

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

May 19, 2011

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22 REPORTER'S TRANSCRIPT OF PROCEEDINGS

23 taken telephonically on Thursday, May 19, 2011, at

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1 THURSDAY, MAY 19, 2011 9:02 A.M.

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3 SPECIAL MASTER THOMPSON: So let's officially
4 start, then. Welcome back. I've missed you all, but I've
5 been following from afar the proceedings at the U.S.
6 Supreme Court level. So why don't we start with formal
7 identification of the counsel, so let's begin again with
8 Montana.

9 MR. DRAPER: Your Honor, this is John Draper for
10 Montana. I have with me here in Santa Fe, Jeff Wechsler
11 and my assistant Donna Omerod and on the phone from Helena
12 is Jennifer Anders and Andrew Huff.

13 SPECIAL MASTER THOMPSON: Thank you.

14 And for Wyoming.

15 MR. MICHAEL: Your Honor, this is Peter Michael.
16 With me are Andrew Kuhlman, David Willms, Jay Jerde, and
17 our paralegal Casey McMullin.

18 SPECIAL MASTER THOMPSON: Welcome everybody.

19 North Dakota.

20 MR. SATTLER: Thank you, your Honor. Todd
21 Sattler, Assistant Attorney General from North Dakota.

22 SPECIAL MASTER THOMPSON: Thank you.

23 And then for amicus United States.

24 MR. JAY: This is William Jay, your Honor, from
25 the Solicitor General's Office joined on the phone by Jim

1 Dubois of the Environment and Natural Resources Division.

2 SPECIAL MASTER THOMPSON: Okay. Thank you.

3 And then amicus Northern Cheyenne Tribe.

4 MS. WHITEING: Yes, your Honor. This is Jeanne
5 Whiteing representing the Northern Cheyenne Tribe.

6 SPECIAL MASTER THOMPSON: Okay. Thank you.

7 And is there anyone else on the line who has not
8 identified themselves or been identified by somebody else?

9 Okay. Thank you.

10 So we set aside an hour and a half. I'm hoping
11 that this doesn't take that long, but I just wanted to
12 make sure that we had sufficient time, if necessary, to
13 handle any issues that come up.

14 The principal purpose of this conference call is
15 to determine what the next steps should be in the case now
16 that it's been remanded back from the Supreme Court. And
17 I have a variety of thoughts on the question, but what I
18 would really like to do is to start out first by getting
19 the parties' thoughts on what the next steps should be in
20 the -- in the proceeding.

21 So why don't I start with you, Mr. Draper, do
22 you have thoughts as to what should be the next steps?

23 MR. DRAPER: Your Honor, this is John Draper. I
24 have been thinking that the natural next step is for us to
25 enter a Case Management Plan that would govern the next

1 part of the proceedings getting the case ready for trial,
2 and that would include things like discovery and
3 completion of any pleadings, and things like that. That
4 seemed to me to be the logical next step.

5 SPECIAL MASTER THOMPSON: Okay. Thank you.

6 I do have the copy of the draft Case Management
7 Plan No. 1 that you submitted on behalf of the parties
8 back in December of last year. And we can come back and
9 talk about that draft Case Management Plan in a moment,
10 but let me turn to Mr. Michael. Do you have any thoughts?

11 MR. MICHAEL: Your Honor, I generally agree with
12 Mr. Draper that we ought to proceed with the Case
13 Management Plan. And he and I did have a good discussion
14 this morning about some of the blanks, so we're prepared
15 to go forward with that, but I didn't have anything very
16 interesting, just plow forward.

17 SPECIAL MASTER THOMPSON: Okay. Thank you.

18 And Mr. Sattler for North Dakota?

19 MR. SATTLER: Thank you. I don't really have
20 much to add, your Honor. I would just note that we had
21 some discussion last year about North Dakota voluntarily
22 producing documents, and I would just remind your Honor
23 that that did occur last November. North Dakota sent out
24 a CD ROM with all the documents in its possession that are
25 related to the Compact.

1 SPECIAL MASTER THOMPSON: Okay. Thank you.

2 And does anyone have any additional suggestions
3 than what has been put forward so far in terms of
4 finalizing the Case Management Plan?

5 Okay. Then let me just suggest what I would
6 like to do. I agree with both Montana and Wyoming that
7 the very first step is to try to finalize the Case
8 Management Plan.

9 In addition to that, I want to talk about the
10 possibility, as I suggested before, of having both parties
11 file letters that would identify to the best they can at
12 this point in time what they see as the remaining issues
13 of fact and law that will need to be resolved as part of
14 this case. I realize that additional questions can come
15 up as a result of discovery, but I would like the parties
16 to set out as best they can what they see as the -- as the
17 remaining issues because I think that will help all of us
18 as we move forward in trying to tighten the case.

