
NO. 137, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,)
Plaintiff,)
vs.) No. 220137 ORG
STATE OF WYOMING and)
STATE OF NORTH DAKOTA,)
Defendants.)
_____)

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
STATUS CONFERENCE
March 28, 2016

Reported by: PAIGE HUTCHINSON, CSR No. 13459

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21 TRANSCRIPT OF TELEPHONIC PROCEEDINGS,

22 reported at Kramm Court Reporting, Murrieta, California

23 92563, commencing on Monday, March 28, 2016, at 10:02

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25 Reporter, CSR No. 13459.

1 MURRIETA, CALIFORNIA

2 MONDAY, MARCH 28, 2016, 10:02 A.M.

3 - - -

4 SPECIAL MASTER THOMPSON: So then let's go on
5 the record.

6 This is a status conference in Montana versus
7 Wyoming and North Dakota, Number 137, Original, in the
8 Supreme Court of the United States.

9 And why don't we begin by having appearances
10 for the parties.

11 So who is appearing for the State of Montana?

12 MR. DRAPER: Your Honor, this is John Draper
13 here for the State of Montana, and we also have three
14 others. I would start by saying that Attorney General
15 Fox had wanted to be on this call, but he is at the
16 Supreme Court today in connection with an argument on
17 behalf of the State of Montana, so he regretted not to
18 be a part of this.

19 But with us is the Chief Deputy Attorney
20 General Alan Joscelyn, also Deputy Attorney General
21 Tommy Butler, and Special Assistant Attorney General
22 with the Department of Natural Resources &
23 Conservation, Kevin Peterson.

24 And in addition, your Honor, we have with us
25 Tim Davis who is the administrator of the Water

1 Resources Division of the Department of Natural
2 Resources for the State of Montana. Those are all who
3 are on the call for the State of Montana.

4 SPECIAL MASTER THOMPSON: Okay. Thank you
5 very much, Mr. Draper. And I certainly understand why
6 Attorney General Fox was not able to be on the line
7 today, and welcome to the other attorneys and
8 administrators on the line for Montana.

9 So next, then, for the Defendant State of
10 Wyoming?

11 MR. KASTE: Good morning, your Honor. This is
12 James Kaste. I'm here with Chris Brown and State
13 Engineer Pat Tyrrell. Attorney General Michael ought
14 to be joining us shortly; we can certainly proceed in
15 his absence. I'm not exactly sure why he got hung up,
16 but that happens to him occasionally.

17 SPECIAL MASTER THOMPSON: So again, thank you
18 very much, Mr. Kaste. And Mr. Brown, Mr. Tyrrell, it's
19 great to have you on the -- or I think it's great --
20 it's great from my standpoint to have you on the line
21 again. And I certainly understand why attorney
22 generals are sometimes busy, so I will look forward to
23 Mr. Michael if he is able to come on the line.

24 So then next, who is representing the State of
25 North Dakota?

1 MS. VERLEGER: Good morning, your Honor. This
2 is Jennifer Verleger for North Dakota. And I'm at the
3 airport so it's really loud, so I'm going to put you on
4 mute.

5 SPECIAL MASTER THOMPSON: Okay. Thank you,
6 Ms. Verleger. And if for any reason I ask you a
7 question, I will make sure to give you a little bit
8 time to come back off of mute. And if you need to say
9 anything, just remember to come back off of mute. If
10 we don't seem to be hearing you, that's probably the
11 reason.

12 MS. VERLEGER: Sounds good.

13 SPECIAL MASTER THOMPSON: So are there any
14 attorneys for any of the Amici in the case?

15 MR. DUBOIS: This is James Dubois for the
16 United States.

17 SPECIAL MASTER THOMPSON: Okay. Welcome
18 Mr. Dubois.

19 MR. DUBOIS: Good morning.

20 SPECIAL MASTER THOMPSON: And I do not believe
21 that there was going to be counsel for either of the
22 other two parties, but let me just -- is Ms. Whieting
23 on the line?

24 (No audible response from counsel.)

25 SPECIAL MASTER THOMPSON: No. Okay.

1 So what I'd like to do, having taken
2 appearances, is to go off the record for a moment.

3 (Recess taken.)

