
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

April 12, 2012

Reported by: Antonia Sueoka, RPR, CSR No. 9007

1 TELEPHONIC APPEARANCES:

2

3 SPECIAL MASTER BARTON H. THOMPSON, JR.

4 STANFORD UNIVERSITY

5 JERRY YANG AND AKIKO YAMAZAKI

6 ENVIRONMENT & ENERGY BUILDING, MC-4205

7 473 Via Ortega, Mail Code 4205

8 Stanford, California 94305

9 605.721.1488.

10 buzzt@stanford.edu

11 susan.carter@stanford.edu

12

13

14 FOR THE STATE OF MONTANA:

15 MONTGOMERY & ANDREWS, P.A.

16 BY: JOHN B. DRAPER

17 JEFFREY J. WECHSLER

18 SPECIAL ASSISTANT ATTORNEYS GENERAL

19 DONNA OMEROD, PARALEGAL

20 325 Paseo de Peralta

21 Santa Fe, New Mexico 87501

22 505.982.3873; Fax 505.982.4289

23 jdraper@montand.com

24 jwechsler@montand.com

25

1 TELEPHONIC APPEARANCES (CONTINUED)

2 FOR THE STATE OF MONTANA:

3 MONTANA ATTORNEY GENERAL'S OFFICE

4 BY: JENNIFER ANDERS

5 ASSISTANT ATTORNEY GENERAL

6 215 North Sanders

7 Helena, Montana 59620-1401

8 406.444.5894; Fax 406.444.3549

9

10 FOR THE STATE OF WYOMING:

11 WYOMING ATTORNEY GENERAL'S OFFICE

12 BY: PETER K. MICHAEL

13 CHIEF DEPUTY ATTORNEY GENERAL (Counsel of Record)

14 DAVID WILLMS, SENIOR ASSISTANT ATTORNEY GENERAL

15 JAY JERDE, DIVISION CHIEF

16 ANDREW KUHLMANN, ASSISTANT ATTORNEY GENERAL

17 MATTHIAS SAYER, ESQUIRE

18 CHRIS BROWN, ESQUIRE

19 200 West 24th Street

20 123 Capitol Building

21 Cheyenne, Wyoming 82002

22 307.777.7841; Fax 307.777.6869

23 pmicha@state.wy.us

24 dwillm@state.wy.us

25 akuhlm@state.wy.us

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR THE STATE OF NORTH DAKOTA:

4 NORTH DAKOTA ATTORNEY GENERAL'S OFFICE

5 BY: JENNIFER VERLEGER

6 ASSISTANT ATTORNEY GENERAL

7 500 North Ninth Street

8 Bismarck, North Dakota 58501

9 710.328.2210

10 jverleger@nd.gov

11

12

13 FOR AMICUS THE UNITED STATES:

14 UNITED STATES DEPARTMENT OF JUSTICE

15 ENVIRONMENT & NATURAL RESOURCES

16 DIVISION OF NATURAL RESOURCES SECTION

17 BY: JAMES J. DUBOIS, ESQUIRE

18 1961 Stout Street, 8th Floor

19 Denver, Colorado 80294

20 303.844.1375; james.dubois@usdoj.gov

21

22

23

24

25

1 TELEPHONIC APPEARANCES (CONTINUED)

2

3 FOR AMICUS NORTHERN CHEYENNE TRIBE:

4 BY: JEANNE S. WHITEING, ESQUIRE

5 1628 5th Street

6 Boulder, Colorado 80302

7 jwhiteing@whiteinglaw.com

8

9

10 FOR AMICUS ANADARKO PETROLEUM COMPANY:

11 BINGHAM, McCUTCHEN, LLP

12 BY: MICHAEL B. WIGMORE, ESQUIRE

13 2020 K Street N.W.

14 Washington, D.C. 20006

15 202.373.6000

16 michael.wigmore@bingham.com

17

18

19

20 TELEPHONIC STATUS HEARING,

21 reported by Kramm Court Reporting, San Diego, California

22 92101, commencing on Thursday, April 12, 2012, at

23 2:32 p.m. before Antonia Sueoka, Certified Shorthand

24 Reporter, CSR No. 9007, RPR, in and for the state of

25 California,

1 THURSDAY, APRIL 12, 2012, 2:32 P.M.

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3 SPECIAL MASTER THOMPSON: Okay. Why don't we go
4 on the record then.

5 So this is a hearing in State of Montana vs.
6 State of Wyoming and State of North Dakota, U.S. Supreme
7 Court Original Number 137, and it is a hearing on
8 Montana's expedited motion for extension of Case
9 Management deadline.

10 And why don't we begin by having counsel identify
11 themselves formally for the record.

12 So we'll begin with the State of Montana. So,
13 Mr. Draper, if you want to introduce everybody.

14 MR. DRAPER: Thank you. Your Honor, this is John
15 Draper. I have with me Donna Omerod, my assistant, and
16 also separately on the line are Jeff Wechsler from our
17 office and Jennifer Anders from the Attorney General's
18 office in Montana.