19 And then the third thing -- and this gets back
20 to the Case Management Plan and finalizing it -- I'd like
21 to try and get us to begin discovery as soon as possible
22 so that we can move the case along. Unlike some Special
23 Masters, I don't want to make a career of this, and I have
24 other matters that I can turn my attention to.

25 And then the fourth thing is I want to start to

1 schedule regular status conferences so that, again, we
2 can -- we can move things forward as quickly as possible.

3 So let's go back to the Case Management Plan for
4 a moment. There were two things looking at the Case
5 Management Plan that seems to be open issues: One was an
6 agreement on dates, and then a second issue was the
7 question of bifurcation of the proceeding into, well, two
8 phases, a liability phase and a remedies phase.

9 So just turning to that latter issue first, in
10 the draft Case Management Plan that was circulated in
11 December, the second paragraph of it provides for
12 bifurcation in the two phases, a liability phase and a
13 remedies phase, and there is a bracketed, italicized
14 notation at the end that Wyoming hasn't agreed to -- to
15 this section. So I'd be curious to find out from both
16 Montana and Wyoming what the disagreement is there and
17 whether or not you think there's any possibility of
18 resolving that as part of your discussions on finalizing
19 the Case Management Plan.

20 MR. DRAPER: Your Honor, this is John Draper.
21 Mr. Michael and I have been discussing that question, and
22 we have not resolved our disagreement about that yet. And
23 we continue to feel that it's -- it's -- it's a very
24 useful approach. It was used very well in the Arkansas
25 River litigation between Kansas and Colorado, and it

1 was -- it was a way of organizing the approach to the case
2 that was neutral, didn't prejudice any of the parties, but
3 it allowed the focus in each of the phases to be on the
4 type of evidence and the type of experts that are needed
5 which are in many ways different.

6 And so we continue to believe that it's a very
7 useful tool for you to organize the case so that there
8 is -- when you get to the remedies phase, you've confirmed
9 or determined the existence and amount of violations. The
10 answers to those questions may determine liabilities or
11 have an effect on them on the -- I'm sorry, I misspoke.
12 Those determinations of whether there's a violation, and
13 if so, how much will have an effect on the remedies.

14 As the Supreme Court has said in the past, the
15 remedies can be either in water or money. You need to
16 make that determination, if there's a disagreement between
17 states, about how that should be done. And I think the
18 determination even by the states is going to be affected
19 by the results of the first phase. And to try to get to
20 those at this point, it's not an efficient use of the
21 States' time and the Court's time.

22 And when we look at the discovery aspect of it,
23 if you don't -- if you don't bifurcate, then you need to
24 look at the special types of experts that are needed to
25 assess and quantify the effect of violations on the

1 downstream state. And as I say, those tend to be in many
2 instances different kinds of experts: agricultural and
3 economists, for instance. And the economists in our
4 experience in the Arkansas litigation were a whole new
5 sets of experts that needed to be engaged, be made the
6 subject of discovery both in terms of discovery to
7 determine the different sets of facts, sometimes which are
8 economical, not hydrologic or engineering, that are needed
9 to formulate their analysis and prepare their experts'
10 reports, and then the opportunity for the other state to
11 discover the bases for these determinations and prepare
12 their own counterreports.

13 So we -- as you can see, based on our experience
14 there, I feel that it would be a very good thing to
15 consider, would make the case more efficient, and although
16 we have talked about it, we have not reached agreement
17 between the states at this time.

18 SPECIAL MASTER THOMPSON: Okay. And
19 Mr. Michael?

20 MR. MICHAEL: Your Honor, let me voice our
21 concern with the bifurcation. And Mr. Draper and I talked
22 about this just a bit ago, and we have talked about it
23 during various status -- or case management conferences we
24 had with all parties.

25 There is -- the way I understand what Montana is

1 proposing here is not a bifurcation of the trial under
2 Rule 42. And I think that would be something the Court
3 would take up later anyway. But they're talking about a
4 bifurcation of all the proceedings, and I think they mean
5 discovery as well. And I guess one of my concerns is an
6 efficiency question.

7 The way I see the case now -- and I think your
8 idea of having to submit letters to try to see where we
9 are on legal and factual issue is a very good one, but
10 I'll take a quick shot at that in the context of this --
11 of this issue.

12 Seems to me that the guts of this case now is
13 are there -- were there times in the past that pre-1950 --
14 or water -- Montana water users with pre-1950 rights on
15 these rivers didn't get as much water as they should have
16 because Wyoming posted the surface water users,
17 groundwater users with their taking interconnected
18 groundwater or reservoir operators were holding back water
19 at those critical times. That's kind of just general
20 where I believe the case is.

