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case # 4993

File # 110

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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 WYO-)
MING,)

Civil No. 4993

FILED _____
2/6 1981
Margaret V. Hampton CLERK
DEPUTY

VOLUME III

Tuesday, January 27, 1981

Morning Session

ORIGINAL

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1

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WYOMING:

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(Also appeared Monday, January
26, 1981)

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(Also appeared Monday, January
25, 1981)

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THE SPECIAL MASTER: May we come to order, please. Are you ready, Regina?

MS. SLEATER: Yes, sir.

MR. WHITE: Your Honor, I have a couple of things I'd like to address before we get back to Mr. Merchant. First, Your Honor, we've got -- we would ask for a Court order directing the United States to return to us negatives of photographs which we provided them of certain exhibits that are exhibits in our aesthetics case to rebut the aesthetics case put on through Mr. Harbour. We made numerous requests to the United States for those negatives so we could prepare our photographic exhibits. We can't seem to get them, and we'd like to get an order directing that they be returned to us.

THE SPECIAL MASTER: May I have the attention of the United States counsel. Mr. White, if you will prepare that order, I will be disposed to sign it, but I'll be happy to hear if there's any offer of compliance and maybe not needing the order, without requiring the order.

MS. SLEATER: Your Honor, I don't think that's necessary. We'll -- that's what I was going to ask my secretary, if she could find what

1 they're talking about.

2 THE SPECIAL MASTER: If you find them and
3 provide them before my pen hits the signature on
4 the order, that would be fine.

5 MR. WHITE: We won't provide the order
6 until tomorrow. It's not as if we need them this
7 minute, we just need them to have them blown up
8 into exhibits and provide those exhibits to the
9 parties.

10 The other item, Your Honor, is verbally on
11 January 7th, the United States agreed to produce
12 some documents that were disclosed during the
13 deposition. We again asked for those documents
14 in writing on January 19th. We've not yet received
15 them. We would move to compel discovery under
16 Rule 37 for the reproduceable copies of soil and
17 land classification work maps which were used by
18 HKM as well as their hydrographic information
19 that's disclosed on those maps, and would ask the
20 Court either to order the United States to produce
21 that material for us or to bar the United States
22 from putting any evidence on that's based on that
23 material.

24 THE SPECIAL MASTER: Similarly, Ms. Sleater.

25 MS. SLEATER: Your Honor, the agreement

1 was at the time that they could go to Billings and
2 look at the work maps. We, in fact, at a later date
3 inquired of the State of Wyoming when they wanted
4 to do that, and they said they would wait until
5 after they deposed Mr. Billstein. He's not yet
6 been redeposed. The other information on the
7 hydrographic survey, it was to be completed by Mr.
8 Billstein who is going to testify and can be deposed
9 about it. And that was the situation on January 7th.

10 MR. WHITE: Your Honor, that's not correct,
11 Ms. Sleater has other matters in mind that we were
12 going to go to Billings to review. I can show to
13 the Court the letter of January 19, there's been
14 absolutely no response to that. It covers different
15 documentation or different documents that were
16 going to be reviewed in Billings. The problem
17 is, Your Honor, that we're coming up to the point
18 where we'll have to do two things, cross examine
19 their witnesses and prepare our own case, and
20 without knowing the facts and data upon which
21 they're experts base their conclusions, which
22 we're entitled to know in detail, we can't get
23 ready for it. And I would like to ask the Court
24 to either tell them to produce it or tell them
25 to -- that they can't put on the evidence that's

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based on it.

MS. SLEATER: Your Honor, I'd like to first address the letter of January 19 when that was delivered to the United States by a witness for the State of Wyoming. It was pointed out at that time that that letter was inaccurate insofar as it requested information not heretofore requested even though it purported to say that, and the next day in meeting with counsel, I believe it was Mr. Merrill for the State of Wyoming, that was again pointed out to the State of Wyoming. However, the State of Wyoming feels that that is so crucial to their preparation, we certainly don't want to deprive them of any preparation time, therefore, if they will pay for the cost of having them made, we will certainly provide them with the copies.

* * * * *

1 THE SPECIAL MASTER: I would expect you to
2 do that and get it done.

3 MR. WHITE: We will pay for the costs,
4 Your Honor.

5 THE SPECIAL MASTER: All right. That should
6 take care of the second matter.

7 MS. SLEATER: Your Honor, they should note
8 it will be approximately three thousand dollars to have
9 the stuff reproduced, which I thought that was why
10 they were going to go up to Billings to look at it
11 rather than have it reproduced.

12 MR. WHITE: Three thousand dollars is a lot
13 of money, but on the other hand we do have to get
14 ready to try the lawsuit and we don't want to hold it
15 up because of delays. We just want to see the infor-
16 mation.

17 THE SPECIAL MASTER: Now, the first item
18 involved copies of photographing. Are those going
19 to be taken care of? If they were, I won't need to
20 sign the order for you to respond to their request.
21 Mr. White, if that order is prepared and ready for
22 my signature, I will sign it.

23 MR. WHITE: We will wait a day or so, Your
24 Honor. I just needed it to get some heat on that
25 particular matter.

1 Your Honor, I just have one other thing,
2 and that was yesterday during our discussions over
3 the exclusion of witnesses, it was suggested that the
4 State's witnesses experts had never been excluded,
5 contrary to my representations, and I would simply
6 refer the Court to page 597 at the Boundaries Hearing
7 Trial. I am not trying to reopen it, I am just trying
8 to clarify the record.

9 It was suggested I was in some way mis-
10 leading the Court, and I --

11 THE SPECIAL MASTER: You said the State's
12 witnesses were not excluded?

13 MR. WHITE: They were excluded, Your Honor.

14 THE SPECIAL MASTER: They were excluded?

15 MR. WHITE: And that was my point, it was
16 suggested I was somehow inventing information.

17 THE SPECIAL MASTER: What was the page on
18 that?

19 MR. WHITE: 597, Your Honor.

20 THE SPECIAL MASTER: 597?

21 MR. WHITE: Yes, sir.

22 THE SPECIAL MASTER: The hearing was on what
23 date? Do you remember?

24 MR. WHITE: April 18th, I believe, Your Honor.
25 It really makes no difference now. You have ruled, but

1 I just wanted to clear the record.

2 The second thing was it was suggested I
3 also misadvised the Court with respect to the
4 permissability of the Tribal Council remaining in
5 the room, or the members of the Tribal Council
6 remaining in the room. I would suggest to the Court
7 that rule 615-2 allows one designated representative
8 of the Tribe to remain in the Court. We agreed, and
9 we won't go back on that agreement, that all the
10 Council may remain in the Courtroom. But it was
11 suggested that I mislead the Court, and I did not.

12 THE SPECIAL MASTER: Very well. I hope
13 that we can remove these necessary but sometimes
14 distressing evidences of a strong case that is strongly
15 fought and get into a smooth presentation of the
16 evidence necessary to get our case forward and our
17 hearing over with. I thank both of you for your
18 efforts in that regard.

19 May we proceed with the witness on direct
20 examination?

21 (Witness comes forward.)

22 THE SPECIAL MASTER: Mr. Merchant?

23 THE WITNESS: Yes.

24 THE SPECIAL MASTER: Are you the same person
25 that testified yesterday?

1 THE WITNESS: Yes, I am, Your Honor.

2 THE SPECIAL MASTER: You know you are still
3 under oath?

4 THE WITNESS: Yes, I am.

5 THE SPECIAL MASTER: All right. Would you
6 take the stand, please?

7 MR. WHITE: Your Honor, can I be excused from
8 the Courtroom? I understand their next witness may
9 be somebody I am not prepared to cross at this time,
10 and I need about an hour to get ready.

11 THE SPECIAL MASTER: Indeed. You are
12 welcome to use the chambers back here if you can find
13 one.

14 MR. WHITE: I will run back where I have
15 my scratch material.

16 THE SPECIAL MASTER: Mr. Merrill, you
17 are standing in, I presume?

18 MR. MERRILL: Yes, Your Honor, I am.

19 THE SPECIAL MASTER: Okay.

20 (CONTINUED) DIRECT EXAMINATION

21 BY MS. SLEATER:

22 Q Mr. Merchant, I noted you had a paper in your
23 hand. Would you like to hand that over at
24 this time?

25 merchant-direct-sleater

1 THE WITNESS: Yes, Your Honor. By
2 mistake I walked off with that last night, and
3 it is an exhibit that has not been admitted.

4 THE SPECIAL MASTER: All right. We did
5 not make any changes or alterations or anything.

6 MR. MERRILL: Just for the record, which
7 exhibit is this?

8 MS. SLEATER: That was Exhibit 8, the one
9 that was introduced.

10 THE SPECIAL MASTER: I asked about this
11 yesterday.

12 MR. MERRILL: Okay, fine.

13 Q (By Ms. Sleater) Okay, Mr. Merchant, could you
14 briefly recap where we were on the analysis
15 of the livestock operation and its expansion?

16 A Yes. I believe we have discussed the basic
17 characteristics of the livestock operation that
18 we used to analyze the feasibility of expanding
19 livestock on the Reservation.

20 I think we have discussed the feed rations,
21 which is the most important cost item, and I
22 believe we have completed discussing the returns
23 to the livestock operation.

24 Q Other than feed, are there other physical
25 merchant-direct-sleater

1 requirements necessary for the cattle in your
 2 model?

3 A Well, another one that was necessary to
 4 analyze for this was the water requirement.

5 Q And what water requirement did you put into your
 6 model for use by the cattle?

7 A We used the figure 15 gallons a day per animal
 8 for water consumption, and we added an additional
 9 factor to account for evaporation from stock
 10 ponds.

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1 Q (By Ms. Sleater) What factor was that?

2 A I can't give you the per animal figure, but I
3 can give you the total figure of, for 25,000
4 head, it's about 1420 acre-feet, as I recall.

5 Q All right.

6 THE SPECIAL MASTER: May I have that figure
7 again? Twenty-five hundred acre-feet?

8 MS. SLEATER: Twenty-five thousand cattle,
9 1420 acre-feet.

10 Q (By Ms. Sleater) Was that your evaporation
11 figure and not the consumptive use factor?

12 A Yes, the 1420 acre-feet is evaporation.

13 THE SPECIAL MASTER: Is what?

14 THE WITNESS: Evaporation from stock ponds.

15 THE SPECIAL MASTER: I don't understand you.

16 Could you read Regina's question again for
17 me, please?

18 (The above question and answer
19 were read back by the reporter
20 (as follows, to wit: "Q: What
21 (factor was that? A: I can't
22 (give you the total figure of,
23 (for 25,000 head, it's about
24 (1420 acre-feet, as I recall."

25 THE SPECIAL MASTER: Would you read the
question before that?

THE REPORTER: I'm sorry. That question was
taken by the previous reporter.

merchant - direct - sleater

1 MS. SLEATER: Would it be better if I started
2 again?

3 THE SPECIAL MASTER: I will get it from the
4 record. Go ahead.

5 Q (By Ms. Sleater) You said this was evaporation
6 from stock ponds?

7 A. Yes.

8 Q Why was it necessary to include that?

9 A. Because it's a loss of water associated with the
10 livestock industry.

11 Q You said you used 15,000 gallons a day for animal
12 consumption?

13 A. Yes.

14 Q Where did this figure come from?

15 A. That's from various sources in the literature,
16 including USDA publication and Extension Service
17 publication, and I have also found it in a Wyo-
18 ming State Engineer's publication, and that was
19 checked as to its reasonableness with people on
20 the reservation.

21 Q And, in your opinion, is that a standard and
22 reasonable figure for cattle consumption?

23 A. Yes.

24 THE SPECIAL MASTER: Let's take five minutes

25 merchant - direct - sleater

1 so we can see if we can find someone to hook up
2 this system.

3 (Off-the-record discussion.