19 SPECIAL MASTER THOMPSON: Okay. Thank you.

20 And then for the State of Wyoming.

21 MR. MICHAEL: Yes, Your Honor, this is Peter
22 Michael calling from Cheyenne, Wyoming. I have five other
23 attorneys from our office here. They're all with the
24 Water Natural Resources Division, so I won't give you
25 their positions, but David Willms is here, you know him;

1 Matthias Sayer, S-a-y-e-r; Jay Jerde, J-e-r-d-e; Chris
2 Brown; and Andrew Kuhlmann.

3 SPECIAL MASTER THOMPSON: Okay. Thank you very
4 much.

5 And so then for the State of North Dakota.

6 MS. VERLEGER: Jennifer Verleger. That's V, as
7 in "Victor," e-r-l-e-g-e-r from the Attorney General's
8 office.

9 SPECIAL MASTER THOMPSON: Okay. Thank you very
10 much.

11 And then for the various Amici, so United States.

12 MR. DUBOIS: This is James DuBois, Your Honor.

13 SPECIAL MASTER THOMPSON: Okay. And North
14 Cheyenne.

15 MS. WHITEING: Jeanne Whiteing, Your Honor.

16 SPECIAL MASTER THOMPSON: And then Anadarko.

17 MR. WIGMORE: Michael Wigmore of Bingham,
18 McCutchen for Anadarko.

19 SPECIAL MASTER THOMPSON: Okay. Thank you.

20 Is there anyone I'm forgetting?

21 Okay. Then if not -- so I have read through
22 Montana's expedited motion and all of the various
23 attachments. And let me just start with one question for
24 Mr. Draper, which is there's some suggestions in, for
25 example, the two declarations that you have of your expert

1 witnesses that the trial date of late August, early
2 September was -- was -- or I guess actually August was
3 unexpected.

4 Could you just give me a little bit of history as
5 to what you had been expecting and then what took you by
6 surprise here?

7 MR. DRAPER: Yes, Your Honor. This is John
8 Draper. I had frankly been hoping that Special Master
9 Kayatta in that case would set trial for next January.
10 But as it turned out, since he is a candidate for a seat
11 on the First Circuit and his nomination is pending before
12 the Senate -- he's had his hearing before the Judiciary
13 Committee already -- he believes that if it's successful,
14 that he may be seated as early as Labor Day. And so he
15 said because of that he wanted to be sure he finished this
16 up before then.

17 And we had been generally aware that his
18 nomination was pending, but in an election year that's a
19 very variable item and had not expected that it would form
20 the basis of an early trial date here. And so it did
21 take -- it did take me by surprise, and I realized
22 immediately that I was going to have a major conflict here
23 in terms of both our experts and our own attorney time.

24 And I did express that to him when I got over the
25 initial shock, and said that given what he was saying

1 about the setting in that case, that I would need to
2 approach the parties and you in this case about
3 accommodating that with some relaxation of our schedule in
4 this case. And he declined to give me any advice, but
5 said that if there arose unavoidable collision of the few
6 cases to get back with him promptly.

7 So we did. We were -- we were meeting with the
8 Wyoming counsel the following Monday after that Friday
9 call and mentioned this new development, and also in our
10 status report last week, and then described it more fully
11 in the motion we recently filed.

12 SPECIAL MASTER THOMPSON: Okay. Thanks. And I
13 do appreciate your also raising this right away.

14 So let me give you my initial impressions and
15 then get all of your thoughts on the motion and how to
16 deal with it.

17 I certainly understand the problem of trying to
18 deal with -- well, deal with discovery in the Montana vs.
19 Wyoming case at the same time that you're in trial in the
20 Kansas vs. Nebraska case. And so I want to try to
21 accommodate that conflict to the degree which I think is
22 appropriate.

23 At the same time, I am very reticent to let this
24 case basically slide another four months. It might be
25 that I'm highly influenced by the fact that a Special

1 Master who was also a professor here at Stanford Law
2 School in the 20th century had a case which ended up
3 lasting for about 10 years.

4 And this case I know has only been around for
5 four years, but I -- you know, these cases, particularly
6 if the calendar begins flipping, can end up taking a lot
7 longer than they should. And obviously, this is all
8 relevant to the way in which the Yellowstone River System
9 is being administered, I'm told. To the degree we can
10 come to a quicker conclusion, that's what I would like to
11 see. So, as I said, I'm very reticent to see this slip
12 another entire four months.

13 I'm also not convinced that it needs to slip
14 another four months. I realize that we're talking here
15 not only about the one month that you will be in trial,
16 but that you'll also need to be focusing on preparation
17 for that trial.

18 Of course, though, in any case, even if the trial
19 date had not been moved forward, you would have been in a
20 process of having to get two cases ready at the same time.
21 And also I'm hoping that, although I know that,
22 Mr. Draper, that you're central to Wyoming's team, that
23 there are others who can perhaps work on various matters
24 for Montana during this period of time either in your
25 office or in the Montana Attorney General's office.

1 So taking a look at the calendar, what I would
2 like to be able to do is to try and figure out a schedule
3 that, as I say, would accommodate the most exiguous
4 elements of the conflict between the two original
5 jurisdiction cases and yet at the same time would get this
6 case ready for final motions at the very beginning of May.

7 And in trying to, well, see how that would be
8 possible, I look basically at two potential options. One
9 option would be that we would keep the motion -- Wyoming's
10 motion for partial summary judgment scheduled as it
11 currently is. And I realize that that would basically
12 require that Montana prepare a brief on July 13th. We
13 would also -- I would think if we did that -- probably
14 move up the date for Wyoming's reply brief a day or two
15 and try to actually hear the motion like on the 26 or 27th
16 of July. So, in other words, you know, we would get that
17 all done so that you would be able to then go to trial
18 weeks later.

19 And I recognize that that would not be probably
20 your preference, Mr. Draper, if you had it all to arrange
21 yourself. But if we did that, then we would at least have
22 a sense at that point of the overall scope of the -- of
23 this first phase of the case and parties could proceed
24 forward on that.

25 And then what we would end up doing would be

1 delaying the expert reports by something in the nature of
2 a month and a half to two months, which hopefully would be
3 after the trial in the Kansas case, but you would be able
4 to -- experts would be able to turn their attention to
5 that. And I can go into more detail on it.

