percent, and probably no

25 dornbusch-cross-merrill



1 higher than four percent.

2 THE SPECIAL MASTER: Well, let me ask a question,  
3 then.

4 THE WITNESS: Yes.

5 THE SPECIAL MASTER: A few years ago the  
6 difference between a private sector financing of a  
7 project, public, quasi-public or private and public  
8 financing of that project was something between six  
9 and eight percent, that is it might cost you 12 percent  
10 on the private money markets of New York or the world,  
11 and if it were federally guaranteed loans, then it  
12 would usually be six percent or so or on tax benefits.  
13 This is a six to eight percent spread there. Is that  
14 a factor you included in arriving at a four percent  
15 vis a vis a seven and a half?

16 A I don't know to what you are referring to specifically,  
17 but my guess and my judgment is that in talking about  
18 a six to eight percent that would have to be a nominal  
19 rate, it would have to include some component of  
20 the inflation.

21 THE SPECIAL MASTER: These were real world  
22 figures as of four years ago in the construction --

23 THE WITNESS: Oh, they may very well be real  
24 in the sense that's what you must pay in dollars for

25 dornbusch-cross-merrill



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the loans.

THE SPECIAL MASTER: That's right.

THE WITNESS: But what I'm trying to explain is the amount which you must pay in interest has an inflation component because when you make the loan and you seek to have those dollars repaid, you must expect or anticipate the fact that the dollars that are going to be paid back to you are going to be worth less in the future than they are today. I think that just basically is the principal of inflation.



1 THE WITNESS: If I said, "Which would you rather  
2 have, inflated dollars, dollars that are worthless because  
3 they will only buy --" Let me put it this way. Suppose  
4 you knew it cost you \$1,000.00 to buy some good  
5 today, and the value of the dollar is going to decrease  
6 into the future and it would cost you money, many more  
7 dollars to buy that in the future. You could see that you  
8 would be dealing with inflated dollars, the same thing as  
9 in Brazil.

10 THE SPECIAL MASTER: Yes, but --

11 THE WITNESS: Money you take home today is worthless  
12 tomorrow.

13 THE SPECIAL MASTER: But a project of this kind  
14 carries with us the advantage that the product of the  
15 project will also be selling for higher prices and  
16 commanding more of those cheaper dollars than it does today.

17 THE WITNESS: That's right. Now, if you were to sell  
18 those products and if you were to account for inflation  
19 into the future and you did that for cost, as well, then  
20 the proper discount rate would be just the rate you are  
21 talking about, the inflated discount rate. It would be  
22 the higher rate, but you would come up with the same  
23 answer.

24 If you had dollars that inflated into the future, and  
25 suppose I projected my returns for alfalfa and barley to



1 increase with inflation on into the future, and suppose  
2 I projected the costs for my farm equipment and all of  
3 those things also to inflate into the future.

4 THE SPECIAL MASTER: But you did not do that, you  
5 analyzed them on a hundred year basis. Is that right?

6 THE WITNESS: Well, yes, but suppose the future  
7 returns in the future costs all the way out to one  
8 hundred years were to inflate into the future as you  
9 might reasonably expect, then the proper discount rate  
10 would be the inflated rate, the higher rate.

11 THE SPECIAL MASTER: I think I see. Thank you.

12 Q. (By Mr. Merrill) Mr. Dornbusch, in your discount rate  
13 memorandum, Exhibit C-275, you cite an editorial by  
14 Mr. Paul W. McCracken, which appears in the November 13th,  
15 1980 issue of the Wall Street Journal, is that correct?

16 A. November 13th, 1980, that is correct.

17 Q. I hand you what has been marked for identification as  
18 Exhibit ED-24. Would you please identify that document?

19 A. Yes. This appears to be the article written by Mr.  
20 McCracken called, "Auguries for Economic Policies".

21 Q. In looking at that exhibit, let me caution you that there  
22 is some overlap between the first and second pages of the  
23 article.

24 MR. ECHOHAWK: Your Honor, just for the record, I  
25 would like to indicate this document was not presented to  
dornbusch - cross - merrill



1 us last night along with the other documents.

2 THE SPECIAL MASTER: Well, that's okay. All right.

3 MR. MERRILL: Your Honor. I'm real sorry about  
4 that. Since Mr. Dornbusch cited it in his article, I  
5 thought he would probably be familiar with it.

6 THE SPECIAL MASTER: Off the record, please.

7 (Off the record discussion.)

8 MR. MERRILL: Your Honor, I'm sorry this exhibit  
9 turned out to be so distracting.

10 Q (By Mr. Merrill) Isn't it true Mr. McCracken's article  
11 is dealing with the overall economic policy of the United  
12 States with regard to the true interest rate?

13 A I guess that might be a summary of what he's dealing with.

14 Q Would you tell the Court how this economic policy has any-  
15 thing to do with taking investment capital from the private  
16 sector and investing it in the public sector?

17 A All right. It goes to the point of the opportunity cost  
18 of capital and how you evaluate what is the cost of the  
19 money that you are using to finance this project, and since  
20 you are drawing capital from the private sector and putting  
21 it into the public sector, you must recognize that by doing  
22 so, it has an opportunity cost, that is an alternative use  
23 and a return in the private sector.

24 Q Aren't we talking in this case about a natural resource  
25 dornbusch - cross - merrill



1 investment in the public sector and not monetary policy  
2 of the United States?

3 A. Yes, that's correct.

4 THE SPECIAL MASTER: Is it really in the public  
5 sector? I suppose it is in a way, the public as guardians  
6 for a certainly private ownership.

7 Q. (By Mr. Merrill) Mr. Dornbusch, in your discount rate  
8 memorandum, Exhibit C-275, you also cite a statement from  
9 the March, 19th, 1980, edition of Fortune Magazine, is that  
10 correct?

11 A. Yes, that's correct.

12 THE SPECIAL MASTER: What page is that on, five?

13 THE WITNESS: I did that on Page 4, Your Honor,  
14 towards the bottom of the page.

15 THE SPECIAL MASTER: Thank you.

16 Q. (By Mr. Merrill) I've handed you what has been marked  
17 as Exhibit Ed-23. Would you please identify that document?

18 A. Yes, ED-23 consists of the cover, the table of contents,  
19 and it appears to be the article to which I referred in my  
20 paper entitled, "The Tax Strategy to Renew the Economy".  
21 It is the Fortune Magazine article, March 9, 1981.

22 Q. Isn't it true that the Fortune article is concerned, first,  
23 with elective incentives to divert more dollars from spending  
24 to savings, and second, depreciation and reforms to encourage

25 dornbusch - cross - merrill



- 1 productive business investment?
- 2 A. Yes, that might be a reasonable explanation of what is
- 3 expressed in the article.
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1 Q (By Mr. Merrill) Isn't that the expression that appears  
2 in the headnote at the top of Page 93 of the article?

3 A It says, "First, effective incentives to divert more  
4 dollars from spending to savings. Second, depreciation  
5 reforms to encourage productive business investment."

6 Q What does an article having to do with tax policy of the  
7 United States have to do with a Water Resources project on  
8 the Wind River Indian Reservation?

9 A Well, tax policy of the United States is very directly  
10 related. As I said, the source of money that's invested  
11 in this project is the private sector, and there are two  
12 sources, taxes and debt, and the Government raised the  
13 money from the private sector with both of those instru-  
14 ments.

15 And when you take money from the private sector and  
16 put it into the public sector and recognize the opportunity  
17 costs for that capital, you should recognize the sources  
18 of that capital.

19 Q What does depreciation reforms to encourage productive  
20 business investment have to do with this irrigation  
21 project?

22 A Well, to answer your question, I think what you are trying  
23 to do is pull subjects out of an article which are not  
24 necessarily relevant specifically to what we are talking

25 dornbusch - cross - merrill



1 about,

2 However, in the article is cited some information  
3 which is directly related and specific, and there are  
4 articles which deal with this issue directly and are  
5 titled accordingly. And there are other articles which  
6 also have relevant information in them which may be  
7 primarily focused somewhere else, but, nevertheless,  
8 have relevant information for us.

9 Q Would you please direct the Court to the locations in the  
10 article in which citations appear that relate to other  
11 articles which you believe are relevant?

12 A Yes. On Page 96, which is the last page, the last para-  
13 graph in the first column, and continuing over to the top  
14 of the middle column, they refer to 4 percent which they --  
15 excuse me -- the author says, "Why 4 percent? Because  
16 Jorgenson and Auerbach believe that is the best estimate  
17 of the average real return," real return, "on business  
18 equipment."