21 And so I think the water -- the damage issues
22 from our standpoint is going to be maybe a little
23 different than what you find in other compact cases which
24 I think, you know, more revolve around how much water was
25 delivered at the state line.

1 This case is more the individual water user in
2 Montana and what happened to his particular field in a
3 particular year becomes important. And we have to find
4 that out in discovery. And it seems like in a liability
5 phase, we're going to be deposing the same kinds of
6 witnesses, you know, managers of an irrigation district on
7 the Tongue River in Montana, for example, to find out, you
8 know, what years they felt they were not getting the water
9 they should have gotten, and so forth.

10 And at the same time, we would want to ask them
11 about their damages, and what crops were being grown at
12 the time; what do you think happened to the crops that
13 year in your district; you have documents to prove it,
14 because I think that's how this case is going to build.
15 And that being the case, we would like -- when we take
16 those depositions and do that discovery, we would like to
17 gather it all at once, really.

18 And then the other issue goes, I guess, more to
19 the more discrete question of actually quantifying into
20 maybe dollar terms what damages may have happened. And we
21 would like to see what Montana thinks their damages at
22 some reasonable period of time because there's always a
23 possibility of settlement, and we would like to have an
24 idea of the scope -- of what they think the scope of their
25 case is. That really affects what might be possible in a

1 settlement discussion. So delaying that has a negative
2 consequence in terms of the possibility of us getting
3 together and talking settlement.

4 And I'm not sure how much is gained by
5 bifurcating the discovery process, the litigation itself
6 into two packages here.

7 And that's pretty much my two issues with it.

8 SPECIAL MASTER THOMPSON: Okay. So I agree with
9 you, Mr. Michael, that I think the most relevant question
10 at the moment is how potential bifurcation of the issues
11 would impact discovery, and that's the key question at the
12 moment. And so I guess I have two questions for both you
13 and Mr. Draper.

14 The first is: Can we complete the Case
15 Management Plan, including having dates for the relevant
16 types of discovery until we have resolved this question?

17 And then the second one is: Could you imagine a
18 situation where you might be able to delay some forms of
19 discovery; for example, maybe expert witnesses on the
20 remedy question while ensuring that to the degree you're
21 bringing people in that are right now relevant to the
22 liability issue -- for example, witnesses for irrigation
23 or water districts -- that there you would conduct
24 discovery on all the issues?

25 Just wondering whether you have thought about

1 that possibility.

2 MR. MICHAEL: Your Honor, Peter Michael. I
3 agree there is a distinction there. We have thought about
4 that. And I think what you are suggesting is the Case
5 Management Plan, we have a carve-out for Montana's experts
6 that quantify damages with maybe economic damages carved
7 out from all the information that might go into that
8 calculation. And that's what I'm hearing you say. And I
9 think that has some potential as a solution to this.

10 SPECIAL MASTER THOMPSON: So I guess I have --
11 when I heard you talking about your concerns about
12 actually separating out the discovery on liability issues
13 and remedies issues, one of the things I heard you having
14 a concern about was really the efficiency of discovery.
15 If you're going to spend time deposing the hat of an
16 irrigation or water district about their water use and
17 whether or not during certain periods of time they were
18 denied water, you don't want to have to go back and depose
19 somebody twice and, presumably, they don't want to be
20 deposed twice.

21 And so what I'm wondering is whether or not
22 there's a way of solving your concerns, particularly on
23 the efficiency side, while at the same time making sure
24 that, you know, we are not trying to get some discovery at
25 the stage where it might be premature, and I'm thinking

1 specifically on the expert witnesses on the liability
2 questions -- or, I'm sorry, on the remedies questions.

3 MR. MICHAEL: I think if it was -- your Honor,
4 Pete Michael again. If it was a special carve-out that
5 was very targeted and clearly stated, I think that would
6 be something that would be -- have some pretty good
7 potential. It doesn't give us the second argument I made,
8 which is, you know, how strong a case does Montana think
9 it has for how much money or can support, but it does deal
10 with that. I think it deals with the discovery issues
11 that I have identified --

12 SPECIAL MASTER THOMPSON: Yeah.

13 MR. MICHAEL: -- to be specific and clear.

14 SPECIAL MASTER THOMPSON: No, I understand. It
15 deals with the -- with the discovery efficiency question;
16 it doesn't necessarily get you the information that might
17 help in settlement discussions.

18 I guess one question I have there is whether or
19 not you can really prepare expert witnesses on the
20 remedies question until you have resolved all of the
21 liability questions.