6 I think it requires some squeezing here and there
7 that actually is already reflected in the -- in the
8 revised schedule that Montana has suggested, but it would,
9 I think, be able to get us ready for the final motions
10 having to be filed at the very beginning of May.

11 A second option would be to hold a -- would be to
12 have Wyoming file its renewed motion for partial summary
13 judgment at the beginning of September after the date when
14 the Kansas vs. Nebraska case is currently expected in I'm
15 thinking something in the nature of September 7th.

16 If we, for example, said that Wyoming would file
17 its renewed motion there on September 7th, that would mean
18 that Montana would have its response due on October 5th;
19 it would then have Wyoming's response due on October 18th.
20 We can have a hearing right away. I'm perfectly willing
21 to dive into those papers and have a hearing within a day
22 or two. And then everything else, including when the
23 expert reports would be due, would be the same as under
24 the first option.

25 The difference would be that there would be a

1 much shorter period of time between when I rule on
2 Wyoming's renewed motion for partial summary judgment and
3 when Montana would have to disclose its first expert
4 reports. Although I'm thinking that the expert reports
5 would be sometime in sort of the middle of December for
6 Montana. That would still give you about a, if I ruled
7 right away, something in the nature of a month and a half
8 in which to finalize the expert reports in light of that
9 ruling, which is about the same time you've actually
10 proposed in the revised schedule that you've set out on
11 Page 1.

12 So those are two options that I looked at how --
13 you know, as I say, trying to accommodate the trial
14 schedule that the Special Master in Nebraska vs. -- I'm
15 sorry, Kansas vs. Nebraska has set out, how to accommodate
16 that trial, basically to delay everything by, as I say,
17 you know, about a month and a half to two months. And
18 that reflects the month of the trial and the fact that you
19 probably lose some time because you're also having to
20 prepare ahead of time.

21 I'm sure, Mr. Draper, that neither option one nor
22 option two would be your preference. But as I say, what
23 I'm trying to do is to find a way of accommodating you
24 without delaying everything by four months. And this is
25 partly recognizing that inevitably I'm sure there will be

1 some other delays in the process.

2 And I really began to get worried when I saw your
3 efforts to accommodate Wyoming's concerns that it might
4 take them a little bit longer to actually develop their --
5 their expert reports after seeing yours and had extended
6 all the various deadlines out until September.

7 So, as I say, I just realize there are going to
8 be other issues that will come up, and so I'm trying to
9 keep us on track as much as possible while accommodating
10 your need also at the same time.

11 So what I would love to do is get everyone's
12 thoughts on these two options as to number one, are either
13 options in your view feasible? And if not feasible, then
14 try to convince me why. And then also, if I were to
15 choose one of these two options, whether you have a
16 preference between those two options.

17 Basically, the first option, you know, requires
18 people to stay on the current schedule for the renewed
19 motion for partial summary judgment, but then gives people
20 plenty of time after that to actually work on the expert
21 reports and discovery in light of whatever my ruling is on
22 that renewed motion, while the second option puts the
23 motion off until after the trial, but then as a result of
24 that provides sort of less time between then and the
25 expert reports, and therefore, not as much of an advantage

1 to being able to use whatever my ruling is to shape the
2 discovery that has taken place.

3 I also worry a little bit about option two also
4 in that although I know that the Special Master in Kansas
5 vs. Nebraska has decided to hear this in August, I can
6 imagine that flipping a little bit under the first option,
7 if it flips a little bit, it doesn't matter. Under the
8 second option, if it flips a little bit, we're back into
9 conflict again.

10 So that's -- those are my initial thoughts. And,
11 Mr. Draper, because, as I said, I'm sure that you will --
12 you're the one that this will be most problematic for, why
13 don't I start with your thoughts.

14 MR. DRAPER: Your Honor, this is John Draper.
15 Well, you are correct, this is going to either -- either
16 of those would be problematic from our point of view. And
17 I would ask in general for your consideration of
18 slightly -- at least slightly longer time frames than
19 you're thinking of here.

20 I -- you know, it's hard to choose between these
21 on the spur of the moment. What you said about the
22 advantage of doing the motion for partial summary judgment
23 briefing and hearing ahead of the scheduled trial date
24 made some sense. But I do fear that cutting it so close
25 for the expert reports as a month and a half, two months

1 is a problem.

2 And we, I think, have a responsibility, each of
3 the states does, to be sure that we do everything we can
4 to provide a full record for you and the court, and this
5 makes it more difficult for us to do so.

6 So I guess if I -- understanding your
7 inclinations, I would -- at least subject to consulting
8 with my client, which I can't do during this call, I would
9 think your first option is maybe the preferable one if you
10 could see your way clear to a little bit more time to
11 accommodate the realities of our situation for the filing
12 of expert reports.

13 SPECIAL MASTER THOMPSON: So let me just ask you
14 on the expert reports. So I know that the -- both of the
15 two experts in their declarations suggest that they need
16 until February 15th, which is a full four-month delay.
17 And I certainly understand they're central to both of your
18 two cases, but given that the trial is about a month and
19 that they would have been working on both cases at the
20 same time, even if you had gone to trial in January, can
21 you try to explain to me why they need an additional four
22 months?

23 That just seems like a long delay as a result of
24 the one-month trial in August.

25 MR. DRAPER: Well, Your Honor, the four-month

1 figure didn't come from me; it came from them. And I am
2 probably a little bit handicapped in explaining exactly
3 how that differs. But if -- if we're going to have to put
4 a trial before the completion of expert reports in this
5 case, put a trial of something approaching a month with
6 the associated preparation and pre- and post-trial
7 briefing that involves the expert, it's -- it seems rather
8 clear that they're going to have to do things that -- now
9 that we had no notice of until this announcement by
10 Special Master Kayatta that we were going to have to do
11 before the expert reports would be due in this case.

