

1-28-1981

## Trial Transcript, Vol. V, Morning Session

Frontier Reporting Service

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/all>

---

### Recommended Citation

Frontier Reporting Service, "Trial Transcript, Vol. V, Morning Session" (1981). *Hedden-Nicely Collection, All*. 145.  
<https://digitalcommons.law.uidaho.edu/all/145>

This Transcript is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Hedden-Nicely Collection, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

File 112  
4363  
Box 10

case # 4993

File # 112

4363

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

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

Civil No. 4993

**FILED** 4993  
2/6 1981  
*Margaret H. Hampton* CLERK  
DEPUTY

VOLUME V

Wednesday, January 28, 1981

Morning Session

**ORIGINAL**

APPEARANCES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

FOR THE STATE OF  
WYOMING:

MR. JOHN TROUGHTON  
Attorney General  
Capitol Building  
Cheyenne, WY 82002

MR. JAMES MERRILL, MR. MICHAEL  
D. WHITE and MR. SCOTT KROB  
Special Assistants Attorney  
General  
2900 Energy Center One Bldg.  
717 17th Street  
Denver, CO 80202

FOR THE UNITED  
STATES OF AMERICA:

MR. CHARLES GRAVES  
U.S. Attorney for the District  
of Wyoming  
Federal Building  
Cheyenne, WY 82002

MS. REGINA SLEATER  
Attorney at Law  
Land and Natural Resources  
Division  
Federal Building  
Cheyenne, WY 82002

MR. TOM ECHOHAWK  
Attorney at Law  
Land and Natural Resources  
Division  
1961 Stout Street  
Denver, CO 80294

MR. JOSEPH MEMBRINO  
U.S. Department of Justice  
Washington, DC 20006

APPEARANCES (Continued)

1

2

3

FOR THE ARAPAHOE  
TRIBE:

WILKINSON, CRAGUN & BARKER  
1735 New York Ave., N.W.  
Washington, DC 20006  
BY: MR. R. ANTHONY ROGERS

4

5

6

FOR THE SHOSHONE  
TRIBE:

SONOSKY, CHAMBERS & SACHSE  
200 M. Street, N.W.  
Washington, DC 20006  
BY: MR. HARRY SACHSE

7

8

9

FOR THE ARAPAHOE &  
SHOSHONE TRIBES:  
(LOCAL COUNSEL)

DRAY, MADISON & THOMSON  
204 East 22nd  
Cheyenne, WY 82001  
BY: MR. WILLIAM THOMSON

10

11

12

FOR THE PRIVATE  
WATER HOLDERS:

MS. RUTH YONKEE  
Attorney at Law  
P.O. Box 1324  
Thermopolis, WY 82443

13

14

15

MR. STEVEN AVERY  
Attorney at Law  
420 Washington  
Riverton, WY 82501

16

17

MR. JEFFREY DONNELL  
Attorney at Law  
P.O. Box 552  
Worland, WY 82401

18

19

MR. MELVIN FILLERUP  
Attorney at Law  
P.O. Box 929  
Cody, WY 82414

20

21

MR. C. EDWARD WEBSTER, II  
Attorney at Law  
1201 Sheridan Ave.  
Cody, WY 82414

22

23

24

25

APPEARANCES (Continued)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

FOR THE PRIVATE  
WATER HOLDERS:

MR. GEORGE RADOSEVICH  
Attorney at Law  
Lander, WY 82520

MR. VAN WILGUS  
Attorney at Law  
1607 Draw Street  
Cody, WY 82414



1 THE SPECIAL MASTER: Ladies and Gentlemen,  
2 will we please come to order.

3 Ms. Sleater, is is true and you and the State  
4 of Wyoming have agreed to a settlement and that you wish  
5 to announce.

6 MS. SLEATER: If only, Your Honor.

7 THE SPECIAL MASTER: If only is right.

8 MR MERRILL: Your Honor, before we begin, I'd  
9 like to raise a couple of matters that are sort of ongoing  
10 with respect to the trial. As you recall, we discussed  
11 some photographs belonging to Mr. Keith which were loaned  
12 to the United States, and Ms. Sleater informed me that her  
13 secretary is looking for those. We have prepared an order  
14 requiring production of those, but thought we would hold  
15 off having you enter any such order until at least lunch  
16 today to give the United States an opportunity to produce  
17 those without being ordered to do so.

18 THE SPECIAL MASTER: Very well.

19 MR. MERRILL: The second matter I'd like to raise  
20 is the tribes' position with respect to the technical con-  
21 flict of interest matter that we raised earlier, which  
22 has been raised by the State of Wyoming and many private  
23 parties, and thought it would be good if the tribes had  
24 made any decision at this time that they go on the record  
25 and state their position. If not, we may want to alter the  
course of the proceedings based on their position.

THE SPECIAL MASTER: Mr. Rogers.

MR. ROGERS: We have met with our clients, the five  
members of each business

1 council who are down here, which represents a quorum of  
2 both business councils; discussed the matter with them.  
3 No formal vote was taken, however, no objection was raised  
4 to your continuance as Master, and that is the client's  
5 position at this time.

6 And we, as I represented to the Court, had recom-  
7 mended to them that we raise no objection and that they  
8 have voiced none.

9 THE SPECIAL MASTER: Very well. I'd like you  
10 to, Leo Salazar, my assistant, will show you the report  
11 that will accompany the schedule that's going into the  
12 mail today to all the attorneys of record and pro se, which  
13 carries out, I think, my requirements under this last  
14 discussion.

15 MR. MERRILL: Your Honor, may I ask if that waiver  
16 also extends to the Shoshone Tribes?

17 MR. SACHSE: What Mr. Rogers has just described  
18 is not a waiver, but that his statement does cover both  
19 tribes, both tribes.

20 MR. WHITE: Your Honor, I think it's important  
21 for all the participants in this trial to get this techni-  
22 cal problem taken care of. I think we all recognize it's  
23 a technical problem. I think that the other participants  
24 are entitled to know whether or not the tribes are waiving  
25 any past--any objections based on any technical conflicts  
in the past or any continuation of those technical conflicts.  
We can't go on forever with the tribes sort of having the



1-3 MR-d

1 best of both worlds, saying that we've got no problem and  
2 yet saying it's not a waiver, so that later on if they lose  
3 some issue, they can come back in and open up the trial.

4 I think we are entitled to get an unequivocal  
5 waiver for those matters which were contained in your  
6 excellent disclosure both with respect to past activities  
7 and those which are continuing.

8 THE SPECIAL MASTER: Just a minute. I know of  
9 no statute or procedural requirement that mandates a need  
10 for a waiver of such things. If the tribes have stated  
11 they have no objection as my continuing as a Special Master,  
12 you have indicated a waiver to the--

13 MR. WHITE: Yes.

14 THE SPECIAL MASTER:--matters raised, I think we  
15 can leave matters sit as they are. I don't think any litigant  
16 or party to this matter can be required to sign off on  
17 objections to what I may do a month from now or three months  
18 from now or nine months from now. So up until now we agreed  
19 there is no objection to be filed in this new procedure, but  
20 that I believe all of you are reserving the right to raise  
21 an inquiry in the months to come or to raise an objection  
22 in the months to come to what might be some new activity  
23 of mine to which you might object.

24 MR. WHITE: I think that's right, Your Honor.  
25 The only point I'm trying to make is we ought to be able  
to get an assurance that the objection based on those  
matters which you describe which are either past in nature  
or continuing in nature will not be raised later on to defeat--

1-4 MR-d

1 THE SPECIAL MASTER: Let me see if that isn't  
 2 understood by all. It is my understanding, Mr. Sachse and  
 3 Mr. Rogers, that the tribes are raising no objections to  
 4 the matters that were raised in my conference regarding  
 5 lobbying activities in which I have engaged in behalf of  
 6 the State of Wyoming. And I have made it explicitly clear  
 7 if I would be asked to continue that effort by way of  
 8 visit to members of the U. S. House of Representatives  
 9 or Senate this year in behalf of the elected delegation  
 10 in Washington from Wyoming or the Governor or any other  
 11 state officials, I don't believe I can possibly say no  
 12 to them, and God, believe me, it's not the return, it's  
 13 the principle of federal government saying to a state  
 14 we'll put a cap on what you can tax for resources for  
 15 your impact troubles, and I don't believe Uncle Sam has  
 16 the right to do that, and I think it's my duty to go back  
 17 and try to defeat it, I would go back and try to do that.

18 I understand maybe I won't be asked to inasmuch  
 19 as this trial is getting to be three weeks of a month,  
 20 which means more than just full time, but I understand  
 21 that any objections to that activity will not be raised.  
 22 That doesn't mean you have to sign a waiver to say the  
 23 Special Master has become a monopoly on virtue, so if I  
 24 may quote General Haig, Senator, I don't think any of  
 25 us have that, that includes counsel in this case as well  
 as me.

So I think we got an understanding without  
 requiring any more, and if that's true, let's proceed

1 with the litigation. Does that pretty much represent  
 2 what you want to say?

3

4

5

6

\* \* \* \* \*

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

\* \* \* \* \*

1 MR. ROGERS: Your Honor, I have to say  
2 with respect to your continuation on that case,  
3 I don't believe the members of my business council  
4 did take a position on that one way or another.  
5 I think they regard that as something that would have  
6 to be considered if it, in fact, happens.

7 The whole matter was discussed, including  
8 the possibility of your continuation if asked by  
9 the State, but they understood that. The whole matter  
10 was done in a -- as I said, no formal vote was taken,  
11 and I don't think that -- it's not clear in my mind  
12 if they have committed themselves to any future  
13 course of action on a position should you continue  
14 that employment. So I can't state anymore than  
15 that about that at this time.

16 THE SPECIAL MASTER: I think that's fine.  
17 I think that serves notice upon me that my activities  
18 are being watched by both sides, and I think that's  
19 good, and I think if my lobbying activities continue  
20 to defeat HR 6625 and it says nothing more than it  
21 did the last session, I can't see anybody objecting  
22 to my doing that, and I believe deeply in that.

23 As a matter of fact, I think it is a  
24 service to all of you if that can be defeated. I  
25 suppose if your name is Sam Gibbons and you are the



1 ranking member of the house Ways and Means Committee  
2 of the United States House of Representatives, you  
3 take almost violent exception to what I just said,  
4 and he is carrying this battle on the basis that this  
5 nation cannot be vulcanized, and laws like what  
6 Wyoming and Montana have now are creating vulcanization  
7 of America on natural resources, and he is being  
8 adamant on that and he is taking a position on this.

9 But I'm not working for Mr. Gibbons, I'm  
10 working for the Courts of the State of Wyoming to be a judge in  
11 pro tempore for these Proceedings, and these Proceedings  
12 involve water in Water Division Number Three, not the  
13 principle of the State of Wyoming taxing its coal,  
14 and I can't conceive of a conflict in there, and so  
15 far we have had no conflict by your admissions, and  
16 I will stop at that point.

17 MR. ROGERS: I will leave what I have said  
18 on the record, and I appreciate your feelings on the  
19 matter, but I do have to make one more comment  
20 about what Mr. White has said about removing the  
21 uncertainty from these Proceedings. I don't think  
22 any uncertainty can be removed about these  
23 Proceedings until all parties of the case have been  
24 notified of the matter and have had their chance to  
25 object, as well. We have to proceed in tandem with



1 the procedure that has been developed for that,  
2 and as I understand, all have 30 days in any event  
3 to state objections. I think the Tribe's position  
4 is as I stated, and is set, but I don't think it's  
5 set by any means for what the other parties may say.

6 THE SPECIAL MASTER: Is it until February  
7 28th?

8 Yes, all parties have until February 28th,  
9 and that's the notice going in the mail today.

10 MR. SACHSE: Another statement I want to  
11 make on the record, just so there is no lack of  
12 clarity, the reason I objected to the word "Waiver,"  
13 is that the Tribes have objected to the jurisdiction  
14 of the State Court to hear this case at all, and  
15 we have preserved that objection throughout all  
16 Proceedings here. Whether the objection is valid  
17 or not or could be convened in this case is something  
18 a court may have to determine at a later time. But  
19 we are not waiving any of our basic objections of  
20 jurisdiction of this Court, and part of the juris-  
21 diction of this Court is the jurisdiction of the  
22 Master.

23 MR. WHITE: Your Honor, that is a remarkable  
24 statement, because I can see the Tribes' argument now.  
25 The argument will go something along these lines:

1 Wyoming Court should have no jurisdiction because  
2 they will say, and it's not true, but they will say  
3 it's impossible for them to get a fair trial in a  
4 Wyoming Court because, look here, the Master has some  
5 relationship with the Governor.

6 THE SPECIAL MASTER: They have already said  
7 that once, and the Court sustained them. That the  
8 Master at the time being the State Board of --

9 MR. WHITE: I'm talking about you, Your  
10 Honor.

11 THE SPECIAL MASTER: I know you are, but  
12 let me say to you that objection was understandably  
13 raised once long before I got into the case.

14 MR. WHITE: I understand.

15 THE SPECIAL MASTER: I believe Judge Joffe  
16 sustained that thing and said, who do you want for  
17 a special master, and all of you went and searched  
18 for a new special master, so I think the Pre-Trial  
19 Order sets that clear, and it is merely that the  
20 Indians have reserved the question of jurisdiction  
21 and reserved the right to continue an objection to it.  
22 I suppose if they want to continue an objection to  
23 me as a Master, there is not much we can do about it.  
24 They will have to show some proof, but the thing that is  
25 important is that they have agreed on the record as of

1 this morning that they will raise no objection to  
2 the Master having been employed by Wyoming to defeat  
3 HR 6625 in the 96th Congress.

4 Now, Mr. Rogers said to me, and if you  
5 don't do it again in the 97th Congress we will have  
6 no objection, and I had to answer to Mr. Rogers  
7 and his Indians that I cannot in good conscience  
8 say to you I am not going to help defeat this bill.

9 MR. WHITE: I just wanted to deal with the  
10 argument when the Tribes turn it around and say "Look  
11 what the Special Master did" in their jurisdiction  
12 argument. I think that ought to be put to rest, and  
13 I'm doing so for the record now.

