

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.)

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TRANSCRIPT OF TELEPHONIC PROCEEDINGS

STATUS CONFERENCE

MAY 24, 2013

Reported by Laurelle A. Simms, CSR No. 5762

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24 Simms, Certified Shorthand Reporter, CSR No. 5762, in and

25 for the state of California.

1 SAN DIEGO, CALIFORNIA, FRIDAY, MAY 24, 2013, 10:02 A.M.

2 * * *

3 SPECIAL MASTER THOMPSON: So this is a status
4 conference in Montana versus Wyoming, which is No. 137
5 Original, before the United States Supreme Court.

6 And why don't we just start out with the various
7 parties identifying themselves or counsel for the parties
8 identifying themselves.

9 So why don't we start with counsel for Montana.

10 MR. DRAPER: Good morning, Your Honor. This is
11 John Draper. I have with me here in Santa Fe
12 Jeffrey Wechsler and my assistant, Donna Omerod. Also,
13 for Montana on the phone separately are Cory Swanson and
14 Anne Yates. And if there's anybody else from Montana, I
15 would ask that they identify themselves.

16 SPECIAL MASTER THOMPSON: Okay. Good morning,
17 Mr. Draper.

18 So counsel for Wyoming.

19 MR. KASTE: Good morning, Your Honor. This is
20 James Kaste on behalf of State of Wyoming. I'm here with
21 Peter Michael, Chris Brown, David Willms, and
22 Andrew Kuhlmann, all from the Attorney General's Office.

23 SPECIAL MASTER THOMPSON: Okay. Good morning,
24 Mr. Kaste.

25 So next is, do we have counsel for North Dakota

1 on the line?

2 MS. VERLEGER: Jennifer Verleger, Your Honor.

3 SPECIAL MASTER THOMPSON: Okay. Good morning.

4 And then we'll go through the various Amici.

5 We'll start with the United States.

6 MR. DUBOIS: James Dubois, Your Honor. Good

7 morning.

8 SPECIAL MASTER THOMPSON: Good morning.

9 And then next, counsel for the Northern
10 Cheyenne. So is Ms. Whiteing on the line?

11 MS. WHITEING: Yes, this is Jeanne Whiteing for
12 the Northern Cheyenne Tribe.

13 SPECIAL MASTER THOMPSON: Okay. Great. Thank
14 you very much.

15 And then, finally, for Anadarko?

16 MR. WIGMORE: Yes, Your Honor. Michael Wigmore
17 for Anadarko.

18 SPECIAL MASTER THOMPSON: Okay. Good morning,
19 Mr. Wigmore.

20 So this is a regularly scheduled status
21 conference. And Susan Carter is on vacation today, and
22 she actually took off like about 2:30 yesterday, and I've
23 been out of town. So if there were any types of
24 submissions either late yesterday or early this morning,
25 I haven't seen them.

1 So I think the very first thing I should ask is
2 whether or not anyone submitted anything.

3 MR. DRAPER: Okay. Your Honor, this is
4 John Draper.

5 SPECIAL MASTER THOMPSON: Yes, Mr. Draper.

6 MR. DRAPER: I was just going to say -- to
7 identify myself, John Draper, and say that I'm not aware
8 of any recent submittals.

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

11 So then there's really just two things that I'd
12 like to do. The first one is to just get a quick status
13 update of both counsel for Montana and counsel for
14 Wyoming, and then, second, after that, talk about the
15 need to begin thinking about the details on the
16 scheduling for the variety of other pretrial matters
17 because, by my count, we're less than five months away
18 now from the beginning of trial. So it's time to begin
19 to think about those various other matters.

20 Before getting to that, just a status conference
21 on how discovery and designation of expert witnesses is
22 coming along.

23 So, Mr. Draper.

24 MR. DRAPER: Thank you, Your Honor. This is
25 John Draper.

1 Since the last conference call, we've been
2 taking the depositions of Wyoming experts and water users
3 upon whom those experts have relied. We anticipate
4 further discovery within the time allowed to do so.
5 We're preparing expert reports for submission on
6 June 4th. And this past month we've responded to
7 concerns of Wyoming on discovery responses.

