

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 18, 2013

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6 California,

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1 THURSDAY, APRIL 18, 2013, 10:32 A.M.

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3 SPECIAL MASTER THOMPSON: So this is a hearing in
4 Number 137 Original, Montana vs. Wyoming. And it is a
5 telephonic hearing on Montana's objections to Wyoming's
6 expert designation and expedited motion for supplemental
7 depositions.

8 And since this is a motion by Montana, why don't
9 we start with counsel for Montana. So you want to state
10 an appearance?

11 MR. DRAPER: Yes, Your Honor. This is John
12 Draper. Also on the phone today from Montana is Attorney
13 General Tim Fox. With Attorney General Fox is Chief
14 Deputy Attorney General Mark Mattioli, in addition Deputy
15 Attorney General Cory Swanson, and Chief Counsel for the
16 Montana Department of Natural Resources and Conservation
17 Ann Yates, along with other lawyers from that department,
18 Brian Bramblett, and Kevin Peterson.

19 With me here in Santa Fe is Jeff Wechsler and
20 Laura Katz.

21 SPECIAL MASTER THOMPSON: Thank you very much,
22 Mr. Draper.

23 So next, then, counsel for State of Wyoming?

24 MR. KASTE: Your Honor, this is James Kaste from
25 Wyoming's Attorney General's office. With me today are

1 Pete Michael, Andrew Kuhlman, David Willms, and Chris
2 Brown.

3 SPECIAL MASTER THOMPSON: Thank you.

4 And I received an e-mail message earlier in the
5 week that the State of North Dakota did not believe that
6 they would be able to participate.

7 Is there anyone on the line from the State of
8 North Dakota?

9 MS. VERLEGER: This is Jennifer Verleger. And
10 I'm here for now. We're in the middle of a mediation, but
11 the mediator is with the other side, so I'll hang around
12 for as long as possible.

13 SPECIAL MASTER THOMPSON: Okay. Well, it's great
14 to have you on the call and certainly understand the
15 situation and hope the mitigation goes well.

16 So next for the various Amici. So, first of all,
17 for the United States?

18 MR. DUBOIS: This is Jim DuBois for the United
19 States, Your Honor. Good morning.

20 SPECIAL MASTER THOMPSON: Okay. Good morning.

21 And next for the Northern Cheyenne Tribe?

22 Okay. And then -- so no one for the Northern
23 Cheyenne Tribe on the phone at the moment.

24 And then for Amicus Anadarko Petroleum?

25 MR. WIGMORE: Yes, Your Honor. This is Michael

1 Wigmore for Anadarko.

2 SPECIAL MASTER THOMPSON: Okay. Thank you.

3 And is there anyone on the line that I have
4 forgotten?

5 Okay. If not, so I have reviewed all the -- all
6 of the papers, including the State of Wyoming's expert
7 designation. And I did receive Montana's reply in support
8 of its objections and expedited motion this morning.

9 And I think maybe the best place to start is to
10 see whether or not we can come to some agreement as to
11 exactly who is an expert for purposes of the expert
12 designation.

13 And one of the things I found in reading through
14 most of the papers was that it's difficult to -- to
15 actually talk about some of the issues because we're
16 dealing in the abstract at the moment without any specific
17 testimony in mind.

18 But, Mr. Kaste, you've received, I assume,
19 Mr. Draper and Montana's reply this morning. And I guess
20 I would be interested in your thoughts on that reply, and
21 then we can maybe get into the question of exactly what an
22 expert is for purposes of designation.

23 MR. KASTE: This is James Kaste.

24 We did receive the reply from the State of
25 Montana this morning, had a chance to go through it, and

1 confirms in my mind what I was thinking yesterday, which
2 is, as is the case with the majority of this litigation,
3 much to-do about nothing.

4 Obviously, we, State of Wyoming, has retained
5 three experts to give opinions about the litigation that
6 they have developed for purposes of this litigation, and
7 Wyoming employs a whole host of subject matter experts who
8 are also fact witnesses in this case.

9 Now, there is some, I guess, imprecision in the
10 Civil Rules of Evidence and the rules related to
11 disclosure. And we talked generically about expert
12 witness testimony, which is simply testimony based upon
13 scientific, technical, or otherwise -- other specialized
14 information.