22 MR. DRAPER: Your Honor, this is John Draper. I
23 certainly have some sympathy for the plaintiff,
24 Mr. Michael, mentioned about efficiency. We don't want to
25 be taking people's depositions twice if there are obvious

1 questions that could be covered in the first go-around.

2 I will say, from our experience in the Arkansas
3 River where we did bifurcate the case, we didn't have that
4 problem come up. You know, people are usually sensitive,
5 "Hey, you want to take this guy's deposition a second
6 time." We didn't have those issues come up, to my
7 recollection; they were different people.

8 And your expert witnesses in the remedies phase,
9 they're in many ways defining the facts that need to be
10 discovered, and so you got to have -- you got to have
11 pretty full engagement of those experts in order to do
12 discovery at an early stage on things that relate to their
13 expert analysis, and our finding was that there were many
14 facts that were determinable through different needs;
15 depositions wasn't necessarily the only way to do it. The
16 economists often worked off of official economic's
17 reports, and so on, and looking at prices, and a number of
18 different factors that had nothing to do with the
19 hydrology and engineering of determining the amount of
20 violations.

21 And so it's -- on the one hand, it is pretty
22 difficult to anticipate all of the questions without fully
23 getting into that remedy phase, hiring experts, and
24 getting them working at the very beginning and not having
25 to do that until we had completed the hydrologic

1 engineering analysis necessary to determine Compact
2 compliance or not and the amount of noncompliance was very
3 helpful.

4 I think we could -- as I say, I'm sympathetic to
5 the notion to anything that you can do to streamline
6 things is all for the good. And there may be -- there may
7 be things that can be inquired into during that first
8 phase of depositions that are of a general nature. And
9 certainly, I think it's good to encourage the parties to
10 do that, even if it is bifurcated, so that we minimize any
11 duplication. But our experience in the Arkansas River
12 litigation was there was not any noticeable amount of
13 duplicative discovery.

14 SPECIAL MASTER THOMPSON: So let me ask for
15 the comments, if any, from either Mr. Sattler, you for
16 North Dakota, or for any of the amici on the line.

17 MR. SATTLER: Your Honor, this is Todd Sattler.
18 I don't have any position with regard to bifurcation.

19 SPECIAL MASTER THOMPSON: Mr. Jay or Mr. Dubois?

20 MR. JAY: Your Honor, this is Mr. Jay. I don't
21 think we have anything to add at this point.

22 SPECIAL MASTER THOMPSON: Okay. Ms. Whiteing?
23 Ms. Whiteing, are you still on the line?

24 MS. WHITEING: Yes. I'm sorry, your Honor. I
25 had my phone on mute. We're talking, but you didn't hear

1 me.

2 SPECIAL MASTER THOMPSON: I understand the
3 problem. It happens frequently.

4 MS. WHITEING: We do not have a separate
5 position on bifurcation.

6 SPECIAL MASTER THOMPSON: Okay. So let me just
7 suggest the following on this, and then Mr. Michael and
8 Mr. Draper, get your thoughts on it:

9 Given that this affects the scope of the
10 discovery that can take place at various points in time,
11 it seems from what you said that it makes sense to try to
12 resolve the question of that discovery scope before
13 finalizing the Case Management Plan because it's hard for
14 me to see actually setting out the dates and moving
15 forward with discovery until that is resolved. And I'd
16 like to try to get that resolved as quickly as possible.

17 So I'm wondering whether or not the first step
18 would be to ask the parties to get together again and see
19 one last time whether or not you might be able to reach an
20 agreement as to how to move forward with the discovery and
21 with the notion that, again, the question of whether or
22 not the actual trial should be bifurcated is something
23 that we can resolve later, if necessary. And at the
24 moment the question is: What is the legitimate scope on
25 the -- on the discovery?

1 And I would ask you if you can think about
2 whether or not there might be some type of middle ground
3 in which, for example, you might carve out the expert
4 witnesses on the liability phase. And if you cannot reach
5 an agreement on that question, that the parties then
6 submit letter briefs to me, and in those letters set out
7 what their position is on how they think discovery should
8 be handled, again, specifically on this issue of whether
9 or not there should be any separation in the discovery,
10 and also then set out any precedence that they think
11 support their particular approach, as well as why they
12 think their approach is the appropriate direction to go,
13 and then we would have another phone conference in order
14 to resolve that question after which we would then quickly
15 finalize the Case Management Plan itself.

16 MR. MICHAEL: Your Honor, this is Peter Michael.
17 I will add an addendum to what you just mentioned. I
18 think it sounds like a good plan.