4 SPECIAL MASTER THOMPSON: Okay. Why don't we
5 go back on to the record.

6 So the reason why I called this status
7 conference is probably obvious. The Supreme Court,
8 last Monday, on March 21st of this year, issued an
9 order and judgment adopting my recommendations from the
10 second interim report and issuing an order that granted
11 Wyoming's motion for partial summary judgment. That in
12 part found Wyoming also not liable for Montana in a
13 number of other years but that also found Wyoming
14 liable to Montana for reducing the amount of water
15 available in the Tongue River to Montana in both 2004
16 and 2006, and then remanding the matter to me for the
17 termination of damages and other appropriate relief.

18 At the very outset, I should probably
19 emphasize that, as you know, one of the things I said
20 at the end of the second interim report was given the
21 narrow focus of the case after the liability case, that
22 proceedings for determination of remedies can and
23 should be short. And having told the Supreme Court
24 that, that's exactly my goal in this particular case.

25 The Supreme Court, as they have said several

1 times in this and in other proceedings, would far
2 prefer that states settle disputes among them over
3 interstate waterways, and I know the Supreme Court
4 still feels strongly about the value of settlement in
5 this particular case. So as the Court's special
6 master, I just want to reemphasize the value of
7 settlement and let all of the parties know that I am
8 willing to take any steps or entertain any actions at
9 any particular point in time that can help to promote
10 the states reaching a mutually acceptable settlement in
11 this particular matter; therefore, the parties should
12 never hesitate to make any type of discussion that
13 might promote settlement.

14 What I would like to do in this settlement
15 conference is to, number one, get a sense of what the
16 parties see as the issues in this particular phase and
17 then get the parties' initial thoughts on the best way
18 of resolving the remedies issues on an expeditious but
19 considered basis as is possible.

20 So, again, why don't I start out with the
21 question of what the issues are in this particular
22 phase. Based on prior proceedings in this case, I've
23 been assuming that there are three issues, absent
24 settlement on any of these issues. The first is the
25 amount of damages to be awarded to Montana for the

1 liability in the year 2004 and in the year 2006. The
2 second issue would be the question of whether Montana
3 is entitled to any form of affirmative relief, and if
4 Montana is, what the nature of that relief should be.
5 And then the third issue would be the allocation of
6 costs in this particular proceeding.

7 But, again, I would love at this point to get
8 Montana and Wyoming's views on whether or not those are
9 the issues that need to be resolved in this final
10 portion of the proceedings.

11 So Montana, Mr. Draper?

12 MR. DRAPER: Your Honor, thank you. And we
13 appreciate your offer with regard to assisting with any
14 settlement that may become possible. We have made, on
15 both sides, assiduous efforts in that regard and will
16 keep your advice and offer in mind as we go forward.

17 With respect to the issues, I think as a
18 general statement, your listing is consistent with our
19 view. The first one, the amount of damages would also
20 include the form of damages, whether in water or money.
21 There are a number of sub-issues in each of the areas
22 that you mentioned, some legal, some factual. And we
23 would suggest to your Honor that it might be
24 appropriate to initiate this phase by scheduling a time
25 when the states could both submit their specific views

1 on what issues need to be resolved and perhaps whether
2 those are legal that can be resolved by briefing or
3 factual. So in general, yes, that's the way we see it
4 with those for the comments.

5 MR. KASTE: This is James, your Honor. I
6 agree again. It's a good day for Mr. Draper and I; we
7 agree on everything so far, that the general categories
8 are generally the issues before you in this phase, that
9 each of them has unique attributes that need to be
10 addressed, and I agree that it would likely make sense
11 for the parties at this phase of the proceedings to
12 flesh out what those issues are in particular.

13 And I was kind of thinking it might make sense
14 for us, sort of consistent with our prior practice in
15 this case, to put together a proposed schedule for the
16 further proceedings once we have come to some agreement
17 amongst ourselves about what the issues are. And as
18 part of that schedule, there probably should be some
19 preliminary legal rules with respect to the three
20 issues you have phrased, and potentially those legal
21 rulings will be dispositive on some of these general
22 issues.