4 MS. SLEATER: Would you read back the last
5 question?

6 (The above question was read
7 (back by the reporter as
8 (follows, to wit: "Q: And,
9 (in your opinion, is that a
10 (standard and reasonable
11 (figure for cattle consump-
12 (tions?"

13 Q (By Ms. Sleater) After you developed the feed
14 ration as shown, what was the next thing that
15 you did?

16 THE SPECIAL MASTER: Regina, you are just
17 going to have to speak up. I don't know any other
18 way to do this but ask you to speak up.

19 Q (By Ms. Sleater) After you developed the feed
20 rations, what was the next thing you did with
21 them?

22 A We costed them out.

23 Q I direct your attention to U.S. Exhibit WRIR C-14,
24 marked for identification purposes, and ask if you
25 can identify that, please?

A Yes, that exhibit shows the summary of feed re-
quired over a four-month feeding season per ranch,

merchant - direct - sleater

1 and there are cost figures associated with each
2 category of feed.

3 Q Is that summary obtained from totaling the amounts
4 shown on Exhibits 9 through 13?

5 A Yes, multiplying by the number of respective types
6 of animals.

7 Q How did you develop the price per ton column as
8 shown on WRIR C-14?

9 A Those are normalized prices, which are long-term
10 average prices for each type of feed. The alfalfa
11 hay price is a Water Resources Council price for
12 the State of Wyoming. Barley straw and corn silage
13 prices are rations of the alfalfa hay price based
14 on the relative nutritional values. Corn grain is
15 a Water Resources Council price, and soybean meal
16 was based on a price obtained from a local feed
17 store and then converted to a normalized price.

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25 merchant - direct - sleater

1 Q (By Ms. Sleater) (Continued) Why is this expressed
2 in normalized price?

3 A Well, again, the reason to use normalized prices
4 is to attempt to take the year to year fluctuations
5 out of the prices we use for a long-term analysis.
6 We use a more stabilized price for our analysis.

7 Q And the last column, cost per season.

8 A That's simply the multiple of the first two.

9 Q And how did you develop your cost for the
10 supplements?

11 A Those costs are based on the ingredients for those
12 supplements, and the price for the ingredients
13 are obtained from local feed companies.

14 Q Are those also normalized?

15 A Yes, they are.

16 Q What was your next element of cost?

17 MS. SLEATER: I'm sorry, I forgot, at
18 this time, Your Honor, I'd like to move U.S. Exhibit
19 WRIR C-14 into evidence.

20 THE SPECIAL MASTER: Mr. Merrill.

21 MR. MERRILL: A short voir dire, Your Honor.

22 VOIR DIRE EXAMINATION

23 BY MR. MERRILL:

24 Q Mr. Merchant, in developing the prices per ton for

25 merchant-direct-sleater
merchant-voir dire-merrill

1 the various feeds shown on Exhibit C-14, what
2 regions prices did you use?

3 A Wyoming.

4 Q And in developing the price per hundredweight on
5 Exhibit C-13 you used prices, the average of
6 normalized prices for the past twenty years in
7 Billings and Omaha; is that correct?

8 A For the cattle prices?

9 Q Yes.

10 A Yes.

11 Q So you're using one region, Wyoming, to develop
12 your feed prices?

13 THE SPECIAL MASTER: You want to try that
14 question again, please? So you're using --

15 Q (By Mr. Merrill) Isn't it true you are using the
16 region of Wyoming to develop your prices for feed?

17 A Yes, I'm using the State of Wyoming.

18 Q And you're using other states to develop your
19 prices that are going to be paid for the cattle
20 that is Billings and Oklahoma; isn't that correct?

21 A I'm using a broader region to base my cattle prices
22 on simply because the data is superior for those
23 cattle markets.

24 MR. MERRILL: Your Honor, I think we have

25 merchant-voir dire-merrill

1 a fundamental inconsistency in the model here, in
2 that the scope of the information considered in
3 putting together the various stages of this model
4 is clearly not consistent. The witness has agreed,
5 he uses a broader region for developing the prices
6 that would be paid for cattle and uses a much
7 narrower focus in determining the cost of feeds
8 which are a major component of the ranging operation.

9 THE SPECIAL MASTER: I'm inclined to
10 agree with you, but I don't think the facts here
11 would warrant it because it seems to me the feed
12 is available in Wyoming, so using Wyoming's figures;
13 the cows, if there had been any kind of market,
14 they have to go where there's a market for them.
15 So, I suspect it's not too close, I suspect it's
16 not too much of a departure from an ordinary
17 requirement, selling as distinguished from feeding.

18 MR. MERRILL: Your Honor, the evidence
19 will show later --

20 MS. SLEATER: Your Honor, I object to
21 any further statement --

22 THE SPECIAL MASTER: Regina, don't interrupt.

23 MR. MERRILL: Your Honor, the evidence
24 will show through cross examination of Mr. Merchant

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that there are local markets for cattle in Wyoming.

THE SPECIAL MASTER: Yes. Now, Regina.

MS. SLEATER: Your Honor, I object to any further statements by Mr. Merrill regarding evidence that is not yet in evidence. I further object to the use of voir diring an exhibit to cross examine on matters not contained in the exhibit, and I request that the Court order that in the future voir dires relating to exhibits be confined to the exhibits, and cross examination be confined to cross examination.

THE SPECIAL MASTER: I'm sure it will be without my ordering it.

Proceed, Mr. Merrill.

MR. MERRILL: Your Honor, my second point concerning Exhibit C-14 is that there's been no testimony thus far as to the alternative feed rations, which was described as Exhibit C-9 through C-12. As you'll note, Your Honor, each of these has two rations displayed, and there is no evidence in the record as to which rations were used or which proportion goes where, and therefore there's been no foundation for the number of tons of each feed per season that would be required for the

merchant-voir dire-merrill

1 operation.

2 THE SPECIAL MASTER: How do you respond
3 to that, Mr. Merchant?

4 THE WITNESS: We used a mix of the two
5 feed rations. I think I stated that yesterday,
6 although I didn't give the exact figures. We used
7 a 50-50 mix between the alfalfa, hay ration and
8 corn silage rations to establish the overall
9 feeding requirements for the ranch. In other
10 words, we're saying that it's reasonable to think
11 that half of the ranchers might use alfalfa, hay
12 based ration and half may use corn silage ration.
13 One based more on tradition, the other is based
14 on slightly lower cost.

15 THE SPECIAL MASTER: I'll overrule the
16 objection, Mr. Merrill, and permit the introduction
17 of the exhibit.

18 MS. SLEATER: Thank you, Your Honor.

19 THE SPECIAL MASTER: And the exhibit is
20 received.

21 (Thereupon the chart marked C-14
22 (was received as evidence.

23 Q (By Ms. Sleater) What was the next element you
24 costed in analyzing the livestock enterprise?

25 merchant-direct-sleater

1 A The next step was to cost the grazing requirements
2 for animals. And there were three elements to that,
3 included in our budget. The first was grazing land
4 and as we did with all our costs, we've used
5 economic costs for these elements and for grazing
6 land. The economic costs relating the opportunity
7 costs of that grazing land, we felt was zero because
8 the land used for grazing is not being taken out of
9 any alternative type of production. That is arid
10 land and it's unsuitable for cropland or other uses.
11 So grazing is the basic use for that land, therefore,
12 it's opportunity cost is zero.

13 Q I think at this time you better explain to us the
14 difference between financial and economic cost.

15 A Well, financial cost is that typically used in
16 determining whether a private individual wishes
17 to invest in a project and that determines whether
18 his private returns will exceed his private costs,
19 and if he would have to pay for grazing fees, that
20 would be a proper cost to include in a financial
21 analysis. The economic analysis, on the other
22 hand, that's used for project evaluation, and the
23 purpose of that is to determine whether the total
24 production from using resources in a project exceeds

25 merchant-direct-sleater

1 the cost of those resources in terms of what pro-
2 duction is being precluded by the use of those
3 resources. And that's the standard of analysis
4 used by the World Bank in evaluating project
5 feasibility. It's -- that's used by the Water
6 Resources Council generally in evaluating project
7 feasibility. It's a typical standard used for
8 project evaluation.

9 Q In your professional opinion, which is the
10 appropriate method to use in evaluating livestock
11 enterprise in an increase such as we've been
12 talking about?

13 A For this purpose, the economic analysis.

14 Q You mentioned opportunity cost. Perhaps if you
15 would briefly explain opportunity cost.

16 A Yes. Opportunity cost is the -- it is -- it
17 reflects the loss in production due to the use
18 of resources, of the resources. You're costing.
19 I should start over again, I tied my tongue up.

20 The opportunity cost is the amount of production
21 that is precluded by using resources for another
22 purpose. So if we're using grazing land on the
23 reservation to support a livestock industry, then
24 if we convert that grazing land to irrigated

25 merchant-direct-sleater

1 agriculture, then we're precluding the livestock
2 operation on that land. So the cost to the
3 irrigated agriculture of using the land for
4 irrigation should reflect the loss to the
5 livestock industry, that's what I meant by
6 opportunity cost.

7 THE SPECIAL MASTER: Do you expend by using
8 accrediting any gain to the cropping income?

9 THE WITNESS: In the irrigation budget
10 there's a return to irrigation, and also a cost
11 for the loss to livestock industry.

12 THE SPECIAL MASTER: How can you, in
13 livestock, how can you debit that land that's been
14 converted in use without crediting to the entries
15 of that land, the benefits that went to the
16 person doing the irrigating and the crop yields?

17 THE WITNESS: We do, by all means, but
18 that takes place in the irrigated agriculture.

19 THE SPECIAL MASTER: That's what I
20 wanted to know.

21 Q (By Ms. Sleater) How did you -- how did you calculate
22 the amount of grazing land required?

23 A Well, these are the calculations that we used to
24 determine the potential for expansion of the

25 merchant-direct-sleater

1 livestock industry on the reservation. There's --
2 we divided the year into four grazing seasons; a
3 four month winter period, a spring period of
4 about a month and a half, a summer period of
5 about three and a half months, and a fall period
6 of a couple of months, two and a half months I
7 think it was. And then we analyzed each of those
8 seasons separately. We found, by talking to
9 people on the reservation that the winter feed
10 was presently a constraint on the livestock
11 operations.

12 Q Could you explain that a little more?

13 A The availability of local feed for livestock was,
14 there's a shortage in some years, and that's one
15 reason the livestock industry isn't any larger
16 today than it is. With the irrigated agriculture
17 that is part of the testimony that will be heard
18 later, we determined that there will no longer be
19 a constraint during the winter season, there will
20 be plenty of harvested forage.

21 So we turned our attention more to the
22 other three seasons, the grazing season. We
23 found, by talking to the range operations officer
24 on the reservation, Bob Robinson, that the summer

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1 grazing lands were unutilized by about a third,
2 and that would permit a fifty percent increase
3 in the livestock operations. And ultimately
4 that's where our fifty percent increase is based on.

5 The spring/fall grazing lands are under-
6 utilized by about fifteen percent. So that will
7 support some increase. In addition, in the fall
8 we found that there will be available substantial
9 amounts of aftermath pasture, the crop residues,
10 after harvesting alfalfa and corn for grain, so
11 with that additional forage, we found that there
12 will be no constraint in the fall on the livestock
13 industry, at least not at the fifty percent level.

14 THE SPECIAL MASTER: Whose figures were
15 these actually, Mr. who?

16 A Bob Robinson gave us the figures on underutilization
17 of grazing land.

18 THE SPECIAL MASTER: And who is he again?

19 THE WITNESS: He's the range operations
20 officer at the BIA in Fort Washakie. He is in
21 charge of managing all the range units on the
22 reservation.

23

24

25

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1 MR. MERCHANT: So the other constraint
2 was the spring grazing season, and even with
3 the 15 percent under utilization, we found that
4 in order to support a 50 percent increase in
5 grazing, we would need somehow to provide
6 additional grazing capacity during that season.
7 It would need somehow to provide additional
8 grazing capacity during that season. We did
9 that by including in our livestock budget an
10 amount for range reseeding to increase the
11 carrying capacity of the range land.