15 As it relates to the issues in this case, every
16 one of Wyoming's employee witnesses who may testify will
17 certainly meet that standard. They will testify about how
18 they operate the streams here in Wyoming, and that is by
19 its very nature scientific, technical, or otherwise
20 specialized information.

21 As a result, Wyoming believes people like that at
22 least ought to be on the list, at least ought to be
23 identified. That's just good practice. And they are
24 identified on our list to say exactly what we said. They
25 have factual information and have formed opinions in the

1 course of their ordinary employment which have been the
2 subject of their depositions, and they'll testify thereto.

3 Are they expert witnesses in the classic sense of
4 a paid expert brought in to give litigation or opinions
5 formed solely for purposes of the litigation? Absolutely
6 not. But are they technically giving expert testimony?
7 Yeah, they are, even though it really is a mixture of lay
8 and expert testimony by virtue of the sub -- or the
9 subject matter of the testimony.

10 So, like I said in our motion, out of an
11 abundance of caution and in order to be technically
12 correct, these people are on the list. I see no reason to
13 take them off the list, but I see no reason to overreact
14 in any way and take any additional action with regard to
15 this designation.

16 You know, the only possible conceivable thing
17 that could be done in the event the Court determines that
18 for some reason these employees somehow terribly wrong for
19 us to be honest and up front to stick them on the list, if
20 that was somehow bad, then the Court is going to have to
21 make us take them off the list, but no further depositions
22 or supplementation or any of that -- any activity of that
23 nature is warranted.

24 So in answer to your question, my answer is
25 technically all of them are experts. There are only three

1 of them are experts for whom there's specific opinions and
2 the basis, therefore, need to be disclosed in the course
3 of this designation.

4 SPECIAL MASTER THOMPSON: So in the reply papers
5 that Montana submitted this morning, at Pages 4 to 5,
6 there's a paragraph that talks specifically about what
7 Mr. Boyd might offer in the way of testimony on the return
8 flows. And as I said, I think to the degree that we can
9 talk concretely, it will be helpful, and so I'm just going
10 to quote from the papers.

11 Montana says: For example, in its designation,
12 Wyoming suggests that Mr. Boyd may offer testimony on
13 return flows. "As a percipient witness, Mr. Boyd can
14 offer testimony on the return flows that he measured or
15 observed in the years at issue; however, he cannot attempt
16 to offer opinions about return flows that he did not
17 measure or observe or on the impact of return flows to
18 Montana."

19 And as I read Montana's papers, what they're
20 saying is is that if by designating Mr. Boyd as an expert,
21 all Wyoming is attempting to do is make sure that no one
22 later can object on grounds of surprise when Mr. Boyd
23 offers testimony on return flows that he measured or
24 observed in the years at issue, even though his
25 measurement or observation is in his capacity as an expert

1 in that area, but that if what Mr. Boyd is going to do is
2 to attempt to offer opinions about return flows that he
3 did not measure or observe or on the impact of the return
4 flows to Montana, that that is expert testimony and that
5 he does need to be designated as an expert witness and
6 that they should be able to depose him on those particular
7 questions at the moment.

8 So my question is to you, Mr. Kaste, would you
9 agree with that distinction between the two different
10 types of testimony and -- I'll make this a compound
11 question -- is it your intent only that Mr. Boyd would be
12 offering testimony about, in this particular case, return
13 flows that he measured or observed?

14 MR. KASTE: Yep. I mean, I think we made that
15 clear in three separate pieces of paper now when we said
16 that they were going to testify about facts they observed
17 and the opinions that they formed from those facts.

18 You know, when you get a person like Pat Boyd on
19 the stand who is really a, you know, a technician might be
20 a good way to describe him, but he's the guy that goes out
21 as the hydrographer commissioner and observes the streams
22 in action and makes determinations at the time to turn on
23 or turn off headgates. And he's going to testify to his
24 actions in those years that are at issue, and part of that
25 is going to be, "Well, on this day I went out and I shut

1 this headgate off."

2 "Well why did you do that?"