19 The repeat of "real return" is my emphasis.

20 Q Did you accept that 4 percent figure or rely on this state-  
21 ment of it?

22 A Yes.

23 Q Do you see an economic analysis in this article supporting  
24 a 4 percent figure?

25 dornbusch - cross - merrill



1 A. I did not.

2 Q. Didn't you state to the Court yesterday that you didn't  
3 like Mr. Howe's figure of 6 percent because it was not sup-  
4 ported by an economic analysis in the article I handed you?

5 A. And I would not entirely base my paper on this statement  
6 either. I think it serves to bolster the opinions and re-  
7 sults of analyses that are cited in the paper, and I used  
8 it to refer to that.

9 Q. Did you review the study by Jorgenson and Auerbach?

10 A. No, I did not.

11 But I reviewed the study of others who very specifi-  
12 cally focused on the issue of the real discount rate and  
13 reviewed their methods and techniques and their conclusions.

14 Q. Mr. Dornbusch, isn't it true that despite all the discus-  
15 sion in Exhibit ED-21 concerning options for the discount  
16 rate that the Water Resources Council has not modified in  
17 any way the method by which the discount rate is deter-  
18 mined?

19 A. That's correct.

20 Q. I direct your attention to Exhibit ED--

21 A. But, however, I must say that the Water Resources Council  
22 in their guidelines specifically allows for the fact that  
23 changes will be made in the future to recognize the require-  
24 ments of making just those changes.

25 dornbusch - cross - merrill



1 Q Can you direct the Court's attention to any particular  
2 statement in the WRC guidelines that says that?

3 A I can't offhand, but I believe my staff may have it. I  
4 don't have it with me now.

5 Q While they are looking for that citation, let me direct  
6 your attention to Exhibit ED-3, which is Part 2 of the WRC  
7 Principles and Guidelines, and specifically Page 64371.

8 MR. ECHOHAWK: Your Honor, for the record, the cita-  
9 tion Mr. Dornbusch is referring to is contained in Exhibit  
10 ED-6, Page 72896.

11 THE SPECIAL MASTER: All right, thank you.

12 A Would you repeat the publication you wanted me to refer to?

13 Q (By Mr. Merrill) Yes, it's Exhibit ED-3, Part 2 of the  
14 Water Resources Guidelines.

15 A December 14, '79?

16 Q No, September 29, '80. It looks like this (indicating).

17 If I gave you an exhibit copy, it was marked ED-3.

18 A Well, this is the pile --

19 THE SPECIAL MASTER: There is a copy here, if you need  
20 it.

21 (Document handed to the witness  
22 (by the Special Master.

23 THE WITNESS: Thank you, Your Honor.

24 A What page?

25 dornbusch - cross - merrill



1 Q (By Mr. Merrill) 64371.

2 A 64371. Yes. Where on the page?

3 Q Okay. The bottom of the second column, No. 32, "Comment."

4 Isn't it true that over the years the Water Resources  
5 Council has received comments that the discount rate is  
6 too high?

7 A I don't know that for a fact.

8 Q Isn't it true that this document says they have received  
9 such comments?

10 A Yes, it appears that's true.

11 Q And isn't it true, according to this, that they have  
12 received comments that the discount rate is too low?

13 A Yes, and what I would expect that to refer to is just the  
14 thing that I was referring to is the discount rate that is  
15 used is right smack in the middle -- or I shouldn't say --  
16 it's in the middle of the nominal and the real rate, and  
17 it's not high enough if you use a nominal rate with in-  
18 flation and it's not low enough if you use a real rate  
19 without inflation.

20 Q Isn't it true that according to this document, quote, the  
21 basis for determining the discount rate has not been changed  
22 for the final rule? The method of determining the discount  
23 rate for evaluating projects has been confirmed by the  
24 Congress in Section 80, Public Law 93.251, close quote?

25 dornbusch - cross - merrill



1 MR. ECHOHAWK: Objection, Your Honor. It's irrelevant.  
2 It doesn't matter whether Congress has affirmed what the  
3 discount rate is for these projects or not. The real  
4 question is economic feasibility for practicably irrigable  
5 acreage. Again, we are talking about two different things.  
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1 THE SPECIAL MASTER: The objection is overruled.

2 You may answer.

3 A Yes, the purpose of leaving the discount rate to be  
4 computed according to the formula that the Government  
5 does I cannot guess at. It's clear, however, that  
6 there must -- there is certainly either a misunderstanding  
7 of the correct economic principles to use or there is  
8 some other motivation in allowing that rate to  
9 increase at an artificial rate that I cannot speculate  
10 on. I do not know. There may very well be political  
11 or social purposes to do that.

12 Q (By Mr. Merrill) But with respect to the economic  
13 theory, Congress is just plain wrong; is that what  
14 you are saying?

15 MR. ECHOHAWK: Objection.

16 THE SPECIAL MASTER: Well, everybody knows that.  
17 I will sustain the objection. That's argumentative.

18 Q (By Mr. Merrill) Mr. Dornbusch, what will it cost to  
19 build all of the irrigation projects that have been  
20 proposed on the Reservation including the future lands,  
21 the Type VIII, and Type VII lands?

22 MR. ECHOHAWK: Objection, Your Honor. It's  
23 irrelevant.

24 THE SPECIAL MASTER: Oh, my.

25 MR. MERRILL: I don't believe it is, Your Honor,



1 because we are talking about some capital cost. I  
2 would like to get some idea from the Witness what  
3 that is so we can look for the likely sources of  
4 funding.

5 THE SPECIAL MASTER: It's a massive general  
6 question, and if there's an objection, it might be  
7 that it is so general that it would have to call for  
8 a couple of days or follow on as to what specific  
9 costs how did the total get made for a particular  
10 project, or why -- but I think that Dr. Mesghinna  
11 has answered your question, frankly.

12 Maybe not. Maybe not. Or was it Mr. Tom  
13 Stetson?

14 MR. MERRILL: I think the cost projections in  
15 those documents are on a per acre basis, and I believe  
16 Dr. Mesghinna did give a cost, and you asked him that.

17 THE SPECIAL MASTER: Yes, and I'm still in a  
18 state of shock from the cost he gave. I don't know.  
19 I think that if this Witness can answer, if he has  
20 totals by project and can bring the totals of all the  
21 projects plus the total Type VII's plus the total  
22 Type VII lands, I think I will let him answer.

23 MR. ECHOHAWK: But it's relevant as to consider  
24 the source of funding for the projects.

25 THE SPECIAL MASTER: It is irrelevant to the fact





1 that if there is an entitlement for water, it should  
2 be forthcoming, I will grant that, but I don't think  
3 it's relevant to his direct case and has some bearing  
4 on it and, therefore, since it does touch the matters  
5 he referred to on direct, he may answer.

6 MR. ECHOHAWK: I would point out further, Your  
7 Honor, as I understand it, considerations as to the  
8 source of funding, whether these projects are to be  
9 built and so forth, the financial consideration --

10 THE SPECIAL MASTER: That's totally --

11 MR. ECHOHAWK: That's what Mr. Merrill just  
12 indicated that's the reason he wanted to question  
13 is to pursue the source of funding.

14 THE SPECIAL MASTER: Well, no, if the next  
15 question goes into source of funding, then it's  
16 clearly irrelevant, and I will overrule that, but if  
17 this Witness knows what the total costs in 1979  
18 dollars would come to, if the Reservation were to  
19 conclude that they want to complete all of the projects  
20 that he has testified are economically feasible, what  
21 they would come to, he may answer.

22 A I haven't made the calculation, Your Honor. It's a  
23 calculation that could be made, but I haven't done it.

24 THE SPECIAL MASTER: Okay.

25 dornbusch-cross-merrill



1 Q (By Mr. Merrill) Mr. Dornbusch, do you have even  
2 a rough idea?

3 THE SPECIAL MASTER: That I don't think -- it's  
4 too late in your cross-examination to botch it up  
5 with a speculative question like that.

6 MR. MERRILL: Are you telling me to quit while  
7 I'm ahead, Your Honor?

8 THE SPECIAL MASTER: Well, you are ahead, but  
9 when you quit is up to you.

10 I know that we are drawing to an end because  
11 actually we could spend another week on this business  
12 of the discount figure. It is troubling a lot of  
13 people in this world besides just us today as to what  
14 money should be lended for.