14 THE SPECIAL MASTER: All right. Let me  
15 respond that I have taken the position it's none of  
16 my business, that's none of my affair. That is up  
17 to the Appellate Procedure if you argue jurisdiction  
18 under the McCarren Amendment. I have nothing to  
19 say about that.

20 Very well. Ms. Sleater.

21

22

23

24

25

\* \* \* \* \*



DIRECT EXAMINATION (RESUMED)1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MS. SLEATER:

Q Mr. Merchant in the course of your work, have you formulated any professional opinions regarding the water needs for municipal, domestic and commercial uses on the Wind River Reservation for the present and in the future?

A Yes, I have.

Q What are those opinions, please?

A I concluded that the municipal, domestic and commercial needs on the reservation are approximately 1,041 acre-feet per year currently, that they would be approximately 1,524 acre-feet per year in the year 2000, and that they would be 2,226 acre feet per year in the year 2020.

Q In the course of your studies, did you also reach an opinion as to the source of that water?

A Yes, I did.

Q Would you please tell us what that opinion is?

MR. MERRILL: Objection, Your Honor. There has been no foundation at all other than he says he studied the source. How did he study the source? What sources did he consider? We don't have any of that information in the record.

merchant - direct - sleater

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE SPECIAL MASTER: The objection is over-ruled. He may answer.

MS. SLEATER: Thank you, Your Honor.

A. From the Wind River serving the Indian population in Riverton, we concluded that about 18 acre-feet per year are necessary now, 27 acre feet per year would be required in the year 2000, and 39 acre-feet per year in the year 2020.

From the Little Wind River serving Fort Washakie by surface diversion, we concluded that 455 acre-feet per year are necessary in 1980, 666 acre-feet per year in the year 2000, and 972 acre-feet per year in the year 2020.

From the Little Wind River serving the Ethete by means of an infiltration gallery, I concluded that 257 acre-feet per year are necessary today, or in 1980, 375 acre-feet per year would be necessary in the year 2000, and 549 acre-feet per year would be required in the year 2020.

From the Popo Agie River serving the Boulder Flat by an infiltration gallery, I concluded that 26 acre-feet per year was required in 1980, 37 acre-feet per year would be required in the year 2000, and 56 acre-feet per year would be required

merchant - direct - sleater



1 in the year 2020.

2 Q (By Ms. Sleater) I don't believe yesterday you  
3 gave a definition of infiltration galleries. Could  
4 you explain what an infiltration gallery is?

5 A. It's my understanding that an infiltration gallery  
6 is a horizontal pipe perforated and laid in the  
7 alluvium of a water body, a stream in these cases,  
8 serving a sump of some sort, and that sump serving  
9 a water system.

10 Q Thank you. Do you have any other professional  
11 opinions regarding the municipal, domestic and  
12 commercial water needs on the Wind River Indian  
13 Reservation?

14 A. Yes. From groundwater I have concluded that River-  
15 ton required 18 acre-feet per year in the year 1980  
16 to serve the Indian population. It will require  
17 27 acre-feet per year in the year 2000, and will  
18 require 39 acre-feet per year in the year 2020.

19 Arapahoe required approximately 155 acre-feet  
20 per year from groundwater in 1980, 228 acre-feet  
21 per year would be required in the year 2000, and  
22 in 2020, 331 acre-feet would be required per year.

23 In Pavillion, approximately 2 acre-feet per year  
24 was required in the year 1980 to serve the Indian

25 merchant - direct - sleater

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

population, 3 acre-feet per year in the year 2000 would be required, and in the year 2020, 4 acre-feet per year would be required.

Throughout the rest of the reservation, people served by private wells would require approximately 110 acre-feet in the year 1980, 161 acre-feet in the year 2000, and 236 acre-feet in the year 2020.

\* \* \* \* \*

1 Q (By Ms. Sleater continued) Have you formulated  
2 any other professional opinions regarding the  
3 municipal, domestic, and commercial water needs  
4 on the Wind River Indian Reservation now or in  
5 the future?

6 A I formulated the opinion that my estimate of  
7 325 gallons per capita per day as a  
8 requirement for Ft. Washakie is in fact accurate.  
9 I spoke this morning with the former operator  
10 of the plant who confirmed the information I had  
11 before, from which I derived that estimate of  
12 daily per capita water consumption.

13 Q Thank you. And any other opinions?

14 A No.

15 Q Now, I believe when you started to testify on  
16 Monday you said you had worked in the three  
17 areas, the third area which we have not yet  
18 discussed being present and future mineral develop-  
19 ment on the Wind River Indian Reservation?

20 A Yes.

21 Q Could you briefly describe what work you did  
22 in that area.

23 A Yes, I can. I'd like to begin by saying that I  
24 consider mineral development different in character  
25 from other opportunities for development on the  
Reservation, and the reason for that is the mineral  
development involved depletable resources, as

merchant-direct-sleater

1 opposed to the renewable resources that we considered  
2 for livestock, and that has been considered for  
3 irrigated agriculture.

4 Q What is a depletable resource?

5 A Depletable resource is one that's once used is not  
6 available for future consumption.

7 Q How did you study these minerals?

8 A Our basic approach was to review all the information  
9 we could identify concerning the mineral resources  
10 on the reservation, then investigate the characteristics  
11 of the mining and processing industries associated  
12 with those minerals. And then, then identify or  
13 evaluate trends into those mining and processing  
14 industries.

15 MR. MERRILL: Your Honor, I'm going to object  
16 at this time to any further line of testimony or  
17 exhibits concerning mineral development on the Wind  
18 River Indian Reservation and water requirements for  
19 that activity. The objection evidentiarily is  
20 one based on Rule 6-11 of the Wyoming Rules of  
21 Evidence, which states that evidence must be shown  
22 to be relevant to an issue in the case before it  
23 is admitted. That rule should be combined with  
24 some fundamental tenants of the reserve rights  
25 doctrine as stated by the United States Supreme  
Court in Arizona v. California, and most recently  
in the United States v. New Mexico. One of the

merchant-direct-sleater



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

tenants of that doctrine is that there must be some showing in the proving of the existence of a reserved water right of the purposes for which Congress intended to reserve water, and until the United States makes some showing in this case with competent evidence at trial, that Congress intended it to reserve water for mineral development on the Wind River Indian Reservation, I don't think any evidence as to amount of water or types of mineral development is relevant to these proceedings. The state has prepared a trial brief on this point which I would like to file now with the Court, and to serve copies on opposing council, and would ask for the Court to review the brief and authorities cited in the brief before ruling on this very important issue of evidence.

MS. SLEATER: Your Honor, if I could just respond briefly. I just looked up Rule 6-11, which is entitled Mode and Order of Interrogation and Presentation. I'll just read you the first part: "a, controlled by the Court, the Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to, 1, make the interrogation and presentation effective for the ascertainment of the truth. 2, avoid needless consumption of time, and 3, protect witnesses from harassment and undue embarrassment."

merchant-direct-sleater



1 "Part B, Scope of Cross Examination" and Part  
2 C, "Leading Questions". Perhaps Mr. Merrill mis-  
3 stated the number of the rule upon which he was  
4 relying, but that rule certainly has nothing  
5 to do with the issue raised by Mr. Merrill.

6 MR. MERRILL: Your Honor, as I say, we have  
7 prepared a brief on the point. I'm serving copies  
8 on opposing counsel as well as filing one with you,  
9 and would ask that you review that before ruling  
10 on the threshold issue as to whether this evidence  
11 can come in.

12 THE SPECIAL MASTER: Doesn't it point, belong  
13 on the issue of Congressional intent which we  
14 argued before and now.

15 MR. MERRILL: Your Honor, we have never argued  
16 the issue of Congressional intent and presented  
17 evidence on the issue of Congressional intent  
18 as to what purposes Congress may have had in mind.  
19 If it reserved any water for this indian  
20 reservation; that's the threshold issue, and until  
21 evidence comes in that Congress did intend to  
22 reserve water for mineral development, there is  
23 no foundation in which to tie evidence of potential  
24 mineral development on the reservation or the quantity  
25 of water--

THE SPECIAL MASTER: I am of the opinion that the  
merchant-direct-sleater

1 Winters case rendered virtually moot  
2 the Congressional intent because it stated,  
3 in fact, and found as a Supreme Court finding  
4 that Congress did intend to reserve water for  
5 the use of the indians at the time of the creation  
6 of a reservation; use raises a question again.  
7 What you're saying now is  
8 mineral extraction and the use of water there  
9 goes farther than what you feel was the intent  
10 of--

11 MR. MERRILL: Congress in this case, that's  
12 correct, Your Honor.

13 THE SPECIAL MASTER: And you bring New Mexico  
14 in support of your position.

15 MR. MERRILL: That's right. The New Mexico  
16 case mandates that the first examination in deter-  
17 mining the existence and scope of reserved rights  
18 is did Congress intend to reserve any water. If  
19 question--

20 THE SPECIAL MASTER: For the purpose of that  
21 question, it is answered "Yes".

22 MR. MERRILL: If that question is answered  
23 yes, then the second inquiry becomes for what  
24 purpose did Congress intend to reserve water.

25 Once that inquiry is answered by specific purposes,

merchant-direct-sleater

1 then the third inquiry becomes how much water is  
2 required to fulfill those purposes.

3 THE SPECIAL MASTER: Mr. Merrill, if the second  
4 question is answered that there was included in the  
5 reservation water for a continuance of the arts  
6 of civilization does that overrule your objection  
7 at this time?

8 MR. MERRILL: I don't believe so, Your Honor.  
9 There has been many cases in which Congress has  
10 reserved water for the arts of civilization and  
11 yet the reserve water right has been quantified  
12 using a purely agricultural standard with no mineral  
13 development at all, and I would point the Court to  
14 the Arizona v. California--

15 THE SPECIAL MASTER: And your result being  
16 that the party to whom the water is reserved,  
17 wishes to use water for mineral enhancement, it  
18 must take it from its agricultural allocation,  
19 is that what you're saying?

20 MR. MERRILL: Yes, that's correct. And the  
21 real issue here is what is the proper yardstick  
22 by which to measure the reserved rights and  
23 the type of yardstick that ought to be used  
24 is determined by looking at Congressional intent,  
25 what purposes did Congress have in its collective

merchant-direct-sleater



1 mind at the time it enforced the Treaty and reserved  
2 any water.

3 THE SPECIAL MASTER: All right. I accept your  
4 trial brief now, and will take it under immediate  
5 consideration. I would ask for a short reply brief  
6 within two weeks if the tribes wish to put one  
7 together, a responsive brief.

8 I will overrule your motion now only for these  
9 purposes, to allow a continuation of this portion  
10 of the evidence in the record. If I come down on  
11 the position that the use of water for mineral  
12 enhancement or recovery for secondary, tertiary  
13 recovery for mineral resources, must come out of  
14 other allocation, all this evidence then will be  
15 subject to your motions then that it be stricken  
16 and expunged from the record. Otherwise it will  
17 stay in the record.

18 MR. MERRILL: Thank you, Your Honor.

19 MS. SLEATER: Thank you, Your Honor.

20 THE SPECIAL MASTER: I will look forward to  
21 these briefs in the two weeks, Mr. Rogers, Mr.  
22 Sachse.

23 MS. SLEATER: Your Honor, the United States would  
24 like to respond also since it's our witness and our  
25 testimony.

merchant-direct-sleater

1 THE SPECIAL MASTER: When I say them, I mean  
2 the United States and tribes; capacity,  
3 fiduciary and pro se.

4 MS. SLEATER: I just want the record to reflect  
5 that we get to file one too.

6 DIRECT EXAMINATION CONTINUED

7 BY MS. SLEATER:

8 Q Have you previously, in your professional duties,  
9 studied the development of mineral resources on the  
10 indian reservation?

11 A Yes, I have.

12 Q And how many times have you done that?

13 A On four previous occasions.

14 Q Which minerals did you study?

15 A On the other reservations?

16 Q No, on this reservation.

17 A On this reservation; oil, gas, coal, uranium, phosphate  
18 rock, gypsum, bentonite, iron ore, and to some extent,  
19 zeolites.

20 Q And was there a difference in the level of your  
21 study of these various minerals?

22 A Several we identified at an early stage as being  
23 unlikely prospects for future development, we  
24 eliminated.

25 merchant-direct-sleater



1 Q And which were those?

2 A Those were iron ore, bentonite and eolites.

3 Q Let's start then with the ones you further studied.

4 I believe you mentioned oil.

5 A Yes. There's--there is presently considerable  
6 oil production on the reservation, and much of  
7 this production is associated with water use  
8 required for secondary recovery. In particular,  
9 there are fields that--at Steamboat Butte, Winkle-  
10 man Dome, and Lander that are under secondary  
11 recovery operation.

12 MS. SLEATER: At this time, Your Honor, I'd  
13 like that the witness be allowed to step down from  
14 the witness stand and approach what has been marked  
15 for identification as U. S. Exhibit WRIRC-22.

16 THE SPECIAL MASTER: Very well.

17 (Thereupon the witness approached  
18 the plate.)

18 Q (By Ms. Sleater) Can you identify U. S. Exhibit  
19 WRIRC-22, please.

20 A Yes. It's a plate of the Wind River Indian Reservation  
21 showing the location of the oil fields on the reser-  
22 vation. Only a few of these oil fields are under  
23 secondary recovery, however. And it's the ones  
24 I spoke of, on the Lander field down here and

25 merchant-direct-sleater

1 Winkleman Dome here, and Steamboat Butte at this  
2 location.

3 Q The Lander field is the one on the southern boundary  
4 of the reservation?

5 A Yes, here.

6 Q Could you locate the other two in relation to the map,  
7 please.

8 A Winkleman Dome is north of Ft. Washakie on the road  
9 to the Wind River, approximately ten miles. Steamboat  
10 Butte is across on the north side of the Wind River,  
11 approximately ten miles west of Pavillion.

12 Q I notice that there are other orange areas on the map.  
13 Could you please identify those.

14 A Well, these are all oil fields. There's Circle Ridge  
15 at the northern end and I'll work south. There's  
16 Maverick Springs, Northwest Sheldon, Sheldon. Mines,  
17 I don't know all the names. There's another one in  
18 here, Pilot Butte that I recognize. And the  
19 Riverton oil field south, southeast of Riverton.