12 In this case there's still a good deal of
13 data-gathering and discovery to be done that needs to
14 involve the experts in terms of several stages of
15 assessing data and evidence and determining what further
16 is necessary and then going through the procedures
17 necessary to obtain that data and then the analysis, and
18 so on, that has to go on in between those stages in
19 preparing the final report.

20 So it's a -- it's a pretty intensive period in
21 terms of expert -- the need for expert attention in that
22 phase of the case. And it's something that will now not
23 be possible to devote the time that we had assumed would
24 be available.

25 SPECIAL MASTER THOMPSON: I assume that there's

1 not been any schedule yet that --

2 (Mr. Wigmore rejoined the meeting.)

3 SPECIAL MASTER THOMPSON: So I assume that
4 there -- since the trial hasn't actually taken place,
5 there is no schedule yet for post-trial briefings?

6 I assume that's something you'll probably do at
7 the end of the trial or is there a sense of when that is
8 likely to be and when?

9 MR. DRAPER: There isn't any detail about the
10 pre- and post-trial schedule yet, but the Special Master
11 in that case has indicated that he would be discussing
12 that with us and entering orders covering -- covering
13 those issues in detail here probably in the next -- we
14 have a -- we have a call scheduled with him on the -- I
15 think it's the 24th of -- yes, the 24th of April. And I
16 expect that at that time we'll be informed of what is
17 going to be required, and he will hear inquiries and
18 comments by the parties at that point, and then on the
19 basis of that set the schedule.

20 SPECIAL MASTER THOMPSON: Okay. So that's
21 helpful.

22 So, Mr. Michael, before you actually get through
23 these options, let me ask you whether Wyoming has a -- any
24 concern about extending the deadline other than the way
25 that it might impact other deadlines that you face?

1 Obviously, from the standpoint of the judicial
2 system, there's the importance of moving this forward in
3 any case, but I'm also curious, and it wasn't clear from
4 the one letter that was part of the emergency motion,
5 whether or not your concerns about the proposed revised
6 calendar was really focused that -- on the fact that this
7 might end up squeezing you at the time of the release of
8 the expert reports or whether or not you also thought from
9 the standpoint of Wyoming that it was important to move
10 this forward.

11 MR. MICHAEL: Your Honor, I have a number of
12 concerns. And I've had a chance, after seeing Montana's
13 motion which came in a couple days ago, also of doing some
14 legal research, seeing what the law is on these and
15 looking at our Case Management Plan. So I've got maybe
16 four or five I can tick off for you.

17 SPECIAL MASTER THOMPSON: Okay.

18 MR. MICHAEL: I won't belabor you with the legal
19 system concerns that show up in all these cases on
20 extensions of scheduling orders under Rule 16. It's
21 well-known law. There's a case called Johnson vs. Mammoth
22 Recreation. It's probably the best case, a Ninth Circuit
23 case.

24 But I looked at the scheduling orders, and my
25 first concern is this: We have on Pages 5 and 6, "Montana

1 shall disclose its experts no later than October 19,
2 2012." Then we have two provisions following that; one
3 for Wyoming disclosure and one for Montana disclosures.
4 And this isn't about dates; this is about the standard.

5 If we want to get more time -- and I don't know
6 whether we'll need it because we're working very hard to
7 try to prevent that possibility with our experts and
8 trying to anticipate what we'll see from Montana, but if
9 we need to get that, we have to prove good cause shown.
10 And one of the concerns I have is just a general concern
11 about this case is that we have standards for these kinds
12 of motions and that we apply the law. So that's number
13 one.

14 We expect to, if we want to get an extension
15 sometime for that and hope we don't have to, to have to
16 meet the standard of good cause shown. And I don't think
17 Montana has done that with respect to what they want here.
18 So I'm concerned about that. That's over -- just a
19 general concern.

20 On pure scheduling concerns, I have a number of
21 them on timing. First of all, let's talk for a minute
22 about the renewal of our motion for summary judgment.
23 First of all, I don't see it as a significant -- all that
24 significant event from a briefing standpoint.

25 I think we have had our -- we had our long

1 hearing in Denver last September and you made ruling on a
2 lot of the legal issues, and it was, you know, well
3 briefed and heavily briefed. And I think all we're doing
4 today is giving Montana what they ask for, which is a
5 chance to do some discovery to see if they can find
6 another year besides 2004 and '06.

7 And I think it's very important to us to try to
8 get those issues resolved early as we said last August at
9 the scheduling conference when we talked about putting
10 that call issue on our docket early because of the kind of
11 efficiency that would add to the case when we get that
12 issue narrowed down.

13 And we have worked on that. We had -- in our
14 interrogatories that we sent to Montana, we included
15 questions about that, and we haven't received anything new
16 that Montana discovered and Montana hasn't done any
17 discovery on that issue. I think we need to get that and
18 bring that forward on the schedule that we now have.

19 And I would add this: Because I don't think that
20 there is all that much more to argue about, other than to
21 maybe talk about what further facts may be brought forward
22 on that issue, that I don't think it's going to be that
23 big of a problem for Montana to staff that argument, if
24 necessary, even if it was somebody else. I know that
25 Jennifer Anders who I've been working with very closely on

1 discovery issues almost on a daily basis attended those
2 arguments, and she knows what the issues are.

