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## Trial Transcript, Vol. II, Afternoon Session

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CASE # 4993

File # 109

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

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

Civil No., 4993

FILED \_\_\_\_\_  
2/16 1982  
*Margaret V. Hampton* CLERK  
DEPUTY

VOLUME II

Afternoon Session

Monday, January, 26, 1981

**ORIGINAL**

1

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

2

3

THE SPECIAL MASTER: Come to order, please.

4

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

6

7

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

8

9

10

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

11

12

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

13

14

15

THE SPECIAL MASTER: Thank you.

16

17

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

18

19

THE SPECIAL MASTER: Sure.

20

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

21

22

23

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

24

25

- 1 Q Will you please indicate for the Court where  
2 the outline for the roadless area is?
- 3 A The roadless area is south and west, thusly  
4 (indicating) of this dashed orange line.
- 5 Q Were you personally responsible for the place-  
6 ment of that line?
- 7 A Yes, ma'am, I was.
- 8 Q Is that the same -- does that line correspond  
9 with the legal description as stated in the  
10 CSR Exhibit of the United States?
- 11 A Yes, ma'am, it does.
- 12 Q What do the beige areas represent?
- 13 A The beige areas are those areas we have defined  
14 as aesthetic that contain the areas -- they are  
15 just of the aesthetic area.
- 16 Q Were you personally responsible for that?
- 17 A Yes, ma'am.
- 18 Q Do you know who prepared this exhibit and placed  
19 the beige areas upon it?
- 20 A This exhibit was also prepared by Stetson  
21 Engineers.
- 22 Q Does that exhibit fairly and accurately represent  
23 the information portrayed as the boundary of  
24 the aesthetics areas and boundary of the roadless  
25 areas?

1 A Yes, ma'am.

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

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

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

13 MS. SLEATER: Your Honor, it is my under-  
14 standing of the Rules of Evidence that before a  
15 witness can testify concerning the background  
16 information on a map, that the map should be in  
17 evidence properly admitted as fairly and  
18 accurately representing the information that he  
19 placed or caused to have placed thereon.

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

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

24 THE SPECIAL MASTER: He did this himself?

25 THE WITNESS: Yes, sir.

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

3 THE WITNESS: That is right, Your Honor.

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

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

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

13 MS. SLEATER: Thank you.

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

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

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

21 A That is correct.

22 Q Could you describe these areas generally?

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

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

12 Q What is the land status in these areas?

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

19 Q Is there any wildlife on these areas?

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

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

24 A This --

25 THE SPECIAL MASTER: I believe he answered



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

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

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

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

8 Q Are these areas available for fishing?

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

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

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

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

19 THE WITNESS: In my opinion, it would take  
20 all of the water that is in these areas to main-  
21 tain it in the state that it presently is.

22 Q (By Ms. Sleater) Why is that?

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

1 condition.

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

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

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

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

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

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

22 A The only consumption that I can envision in that  
23 area would be the consumption of water by live-  
24 stock that would happen to be grazing there and  
25 the wildlife. Other than that, you know, as an

1 ultimate consumption, no.

2 MS. SLEATER: Thank you. That is all.

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

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

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

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

13 MR. WHITE: What?

14 THE SPECIAL MASTER: Questions by the State?

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

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

21 MR. ROGERS: None, Your Honor.

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

24 Are there any other defendants -- attorneys  
25 for defendants?

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(No response.)

THE SPECIAL MASTER: The State of Wyoming?

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

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

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

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

CROSS-EXAMINATION

BY MS. YONKEE:

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

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

MS. YONKEE: I see.

\* \* \* \* \*

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

4 A. Yes, ma'am.

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

11 A. I said the majority, Ms. Yonkee, and that doesn't  
12 include all of the people who live on the reserva-  
13 tion, but that is the general areas that they live  
14 in. There are other people residing on the reser-  
15 vation outside of those areas that fit in those  
16 tribes --

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

19 A. Yes, ma'am, it is.

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

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

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

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

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

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

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

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

14 CROSS-EXAMINATION

15 BY MR. MERRILL:

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

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

- 1 Q Who is the manager of the ranch?
- 2 A Currently the manager's name is Ron Hoffman.
- 3 Q Is he an Indian?
- 4 A No, sir, he is not.
- 5 Q Approximately how many people does the ranch
- 6 employ?
- 7 A Well, it depends on the time of year, but right
- 8 now I'd say they have in the neighborhood of --
- 9 I can't give you an exact figure because, you
- 10 know, I haven't been over there to count them,
- 11 but I'd say in the neighborhood of 20 right now.
- 12 Q And of those 20 folks, how many are Indians, en-
- 13 rolled members of one of the two tribes?
- 14 A I would venture to say 17 of them.
- 15 Q What types of positions do the Indians hold in
- 16 the management of the ranch?
- 17 A The cow foreman and the ranch foreman are both
- 18 Indians. All except one of the cowboys are
- 19 Indians, and then the farm help are all Indians.
- 20 Q Do you know how much acquired land there is in
- 21 the Arapahoe Ranch?
- 22 A In acres?
- 23 Q Yes.
- 24 A No, I can't off of the top of my head tell you
- 25 how much of those acres was bought.