3 And the answer that flows from the "why" question
4 is going to be a mixture of fact and opinion and is going
5 to be based on scientific, technical, or other specialized
6 knowledge.

7 Am I going to ask him, "What do you think, have
8 you formed an opinion about what goes on in Montana that
9 you formed specifically for purposes of this case?" No.

10 And I think we said that three different times to
11 Montana that we're not going to be offering these
12 witnesses to give testimony that they formed specifically
13 from -- for this litigation as opposed to fact and opinion
14 testimony that they formed in the ordinary course of their
15 job. And I would expect the employees to testify for the
16 State of Montana to give similar kinds of testimony.

17 You know, I can imagine Mr. Moy, who wasn't
18 designated, get on the stand and say, "You did this in a
19 particular year; why did you do that?" And he is, you
20 know, by all accounts an expert in his particular field
21 and has a certain amount of expertise, and he's going to
22 say why. And that's going to implicate, technically, the
23 language of 702.

24 So I don't know how many times I have to tell
25 them, to reassure them of the fact that these are going to

1 be limited to the perceptions of our witnesses, but this
2 will be the fourth time.

3 SPECIAL MASTER THOMPSON: So I understand what
4 you're saying, Mr. Kaste. In fairness to Montana, though,
5 the designations were broad enough that it was not clear.
6 And so one of the things I am trying to decide right now
7 is whether or not there is still any disagreement between
8 the parties that might come back and haunt us at a later
9 point in time. So that's the reason why I'm trying to get
10 into this particular hypothetical. And I appreciate your
11 directness in the answers to them.

12 So let me just continue on Mr. Boyd and try to
13 extend it in the way of a hypothetical.

14 Again, what I want to make sure is that you and
15 Montana are not saying basically the same thing, but, in
16 fact, interpreting what you're saying in very different
17 ways, because then we could just end up with the same
18 problem four months from now. I want to avoid that. So I
19 don't think this is the case.

20 But let's assume that Mr. Boyd, for example,
21 actually used some type of a mathematical model that could
22 extrapolate from a particular gauge that was measuring
23 some return flow as to overall return flow. Certainly, to
24 the degree that he used that model, I would assume that at
25 trial he would testify that he used such and such a model

1 in actually determining the return flow. If he also
2 wanted to testify as to the reliability of that particular
3 model, was that -- which side of the line would you put
4 that?

5 MR. KASTE: Well --

6 SPECIAL MASTER THOMPSON: You see, This is a
7 problem for me only because, as I say, I'm dealing with
8 this totally in the abstract. This might not even be an
9 issue.

10 MR. KASTE: I seriously doubt that it would. But
11 I guess there's a distinction to be made. Was the model
12 created after the litigation was initiated by Mr. Boyd in
13 order to explain events or is it a model that has been in
14 the office and that they rely on?

15 And there are -- there are certain things like
16 that. Like we have stream diagrams and, oh, there are a
17 couple of cheat sheets that the Sheridan office uses there
18 to help guide them as they regulate the streams.

19 Those kinds of things, I think it would be
20 perfectly appropriate for a person like Mr. Boyd to say,
21 "Oh, I have that cheat sheet and I use it," and if he
22 participated in the development of it, to explain how he
23 development -- how he developed it and whether he thought
24 it was reliable because he developed it.

25 Now, those cheat sheets, of course, have been

1 produced in the course of discovery and discussed during
2 the course of the depositions because they're just, you
3 know, the facts on the ground about how we regulate here
4 in Wyoming. That's fair game.

5 Now, if after the litigation began, Mr. Boyd
6 created a mathematical cheat sheet that helped explain
7 actions that we took in the past for purposes of this
8 litigation only, that would have to be disclosed, and that
9 would have to be discussed specifically in the course of
10 his expert designation. There's no such -- there's no
11 such thing like that, and we're not purporting in the
12 course of our disclosure that any of these witnesses have
13 done any activity like that, except the three people that
14 we retained to do the scientific analysis specifically for
15 purposes of this litigation, and those individuals gave
16 extensive reports and were disclosed in a very different
17 manner than the kind of hybrid-fact experts that we have
18 identified as our employees.