3 So I would say I just don't see any reason
4 whatsoever on that call issue, we don't move that and keep
5 that up front, because it really helps eliminate this
6 uncertainty about do we have to look at some other year?
7 Do we have to go do research on what was happening in 1981
8 or 1997 other than 2004 and '6? So I really think that's
9 important to keep that up front.

10 The other area -- I do have an area of concern
11 about a discovery stay, and that's something I don't think
12 you've really talked about much here, but it --

13 SPECIAL MASTER THOMPSON: I was going to address
14 that, but why don't you go ahead and raise it now.

15 MR. MICHAEL: Okay, I'll raise.

16 This summer we're looking at a snowpack in the
17 Big Horn Mountains of about 75 percent of average right
18 now. We had, as you know, nationwide and also here a
19 horrendously warm early spring, and we're going to have
20 probably an early runoff. We're going to have a water
21 year where actual inspections under Rule 34 might be very
22 valuable to help tell how this -- this river is regulated,
23 especially in Montana, a state that doesn't -- in those
24 two rivers does very little administration we're finding
25 out. And so we think that it might be important for us to

1 actually see on the ground some things. And we can't do
2 that in July and August, critical irrigation months, if
3 Montana -- if we have a stay of discovery and there's no
4 room to use Rule 34.

5 So -- and I would add this: As I said a minute
6 ago, we've been working with Jennifer Anders in Montana
7 very closely on document production. We get up there. We
8 took four lawyers, two experts up there on a trip to
9 Montana. They sent people down here to look at stuff.
10 We've been doing that. And I really believe that even if
11 Mr. Draper and Mr. Wechsler feel they personally have to
12 be attending depositions to take depositions, I still
13 think we move the case forward if it turns out Wyoming --
14 we front-load the Wyoming depositions, and surely somebody
15 can defend those depositions. I don't see that as a
16 difficulty.

17 I don't -- depositions I take, and I think I can
18 speak for the other lawyers here, are depositions that are
19 very genteel and done the right way and with the right
20 kind of working between the attorneys. So I just don't
21 see that as a problem. So I would -- I very much oppose
22 any stay of discovery. I think it's unnecessary. And I
23 think we can keep this thing moving for that reason --
24 those reasons.

25 And as far as the experts go, as I said before, I

1 don't think Montana -- I think you've asked some
2 questions -- have actually come forward with a motion here
3 that gives any of the kind of information that would be
4 necessary to share the test of due diligence, which is
5 what have they done in this case in the last five years to
6 have these experts get prepared.

7 But one month -- I'm not going to stand here and
8 tell you that a one-month delay is all that big of a deal.
9 As I said, we're working very hard to get our experts
10 ready. We hope we don't have to ask for any kind of a
11 good cause extension. And -- but -- and we're trying to
12 predict what their experts will be designating so we can
13 try to do that.

14 But I think that kind of covers the issues that I
15 wanted to talk about in terms of the schedule. So your
16 option number one seems to be by far the fairest and the
17 best.

18 SPECIAL MASTER THOMPSON: Okay. Thanks.

19 So let me -- I want to separate out two things
20 for a moment. The first is the schedule as a whole and
21 second of all the question of a discovery stay.

22 First of all, in terms of the schedule as a
23 whole, do any of the Amicus want to say anything with
24 regard to that? Any comments? Any thoughts?

25 Okay. And then, Mr. Draper, I know it's a little

1 bit different because -- difficult for you because you're
2 in one room and the other attorneys for Montana are in
3 different locations. So let me also ask whether or not
4 any of your co-counsel in this case have anything that
5 they want to add?

6 Okay. So then, Mr. Draper, again just staying on
7 the schedule, and we can talk, as I say, about the
8 discovery stay in a moment, but any response that you want
9 to make to -- well, to Mr. Michael's comments?

10 MR. DRAPER: Yes, Your Honor. We believe that we
11 have shown good cause by our motion, the affidavits, and
12 the discussion today. I think Mr. Michaels -- Michael
13 said that there was -- we had not done any discovery.

14 We've been -- we've made two separate trips to
15 Wyoming with counsel and experts for significant parts of
16 weeks in each case to push discovery along, so we have not
17 been sitting back on that as he seemed to suggest.

18 In terms of adding to the efficiency of the case,
19 I expressed my initial preference for the first option.
20 But in terms of adding to the efficiency of the case, I
21 think you've made it clear that the decision on the motion
22 for partial summary judgment is going to a remedy and
23 whether damages can be awarded in certain years, not as to
24 standards for Compact Compliance. So I don't think that
25 point is particularly relevant. But the points that you

1 have raised I think are. And we do all want to
2 participate in an expeditious manner to take care of our
3 part in the Court's responsibility to hear and decide
4 these cases based on a full record.

5 As far as the statements regarding how
6 unnecessary it is to have any particular person involved
7 in discovery, it seems to me that whenever possible the
8 Court should allow the parties to have their normal
9 counsel present and not schedule things in a way that
10 makes it impossible for that to happen.

11 So those are my comments. And as I said before,
12 the first option seems to be somewhat preferable from our
13 point of view, but I do -- I would urge that we be allowed
14 more time in the big scheme of things, another month or
15 two is not -- is not going to loom very large. What will
16 be important is whether the case gets properly prepared
17 and tried and properly decided.

18 SPECIAL MASTER THOMPSON: Okay. And then on the
19 discovery stay -- so the proposal right now is that
20 discovery be stayed from July 15th to September 15th. As
21 I understand what you're requesting, it is that no
22 depositions would take place during that period of time,
23 and in addition to that, that no discovery answers due
24 during that period of time; is that correct?