- 1 Q Do you know how much reserve land there is in the  
2 Arapahoe Ranch?
- 3 A Well, are you talking about the ranch as a total  
4 entity?
- 5 Q Yes.
- 6 A That's approximately 3,000 acres.
- 7 Q Of reserve land?
- 8 A It's all reserve land. I'm assuming you are using  
9 the term "reserve" as we use it analogously with  
10 trust.
- 11 Q No, I'm using it as reserved, meaning that land has  
12 been reserved from the public domain and is part of  
13 the Wind River Indian Reservation.
- 14 A All right. Fine.
- 15 Q Is your answer still the same?
- 16 A It's still the same.
- 17 Q Rich, as a resource manager, resource planner,  
18 would you say that there is a need for common  
19 definitions to be used in resource management?
- 20 A It makes it much easier to work with if that is  
21 the case, yes.
- 22 Q So, for example, we might define grazing capaci-  
23 ties in terms of AUM's?
- 24 A Yes, sir.
- 25 Q And is that a fairly widely accepted definition



- 1 or a term so that if you go talk to somebody in  
2 New Mexico about AUM's, they know what you are  
3 talking about?
- 4 A. If they are technicians in the field, yes.
- 5 Q. Does the same hold true, for example, with respect  
6 to soil composition?
- 7 A. Yes.
- 8 Q. Percentage of sand and loam and clay?
- 9 A. Right.
- 10 Q. Would the same be true of the SCS system called  
11 the Range Site Index that is used to determine  
12 natural vegetation?
- 13 A. Yes.
- 14 Q. So that you have some common ground of definitions  
15 with which to communicate?
- 16 A. That is correct.
- 17 Q. Do you think, as a natural resource planner, it  
18 would create a problem if all natural resource  
19 planners were to establish their own standards  
20 and definitions?
- 21 A. It would cause a communication problem, yes.
- 22 Q. Do you think it would cause a management problem,  
23 or could cause?
- 24 A. Are you talking about interagency?
- 25 Q. Yes, I'm talking about various management people

- 1 trying to communicate with one another about how  
2 to attempt to manage a piece of ground or a resource.
- 3 A. I think that's a real probability. It could cause  
4 come problems, communication problems, if you  
5 couldn't talk it out among yourselves.
- 6 Q. Rich, is it true you did not use the United States  
7 Forest Service visual management system to delineate  
8 the area that's shown or the two areas shown as  
9 aesthetic areas on Exhibit C-7?
- 10 A. That is right.
- 11 Q. Is it true that you are not familiar with the  
12 Forest Service visual management system?
- 13 A. Well, I know it exists, but I'm not familiar with  
14 it.
- 15 Q. I take it then that you don't know that the system  
16 has been used by the Forest Service to classify  
17 millions of acres of land under its jurisdiction?
- 18 A. Well, yeah, we know that it's been used by other  
19 people, but I don't know enough about the system  
20 to use it myself.
- 21 Q. Are you aware that the visual management system  
22 that's been adopted by the Forest Service is a  
23 commonly accepted technique within the Forest  
24 Service for talking about forest lands?
- 25 A. No, I have not communicated with the Forest Service

1 on any of this type of thing, so what you are tell-  
2 ing me is something that is new to me. I'm assum-  
3 ing that's the case, but I don't know that as a  
4 fact.

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

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

11 Q And the system that you used was essentially to  
12 take the steep, high, wooded areas and try to in-  
13 clude those in your areas; is that correct?

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

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

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

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water or high water, that type thing.

\* \* \* \* \*

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

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

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

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

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

18 A No.

19 Q Or change with altitude?

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

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

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

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

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

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

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

16 A Well, in my deposition I used the word "pristine",  
17 but I qualify that definition considerably.

18 Pristine is a word that is very hard to use and  
19 not use it in the context of a wilderness area  
20 and this definitely is not a wilderness area.

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

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

1 Q Only a hundred percent will do?

2 A Well, that's all of it.

3 Q Okay.

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

6 (Brief pause.)

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

14 A I believe that's correct.

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

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

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

25 A Under stress?

1 Q Yes.

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

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

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

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

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

20 Q That's fine, thank you.

21 (Brief pause.)

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



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

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

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

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

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

THE SPECIAL MASTER: If you can let me

1 know later, I'd appreciate it.

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

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

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

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

1 reserved within the reservation and then been  
2 reacquired.

3 THE SPECIAL MASTER: Thank you.

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

7 THE SPECIAL MASTER: Oh, yes.

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

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

18 THE SPECIAL MASTER: All right. Next --

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

21 THE SPECIAL MASTER: Yes, Mr. Donnell.

22 CROSS-EXAMINATION

23 BY MR. DONNELL:

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

- 1 on these areas?
- 2 A By definition of public, do you mean, are the
- 3 Indians public?
- 4 Q No. I mean only the public in general.
- 5 A No.
- 6 Q Did you conduct any such surveys among the Indian
- 7 public?
- 8 A No. I didn't even conduct a survey of my own
- 9 Indian people. I talked to them, but I didn't
- 10 conduct a survey in the definition of a survey.
- 11 Q So you don't even know or have any evidence to
- 12 know what the Indians think about this area?
- 13 A Yes, I think I do.
- 14 Q That isn't what I asked you. You don't have any
- 15 survey to indicate that, do you?
- 16 A No, I don't have the surveys, no.
- 17 Q Now, you said, and I'm trying to understand the
- 18 standard, apparently you didn't use accepted
- 19 standards, forest service standards in determining
- 20 these areas, right?
- 21 A I didn't use the standards that Mr. Merrill was
- 22 talking about, no.
- 23 Q Well, what standards did you use?
- 24 A I used the standards that I have in on my own
- 25 from my experience in living. They are not published

- 1 standards.
- 2 Q In other words, you decided what you liked and
- 3 that's what's on the map?
- 4 A Essentially.
- 5 Q And that is, that's a subjective judgment, isn't
- 6 it?
- 7 A Yes, but I don't think it will differ very much
- 8 from any of the others, even though they were
- 9 conducted under the standards that are acceptable.
- 10 Q And not based on any scientific standard, in fact,
- 11 isn't it?
- 12 A Well, I wouldn't go so far as to say that. There's
- 13 scientific standards that I use in my daily
- 14 operation that would fit into that category.
- 15 Q Well, did you use scientific standards, forest
- 16 service standards in making these delineations?
- 17 A By forest service standards, which ones are you
- 18 talking about?
- 19 Q The ones Mr. Merrill talked about.
- 20 A As I stated earlier, I did not use those.
- 21 Q And you stated you used your own experience in
- 22 life in making these judgments; is that right?
- 23 A Some of the scientific knowledge that I have, yes.
- 24 MR. DONNELL: That's all I have.
- 25 THE SPECIAL MASTER: Mr. Webster.