12 Q And what does range reseeding involve?

13 A It involves clearing the sagebrush from the land
14 and planting some seed of grasses.

15 Q Native grasses, was this?

16 A Oh, crested wheat grass, intermediate wheat
17 grass -- I think generally
18 a mixture is common.

19 Q From your explanation you made a distinction
20 when you were developing your costs between
21 grazing land and aftermath pasture?

22 A Yes, we did.

23 Q In your model and consideration of the livestock
24 industry, was one of your parameters or consideration
25 merchant-direct-sleater

1 grazing on the areas which are proposed for
2 future irrigation development?

3 MR. MERRILL: Your Honor, at this time I'm
4 going to object ot Ms. Sleater's use of leading
5 questions. We are well beyond the preliminary
6 stages of this witness' examination, and I think
7 it is inappropriate on direct examination to
8 have one leading question follow the other.

9 THE SPECIAL MASTER: I am not sure I sus-
10 tain the charges of leading questions, but I
11 would say that Mr. Merchant is not bringing out
12 some questions to show he was competent to
13 testify to show what areas are potentially avail-
14 able for conversion to irrigated land. If he
15 doesn't know that, then the question is improper.

16 MS. SLEATER: Your Honor, what I meant to
17 get at, and perhaps I should rephrase it, is
18 what areas did you include as a part of your
19 grazing land in considering the livestock operation?

20 THE WITNESS: Well, I would like to point
21 to this plate over here, if I may.

22 THE SPECIAL MASTER: Let's move the other
23 one out of the way for now and put it down.

24 (Whereupon, the exhibit is moved
25 by Mr. Merrill.)

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1 THE SPECIAL MASTER: That's better.

2 MR. MERRILL: Can you see that?

3 THE SPECIAL MASTER: Thank you, Jim.

4 (Whereupon, U.S. Exhibit WRIR
5 C-14-A was marked for ident-
6 ification.)

7 MS. SLEATER: We'll mark for identification,
8 Your Honor, U.S. Exhibit WRIR C-14-A.

9 THE WITNESS: This Exhibit shows the general
10 areas on the Reservation used for livestock
11 grazing. Excluded are the reclamation areas, the
12 FIP areas, and the newly classified lands that
13 will be developed for project areas. Also
14 excluded are some oil fields that we excluded
15 just so their locations would be easily identified.
16 Actually, there is some cattle grazing in the
17 same area.

18 As you can see, the Reservation is used --
19 most of the Reservation is used for livestock
20 grazing. It is the predominate land use on the
21 Reservation.

22 Q (By Ms. Sleater) At this time perhaps you could
23 explain the other markings on that exhibit.

24 A Oh, yes. These dashed (indicating) lines mark
25 the boundaries of the various watersheds on the
merchant-direct-sleater

1 Reservation. North of the Owl Creek Mountains
2 here, the large Wind River watershed, the Little
3 Wind and the Popo Agie.

4 Q Were you responsible for having those lines
5 placed upon that map?

6 A Yes, I was.

7 Q Have you personally reviewed that exhibit?

8 A Yes.

9 Q Can you state that that fairly and accurately
10 represents the information portrayed thereon as
11 you have described it?

12 A Yes, I can.

13 MS. SLEATER: At this time, Your Honor, I
14 would like to ask that U.S. Exhibit WRIR C 14-A
15 be admitted.

16 VOIR DIRE EXAMINATION

17 BY MR. MERRILL:

18 Q Mr. Merchant, you testified you supervised the
19 placing of the lines of the watershed boundaries
20 on that map, is that correct?

21 A Yes, I did.

22 Q How did you determine the watershed boundaries?

23 A From a topographic map.

24 Q Did you do it personally?

25 merchant-direct-sleater
merchant-voir dire- merrill

- 1 A No.
- 2 Q Do you know who did?
- 3 A David May.
- 4 Q Did you supervise that work?
- 5 A Yes.
- 6 Q Did you consult with hydrologists or geologists
7 to determine if those were, in fact, the correct
8 watershed boundaries?
- 9 A No, not with either of those types of people.
- 10 Q How did you determine the location of the present
11 and future irrigated areas to be blocked out on
12 that map?
- 13 A From consulting with Stetson Engineers.
- 14 Q Would you describe in a little more detail how
15 you got that information, what information they
16 supplied you and in what form?
- 17 A Yes. They have maps showing the locations of
18 the future irrigated lands.
- 19 Q And did you personally transpose the future
20 irrigated lands over to that map to make sure
21 none of those were included in the livestock
22 area?
- 23 A I compared the two after the work had been done.
- 24 Q How did you compare the two?
- 25 merchant-voir dire-merrill

1 A By overlaying a map of the same scale showing
2 the new project areas.

3 Q How did you determine the locations of the
4 federal irrigation projects that are shown in
5 white, I suppose, on that map?

6 A Yes, that was done the same way.

7 Q Okay. And how about the historically irrigated
8 areas?

9 A I believe those lands are included in the FIP
10 map.

11 Q So these are all lands that were shown on some
12 other map that you overlayed on this map, is
13 that correct?

14 A Yes.

15 Q And that includes the area showing the future
16 lands?

17 A I believe it does, yes.

18 MR. MERRILL: Your Honor, we object to the
19 admission of Exhibit C-14-A on the grounds that,
20 number one, it is based on matters which are
21 not of evidence yet; that being location of any
22 potentially irrigable lands in the future. That
23 matter is not in evidence.

24 Secondly, that the witness has admitted he
25 merchant-voir dire-merrill

1 did not check the designation of the watershed
2 boundaries with a hydrologist or a geologist,
3 and yet did not personally put those lines on
4 the map himself, and therefore, he can't testify
5 they are necessarily accurate.

6 THE SPECIAL MASTER: The objection is
7 sustained as to this proposed exhibit showing
8 any of the proposed irrigable lands potentially
9 set aside for additional irrigation. I don't
10 think it is competent to show that.

11 It is competent to show what the livestock
12 range area of the Reservation is, and for that
13 purpose it will be admitted, and for that pur-
14 pose only.

15 MS. SLEATER: Thank you, Your Honor. That
16 was the purpose of the exhibit.

17 (CONTINUED) DIRECT EXAMINATION

18 BY MS. SLEATER:

19 Q Mr. Merchant, at this time I am going to show
20 you what has been marked for identification
21 as U.S. Exhibit WRIR C-15, and ask you if you
22 can identify it. I think it will facilitate
23 picking up from where we left off.

24 A Yes, this table summarizes the economic costs
25 merchant-direct-sleater

1 associated with the livestock enterprise used
2 in our analysis of expansion of the livestock
3 industry on the Wind River Reservation.

4 Q Were you responsible for the preparation of
5 that table?

6 A Yes, I was.

7 Q I note the first group on the table seems to
8 correspond with the information displayed on
9 U.S. Exhibit WRIR C-14. Is that true?

10 A Yes. That information is simply transcribed
11 from the blown up table to this Exhibit C-15.

12 Q Are all of the costs on this Exhibit expressed
13 opportunity costs?

14 A Yes.

15 Q I believe we were in the area of aftermath
16 pasture?

17 A Yes. That is calculated based upon determining
18 the availability of aftermath pasture from the
19 newly irrigated project lands, and allocating
20 that to the livestock that we think is feasible
21 to be on the Reservation.

22 Q And how do you allocate aftermath pasture to
23 livestock?

24 A Well, we simply assumed that it would be available
25 merchant-direct-sleater

1 equally to all the operations on the Reservation,
2 and took a porportionate share of the available
3 aftermath pasture.
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1 THE SPECIAL MASTER: May I interject one
2 question?

3 MS. SLEATER: Yes.

4 THE SPECIAL MASTER: Would you give me your
5 definition of aftermath pasture?

6 THE WITNESS: Yes, it's crop residue left
7 after harvesting an irrigated crop.

8 THE SPECIAL MASTER: Now existing?

9 THE WITNESS: Oh, no.

10 THE SPECIAL MASTER: Well, now, let's get it
11 straight. What is your definition of aftermath
12 pasture?

13 THE WITNESS: The aftermath pasture --

14 THE SPECIAL MASTER: As it pertains to Wind
15 River Indian Reservation.

16 THE WITNESS: As used in this budget, it's
17 the crop residue left after harvesting irrigated
18 crops in the newly irrigated project areas on the
19 reservation.

20 THE SPECIAL MASTER: Are those newly irri-
21 gated project areas now in existence?

22 THE WITNESS: No, they are not.

23 THE SPECIAL MASTER: You project and contem-
24 plate those on what basis of lands that are avail-
25 able? Do you have a basis for proposed irrigable

6-2

1 lands?

2 THE WITNESS: The basis was provided by
3 Stetson Engineers and by David Dornbusch, who
4 are evaluating the feasibility of those --

5 THE SPECIAL MASTER: They gave you informa-
6 tion -- Did they give you information that you
7 cranked into this figure?

8 THE WITNESS: Yes, that's right, sir.

9 THE SPECIAL MASTER: All right.

10 Q. (By Ms. Sleater) When you were making a propor-
11 tional allocation, did you take into account vary-
12 ing types of crops?

13 A. Yes, the aftermath pasture used here and used also
14 in the irrigated agriculture budget reflects only
15 the grazing of aftermath from alfalfa hay and corn
16 harvested for grain.

17 Q. How did you calculate the cost for the aftermath
18 pasture?

19 A. Well, first of all, to calculate the available
20 pasture, you first had to obtain from Stetson
21 Engineers and David Dornbusch the acres of the
22 various crops that would be anticipated in the
23 new project areas. And then, once we had those
24 acres, we applied factors of 1.5 AUM's per acre

25 merchant - direct - sleater

1 for alfalfa hay -- that's animal unit months --
2 and 1.6 AUM's per acre for corn harvested for
3 grain. So those calculations gave us the after-
4 math that would be available for consumption.

5 And then, as I said, we allocated those
6 evenly across the livestock industry on the
7 reservation to calculate a proportionate share
8 of that for each typical ranch that we've used
9 in this analysis. Then to cost that, we used a
10 survey done by the branch of the Department of
11 Agriculture, the Economic Cooperatives and Ex-
12 tension Service -- or Statistical -- Economic
13 Statistics Cooperative Service, ESCS. This sur-
14 vey was of Wyoming operators, and it asked them
15 the price paid for grazing land, and we normalized
16 that price and used that in this analysis.

17 Q You said you received your original information
18 regarding acreage and crop economics from Stetson
19 Engineers and David Dornbusch. Is it usual for a
20 person in your profession to rely on information
21 from other experts?

22 A Yes, it is.

23 Q Could you explain what an animal unit month is?

24 A Yes. It's the grazing requirement for one animal

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1 unit for one month, and an animal unit is a
2 1,000 pound cow.

3 Q What happens when the cows aren't 1,000 pounds?

4 A Well, our cows are roughly 1,000 pounds, so we
5 use one animal unit for that, but for the other
6 types of animals -- the calves, yearlings and
7 bulls -- we had to adjust the animal units per
8 animal to figure out a composite number of animal
9 units for the ranching operation because it's
10 different from the number of animals.

11 Q And how did you figure out that composite?

12 A That basic information was found in the Gordon
13 Kearn model of the livestock operation.

14 Q Did you make any adjustments to that?

15 A I believe we did make one adjustment, and that
16 is the Gordon Kearn model has animal units defined
17 for various animals at two points over the year.
18 And, because the calves and yearlings gain weight
19 over the year, their animal unit designation would
20 change during the year. So I believe we did formu-
21 late an intermediate number of animal units per
22 animal for those two animals as they grew over the
23 year.

24 Q What other costs did you include?

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1 A. Well, the range improvement costs I have des-
2 cribed.

3 Q. That was for reseeding?

4 A. Yes, yeah. There are several smaller cost ele-
5 ments included in the budgets that are based on
6 information in the Gordon Kearl study, and we
7 have updated those prices to reflect a normaliz-
8 ing procedure and also to bring them more up to
9 date because his prices were based on 1972 to
10 '77 averages, and we wanted a more current and
11 also more stable price. So we used a 1979 nor-
12 malized price.