23 SPECIAL MASTER THOMPSON: Okay. Thank you.

24 So, Ms. Verleger, do you have anything that
25 you would like to add for in North Dakota?

1 MR. DUBOIS: No. No, thank you, your Honor.

2 SPECIAL MASTER THOMPSON: Okay. Thank you.

3 So that sounds -- the proposals of Mr. Draper
4 and Mr. Kaste sound fine to me. Let me just maybe
5 mention sort of a couple of thoughts at the very
6 outset. And that is, from what I note to date -- and I
7 am not in any way prejudging any of the questions that
8 are now before me as special master. If you take the
9 three separate issues, first of all, on the damages
10 side, given the amount of water that is involved, it
11 does not appear to me that it is an issue that would be
12 worth any type of significant proceedings. I cannot
13 imagine that it would not actually eat up more of the
14 parties' monies, for example, to try the question of
15 damages than might actually be at stake. And again, I
16 recognize I am saying that without any evidentiary
17 proceedings in front of me and therefore without
18 knowing what type of evidence Montana would provide on
19 the damages, but simply to say that strikes me as an
20 issue that it would be ideal either for the parties to
21 settle or to try to resolve through summary
22 proceedings.

23 On the issue of affirmative relief, I can
24 imagine that, you know -- well, let me just, you know,
25 stop on the affirmative relief for a moment. I can

1 imagine some legal issues there. But I'm just curious
2 as to the parties' initial thoughts on whether or not
3 there would need to be any type of significant
4 discovery on that issue, given the discovery that's
5 already occurred. And I realize I'm putting you on the
6 spot and you can change your mind later. I'm just
7 curious as to initial impressions.

8 MR. DRAPER: Your Honor, this is John Draper.
9 We really haven't considered that question. I think it
10 would depend a lot on how the issues were framed by
11 both states to begin to answer that question, so
12 unfortunately, I just have to hold off on that until we
13 understand the issues as propounded by both states and
14 any comments you may have on them once we have done
15 that.

16 SPECIAL MASTER THOMPSON: Okay. And,
17 Mr. Kaste, I assume you're going to agree with
18 Mr. Draper on that.

19 MR. KASTE: Well, there comes a point in every
20 day where we part ways. We've reached that point. I
21 don't think that extensive discovery, or frankly any
22 discovery, is probably necessary with regard to
23 Montana's request for affirmative relief given that it
24 really is the product of the liability phase of these
25 proceedings. You know, I do think that there's

1 probably opportunities, as you've probably noticed,
2 with regard to the exceptions that the parties
3 submitted, for the submission of evidence for the
4 continuing course of conduct of each party in light of
5 the rulings in the second interim report.

6 As you probably noticed, there was information
7 submitted to the Supreme Court to demonstrate each
8 party's attempt to comply with the second interim
9 report in the course of a real year and our attempts to
10 work out that process for the first time in light of
11 the rulings that you've made that have now been adopted
12 by the Court. So I think that there's some opportunity
13 for the submission of evidence, but the need for
14 additional discovery on that issue, I think, is limited
15 or nonexistent, like I say, because the affirmative
16 relief, to the extent Montana is entitled to any,
17 really flows directly from any conclusions that you
18 made with regard to liability and the findings you
19 might make with regard to the imminent future
20 noncompliance by the State of Wyoming, so that's my
21 thought on that.

22 I will note for the record that Attorney
23 General Michael has joined the telephone conference,
24 your Honor.

25 SPECIAL MASTER THOMPSON: Okay. Welcome,

1 Attorney General Michael.

2 MR. MICHAEL: Thank you, your Honor.

3 SPECIAL MASTER THOMPSON: Yeah, so -- and
4 again, this is an issue that I would initially like to
5 hear from the parties on after due consideration, but,
6 you know, sort of my initial impression is, given the
7 amount of discovery that took place earlier as well as
8 what was presented in court on a variety of issues
9 which suggested to me that, you know, the parties have
10 asked questions along the way, that even if they were
11 directed to liability, may be relevant to this second
12 phase also, that the only potential area I could
13 imagine any type of discovery on that would be relevant
14 might be on the most recent years' experience. I would
15 think, though, that most of that would probably be on
16 the public record or available at this particular point
17 to both states.

18 I emphasize all of this because, again, I
19 would think that we might very well be able to resolve
20 the affirmative relief issues also through some type of
21 summary proceedings. And that if any type of discovery
22 were necessary, it could be limited in a way that would
23 not require a great expenditure by the parties and
24 could keep the amount of time needed to a minimum also.