8 So that's really a quick rundown of the status
9 of things as we see it.

10 SPECIAL MASTER THOMPSON: Okay. Thank you.

11 And Mr. Kaste.

12 MR. KASTE: Thank you, Your Honor.

13 I think that's an accurate description of our
14 activities over the past months. I have a couple of
15 things I'd like to talk about in terms of our activities
16 in the coming months to give everyone a head's up on a
17 few things.

18 First, unfortunately, we're going to be filing a
19 motion that I hate to file, and it's a motion to
20 withdraw. It's going to be from Mr. Willms. Mr. Willms
21 has finally figured out that we don't pay him nearly
22 enough for the good work that he does, and he's going to
23 enter private practice. So very shortly everyone will
24 see a motion to withdraw filed by Mr. Willms. And we
25 regret to see him go, but I want to make everyone aware

1 that that's going to take place here in the next month.

2 In addition, as Mr. Draper pointed out, the
3 State of Montana responded to some discovery concerns
4 that had been raised by the State of Wyoming. I think
5 it's fair to say the State of Wyoming isn't satisfied
6 with that response, and in the coming weeks we'll be
7 taking the appropriate action to bring those matters to
8 your attention. We're not yet finished with the drafting
9 process to get those matters in front of you, but we'll
10 follow the procedure outlined in the case management plan
11 for doing that. And I don't want it to be a surprise to
12 anybody that that's going to come. And I'm thinking next
13 week, but we're not yet there.

14 Similarly, we are anticipating conducting
15 further depositions in this case. We have been in
16 contact with counsel for the tribe and with a couple
17 members of the tribe to set up depositions to learn where
18 their water has been going. And we have -- we anticipate
19 ultimately getting a deposition set up for a
20 representative from Decker Coal Mine. That's been
21 complicated by the fact that the Decker Mine was recently
22 purchased, and so finding the right people to make that
23 process work has become more difficult in light of their
24 changeover. I think we anticipate deposing one more
25 Montana water user who was on, I think, our original

1 list, and it's just been difficult to get him in the same
2 room with everybody.

3 At this time I think we're anticipating the
4 depositions of the two tribal members on June 5th, and
5 that date has been communicated to counsel for Montana.
6 We've been working with the tribe to get that set up at a
7 time that's convenient for those individuals.

8 With regard to additional written discovery, we
9 haven't made a determination on whether or not that will
10 be necessary. I know that the deadline for submitting
11 that is coming right up, and we'll be making that
12 determination here in the near future.

13 Otherwise, as it relates to depositions, I don't
14 believe we see any additional depositions on the horizon
15 from our side.

16 And then I guess it's probably necessary to make
17 the Court aware that I think we anticipate filing a
18 motion here in the near future related to Montana's
19 claims that were included in the Bill of Complaint that
20 relate to the Powder River. As you know, during a
21 previous status conference there was an acknowledgement
22 or admission by the State of Montana that they would not
23 be bringing any claims related to the Powder River. We
24 would like to see that aspect of the case formally
25 closed. And so we think we'll need to make an

1 appropriate motion to obtain an order dismissing any and
2 all claims related to the Powder River that may have been
3 included in the Bill of Complaint.

4 We have attempted to obtain a notice of
5 voluntary withdrawal from the State of Montana
6 voluntarily. That hasn't been forthcoming. And we do
7 believe we're entitled to a formal resolution of those
8 complaints. And it's fair to say that Montana, true to
9 its word, has included nothing related to the Powder
10 River in its expert reports and discovery since that time
11 has focused exclusively on the Tongue River. We'd just
12 like to have it in the Court's file in an appropriate
13 document that those claims are dismissed with prejudice.
14 We may need to make that motion here in the near future.

15 Finally, I think -- and this falls in line very
16 well with the second matter that you'd like to discuss.
17 We were going to ask the Court whether we could get a
18 scheduling order in place for the remaining events in
19 this litigation. As you know, we're working currently on
20 a letter that was drafted by counsel and some discussions
21 in a status conference like this, and the parties -- I
22 think we'd all be better served by having that formal
23 scheduling order in place that puts specific dates on all
24 the remaining events that are going to be necessary in
25 the course of this case.

1 So I guess I would suggest that consistent with
2 the prior procedure the parties take a shot at drafting a
3 stipulated scheduling order. And instead of maybe doing
4 it in a letter form this time, to ease the burden on you,
5 perhaps we could draft it in the form of an order, and
6 you could sign it if the parties' stipulation meets with
7 your approval. And my assumption would be that there
8 would be a number of dates that we still probably need to
9 settle on, working back from the October trial date that
10 you had set.