19 So there's a dividing line there between
20 prelitigation and post, and the prelitigation materials
21 like that have all been disclosed and discussed in the
22 course of discovery.

23 SPECIAL MASTER THOMPSON: Okay. So let me turn,
24 then, over to Mr. Draper. And so I am interested in your
25 thoughts on that, along the questions that I had with

1 Mr. Kaste.

2 And, also, I am assuming that whatever the
3 dividing line is here is one that applies both to Montana
4 and Wyoming.

5 MR. DRAPER: Yes, Your Honor. This is John
6 Draper.

7 I've been listening with interest to your
8 colloquy with Mr. Kaste. Basic facts are here that
9 Wyoming designated these 13 individuals that are in
10 question as experts and is seeking to have them accorded
11 the special status of an expert in this litigation, and
12 yet they are refusing, at least so far, to follow Rule 26
13 requirements that every expert including the type of
14 expert we're talking here about who doesn't submit his
15 formal report, but nevertheless have submitted on his or
16 her behalf a summary of the facts and opinions to which
17 that expert will testify.

18 I think what I've hearing from Mr. Kaste is that
19 these 13 witnesses are, in essence, fact witnesses, but at
20 the same time he is refusing to agree to have them
21 stricken from the expert designation list.

22 And I think your hypothetical was particularly
23 helpful where you talked about Mr. Boyd and the difference
24 between measuring quantity of water physically on the one
25 hand versus using that information to extrapolate to

1 determine the amount of return flows that were not
2 directly observed. And I think when you make that step
3 that you posited in your hypothetical, you're going from
4 being a fact witness to an opinion witness.

5 If it's just -- you haven't done it if you're
6 Mr. Boyd and you say, "I measured this flow and someone
7 gave me this mathematical model and told me that it had
8 been used in the office, and if I put this number in here,
9 I should look at the number that comes out and enter that
10 in my records." That's still being a fact witness.

11 But if Mr. Boyd says, "And from that I could tell
12 what the unobserved return flows were based on this
13 model," then he has stepped over that line and gone into
14 the area of expert testimony. And if he does that, then
15 he needs to have been designated as an expert and have met
16 the requirements for expert designation, which in this
17 case is submitting a summary of the specific opinions and
18 facts to which he will testify, and that has not been
19 done.

20 So I would say that what we have here is a
21 situation where Wyoming has not been forthcoming. They
22 designated 13 people. They want them accorded a special
23 status of being an expert, which allows them to do things
24 that nonexperts cannot do at trial, and yet they are not
25 forthcoming about the information that the Rule 26

1 requires. They have not given us the specific opinion in
2 which they're going to testify and they have not given us
3 a summary of the facts. So I think your hypothetical
4 helped to bring out that distinction.

5 And there are many good reasons for the way the
6 rules, which we believe are totally consistent, the way
7 they put the dividing line between fact testimony and
8 expert testimony, and that as I think Your Honor has
9 alluded to, that it's really the testimony here that must
10 be looked to to see whether we're talking about an expert
11 designation or not.

12 If there is a claim, which apparently there is,
13 by Wyoming that some or all of these 13 people have some
14 kind of expertise that qualifies them to give expert
15 opinions, that is something that needs to be tested
16 against the opinions. Is it in an area that they claim to
17 be experts? We have no idea. And that's the kind of
18 rationale that is underlined rules, that I could go on at
19 some length about why the rules are as they are, but the
20 simple fact is they have not been forthcoming as the rules
21 require and provide us the information that we should have
22 and allow, and then as a follow-on to that, permission to
23 take an expert deposition on the expert opinions that are
24 properly revealed.

25 So maybe I'll stop there and see if you have

1 further questions for me, Your Honor.

2 SPECIAL MASTER THOMPSON: So I think there's two
3 or three different issues that we need to resolve.

4 The first question is: Under what circumstances
5 does somebody who is testifying as a percipient witness
6 and testifying only to either things that they did or
7 events that they were witness to need to be designated as
8 expert witnesses?