13 Q. And how did you do that?

14 A. The Department of Agriculture published statis-
15 tics on prices over time, and we used those
16 statistics to normalize the prices.

17 Q. I ask you to review what has been marked for
18 identification WRIR C-15 for a moment, please.

19 (Pause.

20 THE SPECIAL MASTER: Do you mind if I correct
21 the spelling in the heading and transpose the "o"
22 and the "c" on "economic"?

23 THE WITNESS: I would appreciate it if you
24 would.

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1 Q (By Ms. Sleater) Do those figures accurately
2 represent the costs by various headings?

3 A The economic costs by item, yes, they do.

4 Q Is it your opinion that those are the annual
5 economic costs of the livestock enterprises
6 you analyzed?

7 MR. MERRILL: Your Honor, I'm going to ob-
8 ject to that. We are getting to the point where
9 counsel is asking leading questions to elicit
10 the professional opinions of the witness, and I
11 think in a case of this nature that's improper
12 examination.

13 THE SPECIAL MASTER: Well, the witness has
14 stated that the results of his study are these
15 figures projected for these purposes; is that
16 correct?

17 THE WITNESS: Yes.

18 THE SPECIAL MASTER: You are not testifying
19 that you have personal knowledge of a 250-cow-
20 calf-yearling ranch, but that your study was based
21 on that?

22 THE WITNESS: Yes.

23 THE SPECIAL MASTER: While I have interrupted,
24 let me ask a few more questions.

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1 There is no land tax item in this matter,
2 is there, included in this item called general
3 overhead, all other operating costs?

4 THE WITNESS: No, we removed the taxes from
5 this budget because in an economic analysis taxes
6 aren't an appropriate cost.

7 THE SPECIAL MASTER: Do you feel that inter-
8 est on operating costs is an appropriate cost in
9 this case?

10 THE WITNESS: Yes, I do.

11 THE SPECIAL MASTER: Where there is no mortgage
12 on the land?

13 THE WITNESS: Yes, I do.

14 THE SPECIAL MASTER: Why?

15 THE WITNESS: Because interest components --
16 interest is in two places here. You will see
17 interest on operating costs, and then a few lines
18 down there's an interest -- actually three places
19 -- interest on machinery and equipment, and below
20 that interest on cattle inventory.

21 THE SPECIAL MASTER: Where did you have your
22 banking experience?

23 THE WITNESS: Well, again, this is different
24 from a financial analysis. It doesn't necessarily
25 reflect the cash cost to a single operator. This

1 represents the economic costs of the interest,
2 and the reason the interest is appropriate in
3 this case, even if the cattle herd is already
4 paid for and the equipment is already paid for
5 -- interest is an appropriate expense because
6 it reflects the fact that an operator always
7 has the alternative of liquidating his operation,
8 and in order to continue the operation, he has
9 to forego that opportunity for, say, another year,
10 and the interest represents that fact, that he
11 always has the opportunity of cashing out his
12 operation and we feel --

13 THE SPECIAL MASTER: Yes, but you have added
14 \$15,000 of interest cost on a \$16,000 capital cost?

15 THE WITNESS: No.

16 THE SPECIAL MASTER: From the beginning of
17 time there has been strong moral laws against
18 that type of a charge.

19 THE WITNESS: \$1500, I believe. I'm sorry.
20 I don't know to which --

21 THE SPECIAL MASTER: Your interest on the
22 cattle industry amounts to \$13,000?

23 THE WITNESS: Yes, the cattle inventory is
24 worth about \$190,000.

25 THE SPECIAL MASTER: So if your total

1 economic cost is \$62,600, there is included at
2 least a \$16,000 interest cost. I find that
3 rather hard to stomach, frankly.

4 But the question is -- No, you haven't
5 offered this. All right. Go ahead.

6 Q (By Mr. Sleater) Mr. Merchant, what interest
7 rate did you use in your calculations?

8 A We used an interest of 7 1/8 percent.

9 Q And why did you do that?

10 A We used that because in an economic analysis
11 we should use a discount rate that reflects the
12 opportunity cost of using resources for a parti-
13 cular project, and various sources indicate that
14 the proper discount rate is anywhere from 2 per-
15 cent to 4 percent, and in this case we found
16 that 7 1/8 percent from a recognized source.
17 For this purpose, we felt the operation was
18 clearly feasible, so we used a conservative
19 number. We didn't feel it was appropriate to
20 explicitly analyze what the appropriate dis-
21 count rate should be. It's probably lower than
22 this, but at the outside, this is appropriate.

23 * * * * *

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1 Q (By Ms. Sleater) (Continued) Okay. Does U.S.
2 Exhibit WRIR C-15 reflect the value of the inventory?

3 A Yes, it does.

4 Q And in what way?

5 A As I have explained a little bit, an operator has
6 the option of selling his operation before the
7 winter feeding season, so he doesn't have to
8 incur those costs. For example, he can sell all
9 his cattle, some for market, the pregnant cows
10 and heifers to another operation. He could
11 completely liquidate his holdings and he'd have
12 the returns a year earlier than if he were to
13 continue to operate for another year and sell
14 additional cattle the next fall.

15 The fact that he always has this option of
16 selling out his inventory is a real economic cost,
17 and we feel it's appropriate to include that cost
18 in this analysis.

19 In a financial analysis, if he owned that
20 livestock free and clear, this wouldn't be an
21 appropriate cost to include, but in an economic
22 analysis we feel it is.

23 Q And what, in your professional opinion, are the
24 total economic costs for this operation?

25 merchant-direct-sleater

1 A \$62,600.

2 MS. SLEATER: At this time, Your Honor, I
3 would like to move U.S. Exhibit WRIR C-15 into
4 evidence.

5 THE SPECIAL MASTER: Mr. Merrill.

6 MR. MERRILL: Your Honor, before I voir
7 dire this exhibit, I'm going to make an objection
8 that's long been simmering, and which we did not
9 raise yesterday because we never reached the point
10 where the failure of the United States to comply
11 with the ten day rule for serving exhibits has
12 prejudiced the preparation on our side to cross
13 examine Mr. Merchant, and the preparation of our
14 case in chief.

15 I would like to make the record clear that
16 that failure to raise the ten day objection
17 yesterday was for purposes of expediting the case,
18 and the fact that we were not prejudiced, and the
19 fact that we did not object should not be construed
20 as a waiver of the ten day rule. I raise the
21 objection now because a copy of WRIR C-15 was
22 hand delivered to me last night by Mr. Echohawk
23 at, I believe, 6:00. If we're running on a ten
24 hour rule, then, fine, they made it. But I

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1 don't think that's what the pre-trial order says.
2 I think the pre-trial order requires that all
3 exhibits be served ten days in advance, and we
4 have now reached the point where it has
5 prejudiced the State of Wyoming.

6 We obtained some of the information displayed
7 on this exhibit through discovery, but there has
8 been a modification to the exhibit in the two weeks
9 that have elapsed since I last took Mr. Merchant's
10 deposition. And I believe, based on the failure
11 to comply with the ten day rule in this, that this
12 particular exhibit, which was not received until
13 last night, shouldn't be admitted into evidence.

14 If you overrule my objection based on the
15 ten day rule, I'd like to voir dire Mr. Merchant,
16 but I thought I'd find out your ruling and save
17 him that discomfort.

18 MS. SLEATER: If I could address this
19 issue. As a trial attorney who has been involved
20 in cases and Mr. White has been involved in many
21 cases, as noted previously, you cannot always
22 have all of your exhibits prepared ahead of time.
23 In this instance we previously provided the
24 State with this information, as Mr. Merrill noted.

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1 However, yesterday there was a change in the
2 exhibit. The change occurred yesterday, the
3 exhibit was prepared yesterday and the information
4 was given to the State of Wyoming upon preparation
5 of the new exhibit.

6 THE SPECIAL MASTER: What was the change
7 yesterday, a substantive change in the context of
8 this exhibit?

9 MS. SLEATER: It was a change in the numbers,
10 so I would say that would be substantive.

11 THE SPECIAL MASTER: I'll have to hold
12 that to the ten day rule. It really means you
13 ought to give the other side, nine days or eight
14 days necessary for follow-up in the numbers.

15 MS. SLEATER: Your Honor, I would like
16 to explain that this change occurred yesterday,
17 these numbers were not changed until yesterday,
18 through information that could not have been
19 gotten, and if you are going to make this ruling,
20 I should demand the same thing from the State of
21 Wyoming, and I would think that based on previous
22 representation of Mr. White, that's not what they
23 want. However, if they would prefer that there
24 be no exhibits used that are changed the night

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1 before the testimony, when somebody finds a number,
2 mistake or a transposition, that's fine.

3 THE SPECIAL MASTER: Well, now I just
4 asked you if the change in these numbers was
5 substantive, and now you're saying they're mere
6 transpositions. I would just change a mere
7 letter transposition myself, and I don't intend
8 to have ten days in which to prove that economics
9 is spelled the way I just spelled it. Now, you're
10 saying these are also transpositions, I'm beginning
11 to believe what you said first was correct, there
12 was a substantive change in the figures. And there
13 were -- and if you're all serious about the ten
14 day rule, which all of you concurred in on the
15 pre-trial order, I've got to enforce it, I have
16 no recourse.

17 MR. MERRILL: We're serious about the
18 pre-trial order, we're willing to live by it.

19 THE SPECIAL MASTER: I'll hold that the
20 United States Exhibit C-15 is not admissible for
21 one reason only so far, the other foundation has
22 been laid for it, and it merely -- it offends the
23 pre-trial order regarding ten days notice to
24 other adverse parties, and therefore, can't be

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1 admitted at this time.

2 MR. ROGERS: Your Honor.

3 THE SPECIAL MASTER: Yes, Mr. Rogers.

4 MR. ROGERS: May I speak on this issue?

5 The pre-trial order, as I understand it -- I don't
6 have it pulled out -- but it is the requirement
7 that the exhibits be exchanged with one exception,
8 be exchanged ten days in advance of trial, not
9 ten days in advance of their being offered into
10 evidence. I would suggest if that rule is rigidly
11 enforced in the trial we are all going to be in a
12 position including the State of Wyoming and
13 certainly the Tribes, in a position of not being
14 able to present a good part of our evidence. I
15 know it's not directly at the issue at the moment
16 in this particular exhibit, but I think we ought
17 to be considering the affect of the ten day rule
18 as to whether or not it should be -- at least
19 not be modified to cover the situation of ten
20 days in advance of its use. The one exception
21 I refer to was in the case -- Well, there are
22 exceptions in the language, I think, unless
23 the parties agree or certain circumstances
24 required as an exception to the ten day rule in

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1 advance of trial. The other exception was in the
2 case of private parties who had, who could furnish
3 their exhibits ten days in advance of the witnesses
4 appearing.

5 THE SPECIAL MASTER: Only for the purpose
6 of affects.

7 MR. ROGERS: On the impact, yes, Your
8 Honor.

9 THE SPECIAL MASTER: On impact.

10 MR. ROGERS: It seems to me in the
11 situation we find ourselves where obviously some
12 work on the case is still going on with experts,
13 and I can certainly state that is true with
14 tribal witnesses, and I fully anticipate it's
15 going to be true with State's witnesses that we
16 ought to alter that rule in any event regardless
17 of how you rule here, to providing exhibits ten
18 days in advance of their being offered into
19 evidence.

20 THE SPECIAL MASTER: It's something
21 for all of you to think about, and I thank you
22 for your observations, Mr. Rogers.

23 First let me read the present order. It's
24 Item 7, Paragraph 6 of the Pre-trial Order, And

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1 it states "That the parties by mutual agreement
2 will submit copies of the exhibits to counsel of
3 the major parties at least ten days before commencement
4 of trial unless otherwise agreed, or persuasive
5 reasons are shown for the inability to present
6 exhibits within the ten day rule."