20 Q I note there are also circles on the map.

21 A These circles indicate the locations of existing  
22 secondary recovery operations.

23 Q And the arrows?

24 A The arrows, I believe there's only one arrow, it  
25 merchant-direct-sleater

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

indicates the water source for the particular secondary oil field recovery operation is off site. And in this case, it's the fact that Steamboat Oil--Steamboat Butte oil field obtained a large part of its water from the Wind River, from the well field into the alluvium on the Wind River.

\* \* \* \* \*

1 Q (By Ms. Sleater) And that is an existing  
2 system?

3 A Yes, it is.

4 Q Were you responsible for the information that  
5 is portrayed on that map?

6 A Yes.

7 Q Have you personally reviewed this map?

8 A Yes, I have.

9 Q Does that map accurately represent the information  
10 which you have identified as being present on it?

11 A I believe it does.

12 MS. SLEATER: At this time, Your Honor, I  
13 would ask that U.S. Exhibit WRIR C-22 be  
14 admitted into evidence.

15 THE SPECIAL MASTER: Mr. Webster?

16 MR. WEBSTER: Initially, Your Honor, for the  
17 record, I would like to object on the basis of  
18 foundation. We haven't been privy, or it hasn't  
19 been made available to us, any of the sources of  
20 where he got the information for this map. Until  
21 that is done, I believe it is objectionable on  
22 the basis of foundation.

23 THE SPECIAL MASTER: Do you wish to remove  
24 that objection?

25 merchant-direct-sleater



1 MS. SLEATER: Well, Your Honor, I don't  
2 believe that objection is appropriate in terms  
3 of this particular exhibit, but if the Court  
4 would prefer additional questions, I would  
5 certainly --

6 THE SPECIAL MASTER: I would like to know  
7 where he got his information for inserting  
8 those areas he calls the oil field. Is that  
9 something the USGS had a hand in or --

10 MS. SLEATER: Certainly, Your Honor.  
11 Would you like us to tell you where the  
12 information came from, Your Honor.

13 THE SPECIAL MASTER: Yes.

14 THE WITNESS: It is from the USGS Administra-  
15 tive Report, BIA-8. I think the title is  
16 Mineral Resources on the Wind River Reservation.

17 THE SPECIAL MASTER: Do you have -- well,  
18 it will come out a little later.

19 I would admit the exhibit for -- with the  
20 restraints that I previously put on all the  
21 exhibits on this phase of questioning. It is  
22 qualifiably admitted.

23 MR. MERRILL: Well, Your Honor, I think Mr.  
24 Webster may have had some voir dire on the

25 merchant-direct-sleater

1 exhibit, and if he doesn't, I certainly do.

2 THE SPECIAL MASTER: When I asked for  
3 objections, I thought everybody stood up. Go  
4 ahead, Mr. Webster, if you have more.

5 MR. SACHSE: Your Honor, I want to object  
6 to the procedure of the State of Wyoming  
7 speaking for the private individuals and asking  
8 if they have more evidence. If the State is  
9 handling the case by itself, then let the  
10 State represent the State and let the private  
11 individuals represent the private individuals,  
12 but if the State is using the private individuals  
13 to get two, three, four bites at the apple,  
14 then we object to that. We have some inquiry  
15 about the propriety of the State handling this  
16 case at all since the State has not asserted  
17 any water right of its own and private individuals  
18 are here represented by counsel. But if the  
19 State is to continue as a party in the case, then  
20 it should not also speak for the private indivi-  
21 duals.

22 THE SPECIAL MASTER: We will try to avoid  
23 the duplication of the double bite.

24 MR. MERRILL: Your Honor, I would simply

25 merchant-direct-sleater

1 point out Mr. Webster said before he was going  
2 to voir dire he had a foundation objection,  
3 which might have obliterated the need for voir  
4 dire, and I simply wanted to defer to him going  
5 first as we have done in the past.

6 In respect to getting three or four bites  
7 at the apple, I don't have the slightest doubt  
8 Wyoming's experts and the other private parties'  
9 witnesses would be subject to rigorous cross-  
10 examination by both the United States and the  
11 attorneys for the two Tribes. Now, if they want  
12 to waive that right and allow only for the  
13 United States to voir dire, then maybe we can  
14 reach some agreement on it.

15 THE SPECIAL MASTER: Please, gentlemen,  
16 we have done pretty good so far over the many,  
17 many months of confrontation, tribulation and  
18 controversy. If we can avoid it a few more  
19 months, that will be a joy, so let's try not to  
20 hassle.

21 Mr. Webster, I recognize you.

22 MR. WEBSTER: Thank you, Your Honor.

23

24

25

1

VOIR DIRE EXAMINATION

2

BY MR. WEBSTER:

3

Q Would you tell me who was the author of the report you referred to?

4

5

A I have to refresh my memory.

6

(Brief pause.)

7

A I don't believe I have the information with me.

8

Q Do you know the date of the report?

9

A 1975.

10

Q Do you know if the information in that report accurately reflects the situation on the Reservation at this time?

11

12

13

A I believe it does.

14

Q And what is the basis for that belief?

15

A I have reviewed this map with the lands operations officer.

16

17

Q And you have some reason to believe that he knows, as far as mineral -- or the oil exploration on that Reservation?

18

19

20

A Yes, I do.

21

Q And why is that?

22

A Because that comes under his jurisdiction.

23

Q That is your understanding or do you have some personal knowledge of that?

24

25

merchant-voir dire-webster



- 1 A That's my belief.
- 2 Q Okay. And is the basis for that belief some-
- 3 thing he told you?
- 4 A Yes, and the basic familiarity I have with the
- 5 role of a lands operations officer.
- 6 Q With regard to those red figures on the map,
- 7 are all those areas currently in production?
- 8 A That's my understanding.
- 9 Q How did you get that understanding
- 10 A By reviewing the map of the lands operations
- 11 officer. I believe this reflects the producing
- 12 oil fields on the Reservation.
- 13 Q It does currently?
- 14 A Yes.
- 15 Q And the dimensions that are outlined in red,
- 16 are those the dimensions of the established
- 17 oil fields by the USGS?
- 18 A Yes.
- 19 Q Are those the dimensions of the units, the
- 20 producing units?
- 21 A I'm not sure I understand your question. Will
- 22 you rephrase it, please?
- 23 Q Usually the USGS unit type is producing areas,
- 24 and my question was whether or not those were
- 25 merchant-voir dire-webster

1 the dimensions of the producing units on the  
2 Reservation?

3 A That, I don't know.

4 Q Are they using water recovery in any areas  
5 besides those three that you have circled?

6 A Yes, there is some water recovery in the  
7 Northwest Sheldon Dome area.

8 Q Is that designated on this map?

9 A Yes, it is.

10 Q How is that so designated?

11 A There is a circle in that area.

12 Q Would you show me where that is, please?

13 (Witness leaves the witness  
14 stand and approaches the  
exhibit.)

15 A It's here (indicating).

16 Q I'm sort of interested, why are the dimensions  
17 of that particular production area an even  
18 circle?

19 A The circle indicates that there is a secondary  
20 recovery operation in that area. That is not  
21 the dimension of the field. If you will notice  
22 the legend on the lower left corner, I believe  
23 that explains that the circle represents the  
24 fact that there are secondary recovery operations.

25 merchant-voir dire-webster

1 Q (By Mr. Webster) I recognize that, but in the  
2 other areas where there are circles -- here and  
3 here (indicating) -- they are all within the  
4 dimensions of oil reserve area as outlined by  
5 the legend. In this particular area it just  
6 stands by itself.

7 A. I believe it's adjacent to the producing oil  
8 field?

9 Q Pardon me?

10 A. I believe it's adjacent to the producing oil  
11 field.

12 Q I guess the map will have to speak for itself  
13 there, but it's obvious that that isn't true.  
14 It stands by itself.

15 Is there any other discussion or any other  
16 reason that you have knowledge of?

17 A. No, I don't.

18 Q Other than that secondary recovery area, are  
19 there any other areas that are using secondary  
20 recovery?

21 A. Not that I'm aware of.

22 Q Do you know of any other identified oil reserves  
23 other than those designated on the map?

24 A. No.

25 merchant - voir dire - webster

1 MR. WEBSTER: I have no further questions,  
2 Your Honor, except I would, I guess, at this time  
3 enter an objection to the map as not reflective  
4 of the situation on the ground as indicated by the  
5 witness. And, once again, I would renew the im-  
6 proper foundation objection I raised earlier.

7 THE SPECIAL MASTER: Mr. Merrill?

8 MR. MERRILL: Thank you, Your Honor.

9 VOIR DIRE EXAMINATION

10 BY MR. MERRILL:

11 Q Mr. Merchant, did I hear you state that you re-  
12 viewed a 1975 report concerning oil recovery on  
13 the reservation?

14 A Yes.

15 Q Did you review any more recent sources?

16 A No.

17 Q On what then do you base your opinions that this  
18 map accurately reflects the current oil situation  
19 and location of reserves and recovery operations?

20 A Discussions with the land operations officer.

21 Q Is that Bob Robertson?

22 A No.

23 Q Rich Harbour?

24 A Yes.

25 merchant - voir dire - merrill



1 Q I note that the top symbol on Exhibit C-22 says  
2 "Oil Reserves". Is it your understanding that  
3 that map represents the location of all of the  
4 known oil reserves on the Wind River Indian Reser-  
5 vation?

6 A That are currently being produced, yes.

7 Q So it should say oil reserves, current production,  
8 or something like that, rather than just all oil  
9 reserves?

10 THE SPECIAL MASTER: That's a little argumen-  
11 tative, I think. It goes beyond--- it says what  
12 it says and speaks for itself.

13 MR. MERRILL: All right.

14 Q (By Mr. Merrill) Are you saying then, Mr. Merchant,  
15 that the areas designated as oil reserves are show-  
16 ing the areas of current oil production?

17 A Yes.

18 Q Did you verify the information portrayed on this  
19 map with the United States Geological Survey?

20 A No.

21 Q Did you consult with the Wyoming Geological Survey  
22 in either preparing or proofreading the map?

23 A No.

24 Q Did you consult with any private oil companies who

25 merchant - voir dire - merrill

1 are conducting recovery operations on the reserva-  
2 tion?

3 A. Yes.

4 Q. Who did you talk to there?

5 A. I talked to Gulf and Amoco.

6 Q. Did you show them this map and have them examine  
7 whether or not it was correct?

8 A. No.

9 Q. How did you plot the locations of the oil reserves  
10 shown on Exhibit C-22?

11 A. This is taken from a map that's contained in the  
12 publication I referred to earlier.

13 Q. Is that the 1975 report?

14 A. Yes, and the proper title, I think, is "Status of  
15 Mineral Resources on the Wind River Indian Reser-  
16 vation".

17 Q. Who was that report prepared by, if you know?

18 A. The USGS.

19 Q. I notice the second legend symbol on the map says  
20 "General Location of Enhanced Oil Recovery Opera-  
21 tions". What does the word "general" mean in that  
22 legend?

23 A. The circle isn't meant to show only the area of  
24 secondary oil recovery operations, because such

25 merchant - voir dire - merrill

1 a designation would be too small for convenient  
2 reading on a map.

3 Q. You just wouldn't be able to see it in this scale?

4 A. That's right.

5 Q. Okay. Now, as I understand it, it's only the  
6 secondary oil recovery operations that require  
7 water to be injected into the ground; is that  
8 correct?

9 A. Yes.

10 Q. So all of the rest of the areas that are not desig-  
11 nated as enhanced oil recovery operations are  
12 simply oil reserves from which there is current  
13 production, but not necessarily oil fields that  
14 are using water; isn't that right?

15 A. That's right.

16 MR. MERRILL: Your Honor, the State will ob-  
17 ject to the introduction of Exhibit C-22 on the  
18 grounds that the legend, "Oil Reserves", is im-  
19 proper in that it does not show the locations of  
20 all the oil reserves. Secondly, that the exhibit  
21 shows the locations of oil reserves which have  
22 nothing to do with water by the witness' own ad-  
23 mission, only secondary oil recovery operations  
24 are ones requiring water in this case, and yet

25 merchant - voir dire - merrill

1 the map has all kinds of other extraneous informa-  
2 tion about oil fields that don't have anything to  
3 do with water needs; And, thirdly, that the legend  
4 itself admits that the locations shown for the  
5 secondary recovery operations are only general.

6 If the Court was to go ahead and admit this  
7 exhibit, I would ask that it be admitted only for  
8 illustrative purposes, and not for the truth of  
9 its contents.

10 THE SPECIAL MASTER: The objection that you  
11 first raised is overruled. I don't know that it  
12 is in the purview of the present status of the art  
13 of geophysics or geology to prepare any map of any  
14 given area showing all the oil reserves. There's  
15 a whole new world of potential reserves beneath  
16 certain areas that were considered unapproachable  
17 or unthinkable just a few years ago from elevations  
18 of nine to twelve on down to 25 and 30,000 feet,  
19 so that I would overrule that objection.

20 Secondly, I don't know what purpose this is  
21 showing except for illustrative purposes and can't  
22 try to show from the best obtainable evidence  
23 where there is now the use of water to recover  
24 oil, and I think for that purpose the exhibit  
25 would meet my test for admission within the



1 earlier stated qualification on all these exhibits  
2 dealing with this subject matter.

3 MR. MERRILL: Well, the exhibit was offered  
4 without qualification, which I understood to mean  
5 for the truth of its contents. And since its con-  
6 tents are not absolutely true, the Court should  
7 not accept it --

8 THE SPECIAL MASTER: I'm not saying that  
9 there isn't some water being used to recover  
10 petroleum reserves. I believe it does show that.  
11 I have a few questions to ask about them, and this  
12 one I will ask now:

13 Where does the return flow water come to as  
14 it is recovered? You said there is one place  
15 where there is recovery of water. You said that  
16 to Mr. Webster. Is that returned to the flow of  
17 the Wind River?