15 And now many young people go without a home  
16 because what can the savings and loan institutions  
17 of the world do? This is the most massive question  
18 in the American economy today, in my opinion.

19 Unless you want to break, I think we can go ahead.

20 MR. MERRILL: I think we might as well go ahead,  
21 Your Honor.

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1 Q (By Mr. Merrill) Mr. Dornbusch, throughout your  
2 testimony concerning discount rate you frequently  
3 refer to the notion of opportunity cost. Do you  
4 believe that the opportunity costs of capital is  
5 a relevant concept in determining the real discount  
6 rate?

7 A Yes, I do.

8 Q Do you believe that the real rate of return in the  
9 capital market is a relevant notion for determining  
10 the real discount rate?

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

12 THE SPECIAL MASTER: Yes, please.

13 (Whereupon, the Reporter  
14 (read back, "Q Do you  
15 (believe that the real rate  
16 (of return in the capital  
17 (market is a relevant notion  
18 (for determining the real  
19 (discount rate?"

20 THE WITNESS: Okay, the answer is a qualified  
21 yes, and it has to be qualified because you have to  
22 worry about for what investment and what capital  
23 markets, so I think in general terms, yes, I agree  
24 with that, but it depends on the specific application  
25 of what you are talking about.

Q (By Mr. Merrill) Isn't it true that different sectors  
of the capital market produce different real rates of  
dornbusch-cross-merrill



- 1 return?
- 2 A That's correct.
- 3 Q So if we were to use the concept of opportunity cost  
4 in examining the source of capital for this project,  
5 we would be faced with a variety of capital markets  
6 from which a real discount rate might be determined,  
7 isn't that correct?
- 8 A To some degree, that's correct, and again, depending  
9 on what the purpose of the funds are, the use of  
10 the funds. There may or may not be -- let me put it  
11 this way: The complexity of the problem may be greater  
12 or less.
- 13 Q Mr. Dornbusch, isn't it true that there is and has  
14 been an on-going debate for many, many years amongst  
15 economists and policy makers concerning the appropriate  
16 discount rate to use for these types of projects?
- 17 A I think there's always disagreement. I think that  
18 the degree of the disagreement and its nature should  
19 be brought into focus when you are talking about this.  
20 Just because one or two or three or four people  
21 disagree on some principles and not on others, it's  
22 very difficult to generalize. I think what we ought  
23 to do is talk more specifically about this type of  
24 project and the sources of funds from this type of  
25 dornbusch-cross-merrill



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project.

Q Mr. Dornbusch, isn't it true according to the Water Resource Council's own publications, that one of the bases for establishing a discount rate in the WRC Principles and Standards was to end the disagreement amongst economists as to the appropriate discount rate and apply a uniform set of standards to federally funded water projects in the United States?

A Well, if that was their purpose, they haven't succeeded apparently. If they succeeded, they have -- in terms of applying this federally mandated discounted rate, they have done so in a way that is not entirely correct applying economic principles, but may be appropriate for the purposes that the Government has in mind. As I said before, I can't guess at those specific purposes.

MR. MERRILL: Your Honor, I have no further questions on cross-examination. I would ask the Court to take a break at this time so I can organize my exhibits and come back and offer my cross-examination exhibits after that.

THE SPECIAL MASTER: That will be fine. We thank you for that. We will take a ten-minute break.

(Whereupon, a ten-minute recess was taken.)

dornbusch-cross-merrill



1 MR. MERRILL: Your Honor, before I begin my  
2 offer of exhibits, let me do a few housekeeping  
3 chores with respect to those exhibits which were  
4 temporarily marked for identification.

5 Q (By Mr. Merrill) Mr. Dornbusch, I'm returning to you  
6 what was temporarily marked as Exhibit ED-54 and I'm  
7 handing you a permanently marked copy. Would you  
8 confirm for the record that those are one and the  
9 same?

10 A They are one and the same.

11 Q Okay. I'm now handing you ED-55. Please check that  
12 against the permanent marked copy I'm handing you.

13 THE WITNESS: They are the same.

14 Q And the last document which you kindly lent me was  
15 ED-56, which I'm returning to you now. I'm also  
16 handing you a permanently marked copy. Are those  
17 the same?

18 A They are the same.

19 MR. MERRILL: Your Honor, I'll begin my offer  
20 of exhibits used in the cross-examination of Mr.  
21 Dornbusch. With respect to each exhibit, I will  
22 identify it and state as best I can a brief description  
23 of what the exhibit is.

24 THE SPECIAL MASTER: Thank you for that. I  
25 dornbusch-cross-merrill



1 appreciate that, a brief description, but --

2 MR. MERRILL: Descriptive.

3 THE SPECIAL MASTER: Adequate, yeah.

4 MR. MERRILL: I will do the best I can, Your  
5 Honor. After the description of each exhibit I  
6 will state the purpose for which I'm offering it into  
7 evidence. The first exhibit is Exhibit ED-100. It  
8 is the oversized graph called "Alleged benefit cost  
9 ratio of U.S. future irrigation projects." I'm  
10 offering that exhibit for illustrative purposes.

11 THE SPECIAL MASTER: Go ahead with your listing.  
12 I beg your pardon.

13 MR. MERRILL: I just didn't want to get ahead  
14 of you.

15 THE SPECIAL MASTER: No, go ahead with your  
16 listing. I'm identifying the ED is "Economic,  
17 Dornbusch".

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

19 THE SPECIAL MASTER: And begin with 100.

20 MR. MERRILL: At least that is what I had in mind.

21 THE SPECIAL MASTER: All right.

22 MR. MERRILL: Exhibits ED-12, 13 and 14 I believe  
23 have already been admitted into evidence. They are  
24 copies of Mr. Dornbusch's crop budgets and feasibility  
25 analyses at five, six and seven and one-eighths percent



1                   respectively. And on the first day of Mr. Dornbusch's  
2                   direct testimony, the Court admitted those documents  
3                   into evidence.

4                   The next exhibit is ED-8.

5                   THE SPECIAL MASTER: ED what number?

6                   MR. MERRILL: ED-8, Your Honor.

7                   THE SPECIAL MASTER: All right.

8                   MR. MERRILL: That is a report by Mr. Agee, "Costs  
9                   of producing crops in the Riverton area." I'm offering  
10                  that document for purposes of cross-examination and  
11                  impeachment.

12                 MR. ECHOHAWK: What?

13                 MR. MERRILL: Cross-examination and impeachment.

14                 The next exhibit is ED-30. That is a May, 1981  
15                 report issued by the Wyoming Crop and Livestock  
16                 Reporting Service. I'm offering that exhibit for  
17                 purposes of cross-examination and impeachment.

18                 The next document is Wyoming Exhibit ED-24,  
19                 I believe, Your Honor. Let me check. It is a 19 --  
20                 an excerpt from the 1980 issue of Wyoming Agricultural  
21                 Statistics.

22                 THE SPECIAL MASTER: Is that ED-24 or ED-25?

23                 MR. MERRILL: ED-24, Your Honor.

24                 MR. ECHOHAWK: What is it, again?

25                 MR. MERRILL: An excerpt of the 1980 edition of





1 the Wyoming Agricultural Statistics. I offer that  
2 document for purposes of cross-examination and  
3 impeachment.

4 THE SPECIAL MASTER: All right.

5 MR. MERRILL; The next exhibit is ED-16, which  
6 I have called on my sheet "Dornbusch notes concerning  
7 farmer interviews." I offer that document for  
8 illustrative purposes.

9 The next document is ED-17. That document is  
10 the BIA Wind River Completion Report.

11 MR. CLEAR: Just the two pages of it, though?

12 MR. MERRILL: Yes, I'm sorry, it's an excerpt.

13 THE SPECIAL MASTER: I want to call your attention  
14 that there has been offered and identified an Exhibit  
15 ED-29, the Wyoming Agricultural Statistics compiled  
16 by the Crop and Livestock Reporting Service that I  
17 believe you referred to ED-24.

18 MR. MERRILL: You're right, Your Honor, it's my  
19 mistake.

20 THE SPECIAL MASTER: ED-24 is called "Street  
21 journal article on how the democrats should -- whoops,  
22 pardon me -- "Auguries for economic policy."