11 SPECIAL MASTER THOMPSON: Okay. Mr. Draper, did
12 you want to respond to anything that Mr. Kaste said, or
13 do you want to add any of your thoughts regarding
14 activities over the next month or so?

15 MR. DRAPER: Yes, if I may. We have discussed
16 with Wyoming the need to file the proper motion disposing
17 of our claims on the Powder, and we do intend to do that.
18 And so I don't think it's necessary for them to move
19 that, but we will go ahead and get that done, and I
20 appreciate Mr. Kaste mentioning that because it is
21 something we intend to do and bring before you and get
22 that entered.

23 With respect to the scheduling, yes, at this
24 point we're working off of an April 21 email from
25 Susan Carter giving proposed dates, and we're assuming

1 that those are the dates that you want us to follow. But
2 I would second Mr. Kaste's thoughts that it would be good
3 to have that, you know, in a formal order.

4 Also, with respect to future activities, I might
5 add that we had the next conference -- status conference
6 we have scheduled in this case is for Friday, June 21,
7 and I'm going to be away for most of the time -- well,
8 it's actually, from this Tuesday until June 23rd. And I
9 would, therefore, ask your indulgence, if it's not
10 inconvenient for you or the parties, to hold that
11 scheduling conference or status conference in the
12 following week of June 24th to 28th.

13 I had one other request for future activities
14 that might be appropriate for me to mention at this
15 point. We're coming up on the end of the fiscal year for
16 Montana and, I think, for many states. And it would be
17 helpful if in July Your Honor could provide the states
18 with the fees and expenses approved by you and your
19 office through June 30 so that we can designate funds and
20 hold those to support the payment of your next
21 application to the Court whenever that may occur.

22 So those were the things that came to mind as I
23 listened to Mr. Kaste.

24 SPECIAL MASTER THOMPSON: Okay. Great. Let me
25 just go back over several of them.

1 The first is that I see no problem -- actually,
2 let me go back. So you said you are out of town,
3 Mr. Draper, or at least not available starting next week
4 through the week of June 21st?

5 MR. DRAPER: Yes, that's right, Your Honor,
6 through June 21st.

7 SPECIAL MASTER THOMPSON: So, basically, then it
8 doesn't make any sense to try to advance the June 21st
9 date; instead, we would need to delay it until the week
10 after?

11 MR. DRAPER: Yes, if that would be possible.

12 SPECIAL MASTER THOMPSON: I think that should be
13 fine. And, in fact, the date of June 21st was not going
14 to end up working for me either. So I have no problem
15 changing that particular date. But let's come back and
16 talk about that in a minute when we talk about doing a
17 scheduling order.

18 With respect to any discovery motion that you're
19 filing, Mr. Kaste, I think there's really sort of two
20 questions on there. The first is Mr. Draper's
21 availability, and obviously if you need a quick ruling on
22 any discovery, then we'll proceed according to the case
23 management plan. I should let you know, however, that
24 I'm actually going to be out of the country from
25 June 13th through June 21st. So during that period if

1 any of the parties try to reach me it will be difficult.
2 I will have email, but it will be only periodic.

3 On the Powder River, it sounds like that Montana
4 will be dealing with that particular issue, but
5 obviously, Mr. Kaste, if you don't feel that what they do
6 is satisfactory, you are free to file any type of motion
7 that you want on that, but it sounds like that's going to
8 resolve itself.

9 I have no problem on filing or providing the
10 parties before July with fees and expenses. And, in
11 fact, what I will do is I will actually file my motion
12 for fees with the Supreme Court before then so that it's
13 actually an official filing that you can rely on at that
14 stage. The Court obviously won't get to that until their
15 beginning October term, but at least that will be
16 officially filed.

17 And so unless anyone has anything in addition to
18 talk about, what I would suggest we do is to turn to a
19 scheduling order.

20 So is there anything else before we turn to that
21 that people want to discuss?

22 MR. KASTE: Well, this is James Kaste. I would
23 just put on the record that moving the status conference
24 to accommodate Mr. Draper's schedule and your schedule is
25 fine with us. We're available anytime the following

1 week.