25 And then finally on the cost issues, that

1 would also strike me as an issue that is really
2 entirely legal at this particular point and does not
3 require any discovery.

4 So thinking about the three issues together,
5 my hope would be that the parties, when they sit down
6 together to talk about what issues need to be resolved
7 and what type of proceedings and schedule should be
8 proposed, would start out by asking whether or not we
9 could begin with some type of summary proceedings that
10 would either permit me to issue recommendations at this
11 stage without the need of any proceedings beyond those
12 summary proceedings or at a minimum, could narrow the
13 realm of any kind of discovery to a minimum because it
14 would be great to be able to finish this phase of the
15 proceedings quite quickly, and if the parties are not
16 able to settle, to get this back up to the Court for a
17 final resolution of the dispute.

18 So with that in mind and given the
19 recommendations of Mr. Draper and Mr. Kaste, what I
20 would like to suggest would be that the parties begin
21 by meeting and conferring and seeing whether or not
22 they can agree to a joint submission that would jointly
23 set out the issues that need to be resolved, would
24 jointly propose an approach to bringing this second
25 half of the proceedings to a rapid resolution, and also

1 set out a schedule. So those would be the -- or a
2 proposed schedule. Those would be the three elements,
3 issues that need to be resolved and an approach that
4 would hopefully maximize the chances that this could be
5 brought to a speedy resolution at this stage, and then
6 third of all, a proposed schedule for those particular
7 proceedings.

8 Let me just stop there and see Mr. Draper,
9 Mr. Kaste, and Ms. Verleger, whether any of you have
10 any comments on that.

11 MR. DRAPER: Your Honor, this is John Draper.
12 I think that sounds like an excellent approach. We
13 would certainly be glad to work with the other states
14 to accomplish what you just set out. We're going to
15 need a little bit of time to do so to rearrange our
16 schedules now that this case is active, and so I would
17 request an appropriate amount of time to allow us to
18 meet either in person or by telephone and to formulate
19 the joint submittal that you mentioned.

20 SPECIAL MASTER THOMPSON: Mr. Kaste?

21 MR. KASTE: I think that what you proposed
22 makes a lot of sense, and I agree with Mr. Draper, that
23 we just need an adequate, although not extended period
24 of time, to put that together for you.

25 SPECIAL MASTER THOMPSON: Okay. And

1 Ms. Verleger?

2 MR. DUBOIS: I agree with everyone, your
3 Honor.

4 SPECIAL MASTER THOMPSON: Okay. So what about
5 April 15th? That provides you basically three weeks of
6 time to find an opportunity to meet and confer and to
7 reduce things to paper.

8 MR. DRAPER: Your Honor, this is John Draper.
9 I hadn't included in my thoughts on that subject the
10 benefits of just conferring with the other states
11 before submitting anything. My proposal without the
12 time for that was going to be to ask you for 30 days to
13 submit that which would be about the 27th of April. My
14 proposal would be to give us a week beyond that so that
15 we could have a reasonable but relatively short amount
16 of time allowed for us to confer and hopefully come up
17 with a joint recommendation to you.

18 MR. KASTE: Your Honor, this is James. Any
19 time between April 15th and the last day that
20 Mr. Draper mentioned works for us.

21 SPECIAL MASTER THOMPSON: Okay. Why don't
22 we -- because I do want the parties thinking on this
23 and why don't -- I'm just going to look here at my
24 calendar. Hold on one second while I get into it.

25 Okay. So what I would suggest, and giving you

1 a weekend, let's do April 25th; that's effectively four
2 weeks from today, and that's a little bit more time
3 than the April the 15th, but, you know, I don't think
4 this is going to be a particularly complicated
5 proceeding, and I really do want to continue to move
6 this along. And so that will give you a full four
7 weeks as well as a weekend, hopefully to be able to
8 come to an agreement on this.

9 And I guess the other thing I would suggest
10 here is, as I said, I hope the parties can agree on the
11 issues, a procedure, and a schedule. But what I would
12 also suggest is if the parties cannot agree on some
13 aspect of any of those three elements, then you should
14 either in the joint document set out both sides'
15 position, or if you want to, you can submit separate --
16 what I have referred to as letter briefs along the way.
17 It doesn't need to be formal, just some type of a
18 written communication in the form of a letter or short
19 brief on your position on the particular issue. But
20 again, my hope is that the parties will be able to
21 actually reach agreement on certainly most if not all
22 of the issues here.