18 THE WITNESS: I beg your pardon. In response  
19 to his question, I believe he asked if there were  
20 any other secondary operations on the reservation  
21 besides the three I spoke of earlier. There is  
22 one other one at Northwest Sheldon Dome. As far  
23 as I know, there is no water recovered from that  
24 secondary operation and, in fact, we were unable  
25 to obtain water use information on that operation

1 due to uncooperation of the oil company. So that  
2 operation is not included in the claim, but I  
3 believe it's minor.

4 THE SPECIAL MASTER: Did you report that to  
5 your client so the client might use the resources  
6 which the law permits for the United States to  
7 obtain that information if they wish it?

8 MS. SLEATER: Your Honor, if I could at this  
9 point state that due to situations which have  
10 arisen with regard to the oil resources on the  
11 reservation and with respect to various things  
12 which I'm sure Your Honor is well aware of just  
13 from reading the paper, it was felt inappropriate  
14 to pursue.

15 THE SPECIAL MASTER: Well, I'm not supposed  
16 to take notice of what I see in the newspapers  
17 to be a good Master, but I understood there's a  
18 rhubarb going on now as to who reads the meters  
19 and all sorts of problems. But that should not  
20 detract from the right you have to know how much  
21 water is being used and where does the water go.

22 I don't think you mean to tell me that of  
23 the three places where you testified to there is  
24 no recovery of water as well as oil?

25 THE WITNESS: No, I'm not saying that. There

1 is some recovery of water.

2 THE SPECIAL MASTER: I'd like to know if the  
3 water is returned to the flow of the Wind River.

4 THE WITNESS: I believe at Winkleman Dome  
5 there is some recovered water that is allowed to  
6 flow down the watershed. As to whether it reaches  
7 the Wind, I can't tell you.

8 THE SPECIAL MASTER: Or goes back into the  
9 aquifers from which it comes?

10 THE WITNESS: That's correct.

11 THE SPECIAL MASTER: You say this comes from  
12 the alluvium?

13 THE WITNESS: That includes Steamboat Butte.

14 THE SPECIAL MASTER: What happened to the  
15 water at Steamboat Butte as it's recovered?

16 THE WITNESS: I don't believe it's reinjected  
17 into the oil field.

18 THE SPECIAL MASTER: So it's a cycling of the  
19 waters used?

20 THE WITNESS: Yes, that's my understanding.

21 THE SPECIAL MASTER: With the addition from  
22 time to time of a few acre-feet or a few cubic  
23 feet?

24 THE WITNESS: It's more than a few, but  
25 yes.

1 THE SPECIAL MASTER: All right. Mr.  
2 Webster asked one more question I wanted the  
3 answer to, too.

4 Well, very well. I'm going to overrule the  
5 objection to this and admit it for whatever pro-  
6 bative value it has, though I'm not satisfied  
7 it gives us the figures we would like to have  
8 had on the uses for a secondary recovery opera-  
9 tion. I'm not sure it's possible to humanly  
10 arrive at those figures.

11 MS. SLEATER: We have a couple figures,  
12 Your Honor, that we are going to get to.

13 THE SPECIAL MASTER: I'll bet you do.

14 DIRECT EXAMINATION (RESUMED)

15 BY MS. SLEATER:

16 Q Did you make a determination of what water was  
17 being used at the various sites for secondary  
18 recovery?

19 A Yes.

20 Q Would you please tell us what your study indicated  
21 in that respect?

22 A Yes, at the three fields I spoke of earlier,  
23 Winkleman Dome, Steamboat Butte and Lander,  
24 there's approximately 6,580 acre-feet being used

25 merchant - direct - sleater



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

in the secondary recovery operation. One thousand thirty acre-feet of that is diverted from the Wind River for use at Steamboat Butte. The remainder is groundwater that is either produced water or water from deep aquifers.

\* \* \* \* \*

1 Q (By Ms. Sleater) (Continued) Did you make  
2 any determination regarding future needs for  
3 water for secondary recovery?

4 A The best we could do on that was to determine  
5 that we believe this level of use would  
6 continue for some time while these fields were  
7 under secondary recovery. We investigated the  
8 possibility of forecasting new discoveries  
9 and new use of secondary water, but decided that  
10 there wasn't a sound enough basis for present-  
11 ation of evidence. So our claim is limited to  
12 existing use of water for secondary recovery.

13 Q And that is -- that is 6,580 acre-feet total,  
14 combined groundwater and surface water?

15 A Yes.

16 Q Broken out as you previously testified?

17 A Yes.

18 Q Is there anything else you did with respect to  
19 the oil investigation?

20 A No.

21 MS. SLEATER: If I could have a brief  
22 moment, Your Honor.

23 (Brief pause.)

24 MS. SLEATER: Tribal Council is providing

25 merchant-direct-sleater

1 assistance today, my co-counsel is otherwise  
2 involved.

3 THE SPECIAL MASTER: Incidentally, while  
4 Mr. Rogers is doing that and we have a moment,  
5 I would like to announce that I have been asked  
6 to be a pallbearer Friday afternoon at one  
7 o'clock at a funeral. I'd like to oblige that.  
8 Does that meet with anyone's disapproval or is  
9 there an objection if we do not meet Friday  
10 afternoon? I've been asked by several counsel  
11 to not meet Friday anyway.

12 MS. SLEATER: No problem with the United  
13 States.

14 MR. MERRILL: No problem.

15 MR. ROGERS: No problem with the Tribes.

16 THE SPECIAL MASTER: We'll meet Friday  
17 morning, we may meet Friday morning if we wish,  
18 but in any event we will not meet Friday after-  
19 noon at one o'clock.

20 All right, Regina.

21 MS. SLEATER: I have to write this down so  
22 I don't show up.

23 Q (By Ms. Sleater) I believe the next mineral  
24 you mentioned was natural gas.

25 merchant-direct-sleater

1 A Yes.

2 Q Could you please briefly describe what you did  
3 in relation to your study of natural gas  
4 resources and water requirements on the Wind  
5 River Reservation.

6 A Yes. We investigated the location and pro-  
7 duction of existing gas fields on the Reservation,  
8 and those water uses presently associated with  
9 natural gas production. We also investigated  
10 the possibility of using natural gas for pro-  
11 duction of anhydrous ammonia. And concluded  
12 that approximately six acre-feet per year would  
13 be required for, is presently required for the  
14 processing of natural gas reserves in the East  
15 Riverton field.

16 MS. SLEATER: At this time I would ask if  
17 the witness could approach what has been marked  
18 for identification as U.S. Exhibit WRIR C-23,  
19 and perhaps identify the exhibit and indicate  
20 the areas as he is describing them?

21 THE SPECIAL MASTER: All right.

22 (Thereupon the witness approached  
23 the plate.)

24 THE WITNESS: In the Riverton East field here --  
25 merchant-direct-sleater



1 Q (By Ms. Sleater) First, Mr. Merchant, if you  
2 could identify the exhibit.

3 A Excuse me. This is a plate showing the boundaries  
4 of the Wind River Indian Reservation and within  
5 those boundaries the location of the natural  
6 gas fields that are presently under production,  
7 and also showing the approximate locations of  
8 those processing plants associated with natural  
9 gas, and the three processing areas are here in  
10 the Riverton East field. There is a natural gas  
11 sweetening and dehydrating plant.

12 Q That's the circle that appears furthest east  
13 on the map?

14 A Yes, it is. Here, southwest of Riverton is the  
15 sulfuric acid plant and northeast of Riverton is  
16 a circle showing a possible location for an  
17 anhydrous ammonia plant, although I must say that  
18 we haven't determined a specific location for  
19 that. This, we feel the Riverton area is an  
20 appropriate location, but within that we haven't  
21 investigated the precise location of such a plant.

22 Q So you're saying that circle is merely meant to  
23 represent the Riverton area as a whole?

24 A Yes, it is.

25 merchant-direct-sleater

1 Q Could you describe the other notations on  
2 that exhibit, please?

3 (No response.)

4 Q Perhaps the question was ambiguous. Could you  
5 explain what the larger areas are?

6 A Well, these are locations of the various gas  
7 fields, the Pavillion field, and Steamboat  
8 Butte -- Pilot Butte, excuse me, and this is  
9 the Argo Butte. The other gas fields are  
10 fairly minor, I don't know their names.

11 Q If you could resume the stand, please.

12 (Witness complied.)

13 Q I believe you were telling us the six acre-feet  
14 used for refining purposes currently.

15 A Yes. For the natural gas processing plant,  
16 the anhydrous ammonia plant would require  
17 approximately 4,250 acre-feet per year, and the  
18 sulfuric acid plant, which is presently located  
19 on the Reservation requires approximately 95  
20 acre-feet per year.

21 Q Now, of these, is the anhydrous ammonia plant the  
22 only one not currently existing?

23 A Yes.

24 Q How did you determine it was appropriate to consider  
25 merchant-direct-sleater

1 an anhydrous ammonia plant on the Reservation?

2 A We considered it feasible by looking at long-  
3 term trends, and the use of nitrogen fertilizers  
4 in the market area that might be served by such  
5 a plant, which includes not only the mountain  
6 states, but the west, north central states such  
7 as the Dakota's, Minnesota, Iowa, Kansas, Missouri,  
8 Nebraska.

9 We determined that a market for such  
10 production existed, and that it was not only  
11 technically but would be economically feasible  
12 to construct such a plant.

13 Q Did you determine the cost and returns from such  
14 a plant?

15 A No, because we were looking into the future, we  
16 thought it more appropriate to look at trends  
17 and industry supply capacity development and  
18 not to supply and demand development, and not to  
19 look so much at the prices and costs involved  
20 because that is more speculative.

21 Q Have you determined the water sources for the  
22 various water needs you have indicated?

23 A The natural gas processing plant and the sulfuric  
24 acid plant both rely on their own groundwater  
25 merchant-direct-sleater

1 systems.

2 The anhydrous ammonia plant water requirement  
3 was determined by us, but the water source was  
4 determined by Oliver Page.

5 Q Is there anything else you did with respect to  
6 the natural gas --

7 A No.

8 Q -- resource development or any professional  
9 opinion you have formed relating to that?

10 A No.

11 MS. SLEATER: At this time, Your Honor,  
12 I would ask that U.S. Exhibit WRIR C-23 be  
13 admitted into evidence.

14 THE SPECIAL MASTER: I have some questions  
15 before I ask for voir dire from other parties.

16 EXAMINATION

17 BY THE SPECIAL MASTER:

18 Q Did your studies, in order to proceed -- did  
19 your studies proceed to the comparison of  
20 other alternate methods or secondary tertiary  
21 recovery other than the use of water and gas  
22 fields?

23 A Your Honor, we have projected no use of water  
24 gas fields.

25 merchant-direct-sleater  
merchant-examination-the special master



- 1 Q This is merely on the sulfur plant and anhydrous  
2 ammonia plant? "
- 3 A And the natural gas processing plant, which  
4 removes the sulfur and water.
- 5 Q Sweetening plant?
- 6 A Yes.
- 7 Q And that total was six plus 95?
- 8 A Plus 4,250 for anhydrous ammonia.
- 9 Q 4,250 acre-feet a year?
- 10 A Yes.
- 11 Q For a proposed plant?
- 12 A Yes, sir.
- 13 Q Do your studies show whether there is sufficient  
14 gas source to justify a plant of that size and  
15 capacity?
- 16 A The production on the Reservation exceeds the  
17 requirement of such a plant.
- 18 Q The life of the reserves, do you have evidence  
19 of that affect other than your statement?
- 20 A I have evidence of present production exceeds --  
21 or historic production, I don't have current  
22 records, but I have it up to the last year or  
23 two.
- 24 Q Do you have any studies of De Golyer or other  
25 merchant-examination-the special master

1 authorized or qualified competent experts in  
2 the field of oil and gas reserve figures to  
3 sustain that conclusion?

4 A Sir, if the natural gas reserves prove to be  
5 insufficient, the coal gassification plant which  
6 I will discuss later would provide --

7 Q I see. So this request is locked into the coal  
8 gasification future as well as gas future?

9 A That's a possibility. If the future gas reserves  
10 would prove insufficient in the future to  
11 support such a plant.

12 THE SPECIAL MASTER: Very well, Mr. Webster  
13 or Mr. Merrill?

14 By the way, Mr. Webster, we've been at it  
15 for an hour and fifteen minutes. Should we  
16 adjourn for a fifteen minute break for the  
17 Reporters?

18 All right, we'll take a ten minute break.

19 (Thereupon a ten minute recess  
20 was taken.)

21

22

23

24

25

26

\* \* \* \* \*

1 THE SPECIAL MASTER: We are ready to proceed.

2 All right, we will come to order.

3 MS. SLEATER: Your Honor, at this time if  
4 I had not offered U.S. Exhibit WRIR C-23 into  
5 evidence, I so request it at this time.

6 THE SPECIAL MASTER: The offer was made  
7 and I had asked some questions, but I had not yet  
8 given an opportunity for other counsel to voir dire.

9 Mr. Webster.

10 MR. WEBSTER: Thank you, Your Honor.

11 VOIR DIRE EXAMINATION

12 BY MR. WEBSTER:

13 Q Where did you get the information that is shown  
14 on the map?

15 A From the USGS 1975 report I have alluded to  
16 earlier.

17 Q Have there been any modifications since 1975  
18 that's reflected on this map --

19 A No.

20 Q -- other than the proposed anhydrous ammonia plant?

21 A As far as the gas fields are concerned, no.  
22 The USGS map did not contain the location of  
23 processing the natural gas associated water  
24 requirements.

25 merchant-voir dire-webster

1 Q Is it your understanding that these are all  
2 the gas fields currently in operation on the  
3 Wind River Reservation?

4 A Yes.

5 Q And how did you reach that understanding?

6 A By reviewing the map with the land operations  
7 officer.

8 Q I was particularly interested in the area over  
9 here (indicating) near Morton, and so forth.

10 Why would the gas fields have a hole in the  
11 center?

12 A That --

13 Q If you know.

14 A Yes. That was to indicate that those are joint  
15 oil and gas fields. The combined map of the  
16 two would show both colors, and this map just  
17 shows one of the two colors.