25 MR. DRAPER: Yes, Your Honor. That discovery be

1 temporarily suspended so that during that time the State
2 of Montana and, in particular, the experts that we have
3 and counsel are not required to play a major role with
4 respect to discovery; in other words, to have a schedule
5 that would require substantial involvement of counsel
6 during that period because some deadline is immediately
7 after it or at the end of it.

8 It was -- it was my concern really for the
9 immediate pretrial responsibilities that Special Master
10 Kayatta has indicated in forceble terms would be occurring
11 in the time leading up to the trial and that there will be
12 post-trial briefing. So during that particular time it
13 seems particularly inappropriate to be requiring us to
14 discharge that responsibility if it's not absolutely
15 necessary.

16 SPECIAL MASTER THOMPSON: Mr. Michael, just going
17 back to you for a moment, and I know that this will be a
18 somewhat difficult question to ask, but do you have any
19 sense of the type of discovery that you would expect to
20 conduct during that period of time if you could?

21 MR. MICHAEL: Oh, absolutely, Your Honor. We're
22 taking a deposition next week. We're taking -- I'm taking
23 four the week after in Helena and Billings. Those are the
24 Compact commissioners and the higher officials in Montana
25 so I can talk to them about the call issue, and then we're

1 going to talk about a lot of other issues involving
2 administration, how dams are regulated, that sort of
3 thing.

4 So we would probably take depositions of possibly
5 some of the ranchers, the major -- or actually the major
6 irrigation district which is the T & Y Irrigation
7 District. We would take the deposition of the fellow that
8 manages Tongue River Reservoir. We would probably take
9 the deposition of the several people that were asked to be
10 administrators by Montana court to administer the rivers
11 in 2004 and 2006, and we would be gathering just simple
12 facts: How do they do things? How do they operate? What
13 do they recall about those years, the things that they
14 did?

15 That's the kind of things that Montana's experts,
16 of course, can simply read the transcripts later on.
17 We're not talking about taking the depositions of a bunch
18 of -- you know, this isn't highly technical, really. It's
19 just tell us how you operate, what you do, that sort of
20 thing. I think it's something that Montana could readily
21 defend without any difficulty and wouldn't be one that
22 their experts would have to attend necessarily.

23 So, yes, we'd be thinking about doing those
24 depositions in the summer when it makes sense. And if a
25 combination of a deposition and also a field inspection of

1 a diversion point, we would want to do that, we would go
2 do that. And I'm sure Montana can then, you know -- we
3 can't trespass, so Montana would have to escort us on
4 that.

5 That's what I have in mind. And that's why I
6 said I felt that could continue without any difficulty.

7 SPECIAL MASTER THOMPSON: Okay. So let me just
8 say on this -- you know, again, I understand Montana's
9 concerns here. I think at a minimum, and this really is a
10 minimum, that, you know, any -- you know, to the degree
11 that discovery was stayed for a period of time that there
12 be an exception for any type of discovery that needs to be
13 taken during that period of time. So the type of field
14 inspection you're talking about, Mr. Michael, would
15 clearly fall into that category.

16 And, you know, at this point for me the question
17 is whether I stay discovery for a limited period of time
18 subject to, let's say, to any exceptions for things that
19 have to take place during that -- during that window or
20 permit discovery to -- well, to take place or another
21 possibility would be to permit discovery subject to --
22 well, Montana if it believed that it cannot adequately
23 defend, for example, a deposition because of the
24 importance of having an expert there, raising the question
25 initially with Wyoming, and if the two of you couldn't

1 agree, then asking me for basically a stay on that
2 specific discovery so that we can do this on a case by
3 case basis.

4 So Mr. Draper and Mr. Michael, thoughts on those
5 options. I know which option each of you prefers, but --

6 MR. DRAPER: Your Honor, this is John Draper. I
7 think that your suggestion there sounds like a workable
8 one. I would say that the types of matters that
9 Mr. Michael has referred to don't occur exclusively during
10 this July 15th to September 15th period. Irrigation is
11 going on before then. And I think we should be able to
12 accommodate their requests under the conditions that they
13 would like to do it and not -- and not need to do it
14 within this period that we've requested.

15 SPECIAL MASTER THOMPSON: I actually put several
16 options out there. So when you said that what I set out
17 sounded like it would be workable, I'm not quite sure
18 which one you were thinking of.

19 MR. DRAPER: I was thinking, Your Honor, of the
20 staying of discovery for a limited period. And there I
21 was thinking of the period that we had requested,
22 July 15th to September 15th, with the caveat or exception
23 that discovery can go forward during that period
24 nevertheless if it's the only time such discovery can be
25 conducted.

1 SPECIAL MASTER THOMPSON: And Mr. Michael.

2 MR. MICHAEL: Well, there's one other point I
3 wanted to raise, and I kind of got off focusing on
4 depositions. And I really believe that -- I disagree with
5 Mr. Draper, what he said a moment ago.

6 I mean, this -- in a drought year, 2006, the
7 Tongue River didn't go into administration of Montana
8 till -- at least they didn't make a call on Wyoming till
9 July 28th of 2006. So to say that we can find out what we
10 need to find out earlier, I'm not sure.

11 But the other issue is records and documents,
12 and, you know, there's been a big effort. And I misspoke
13 before, and I apologize for that if I said Montana hasn't
14 done discovery. I just said what they've done is
15 basically the document, you know, sharing that we've been
16 doing between each other. But I suspect there's going to
17 be some document discovery, and there might be a
18 deposition or two of some document custodians, I forget to
19 mention, that would be able to tell us what Montana
20 documents were and how you would manipulate their data,
21 that sort of thing.