2 With regard to the timing related to the
3 discovery motion that will be forthcoming, I don't see
4 where either the absence of counsel or your absence from
5 the country for a limited period should be a problem.
6 Montana's entitled to, you know, a sufficient amount of
7 time to respond to that, and, you know, we've done a lot
8 of motions in the course of this case on very short
9 notice, and this one can be an exception to that
10 practice. I don't have a problem with taking this one in
11 due time.

12 I would say with regard to the motion related to
13 the claims related to the Powder River, if we could get
14 some resolution on that in the next couple of days,
15 perhaps before Mr. Draper leaves the country, that would
16 help. That matter has kind of been pending out there for
17 the last five months or so since the status conference
18 for that information was relayed. Certainly our draft
19 motion hasn't been out there on the table that long, but
20 it's been a while. And if we could put that matter
21 behind us relatively quickly, I'd appreciate it.

22 SPECIAL MASTER THOMPSON: Mr. Draper, do you
23 think it's possible to take care of that before you
24 leave?

25 MR. DRAPER: Yes, your Honor. I would mention

1 that Jeffrey Wechsler in my office will be covering for
2 my functions while I'm away. So we should be in good
3 shape. And I will make sure we address that very
4 quickly.

5 SPECIAL MASTER THOMPSON: Okay. Excellent.

6 So on the scheduling order, so there's a variety
7 of things that I think the order will need to address.
8 So, as you pointed out, there was the email which set out
9 dates both for the dispositive motions as well as the
10 beginning of trial, and so, hopefully, the scheduling
11 order could incorporate those. It should also address
12 motions in limine and other pretrial motions, dates for
13 pretrial briefs, not expert witnesses -- and we should
14 come back and talk about that for a moment in a minute --
15 exhibits, and any other matters that you think would be
16 relevant to that. And, in particular, to the degree that
17 we are at this stage going to be addressing exhibits,
18 probably also use of confidential documents or
19 information, any items of that nature that you think
20 should be incorporated into an order at this stage, that
21 would seem appropriate to me.

22 And then what I would propose is that the
23 counsel for the parties meet, see whether or not they can
24 come to an agreement with respect to the provisions of
25 this order. I agree that the best thing to do would be,

1 if you can come to an agreement, just submit it to me as
2 a draft document that the parties have agreed to. And to
3 the degree that there are any open issues where there is
4 any disagreement between the parties, what I would
5 propose is that you submit a draft order which includes
6 all of the provisions that you've agreed to, to the
7 degree that there is any disagreement, then alternative
8 provisions -- and then you can do this again in the form
9 of letters to me -- discussion of the nature of any
10 disagreement and the arguments for why you think it
11 should provide the provisions that you've proposed.

12 MR. KASTE: This is James Kaste. I assume this
13 order would include a pretrial conference date. And when
14 you say "pretrial briefs," is it your preference to
15 see -- you know, my experience is that in advance of
16 trial -- in advance of trial parties file a pretrial
17 conference memo. The contents of those vary somewhat. I
18 think the parties could agree on a form of pretrial
19 conference memorandum.

20 Is it your preference to see a pretrial
21 conference memorandum that is, you know, very traditional
22 looking and what sounds like a pretrial brief on the law
23 that might be governing the various aspects of this case,
24 or one or the other?

25 SPECIAL MASTER THOMPSON: I think both.

1 MR. KASTE: Both, okay.

2 SPECIAL MASTER THOMPSON: That would be my
3 preference.

4 So let me come back to the nonexpert witnesses.

5 So, Mr. Draper, in the Kansas versus Nebraska
6 case, was all the direct testimony there in writing or
7 was there also oral direct?

8 MR. DRAPER: In that case, the trial that took
9 place last summer, the Master required prefiled
10 testimony.

11 SPECIAL MASTER THOMPSON: Okay.

12 MR. DRAPER: And then what occurred in trial was
13 cross-examination and redirect.

14 SPECIAL MASTER THOMPSON: All right. Okay. So
15 another thing that I would ask the parties to consider is
16 whether or not it would make sense to do any and/or all
17 of the direct testimony in writing.

18 MR. KASTE: I don't need much time. This is
19 James Kaste, Your Honor. The State of Wyoming will not
20 consent to that procedure.

21 SPECIAL MASTER THOMPSON: Okay.

22 MR. KASTE: I would object vehemently to it.

23 SPECIAL MASTER THOMPSON: Okay. Let me ask then
24 a different question, which is, given that we still have
25 dispositive motions coming up, do the two sides have any

1 estimate right now for how long they think the trial
2 would last? Let's assume that the dispositive motions
3 don't dispose of anything.