7 Now, if you had given a copy of this a day
8 or two -- ten days ago, but you found some
9 mathematical errors in extension or tabulations
10 or totals, that's understandable. If there is a
11 formal correction or something that the time itself
12 necessitated, that's understandable, and I think
13 would be exception that could be made under this,
14 under the persuasive reasoning clause. But I'm
15 going to hold firm on this one, and that Mr. Rogers,
16 if counsel wishes to have a little conference and
17 mutually agree to modifying that rule, that's fine
18 with me, but right now let's let it stand on the
19 trial.

20 So I will rule that this is inadmissible at
21 this time. And I'll also move for a fifteen minute
22 break for the reporters. That will be 10:35, we'll
23 readjourn.

24 (Thereupon a 15 minute recess
25 (was taken.)

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1 THE SPECIAL MASTER: Ladies and gentlemen,
2 we are ready to proceed.

3 Yes, Mr. Fillerup?

4 MR. FILLERUP: I would like to register an
5 objection to this exhibit.

6 THE SPECIAL MASTER: Do you know it has
7 already been ruled inadmissable?

8 MR. FILLERUP: Yes, but for the record I
9 would also like to enter another objection, and
10 that is I just feel that there is no proper
11 foundation, and that's the basis for the
12 objection. It is too theoretical. There is
13 no proper foundation laid for the additional
14 A.M.U.s available that they are talking about.
15 There is no proper foundation laid for the
16 availability of the aftermath pasture; the
17 projected costs and so on are all just too nebulous
18 and too theoretical to be a proper basis for
19 anything.

20 There is no foundation for the information
21 that goes into this calculation. It is just
22 simply too theoretical.

23 THE SPECIAL MASTER: Mr. Echohawk?

24 (Off-the-record discussion.)

25 MR. ECHOHAWK: Mr. Master, during the break

1 I checked with the people who have -- our
2 experts who have the photos that the State of
3 Wyoming requested. I was just informed that
4 they can have them reproduced and shipped out
5 probably by Monday at a cost of \$5,000, and
6 Mr. Merrill says that's --

7 THE SPECIAL MASTER: That is not my
8 concern. You should be concerning yourself
9 with Mr. White and Mr. Merrill on that. I
10 appreciate that.

11 MR. MERRILL: That is correct, Your Honor.
12 We appreciate Mr. Echohawk's efforts on our
13 behalf to get that information to us.

14 THE SPECIAL MASTER: That's fine. Ms.
15 Sleater?

16 MS. SLEATER: Your Honor, I would like at
17 this time to interrupt my examination and make
18 a brief statement. There have been some objections
19 raised due to the fact that the testimony
20 relating to future irrigable lands has not yet
21 been presented. Well, as Your Honor is quite
22 aware, under the Wyoming Rules of Evidence an
23 expert can rely on another expert's opinion or
24 other information whether or not it is in
25 evidence.

1 I feel at this time the record should
2 reflect that the United States was, in fact,
3 anticipating beginning this trial with the
4 irrigated agriculture portion of the case.
5 However, when we were advised by Mr. White that
6 his schedule was such that trial would have to
7 be one week, off a week, on a week, off a
8 month, due to the bulk of the evidence in that
9 portion of the case and a large number of
10 witnesses and the fact that it is not only a
11 very important part of the case for the United
12 States, but also for the Tribes, and a very
13 involved part of the case such that all of the
14 witnesses should come on in a normal flow to
15 enable persons to remember what is going from
16 one step to the next step, we felt it was not
17 possible for us to put on this case until we
18 got to the point where there were blocks of time
19 set aside for the convenience of everyone to
20 allow everyone to understand what was going on.
21 That is why that portion of the case has not been
22 on.

23 It was not of the United States' doing at
24 all, and I just want the record to clearly reflect
25 that so there is no misunderstanding here.

1 MR. MERRILL: Your Honor, may I briefly
2 respond to that?

3 I appreciate Ms. Sleater's predicament
4 and her desire to put on her case concerning
5 practicably irrigable acreage in one long
6 continuous block of time, but I think, as the
7 Court is well aware, the trial of this matter
8 was originally scheduled in October of 1980,
9 and in the spring of 1980 the Tribes insisted,
10 in fact objected, to a continuance of that trial
11 date until December 1st. Based on that later
12 continuance, Mr. White and myself, who both have
13 other trial responsibilities, accepted other
14 commitments to be in other parts of the country
15 throughout this period of time.

16 Then the Tribes came in shortly before
17 December 1st, and you will recall, and moved for
18 a seven-week continuance. Now, we don't intend
19 to break up Ms. Sleater's case, but I would like
20 to have the record reflect we have reset matters
21 in other cases two and sometimes three times to
22 adjust for the schedule of this case, and when
23 Ms. Sleater asked us in a private conference
24 whether it would be possible to clear out, for
25 example, the month of February, we felt it would

1 be simply inappropriate and unfair to the courts
2 and counsel to whom we are engaged with in
3 other cases to ask them again to reset the
4 hearings at the behest of this case.

5 THE SPECIAL MASTER: I appreciate the
6 particular difficult problems that all of you
7 face in a difficult case, and I will consider
8 that in my rulings on these various matters,
9 and the fact it overlaps in one exhibit to material
10 that might not have appropriately been introduced
11 before it. Let us proceed.

12 I would only say that in the recesses, if
13 Counsel want to get together and agree to
14 stipulate to some kind of acceptance or renewal
15 of objections on C-15, I would welcome it. If
16 not, I would suspect it would be offered in a
17 week or ten days, at which time the ten days
18 time is up after I dispose of other objections.

19 MR. MERRILL: Should that be the case, Your
20 Honor, I would reserve my right to voir dire
21 on that exhibit at the time it is appropriate.

22 MS. SLEATER: Your Honor, at this time I
23 would like to state for the record that on Friday,
24 January 16th, this table was available in my
25 office in the form -- I'm corrected, Mr. Merrill

1 and Mr. White were both there on another matter,
2 and when I said, "Do you want these exhibits now,"
3 they said, "Oh, in view of these other things,
4 why don't you hold off and give it to us some
5 time at the later depositions." So they did not
6 get the original within ten days of the trial,
7 which would have been January 16th, but that was
8 their agreement.

9 Over the course of the weekend through
10 checking his calculations and going over things,
11 Mr. Merchant noticed two areas that I am going to
12 have him explain that were changed. This
13 exhibit was retyped yesterday to reflect Mr.
14 Merchant's work over the weekend, and when avail-
15 able, was given to the State of Wyoming. Now,
16 if Your Honor is going to rule that that is a
17 violation of the ten-day rule when they were pro-
18 vided the table with the basic information, I
19 think that that ruling should be explicit and
20 clear at this time so it can apply to all materials.

21 THE SPECIAL MASTER: Ms. Sleater, I merely
22 asked if the changes were substantive, and I
23 thought your answer was, yes, they were, and then
24 I ruled and then you later said, no, they were
25 merely clerical and di minimus, and I thought I

1 would go with your first answer and not your
2 second.

3 MS. SLEATER: Your Honor, I believe --

4 THE SPECIAL MASTER: Just a minute, please.

5 Since the objection was raised, I sustained
6 it on the ten-day rule. Now, if you want to
7 argue -- relay the point a little bit more and
8 wish to offer a comparison of what the first
9 exhibit was compared to what it is now, I suppose
10 I could look at it and make a determination of
11 whether the corrections were substantive or not
12 enough to effect excluding information from being
13 admitted.

14 MS. SLEATER: Thank you, Your Honor.

15 THE SPECIAL MASTER: I don't believe it is
16 all that important, but I think if we are going
17 to have a ten-day rule, we have to live by the
18 ten-day rule and specifically the exception was
19 made. Now, the rule provides for exceptions, and
20 if Counsel doesn't want to admit that, then you
21 can produce the copy -- he can tell you how to
22 try your case, but I would maybe produce a copy
23 of the other one and make the changes on it, and
24 it may be admitted. I don't know how to tell you
25 to proceed, but I know I have got to sustain

1 the objection on the ten-day rule factor, and I
 2 may well rule on some objections as to other
 3 things that I am not satisfied with, let alone
 4 private counsel -- or counsel for other parties
 5 regarding the fact that this annual economics
 6 cost doesn't reflect benefits; that if there is
 7 aftermath pasture taken in charge against the
 8 operation, then there ought to be credits to the
 9 operation from the crops taken from the aftermath
 10 field, and there isn't on this exhibit, and there-
 11 fore, I don't think it constitutes an accurate
 12 representation of the economic costs of running
 13 that operation.

14 Do you follow me, Mr. Merchant?

15 THE WITNESS: Sir, the benefits are reflected
 16 in another budget.

17 THE SPECIAL MASTER: Well, there ought to be
 18 asterisks on this one or something indicating there
 19 is some credits due to this sixty two six on the
 20 bottom line because that is not an accurate
 21 bottom line now because it means the credits are
 22 not reported, in my opinion. I don't know.

23
 24
 25

* * * * *

9-1 V-e

1 THE SPECIAL MASTER: I tried to be very,
2 very considerate and liberal in rulings so that
3 nearly everything offered can be in evidence
4 and from it we can draw all of our conclusions.
5 This is a theoretical exhibit anyway. It's not
6 a factual experience as a result of an actual
7 operation, but at the same time I feel I have
8 a duty to follow the pre-trial order that we all
9 agreed to in setting up the ground rules for the
10 hearing.

11 MS. SLEATER: At this time, Your Honor,
12 I would like to hand to Mr. Merchant what
13 I've marked for identification U. S. Exhibit 15-A.

14 (Discussion off the record.)

15 MS. SLEATER: Excuse me. Let the record
16 reflect that this is U. S. Exhibit WRIR C-15A.
17 Thank you, Mr. Merrill.

18 MR. MERRILL: You're welcome.

19 MS. SLEATER: I'm afraid I only have one
20 copy of this because I just pulled it out of the
21 file at this time.

22 Q. (By Ms. Sleater) I ask you if you could identify
23 what has been marked for identification as U. S.
24 Exhibit WRIR C-15A?

25 merchant - direct - sleater

1 A. Yes, I can. That Exhibit is a table showing the
2 economic costs associated with the livestock
3 enterprise that might be expected in the future
4 on the Wind River Indian Reservation. This table
5 reflects our findings as of a few weeks ago.

6 However, since that time, we've made one
7 substantive change in the table which resulted
8 in several numbers being changed, and we found
9 one error of one dollar that has been corrected.

10 Q. And could you please indicate what changes have
11 been made specifically between Exhibit 15 and
12 Exhibit 15A?

13 A. Yes, the aftermath pasture entry was changed
14 to reflect a different amount of irrigated
15 crop land that was the basis for the calculation.

16 As I described earlier, this is simply
17 a share of the total amount of aftermath pasture
18 that would be available from the future irrigated
19 crop land on the Reservation. I believe the
20 number which was the basis for the earlier
21 calculation was changed by Stetson Engineers
22 in the meantime, and I changed my number to reflect
23 that change.

24 Q. What was the original number as shown on Exhibit 15A?
25 merchant - direct - sleater

1 A. \$3,334.

2 Q. And what is the number as shown on Exhibit 15?

3 A. \$3,255.

4 Q. Are there any other changes or discrepancies
5 between 15 and 15A?

6 A. Yes, the subtotal titled "Total Grazing" changes
7 as a consequence of the change I just described.

8 Then the line item called interest on
9 operating costs changes by \$3 to reflect the
10 lower amount of expenditures incurred in operating
11 the enterprise.

12 Q. And what is that figure?

13 A. The old figure is \$1,593. The new figure is
14 \$1,590, and it's associated subtotal changes
15 as well as a result.

16 MR. MERRILL: Your Honor, I'm going to ob-
17 ject to this line of questioning and ask that
18 the witness' responses concerning Exhibit WRIR
19 C-15A be stricken from the record.