9 And I understand from the papers that Wyoming's
10 major concern there is that since a number of their
11 witnesses, including people like Mr. Boyd, are acting in
12 their employment in a scientific, technical, or otherwise
13 specialized capacity, that they wanted to make sure that
14 if they got to trial and start asking Mr. Boyd questions,
15 that there's no objections that, in fact, that testimony
16 is that of an expert, and since they didn't designate
17 Mr. Boyd, they can't actually put Mr. Boyd on the stand.

18 And, you know, if that's the only issue here,
19 then I think it can be readily resolved by simply --
20 simple ruling on my part that to the degree that somebody
21 who is a percipient witness, they will be able to testify
22 to everything that they observed and did even though it is
23 based on scientific, technical, or specialized knowledge.
24 So I think that is fairly easy to resolve.

25 My concern is that there is still some

1 disagreement between the two sides as to what actually
2 falls into that particular category.

3 So one thing that would be helpful just as
4 background, Mr. Draper, so -- so I didn't actually see
5 your expert designation. So in addition to your
6 designation of retained experts, did you designate any of
7 your percipient witnesses also as experts?

8 MR. DRAPER: Your Honor, this is John Draper.

9 We did not designate any percipient witnesses as
10 part of our expert designation. We designated experts who
11 were specially hired for this and also experts who are in
12 the employee -- in the employ of the State of Montana.
13 And we submitted a summary of the facts and opinions for
14 those who were employees, and we've submitted reports for
15 those who have been specially engaged for this litigation.

16 And, of course, we will have percipient or fact
17 witnesses, state officials and so on, who will testify as
18 to facts, but we did not include them on the expert
19 disclosure list because simply testifying to a fact as
20 some action that was taken or even why the action was
21 taken.

22 If you ask -- if you ask an official why he took
23 an action, he can tell you as a matter of fact why he took
24 it. And that is not expert testimony. So we felt that
25 our distinction between those two categories, the experts

1 on the one hand and the fact witnesses on the other, was
2 properly drawn. And we disclosed either through reports
3 or through summaries of facts and opinions of all of the
4 information required by Rule 26 with respect to our
5 experts.

6 SPECIAL MASTER THOMPSON: And so, again, to the
7 degree that you had a witness who you placed on the stand
8 who has been involved in measurements of, say, flow across
9 the border or -- you know, and they testify as to what was
10 measured at a particular stage, they then talk about
11 modeling that they engaged in in order to actually try to
12 extrapolate from that piece of information as to what the
13 overall flow was, that would all be, in your view, factual
14 testimony, not expert testimony. Is that right? I am
15 just going to take this a step at a time.

16 MR. DRAPER: Your Honor, this is John Draper
17 again.

18 As to what is actually observed or experienced,
19 that is fact testimony. If they -- if a witness seeks to
20 assert a fact that he did not observe, something that is
21 the result of analysis that by its nature takes expertise
22 in hydrologic modeling, for instance, then I think you
23 have crossed into the area of expert testimony. But
24 certainly, as I mentioned with respect to Mr. Boyd, if he
25 simply is stating that he performed certain functions,

1 that -- that is unobjectionable as a statement of fact.

2 If he then is asked to go into whether those --
3 whether the results represent something in particular and
4 whether it is reliable to rely on those quantifications
5 that he did not actually measure, then I think you're in
6 the area of expert testimony.

7 SPECIAL MASTER THOMPSON: I understand.

8 So, again, going back to my hypothetical -- and,
9 again, I realize this doesn't bear any resemblance to the
10 actual facts of this particular case -- but if the
11 function of a Montana official to actually try to
12 determine how much water is going over the border from
13 Wyoming in a particular river or a stream and there is a
14 gauge that he measures, and then he applies a particular
15 model that he has applied for 20 different -- you know,
16 for 20 years and has close familiarity with it and he uses
17 that and comes up with a particular figure, the fact that
18 he actually took the measurement of the gauge, he used his
19 model, he came up with a particular figure for what he
20 thought the flow over the border was and then maybe took
21 some action on that, all of that, to the degree it is
22 simply talking about the steps he took and his experience
23 in doing it and how he went about doing it, all of that
24 strikes me at least as factual testimony, but then once he
25 is then asked, "In your opinion, is that a" -- you know,

1 "is that a reliable and valid model for actually
2 determining the amount?" that would be opinion testimony.