4 MR. DRAPER: Your Honor, this is John Draper.
5 Frankly, I don't, but we could, perhaps, include that in
6 a subsequent submittal after the parties have a chance to
7 consider it and discuss it to give you an estimate that
8 might be more useful.

9 MR. KASTE: I think that that's fair -- this is
10 James Kaste -- that we could in the proposed scheduling
11 order that we submit would reference the trial date and
12 the parties would identify, if we can agree, that it
13 would be whatever length we could identify towards the
14 end of that document what we anticipate. I think that's
15 a good conversation for counsel on both sides to have,
16 frankly. And, of course, some portion of that is going
17 to depend on the rulings on summary judgment.

18 SPECIAL MASTER THOMPSON: Yeah, I understand
19 that.

20 And so I would appreciate if -- as part of the
21 discussions with respect to the scheduling order, if you
22 were able to discuss your thoughts as to the potential
23 length of the trial, and then at the same time that you
24 file the draft scheduling order, if you could provide
25 along with that -- and, again, conform -- take the form

1 of a joint letter -- your thoughts as to the length of
2 the trial.

3 Let me go back to the direct testimony in
4 writing.

5 Mr. Draper, do you have any thoughts on this?
6 You may not have been able or had a chance to talk to the
7 Attorney General's Office, but I'm curious to see your
8 thinking.

9 MR. DRAPER: Well, Your Honor -- this is
10 John Draper -- we haven't had that discussion internally.
11 I would say it does shorten trial, but it has certain
12 disadvantages. I think parties naturally like to have a
13 chance -- an unfettered chance to present their experts
14 and other witnesses in a way they'd like to have the
15 Special Master see them. And you miss all of that when
16 you prefile testimony. So there's advantages in terms of
17 if there's some reason that you've got to finish up trial
18 very quickly. I think in that case the Master did feel
19 that that was necessary.

20 But I think we do need to keep in mind in this
21 type of proceeding that the Court has indicated over the
22 years that it needs to have a full record when it's
23 making a decision between sovereigns. So I think that's
24 a consideration that counterbalances the speed that it
25 adds to the trial to have prefiled testimony.

1 So those are some considerations that would be
2 at play in how we approached this, and, as I say, we
3 haven't formulated a final recommendation to you on that.

4 SPECIAL MASTER THOMPSON: All right. Okay. So
5 let me do some additional thinking on that. I think for
6 purposes of your discussion right now you can assume that
7 there would not be direct testimony in writing, but, as I
8 say, I'm going to keep that issue open for the moment so
9 I can do some additional thinking on the question.

10 So ideally what I would like to be able to do is
11 at the next -- at the next status conference to actually
12 have the draft scheduling order, which, as I say, I'll
13 probably enter in the form of a case management order, to
14 have that draft from you so that if there's any issues to
15 discuss we can address them then.

16 So thoughts on when that would mean that we
17 would schedule the next status conference? And, ideally,
18 I would like to either be able to do it that week of the
19 24th, or, if necessary, we can do it the very beginning
20 of the week of the 1st.

21 And so, Mr. Draper, I think it depends on the
22 degree to which you think that people in your office and
23 the Montana Attorney General's Office can address a lot
24 of the scheduling issues while you're away.

25 MR. DRAPER: Your Honor, this is John Draper. I

1 think it is true that the Attorney General's Office and
2 Mr. Wechsler here can make good progress on that. I
3 would suggest that maybe we look at the last day or two
4 of that week to give me some chance to get over jet lag
5 and to participate in the finalization of that proposed
6 scheduling order.

7 SPECIAL MASTER THOMPSON: Okay.

8 MS. VERLEGER: Your Honor?

9 SPECIAL MASTER THOMPSON: Yes.

10 MS. VERLEGER: This is Jennifer Verleger. I'm
11 in depositions all day on the 27th and 28th. So maybe
12 the 26th would be better.