18 Q I guess I still don't understand. You are  
19 saying all of this is one gas field?

20 A May I approach the exhibit?

21 Q Yes. I'm pointing to the area near Morton.

22 A Yes. Each of these are one field. The white  
23 area in the middle signifies that it's also  
24 an oil field.

25 merchant-voir dire-webster



1 Q It's an oil field?

2 A Oil and gas field.

3 Q I see. Okay, thank you. I misunderstood that.

4 With regard to the proposed anhydrous  
5 ammonia plant that you have located somewhere  
6 near Riverton, I understand, how did you make  
7 a determination of the amount of water that  
8 would be necessary for that plant?

9 A That was based on conversation with the plant  
10 engineer at an ammonia plant in California.

11 Q Who is that?

12 A May I refresh my memory?

13 THE SPECIAL MASTER: Yes.

14 MR. WEBSTER: Sure.

15 (Brief pause.)

16 MS. SLEATER: Your Honor, at this time I  
17 would like the record to reflect this question  
18 has nothing to do with the exhibit that the  
19 voir dire is directed to, as that exhibit shows  
20 no water requirements and does not portray that  
21 information.

22 THE SPECIAL MASTER: The objection will be  
23 overruled. The witness testified in answering  
24 my questions that he had 4,250 acre-feet per year  
25 merchant-voir dire-webster

1 for an ammonia plant.

2 THE WITNESS: His name is Andrew Chasey  
3 (phonetic), and he is the chief chemist, not  
4 the plant engineer.

5 Q Where at?

6 A At Valley Nitrogen Producer in El Centro,  
7 California.

8 Q Is he the only one you consulted about the  
9 amount of water required?

10 A He's the only source we relied on in determining  
11 this estimate.

12 Q Other than his designation as chief chemist,  
13 are there any other qualifications for him that  
14 you are aware of?

15 A No.

16 Q You don't know what his educational background  
17 is?

18 A No, I don't.

19 Q How big a plant are you anticipating putting in  
20 there at Riverton?

21 A A thousand ton per day plant.

22 Q And why did you reach that determination?

23 A Because that is the smallest size at which  
24 economies of scale in that industry are achieved.

25 merchant-voir dire-webster

1 Q I'm sorry, what was that?

2 A It's the smallest plant at which economies  
3 of scale in that industry are achieved.

4 Q Why did you pick the smallest plant?

5 A Because that is also the typical plant size for  
6 a new plant, new ammonia plants.

7 Q Isn't it true you also picked the smallest plant  
8 because of the availability of natural gas?

9 A That was an element in our decision, yes.

10 Q With regard to the economies of scale, and as  
11 I understand it the smallest plant that is  
12 economically feasible at all any place is about  
13 a thousand ton per day, is that correct?

14 A I wouldn't go so far as to say that, that is  
15 the smallest plant feasible anywhere, but the --  
16 a plant smaller than that size would be at a  
17 competitive disadvantage with plants that were  
18 a thousand tons per day.

19 Q And where did you get that information?

20 A From several sources, but I think the primary  
21 one was a USDA publication on the U.S. fertilizer  
22 industry.

23

24

\* \* \* \* \*

25 merchant-voir dire-webster

- 1 Q Does that publication and your determination  
2 take into account the factors in Northwest  
3 Wyoming, such as transportation costs and market  
4 location?
- 5 A That publication did not.
- 6 Q Did you?
- 7 A Yes.
- 8 Q And how did you take those into consideration?
- 9 A By examining the probable market area for produc-  
10 tion and its location relative to the major cen-  
11 ters of ammonia production in the United States,  
12 looking at long-term trends in ammonia production,  
13 and discussing these factors with people in the  
14 Department of Commerce, with a person at the  
15 Department of Commerce.
- 16 Q Did you make a marketing analysis with regard to  
17 the marketing potential of an ammonia, anhydrid --
- 18 A Anhydrous ammonia.
- 19 Q Anhydrous ammonia plant; is that right?
- 20 A To the extent I just described, yes.
- 21 MS. SLEATER: Your Honor, I would request  
22 that the record show that I would like to object  
23 to this entire line of questioning as being  
24 cross-examination and not proper voir dire of  
25 merchant - voir - webster



1 the exhibit, please.

2 THE SPECIAL MASTER: Well, the exhibit shows  
3 actual gas fuels, but shows one proposed operation  
4 or function. I think the questions follow along  
5 with the direct relations of the exhibit. I'll  
6 overrule it.

7 MR. WEBSTER: Would you mind reading my last  
8 question, please?

9 (The following question and  
10 (answer were read back by the  
11 (reporter as follows: Q: Did  
12 (you make a marketing analysis  
13 (with regard to the marketing  
14 (potential of an anhydrous  
15 (ammonia plant? A: To the  
16 (extent I just described, yes.

17 Q (By Mr. Webster) Where would you feel that the  
18 fertilizer produced by this plant could be mar-  
19 keted?

20 A In the mountain and west, north-central states  
21 area.

22 Q Anything more specific than that?

23 A Well, this is a plant that would serve a market  
24 area in several states, so I think it would have  
25 a regional market and not just a Wyoming or a  
reservation market.

Q Is there a need for it?

25 merchant - voir dire - webster

1 A. There will be, yes.

2 Q. When?

3 A. It's difficult to say, but in the -- I think I  
4 would conclude that within the next twenty years  
5 that would be a feasible operation.

6 Q. Based upon current availability of this type of  
7 fertilizer, the need for this plant would come  
8 about within the next twenty years?

9 A. I believe it would.

10 Q. What about potential competition in the next  
11 twenty years from other plants? Did you make  
12 any study as far as potential increase in com-  
13 petition?

14 A. No, but it's a well-known fact that natural gas  
15 reserves are a precious resource and that it  
16 won't be as easy to build new plants in the  
17 future as it has been in the past.

18 Q. Well, surely you are not saying that because they  
19 have some natural gas reserves here in the Wind  
20 River Reservation that that's a better location  
21 for an anhydrous ammonia plant than someplace  
22 else that has natural gas reserves, are you?

23 A. Most of the ammonia production in this country  
24 takes place on the Gulf Coast, and this area

25 merchant - voir dire - webster

1 would have a competitive advantage with respect  
2 to the market area that I stated.

3 Q Would it have any better competitive advantage  
4 on the Wind River Reservation than it would have  
5 in Park County, Wyoming?

6 A No.

7 Q Did I understand an answer to a previous question  
8 that you have some reservations as to whether or  
9 not there is sufficient natural gas production  
10 to handle this type of a plant?

11 A No.

12 Q You have no reservation about that?

13 A No.

14 Q And its current level?

15 A Yes.

16 Q Would that take all of the natural gas production  
17 from the reservation now?

18 A No.

19 Q What percentage of the natural gas production would  
20 it take from the reservation now?

21 A Approximately three-quarters.

22 Q Would the uses of the natural gas now existing on  
23 the reservation be supplemented if you took out  
24 three-quarters of the existing gas production?

25 merchant - voir dire - webster

1 MR. ROGERS: Your Honor, may I join in the  
2 objection previously made by the United States to  
3 the fact that this is, in fact, cross-examination?  
4 It goes far beyond the voir dire of the particular  
5 exhibit, and what my concern is is that we are  
6 going to be subjected to the repetition of this  
7 when the parties on this side of the room have  
8 an opportunity to actually cross-examine.

9 There's not going to be a sensible way of  
10 weeding out what questions they have previously  
11 asked under the rubric of voir dire, and I don't  
12 think we should have to be subjected to cross-  
13 examination of the witness twice.

14 In addition, it strikes me that it is an  
15 unfair disruption of the direct testimony of  
16 the witness. Obviously, it's perfectly appro-  
17 priate to voir dire the exhibit, but this goes  
18 far beyond that and disrupts the flow of direct  
19 examination.

20 THE SPECIAL MASTER: I believe the questions  
21 were proper and I permitted them up to the one  
22 about where would the supplemental gas come from  
23 to take care of the three-quarters that went into  
24 their plant, and that one I would sustain as being  
25 beyond the exhibit.



1 MR. WEBSTER: For the record, I will waive  
2 any cross-examination of this witness;

3 THE SPECIAL MASTER: That's all right.

4 MR. ROGERS: Then that strikes me as an  
5 admission that he is cross-examining the witness.

6 MR. WEBSTER: I don't intend --

7 THE SPECIAL MASTER: Please, gentlemen.  
8 You are just being kind this morning and trying  
9 to move it along. The point has been made and  
10 sustained, Mr. Rogers.

11 Q (By Mr. Webster) I believe you testified in con-  
12 nection with this exhibit that you didn't know  
13 where the water resources were going to come from  
14 for that anhydrous ammonia plant; is that correct?

15 A That's correct.

16 Q Did you make any kind of a -- Who has that in-  
17 formation?

18 A Mr. Oliver Page.

19 Q What was the date of the records you relied upon  
20 to get the information about the existing gas  
21 production?

22 A It's the time series of data. The last year in  
23 that time series was 1978, a full year production.

24 MR. WEBSTER: Your Honor, I have no more

25 merchant - voir dire - webster

1           voir dire, and I would just say to the Court that  
2           I have to leave now, and that's why I so graciously  
3           waived any cross-examination to Mr. Rogers. I  
4           appreciate the Court's indulgence.

5                   THE SPECIAL MASTER: Thank you very much, Mr.  
6           Webster.

7                   Mr. Merrill?

8                   MR. MERRILL: Your Honor, I think Mr. Webster  
9           has exhausted the voir dire of this exhibit through  
10          the witness.

11                   The State of Wyoming would object to the intro-  
12          duction of Exhibit C-23 for the truth of its con-  
13          tents on two grounds: Number one, that the an-  
14          hydrous ammonia production, which is portrayed on  
15          the map, doesn't even exist, as Your Honor is well-  
16          aware. And, secondly, that the gas fields that  
17          are shown on the map, there's been no connection  
18          between the operation of those fields and the  
19          consumption of any water. And I think that the  
20          water is what this case is all about. And, there-  
21          fore, I would object to its introduction.

22                   THE SPECIAL MASTER: I will allow it to be  
23          introduced for whatever its value is and would  
24          recognize that in evaluating it the two objections  
25          are valid and well-taken, to which the truth of

1 its contents -- one is it's necessary for the  
2 continuation of natural gas production and, two,  
3 that the proposed plant is well into the future,  
4 as much as twenty years. So with that understand-  
5 ing, this exhibit is admitted into evidence.

6 (The instrument hereinbefore  
7 (identified as Exhibit C-23  
(was received into evidence.

8 THE SPECIAL MASTER: Before we proceed, may  
9 I ask a question? I am taking the liberty of  
10 reading beforehand the trial brief submitted to  
11 me about a half an hour ago by the State of Wyo-  
12 ming on the proposition that the acceptance of  
13 evidence of this kind is improper if it's accepted  
14 before evidence of creation and purposes of re-  
15 served water right.

16 I would like to ask a question about this,  
17 and I'm going to do so now so I can be in a  
18 better position to do my work. Mr. Merrill?

19 MR. MERRILL: Yes, Your Honor.

20 THE SPECIAL MASTER: How do you describe  
21 evidence of creation and purposes of this right?  
22 What are you talking about?

23

24

25

\* \* \* \* \*

1 MR. MERRILL: Your Honor, I think in  
2 the reserve rights case that has gone to trial in  
3 the past, the proponent of the existence of  
4 reserved rights in this case, usually the  
5 United States has put on evidence through acts  
6 of Congress, committee debates, records, the  
7 various kinds of documents which you yourself  
8 participated in creating.

9 THE SPECIAL MASTER: Which we used  
10 in the dates and boundaries?

11 MR. MERRILL: Yes, of that type evidence,  
12 that type of evidence which would tend to show  
13 or make it more likely than not that Congress  
14 did intend at that time to reserve water for  
15 the reservation, and that evidence might also  
16 show the purposes which Congress contemplated.

17 THE SPECIAL MASTER: Let me interject  
18 that that is my belief, that that was an  
19 accepted and understood and disposed of facet  
20 of this litigation, in that we concluded that  
21 the -- that the key Winters case of 1908  
22 established the Congressional intent to a  
23 reserved right of water.

24 MR. MERRILL: With respect to the  
25 Fort Belknap reservation in Montana, that's



1 correct, but we have never acquiesced in the  
2 proposition of that Congressional intent is  
3 thereby confirmed for every reservation that  
4 has been created.

5 With respect to each new federal reservation  
6 for which a reserved right is sought, the Court, in  
7 the United States versus New Mexico stated quite  
8 clearly that the proponent must show that  
9 Congress intended to reserve water and the  
10 purpose for which they intended the water, and  
11 without water, therefore how much water is  
12 required.

13 THE SPECIAL MASTER: Well, are you  
14 saying that until the United States Supreme  
15 Court passes specifically on the locus in quo  
16 that we're looking at on in these maps, that  
17 there can be no further movement of accepting  
18 evidence regarding water uses on the reservation?

19 MR. MERRILL: No, Your Honor, I'm not.  
20 I am suggesting that before we begin taking  
21 evidence with respect to the quantification  
22 of the various amounts of water to fulfill  
23 purposes, that the record should contain some  
24 evidence by the United States that Congress  
25 intended to reserve the water for this particular

1 reservation, and the purposes which Congress  
2 had in mind in reserving that water. Then once  
3 there is evidence as to those two questions  
4 in the record, I think it's proper to receive  
5 evidence as to quantifications, but not before.

6 THE SPECIAL MASTER: You further stated  
7 that the Court will have no basis for understanding  
8 and regulating proof on quantity. I fail to find  
9 that that is true. If there's no intent, the  
10 evidence is all inadmissible and stricken, no  
11 longer of any -- what difference would it make  
12 if the intent is decided before we hear what we're  
13 hearing now?

14 MR. MERRILL: Well, Your Honor, as  
15 Ms. Sleater pointed out, the discretion lies  
16 with you as to the order of the presentation of  
17 proof. What I'm suggesting is until such proof  
18 is adduced at trial, there is no foundation for  
19 the quantification question, and that it should  
20 be admitted subject to later being tied into  
21 evidence which they could bring on at a later  
22 time showing intent. And if it's not so tied  
23 in, that it ought to be stricken later.