19 Mr. Draper and I this morning reviewed our
20 deadlines in the plan, and -- we haven't gone over with
21 the amici, so we're not -- we don't have anybody in
22 agreement, but we -- given the fact that the Supreme Court
23 has given us more direction on where the case is heading,
24 we were able to reach some what we think is agreeable
25 dates. So that last process, if we get this through

1 bifurcation, I think would happen very quickly. We'd
2 probably be presenting you something that is agreed
3 upon.

4 SPECIAL MASTER THOMPSON: And so let me just
5 ask. I've been assuming, as I mentioned, that we have to
6 really resolve the bifurcation question in order to
7 finalize those dates, but if you think that you can
8 finalize those dates and still have that question open for
9 resolution at the next status conference, that would be
10 fine with me. I think that would speed things up.

11 MR. DRAPER: Your Honor, this is John Draper. I
12 think your original notion is correct that, really, we
13 have to resolve the bifurcation question. And Michael and
14 I have talked about these dates, but I realized as we go
15 through this conversation, I was assuming that -- that
16 when I was working with those dates that the case would be
17 bifurcated, and he may have been assuming the exact
18 opposite, and I didn't clarify that with him, so I think
19 we have got some further discussion to do.

20 It seems like if we have dates, we're going to
21 need two alternative sets of dates since we're talking
22 about the time to hire new experts and get them on board
23 and all of the site visits and things that those people
24 will have to do and separate types of discovery would make
25 it a different set of dates, from my point of view, than

1 what I have been thinking of so far. But I would think
2 that the general notion that we could come to some
3 agreement is very likely to happen quickly after we
4 determine from you whether the case will be bifurcated or
5 not.

6 SPECIAL MASTER THOMPSON: Okay. And when I
7 looked at the Case Management -- or the draft Case
8 Management Plan, it did appear that those were really the
9 only two unresolved questions: Number one, the question
10 of bifurcation; number two, the agreement on the dates.

11 Are there other disagreements that are not
12 obvious from the documents?

13 I'll take that as no.

14 MR. MICHAEL: Your Honor, that's a negative.

15 SPECIAL MASTER THOMPSON: Go ahead, Pete.

16 MR. MICHAEL: Excuse me. I think it is a no
17 from my standpoint. I think you have covered the two
18 issues.

19 SPECIAL MASTER THOMPSON: Yeah.

20 MR. DRAPER: I think also --

21 SPECIAL MASTER THOMPSON: Go ahead,
22 Mr. Draper.

23 MR. DRAPER: John Draper. I think, you know, we
24 have got some smaller matters, like typographical errors
25 that we've noticed in the draft and so on. But in

1 addition it's occurred to me -- and I haven't had a chance
2 to talk to counsel on this since it occurred to me, but we
3 probably need to provide for the fact that the pleadings
4 are complete or else if there are going to be any amended
5 or additional pleadings, that there needs to be a deadline
6 for that. So that is the only other thing that I can
7 think of at the moment.

8 SPECIAL MASTER THOMPSON: Okay. And let me ask,
9 when I was looking at places where there were dates to be
10 filled in, I saw that you had reserved places for dates
11 for the submission of expert reports for initial
12 disclosures for written discovery, but I didn't see any
13 places to fill in dates for depositions. Are you planning
14 on submitting those?

15 MR. DRAPER: Your Honor, this is John Draper.
16 There is some consideration -- that is in part true.
17 Whereas we provided for beginning and ending of written
18 discovery, we only provided for the beginning of
19 deposition discovery, and we did not have a provision in
20 there for concluding deposition discovery. And we would
21 have a proposal for a date to conclude deposition
22 discovery to add to this, so that would be another
23 addition, yes.

24 SPECIAL MASTER THOMPSON: Okay.

25 MR. DRAPER: Right now the beginning of

1 discovery, which was part of your point, is covered, I
2 believe, on -- at least in my printout of it on Page 10,
3 there's an Arabic 2 entitled "Deposition Discovery." And
4 it starts out by saying, "Upon completion of all States'
5 initial disclosures, deposition discovery may commence."

6 SPECIAL MASTER THOMPSON: Okay.

7 MR. DRAPER: Both written and deposition
8 discovery are contemplated by the States to start at the
9 time of the initial disclosures.

10 SPECIAL MASTER THOMPSON: Okay. I think when --
11 when you do finalize the Case Management Plan, one of the
12 things I'd like to see is a date for finalization and
13 completion of all discovery, including the depositions.

14 MR. DRAPER: Okay.

15 SPECIAL MASTER THOMPSON: And also there are
16 some provisions in the Case Management Plan, so I think
17 it's appropriate, that deal with the amici, including the
18 United States. Have they participated in any of the --
19 any of the conferences that you have had discussing the
20 Case Management Plan?