13 SPECIAL MASTER THOMPSON: Well, what I'm
14 wondering is, are people planning on being in on
15 July 1st?

16 MR. DRAPER: Your Honor, we're available that
17 day.

18 SPECIAL MASTER THOMPSON: Mr. Kaste?

19 MR. KASTE: This is Mr. Kaste. We're always
20 available. We're available July 1st and --

21 SPECIAL MASTER THOMPSON: Now I know why
22 Mr. Willms is leaving.

23 MR. WILLMS: That's right.

24 SPECIAL MASTER THOMPSON: My thought would be if
25 we scheduled the status conference on July 1, that then

1 if we could, say, schedule the time for submitting the
2 draft scheduling order as, you know, sometime late that
3 week of June 24th, you know, say either June 26th or
4 June 27th, that would give me an opportunity to review
5 things after you've submitted it and then for us to have
6 the conference call on July 1.

7 How would that sound to people?

8 MR. DRAPER: Your Honor, this is John Draper.
9 That would be fine, and I would request the 27th for that
10 submittal of those two options.

11 SPECIAL MASTER THOMPSON: Mr. Kaste?

12 MR. KASTE: The 27th is fine for Wyoming.

13 SPECIAL MASTER THOMPSON: Okay. So why don't we
14 go ahead and do that. As I say, you know, in addition to
15 the matters that I've outlined a moment ago, I would
16 encourage you to be inclusive rather than exclusive. We
17 can always decide not to include something. So anything
18 that you think it would be appropriate to agree to at
19 this particular point in time let's put into that
20 particular order.

21 Also, I've not checked on various locations for
22 the proceeding at the moment, but I think I've mentioned
23 before my current inclination will be that if the trial
24 lasts more than two weeks, which my guess is it probably
25 will, is that it will be here probably at Stanford. And

1 I realize that there are witnesses who may not have a lot
2 that they want to testify to, but that -- and, therefore,
3 you don't want them to have to travel all the way here to
4 California.

5 And so, as I mentioned before, there are at
6 least two options that I could see for handling those
7 witnesses. The first -- and, again, this depends, I
8 think, on the overall length of the trial. But one
9 possibility would be that we could actually hold, say,
10 two weeks of proceedings in Billings, which I believe was
11 the city that everyone was agreed to before, and anyone
12 who you wanted to present there rather than here could be
13 presented at that point in the proceeding. Obviously,
14 the disadvantage of that from your standpoint is that
15 some witnesses would be presented out of order that you
16 might ideally want to be presented. But it would mean
17 that we'd all be in one place for purposes of that
18 testimony.

19 Another option would be the possibility of video
20 presentation. And I can tell you that here we would be
21 totally capable of handling that, and I think there
22 wouldn't be any problem finding locations in both Montana
23 and Wyoming where the witness could be. And, obviously,
24 that also has advantages and disadvantages to it. There
25 might be other options that I'm not thinking of.

1 But the bottom line is if it's a very short
2 proceeding, then I don't have any problem doing it in
3 Montana, but if it's more than two weeks, then I'm
4 planning on doing it here. I am open to any type of
5 options that you would like to consider for purposes of
6 listening to the testimony of witnesses, who, again, it
7 doesn't make any sense to fly them here to California.

8 So another thing that I'd like you to think
9 about for purposes of that scheduling -- well, let me say
10 one thing that you should think about in the same time
11 that you are coming up with a draft scheduling order is
12 how you might want to deal with that, and then we can
13 talk about that more the next conference call.

14 MR. KASTE: This is James Kaste. Can I make a
15 suggestion/request? In the intervening period between
16 now and our next conference call I think it would be
17 beneficial for the parties to understand whether or not
18 there are federal facilities available to us in Billings.
19 I've been hesitant to make that call up to the judges in
20 Billings. I think a call from you to the district judges
21 in Billings to ask and inquire about the availability and
22 the feasibility of their facilities for any portion of
23 this case there would be certainly well received in a way
24 that it wouldn't be from me. And it would be helpful for
25 all of us to know whether or not those federal facilities

1 are even available to us and whether or not we would need
2 to make provisions to do something different in the city
3 of Billings.

4 I can tell you my initial inclination with
5 regard to video testimony is that it's awful. I've been
6 through that morass a few times, and it's never, never
7 good and certainly nowhere near as valuable to anybody as
8 testimony in person.

9 I'm troubled by scheduling trial -- obviously
10 the blocks of time that we're in California and the
11 blocks of time we're in Billings will be sequential, and
12 yet we'd be taking witnesses out of order. The
13 Plaintiffs' case-in-chief, if we're going to do certain
14 witnesses in Billings, they're going -- if there's going
15 to be witnesses that we would try and squeeze into that
16 block, that doesn't strike me as optimal, I guess.