23 MR. MERRILL: Your Honor, I'm sorry, I have 4s  
24 that look like 9s on this sheet. You are right. I  
25 will amend the offer to make the 1980 Wyoming



1 Agricultural Statistics excerpt ED-29, and I offer  
2 that document for cross-examination and impeachment.  
3 I don't know if I stated the purpose of the offer of  
4 ED-17, which is an excerpt from the BIA Completion  
5 Report. I offer that for purposes of cross-examination  
6 and impeachment.

7 THE SPECIAL MASTER: All right.

8 MR. MERRILL: The next document is ED-15. It is  
9 an HKM report entitled, "Criteria For Selection of  
10 Project Study Areas." I would offer that document  
11 for purposes of cross-examination and impeachment.

12 The next document is Exhibit C-278-A.

13 THE SPECIAL MASTER: C-278-A?

14 MR. MERRILL: That's correct, Your Honor. That  
15 is a rough copy of Mr. Dornbusch's report which, as  
16 you will recall, was served on the State of Wyoming  
17 on May 15, 1981. I offer that document -- it's in  
18 rough form, Your Honor, handwritten notes and so  
19 forth. The purpose of that offer is only to illustrate  
20 the information that was served on the State by the  
21 United States on May 15th.

22 THE SPECIAL MASTER: All right.

23 MR. MERRILL: The next document is Wyoming  
24 Exhibit ED-11. I will withdraw that document,  
25 although I believe it remains a part of the record,



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and offer in its place Exhibit ED-11-A, which I passed out today. That document is the Federal Register notice concerning the WRC discount rate at seven and three-eighths percent.

MR. ECHOHAWK: Do you have a date on that Federal Register?

MR. ROGERS: October 22, 1980.

MR. MERRILL: Thank you, Mr. Rogers.

THE SPECIAL MASTER: 11-22-80?

MR. ROGERS: October 22, 1980.

THE SPECIAL MASTER: Thank you.

MR. MERRILL: I would offer that document for purposes of cross-examination and impeachment.

The next exhibit is ED-26, excerpt from Howe, "Monograph on Natural Resource Economics." I offer that also for cross-examination and impeachment.

The next exhibit is ED-25, Excerpt from Howe entitled, "Benefit Cost Studies for Water Systems." I offer that document for purposes of cross-examination and impeachment.

The next is Exhibit ED-21. It is a WRC publication entitled, "Options for the Discount Rate," dated 1975. It is offered for purposes of cross-examination and impeachment.

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MR. MERRILL: (Continuing) The next exhibit is ED-22. It is an excerpt from a book entitled, Primer for Policy Analysis, by Stokey and Zeckhauser. I offer it for purposes of cross-examination and impeachment.

The next exhibit is ED-51, which is a document obtained from Mr. Dornbusch during his cross-examination, and I have entitled it, "BIA Table Concerning Unemployment Rates on Indian Reservations". I offer that document for illustrative purposes.

The next document is Exhibit ED-6.

THE SPECIAL MASTER: ED what?

MR. MERRILL: ED-6.

THE SPECIAL MASTER: Thank you.

MR. MERRILL: That document is Part 9 of the Water Resources Council Principles and Standards dated 1979. I offer it for purposes of cross-examination and impeachment.

The next document is ED-52. These are Mr. Dornbusch's notes concerning the potential for Indian employment on the Wind River Indian Reservation. I offer that document for illustrative purposes.

The next document has no exhibit number, but it is a copy of an excerpt of the second deposition taken of Mr. Dornbusch on January 12 and 13, 1981.

I don't believe it's proper to offer part of a



1 deposition into evidence, and I will withdraw the copy  
2 of that document and ask the Court and the Court's  
3 assistant to return those copies to me.

4 THE SPECIAL MASTER: I am hereby handing you the two  
5 copies I have.

6 MR. MERRILL: Thank you, Your Honor.

7 (Documents handed to Mr. Merrill  
8 (by The Special Master.

9 THE SPECIAL MASTER: But you are offering neither into  
10 evidence?

11 MR. MERRILL: No, Your Honor. I believe the state of  
12 the law is when a witness reads from his own deposition  
13 during the trial, the statements in the deposition become  
14 a part of the record of the proceedings.

15 THE SPECIAL MASTER: Very well.

16 MR. MERRILL: The next exhibit is ED-3. That is Part  
17 2 of the Water Resources Council Principles and Standards  
18 dated 1980. I would offer that document for purposes of  
19 cross-examination and impeachment.

20 The next exhibit, Your Honor, is ED-53, which is  
21 this over-sized chart here (indicating).

22 THE SPECIAL MASTER: Sketch?

23 MR. MERRILL: Sketch, Dornbusch sketch concerning  
24 benefit-cost analysis about the A's and B's. I offer that  
25 document for illustrative purposes.



1 THE SPECIAL MASTER: Off the record, please.

2 (Off the record discussion.

3 THE SPECIAL MASTER: Back on the record.

4 MR. MERRILL: The next exhibit is ED-54, and I  
5 called this document, "Stetson Costs Concerning Type VIII  
6 Lands."

7 THE SPECIAL MASTER: Stetson irrigation system costs  
8 or just costs?

9 MR. MERRILL: It has both investment costs and operation  
10 costs, Your Honor.

11 THE SPECIAL MASTER: All right. Stetson Cost Type VIII  
12 Lands.

13 MR. MERRILL: I offer that document for illustrative  
14 purposes.

15 Counsel for the United States advises that that docu-  
16 ment is already in evidence. I'm offering it now because  
17 I wasn't here during a good part of Mr. Stetson's testimony,  
18 and I want to make sure that it is in the record.

19 If it's duplicative, I apologize to the Master.

20 The next document, Your Honor, is ED-55, and I'm not  
21 sure exactly how to describe this. I'll take a crack at  
22 it. Maybe Mr. Dornbusch can do a better job.

23 I would call it a scheduling of construction costs  
24 for the future project areas.

25 Does that sound reasonable?



1 THE WITNESS: Yes, I think that's right.

2 MR. MERRILL: I would offer that document for illus-  
3 trative purposes.

4 The next document is ED-56. That is a table by  
5 Mr. Dornbusch showing the skilled and unskilled labor  
6 requirements for the systems operation and maintenance of  
7 the five future areas. I offer that document for illus-  
8 trative purposes.

9 The next document, Your Honor, is Exhibit ED-28. It  
10 is an excerpt from the book entitled, Public Investment,  
11 the Rate of Return and Optimal Fiscal Policy, by Arrow and  
12 Kurz. I would offer that for purposes of cross-examination  
13 and impeachment.

14 The next document is ED-24. That is the McCracken  
15 article, November 13, 1980, Wall Street Journal, and I would  
16 note that that also includes Mr. Hodding Carter's article.

17 THE SPECIAL MASTER: Thank you.

18 MR. MERRILL: I offer that for purposes of cross-  
19 examination and impeachment with respect to the McCracken  
20 report.

21 THE SPECIAL MASTER: We refer to the McCracken article  
22 as a voice in the voice in the wilderness these days.

23 What's the purpose on that?

24 MR. MERRILL: For cross-examination and impeachment.

25 And the last exhibit, Your Honor, is ED-23, and that



1 is an excerpt from the March 9, 1981, issue of Fortune  
2 Magazine, which was cited by Mr. Dornbusch, and I offer  
3 that document for purposes of cross-examination and  
4 impeachment.

5 MR. ECHOHAWK: That's all?

6 MR. MERRILL: That's all of the exhibits I'm offering.

7 THE SPECIAL MASTER: I have referred to ED-7 a time  
8 or two and been exposed to it, and you should know that  
9 if it's not to be offered, I will try to strike from my  
10 mind the references to it a time or two.

11 MR. MERRILL: Right, Your Honor. We left it off of  
12 our exhibit log sheet. I apologize. ED-7 is a copy of  
13 the 1980 Water Resources Council Reference Handbook, and  
14 I offer that document for purposes of cross-examination  
15 and impeachment.

16 THE SPECIAL MASTER: And I have looked at the ED-3,  
17 but not of any importance. That's the Federal Register  
18 for September 29.

19 MR. MERRILL: Yes, I believe I offered that.

20 MR. ROGERS: I have that on the list, Your Honor.

21 THE SPECIAL MASTER: I beg your pardon. You sure  
22 did. I'm sorry.

23 Let me just take a minute to make sure I'm not working  
24 with material that won't be in evidence. Would you just  
25 be kind enough to let me know if these are in as I give





1 the number? 28.