21 MR. DRAPER: Your Honor, this is John Draper.
22 Yes, they have. They have been involved, certainly
23 invited, and I think to a great extent involved in all of
24 our conversations that led up to the version that we have
25 submitted to you.

1 SPECIAL MASTER THOMPSON: Okay. Great.

2 And so Mr. Jay and Mr. Dubois for the United
3 States, and Ms. Whiteing, do you have any problems with
4 any of the provisions that specifically deal with amici,
5 including the discovery?

6 MR. DUBOIS: This is Jim Dubois.

7 SPECIAL MASTER THOMPSON: Go ahead, Jim.

8 MR. DUBOIS: I think that we have given our
9 input on those things, and it's been a while, but my
10 recollection is that they are resolved from our point of
11 view.

12 SPECIAL MASTER THOMPSON: Okay. Great.

13 MS. WHITEING: This is Jeanne Whiteing. I would
14 agree, we did provide our comments and had our input in
15 the case management order, particularly on the issues
16 involving the amicus parties.

17 SPECIAL MASTER THOMPSON: Okay. Thank you.

18 So I'll come back in a moment and talk again a
19 little bit more about the Case Management Plan. But I
20 also want to talk a little bit more about my suggestion
21 that parties identify the likely issues of fact and law
22 that still need to be decided in this case. As I said, I
23 think it would be very useful to do that. And I could
24 seek two different routes at the moment for doing it.

25 One is to ask all the parties to do that at

1 approximately the same time that we're finalizing the Case
2 Management Plan. And that was an approach that I saw
3 Ralph Lancaster use as Special Master of the
4 New Jersey vs. Delaware case. And in that case, each of
5 the parties filed a three or four-page letter that again
6 set out what they saw as the issues of fact and law to be
7 resolved in that case.

8 The only difference here is that that set out
9 all of the issues of fact and law. At this stage now that
10 we've resolved some of the legal issues, hopefully the
11 issues of fact and law to be resolved at this point are
12 somewhat narrower than they would have been earlier in
13 this case. So one possibility is for us to just have a
14 separate filing, as I said, probably and approximately at
15 the same time that we're finalizing the Case Management
16 Plan.

17 The second possibility would be to -- to do that
18 as part of the initial -- let's see here, find this -- as
19 part of the discovery process right now is to set out the
20 initial disclosures. And so one possibility would also be
21 to -- well, to have the likely issues of fact and law be
22 set out as part of those initial disclosures.

23 And I'm just curious, again, Mr. Draper and
24 Mr. Michael, whether or not you have any thoughts as to
25 whether there's any preferable time to do that.

1 MR. DRAPER: Your Honor, this is John Draper. I
2 think your second suggestion makes sense. We could draft
3 that into the final version of the Case Management Plan
4 and that would be an orderly way to take care of that and
5 would be something that I think would be worthwhile for
6 the parties to do.

7 I think we would both want to have the caveat
8 that those are the issues of fact and law as we perceive
9 them at this stage in the proceeding prior to discovery,
10 that may -- the discovery and further developments in the
11 case may cause some alteration in those -- in those issues
12 identified.

13 SPECIAL MASTER THOMPSON: Mr. Michael?

14 MR. MICHAEL: Yes, your Honor. I guess the
15 question here is whether it would be helpful to you to --
16 if we submit our -- if we were -- we submit our
17 discussions of the facts and the law more quickly prior to
18 the Case Management Plan being finalized, the advantage of
19 doing that and not waiting for the initial disclosures to
20 do it would be that you would have -- if it turns out
21 there's a dispute of where we see the scope of the case
22 being, that could be relevant to, you know, your final
23 decision of what deadlines you want to impose.

24 So I was just kind of thinking that the facts
25 and the law identification -- and earlier in our

1 discussions this morning, I thought it was worthwhile to
2 talk about facts and laws or a little bit of how I see the
3 case in the context of how discovery might commence. So
4 I'm thinking that maybe that would be something separate
5 from the case management -- or the initial disclosures and
6 actually have it sooner as a separate document.

7 SPECIAL MASTER THOMPSON: So, Mr. Michael, I'll
8 tell you, I'm sympathetic to anyone who tells me today
9 that we should do things earlier rather than later.

10 So let me turn back to you, Mr. Draper, and ask
11 whether there's any reason not to do that.

12 MR. DRAPER: Well, I'm actually somewhat
13 persuaded by Mr. Michael's comment. You know, it might
14 make sense for us to schedule such a submittal, you know,
15 a month before the initial disclosures and that would help
16 the States in refining their initial disclosures. I think
17 it would fine-tune the mutual understanding, and it may
18 not be a common understanding completely, but an initial
19 understanding of what the issues of law and fact are and
20 make -- thereby affect the scope of the initial
21 disclosures that need to be made.