22 And so far anything we've done with documents, at
23 least when we've been up to Montana, we worked with
24 Jennifer Anders, and they've been very gracious, and I
25 hope we've been as equally gracious down here, and I just

1 don't see why that wouldn't continue. I think it's mostly
2 going to be a little here, a little there, a specific
3 document here or a specific thing that somebody
4 discovered, and I just don't see the need why that
5 couldn't be done and continue during that interim. It's
6 really the way we've been working already with Montana on
7 documents. And we've been doing it very much this week on
8 sharing documents.

9 So I forgot to mention that. I did want to also
10 put that on the table, Your Honor.

11 As far as the -- again, I guess if there was a
12 deposition that we noticed and Montana had said, "Look,
13 this is one that we really think we have to have our
14 experts there," and can convince you of that, then so be
15 it, then we'd be barred from taking the deposition. I
16 think we ought to have a chance to go forward and have it
17 be case by case if there's a problem, would be my
18 preference, in terms of compromising a little here.

19 SPECIAL MASTER THOMPSON: Right.

20 And so my general approach on these issues, from
21 the period that I was a litigator, is that, you know, to
22 believe that counsel can generally work these things out,
23 particularly as in this case where it appears to me
24 there's a very good working relationship between the
25 counsel on both sides.

1 And so that's why I'm wondering whether or not
2 one possible approach is to basically have a rule that
3 during the -- during the period of the trial, as well as,
4 you know, I think it's also fair to also give Mr. Draper
5 and his -- and his fellow attorneys an opportunity to
6 prepare for that trial, but during that period of time
7 that Wyoming would avoid any discovery that if it believes
8 it doesn't need to hold during that period of time or that
9 would probably need the presence of either Mr. Draper,
10 Mr. Wechsler, or their experts who are working on the
11 other case, so basically asking Wyoming to accommodate
12 Mr. Draper and Mr. Wechsler and their experts during that
13 period. And also reflecting that Mr. Draper and
14 Mr. Wechsler would be free to say if a particular request
15 was troublesome.

16 And if you all cannot work it out on your own,
17 then I would be more than happy on a case by case basis to
18 say that, no, I think that really you need to let
19 Mr. Draper and Mr. Wechsler handle their other case and we
20 put that off until later.

21 But I guess my question is: Is there any reason
22 why the two of you believe you can't work this out
23 together versus just putting an absolute stay on
24 discovery?

25 MR. DRAPER: Well, Your Honor, this is John

1 Draper. I think it is true that we have established a
2 very good working relationship among counsel. What --
3 what any order you put into place would do is simply set
4 the general assumptions about -- about how things should
5 proceed during a certain period. And certainly if there's
6 something during that period that would otherwise be
7 appropriate and can be accommodated, we'd certainly be
8 open to that. But I think it would be helpful if you were
9 able to set the stage and at least indicate that discovery
10 that doesn't need to take place during that July 15th to
11 September 15th period be avoided if at all possible and
12 that counsel -- counsel be encouraged to work out any
13 issues from either side. I think that kind of approach is
14 likely to be workable given our last -- our historical
15 good working relationship.

16 SPECIAL MASTER THOMPSON: Mr. Michael.

17 MR. MICHAEL: Well, I would say this: If we're
18 going to knock out a couple months of most of discovery or
19 deposition discovery that we just have to be very aware;
20 we have got a discovery -- last day for depositions is
21 currently scheduled for January 25th. And the witness
22 lists are very long from the initial disclosures. So
23 we're talking about the potential here of having multiple
24 depositions going on at the same times later in the fall.
25 So I would just keep that in mind. I think we've got the

1 manpower here to handle it and may have to do that. So I
2 think everybody needs to be aware of that.

3 SPECIAL MASTER THOMPSON: Okay. So let me tell
4 you where I think I am at the moment, which is that -- my
5 inclination is to go forward with the schedule for
6 Wyoming's renewed motion for partial summary judgment,
7 although I do not have any calendar in front of me right
8 now.

9 What I would propose, and I realize that this is
10 asking something of you, Mr. Michael, but what I would
11 propose is probably I will move the deadline for Wyoming's
12 response up a couple of days. You know, as you point out,
13 I would particularly expect when you get to the response
14 stage that it's not going to be particularly time
15 consuming. To the degree that there is any aspect of this
16 motion which is time consuming will probably be pulling
17 the facts together, and trying to, therefore, hold the --
18 a hearing on that renewed motion on Friday, July 27th or
19 potentially Thursday July 26th. That way we can complete
20 all of that and get that out of the way before the trial
21 commences in Kansas vs. Nebraska.

22 As I said, I do expect to -- well, to delay when
23 expert reports are due, but not by four months. And so my
24 best expectation is probably something in the two month
25 vicinity because at least based on the papers in front of

1 me, it's hard for me to see good cause for more than about
2 a two-month extension in those deadlines, but I do think
3 that there is cause shown to delay those dates to some
4 degree to reflect the fact that the experts that
5 Mr. Draper expects to use on behalf of Montana are also
6 involved in the Kansas vs. Nebraska case.

7 And as I said, my goal would be to extend all of
8 the various deadlines that come after the renewed motion
9 for partial summary judgment. So that would include the
10 disclosure of the expert report and the last day for
11 propounding written discovery and the last date for
12 deposition and the final day for motions. All of those
13 would also be moved back to reflect that delay with a goal
14 of having the final day for motions be at the beginning of
15 May rather than the June 25th date. So my hope would be
16 is that ultimately we would maybe lose a month and a half
17 here in moving the trial forward.

18 On the discovery stay, my inclination is, as I
19 mentioned, to issue an order requiring the parties to
20 confer and to decide what is -- what is appropriate.