2 MR. ROGERS: It's on the list.

3 THE SPECIAL MASTER: 23?

4 MR. McDANIEL: Yes.

5 THE SPECIAL MASTER: 7?

6 MR. McDANIEL: Yes.

7 THE SPECIAL MASTER: 22?

8 MR. MERRILL: Yes.

9 THE SPECIAL MASTER: 26, Howe?

10 MR. ROGERS: Yes.

11 THE SPECIAL MASTER: 25?

12 MR. MERRILL: Yes.

13 THE SPECIAL MASTER: I'll go over these quickly.

14 21?

15 MR. MERRILL: Yes.

16 THE SPECIAL MASTER: 11-A, I know that's in.

17 MR. MERRILL: Yes.

18 THE SPECIAL MASTER: ED-52?

19 MR. ROGERS: Yes.

20 THE SPECIAL MASTER: 51?

21 MR. ROGERS: Yes.

22 THE SPECIAL MASTER: 17?

23 MR. ROGERS: Yes.

24 THE SPECIAL MASTER: 16?

25 MR. MERRILL: Yes.



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THE SPECIAL MASTER: 29?

MR. MERRILL: Yes.

THE SPECIAL MASTER: 15? Yes, I see it.

30? Yes, I see it.

10? I do not see it.

MR. ROGERS: Yes.

THE SPECIAL MASTER: The news release.

MR. ROGERS: No, it's not on my list.

MR. MERRILL: Oh, I didn't offer it, Your Honor.

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1 MR. MERRILL: That should be entitled, "WRC  
2 news release concerning seven and one-eighth percent  
3 discount rate."

4 MR. CLEAR: Is that being offered now?

5 MR. MERRILL: Yes.

6 THE SPECIAL MASTER: I didn't mean to do that,  
7 gentlemen of the United States table, but those  
8 things happen.

9 MR. MERRILL: Your Honor, it would have ended  
10 up in the evidence anyway.

11 MR. ECHOHAWK: I'm not sure.

12 MR. MERRILL: That is offered for purposes of  
13 cross-examination and impeachment.

14 MR. ECHOHAWK: What number was that?

15 THE SPECIAL MASTER: ED-10.

16 MR. ROGERS: What is it dated?

17 THE SPECIAL MASTER: It is dated November 1, 1979,  
18 and it's simply a Water Resource Council's news  
19 release, re: discount rate, ED-14.

20 MR. CLEAR: Yes. That is already in, Your  
21 Honor.

22 THE SPECIAL MASTER: Yeah, and 12 is in and 8 is  
23 in.

24 MR. CLEAR: No, 8 is not in, Your Honor. Eight  
25 is being offered.



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THE SPECIAL MASTER: Eight was offered the very first after 12, 13 and 14.

MR. CLEAR: It is not in yet.

THE SPECIAL MASTER: I mean, it was offered. None of them are in yet.

MR. ROGERS: Fourteen and 12 are already in.

THE SPECIAL MASTER: I see. I beg your pardon. I see. Thank you.

Six, yes, it has been offered. Three?

MR. MERRILL: Yes, it has been offered.

MR. CLEAR: Yes.

THE SPECIAL MASTER: All right, thank you very much. Does that constitute the offer?

MR. MERRILL: That constitutes the offer, Your Honor.

THE SPECIAL MASTER: Any voir dire, Mr. Echohawk?

MR. ECHOHAWK: Could I have a minute?

THE SPECIAL MASTER: You bet. Take a minute or two for that.

(Whereupon, a short recess was taken.)

THE SPECIAL MASTER: On the record, please. Voir dire by Mr. Echohawk?

MR. ECHOHAWK: Your Honor, the first objection is to Exhibit ED-24, which is the Wall Street Journal



1 article. It is minor or technical objection, the  
2 point the exhibit sticker has obliterated a portion --

3 THE SPECIAL MASTER: It has, indeed. Is it  
4 duplicated on the second page, the five or six lines?  
5 It was pasted right on it.

6 MR. MERRILL: Yes, Your Honor, it is duplicated  
7 on the second page. If you look in the right-hand  
8 corner of the second page --

9 THE SPECIAL MASTER: It will appear.

10 MR. MERRILL: It will appear. Particularly the  
11 paragraph that begins, "Finally Mr. Reagan has an  
12 unusual opportunity . . . "

13 (Off-the-record discussion.)

14 MR. MERRILL: That should solve the objection.

15 THE SPECIAL MASTER: Does that remove the objection,  
16 Mr. Echohawk? I think it is duplicated on page 2.

17 MR. ECHOHAWK: Just to help me, where is it?

18 THE SPECIAL MASTER: Jim will show you.

19 (Brief pause.)

20 MR. ECHOHAWK: The next objection is to Exhibit  
21 ED-10, which is WR --

22 THE SPECIAL MASTER: E-10?

23 MR. ECHOHAWK: ED-10.

24 THE SPECIAL MASTER: The news release?

25 MR. ECHOHAWK: Yes, which purports to be the news



1 release. The objection is there is absolutely no  
2 foundation or authentication.

3 MR. MERRILL: The Witness identified it, Your  
4 Honor.

5 MR. ECHOHAWK: Your Honor, he identified what it  
6 purported to be.

7 THE SPECIAL MASTER: Not necessary. The next one?

8 MR. ECHOHAWK: The next objection is to ED-15,  
9 which is what purports to be a letter from HKM Associates  
10 and a report entitled, "Criteria for Selection of  
11 Project Study Areas, Wind River Reservation."

12 THE SPECIAL MASTER: And the basis for the objection?

13 MR. ECHOHAWK: No foundation or authentication.

14 MR. ROGERS: Your Honor, might I state that  
15 instead of getting up each time, the Tribes join in  
16 the objection of these exhibits.

17 THE SPECIAL MASTER: All right.

18 MR. ROGERS: Unless we state otherwise.

19 THE SPECIAL MASTER: Very well. It will be noted.

20 MR. ECHOHAWK: The next objection is to Exhibit  
21 ED-28, which is the excerpt from a book or article  
22 entitled, "Public Investment, the Rate of Return and  
23 Optimal Fiscal Policy," by Arrow and Kurz. The United  
24 States objects, it is merely an excerpt, and if  
25 Wyoming will produce the books, we can mark them and



1 put them into evidence right now. With that agreement  
2 from Wyoming, we will have no objection, but it is  
3 just taking one single page out of context, and we  
4 wish the whole book to be entered.

5 The next objection goes to an article by Charles  
6 W. Howe entitled, "Natural Resource Economic, Issues,  
7 Analysis and Policy," which is marked as ED-26, same  
8 objection.

9 THE SPECIAL MASTER: Twenty-six or -- oh, I see,  
10 you are going to object to 26 on the same basis?

11 MR. ECHOHAWK: Twenty-six, same basis, taken out  
12 of context. The United States would have no objection  
13 if we could have the entire book marked into evidence.

14 We have a similar objection to ED-25, which is an  
15 article I believe entitled, "Benefit-Cost Analysis for  
16 Water System Planning," by Charles W. Howe. Same  
17 thing, one page taken out of context. No objection  
18 if we would have the whole information -- excuse me,  
19 the whole item marked and moved into evidence. There  
20 may be a small amount of voir dire on both Howe  
21 articles, but let me hold those off for a second.

22 THE SPECIAL MASTER: I have a problem -- well,  
23 go ahead with your objections.

24 MR. ECHOHAWK: The next objection goes to ED-22,  
25 which is an excerpt out of either a book or an article



1 entitled, "A Primer for Policy Analysis," by Stokey  
2 and Zeckhauser. Same objection, one page taken out of  
3 context. The United States would remove its objection  
4 if the entire document can be marked and moved into  
5 evidence.

6 The United States' next objection goes to what  
7 has been marked as Exhibit C-278-A, which is a hand-  
8 written -- the handwritten information I turned over  
9 to Mr. Merrill when it became available. It serves  
10 absolutely no probative value. The exhibit C-278 is  
11 in evidence and this is merely duplicative and adds  
12 absolutely nothing.

13 The next objection is to ED-17, which purports to  
14 be the two pages out of a document, "Plan for Completion  
15 of the Wind River Irrigation Project," June, 1968.  
16 Again, it's two pages taken out of context. If the  
17 entire document could be marked and moved into evidence,  
18 we would have no objection. I believe that one is  
19 offered for purposes of impeachment. As we have  
20 argued before, that argument comes during the briefs.  
21 If you want to offer it for the truth of its contents  
22 or illustrative purposes or whatever, that is a different  
23 story.