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

3 CROSS-EXAMINATION

4 BY MR. WEBSTER:

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

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

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

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

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

24 A That's correct.  
25

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

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

11 Q Is that kind of information available?

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

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

15 THE SPECIAL MASTER: Mr. Fillerup?

16 CROSS-EXAMINATION

17 BY MR. FILLERUP:

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

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

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

6 Q Is there any diversion proposed at the present time?

7 A Not to my knowledge.

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

13 A Correct.

14 Q Unimpeded and unreserved in any way?

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

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



1 that watershed?

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

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

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

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

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

18 MR. FILLERUP: No further questions.

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

21 THE WITNESS: Certainly.

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

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

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

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

8 THE WITNESS: No, sir.

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

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

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

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

THE WITNESS: It could not.

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

Did you have an additional question?

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

(FURTHER) CROSS-EXAMINATION

BY MS. YONKEE:

Q I notice <sup>4</sup> your area goes up along the Big Horn River, a certain area along the Big Horn River there, and there are --

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

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

1 and yet that is all in the colored area.

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

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

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

12 MS. YONKEE: Thank you.

13 THE SPECIAL MASTER: Well, I thank you.

14 THE WITNESS: You're welcome, sir.

15 THE SPECIAL MASTER: Regina?

16 MR. GRAVES: May it please the Court --

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

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

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

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

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

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

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

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

MS. SLEATER: That's not so.

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

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

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

\* \* \* \* \*

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

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

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

25 And, finally, Your Honor, I think you are



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

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

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

13 As Mr. Harbour himself indicates that although  
14 he has a background in the areas that he has testi-  
15 fied to, that his testimony is principally what he  
16 observed onsite in the performance of his duties.

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

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

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

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

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

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

1 surveying. Although she intended to call the ex-  
2 pert as a witness, she nevertheless claimed he  
3 was exempt from sequestration under subsection  
4 (3) of Rule 615, Federal Rules of Evidence. Rule  
5 615 provides" -- and it's identical to the Wyoming  
6 Rules -- "At the request of a party the court shall  
7 order witnesses excluded so that they cannot hear  
8 the testimony of other witnesses, and it may make  
9 the order of its own motion. This rule does not  
10 authorize exclusion of (1) a party who is a natural  
11 person, or (2) an officer or employee of the party  
12 which is not a natural person designated as its  
13 representative by its attorney, or (3) a person  
14 whose presence is shown by a party to be essential  
15 to the presentation of his cause."

16 "Judge Weinstein recognizes that exception  
17 3 of the Rule 615 will be most frequently invoked  
18 in the case of expert witnesses, but observed that  
19 'the responsibility for demonstrating that a given  
20 witness is essential lies with the parties.'"

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

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

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

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

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

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

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

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

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

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

THE SPECIAL MASTER: Would you be the last to

1 speak from your side?

2 MR. SACHSE: It depends on what he says.

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

5 MR. WHITE: I would like to say that I be-  
6 lieve, furthermore, that the United States has  
7 waived its right to invoke the third subportion  
8 of this rule --

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

17 MR. GRAVES: Well, Your Honor --

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

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

22 THE SPECIAL MASTER: Mr. White?

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

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

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

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

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

19 THE SPECIAL MASTER: Yeah.

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

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

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

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

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

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

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

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

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

7 THE SPECIAL MASTER: Mr. Rogers.

8 MR. ROGERS: Your Honor, I just wanted to  
9 point out that the particular circumstances of  
10 this case -- it seems to be the concern about  
11 Mr. Harbour's testimony is a diminimus factor  
12 in view of the recognition that there are going  
13 to be probably scores of expert witnesses over  
14 weeks of time, and we're talking about the im-  
15 portance of this rule in the context of the case  
16 based on the fact that the witness has only been  
17 on the stand for a couple of hours, which is go-  
18 ing to rule what happens in the rest of the case.  
19 But the real fact of it seems to me to be that  
20 since it is within the discretion of the Court  
21 to rule on this, to recognize the fact that the  
22 State has ordered daily transcripts. And, unless  
23 they were to change that, that daily transcript  
24 is, in fact, going to be available to all of their  
25 experts, who will have a chance to see it.



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

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

16                  MR. GRAVES: Your Honor, finally, I would like  
17 to point out to the Court that Weinstein suggests  
18 that if the rule is called, that the witnesses may  
19 not review the testimony of witnesses who have tes-  
20 tified previously because that would be a total  
21 violation of the rule.

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

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recognized.

THE SPECIAL MASTER: Mr. Sachse.

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

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

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

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

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

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

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

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

4 MR. GRAVES: Your Honor, finally --

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

7 MR. GRAVES: Go ahead.

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

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

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

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

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

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

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

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

7 MR. WHITE: I can clear that up.

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

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

1 cross examination. And --

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

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

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

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

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

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

9 MR. WHITE: Your Honor --

10 THE SPECIAL MASTER: Let Mr. White speak.

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

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

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



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

MR. WHITE: Okay.

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

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

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

MR. WHITE: I'm not sure.