24 THE SPECIAL MASTER: That's what we're  
25 working on now, the subject of a brief in the time

1 that I asked for from the United States.

2 MR. SACHSE: I'd like two minutes on  
3 that.

4 THE SPECIAL MASTER: Let me hear from  
5 Mr. Sachse for two minutes.

6 MR. SACHSE: I just want to point out  
7 to Your Honor that this is a red herring that  
8 was dragged before you at the pre-trial conference,  
9 and that you ruled contrary to. The evidence is  
10 in, the treaty which sets up the reservation as  
11 a permanent homeland is in. We -- there's --  
12 this case the United States Supreme Court in  
13 United States versus Shoshone Tribe, 304 U.S. 111,  
14 has already mentioned the mineral resources on  
15 the reservation as unimportant assets of the  
16 Indians on the reservation. And our pre-trial  
17 brief that we filed on April 7th, page 7, we have  
18 the following two quotations from -- one from an  
19 early description of the reservation right before  
20 it was set up, where it said "The country abounds  
21 in game, has a very mild climate, possesses  
22 agricultural advantages which make it a great  
23 desideratum to the white man. Numerous oil  
24 springs have been discovered and located in the  
25 valley of the Popo Agie, but this tribe is strong --

1 but this tribe strongly opposes any invasion of  
2 their territory by the whites."

3 And on the same page --

4 THE SPECIAL MASTER: Did you use the  
5 term "whites"?

6 MR. SACHSE: That's what was said in  
7 this early -- I'm quoting from an 1860 some odd  
8 statement.

9 On the same page we quote from the Supreme  
10 Court which said "When the treaty of 1868 was  
11 made, the tribe consisted of a full-blood blanket  
12 Indian who was unable to read, write and speak  
13 English. Upon consumation of the treaty, the  
14 tribe went and has since remained upon the  
15 reservation. It was known" -- this is the  
16 United States Supreme Court -- "It was known  
17 to contain valuable mineral deposits; gold,  
18 oil, coal and gypsum. It included more than  
19 400,000 acres of timber, extensively well  
20 grassed bench lands, fertile river valleys  
21 conveniently irrigable."

22 I think there's no point -- we'll give a  
23 brief in two weeks as you requested, but for  
24 the State to continue to say that there has been  
25 no proof presented in this case that it was the



1 intent of Congress to reserve water for minerals  
2 and all other purposes is simply not so.

3 You may believe the proof or not, you may  
4 weigh it one way or another, but the treaty itself  
5 and the decision of the United States in the U.S.  
6 versus Shoshone Tribe are the strongest possible  
7 proof, stronger than any kind of testimony that  
8 we could present to you.

9 MR. WHITE: Your Honor, the red herring --

10 THE SPECIAL MASTER: Just a second,  
11 Mr. White.

12 Regina.

13 MS. SLEATER: Your Honor, I would like  
14 to address this briefly because I think there's  
15 been some, we consider inaccurate readings of  
16 the law; just a brief perusal.

17 There's been reference made to the New Mexico  
18 case or Rio Membres case. The Court in that case  
19 was considering an area of national forest, never  
20 before had the Supreme Court had to address  
21 the question of reserved rights for a national  
22 forest we do this: The Supreme Court has  
23 previously, on numerous occasions, addressed  
24 itself to reserved rights for Indian tribes.  
25 As you know, they felt in both Winters and

1 Arizona versus California that goes without  
2 question that when an Indian reservation is  
3 established there is water reserved. It's  
4 for purposes of the reserve in this case, which  
5 was to establish a reservation for the Shoshone,  
6 and then at a later time the addition of the  
7 Arapahos is identical to the purpose of the  
8 reservations described in both the Winters case  
9 and in Arizona versus California, which were  
10 also to establish Indian reservations. That is  
11 the purpose. The tribe involved is not the purpose.  
12 The purpose is an Indian reservation.

13 THE SPECIAL MASTER: I believe there's  
14 no question about all of that. What Mr. Merrill  
15 is raising is that has not yet been stated and  
16 proven by you, and therefore there is a fault  
17 in moving ahead.

18 MS. SLEATER: Your Honor, I would like  
19 at this time to address -- We've addressed this  
20 question in earlier briefs. The Courts have  
21 very clearly said there's a legal implication  
22 from the documents themselves. In this case  
23 already is the treaty which establishes the  
24 purpose. The legal implication arises from that  
25 document, therefore, the evidence is already

1 before the Court. There is -- I think there is  
2 no question but that there are reserved rights.

3 Further, even if the document was not before  
4 the Court, it is a public document that the  
5 Court is entitled to take judicial notice of  
6 under the Wyoming rules. This argument which  
7 has been brought up numerous times, and I thought  
8 was disposed of this summer, is dragging out and  
9 injecting an element which is not necessary  
10 because the fact is that under the Supreme  
11 Court's ruling a legal implication arises from  
12 the public documents, and whether or not there  
13 is direct evidence on this, the Court can take  
14 judicial notice of this, and the issue has been  
15 resolved by the United States Supreme Court.

16 And as Mr. Sachse rightly points out, the  
17 United States Supreme Court has also told you  
18 exactly what was given to the tribes when it  
19 was made their home; minerals, timber, wildlife,  
20 all the land, if to develop these any water is  
21 necessary, the law is clear, that water should  
22 be and was reserved.

23 Now, that part has gone on already. We're  
24 at the part now of trying to determine if water  
25 is necessary to develop any of these resources,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

and if so, how much.

I think that Your Honor has very appropriately called for briefs on this issue. I think that the sooner this issue is put to rest the better for the orderly progression of the case, and I think the orderly progression is we look at all the resources that the Supreme Court has recognized as being given to the tribes and determine if they need the water.

\* \* \* \* \*



1 THE SPECIAL MASTER: Well, I appreciate  
2 that. It has been put to rest, but it is a little  
3 bit like Banquo's Ghost, it's with us again, and  
4 I want to hear from Mr. White, and then we will wait  
5 and get your briefs. Do you want to speak on it?

6 MR. WHITE: I just want to say, Your Honor,  
7 the reason we raise these issues now is to make a  
8 record that they were raised during the evidentiary  
9 portion of the case. I cannot expect that you would  
10 make a sweeping decision to exclude evidence based  
11 upon these issues. Our full expectation is you would  
12 reserve on these issues, and however you decide the  
13 facts, and if there is an appeal, well, this issue  
14 needs to be reserved for the basis of appeal.

15 It is our feeling that the analysis  
16 suggested by the Justice Department and Counsel for  
17 the Tribes simply doesn't reflect what the case is  
18 now, but we need to make the record. I apologize  
19 if it seems like we are being contentious, but we  
20 need to do that.

21 THE SPECIAL MASTER: I appreciate that, and  
22 I'm glad we have had the dialog because it helps  
23 me, but I will look for that brief at an early date.

24 Proceed, Regina. This Exhibit C-23 was  
25 earlier admitted.

1 MS. SLEATER: We are a little slow on  
2 the exhibits today. I think we are all getting tired.

3 THE SPECIAL MASTER: I think we made good  
4 progress this week.

5 MR. ROGERS: The attorney for the Tribes  
6 has not been as well coached in this as the attorney  
7 for the State, Your Honor.

8 MR. MERRILL: You are a good prop man,  
9 Tony.

10 MS. SLEATER: Large exhibits, while they  
11 are very nice because they are clear, they certainly  
12 present problems in maneuverability.

13 THE SPECIAL MASTER: They do, indeed.

14 Off the record.

15 (Off-the-record discussion.)

16 Q (By Ms. Sleater) I believe the next mineral  
17 you mentioned that you studied was coal, Mr.  
18 Merchant?

19 A Yes, it was. We mentioned the coal deposits  
20 on the Reservation and located two that were  
21 potentially suitable for development, the one  
22 at the northern part of the Reservation in the  
23 Muddy Creek area and another in the southeast  
24 corner in an area called Alkali Butte that are

25 merchant-direct-sleater

1 both suitable for future development.

2 MS. SLEATER: At this time, Your Honor,  
3 I would like permission for the witness to  
4 leave the stand and approach U.S. Exhibit  
5 WRIR --

6 THE SPECIAL MASTER: That won't be  
7 necessary to ask each time. You can proceed  
8 and can do that without having to ask.

9 MR. MERRILL: Your Honor, while he is  
10 doing that, I might as well make an record on  
11 another point I feel obligated to do on behalf  
12 of my client. While Mr. Merchant may be an  
13 expert in the field of economics, we don't feel  
14 he is qualified to testify concerning future  
15 mineral development on the Reservation simply  
16 because that is not within the field of economics.  
17 If a party were to bring in a coal mining  
18 engineer and put him on the witness stand and  
19 start asking him questions about economics and  
20 benefit costs analyses and feasibility of  
21 economic development, people would be screaming  
22 left and right and they would say that's beyond  
23 the field of that expert's knowledge, skill,  
24 training and experience.

25 merchant-direct-sleater

1 Well, what you have is exactly the converse  
 2 of that situation here. You have a witness who  
 3 is going to tell you what mineral deposits there  
 4 are out there, he is going to tell you where  
 5 they are, how he located them, how they can be  
 6 brought out, what is going to be done to them,  
 7 how big a plant it can be, all of these sorts  
 8 of things that are all beyond the field of  
 9 general economics.

10 We have prepared a trial brief on the point,  
 11 and I would like to file it and serve it on  
 12 opposing counsel.

13 Your Honor, I am simply making a record on  
 14 the point because we feel it is a very important  
 15 one, that expert witnesses be limited in giving  
 16 professional opinions and conclusions in a  
 17 field that is strictly limited by their expertise  
 18 and the way they are qualified as experts.

19 THE SPECIAL MASTER: I am happy to accept  
 20 the brief. I agree in spirit with the observations  
 21 you have just made. Although they may be  
 22 anticipatory, they are nevertheless valid. The  
 23 economist on the stand may continue to testify  
 24 to those things his expertise gives him a right

25 merchant-direct-sleater



1 to, but I would doubt if it would go to telling  
2 us what that coal field contains unless he has  
3 had some first-hand knowledge of the core  
4 drilling necessary, hundreds and hundreds of  
5 core drills, the ash content, the market, the  
6 feasibility for moving it from the field, the  
7 vastly complex difficult problem of taking a  
8 body of coal and turning it into an economical  
9 viable asset, and with those constraints I will  
10 watch out for that as we proceed into the  
11 questions to be asked. Mr. Merrill, I think  
12 you made a good point.

13 MR. MERRILL: Your Honor, I simply make it  
14 for the record with the understanding you are  
15 going to let the testimony in, and perhaps I  
16 will make a motion to strike at the appropriate  
17 time.

18 THE SPECIAL MASTER: Surely. I appreciate  
19 that. Proceed.

20 (CONTINUED) DIRECT EXAMINATION

21 BY MS. SLEATER:

22 Q Will you please identify what U.S. Exhibit  
23 WRIR C-24 is?

24 A Yes. It is a plate showing the boundaries of the  
25 merchant-direct-sleater

1 Reservation and the location of two coal  
2 fields that are suitable for exploitation.  
3 There is also a circle in the north part of the  
4 two coal fields showing the possible location  
5 of a power plant utilizing the coal from the  
6 coal fields, and the line drawn to the Wind  
7 River indicating that the source of water used  
8 in cooling for that power plant would be the  
9 Wind River.

10 There is also a circle in the Alkali Butte  
11 coal field in the southeast corner of the  
12 Reservation indicating the location of under-  
13 ground coal gasification operations.

14 Q In the course of your professional responsibilities  
15 as an economist, have you been paid money  
16 from people to determine the feasibility of coal  
17 deposits and coal developments in other  
18 locations?

19 A Yes, I have.

20 Q You may resume the stand.

21 (Witness complies.)

22 Q (By Ms. Sleater) You said these were two  
23 locations of coal suitable for a development.  
24 Are there other coal deposits on the Reservation?

25 merchant-direct-sleater

1 A Yes, there are. There are coal deposits near  
2 the surface in the Hudson area, and deep coal  
3 deposits underlying the Reservation between  
4 two locations indicated on the map.

5 Q Has there been any mining of the coal on the  
6 Reservation?

7 A There has been small-scale mining of coal in  
8 the Hudson area before.

9 Q Where did you get the information regarding the  
10 coal deposits on the Reservation?

11 A This is from several sources; one is, "The  
12 Status of Mineral Resources on the Wind River  
13 Indian Reservation." Another is a report by  
14 Bolmer & Biggs of the Bureau of Mines entitled,  
15 "Mineral Resources of the Wind River Reservation."  
16 A third is a document by Berryhill of the  
17 Geological Survey of Wyoming entitled, "Coal  
18 Deposits of Wyoming."

19 Q All right, let's move to the next area you  
20 examined after you identified the location  
21 of deposits. How did you determine that these  
22 locations were suitable for development?

23 A The Alkali Butte field in the southeast corner  
24 of the Reservation appears to be technically  
25 merchant-direct-sleater

1 suitable for underground coal gasification  
2 processes. The coals are of sub-bituminous  
3 rank. They are at least -- the reserves we  
4 counted are at least five feet thick and they  
5 appear -- they are overlaid by sufficient  
6 overburden to appear suitable for underground  
7 coal gasification. The product of that gas-  
8 ification would be natural gas, and it could  
9 be shipped by way of pipelines off the  
10 Reservation, whatever was not consumed on the  
11 Reservation.

12 Q What is the source of your information concerning  
13 the gasification process?

14 A Primarily a compendium of articles by professionals  
15 in the underground coal gasification field  
16 entitled, "Symposium on Underground Coal  
17 Gasification," and this is an annual publication  
18 I have referred to four -- I have referred to  
19 four or five of these, the most recent four or  
20 five.

21 Q Did you determine -- well, could you please  
22 discuss the northern developments of the  
23 attendant generating plant?

24 A Yes. The coal in the Muddy Creek area is  
25 merchant-direct-sleater



1 shallower than that in Alkali Butte, and  
2 appears suitable for mining. The coal that  
3 would be mined would be sufficient to support  
4 a power plant of the size of 150 megawatts,  
5 and that power, whatever was not used on the  
6 Reservation, could be added to interstate  
7 transmission lines.