23 So with that, let me ask, are there any other
24 issues that you think I need to address in the
25 proceeding today?

1 MR. DRAPER: Your Honor, this is John Draper.
2 I think that covers everything I had in mind.

3 MR. KASTE: This is James, your Honor, and the
4 same goes for Wyoming. That's everything we had on our
5 list.

6 SPECIAL MASTER THOMPSON: Okay. So there are
7 probably two other things that I should mention. The
8 first is, as I think you know and hopefully you felt
9 comfortable with, is I never submitted my last fee
10 request to the Court. I was thinking that might just
11 make more sense, depending on what the Supreme Court
12 did, to address it at the end. But I'll go ahead and
13 submit that now. That's basically for the research and
14 preparation for the second interim report as well as
15 the conference calls last spring with respect to the
16 question of settlement.

17 And then the second thing is, I should let all
18 sides know that as of January 1st, I went back of
19 counsel to the law firm where I had practiced 30 years
20 ago, which is O'Melveny and Myers. I am still
21 retaining my various other positions, so I'm still a
22 law professor at Stanford. Furthermore, I am still
23 director of the Woods Institute here at Stanford.

24 In going back of counsel to O'Melveny, my
25 agreement with O'Melveny was that this particular

1 matter would not be handled through my relationship
2 with the law firm. So I am still proceeding as a
3 Special Master in my individual capacity and not as
4 counsel to O'Melveny, and my fees in this particular
5 proceeding will not change as a result of going back of
6 counsel to O'Melveny.

7 I have also checked, as far as I can tell,
8 there are no forms of conflict, but I did want to let
9 you know that, as I said, I did form that new
10 relationship with my old law firm.

11 MR. KASTE: This is James from Wyoming. Thank
12 you for that information, and I don't see that
13 presenting any concerns for the State of Wyoming.

14 MR. DRAPER: Yeah, this is John Draper. I
15 agree with Mr. Kaste. Glad to know about that, but at
16 first blush, I don't see any possible conflict.

17 SPECIAL MASTER THOMPSON: Yeah. And I should
18 also mention that none of the type of matters I'm
19 handling for O'Melveny, I think, raise any of the
20 issues in this particular case, and to the degree that,
21 you know -- and this has been true all along, but if I
22 see any type of potential conflict, I will obviously
23 let you know right away, but I will make -- you know,
24 I'm being very careful to avoid any potential conflict.

25 Okay. So with that, I will issue an order

1 with respect to the joint memo regarding the issues,
2 proposed procedure, and a proposed schedule. We'll
3 probably get that out tomorrow, and but it's on the
4 record, so you can take it as gospel at this particular
5 point that that is what the order will say also.

6 And with that, unless there's anything else,
7 we can close this proceeding with some additional time
8 to spare.

9 MR. DRAPER: This is John Draper. Thank you
10 very much, your Honor. It's good to talk with you.

11 SPECIAL MASTER THOMPSON: Okay. Thank you
12 very much to everybody.

13 And what we'll also do, the one thing I forgot
14 to say is, I will also have Ms. Carter phone around to
15 counsel and set up a time after April 25th for another
16 status conference and consideration of the joint
17 submission.

18 Okay. Thank you very much. Now we're off the
19 record.

20 - - -

21 (End of proceedings at 10:41 A.M.)

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STATE OF CALIFORNIA)
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COUNTY OF SAN DIEGO) SS

I, PAIGE HUTCHINSON, Certified Shorthand Reporter
No. 13459, State of California, do hereby certify:

That said proceedings were taken at the time and
place therein named and were reported by me in shorthand
and transcribed by means of computer-aided transcription,
and that the foregoing pages are a full, complete, and
true record of said proceedings.

And I further certify that I am a disinterested
person and am in no way interested in the outcome of said
action, or connected with or related to any of the
parties in said action, or to their respective counsel.

The dismantling, unsealing, or unbinding of the
original transcript will render the reporter's
certificate null and void.

IN WITNESS WHEREOF, I have hereunto set my hand
this 4th day of April, 2016.



Paige I. Hutchinson, CSR 13459