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

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

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

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

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

13 MR. ROGERS: I am not an expert.

14 MR. WHITE: Your Honor --

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

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

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

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

4 MR. ROGERS: Any counterpart witness.

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

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

14 MR. GRAVES: May we do that?

15 THE SPECIAL MASTER: You want to do that  
16 9:00 in the morning or now?

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

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

21 MR. GRAVES: May it please the Court --

22 (Brief pause.)

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

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

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

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

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

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

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

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

3 THE SPECIAL MASTER: Yes.

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

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

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

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

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

DIRECT EXAMINATION

1  
2 BY MR. GRAVES:

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

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

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

11 A Yes, sir, I have.

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

15 A Yes, sir, I have.

16 Q And does that involve the use of expert witnesses?

17 A Yes, sir, it does.

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

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

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

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

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

18 THE SPECIAL MASTER: She did.

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

21 CROSS-EXAMINATION

22 BY MR. WHITE:

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

1 Courtroom for consultation as you described?

2 MR. GRAVES: Your Honor, I would object.

3 THE SPECIAL MASTER: Objection's overruled.

4 MR. GRAVES: May I just make the objection.

5 I object to any portion of that question which  
6 relates to divulgence of trial strategy.

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

9 THE SPECIAL MASTER: Proceed with the  
10 question; overruled.

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



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

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

9 A That's one of my ways.

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

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

25 Q Isn't it true that during depositions you engaged

1 in the practice of knitting?

2 A No.

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

4 THE SPECIAL MASTER: That's --

5 MR. WHITE: Your Honor, let me --

6 THE SPECIAL MASTER: That's a little harsh?

7 MR. WHITE: Ms. Sleater attended depositions

8 and didn't take notes in many cases, brought her

9 knitting, cruel or needlepoint with her and the

10 point is, the reason they're not ready is because

11 the depositions were not used --

12 MR. GRAVES: Objection, Your Honor, there

13 is no evidence that we're not ready, and I object

14 to the argumentative nature of the question.

15 MR. WHITE: Well, I asked the Plaintiff a

16 simple question; the witness can answer.

17 THE SPECIAL MASTER: She did, she did answer

18 it.

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

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

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

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

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

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

25 THE SPECIAL MASTER: All right. Let's proceed

1 with the case.

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

4 THE SPECIAL MASTER: That's correct.

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

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

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

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

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

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

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

25 THE SPECIAL MASTER: And that will include to

1 stand by to be recalled for cross-examination.

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

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

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

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

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

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

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

1 but we have some exhibits out in the hall.

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

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

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

(Whereupon a recess was held.)

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

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

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

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

12 MR. GRAVES: Yes, at all times.

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

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

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

25 I will try tomorrow to conscientiously give a

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

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

7 THE SPECIAL MASTER: And avoid the evening  
8 sessions?

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

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

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

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

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

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

25 MS. SLEATER: Oh, yes.



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

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

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

13 THE SPECIAL MASTER: The conventional prece-  
14 dure, I think, is to complete the three units and then  
15 let the cross begin of each of the three units.

16 MS. SLEATER: Okay. Fine.

17 THE SPECIAL MASTER: Has this witness been  
18 sworn?

19 MS. SLEATER: Yes, sir, he has.

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

22 JAMES PHILIP MERCHANT

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

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DIRECT EXAMINATION

1  
2 BY MS. SLEATER:

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

4 A Yes, I have.

5 THE SPECIAL MASTER: Your name is Mr.  
6 Merchant?

7 THE WITNESS: James Merchant, Your Honor.

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

10 A James Philip Merchant, 133 Cazneah Avenue, California.

11 Q Where are you employed, Mr. Merchant?

12 A At David Dornbusch & Company in San Francisco.

13 Q What is your position with David Dornbusch &  
14 Company?

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

16 Q And what does being a principal mean?

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

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

22 A Very much, yes.

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

25 A A bit over eight years now.

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

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

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

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

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

12 A Yes, we've conducted feasibility studies of agri-  
13 cultural and nonagricultural development on several  
14 Indian reservations throughout the West.

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

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

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

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

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

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

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

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

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

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

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

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

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

8 Q Would you please describe your educational back-  
9 ground.

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

14 Q Have you ever practiced law?

15 A No, I have not.

16 Q Do you belong to any professional organizations?

17 A I belong to the American Agricultural Economics  
18 Association.

19 Q Are you a member of any bar?

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

21 Q Are you responsible for any publication?

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

25 Q Were you hired by the United States?

A Yes.

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

3 A Yes. I personally have worked in the areas of  
4 livestock, mineral and -- livestock development,  
5 mineral development and municipal water require-  
6 ments.

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

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

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

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

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

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

3       Q     How did you determine knowledgeable people in  
4           the area?

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

9       Q     What type of written material did you review?

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

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

15      A     Yes, it is.

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

18      A     Yes. The Kearl work is an evaluation and com-  
19           posite of several previous documents that were  
20           developed by his predecessor at the Extension  
21           Service in Laramie, Stevens, and these previous  
22           documents were based on interviews with ranchers  
23           in the mountain valley cattle operations area  
24           in Wyoming.

25                   The Kearl study compared the results of these



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

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

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

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

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

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

3 A Yes, we have.

4 Q And why did you talk to him?

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

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

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

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

14 A In --

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

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

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

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

4 Q Which operations can change over time?

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

7 Q Yes.

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

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

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

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

24 A Yes, we did.

25 Q What rate did you use?

1 A It's about 89 percent.

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

5 A Sure. The sale weights we used were 410 pounds  
6 for steer cows, 380 pounds for heifer calves,  
7 660 for heifer yearlings, and I believe it was  
8 730 for steer yearlings, 1,015 for cull cows,  
9 and 1,345 for bulls.