3 Is that a correct statement of how you would view
4 it?

5 MR. DRAPER: Your Honor, this is John Draper.
6 Yes, that is.

7 SPECIAL MASTER THOMPSON: Okay. And, Mr. Kaste,
8 as I understand it, though, you would -- you know, you, I
9 would assume, plan to ask some of those latter type of
10 questions?

11 MR. KASTE: Well --

12 SPECIAL MASTER THOMPSON: Is that -- and, again,
13 I don't want to make an issue that isn't here, but I just
14 want to make sure that we don't -- decide we don't have an
15 issue and then find out we do later.

16 MR. KASTE: Well, I'm trying to think of a
17 situation where we do something like that, and one that is
18 springing to mind --

19 SPECIAL MASTER THOMPSON: I mean --

20 MR. KASTE: Let me just say, what it highlights
21 to me is that the proper resolution of these issues will
22 be in response to the specific questions at trial. And
23 I'm -- I will ask a question of a witness at trial, and as
24 you would in any case, the opposing party can get up and
25 say, "Wait a minute, you dirty cheaters, you're surprising

1 me with testimony that wasn't designated, and it's expert
2 testimony. I object." And then you can rule on it at
3 that time in the context of those specific facts. And the
4 ruling at that time should be pretty easy. Right now I
5 think it's almost impossible.

6 SPECIAL MASTER THOMPSON: So I agree we're
7 working in the area of hypotheticals, and that's always
8 very dangerous. And -- but here's my -- here's my
9 concern, and it's the one thing I want to avoid.

10 So I agree with the papers of Montana this
11 morning, and, you know, you haven't had a response to me
12 to respond to it in full, so you might agree with it,
13 also, that what is determinative of opinion testimony is
14 not the expertise of the witness, but the nature of the
15 question. And, in theory, where it is going to probably
16 be an opinion is where you are likely to want to frame the
17 question of, "In your opinion, is this model a valid
18 model?" Or you, know, "In your opinion, were those
19 Montana water rights we didn't see used for a period of
20 time, you know, in your opinion based all your years of
21 expertise in Wyoming, you know, would those have been
22 abandoned?" You know, that sounds an awful lot like
23 opinion testimony to me.

24 We can -- obviously, we have to wait until trial
25 to actually make a determination as to what specific

1 questions are expert questions and opinion questions. But
2 to the degree that there is a significant category of
3 questions that you believe you will be asking your
4 witnesses that would fall into that latter category of,
5 you know, they're really asking somebody for their
6 opinion, not what they actually did, not how many years
7 they did it, not the actions that they took on it, but
8 whether or not, for example, a particular methodology is
9 reliable, then if at that point you ask a question and you
10 did not actually say that that is going to be one of the
11 specific opinions that you were going to ask, then at that
12 point -- and there's not been any further deposition, then
13 Mr. Draper at that point in the middle of trial is going
14 to say, "You know, this was what we talked about before,
15 you know; Wyoming just asked an opinion question, and we
16 didn't have our opportunity to depose them, and they
17 didn't really satisfy Rule 26."

18 And I'll be honest, I'll be sympathetic to that
19 because it does sound more like an opinion at that
20 stage.

21 MR. KASTE: I am --

22 SPECIAL MASTER THOMPSON: I just want to make
23 sure, you know, then that we don't have a huge category
24 here that we're missing.

25 MR. KASTE: No. I'm telling you, I told you in

1 my papers, and I'll tell you again, these people are going
2 to be asked about their jobs and their involvement in this
3 litigation. And that's it. But that testimony about
4 their job is going to have, you know, the reasons why they
5 do things are based on their knowledge of scientific,
6 technical, or otherwise special information. They're
7 going to say, "I did this because I know thus and so."

8 And I think that that, you know, is on that
9 verge, but it doesn't cross into the area where they need
10 to be specially designated because those opinions are
11 not -- you know, those are the opinions inherent in the
12 performance of their duties, and they're used to explain
13 their conduct at the time, as opposed to developed
14 specially for purpose of this litigation. And we are not
15 going to ask them about opinions they have developed
16 specially for purposes of this litigation.