17 And I guess I'm still more than a little
18 reluctant to fly our whole trial team and witnesses out
19 to California and have Montana do the same in these -- in
20 these times where everybody in my state is being asked to
21 cut their budget, and I bet the same is true in Montana.
22 I mean, it seems like the most expensive option for us.
23 And I have a responsibility to voice that concern and try
24 my best to protect our public fisc here in Wyoming. That
25 is a lot of heavy hauling to get this case from where it

1 is in Wyoming and Montana out to California.

2 And I understand the difficulty that it presents
3 for you and your schedule, and I suspect you're teaching
4 next semester, but please consider the burden that it
5 puts on the parties to pick this puppy up and move it a
6 thousand miles away.

7 MR. DRAPER: Your Honor, this is John Draper.
8 I'd like to just say, since Mr. Kaste has gone on in some
9 lengths about his choice of location, I probably need to
10 check with the Attorney General in Montana, but my
11 initial reaction is it's not that big of a deal to bring
12 the people out to Stanford. We've had -- when we've done
13 this before -- we have brought witnesses from other
14 states who are the party states to trial proceedings --
15 it hasn't caused any great problem. And picking up and
16 moving a whole trial apparatus, including your office and
17 facilities, and changing to a different one not only has
18 the disadvantages of dislocating witnesses in the order,
19 but also it's an expense in and of itself.

20 So I think that this is something we can discuss
21 further with Wyoming, but would not -- I would not
22 immediately jump to the conclusion that Mr. Kaste seems
23 to be jumping to.

24 SPECIAL MASTER THOMPSON: All right. Just let
25 me just then say several things. The first is that, as I

1 said, I haven't checked on any venues, and that is one of
2 the things I was planning on doing over the next month,
3 and I do believe that's the Special Master's
4 responsibility rather than the parties' responsibility.
5 So I will have a much better sense of what facilities
6 might even be available by the time of the next status
7 conference.

8 The second thing is that I understand,
9 Mr. Kaste, your concerns. You've voiced those before.
10 And I will remain aware of and take those into account.
11 I should warn you, though, at the moment my plan is to do
12 it here. And, therefore, I would hope that you and
13 Mr. Draper can talk about, assuming it is held here, how
14 you would think about handling witnesses, whether or not
15 you would have any desire, if it is held here, to do any
16 of the testimony either by video or by having a portion
17 of the proceeding held there where you can actually have
18 local witnesses who you do not expect to be on the stand
19 for a lengthy period of time.

20 I'm not making a determination today that it
21 will be here at Stanford. I expect to make a
22 determination on that after the next conference call.
23 And so you're certainly -- both parties -- all three
24 parties are more than welcome to state their preference
25 for holding it some place other than Stanford when we

1 have the next conference call. But at the moment that is
2 my inclination, and so it would be, I think, very
3 valuable if you could think, when you get together with
4 Mr. Draper, about if it is held here whether or not you
5 would want any type of option for having witnesses heard
6 in Montana or Wyoming. Maybe it's because I'm in Silicon
7 Valley, but I've found video proceedings a little bit
8 better than I think it sounds like you had the
9 experience, Mr. Kaste, although I realize that they are
10 not perfect. And so, anyway, I would hope that you would
11 spend a little bit of time talking about that as part of
12 the discussion over the scheduling order.

13 The other thing that would -- I'd appreciate
14 your thinking on is whether or not there is a value for
15 me actually taking a tour of the area. My own
16 inclination is that it would be valuable. I think it's
17 very difficult sometimes to have discussions of water
18 issues, particularly when you're talking about an
19 interstate dispute of this nature, without actually
20 having a sense of the overall geography.

21 And so the other thing that we should probably
22 think about doing is scheduling a day when I could
23 actually see the areas that we are talking about. And
24 presumably that would be a tour that both of the two
25 parties would agree to or all three parties would agree

1 to and that any counsel who wanted to could accompany me.