10 The calving rate, as I said, was just under  
11 89 percent. The death rates were generally in  
12 the one to two percent range with the exception  
13 of bulls, for which we used six percent. These  
14 are annual death rates.

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

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

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

23 A Yes.

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

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

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

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

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

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

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

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

6 A It is a 250-cow ranch.

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

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

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

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

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

24 (Brief pause.)

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

1 the interruption.

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

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

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

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

3 A. Yes, they are.

4 Q Would you explain the ration for us?

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

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

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

23 Q Why do you have two rations?

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



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

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

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

14 Were you just saying, Mr. Merchant, that a  
15 46-pound per day ration of corn silage is cheaper  
16 than a 14-pound ration of alfalfa hay?

17 THE WITNESS: Yes, Your Honor.

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

20 VOIR DIRE EXAMINATION

21 BY MR. MERRILL:

22 Q Jim, did you say earlier that you were supplied  
23 with basic feed rations by Mr. Yates and you modi-  
24 fied those?

25 A Yes, I did.

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

4 A Not to be used. The rations he supplied us con-  
5 stituted his opinion as to the rations necessary  
6 to maintain the animal or to provide an average  
7 daily gain. It's the nutritional requirements  
8 necessary for the animals.

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

12 A Yes.

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

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

25 THE SPECIAL MASTER: Well, your first

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

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

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

13 MR. WHITE: Your Honor, could I inquire  
14 whether this witness is being offered as an ex-  
15 pert and, if so, --

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

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

20 A Yes.

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

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

Q Would you please explain those rations to us?

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

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

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

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

21 THE SPECIAL MASTER: Is less.

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

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

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

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

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

14 Q What is the difference between Exhibit 10 and  
15 Exhibit 11?

16 A Well, there are basically two differences. The  
17 pregnant heifers are lighter than the cows, so in  
18 one sense their nutritional requirement is less,  
19 but they are also growing animals, whereas the  
20 cows are mature animals. So, in that sense, they  
21 require more nutrition, and you can see by compar-  
22 ing the two exhibits that they balance fairly  
23 closely, but there are some differences in the  
24 makeup of the ration.

25 Q Would you please state those differences for the

1 record?

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

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

8 A. Yes.

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

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

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

25 Second, is that he has relied on apparently

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

9 He is a nonexpert testifying based on hear-  
10 say and a model for which no foundation has been  
11 laid thus far.

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

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

21 MR. MERRILL: It wasn't a motion to keep them  
22 out of evidence. It was a motion to strike testi-  
23 mony.

24 THE SPECIAL MASTER: I beg your pardon.

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

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

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

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

10 Q. You say this reflects common practice on the reser-  
11 vation. What's your basis for so saying?

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

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

19 THE SPECIAL MASTER: Well, Mr. Merchant, would  
20 you like to tell us how you went about obtaining  
21 the information that was contained in Exhibit No.  
22 12?

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



1 designed to meet the requirements of, in this  
2 case, an 1800-pound bull to meet their protein  
3 TDN, phosphorous and calcium requirements, and  
4 then supplemented by the means that I have ex-  
5 plained already, a 10 percent increase for ex-  
6 treme winter conditions and an additional 5 per-  
7 cent increase for wastage over the winter feed-  
8 ing period.

9 This is the least cost alternative that was  
10 formulated by Mr. Yates, and it also reflects the  
11 common practice on the reservation, which is pre-  
12 dominantly alfalfa hay feeding.

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

15 THE WITNESS: Yes.

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

19 THE WITNESS: Yes.

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

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

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

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

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

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

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

18 MR. WHITE: It was admitted.

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

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

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

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

\* \* \* \* \*

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

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

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

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

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

1 of evidence.

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

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

(Thereupon a fifteen minute  
recess was taken.)

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

3 (Brief pause.)

4 THE SPECIAL MASTER: All right.

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

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

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

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

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

18 THE SPECIAL MASTER: I see. Thank you.

19 VOIR DIRE

20 BY MR. MERRILL:

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

24 A Yes.

25 Q What information did you supply to Mr. Yates in

1 asking that he determined feed rations for you?

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

5 Q Only those four factors?

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

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

13 A I don't think so.

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

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

18 Q Also the average daily gain?

19 A Yes.

20 Q How about the available feeds?

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

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

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

6 Q Is that the only document you relied on?

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

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

14 A Yes.

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

18 A Of types of feed?

19 Q Yes.

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

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



- 1 Mr. Yates?
- 2 A Those are the animals that are contained in the  
3 model that we adapted for our analysis.
- 4 Q So you took those straight out of the Kearl  
5 model?
- 6 A Those are in the Kearl model, yes.
- 7 Q Why did you decide to depart from the Kearl model  
8 for purposes of determining feed availability?
- 9 A Well, the feed, winter feed is the single most  
10 significant cost in the cattle operations budget,  
11 or the year-around budget on an operation. We  
12 felt it was important to be as accurate as  
13 possible on that amount because it was so sig-  
14 nificant in the overall budget, and we felt that  
15 it was we should have something that was specific  
16 to the Reservation area.
- 17 Q So you gave these four different types of infor-  
18 mation to Mr. Yates and chatted with him for an  
19 hour and he came back with some feed rations,  
20 is that right?
- 21 A The basic rations that we adjusted, yes.
- 22 Q Were those basic rations developed by a computer  
23 model that Mr. Yates has?
- 24 A In part.
- 25 Q Did you ascertain whether Mr. Yates' model is