20 What you are seeing going on is an attempt
21 to backdoor in the new information by modifying
22 an exhibit that was provided to the State of
23 Wyoming through discovery proceedings two weeks ago.

24 That is tantamount to letting the new exhibit

25 merchant - direct - sleater

1 in in violation of the ten-day rule, and I don't
2 believe it ought to be permitted.

3 MS. SLEATER: Your Honor, at this point
4 I would like to know whether the State of Wyoming's posi-
5 tion is that experts are to stop work ten days
6 before trial to make sure that any new facts, new
7 information, or refinements are not to occur
8 before trial?

9 THE SPECIAL MASTER: Let me ask, Mr. Merrill,
10 ten days ago you did have indeed a copy of Table
11 3 and its breakdown as contained in C-15 except
12 that there was about a \$150 item higher on the
13 aftermath pasture and a \$3 difference on the total
14 grazing line. Are those the only two differences
15 between the two exhibits?

16 MR. MERRILL: Your Honor, I haven't had a
17 chance to compare the two in detail, but I have
18 noticed the other obvious change which caught my
19 eye was the interest on cattle inventory which
20 changed by more than \$3,000 between these two
21 exhibits.

22 THE SPECIAL MASTER: What is the interest
23 on cattle inventory on 15-A?

24 THE WITNESS: \$13,413.

25 merchant - direct - sleater

1 THE SPECIAL MASTER: That change indicates
2 only \$1 to me rather than \$3,000.

3 MR. MERRILL: I'm afraid I was looking at
4 the wrong exhibit. If I could approach the witness
5 and see the exhibit that he is referring to, I
6 would be happy to correct my statement.

7 THE SPECIAL MASTER: Of course.

8 MR. MERRILL: Your Honor, I stand corrected.
9 I apologize to the Court.

10 THE SPECIAL MASTER: No problem.

11 MR. MERRILL: The corrections are described
12 by Ms. Sleater and Mr. Merchant.

13 THE SPECIAL MASTER: If that is your
14 only oversight in this trial, you are a lucky man.

15 MR. MERRILL: You're right.

16 THE SPECIAL MASTER: In view of what
17 Ms. Sleater brought up, I really can't in good
18 conscience say that those differences would be
19 less than a persuasive reason to make the
20 exception under the ten-day rule. I don't
21 believe that there is a violation of the ten-
22 day rule if these are the only differences.

23 I think you had the exhibit, and the
24 difference of \$1 in interest and the difference of
25 merchant - direct - sleater

1 MR. MERRILL: Well, Your Honor, --

2 THE SPECIAL MASTER: I beg your pardon,
3 C-15.

4 MS. SLEATER: C-15.

5 THE SPECIAL MASTER: And not C-15A.

6 MS. SLEATER: You can admit them both,
7 if you'd like.

8 THE SPECIAL MASTER: No, I'll admit
9 C-15, and you're going to withdraw C-15A?

10 MS. SLEATER: If Your Honor will prefer,
11 I will do so.

12 MR. MERRILL: Your Honor, before you admit
13 C-15, I'd like --

14 THE SPECIAL MASTER: You'd like your
15 voir dire.

16 MR. MERRILL: And I suppose some of the
17 private counsel as well.

18 THE SPECIAL MASTER: All right. Please
19 proceed with your voir dire.

20 VOIR DIRE EXAMINATION

21 BY MR. FILLERUP:

22 Q. Mr. Merchant, you have referred to a number of
23 sources from which you used as a basis for you
24 projections, one of which is the grazing capacity

25 merchant - voir dire - fillerup

1 of this grazing land that you've identified in
2 the green color. Have you made any independent
3 research as to the grazing capacity of these
4 lands?

5 A. I have by discussing those facts with the
6 range operations officer on the Reservation.

7 Q. And who are those people?

8 A. Primarily Bob Robertson; the lands operations
9 officer, Mr. Rich Harbour, also provided some
10 information.

11 Q. That's the only reference you have for that
12 source of information?

13 A. Yes, sir.

14 Q. You made some assumptions with reference to
15 the alfalfa, hay and the corn silage. You
16 stated that you just used half and half?

17 A. Yes.

18 Q. That's strictly an assumption on your part?

19 A. No, that's based on conversations with the people
20 I mentioned; Rich Harbour, Bob Robertson and
21 an operator on the Reservation, Louis Twichell,
22 also based on conversations with other operators
23 in the area who presently feed silage.

24 Q. You don't know then the actual amount of hay
25 merchant - voir dire - fillerup

1 consumed and the actual amount of corn silage?

2 A. On the Reservation, the total?

3 Q. Yes, sir.

4 A. No, sir, I don't know that. That wasn't necessary
5 for what I was doing.

6 MR. FILLERUP: I have no further questions.

7 THE SPECIAL MASTER: Further questions?

8 VOIR DIRE EXAMINATION

9 BY MS. YONKEE:

10 Q. I have a question, and that is on your
11 alfalfa, hay and your corn silage, are you
12 considering that this is not being grown on
13 any of this land? In other words, the purchase
14 has to be made entirely from some other source?

15 A. That's correct. For the purposes of the
16 analysis in this case, we separated the irrigated
17 agriculture analysis from that of the livestock
18 enterprise, so we have two separate enterprises
19 and we recognize, of course, they're integrated
20 on many operations, but for the purpose of this
21 analysis we constructed two separate analyses.

22 Q. I see. And there is no management cost here or
23 cost of --

24 A. Well, you'll see that I characterized the difference
25 merchant - voir dire - yonkee

1 between the difference of the returns from the
2 sale of livestock and the economic costs as
3 returned to operator and labor, so that's where
4 that comes from.

5 Q. And economic cost is not considered as in an
6 operator?

7 A. Pardon me now?

8 Q. Labor is not considered in an economic cost?

9 A. It is an economic cost, but I've -- what I've
10 done is compare the residual between profits --
11 well, the -- in the profit from the enterprise,
12 if you will, I've characterized that as a return
13 to labor and operator. So the cost associated
14 with labor are found in that profit.

15 MS. YONKEE: Thank you.

16 THE SPECIAL MASTER: Mr. Webster.

17 VOIR DIRE EXAMINATION

18 BY MR. WEBSTER:

19 Q. I was interested in a few things, the model
20 generally that has developed during this particular
21 piece of evidence or graph that you're trying to
22 get admitted into evidence. Actually, how many
23 cow-calf, 250 cow cow-calf operations are there
24 on the Reservation now?

25 merchant - voir dire - webster

1 A. Well, there's about 25,000 head on the Reservation,
2 about a third of those are on the Arapahoe ranch,
3 and the remainder is in operations of approximately
4 that size, some are smaller, a few are bigger than
5 that, but that's in the size range that is found
6 on the Reservation.

7 Q. How many would that be then?

8 A. Well, that would be approximately 40 operations,
9 I suppose.

10 Q. And there about, I understand that they probably
11 vary, but they actually have about 40 cow cow-calf
12 operations on the Reservation other than the
13 Arapahoe ranch; is that right?

14 MR. ECHOHAWK: Objection, Your Honor,
15 I believe this is cross examination not voir
16 dire.

17 MR. WEBSTER: It's with regard --

18 THE SPECIAL MASTER: Not quite. Rephrase
19 it a little bit.

20 MR. WEBSTER: Pardon me?

21 THE SPECIAL MASTER: You can rephrase it
22 slightly an meet that objection.

23 Q. (By Mr. Webster) With regard to the exhibit,
24 the basis for the exhibit on 250 cow cow-calf
25 merchant - voir dire - webster

1 operations are existing operations on the
2 Reservation?

3 A. The basis for the exhibit is the survey performed
4 by Stevens, and later reported by Kearn of
5 operators in the Mountain Valley Cattle Ranching
6 area. And confirmed by discussions with people
7 on the Reservation, that this was a reasonable
8 representation of the parameters, the characteristics
9 of the livestock operation.

10 I'm not saying that all the operations on
11 the Reservation were this size.

12 Q. I understand. With regard to your proposed
13 exhibit, you indicate certain selling costs
14 such as marketing, \$1,176; transportation,
15 \$425. Where did those come from?

16 A. The marketing charges are from the Riverton
17 Livestock Commission Company, and then normalized.

18 The transportation costs are from a
19 St. Clair study, a research bulletin, research
20 journal, I think it is, in Wyoming.

21 Q. So your Table 3, Exhibit 15 contemplates the
22 selling of the calves and the culls at Riverton;
23 is that correct?

24 A. Yes.

25 merchant - voir dire - webster

- 1 Q. Did you analyze the cost and revenues with
2 regard to possible selling of the calves at
3 the auction market at, say, in Worland or
4 Greybull or Powell?
- 5 A. No, we did not.
- 6 Q. Under your general overhead classification,
7 you indicate that there are other operating costs.
8 Could you tell me what those are?
- 9 A. Well, these are miscellaneous overhead costs
10 that were reported in the survey of operators.
11 I imagine it includes such things as the counting
12 and general bookkeeping and other overhead
13 type costs.
- 14 Q. That include feeding of labor?
- 15 A. No -- well, possibly it might be in there. It
16 could be in miscellaneous ranch supplies, any
17 costs incurred in feeding, but --
- 18 Q. You would contemplate that that only costs
19 \$750 or \$790 a year?
- 20 A. Well, as I'm -- as I said, I don't think it's
21 in there, but it's probably, if there is any
22 feeding, it's in the miscellaneous ranch supplies.
- 23 This is a result of the survey of
24 operators and reports, the average amount that
25 merchant -voir dire - webster

1 operators spend on these different categories.
2 I'm not saying that operators who feed labor,
3 who have full-time labor all year, which isn't
4 usual, I'm not saying that those kinds of costs would be
5 represented by this budget.

6 Q. Would the costs of the operator or the operators'
7 families be included within --

8 A. No.

9 Q. And why is that?

10 A. Because that's -- there's a return to operator
11 and his living costs would come from that.

12 Q. With regard to the feed costs, do you have any
13 idea whether or not the Reservation now has
14 the capacity to develop the amount of silage
15 you contemplate using in your model?

16 A. If we were to include the withdrawal area,
17 then I would say, yes, they would have that
18 capacity.

19 Q. Now, does it?

20 A. No, they don't produce that much silage now.

21 Q. How about the mechanization costs of producing
22 silage, the choppers, the grinders, mixers?

23 A. Yes, those costs are included in the irrigated
24 agriculture budgets.

25 merchant - voir dire - webster

1 Q And that's something we haven't seen yet?

2 A That's right.

3 Q Are those capacities currently on the Reservation
4 or would that be something new that would have to
5 be developed?

6 A Those capacities, I'm not sure what you mean.

7 Q Capacities to produce the silage.

8 A Oh, yes, there are -- there is silage production
9 on the Reservation now.

10 Q Sufficient for your model?

11 A No, not sufficient for this.

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1 Q (By Mr. Webster) On direct examination you
2 referred to the model as the costs in the future
3 of this type of a cow-calf operation. Is that
4 correct? Do you anticipate this to be the costs
5 in the future for a cow-calf operation?

6 MR. ECHOHAWK: Objection, Your Honor. This
7 is cross examination, this is not --

8 THE HEARING OFFICER: Overruled.

9 MR. WEBSTER: Thank you.

10 THE WITNESS: These costs are -- they are
11 not what we would predict in, say, ten years
12 from now, but what I mean by "future" is that
13 we have tried to stabilize prices and costs for
14 each of the elements so that the costs and
15 returns in our budgets don't reflect the year
16 to year fluctuations in the livestock operation.
17 We have tried to choose stable prices so that
18 these relationships might be those that could be
19 expected to occur in the future.

20 Q For how long in the future?

21 A Well, I can't say whether these relationships
22 would last 40 or 50 years or what, but for the
23 foreseeable future I think these are reasonable
24 representations of the relationships in a livestock

25 merchant - voir dire - webster

1 enterprise.