22 SPECIAL MASTER THOMPSON: Okay. So why don't
23 we -- why don't we do the following: What I would like to
24 do is to schedule another status conference for
25 approximately a month from now and ask the parties to

1 confer before then on the question of bifurcation and its
2 relevance to discovery and see whether or not they can
3 reach agreement on what the scope of discovery would be,
4 whether or not it's necessary to have two phases of
5 discovery, and then to submit to me, probably about a week
6 before that status conference -- so that will give you
7 about three weeks -- either an agreement on the scope of
8 discovery and whether discovery will take place in two
9 phases. And if there is not agreement, as I said, letter
10 briefs from the parties setting out their positions and
11 providing any materials in support of it. Then what I
12 would suggest is that we can resolve that question during
13 that conference call.

14 I would prefer, unless there is something that I
15 see in those letters that I'm not expecting, I prefer that
16 we resolve it in a conference call rather than setting up
17 any type of a formal hearing on the question, and then at
18 that conference call, once that is resolved --

19 (Conference speaker: Joining the meeting.)

20 SPECIAL MASTER THOMPSON: -- once that is
21 resolved, then what we can do is to -- is to set a date
22 fairly soon. I don't want more than a couple of weeks to
23 pass for the filings of the issues of fact and law still
24 to be decided in the -- in the case. And to the degree
25 the parties can agree on that, that would be perfect, but

1 my guess is you'll probably each want to submit separate
2 letters.

3 As Mr. Draper pointed out, I realize that it's
4 possible additional issues can arise during discovery.
5 What I'm asking is that the parties submit their current
6 list of issues in fact and law in good faith and to the
7 degree there are additional issues of law or fact that
8 come up that couldn't have been determined at this point,
9 I will certainly understand that.

10 And I guess then the only question is whether or
11 not -- and we don't need to resolve this today, but
12 whether or not we can do the Case Management Plan at
13 exactly the same time as we do the issues of fact and law
14 or whether or not you want like a one-week lag on that.

15 MR. MICHAEL: Your Honor, this is Pete Michael.
16 I guess after we do the issues of fact and law, probably
17 it would make sense for us to get back together with the
18 entire group, as we have done leading up to this, and see
19 if we can put into the Case Management Plan the dealing
20 with the bifurcation issue, yea or nay, making those
21 adjustments as needed and any changes that would result
22 from any surprises in the issues in facts and law. So I
23 would suggest maybe a week delay there, but have us
24 actively work on it, come back with another Case
25 Management Plan at that time.

1 MR. DRAPER: Your Honor, this is John Draper.
2 That sounds generally satisfactory from our point of view.
3 I -- as we get into scheduling that, I do have a problem
4 in that I'm in trial continuously from June 2nd through
5 June 24th. And if we could, give me just a little bit of
6 time after I get out of trial to undertake the matters
7 that you're describing, I would certainly appreciate that.

8 SPECIAL MASTER THOMPSON: Okay. So why don't we
9 then plan to have the next conference call during the --
10 during the week of June 27th, so we'll schedule a status
11 conference for that week.

12 And I understand what you're saying,
13 Mr. Michael, so you're in trial until --

14 MR. DRAPER: This is John Draper.

15 SPECIAL MASTER THOMPSON: I'm sorry, Mr. Draper.
16 Sorry.

17 MR. DRAPER: Through Friday the 24th. So if it
18 were possible to give me a couple of business days to
19 finalize things with Mr. Michael and submit them to you,
20 that would be -- that would be most helpful.

21 SPECIAL MASTER THOMPSON: We don't need to
22 absolutely schedule the exact date and time over the
23 telephone, but I'm thinking maybe if we could schedule
24 something late in that week of July -- I'm sorry, of
25 June 27th, then what we could do is to have things due at

1 the beginning of the week. I can read fairly quickly.
2 And since I'm thinking about having simultaneous
3 submissions, then it shouldn't be a problem to have
4 something due maybe that Tuesday the 28th.

5 And I assume, Mr. Draper, that you can have
6 somebody else working on any letter brief that you want to
7 submit and then you can take a look at it and finalize and
8 submit it by then.

9 MR. DRAPER: Yes, your Honor.

10 SPECIAL MASTER THOMPSON: And that also gives
11 everyone two weeks to get together before Mr. Draper goes
12 into trial.