8 Q In the course of your studies did you determine  
9 what water is necessary with respect to the  
10 coal reserve, both in the present and in the  
11 future?

12 A Yes. I determined that the mining in the  
13 Muddy Creek area would require 25 acre-feet per  
14 year for dust control and surface reclamation.  
15 The power plant would require about 2,490 acre-  
16 feet per year, while the in situ gasification  
17 would require approximately 2,800 acre-feet  
18 per year.

19 Q Is there any authority for considering reclamation  
20 as a water need in terms of mining?

21 MR. MERRILL: Your Honor, I am not sure I  
22 understand that question. Perhaps Ms. Sleater  
23 could rephrase it and I wouldn't have any  
24 objection, but I am not sure I know what authority  
25 merchant-direct-sleater

1 for reclamation is.

2 Q (By Ms. Sleater) On what did you base your  
3 opinion that there would be water necessary  
4 for reclamation?

5 A On several authorities. One was the Surface  
6 Reclamation Act -- I believe that's the right  
7 title -- of 1975, which requires that all coal  
8 mines reclaim any surface area disturbed by the  
9 mining.

10 Another one is the federal regulation of  
11 giving the Department of Interior authority to  
12 require restoration of any area disturbed by  
13 mining.

14 MS. SLEATER: At this time, Your Honor, the  
15 United States would request that the Court take  
16 judicial notice both of the Surface Mining Act  
17 and the regulations contained in Title 25 of the  
18 Code of Federal Regulations relating to the  
19 mining of coal on Indian Reservations and, in  
20 fact, any mining activities on Indian Reservations.

21 THE SPECIAL MASTER: Having given about four  
22 years of my life to that Act, and all its ram-  
23 ifications, I can't avoid taking judicial notice,  
24 so I will judicially notice the Act and its

25 merchant-direct-sleater

1 statutes within the section of Indian mining  
2 on the Reservation.

3 MS. SLEATER: Thank you, Your Honor.

4

5

6

7

\* \* \* \* \*

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Q (By Ms. Sleater) In the course of your studies  
2 or investigation, did you determine the sources  
3 of the water requirements that you have stated?

4 A I determined in consultation with Oliver Page that  
5 water was available for these activities. However,  
6 it was he who determined the source.

7 Q Then the source is groundwater, as far as you know?

8 A The source is groundwater, I believe, for the  
9 Alkali Butte area. For the power plant at Muddy  
10 Creek the source is surface water from the Wind  
11 River.

12 Q Did you formulate any other opinions as a result  
13 of your studies of the coal reserves on the re-  
14 servation?

15 A No.

16 MS. SLEATER: At this time, Your Honor, I  
17 would like to move U.S. Exhibit WRIR C-24 into  
18 evidence.

19 THE SPECIAL MASTER: I have questions before  
20 I call on other counsel.

21 Do you have authority from the tribal councils,  
22 the managers and owners, mostly from the owners, of  
23 these lands, that they propose this type of a power  
24 plant?

25 merchant - direct - sleater



1 THE WITNESS: No, sir, I don't. I'm simply  
2 determining what the development potential of  
3 these resources are.

4 THE SPECIAL MASTER: Right. When you stated  
5 that the water source for mine-mouth plant -- at  
6 Buffalo Creek, is it?

7 THE WITNESS: Muddy Creek.

8 THE SPECIAL MASTER: -- Muddy Creek, you would  
9 look to a source of water to the river. Have you  
10 excluded that also being an excellent source of  
11 water if drilling were carried to certain under-  
12 ground aquifers?

13 THE WITNESS: I think I should allow Oliver  
14 Page to answer that, but my recollection of what  
15 he told me was that he wasn't certain that the  
16 aquifers in that area could sustain that yield,  
17 but --

18 THE SPECIAL MASTER: Do you know of anyone  
19 who could provide us with accurate, reliable and  
20 thorough geological evidence of the underground  
21 aquifers under the reservation as to potential  
22 capacity, recharge capacity, involved?

23 THE WITNESS: I think Mr. Page would have  
24 the best information available on that.

25 THE SPECIAL MASTER: Very well. Other voir

1 dire now. Mr. Merrill? Mr. Radosevich?

2 MR. RADOSEVICH: Your Honor, I just have a  
3 few questions relating to the nature of the power  
4 plant, one of which you pointed out, that it's  
5 highly speculative that this plant might be con-  
6 structed.

7 VOIR DIRE EXAMINATION

8 BY MR. RADOSEVICH:

9 Q I would like to know when you projected the poten-  
10 tial of this plant to be constructed.

11 A I haven't ascertained a specific date. The time  
12 horizon we used in all these mineral studies was  
13 the next forty years, just as a convenient stopping  
14 place because we felt unable to forecast the con-  
15 ditions beyond that period. But certainly within  
16 that period such developments would be feasible.

17 MS. SLEATER: Your Honor, at this time, for  
18 the record, I would like to renew my objection to  
19 any questions which go beyond the scope of the  
20 exhibit that is being voir dired.

21 THE SPECIAL MASTER: We will keep it in mind,  
22 and we thank you for the observation.

23 Q (By Mr. Radosevich) You indicated, Mr. Merchant,  
24 that the power plant would take up to 2,040 acre-

25 merchant - voir dire - radosevich

- 1 feet of water per year?
- 2 A. Yes.
- 3 Q. What is the calculation on the return flow
- 4 from that plant?
- 5 A. There's no return flow from that plant. This is
- 6 recirculated cooling water, recycled, and the
- 7 loss -- any loss or this loss is makeup water re-
- 8 quired to replace that loss through evaporation.
- 9 Q. So it's totally consumptively used?
- 10 A. Totally used.
- 11 Q. With respect to the gasification plant, the 2800
- 12 acre-feet per year, is this also totally consumed?
- 13 A. Yes.
- 14 Q. You also alluded in your answer that there's a
- 15 possibility of a coal slurry pipeline --
- 16 A. No, I said nothing about coal slurry.
- 17 Q. You indicated that the coal might be piped off
- 18 of the reservation?
- 19 A. No. I hope you misunderstood me. I don't mean
- 20 to say that.
- 21 What I meant to say was that any natural
- 22 gas produced by the coal gasification plant
- 23 which was not consumed on the reservation could
- 24 be piped off the reservation as natural gas, not
- 25 merchant - voir dire - radosevich

1 as coal.

2 Q As far as the construction of the gasification,  
3 plant, is this also in a 40-year time horizon?

4 A Yes.

5 MR. RADOSEVICH: Thank you, Your Honor. I  
6 have no further questions.

7 THE SPECIAL MASTER: Mr. Merrill?

8 MR. MERRILL: Thank you, Your Honor.

9 VOIR DIRE EXAMINATION

10 BY MR. MERRILL:

11 Q Mr. Merchant, in developing the areas shown in  
12 green for coal resources selected for recovery,  
13 isn't it true that you didn't conduct any tests  
14 firsthand of the coal resources on the reserva-  
15 tion?

16 A Yes.

17 Q You didn't do any drilling tests for core sampl-  
18 ing or chemical analysis of samples or anything  
19 like that, did you?

20 A No.

21 Q You relied entirely on studies performed by other  
22 people, isn't that correct?

23 A Yes, by the U.S. Geological Survey and the Bureau  
24 of Mines.

25 merchant - voir dire - radosevich  
merchant - voir dire - merrill



1 Q In outlining the areas outlined in green, in investi-  
2 gating those areas, did you pay attention to the  
3 boundaries of the Arapahoe Ranch cattle operation?

4 A No.

5 Q So is it possible that some of those green areas  
6 intrude into what is known as the Arapahoe Ranch?

7 A Yes.

8 Q Did you compare the boundaries outlined in green  
9 with the map that's been introduced earlier into  
10 evidence as outlining the aesthetic areas of the  
11 reservation?

12 A Yes, I have compared those.

13 Q Now, you stated that you had placed the location  
14 of the coal gasification plant at Alkali Butte  
15 because you thought it would be technically  
16 feasible for underground coal gasification in  
17 the next 40 years; is that correct?

18 A Yes.

19 Q In making that determination, did you consult  
20 with personnel at the Laramie Energy Resources  
21 Technology Center, known as LERTC?

22 A Through their publications, not in person.

23 Q In making the determination that coal gasifica-  
24 tion could be carried on at that location, did

25 merchant - voir dire - merrill

1 you take account of the fact that the federal  
2 government is spending millions of dollars right  
3 now to determine the technical feasibility of  
4 coal gasification?

5 A. Yes, I did.

6 Q. And in determining the water sources for these  
7 operations, if I understood you correctly, you  
8 said you relied on Mr. Page; is that correct?

9 A. Yes.

10 MR. MERRILL: Your Honor, we would object  
11 to the introduction of Exhibit C-24 on the grounds  
12 that all of the information contained in the exhi-  
13 bit is based on secondhand information of one  
14 sort or another, and none of it represents the  
15 original work of the witness who laid the founda-  
16 tion. He did not do any of his own coal resources  
17 studies.

18 This information is stuff that appears in  
19 other publications which can be brought into  
20 court, but haven't been brought into court. And  
21 it's based on speculations and neither the coal  
22 gasification plant or the coal-fired electric  
23 generating plant even exists.

24 He admitted that he has not obtained the  
25 merchant - voir dire - merrill

1 clearance of the tribe for the power plant to  
 2 be located in that area. I think that the  
 3 developments that are proposed which don't even  
 4 exist are purely speculative, and if the exhibit  
 5 is to be admitted at all, it ought to be only  
 6 for illustrative purposes, and I have reserva-  
 7 tions about that.

8 THE SPECIAL MASTER: Well, I will agree  
 9 with many of the criticisms or observations you  
 10 made regarding the exhibit, and it will be ad-  
 11 mitted with an understanding that much of what  
 12 you said is true towards its invalidity here  
 13 and there.

14 It is, nevertheless, a part of the studies  
 15 which the witness has done along the same  
 16 scholastic, economic, professional basis he has  
 17 the others. And, to that extent, I will admit  
 18 it, although even I have some questions I want  
 19 to ask if I may.

20 MR. MERRILL: Absolutely.

21 THE SPECIAL MASTER: You said, Mr. Merchant,  
 22 that the Alkali Butte coal was to be five foot  
 23 in thickness?

24 THE WITNESS: The thicknesses of the seams  
 25 there vary between approximately, the ones reported,

1 at least between two and a half feet and ten  
2 feet.

3 THE SPECIAL MASTER: And ten feet with a  
4 five feet median average?

5 THE WITNESS: We chose only the reserves  
6 that were in the five to ten-foot category be-  
7 cause those seams thinner than five feet are  
8 technically unsuitable for coal gasification.

9 THE SPECIAL MASTER: And you were stating  
10 that this coal gasification operation was to be  
11 in situ, naturally?

12 THE WITNESS: Yes.

13 THE SPECIAL MASTER: Who said to you that a  
14 five-foot average thick seam could justify a coal  
15 gasification operation no matter how vast it is  
16 or how big?

17 THE WITNESS: It's reported in the literature  
18 I have cited.

19 THE SPECIAL MASTER: Would you cite that  
20 literature again for my edification, please?

21 THE WITNESS: It's reported in the symposia  
22 on underground coal gasification.

23 THE SPECIAL MASTER: None of this is surface  
24 mining? It's deep in situ --

25 THE WITNESS: Yes.



1 THE SPECIAL MASTER: Now, to move up to  
2 the area in the center of the map and up north  
3 on what you referred to as Muddy Creek, do you  
4 know how much overburden there is in that area  
5 and who made the feasibility studies that that  
6 lends itself to surfac. mining?

7 THE WITNESS: Your Honor, the overburden  
8 varies for this seam quite considerably. The  
9 depth of the seam ranges from surface outcrops  
10 to 3,000 feet deep, and for the purposes of this  
11 we chose only to evaluate the coal reserves that  
12 were shallower than 1,000 feet deep, and even of  
13 that we feel that only perhaps the top 100 or so  
14 feet would be surface mined, that there would  
15 also be some underground mining connected with  
16 this power plant.

17 THE SPECIAL MASTER: All right, Despite the  
18 objections raised, the exhibit is admitted into  
19 evidence.

20 (The instrument hereinbefore  
21 identified as C-24 was  
received in evidence.

22

23

24

25

\* \* \* \* \*

1 MS. SLEATER: Thank you, Your Honor.  
2 Your Honor, I was just noting that it's now approximately  
3 twenty to twelve. Would you like to continue with the  
4 next mineral or break for lunch?

5 THE SPECIAL MASTER: We can go on til noon.  
6 Why don't we?

7 MS. SLEATER: All right, fine.

8 DIRECT EXAMINATION (Cont'd)

9 BY MS. SLEATER:

10 Q Mr. Merchant, I believe the -- I believe the next  
11 mineral mentioned was uranium?

12 A Yes.

13 Q Could you describe how you determined whether there  
14 was uranium deposits on the reservation which might  
15 require water for its development?

16 A Yes. I should say at the outset that there are  
17 indications of uranium deposits on the reservation,  
18 but the basic fieldwork has never been done to locate  
19 the extent or the quality of the possible deposits  
20 in that area. We felt, however, that with the in-  
21 creasing interest in uranium, it's inevitable that  
22 such fieldwork will be conducted in the future,  
23 because there are, as I said, indications of uranium  
24 deposits in this area. The indications are such that  
25 uranium deposits are reasonably likely to be found,

merchant-direct-sleater

1 but again, I have to say that the data for this isn't  
2 as good as it is for other minerals. With that caveat,  
3 I'd like to say that there are indications of uranium  
4 deposits in the Aycross formation, in the northwest  
5 corner of the reservation; that indications are that  
6 the quality is about one-tenth of one percent of  
7 uranium content, and that if such deposits are docu-  
8 mented, then mining would very likely be underground  
9 mining, and the ore would be beneficiated or refined  
10 on site into yellowcake, and then shipped off the  
11 reservation for further processing.