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

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

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

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

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

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

- 1 Q How did you make that determination?
- 2 A Through discussions with Lynn Merrick and  
3 examination of some sample rations that he had.
- 4 Q Did you make any investigation as to whether  
5 Mr. Yates ran his model correctly and with the  
6 correct parameters in the times that he operated  
7 it to provide feed rations to you?
- 8 A I did some spot checking of calculations to  
9 ascertain that the amount of feed contained in  
10 his budget actually met the requirements that  
11 were stated for the various types of animals.
- 12 Q Did you discuss with Mr. Yates the time of year  
13 that this feed ration would be used?
- 14 A Yes.
- 15 Q Did he take that into account in his calculations?
- 16 A Well, he provided me with rations for different  
17 periods and the pregnancy of a cow, and told me  
18 that that was the only animal whose feeding  
19 requirement varied substantially over different  
20 periods of the winter feed period.
- 21 Q So it was then his opinion to you that the base  
22 rations he gave you would be sufficient to  
23 sustain these types of animals, is that correct?
- 24 A I believe that's -- yes, that's part of his work,  
25 was his opinion that these would be adequate to

1 sustain the various types of animals.

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

4 A Yes.

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

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

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

20 A Yes.

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

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

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

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

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

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

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

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

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

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

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

1 myself.

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

4 A Yes, I believe so.

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

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

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

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

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

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

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

2 (Pause.)

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

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

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

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

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

18 A I have told you the basic facts and --

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

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

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

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

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

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

14 Q Is that the Kearl model?

15 A Yes.

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

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

23 Q Do you know --

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



- 1 on the Reservation.
- 2 Q Do you know specifically what nutritional requirements
- 3 he calculated would be necessary for each of these
- 4 classes of animals?
- 5 A I don't know that offhand, no.
- 6 Q Do you know what feed contents or nutritional contents
- 7 he used; for example, how much protein there is in
- 8 a certain amount of alfalfa?
- 9 A No, I don't remember that offhand.
- 10 Q So you don't know then the intermediate calculations
- 11 by which he computed the nutritional requirements
- 12 or the ability of these various feeds to fulfill those
- 13 nutritional requirements in developing the feed rations
- 14 for the year; is that correct?
- 15 A I reviewed those calculations. I can't tell you all
- 16 the specific numbers right now.
- 17 Q Now, you got the weights and average daily gain
- 18 figures and types of animals out of the Kearl model;
- 19 is that correct?
- 20 A Yes.
- 21 Q Did you take those straight out of the Kearl model?
- 22 A Those are exactly the ones contained in the Kearl
- 23 model, the ones we used in our analysis.
- 24 Q Do you know what facts or data Mr. Kearl used in
- 25 developing those parameters within his model?

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

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

5 A Yes, I did.

6 Q Would you describe what you did?

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

13 Q How did you determine that those weights were  
14 reasonable?

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

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

18 A Oh, perhaps half a dozen.

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

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

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

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

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

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

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

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

18 MR. GRAVES: Dr. Yates.

19 MR. MERRILL: Excuse me. Dr. Yates.

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

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correct?

A Selected and adjusted, yes.

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

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

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

end-27

1 THE SPECIAL MASTER: You asked that twice.

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

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

11 A Discussions with David Yates and my own cal-  
12 culations.

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

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

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

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

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

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

7 THE WITNESS: Yes, that's right.

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

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

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

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

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

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

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

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

9 THE SPECIAL MASTER: Ms. Sleater?

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

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

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

23 THE SPECIAL MASTER: Surely.

24 (Brief pause.)

25 MR. MERRILL: Just a couple of questions,



1

VOIR DIRE EXAMINATION

2

BY MR. MERRILL:

3

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

4

5

A No, this is my first trial.

6

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

7

8

A No.

9

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

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THE SPECIAL MASTER: Oh, goodness.

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

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THE SPECIAL MASTER: Proceed.

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EXAMINATION (CONTINUED)

BY MS. SLEATER:

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

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

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

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

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

MS. SLEATER: I think that should solve the

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

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

12 MS. SLEATER: Thank you, Your Honor. And  
13 to keep my notes straight, you've admitted then  
14 10, 11 and 12 also, the exhibits that were  
15 originally discussed?

16 MR. MERRILL: I believe we did.

17 THE SPECIAL MASTER: I believe we've  
18 admitted everything up through 12 except 1 and  
19 8, the resume of the projects. I'd like to know  
20 what 9 is. Is 9 a chart?

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

23 EXAMINATION (CONTINUED)

24 BY MS. SLEATER:

25 Q Once you established the feed ration as presented,

1 what was the next step in your analysis?

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

7 Q How do you go about analyzing returns?

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

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

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

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

25 Q What is a cull cow?

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

6 Q And what is a cull bull?

7 A Also a bull that's getting on.

8 THE SPECIAL MASTER: A bull getting on in  
 9 years.

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

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- 1 Q. (By Ms. Sleater) What was your selling weight  
2 for steer calves?
- 3 A. Four hundred ten pounds, reduced somewhat to allow  
4 for shrinkage during transport to market.
- 5 Q. Why did you make the reduction?
- 6 A. Well, because the animals aren't sold on the  
7 ranch, they have to be shipped to an auction,  
8 and we used the Riverton auction as our selling  
9 place and used a 50 mile distance as the average  
10 distance that operators might be expected to  
11 ship their cattle.
- 12 Q. And how much was your reduction for shrinkage?
- 13 A. It was two percent reduction with .35 percent  
14 fillback. There is a net shrinkage of about 1.4  
15 percent, I guess.
- 16 Q. You said there was a two percent reduction.  
17 What is fillback?
- 18 A. Once the animal is at its destination, it regains  
19 some of the weight lost during transit.
- 20 Q. How did you develop the percentages which you  
21 used for both shrinkage reduction and fillback?
- 22 A. These are based on a study done by Dr. St. Clair  
23 at the University of Wyoming, and published in  
24 a research journal.
- 25 Q. What was his study?