13 So why don't we do this, then: Why don't -- I
14 will have my assistant, Susan Carter, e-mail around to
15 people to find a date and a time late in that week, again,
16 of June 27th when we can have a status conference call,
17 and at that point we'll resolve any remaining disagreement
18 on the question of bifurcation and its impact on
19 discovery. And then what we will do is to -- well, set
20 some deadlines in July. And what I'm thinking about is
21 probably to have another status conference at the
22 beginning of August.

23 I'm actually in Africa from July 13th to
24 July 27th. But during that period of time of July, you
25 can confer on the question of issues of law and fact. You

1 can have the initial submission of the statement of those
2 issues and then conferral and, hopefully, agreement on a
3 Case Management Plan during July, and then we can have
4 another conference call.

5 Are people going to be around that first week in
6 August?

7 MR. MICHAEL: Your Honor, this is Pete Michael.
8 My vacation is July 30th through August 6th. That's my
9 one-week vacation.

10 SPECIAL MASTER THOMPSON: Okay.

11 MR. MICHAEL: I've got my plane tickets.

12 MR. DRAPER: And I am available for that week --
13 this is John Draper -- but I will be in Europe the
14 following two weeks.

15 SPECIAL MASTER THOMPSON: August 8th through the
16 22nd?

17 MR. DRAPER: Yes.

18 SPECIAL MASTER THOMPSON: Okay. So let's see.
19 So I get back from Africa on Wednesday, July 27th, and --
20 well, I can't -- it looks like I'm getting in that
21 morning. Obviously, I will probably not be fit to do
22 anything for the remainder of that day. But what about
23 then doing something either July 28th or 29th, and that
24 way, both you, Mr. Draper, and you, Mr. Michael, can leave
25 on vacation without anything hanging over your head.

1 MR. MICHAEL: I think that would be great. I
2 think we can get the other things during July that you
3 wanted, the issues and so forth.

4 SPECIAL MASTER THOMPSON: Mr. Draper?

5 MR. DRAPER: Yes. This is John Draper. That
6 sounds like a good solution.

7 SPECIAL MASTER THOMPSON: Okay. Great. So
8 we'll go ahead then. Again, I'll ask Ms. Carter to find a
9 good date and time on one of those two days in which to do
10 that second conference -- status conference call.

11 And then what I will probably ask her also to do
12 is to establish like two more dates for status conference
13 calls in, again, late August, early September, and then
14 again about a month after that so that we have several of
15 these planned in advance. And what I'll try to do is to
16 make sure that periodically we set three or four dates
17 ahead so that people can plan and we don't run into as
18 many scheduling problems.

19 Okay. So is there -- those were everything
20 that -- all -- those were all the various items that I had
21 on my list. And I guess the question is whether there's
22 anything on anyone else's list.

23 MR. DRAPER: This is John Draper. Your Honor,
24 that covers it from our point of view.

25 SPECIAL MASTER THOMPSON: Okay. Mr. Michael?

1 MR. MICHAEL: Your Honor, Wyoming agrees. We've
2 covered it.

3 SPECIAL MASTER THOMPSON: Okay. So what I will
4 do is I will set all this out in a case -- in a case order
5 as soon as we have the dates set for those status
6 conference calls so that those can be part of the order.

7 And then in addition to that, I do have some
8 just small suggestions for changes in the Case Management
9 Plan, and none of this, I think, will be controversial.
10 And what I will do is I will circulate that by letter to
11 the parties. And when you are finalizing the Case
12 Management Plan, you can take those suggestions into --
13 well, into account so that we don't have to worry about it
14 later.

15 MR. SATTTLER: Your Honor, this is Todd Sattler.
16 Just to make clear, you've talked about the parties being
17 involved in discussions about bifurcation and submission
18 of facts and law. I'm assuming that you don't need or
19 want North Dakota to participate. We really don't have
20 any desire to do that. And so I just wanted to make sure
21 that when you issue your order, it makes it clear that
22 it's -- it's the two other states that would be involved
23 in that.

24 SPECIAL MASTER THOMPSON: I'll be happy to do
25 that. I just didn't want to exclude you, Mr. Sattler, in

1 case you wanted to participate.

2 MR. SATTLER: On the issues so far, no.

3 SPECIAL MASTER THOMPSON: Okay. So do you mind
4 then, I will put specifically in the Case Management Plan
5 that you have stated that you do not want to participate
6 in these specific steps of the case, and therefore, you're
7 not covered by the order.

8 MR. SATTLER: That's correct. Thank you.

9 SPECIAL MASTER THOMPSON: Okay. Anything else?

10 If not, then I'll give you all half an hour of
11 your time back.

12 Thank you all.

13 - - -

14 (End of proceedings at 9:57 A.M.)

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