24 Exhibit ED-30, which is the Wyoming Crop and  
25 Livestock Reporting Service, I'm not clear from that





1 particular document whether that is the entire portion  
2 of the document or whether, again, that is an excerpt.  
3 Do you know that, Mr. Merrill?

4 MR. MERRILL: To the best of my knowledge, Your  
5 Honor, it is an entire -- it is simply a news release  
6 that is issued on the front and back, and both the  
7 front and back of the copy were made part of the exhibit.  
8 It is issued monthly.

9 MR. ECHOHAWK: If that is the case, it is a news  
10 release, Your Honor, we object for authenticity.

11 The next objection goes to ED-29, which --  
12 a document marked as "Wyoming Agricultural Statistics,"  
13 compiled by Wyoming Crop and Livestock Reporting  
14 Service. It is a two-page document. The second page  
15 is listed as Page 90. Again, it is a document taken  
16 out of context. We object on two grounds: First,  
17 it's taken out of context and we wish the rest of the  
18 document be marked; and the authenticity basis.

19 The next objection goes to ED-100, which is based  
20 on foundation. If Wyoming wishes to bring the person  
21 in who prepared the graph, the person can be cross-  
22 examined, voir dired on that particular exhibit as  
23 to the preparation of it at that time and the United  
24 States could consider an objection at that time, Your  
25 Honor. We believe that it is entirely premature, no



1 foundation has been laid for that document.

2 MR. MERRILL: Your Honor, the foundation for  
3 that document was laid by Mr. Dornbusch. He testified  
4 it was a pretty good plot of benefit-cost ratios for  
5 projects.

6 MR. ECHOHAWK: Improper foundation.

7 THE SPECIAL MASTER: Any other objections on the  
8 voir dire?

9 MR. ECHOHAWK: Your Honor, for each document where  
10 there was an impeachment purpose listed, and I think  
11 that goes to ED-8, ED-30, ED-29, ED-17, Ed-15, ED-11-A,  
12 ED-26, ED-25, ED-21, ED-22, ED-6, ED-3, ED-28, ED-24,  
13 ED-23, ED-7 and ED-10, same objection applies that the  
14 question of whether or not those documents impeach  
15 Mr. Dornbusch is left for the lawyers to argue in  
16 briefs, and it is improper to offer those for those  
17 purposes. If he wished to offer them for the truth  
18 of their contents or for illustrative purposes, that  
19 is a different story.

20 For the documents -- the United States has a  
21 further objection to the documents Exhibit C -- wait  
22 a minute, excuse me, Exhibit ED-51, which are BIA  
23 tables, unemployment tables used by Mr. Dornbusch.  
24 Those were offered for illustrative purposes. Those --  
25 we would remove our objection if they were offered to



1 show facts and data relied upon by Mr. Dornbusch, and  
2 also ED-51, truth of their contents.

3 ED-52, the United States objects that they were  
4 offered for illustrative purposes. We would offer  
5 them at this time also for the truth of their contents  
6 and to show facts and data relied upon by Mr. Dornbusch.

7 Same objection goes to ED-54, which are the  
8 Stetson costs regarding the Type VIII lands. Those  
9 were offered for illustrative purposes. We would  
10 offer those for truth of their contents and also show  
11 facts and data relied upon by Mr. Dornbusch.

12 Same point goes to ED-55.

13 THE SPECIAL MASTER: Same point goes for what?

14 MR. ECHOHAWK: ED-55.

15 THE SPECIAL MASTER: Thank you.

16 MR. ECHOHAWK: Which is a schedule of construction  
17 costs, future lands. We would offer those to show  
18 facts and data relied upon by Mr. Dornbusch.

19 Regarding ED-56, which is a table proposed by  
20 Mr. Dornbusch showing skilled and unskilled labor  
21 systems regarding operation, maintenance and repair  
22 for the future --

23 THE SPECIAL MASTER: A little louder, please,  
24 Tom.

25 MR. ECHOHAWK: Excuse me. I'm sorry. ED-56,



1 which is a table prepared relied upon by Mr. Dornbusch  
2 showing the skilled and unskilled labor force systems  
3 regarding the operation, maintenance and repair for  
4 the future years. We would offer those for the future --  
5 excuse me, for the facts and data relied upon by Mr.  
6 Dornbusch.

7 THE SPECIAL MASTER: You would enlarge the purpose  
8 of their offer?

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

10 THE SPECIAL MASTER: And that number again, was  
11 55?

12 MR. ECHOHAWK: Fifty-six.

13 THE SPECIAL MASTER: Fifty-six, thank you.

14 MR. ECHOHAWK: May I have one minute, Your Honor?

15 (Off-the-record discussion.)  
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1 MR. ROGERS: Your Honor, I think just one point.  
2 I don't have a reference to it in front of me, but the  
3 ED-54 which was offered by Mr. Merrill for illustrative  
4 purposes is the Stetson Type VIII Land Costs document.

5 THE SPECIAL MASTER: Right.

6 MR. ROGERS: Which has already been admitted in  
7 evidence, I think, but I'm not sure, but that must have  
8 been admitted for the truth of its contents, and that would  
9 be another basis for changing its purpose here.

10 THE SPECIAL MASTER: All right. I'm ready to rule  
11 on this with some misgivings as to how I'm going to rule  
12 regarding the objections.

13 First, as to an excerpt, normally I would categorically  
14 recognize that objection and sustain it because the practice  
15 all too often results in lifting a sentence out of context  
16 and changing or altering the meaning of a particular para-  
17 graph, let alone of the article or whatever he's done.

18 It's been a practice much abused in journalism techni-  
19 ques and in the law up until the last ten years or so, and  
20 the new journalism has made it look pretty innocent as  
21 compared to our new treatment, but in this case I'm going  
22 to overrule these objections because I believe that the  
23 subject matter of these excerpts, be they a page or two  
24 pages out of a book or a page out of an article, deal  
25 with theoretical subject matter anyway, and this is a



1 highly complex matter of what is a valid and appropriate  
2 discount rate for a project as unique and unprecedented  
3 as this one.

4 This is not a Congressional appropriation. This  
5 is not a Congressional authorization. This is a program  
6 where water is readily available and has been appropriated.  
7 It has all sorts of overtones that make it different than  
8 the ordinary thing, and I think that having to require  
9 the State to come up with the full publication in some  
10 of these matters of a book of two or three hundred pages  
11 because the excerpt in evidence is only two or three pages  
12 therefrom would be unduly burdensome and, therefore, I  
13 rule this way.

14 MR. ECHOHAWK: I believe those documents are in the  
15 courtroom, and I have seen on several occasions --

16 THE SPECIAL MASTER: I have seen one or two in the  
17 courtroom. They are books, I think, and textbooks, most  
18 of them.

19 MR. ECHOHAWK: Yes, Your Honor. It's customary during  
20 trial that once those documents are used that the books  
21 are marked and put in.

22 MR. ROGERS: Your Honor, furthermore, if I may say,  
23 with the fact that it is a theoretical subject, there may  
24 indeed be content on other pages not presented that could  
25 be brought to your attention, and they should be part of



1 the record in this case and be brought to your attention  
2 in the proposed findings, all the more important because  
3 they are theoretical subjects, and it is not a burdensome  
4 cost, even if the State had to buy these books to put them  
5 into the record to do so.

6 MR. MERRILL: The record also reflects that we made  
7 them available overnight.

8 If they felt that we had taken material out of context  
9 or there is other material within those documents that should  
10 be presented, they are welcome to do so.

11 THE SPECIAL MASTER: I was going to say would you make  
12 the books available and given them to Mr. Echohawk, what-  
13 ever ones you have available as textbooks, and let him  
14 scour through them for whatever he may want to use in  
15 rebuttal or at least give him a list of what they are and  
16 what libraries they are from, something like that? Give  
17 them a bibliography of them.

18 MR. MERRILL: We will make the books themselves  
19 available as we did last night.

20 THE SPECIAL MASTER: That's all Mr. Echohawk asks,  
21 in effect.

22 MR. ROGERS: We would like more than that, Your  
23 Honor. We want them in the record so we may refer to  
24 them in proposed findings and argument later.

25 THE SPECIAL MASTER: Why don't you take advantage



1 of my offer now, the list and the books and the State  
2 will offer to you -- if you find material in them that  
3 you want to use and you develop your own case. I don't  
4 think they have a duty to develop your case.