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

3 THE SPECIAL MASTER: What year was that  
4 published?

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

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

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

12 Q. Other informants?

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

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

16 A. Heifer calves?

17 Q. Heifer calves, I'm sorry.

18 A. Three hundred eighty pounds plus shrinkage,

19 Q. And for steer yearlings.

20 A. I believe that's 730 pounds.

21 Q. For cull cows?

22 A. One thousand fifteen.

23 Q. And for cull bulls?

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

25 All those are without shrink.

1 Q. Which means you then took two percent of that weight  
2 and subtracted it?

3 A. We took a net of 1.4 percent shrink and subtracted  
4 that.

5 Q.. How many animals are in your total operation?

6 A. Well, it varies over the course of a year, but at  
7 fall inventory there is approximately 375.

8 Q. When do you sell, under your model?

9 A. October, November.

10 Q. In the fall?

11 A. Yes.

12 Q. Can you tell me the number of steer calves that you  
13 sell, under your model?

14 A. It might be easier if we refer to the next exhibit,  
15 because it has all that information on it.

(Brief pause.

16  
17 THE WITNESS: Not that one.

18 That's the one.

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

22 Q. (By Ms. Sleater) We now have displayed what is  
23 being marked for identification as U.S. Exhibit  
24 WRIR C-13. I ask you if you can identify that?

25 A. Yes, that's a table showing the various types of  
animals sold in fall, the number of each animal,



1 their weight -- these weights are net shrink --  
2 the total selling weights for the category of  
3 animal, then the price per hundred weight, and  
4 the total weights by type of animal.

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

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

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

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

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

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

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

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

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

1 Your number -- Sorry, Your Honor.

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

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

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

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

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

1 MR. MERRILL: You are correct, Your Honor.

2 Just where these numbers came from and why.

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

5 THE WITNESS: Certainly.

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

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

19 THE SPECIAL MASTER: What does Kearn do about  
20 your bulls?

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

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

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

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

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

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

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

3 THE SPECIAL MASTER: Have you offered it yet?

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

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

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

11 VOIR DIRE EXAMINATION

12 BY MR. MERRILL:

13 Q Jim, how did you determine the price per hundred-  
14 weight? You said you went back and averaged the  
15 last twelve years; is that correct?

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

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

- 1 that correct?
- 2 A Yes.
- 3 Q And yet to determine the prices you relied on market  
4 prices from Billings and some other city; is that  
5 right?
- 6 A Omaha, yes.
- 7 Q And Omaha?
- 8 A Yes.
- 9 Q And with that exception, then these prices are the  
10 twelve-year average of the prices paid in Billings  
11 and Omaha over the past twelve years?
- 12 A With that exception? I'm sorry.
- 13 Q Let me start the question over again. You took  
14 the average of prices paid in Billings and Omaha  
15 over the last twelve years for each of these  
16 categories of animals; is that correct?
- 17 A For each year, yes.
- 18 Q And did you make some adjustment to bring those  
19 prices to a current value?
- 20 A Yes, we did.
- 21 Q How did you do that?
- 22 A We used U.S. Department of Agriculture Index of  
23 Prices Paid by Farmers for Items Used in  
24 Production and Living.
- 25 Q Why did you decide to use that particular method

1 of computing the present value?

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

3 Q Current price. Excuse me.

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

14 Q What dollars are those?

15 A 1979 dollars.

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

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



1 not something more subject to fluctuation.

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

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

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

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

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

25 The witness has admitted there

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

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

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

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

14 THE WITNESS: Yes.

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

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

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

4 THE WITNESS: Yes.

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

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

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

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

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

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

10 Mr. White?

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

12 Excuse me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Would March be a better week than would be February?

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

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

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

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

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

16 MR. DONNELL: I don't have any problem with  
17 that. For purposes of the courtroom, February's  
18 probably a better time to do it because the judge is  
19 on vacation then.

20 MR. SACHSE: He's on vacation because you  
21 can't tell whether you're going to be able to fly in  
22 or out of Worland. in February.

23 THE SPECIAL MASTER: That's not true.

24 MR. DONNELL: We can accommodate a 727 there.  
25 If you can't accommodate them on a plane that size--

1 THE SPECIAL MASTER: That is correct, that is  
2 correct. I'm only trying to accommodate four or five  
3 attorneys for other parties who voiced this morning a  
4 hope that we might return to Worland this year for a  
5 hearing, and I expect it would make it a lot easier for  
6 joint tribes and Hanover Canal people and the irrigation  
7 system of the Upper Big Horn Basin, I'm trying to  
8 accommodate them.

9 MR. WHITE: Your Honor, on behalf of the  
10 State of Wyoming, we have no objection whatsoever, it's  
11 not less convenient for us, it's a difficult time at  
12 best of times and we endorse the suggestion.

13 THE SPECIAL MASTER: If I could arrange for  
14 some mode of getting my stuff up there a few days  
15 early, I will let you know and you and Harry can pick  
16 up your exhibits and I can help you drive them up and  
17 back and fly them up and back.

18 MS. SLEATER: I'd just like to add my voice to  
19 this. Mr. Echohawk was going to say something too.  
20 As you can see from the size of our exhibits, we have a  
21 whole room-full of these, we have more coming in that we've  
22 had everybody send here because the hearing was scheduled  
23 for here. It's very expensive to move these things around  
24 and we're going to have to go to a lot of extra expense,  
25 probably involving renting a truck or something or other



1 THE SPECIAL MASTER: All right. Let's finish  
2 the case, let's finish the United States' case in  
3 Cheyenne, Wyoming.