21 And in connection with that, I think it is
22 important that we reflect the fact that Mr. Draper and
23 Mr. Wechsler will be in the trial. So that suggests that
24 anything that does not need to take place during the --
25 during the window of the trial and, say, two weeks before

1 that doesn't need to take place during that period of time
2 and is not going to make discovery more difficult for
3 Wyoming or really both parties by requiring doubling up
4 afterwards, to the degree that things can be delayed, then
5 I would ask that Wyoming grant that courtesy to Montana.

6 But I would also expect that as part of that
7 conferral, that number one, if there are specific
8 discovery matters that Wyoming feels is necessary during
9 that period, that we will move forward on those.

10 Similarly, if there is something that is in the -- that is
11 already in the works; in other words, if there's, for
12 example, a written discovery matter where maybe it's to
13 supplement interrogatories and the like and it is
14 relatively minor, you know, my hope is that things just
15 don't shut down as of two weeks before the trial, but that
16 those matters can continue forward.

17 And furthermore, Mr. Michael, if there are
18 particular depositions that you would like to -- well, be
19 able to schedule for that period of time and that you do
20 not believe that Mr. Draper and Mr. Wechsler may be there
21 because Ms. Anders, for example, could handle the defense
22 of the deposition, then I would ask that the parties sit
23 down and basically go through those witnesses and see
24 whether or not an agreement can be made that some
25 depositions can go forward with Ms. Anders as defending

1 them. And that if there is any disagreement there, that
2 it can be brought back to me on an emergency basis. I'm
3 willing to sit down at any point to talk about these, and
4 we can actually resolve those.

5 My expectation is that we probably won't need
6 that because I think you are all very considerate to each
7 other and that you'll be able to work it out, but I'm more
8 than happy to resolve things on a case by case basis.

9 So that's my current thinking. And there are a
10 couple of details there, including the exact amount of
11 time that I would delay the expert reports that I'm not
12 going to decide during this telephone call because I want
13 to sit down with the calendar and actually look at the
14 calendar and see how this can be best addressed.

15 And also I will embody in any order language to
16 the effect that I just said with respect to the discovery
17 stay. So I realize I'll need to put that together. And
18 tomorrow is actually -- we have a retreat of the Woods
19 Institute that both I and Susan Carter will be at, so I
20 probably won't have an opportunity to circulate anything
21 until Monday.

22 And, Mr. Draper, I know I did not give you a
23 chance to consult with your fellow counsel about my two
24 options. And so you're certainly free tomorrow to submit
25 a letter if you want to weigh in on option two versus

1 option one because, as I said, unless I'm convinced
2 otherwise, I am planning on moving forward with option
3 one.

4 And furthermore, if there's any other information
5 that you want to give me with respect to the length of
6 period of time necessary for a delay in the disclosure of
7 the expert reports other than what has -- you've already
8 submitted, you're also free to do that in a letter
9 tomorrow.

10 And, Mr. Michael, I'll give you the same
11 consideration if there's anything more that occurs to you
12 after this phone conference, you're more than welcome
13 to -- well, submit that in a letter tomorrow because, as I
14 said, I won't finalize this until probably -- I'll work on
15 this on Sunday.

16 So let me ask, then, both Mr. Michael and
17 Mr. Draper your thoughts on what I just said. I realize
18 that in neither case it is exactly what you want.

19 MR. DRAPER: Your Honor, this is John Draper. I
20 don't have anything further to say. I appreciate your
21 consideration of our predicament. I'm sorry that it has
22 arisen, but I appreciate the consideration of Wyoming and
23 the other parties as well as yourself in trying to address
24 that in a fair way.

25 MR. MICHAEL: Your Honor, this is Peter Michael.

1 I don't have anything to add. Thank you.

2 SPECIAL MASTER THOMPSON: Okay. Do any of the
3 other parties have anything they want to add or, again, I
4 realize that other counsel from Montana are on the line
5 and can't pass notes to Mr. Draper, so if you do have
6 anything you want to add, feel free to add anything, too?

7 Okay. Then I think if there's no other
8 conversation -- anything else that we need to raise during
9 this telephone conference?

10 MR. DRAPER: Nothing from Montana, Your Honor.

11 MR. MICHAEL: No, Your Honor.

12 SPECIAL MASTER THOMPSON: Okay. Great. So I
13 think this has been a really very productive phone
14 conference. And again, I appreciate the way in which the
15 parties are trying to work together to bring this to a
16 conclusion.

17 And if you do have anything more that you would
18 like to submit on these matters, any other thoughts that
19 come to you, feel free to submit a letter tomorrow.

20 And let me just ask, if you are going to do that,
21 if you could send it not only to Susan Carter as you
22 normally would, but if you could also copy me by e-mail.
23 And my e-mail is buzzt@stanford.edu. And I say that only
24 because she is going to be in the retreat, also, and she
25 probably won't have an opportunity to check and then

1 forward it to me, and that way I know I will have anything
2 that you submitted.

3 Okay. So, again, thank you very much. Hope you
4 have productive remainders of the day, what is left of it.
5 And as I said, I will submit an order revising the Case
6 Management Plan dates along the lines that I just
7 discussed and taking into consideration anything more that
8 you add tomorrow. I will do that on Monday.

9 MR. DRAPER: Thank you very much, Your Honor.

10 SPECIAL MASTER THOMPSON: Thank you, Mr. Draper,
11 Mr. Michael. Thank you everyone on the line.

12 MR. MICHAEL: Thank you, Your Honor.

13 - - -

14 (End of proceedings at 3:38 p.m.)

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