12 The water sources associated with this, as you  
13 can see, is surface water from Crow Creek.

14 Q I was going to ask you what yellowcake is.

15 THE SPECIAL MASTER: That's obvious, I think.

16 MS. SLEATER: Okay.

17 Q (By Ms. Sleater) How much water would be associated  
18 with the mining activities?

19 A Approximately five acre-feet per year simply for  
20 dust control and incidental uses.

21 Q Five acre-feet per year?

22 A Yes, for mining. There would be an additional --  
23 I'm sorry, fifteen acre-feet per year; lots of  
24 figures. Fifteen acre-feet for mining, and an additional  
25 merchant-direct-sleater

1 475 acre-feet for processing.

2 Q And the source of that water again, please?

3 A Crow Creek.

4 Q And those numbers are as a result of your studies?

5 A Yes.

6 Q I'd like you to please approach what has been marked  
7 for identification as U.S. Exhibit WRIR C-25 and  
8 ask you to identify that exhibit, please.

9 (Witness complied.)

10 A The exhibit is a plate showing the boundaries of  
11 the Wind River Reservation, and within those bound-  
12 daries showing the location of the Aycross formation,  
13 and within that formation, the circle indicates a  
14 likely location of yellowcake processing plant.

15 The arrow from the circle to Crow Creek indicates  
16 that the water used in that processing plant would come  
17 from Crow Creek.

18 Q I ask you, is that circle a general representation of  
19 locations?

20 A Yes, it is.

21 Q Were you responsible for the preparation of that  
22 exhibit?

23 A Yes.

24 Q Can you state that that exhibit fairly and accurately  
25 merchant-direct-sleater



1 represents the information that you have just  
2 described?

3 A Yes.

4 MS. SLEATER: At this time, Your Honor, the  
5 United States would ask that U.S. Exhibit WRIR C-25  
6 be admitted into evidence.

7 THE SPECIAL MASTER: Mr. Merrill.

8 VOIR DIRE EXAMINATION

9 BY MR. MERRILL:

10 Q Mr. Merchant, I presume as before that the area shown  
11 as the uranium resources selected for recovery is  
12 again not based on your studies, but on the references  
13 that you looked at; is that correct?

14 A It's based on references that I looked at and the  
15 transfer of that information to a geological map  
16 and from thence to this map.

17 Q And in determining that uranium resources could be  
18 recovered, did you consider the fact that Rocky  
19 Mountain Energy Corporation began uranium mining in  
20 that area and closed down sometime ago when the price  
21 of uranium was \$43.00 per ton?

22 A No, I wasn't aware of that.

23 MR. MERRILL: I have no further questions, but  
24 would incorporate the previous objections and I presume

25 merchant-direct-sleater  
voir dire-merrill

1 they'll probably be overruled.

2 THE SPECIAL MASTER: Yes. I could appreciate  
3 those, I think the witness called his prefatory  
4 remarks a caveat upon the entire uranium industry  
5 at the present time, and puts this one in the realm  
6 of less certainty certainly than the other industries.

7 Can you tell me why you based 450 future uranium--  
8 475, did you say?

9 THE WITNESS: Yes, sir.

10 THE SPECIAL MASTER: What did -- What did you  
11 base that on?

12 THE WITNESS: If I could check, I'll get the  
13 specific reference for you.

14 That's from a Cameron's Engineers Report on  
15 Mineral Industries of Wyoming. It's their reported  
16 water requirement for --

17 THE SPECIAL MASTER: Small to modest?

18 THE WITNESS: For, it's per ton water requirement  
19 for yellowcake processing.

20 THE SPECIAL MASTER: All right. Well, C-25 is  
21 admitted into evidence.

22 (Thereupon the plate marked WRIR  
23 (C-25 was received in evidence.

24 THE SPECIAL MASTER: You did say this is all  
25

1 proposed underground?

2 THE WITNESS: Yes, sir.

3 THE SPECIAL MASTER: Would not be leaching --  
4 no leaching is contemplated, that you know of?

5 THE WITNESS: Sir, I don't think enough is known  
6 about this deposit to determine whether leaching is  
7 possible.

8 THE SPECIAL MASTER: Leaching.

9 THE WITNESS: Yes, that is certainly a possibility,  
10 but much more has to be learned. We could propose that.

11 THE SPECIAL MASTER: That's in a tremendously  
12 sensitive area to things like East/West Dubois, some  
13 of the loveliest area in the United States and world  
14 borders on this particular area, and I would suspect  
15 that the Tribes would be very careful before any  
16 leaching would be permitted in that area, jeopardize  
17 underground water for themselves and all others.

18 MR. RADOSEVICH: I still have one question.  
19 Mr. Merchant testified as to the use of water. Are  
20 there going to be any return flows from the processing  
21 of this plant?

22 THE WITNESS: I don't believe so. No, I don't  
23 think even that's allowed under regulations.

24 MR. RADOSEVICH: Okay.

25 THE SPECIAL MASTER: Regina, proceed.

1

DIRECT EXAMINATION (Cont'd.)

2

BY MS. SLEATER:

3

Q The next mineral was phosphate rock. Could you please describe how you analyzed the possibility of phosphate rock recovery and processing on the reservation?

4

5

6

A Yes. We reviewed the available information on the phosphate deposits on the Wind River Reservation, determined that there was -- there were extensive phosphate deposits on the reservation. Then we investigated the characteristics of the phosphate industry and examined trends and production of phosphoric acid, and in a technological suitability of grades of phosphate rock for processing.

7

8

9

10

11

12

13

14

We concluded that it's very likely that this phosphate deposit could be profitably mined and processed in the future.

15

16

17

Q And what categories of future development do you have -- have you determined based on your studies that phosphate resources could be developed?

18

19

20

A Well, the phosphate rock would first be mined, then shipped to a beneficiating and wet acid process plant in the Riverton area. So there are three stages in the processing -- mining and processing of phosphate rock. The rock is a fairly low grade, and it's only

21

22

23

24

25

merchant-direct-sleater



1           been recently that this grade was capable of the  
2           beneficiation required before it could be used in  
3           a wet acid process.

4           Q    I take it from your statement that today it is possible  
5           to so process the quality of rock that occurs?

6           A    Yes.

7           Q    In your studies, did you formulate an opinion relating  
8           to the amount of water that would be required, attended  
9           to the mining of this reserve?

10          A    Yes. I concluded that five acre-feet per year might  
11          be used for dust control and incidental purposes as-  
12          sociated with mining; that 425 acre-feet per year would  
13          be used in beneficiation, 400 acre-feet per year would  
14          be used in production of phosphoric acid.

15          Q    And do you -- Have you also formulated an opinion  
16          with respect to the source of the water for those  
17          various uses?

18          A    The incidental water for dust control, and related  
19          purposes would be from on site wells near the mine.  
20          The water required for beneficiating and wet acid  
21          production would be obtained either through wells  
22          or from surface water in the Riverton area. And  
23          I know Oliver Page was considering both of those.  
24          I am not sure which he concluded was the best or the  
25          merchant-direct-sleater

1 better source for water.

2 Q So you're deferring that to Mr. Page?

3 A Yes, I am.

4 Q I ask you to please approach what has been marked for  
5 identification as U.S. Exhibit WRIR C-25.

6 (Witness complied.)

7 Q I ask you if you can please identify that.

8 A Yes. This exhibit is a plate showing the location of  
9 the Wind River Indian Reservation boundaries and  
10 within those boundaries the location of the phosphate  
11 rock deposits that we have chosen for development.  
12 I should add that there are other phosphate rock deposits  
13 in the Owl Creek Mountains, but these are the ones  
14 that seem superior for exploiting.

15

16

17

18

19

20

21

22

23

24

25

1 Q (By Ms. Sleater) There is a brown circle which  
2 also appears on that exhibit.

3 A Yes. The brown circle in the Riverton area  
4 is a general area of the beneficiating processing --  
5 or wet acid production plant that would utilize  
6 the phosphate rock.

7 Q And is that again an approximate location?

8 A Yes, it is.

9 MS. SLEATER: At this time, Your Honor,  
10 I would ask that U.S. Exhibit WRIR C-26 be  
11 admitted into evidence.

12 THE SPECIAL MASTER: Before other counsel  
13 voir dire, I have just one or two questions.

14 Mr. Merchant, are you familiar with the  
15 fact there has been a claim filed in this case  
16 by the United States and in that claim a  
17 phosphate rock development matter was given  
18 a total requirement of 318 acre-feet per year?  
19 You said a total of over 800 acre-feet per  
20 year for the same thing. How did that figure  
21 change from 318 to 800 in the course of the  
22 last nine months?

23 THE WITNESS: Your Honor, the earlier  
24 figure was based on some preliminary work we  
25 merchant-direct-sleater

1 did in our investigations of phosphate rock  
2 and other minerals. We have since uncovered  
3 much more reliable information that we have  
4 substituted for our preliminary work.

5 THE SPECIAL MASTER: Well, it is unfortunate  
6 that it is such a gap in such short of time on  
7 figures I would like to think had some reliability  
8 on both ends.

9 Okay. Mr. Merrill.

10 MR. MERRILL: Thank you, Your Honor.

11 VOIR DIRE EXAMINATION

12 BY MR. MERRILL:

13 Q Mr. Merchant, is it fair to say, as with the  
14 earlier mineral resources, that the information  
15 on which you based your location of the re-  
16 coverable reserves of phosphate rock are not  
17 your own studies, but studies performed by  
18 others, geological surveys and companies?

19 A Yes. On the location, that's correct.

20 Q Is this going to be an underground or surface  
21 mining operation?

22 A Underground.

23 Q In determining the location of the phosphate  
24 rock resources selected for recovery, did you

25 merchant-voir dire-merrill

1 take into account the fact that the United  
2 States claims the same area within a so-called  
3 aesthetic area of the Indian Reservation?

4 A No, I did not. But I recognized that there is  
5 an overlap in those two areas.

6 MR. MERRILL: Your Honor, I have no further  
7 questions, but I want to incorporate my  
8 previous objections without belaboring the  
9 Court.

10 THE SPECIAL MASTER: Yes. And the Exhibit  
11 C-26 -- any further voir dire?

12 MR. RADOSEVICH: Your Honor, the only  
13 question I have got specifically to ask on  
14 behalf of my client is:

15 VOIR DIRE EXAMINATION

16 BY MR. RADOSEVICH:

17 Q With respect to the time table on what is  
18 projected on when this mining might go into  
19 operation of the various plans.

20 A I would say that we determined -- that it would  
21 be feasible within the 30-year framework of  
22 our analysis. Also, I would say that it is not  
23 feasible today, but within those two boundaries.  
24 I can't be too much more precise.

25 merchant-voir dire-merrill  
merchant-voir dire-radosevich



1 Q And in the three areas of water use that you  
2 have set out for us, what is the rate of  
3 return flow or the return flow from any of the  
4 two processing plants -- processing activities  
5 or your dust control?

6 A I did not determine that for dust control.  
7 There may be some minimal return flow, but I  
8 imagine most would be evaporated. For the  
9 processing plants it will all be consumptive  
10 use.

11 Q You also indicated this was an underground  
12 operation. Was there calculations made as to  
13 the amount of water that might flow from this  
14 mine as a result of this activity?

15 A Yes.

16 MR. RADOSEVICH: Thank you, Your Honor.

17 THE SPECIAL MASTER: I have one more  
18 question, too. I don't want to get into these  
19 age old Wyoming problems between Powell and Cody  
20 or Lander and Riverton, but why do you go to --  
21 why do you propose this plant in Riverton when  
22 you are just a few miles from Lander, where there  
23 is a potential for a lot more groundwater than  
24 you have at Riverton?

25 merchant-voir dire-radosevich

1 THE WITNESS: That is -- the Riverton  
2 location is chosen for two reasons: One is to  
3 provide the Indians with an on-Reservation  
4 opportunity for development; the other reason,  
5 and more important, is that Riverton has access  
6 to rail and Lander does not.

7 THE SPECIAL MASTER: They just lost it  
8 within the last few years, yeah.

9 THE WITNESS: Yeah.

10 THE SPECIAL MASTER: All right. I guess  
11 you answered the question.

12 C-26 is admitted into evidence.

13 MS. SLEATER: Thank you, Your Honor.

14 Your Honor, I would like to clarify some-  
15 thing in view of the earlier question you  
16 asked the witness about the discrepancy between  
17 the Claims Statement and his testimony today.  
18 If Your Honor will recall at the time the  
19 Statement was filed, I believe it was filed on  
20 March 6th and we had a hearing in this matter  
21 approximately March 15th, and at that time I  
22 represented that the work of the experts was  
23 continuing and on-going, and although what was  
24 presented was the best indication we had at that  
25 time that the continuing work would be done; and

1 I would also like to indicate that the State  
2 of Wyoming has deposed Mr. Merchant twice since  
3 the time of the filing of the Claims Statement,  
4 so they have been aware of the fact that some  
5 figures had changed and that -- that a table  
6 representing the amounts as testified to by  
7 Mr. Merrill (sic) has been provided to the  
8 State of Wyoming.

9 THE SPECIAL MASTER: Very well.

10 MR. MERRILL: Your Honor, we join in the  
11 Court's distress concerning the discrepancy  
12 between the amounts testified to today and  
13 those stated in the record for two reasons:  
14 Number one, the Rules of Procedure provide for  
15 an amendment of pleadings, and then upon learning  
16 the larger amounts of water were going to be  
17 required, the United States should have amended  
18 its Statement of Claims to so indicate. And  
19 that leads to the second problem, which is that  
20 some of the private parties might have based  
21 their participation on the amounts of water claimed  
22 for these various resources and their respective  
23 locations. And as we point out on cross-examination,  
24 some of the amounts as you have already observed  
25 have changed by quite a bit.

1 THE SPECIAL MASTER: The observation is  
2 meaningful, and it would be much, much more  
3 vital, of course, if this were in something  
4 other than the phosphate or uranium fields,  
5 because I do believe they are the lesser Reser-  
6 vation -- or mineral-orientated developments  
7 on the future. In any event, it's admitted.

8 It is now lunch time, so why don't we  
9 adjourn until 1:30.

10 MS. SLEATER: Thank you, Your Honor.

11 THE SPECIAL MASTER: Thank you all.

12 (Whereupon, the Proceedings  
13 were recessed for the noon  
hour.)

14 (End Volume V.)

15

16

\* \* \* \* \*

17

18

19

20

21

22

23

24

25