4 Mr. Webster, you see now our problem. And then let's  
5 move the remainder of the case of the Tribes to Worland  
6 and have a week's hearing up here, I suspect it will be  
7 March, even April.

8 Now, you had something else?

9 MR. WEBSTER: Your Honor, according to your  
10 pre-trial order, opposing counsel were to have been  
11 supplied with lists witnesses and a summary of what  
12 those witnesses were going to say, and that hasn't  
13 been done, and on behalf of the private counsel, at  
14 least on my behalf, I would wish that that would be  
15 complied with.

16 Secondly, with regard to some of the matters  
17 which were discussed on moving the-- all the monstrous  
18 exhibits up to Worland and so forth for one week, it  
19 will certainly be an improvement and I hope that at  
20 some point right away it would be given an opportunity  
21 to have a list of witnesses and the order in which they  
22 are intended to be called, and the approximate that is  
23 expected for the evidence to be taken.

24 What we have gotten into is a situation where some  
25 private counsel have come down here today to listen to a

1 full day of testimony at some considerable expense,  
2 expense to our clients who are paying us, who are paying  
3 the State of Wyoming and, frankly, who are paying the  
4 United State also, it's their expense; to listen to some  
5 evidence which perhaps isn't as relevant as something  
6 down the line. And if we were given an opportunity to  
7 know the order in which witnesses were going to be called,  
8 and if counsel would comply with the pre-trial order  
9 as far as supplying us with a summary of what the evidence  
10 will be, we would have the opportunity of picking and  
11 choosing what evidence we think is important to hear.

12 THE SPECIAL MASTER: Mr. Webster, you made  
13 some good points. I think it was Paragraph 10 of the  
14 pre-trial that said at least 10 days before the trial  
15 commences all parties shall submit to opposing counsel  
16 and the special master, names, addresses, general  
17 testimony of any and all witnesses who will be called.  
18 Is that the one you have reference to?

19 MR. WEBSTER: That's right, Your Honor. In  
20 addition I hope that we get a list or an order of what  
21 witnesses are called when.

22 THE SPECIAL MASTER: All right. Do you want to  
23 hold up the mailing that's about ready to go now and  
24 will be in a couple of days, for a list of witnesses or  
25 shall we order that the United States can list their

1 and give it to us and we'll mail it out some time by  
2 the end of the week.

3 MS. SLEATER: Your Honor, at this time we  
4 could certainly give a list of witnesses we plan to  
5 call, but as to giving the orders, I'm afraid that's  
6 just impossible due to the schedule in this case which  
7 was a result of Mr. White having previous commitments.  
8 The initial stages of this trial are so broken up  
9 that we don't know until we see how long the direct is  
10 who we're planning to put on. We obviously didn't want  
11 to put ourselves where we'll be extending some witnesses  
12 over a period of a week or even a month, as would be  
13 happening in February and March.

14 THE SPECIAL MASTER: Well, Mr. Webster and  
15 other counsel like him have received nothing, so if you  
16 could give a list of witnesses and a sentence or two  
17 of what the witnesses will purport to do, get it to  
18 Leo Salazar, we'll get it into the mail as soon as we  
19 possibly can.

20 I hope you can appreciate this, we don't know  
21 whether we got 400 lawyers or 450 lawyers or 205. The  
22 only way we can get it is 848 mailings of all counsel  
23 and pro se, and thats what we'll do with this if it  
24 isn't more than a couple of pages.

25 MS. SLEATER: Your Honor, I will give you copies

1 of the two letters which we provided to Wyoming which  
2 listed witnesses and exhibits.

3 THE SPECIAL MASTER: Will you do that, Leo,  
4 and see that it gets out, even if it takes two envelopes  
5 or two separate postage things?

6 MR. DONNELL: Your Honor, if I could make one  
7 further request. I appreciate the Unites States'  
8 time problem on this as to when they might call them,  
9 but surely they must have some idea of that, how they're  
10 going to be called in, that would be very important and  
11 helpful to us to know at least roughly when they might  
12 be called so we can be here if it's going to be important.

13 THE SPECIAL MASTER: We'll see if we can't  
14 do something more, like a weekly resume, projected  
15 weekly resume, as best as Regina can supply that  
16 information to us.

17 Yes, Mr. Radosevich.

18 MR. RADOSEVICH: Of the ascertainment that Mr.  
19 Webster made, particularly in our client's case, it  
20 is costly going to great distances, and I do agree,  
21 I think the counsel for the government should be able to  
22 provide us at least with the order. There are many times  
23 when I or someone else doesn't have to be here.

24 I would request a member of our firm be admitted  
25 for special purposes to appear before a trial as present

1 during my absence. I will be gone this Thursday and Friday.

2 THE SPECIAL MASTER: He is not a member of the  
3 Wyoming Bar?

4 MR. RADOSEVICH: He was a member of the Colorado  
5 Bar for four years, and has--is with our firm in Lander,  
6 Wyoming.

7 THE SPECIAL MASTER: I believe that I can move  
8 his admission for the purposes of this lawsuit, and if  
9 there are any objections, please speak up now.

10 (No response.)

11 THE SPECIAL MASTER: What is his name?

12 MR. RADOSEVICH: Greg Parish.

13 THE SPECIAL MASTER: Very well. And did you  
14 make your appearance today, did you file an appearance?

15 MR. RADOSEVICH: No, I did not. I had it filed  
16 previously.

17 THE SPECIAL MASTER: Mr. George Radosevich,  
18 a nice short name like Roncalio.

19 All right. Let's stand in recess until 9:15  
20 tomorrow morning.

21 (Thereupon the proceedings  
22 (were recessed at 5:30 p.m.,  
23 (January 26, 1981.  
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