2 Q So you are saying probably in your model that
3 the costs of cattle production will relate to the
4 revenues from cattle production on a cow-calf
5 operation?

6 A. Yes, on a long-term basis.

7 Q In the same relation as you are setting forth
8 in your model?

9 A. Reasonably so. Of course, there are year to
10 year fluctuations in this, but we are trying to
11 represent a long-term relationship.

12 Q In your exhibit, for instance, you are not saying
13 that marketing costs and transportation costs
14 are going to remain the same for 40 or 50 years,
15 are you?

16 A. No, certainly not. But maybe the same relationship
17 to the other costs.

18 Q Is that characteristic for the livestock market
19 over the last 40 or 50 years?

20 A. We haven't studied the past 40 or 50 years.
21 We have studied the last, say, ten years, and
22 we feel this is characteristic of that period
23 of time.

24 Q So you feel that over the last ten years the
25 merchant - voir dire - webster

- 1 revenues from the cattle operations have increased
2 proportionate to the costs?
- 3 A. Well, again, it's not a simple increase or decrease.
4 There are very wide year-to-year fluctuations,
5 particularly in the places received for cattle,
6 so that the next return might be very large one
7 year and it might be -- there is certainly a
8 loss in some years. So I am not saying there is
9 a trend. What we are saying is what we have tried
10 to formulate is a stable relationship between the
11 costs and the returns; such that if one were to
12 project, say, the average return over a long period
13 of time, it might look something like this.
- 14 Q. So as I understand you, you are saying that
15 based upon your analysis of the last ten years or
16 so, that stable relationship has existed?
- 17 A. No. I'm not saying that -- from year to year
18 there is a stable relationship.
- 19 Q. But over the last ten years generally?
- 20 A. Yes.
- 21 MR. WEBSTER: I have no further questions.
- 22 THE SPECIAL MASTER: Mr. Sachse, were you --
- 23 MR. SACHSE: No questions.
- 24 THE SPECIAL MASTER: Mr. Merrill?
- 25 merchant - voir dire - webster

1 MR. MERRILL: Thank you, Your Honor.

2 VOIR DIRE EXAMINATION

3 BY MR. MERRILL:

4 Q. Mr. Merchant, the operating costs shown on
5 Exhibit C-15 are those costs which you project
6 in your economic model for a 250 cow operation,
7 is that correct?

8 A. Yes.

9 Q. And you just stated, I believe in response to
10 Mr. Webster's cross examination, that you reviewed
11 the relationship between revenues and the costs
12 in the cattle industry, and over the last ten years
13 have found some stability to assume they're
14 proportional in the future, is that correct?

15 MR. ECHOHAWK: Objection, Your Honor. This
16 is cross examination.

17 MR. MERRILL: Your Honor, this goes to
18 the essence of what was assumed in the Exhibit.

19 THE SPECIAL MASTER: I will object -- I
20 mean, I will overrule the objection, but I think
21 I know what he is getting to and so do you.

22 THE WITNESS: Would you repeat the question,
23 please?

24 MR. MERRILL: Sure.

25 Merchant - voir dire - merrill

1 Q. (By Mr. Merrill) Are the assumptions you made
2 in Exhibit C-15 concerning the operating costs
3 in the future based upon the assumption that
4 revenues and costs will continue to remain
5 proportional to one another as they have in the
6 past ten years that you have studied?

7 A. On a long-term basis we feel that there is a
8 relationship between the terms and costs. That
9 is reflected in these budgets.

10 Q. Now, you said you studied the last ten years
11 and determined these costs and revenues would
12 be proportionate, is that right?

13 A. We studied the various elements over the last
14 ten years, yes.

15 Q. On what facts and data did you rely in reaching
16 that conclusion?

17 A. Prices and costs over the last ten years.

18 Q. Where did you get your price information?

19 A. From Omaha and Billings, primarily.

20 Q. Any other sources of information?

21 A. Well, from talking to people.

22 Q. All right. Would that be Rich Harbour and
23 the land operation -- excuse me, what is the
24 other?

25 merchant - voir dire - merrill

- 1 A. Bob Robertson?
- 2 Q. Yes.
- 3 A. Gordon Kearl.
- 4 Q. Gordon Kearl. Any other sources?
- 5 A. For prices?
- 6 Q. Yes.
- 7 A. I don't believe so.
- 8 Q. Okay. How about your sources for costs?
- 9 A. These are primarily from the Department of
- 10 Agriculture, Extension Service -- I think those
- 11 are the only two categories of the publications.
- 12 Q. Can you site me a particular publication of
- 13 the USDA. Report of Costs, or something like that?
- 14 A. Well, there are several. There is one called,
- 15 "Agricultural Statistics," there is another
- 16 called price -- "Agricultural Prices"; there is
- 17 a Water Resources Counsel publication called
- 18 "Agriculture Price Standards" that we referred to;
- 19 the Livestock Meat Situation Publication by the
- 20 USDA.
- 21 Q. Any other sources upon which you relied for costs?
- 22 A. Those are the only USDA, I think.
- 23 Q. Now, in your model you assumed that the aftermath
- 24 pasture components of the grazing costs was based
- 25 merchant - voir dire - merrill

- 1 only on lands which will be irrigated in the
2 future, is that correct?
- 3 A. Yes.
- 4 Q. Do those lands include lands to be irrigated
5 within the federal Indian projects?
- 6 A. No.
- 7 Q. Do they include lands to be irrigated -- which
8 lands are already permitted?
- 9 A. For a grazing permit?
- 10 Q. Yes -- no, excuse me, for a water permit.
- 11 A. These lands include only the newly classified
12 project areas.
- 13 Q. How much acreage did you assume would be
14 available for aftermath pasture?
- 15 A. I think it's 53,900 acres.
- 16 Q. Now, how did you get from that figure to the
17 costs of the aftermath pasture, which I believe
18 is \$3,334?
- 19 A. Yes. We multiplied -- first we divided that
20 into high land and low land areas because there
21 are different cropping patterns in those areas,
22 and multiplied those figures by the respective
23 cropping patterns to get the acreage of alfalfa
24 and corn planted for grain. The we used the
25 merchant - voir dire - merrill

1 1.5 and 1.6 AUMs per acre factors to derive
 2 an estimate for the AUMs available from aftermath
 3 pasture.
 4 Q. Where did you get the 1.5 and 1.6 AUMs per acre?
 5 A. The 1.5 is based on discussions with Gordon Kearn
 6 and Lynn Merrill -- Lynn Merrit, excuse me.
 7 Q. Nobody I know.
 8 A. He's the extension agent at Fort Washakie.
 9 Q. So how did you arrive at the costs for aftermath
 10 pasture?
 11 A. That, as I said before, was based on an ESCS
 12 survey of grazing arrangements in Wyoming conducted
 13 in 1978.
 14 Q. Did you rely on any other sources?
 15 A. Through discussion with Rich Harbour we determined
 16 that that was a reasonable figure to use for the
 17 Reservation.
 18 Q. Did you state earlier in your direct examination
 19 that you had determined that the grazing land
 20 on the Reservation was now about one-third
 21 underutilized?

22 MR. ECHOHANK: Objection, Your Honor. This
 23 is cross examination.

24 THE SPECIAL MASTER: That will be overruled.

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1 The question was appropriate, "did you state".

2 THE WITNESS: I stated the summer grazing
3 land was about one-third underutilized..

4 Q. How did you make that determination?

5 A. I believe I told you before that that's
6 from discussions with the range operations
7 officer.

8 THE SPECIAL MASTER: That doesn't deal
9 with the exhibit on hand that you are taking
10 the place of?

11 MR. MERRILL: Well, it does, Your Honor.
12 If he has items shown for grazing costs and he
13 has range land costs of zero in there, then
14 I may voir dire him on how he arrived at that
15 cost.

16 Q. (By Mr. Merrill) Mr. Merchant, is it true
17 that the marketing portion of the selling cost
18 assumed that these animals would be sold in
19 Riverton?

20 A. Yes.

21 Q. And the transportation portion also assumed
22 that these animals would be sold in Riverton?

23 A. Yes.

24 Q. So the total selling costs assumed animals would
25 merchant - voir dire - merrill

1 be transported wherever they were on the
2 Reservation to Riverton and sold there, is
3 that correct?

4 A. Yes.

5 Q. Isn't it true that the table for your economic
6 model that is shown as Exhibit C-15 does not
7 include any labor costs whatsoever?

8 A. That's true.

9 Q. Isn't it true also that this model doesn't
10 include any management costs?

11 A. No, the model includes management costs in the
12 table we haven't yet discussed on net returns
13 to operator and labor. If you were referring
14 to this table, no, there are no management
15 costs in this table.

16 Q. So Exhibit C-15 doesn't include any management
17 costs and it doesn't include any labor costs,
18 is that correct?

19 A. That's correct, they're in another place.

20 MR. MERRILL: Your Honor, I object to the
21 introduction to Exhibit C-15, and I suppose
22 other counsel would want to join in the objections
23 -- I will let them speak for themselves -- on the
24 grounds there is no tie-in to the model in

25 merchant - voir dire - merrill

1 any piece of reality. If this is simply an
2 economic model he has constructed for analytical
3 purposes, then it has no probative value to the
4 actual operations or the proposed future operations
5 in this case, and if that's the case, then he
6 has constructed a model by borrowing and getting
7 information from a variety of sources, which is
8 admirable work, certainly, but he has not shown
9 these costs reflect either the actual costs or
10 the proposed costs or the financial costs of
11 operating either a current or a future cattle
12 operation on the Wind River Indian Reservation.

13 That being the case, the model has no
14 probative value, and therefore shouldn't be
15 admitted into evidence.

16 THE SPECIAL MASTER: Well, you may be
17 sat at the park as far as what probative value
18 it has, but I'm not sure I can rule it has no
19 place being admitted. Let's keep in mind
20 the end purpose of this trial. It is to determine,
21 first, if there is a reserved right for water to
22 the Wind River Indian Reservation, and if so,
23 secondly, how much water. Not even for what purpose,
24 that's not in our purview, but water. And these

25 merchant - voir dire - merrill

1 exhibits, and these should then lend some credence
2 to the deliberations all of us have to engage
3 in to come up to those findings.

4 Now, if you, Mr. Merchant, have a reason
5 you can give us that warrants excluding from here
6 your labor costs and your management costs, just
7 as you have also excluded the grains that come
8 from aftermath pasture, will you state that?
9 And if they are to come in some other exhibit,
10 let us know about it.

11 THE WITNESS: Yes. The labor and management
12 costs are included in the exhibit that you see
13 on the floor. I'm not sure you can see it.

14 THE SPECIAL MASTER: Well, off the top
15 of my head, I would like to say that is a good
16 place for all of the exhibits, but I guess I
17 shouldn't say that.

18 MR. MERRILL: Well, Your Honor, I guess
19 you can look at this anyway.

20 THE SPECIAL MASTER: All right, I won't
21 look at it.

22 It is in that other exhibit, is that
23 right?

24 THE WITNESS: Yes, it is.

25 merchant - voir dire- merrill

1 THE SPECIAL MASTER: Is there a credit
2 item that will affect this bottom line from
3 gain from aftermath lands that is in another
4 exhibit?

5 THE WITNESS: The return from aftermath
6 is in the irrigated agriculture budget, not in
7 this budget.

8 THE SPECIAL MASTER: I think that might help
9 give us some explanation of the function of the
10 purpose of these exhibits in helping us to arrive
11 to the issues to be determined, and that being
12 the case, I will not sustain those objections to
13 its admission.

14 (The instrument hereinbefore
15 identified as WRIR Exhibit
16 C-15 was received in evidence.

17 MS. SLEATER: Your Honor, at this time I
18 would like to withdraw what has been marked for
19 identification U.S. Exhibit WRIR C-15A so that
20 the record --

21 THE SPECIAL MASTER: All right. Thank you.

22 (Off-the-record discussion.