17 And I'm perfectly fine dealing with this on a
18 question by question basis because we're not going to ask
19 these questions of these witnesses, and I
20 suspect Montana -- or I hope Montana is not going to do
21 the same with their undesignated witnesses.

22 SPECIAL MASTER THOMPSON: Yeah. Well, that's
23 why, as I said a moment ago, the one nice thing about this
24 particular question is it is going to apply equally to
25 both sides.

1 Okay. So what I would then propose that we do,
2 given that my understanding is that Wyoming designated
3 these various other experts out of caution to make sure
4 that, in fact, they were, you know, providing notice that
5 these people would be testifying, but that they're only
6 going to be testifying as percipient witnesses is -- is
7 two things.

8 Number one, that we do remove these witnesses
9 from Wyoming's disclosure, but that I also -- I'm sorry,
10 that's just another line. I thought I'd lost you all.

11 Going back to my last point, that I enter a
12 relatively short order making it clear that that witnesses
13 for all sides can testify to facts as a percipient
14 witness, even though those facts involve that person's
15 role as a scientific, technical, or otherwise specialized
16 employment.

17 Does that make sense?

18 MR. KASTE: That's acceptable to the State of
19 Wyoming, Your Honor. And if you just want to do an order
20 that says for purposes of this litigation, we'll proceed
21 as if those folks are off the list and don't make me have
22 to go cut and paste out these people and clutter the Court
23 file with a revised designation, that would be fine.

24 SPECIAL MASTER THOMPSON: Okay. I'd be happy to
25 do that.

1 And what I will do, in fact, is I will -- you
2 know, just do, again, to make sure that there's no
3 disagreement here, what I would propose is that I do this
4 as a draft order and then circulate to all sides, and if
5 anyone has any concerns, they can let me know, and then
6 I'll enter it as a final.

7 MR. FOX: Your Honor, this is Tim Fox. May I ask
8 a question?

9 SPECIAL MASTER THOMPSON: Yes, you may.

10 MR. FOX: Just so we're clear on this end, so
11 Wyoming is not going to be required to strike the 13
12 individuals from a revised expert disclosure pleading,
13 but, in fact, the Court is ordering that they are stricken
14 and they are not then designated as experts. Is that
15 correct, Your Honor?

16 SPECIAL MASTER THOMPSON: That is correct.

17 MR. FOX: Thank you, Your Honor.

18 SPECIAL MASTER THOMPSON: And so, Mr. Draper, any
19 comments on that solution?

20 Again, I just want to make sure that, you know,
21 as I understand Wyoming's concern is that if they didn't
22 designate them, they would run into problems because
23 somebody would object that because of the fact that they
24 have scientific or technical expertise, anything that they
25 say is maybe expert testimony. I don't think that's

1 right. I don't think that is a valid objection. So I
2 just am going to basically strike all of those expert
3 designations, but at the same time make it clear that they
4 can testify as percipient witnesses even though it,
5 obviously, it's -- percipient witnesses are frequently
6 taking actions as a scientific or technical expert.

7 MR. DRAPER: Your Honor, this is John Draper.

8 That is fine with us, especially with the
9 clarification provided by your discussion with Attorney
10 General Fox.

11 SPECIAL MASTER THOMPSON: Okay. Then I will go
12 ahead and prepare something. As I say, I will circulate
13 it around just to make sure that people are satisfied with
14 the language. And so hopefully this has clarified this
15 particular issue.

16 You know, I know that sometimes that discovery
17 can be contentious, and, you know, this -- hopefully
18 things like this can be resolved in the future without
19 having a hearing. By the same time, though, looking at
20 Montana's papers, I thought it was appropriate to -- well,
21 to have a hearing because there were some clear
22 uncertainties that made it necessary.

23 So I appreciate all of your time, and I will let
24 you get back to your work.

25 MR. KASTE: Thank you very much.

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MR. DRAPER: Thank you, Your Honor.

SPECIAL MASTER THOMPSON: Thank you, all.

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(End of proceedings at 11:14 A.M.)

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STATE OF CALIFORNIA)
) ss
COUNTY OF SAN DIEGO)

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