5 MR. ECHOHAWK: It's not to develop our case. It  
6 is when a document is produced, they showed him one page  
7 out of a book and cross-examined him on that.

8 At that point, Your Honor, we are entitled to have  
9 the entire book put into evidence.

10 THE SPECIAL MASTER: I know books that are published  
11 on this matter where that would not be.

12 MR. ECHOHAWK: That's the risk that Wyoming runs  
13 when they used those books, Your Honor, and it's been  
14 customary practice in trial when it happens --

15 THE SPECIAL MASTER: I don't know how to rule on  
16 that. I will take that under advisement, and my assistant,  
17 Mr. McDaniel, will come up with a proper ruling tomorrow,  
18 but I would like to think my first ruling on this is  
19 appropriate.

20 MR. ECHOHAWK: So the ruling is reserved on those  
21 then?

22 THE SPECIAL MASTER: I will reserve the ruling on  
23 whether or not the State has to produce the entire books  
24 and put them in evidence. I believe my ruling is to give  
25 you a list and you put them in evidence which might be





1 more appropriate.

2 MR. ECHOHAWK: If they can give me the books, I can  
3 put the stickers on them.

4 MR. MERRILL: They came from the professional library  
5 of the State's experts.

6 MR. ECHOHAWK: That's the risk they run. It has  
7 happened time and time again.

8 THE SPECIAL MASTER: Well, anybody who comes and  
9 brings his work papers with him knows what that risk is,  
10 to end up with thousands of sheets being copied.

11 MR. MERRILL: The witness' own work papers were  
12 returned to him along with a marked copy so that he has  
13 not only his original but an extra copy. This is a different  
14 situation. We'll make the books available. If they want to  
15 put them in --

16 THE SPECIAL MASTER: I will order when this case is  
17 completed, and the records go to some tomb or some law  
18 school that the books will be returned to their proper  
19 owner, if xeroxes be made of appropriate pages that were  
20 referred to in the record.

21 I think we are making a mountain out of a mole hill.  
22 I don't think this was at all that important.

23 MR. ECHOHAWK: It is, Your Honor.

24 THE SPECIAL MASTER: But apparently the United  
25 States thinks it is, Mr. Merrill.



1 MR. MERRILL: Your Honor, our expert is going to  
2 get the books right now. We will make them available  
3 again. They can get their own copies, and put them in  
4 on redirect or in the Tribes' case in chief.

5 THE SPECIAL MASTER: Let's go on to the next item.

6 MR. ROGERS: That's not what we are asking.

7 MR. ECHOHAWK: That's not what we are asking. We are  
8 asking that their books, that they use those and put them  
9 in. It's a burden they bear when they bring those in and  
10 cross-examine witnesses on those points.

11 MR. MERRILL: Your Honor, if the United States thinks  
12 it's that important a point, maybe we should put in briefs  
13 on the matter before you rule.

14 THE SPECIAL MASTER: Well, I hate to add to your  
15 work as well as my own work by calling for briefs on this  
16 evidentiary matter. I suspect a few hours of research by  
17 my staff can give me an answer.

18 I know you want a ruling now -- I will give you  
19 a ruling now, but you won't like it.

20 MR. ECHOHAWK: If you want to look into that matter,  
21 and we can address it again on June 2 when we return --

22 THE SPECIAL MASTER: Let's do that. Let's reserve  
23 that point, and I will address it on June the 2nd, and I  
24 will have some authority for my conclusion, and I would  
25 welcome a page or two of your authority if you think



1 that once they xerox a page or two of a publication or  
2 a periodical, it is at their risk in offering it that the  
3 entire document must be produced.

4 That may be something that is true on something  
5 that is cohesive and something that is up to 20,000 words,  
6 but a short piece of literature, a novelette,-- I remember a  
7 lot of -- it is certainly true on smaller articles where  
8 there may be distortions by taking something out of context,  
9 but this is a work on theory, and if there is another  
10 reference within those publications to offset that which  
11 they have taken, I think that would be your duty to find  
12 that and put it into evidence without going into the  
13 entire publication.

14 MR. ECHOHAWK: The question is who bears the burden,  
15 Your Honor, and Wyoming has brought those in, and I think  
16 it is only appropriate that we use their books and put  
17 them in. I think Rule 612 allows for such. We will look  
18 into that further, Your Honor.

19 THE SPECIAL MASTER: Okay. I'll reserve a ruling on  
20 all of the exhibits to which that objection was made.

21 I will permit all those exhibits as follows: 52, 54,  
22 55, and 56, to be admitted within the large purposes as  
23 requested by the United States, and I will deny none of  
24 these exhibits from being admitted into evidence and those  
25 to come where objections were not made, the same are



1 hereby admitted into evidence.

2 Those on which objections were made but other than  
3 being excerpts are hereby admitted into evidence, and  
4 those exhibits to which exceptions were taken because  
5 of being excerpts and the balance of the publication  
6 not before us, we will have a ruling reserved as to their  
7 admissibility until June 2 when we next meet.

8 Okay. Mr. Dornbusch, are you ready -- is there  
9 further redirect?

10 MR. ROGERS: Could I get a clarification? You have  
11 rejected our objection to the admission of exhibits on  
12 the basis of cross-examination and impeachment?

13 THE SPECIAL MASTER: That's correct. The impeachment  
14 concept is up to me to determine whether it has any evi-  
15 dentiary value of impeachment of the purport of his  
16 testimony, and it's in evidence, and it can be cited by  
17 them and cited by you in closing arguments.

18 MR. ROGERS: Thank you.

19 MR. ECHOHAWK: At this time it's now 4:30 and the  
20 United States does have redirect. We would ask, Your  
21 Honor, that redirect be postponed until we return June 2.  
22 The redirect could appear to be quite lengthy, and I'm  
23 sure it's going to generate the same amount of recross.

24 THE SPECIAL MASTER: Oh, heavens. Don't say that.

25 MR. ECHOHAWK: I anticipate Mr. Merrill. With the



1 Court's permission, Your Honor, I would suggest we  
2 adjourn and return June 2.

3 THE SPECIAL MASTER: Yes, that is agreeable, and  
4 it will be so ordered.

5 The redirect of Mr. David Dornbusch will take place,  
6 our first order of business on June the 2nd when we  
7 reconvene.

8 I would like to think that if we find this going into  
9 long sessions like direct was, that I will be constrained  
10 to put some time limitations on both redirect and on  
11 recross. I hope they are not more than a day of each.

12 MR. ECHOHAWK: Okay, Your Honor. I understand.

13 THE SPECIAL MASTER: All right. Thank you all very,  
14 very much.

15 I hope you understand that it is a worry and a  
16 difficult proceedings as all of you know.

17 Mr. Radosevich, you have a pleading before us for  
18 disposition. Would you bring it forth and I'll take a  
19 few minutes now to put a few things in the record to give  
20 you some reasons why we can't proceed with it right now  
21 on its merit?

22 MR. RADOSEVICH: I provided you with two copies and,  
23 unfortunately, I don't have another copy with me now.

24 THE SPECIAL MASTER: Let me see if I have it here.  
25 I probably have it in the office.



1 Does anybody have a copy of that request for publication  
2 for the reservation papers?

3 MR. ROGERS: Yes, Your Honor.

4 THE SPECIAL MASTER: You want to be heard on this too?

5 MR. ROGERS: I want to be heard, Your Honor, but I have  
6 to confess that I have not had time to properly prepare for  
7 this, and it's an important matter.

8 THE SPECIAL MASTER: This matter will also be set over  
9 to be heard probably before the redirect on Tuesday,  
10 November 2 -- Tuesday, June the 2nd.

11 I want to give you now, however, Mr. Radosevich, some  
12 of the things that gave me trouble in what you are asking  
13 me to do.

14 MR. RADOSEVICH: Yes, Your Honor.

15 THE SPECIAL MASTER: I am not sure that I have a  
16 right to say that, "The United States government, through  
17 its attorneys, represents all trust-held lands and has  
18 filed claims for water on those lands to the extent  
19 determined by the government as essential to protect the  
20 trust properties."

21 I cannot in all honesty say that.

22 All I can say is there has been a suit filed in which  
23 the burden before this Court is a general mainstream  
24 adjudication of the rights to use water in this entire  
25 stream by everyone concerned, Indians, non-Indians, and so on.



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Now, if the United States wants to make a document of that kind and agree to it, that's one thing.