23 Q (By Ms. Sleater) I show you what has been marked
24 for identification U.S. Exhibit WRIR C-16 and ask
25 if you can identify that, please?

merchant - direct - sleater

1 A Yes, that's a table showing the gross returns
2 from the livestock enterprise, the costs associated
3 with the livestock enterprise, and the differences
4 returned to operator and labor.

5 Q Could you explain what returns to operator and
6 labor means?

7 A Well, this is a common way of showing a residual
8 from an enterprise that could accrue to operator
9 and labor after all other costs are accounted for.

10 Q You mean this is what he has left over to pay the
11 people that are working?

12 A Remember, that this is an economic analysis, so
13 that all the costs and all the returns are stated
14 in economic terms. And because of the widespread
15 unemployment on the Wind River Indian Reservation,
16 we feel it's not appropriate to cost -- we feel
17 that the appropriate opportunity cost for hired
18 labor is not the full price for labor, but approxi-
19 mately 20 percent of that. And also we feel that
20 there are some operators who would otherwise be
21 unemployed, so that we feel that the appropriate
22 cost for an operator is somewhat less than the
23 full market price, you might say, for an operator.

24 Given those considerations, we feel this is

25 merchant - direct - sleater

1 clearly more than the opportunity cost for the
2 labor involved in this examination.

3 Q I asked you where the figures for gross
4 return and cost come from? Were those the
5 same figures that were on previous exhibits?

6 A Yes.

7 Q And in your professional opinion what is the
8 return to operator and labor based on an
9 economic analysis?

10 A It's \$12,590.

11 MS. SLEATER: At this time, Your Honor,
12 I would move that U.S. Exhibit WRIR C-16 be
13 admitted into evidence.

14 THE SPECIAL MASTER: All right. I would
15 assume there are no objections, but I call
16 for them, or voir dices.

17 MR. MERRILL: Your Honor, if nobody else
18 has, I'll raise the ten-day rule again. I
19 know you are going to deny the objection, but
20 I make it for the record.

21 THE SPECIAL MASTER: You did not see the
22 cost figure before last night?

23 MR. MERRILL: We saw a modified version.
24 It's the same problem as the previous exhibit.

25 merchant-direct-sleater

1 In all candor, I can't say that the
2 difference is that significant, but I just want
3 to make the objection.

4 THE SPECIAL MASTER: I appreciate that,
5 and since it isn't significant, I'll allow it
6 to be entered.

7 MR. WEBSTER: Your Honor, did you admit that
8 into evidence?

9 THE SPECIAL MASTER: I was about to. I
10 asked for -- if there were any objections, and
11 I assumed -- I asked for objections or voir
12 dices.

13 MR. WEBSTER: Can I do that, Your Honor?

14 THE SPECIAL MASTER: Yes, you may, and others
15 that might want to might stand up so I don't over-
16 look you.

17 VOIR DIRE EXAMINATION

18 BY MR. WEBSTER:

19 Q Do I understand from what you have just said
20 about your cost figures on this exhibit that only
21 20 percent of the labor costs are included within
22 the cost figures on this exhibit? Is that what
23 you said?

24 A No, not quite. The \$12,590 is the net returns
25 merchant-voir dire-webster

1 that are available to pay labor and operator
2 for this size livestock operation. I have
3 concluded that that is adequate to support
4 expansion of the livestock industry, and one
5 reason for that conclusion is that is because
6 this is an economic analysis. I feel that labor,
7 as are all the other components, should be stated
8 at their economic cost or their opportunity
9 cost, and because of the high unemployment rate,
10 the opportunity cost of labor that would likely
11 be employed in this operation was less than the
12 actual money wages that would be paid.

13 The idea is that the economic cost is that
14 amount of production that is precluded by using
15 this labor for this enterprise, and if a person
16 is unemployed, then he's not precluded from any
17 other productive labor.

18 Q How about the management costs? Are those in
19 there? Is that \$12,590, are they in there?

20 A Again I have concluded that this is an ample
21 return to cover management costs, and part of the
22 reason is that some of the people who would
23 operate a livestock enterprise would otherwise
24 be unemployed, so again I feel that the opportunity

25 merchant-voir dire-webster

1 cost is somewhat less than the full cost of
2 managing the enterprise.

3 Q So out of your \$12,590 you have got labor costs
4 coming out, of some figure -- you say around
5 20 percent -- and management costs of what per-
6 cent or figure do you have coming out?

7 A Well, I feel that perhaps a 50 percent figure is
8 appropriate, but there's enough in there to
9 even use 100 percent for management, and this
10 still shows a profit according to practice in
11 other livestock budgets. This shows feasibility --

12 Q (Inaudible.)

13 THE REPORTER: I'm sorry. I didn't hear
14 that.

15 MR. WEBSTER: Never mind.

16 THE SPECIAL MASTER: No, leave it in. If
17 you have got a good banker.

18 Q (By Mr. Webster) Is that right? Basically, you
19 are going to have to operate on credit using
20 these figures? Isn't that correct?

21 A Well, in the budget in Exhibit 15 there are
22 several items for interests costs.

23 Q Aren't those interest costs at seven and an eighth
24 percent though?

25 merchant-voir dire-webster

1 A Again, this is an economic analysis, not a
2 financial analysis. If we were doing a
3 financial analysis, we might use market rates
4 for interest, but then we might also project
5 increasing profits over time, and if the
6 operator owned the livestock to start off, then
7 we wouldn't even have to pay any interest on
8 that, so actually in that respect we're quite
9 conservative.

10 Q And out of that \$12,590 figure are going to be
11 some costs of food like I asked about with regard
12 to Exhibit Number 15; is that correct?

13 A Yes.

14 Q Cost of feeding the family and so forth?

15 A Well, again this is an economic return.

16 Q And you figured that \$12,590 figure will be
17 sufficient for that purpose; is that correct?

18 A Yes.

19 MR. WEBSTER: Your Honor, I have one further
20 question which might be objected to on the basics of
21 not timely raised or improper, and, if so, so be
22 it.

23 Q (By Mr. Webster) But in regard to your gross
24 revenue, how many calves do you anticipate

25 merchant-voir dire-webster

1 selling to get your gross revenue figure?
2 A Calves, I'd have to look at the table to be
3 sure, but I believe it's about forty -- let's
4 see -- it's 42 heifer calves, 71 steer calves.

5 Q Forty-two heifer and 71 steer?

6 A Yes.

7 Q How about cow?

8 A Thirty-three.

9 MR. WEBSTER: No further questions.

10 MR. MERRILL: Your Honor, I have some voir
11 dire, if there are no other private parties.

12 THE SPECIAL MASTER: Well, if there are, they
13 can follow you.

14 MR. MERRILL: Okay.

15 VOIR DIRE EXAMINATION

16 BY MR. MERRILL:

17 Q Jim, did you just state that the \$12,590 return
18 to operator and labor shown on Exhibit C-16
19 would be enough to cover 100 percent of the
20 management costs?

21 A Yes.

22 Q What would be the management costs of this
23 hypothetical ranch?

24 A Well, an estimate is five percent of the gross

25 merchant-voir dire-webster
merchant-voir dire-merrill

1 returns.

2 Q Did you determine what the management costs
3 would be?

4 A I believe I have it somewhere, but it's five
5 percent of that top figure. Do you want me to
6 look for it?

7 Q Please, if you could tell the Court the actual
8 number that you believe would be the management costs?

9 A \$3,760.

10 Q So in your hypothetical cost -- or your model --
11 excuse me -- the costs of managing a 250 cow
12 cow-calf-yearling ranch would be \$3,760?

13 A That's what we attribute to management, yes.

14 Q Okay, and you said that the returns to operator
15 and labor would also be enough to pay some
16 portion of the labor costs; is that correct?

17 A Yes.

18 Q What would be the total labor cost, the financial
19 cost, for which you would take a fraction to
20 determine the opportunity labor cost?

21 A Approximately \$3,399 for hired labor and \$7,320
22 for operator labor.

23

24

25 merchant-voir dire-merrill

* * * * *

- 1 Q (By Mr. Merrill) (Continued) Are those the only
2 labor costs?
- 3 A Yes.
- 4 Q So the total labor cost would be something slightly
5 over, slightly over \$10,000 per acre; is that
6 correct?
- 7 A Yes.
- 8 Q And to that would be added the total management
9 costs of \$3,760 per year, these are financial
10 costs?
- 11 A Yes.
- 12 Q But you didn't use the \$10,000 per acre labor
13 costs, you took twenty percent of that amount;
14 is that correct?
- 15 A I felt that was more appropriate.
- 16 Q Okay. I believe that using twenty percent of that
17 amount and one hundred percent of this management
18 cost, that the returns to operator and labor
19 will cover both of those costs; is that correct?
- 20 A That's correct.
- 21 Q How did you determine that the management costs
22 should be five percent of the gross returns?
- 23 A That's common practice in evaluating livestock
24 budgets.

25

merchant-cross-merrill

1 Q Did you make any determination as to whether that's
2 an actual percentage of cost that is incurred by
3 current cattle operations?

4 A Well, it's not a cost that is explicitly incurred
5 because operators don't pay themselves for
6 management. So it's -- there's no way to --
7 to find a market price for that.

8 Q Now, you had about 3,000 roughly 400 dollars of
9 hired labor. How did you determine that figure?

10 A That's from the Kearn budgets, adjusted to reflect
11 the fact that those budgets include a substantial
12 amount of labor hired for hay harvested, and
13 because our crop budgets are separate from the
14 livestock budgets, we adjusted the labor costs
15 and the livestock budgets to try to remove that
16 element.

17 Q What would be the hourly wage of hired labor?

18 A About 3.50 an hour.

19 Q Did you make any determination as to whether
20 people would be willing to work on a cattle ranch
21 for 3.50 an hour?

22 A That information is from the area, yes.

23 Q What do you mean by that, did you perform some
24 sort of survey of what people were paying their

25 merchant-cross-merrill

- 1 ranch hands?
- 2 A The prices is from the area of, of the reservation,
3 and it's a cost that is typically paid workers on
4 farms and ranches.
- 5 Q Okay. How about the \$7,320 of operator labor,
6 where did that number come from?
- 7 A That's priced at the same rate.
- 8 Q Also at 3.50 an hour?
- 9 A Actually that's not priced, it's -- that's from
10 the Kearl budget, and we assumed that we would
11 take a hundred percent of his operator labor,
12 even though some of that might be used for crop
13 production, and use that figure in our budget.
- 14 Q So as it turns out, the total labor costed or
15 \$10,719 added to the management cost of \$3,760,
16 exceeds to operator and labor shown on Exhibit
17 C-16, doesn't it?
- 18 A The financial cost exceeds the economic returns,
19 but that's apples and oranges. If we were to
20 state the returns in financial terms, they might
21 exceed the \$12,000.
- 22 Q But you didn't compute the returns in financial
23 terms, did you?
- 24 A No, we didn't.

25 merchant-cross-merrill

1 MR. MERRILL: No further questions, Your
2 Honor.

3 THE SPECIAL MASTER: I will admit C-15
4 into evidence.

5 MS. SLEATER: Thank you, Your Honor.

6 THE WITNESS: Excuse me, that's C-16.

7 THE SPECIAL MASTER: I beg your pardon,
8 that's C-16. I was looking at C-15.

9 I throw out a suggestion that the word economic
10 returns ought to be put on that somewhere. Is that
11 to meet with everyone's approval?

12 MR. MERRILL: That would be a good idea.

13 THE SPECIAL MASTER: Nice big type, annual
14 economic return.

15 MS. SLEATER: We'll get our draftsman
16 in here and try to do that.

17 THE SPECIAL MASTER: Save some ambiguities.

18 MS. SLEATER: Perhaps, Your Honor, this
19 might be a good time to break for lunch, if it's
20 all right.

21 THE SPECIAL MASTER: Ladies and gentlemen,
22 we'll stand in recess until 1:30 P.M.

23 (Thereupon a lunch recess was
24 taken from 11:35 A.M. until
25 1:30 P.M.)