Next was that the Tribes, "... have retained counsel to represent the Tribes as political entities and have filed claims concurrent with or in addition to claims filed by the federal government on all lands held by the Tribe or members of the two Tribes."

I don't know that that's a fact, and if it isn't, then the Tribes should so state.

MR. ROGERS: There's language in that that is in error in law, and we have also -- the Tribes previously did place a public notice in the newspapers on the location of the reservation advising about the extent of their representation of the Tribes which I will produce at the time of --

\* \* \* \* \*



1 THE SPECIAL MASTER: The point which gives me the  
2 most difficulty, though, is this one, which is the fact  
3 that the State of Wyoming does not represent individual  
4 water right holders in this general adjudication. The  
5 State of Wyoming has in some ways over the past three  
6 years, and even before I got in this case, rather held  
7 itself as being helpful to the holders of water rights,  
8 and to one point of sending around to the various meet-  
9 ings of the Wyoming Farm Bureau in the Big Horn Basin  
10 an agent - an official of the Wyoming Attorney General's  
11 office advising how to fill out a United States deppsi-  
12 tion and how not to, which caused great tribulation  
13 around here. So I don't know now if I have a right to  
14 say they don't represent them. The State is maintain-  
15 ing that all adjudicated water rights of record of the  
16 permittees are in good standing and should not be ad-  
17 versely affected by any claims for the right to use  
18 water other than the State now. That is a conclusion  
19 which I cannot really in all honesty concur because  
20 if there is any kind of an adjudication made of any  
21 kind of reserved rights for the Reservation, there  
22 will be a damage to an adjudicated water right down-  
23 stream. It may not be very serious if you hold a  
24 1904 or 1902 down around Worland, I don't think you  
25 are going to worry too much. But you might have some





1 bad years where you are going to get cut off where you  
2 wouldn't otherwise. If you hold a 1920, I wouldn't say  
3 much that, you know, it's going to do you real harm.

4 So, to the extent under the law of prior appropria-  
5 tion that there will be a setback, that's true.

6 MR. RADOSEVICH: Your Honor, I can appreciate  
7 your concern about the way we state who represents who,  
8 and I think this is precisely the problem, because the  
9 issue that came up, if you recall at that time, was are  
10 the individual Indian and non-Indian owners of fee  
11 simple land and allottees being represented by any  
12 other counsel for the Federal Government, the Tribes  
13 or the State Government.

14 At that time we had -- I raised the question  
15 simply because we get a number of inquiries, and since  
16 I represent the City of Lander and many of the fee  
17 simple landowners that live in that area, and they  
18 presume either they are being represented or their  
19 interests are being represented by the Federal Govern-  
20 ment or by the City of Lander or the State Government.

21 At that time the counsel for the Federal Govern-  
22 ment, they couldn't quite decide who they represented,  
23 and this is a statement they gave me. Now, I realize  
24 the language of this may not be precisely correct, but  
25 the State, I have checked with them, and it is their



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position. I think it is up to counsel for the Tribes and  
counsel for the U.S. Government to determine who they do  
represent. But the fact of the matter still remains,  
there are many non-Indian landholders of fee simple  
land, and if their rights are not included and they  
are under the assumption they are, and by the inquiries  
we have had they presume they are, and, in fact, if  
their rights are not even coming up under the Reserva-  
tion Doctrine, then they certainly should know.

\* \* \* \* \*

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THE SPECIAL MASTER: Mr. Radosevich, If anybody has the permits anywhere and they think they are going to be adjudicated here, they are in error. You know, another one too --

MR. RADOSEVICH: Pardon, Your Honor is absolutely correct.

THE SPECIAL MASTER: So permits are not going to be adjudicated here. We will be confirming I hope, to some degree -- we will be confirming, pass a judgment on, the validity of our adjudicated certificates of appropriation. We will not be touching the permits. The people, I guess should know that sooner or later, but I don't know what good it is to put a notice out to that now. Then again, I keep running into this periodically, not too much lately, but, "Well, hello, Teno, how are you? I see you are still working, my lawyer sent me a statement for another bunch of money, so I guess you are doing something." This is what I get, not up in your area, but north of you.

MR. RADOSEVICH: I don't send out any bills, Your Honor.

THE SPECIAL MASTER: I don't know what we get into when we get to a document like this. I don't like to generate expenses that may not be of my --

MR. RADOSEVICH: First of all, I would like to state it is not my purpose of raising this in order to generate



1 any business.

2 THE SPECIAL MASTER: I know that.

3 MR. RADOSEVICH: Most of my business is not in the  
4 United States, anyway.

5 THE SPECIAL MASTER: I did not intend it that way.

6 MR. RADOSEVICH: But I think the problem is we are  
7 talking about very material rights that may be affected,  
8 and if the people are under the assumption, particularly  
9 non-Indian fee simple landowners, that their rights are  
10 going to particularly date back to the date of the  
11 reservation or there is some question. I think it is a  
12 very valid concern, and they have expressed it in the  
13 sense of inquiring who is representing who.

14 THE SPECIAL MASTER: That might be true, but this  
15 statement, for example, at the end of the notice, says,  
16 "Assertion of individual interests to water rights on fee  
17 simple held lands in addition to any above representations,  
18 must be made by the individuals or their representatives."  
19 I'm not certain that an owner of some water rights has to  
20 certify anything. He may have an adjudicated certificate  
21 of appropriation -- in the Midvale District, and he will  
22 be -- his rights are not going to be hurt by me one iota.  
23 We are not calling him in and saying, "You know, have you  
24 not used it in five years, or we will send a letter to  
25 George Christopoulos and begin a proceeding against you for



1 termination of your interests," I'm not doing that to  
2 anybody. The worst that can happen to him is on the  
3 granting of this federal water right, his certificated  
4 right to use water may not be as thoroughly useful over  
5 the decades to come, may not have permitted an appropriation  
6 date. It may mean he has less water some years than other  
7 times. That is the worst that can happen.

8 MR. RADOSEVICH: Or no water.

9 THE SPECIAL MASTER: I don't know about no water  
10 because they really have no water after 1921 right now.  
11 Worland two years ago, all the years were cut off, '21  
12 or later, so they got no water now, so it can't hurt them  
13 very much, you see.

14 MR. RADOSEVICH: Your Honor, I realize there is going  
15 to be quite a bit of discussion, and I've already dis-  
16 covered that, in fact, it's very difficult at least for  
17 two of the parties in this lawsuit to decide who they  
18 are representing because, as I said, it's going to take  
19 some very complex language. If it's difficult for the  
20 attorneys who are representing not to know who their  
21 clients are, I think it's more difficult for the people  
22 who potentially thought they are clients --

23 MR. ROGERS: Your Honor, I know who my clients are.

24 MR. MEMBRINO: So does the United States.

25 MR. ROGERS: Your Honor, just for the record --



1 THE SPECIAL MASTER: I am not opposed to trying to  
2 do something to be of help to you, but it has to be stated  
3 in a real, real way that doesn't shake up a lot of people  
4 or get a lot of adverse public concern for this litigation  
5 that it already has.

6 MR. RADOSEVICH: Your Honor, I thoroughly agree with  
7 you, and I have requested of counsel to examine it because  
8 I just put a draft forward, and we can discuss the matter  
9 on June 5th or --

10 THE SPECIAL MASTER: This is not being -- I'm not  
11 saying no, but this takes some studying. We are going up,  
12 and we are going to look at some reservation matters as a  
13 group in a week or so -- when are we going up, the 8th?

14 MR. ROGERS: The 10th, Your Honor.

15 THE SPECIAL MASTER: That week of June 8th we are  
16 going up, and I believe that we can fashion some responsi-  
17 ble notice at that time, that perhaps a notice of some  
18 kind for those living on fee land in the reservation area  
19 would be appropriate, but I don't know.

20 MR. RADOSEVICH: Well, we can work on this, Your Honor.  
21 I'm willing to work with whoever else to fashion it.

22 THE SPECIAL MASTER: Do you wish to be heard on this,  
23 Mr. Merrill?

24 MR. MERRILL: No, Your Honor, not at this time.

25 THE SPECIAL MASTER: Does anyone else wish to be



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heard on this?

MR. MEMBRINO: I assume we will be talking about this later, Your Honor.

THE SPECIAL MASTER: Yes. I'm planning no action.

All right, we are adjourned. Thank you very much everybody.

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By Mr. Merrill

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12 direction.

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

16 Dated this 21st day of May, 1981.

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