2 MR. KASTE: Your Honor, this is Mr. Kaste. I
3 can tell you for a fact that a day is not enough.

4 SPECIAL MASTER THOMPSON: Okay. That's fine.

5 MR. KASTE: We're talking about a lot of country
6 out there, and to get a real sense of what's at issue
7 you're going to be traveling, what, a couple of hundred
8 miles from the Big Horn Mountains all way down to the
9 confluence with Yellowstone. I think it's a fantastic
10 idea. I do think you need to see that country and see
11 some diversion works and the reservoirs and the fields,
12 and it will give you a much better sense of what the
13 parties are arguing about.

14 I guess my inclination -- and maybe I'm wrong --
15 is the best time to do that would be in July or August
16 when we're at those periods where really the parties are
17 in conflict, those periods where water is a little bit
18 shorter than during the spring runoff. And I think that
19 the parties could work out an agreeable protocol about
20 who is there and how we would treat the transmission of
21 information to you for purposes of your future decisions
22 in this case. I mean, it's important that you get to ask
23 questions when you see things, but nobody is under oath,
24 and it presents weird problems. But I think we can get
25 over those hurdles relatively easily.

1 And, like I say, my suggestion would be let's go
2 in July and August and see the period at issue in action.
3 But I think, to be fair, you'd better schedule three days
4 on the ground because there's a lot of driving to get
5 from one place to another out there.

6 MR. MICHAEL: Your Honor, Pete Michael. I would
7 also -- Mr. Kaste just said on the ground. In the air,
8 that's been done -- was done in the North Platte case
9 with the Special Master there, I think, in 2001. So some
10 kind of aerial overview is probably a concept, too, as
11 part of this.

12 SPECIAL MASTER THOMPSON: Okay. Mr. Draper,
13 your thoughts?

14 MR. DRAPER: Your Honor, I think it would be
15 helpful. I've seen cases where the Master has taken
16 tours and cases where the Master has not. And I think
17 it's generally been beneficial. I think it would be
18 great. I think we need to figure out the conditions
19 thereunder and the entourage that would be going, but we
20 could work that out for your approval.

21 And in terms of the amount of time, I would
22 think two days should probably be good. I know your
23 schedule may -- the more and more time we try to find, it
24 may be more difficult for you. But it probably is more
25 than a day, but I would think one day would likely do it.

1 And I would support the idea of Mr. Michael that it's
2 helpful to have an aerial tour along with the ground tour
3 to give you a full sweeping view of the basin at issue.

4 MR. KASTE: You need three days to work in some
5 fishing.

6 SPECIAL MASTER THOMPSON: I would love to do
7 that, but I think on this trip it will be probably
8 business, particularly if it's three days.

9 So that's very helpful. I agree that ideally
10 also it would be nice to do that in July or August, but,
11 again, I will leave that up to counsel for the parties to
12 discuss over the next month. I can tell you -- I was
13 just looking at my calendar right now -- probably the
14 ideal times, if you think it is still a relevant period,
15 would be at the beginning of the week of August 12th or
16 the week of August 19th.

17 MR. DRAPER: Your Honor, this is John Draper. I
18 should mention that right at that point we're going to be
19 in trial in Portland, Maine, in the Kansas-Nebraska case.
20 The Special Master just set a couple days at the end of
21 that week of the 12th, in other words, August 15th and
22 16th. So as we discuss this with Wyoming, we'll be
23 looking at various schedules, but I just wanted to
24 mention that that is an issue there.

25 And I think one of the things we can do is

1 work out with Wyoming what the itinerary would be, and
2 that would tell us then how long it will take, and then
3 we could present that to you for your review and
4 approval.

5 MR. DUBOIS: Your Honor, this is Jim Dubois. I
6 apologize, but I'm going to have to drop off. And I will
7 point out that the fishing in the Big Horns is much
8 better the end of July than it is if you get into August.

9 SPECIAL MASTER THOMPSON: Well, it sounds like
10 Counsel has already been up there.

11 MR. DUBOIS: My mother grew up in Sheridan, Your
12 Honor. I've spent a lot of time in the Big Horns.

13 But I have to drop off for another hearing. I
14 apologize. I don't think I have anything to add to the
15 discussion, though.

16 SPECIAL MASTER THOMPSON: Okay. Thank you very
17 much.

18 MR. DUBOIS: Your Honor.

19 (Mr. Dubois left the telephonic proceedings.)

20 SPECIAL MASTER THOMPSON: So, yes, I was more
21 than anything else -- and we're talking about July --
22 trying to help on thinking about dates. The other --
23 there are some options, looking at my calendar, in July.
24 So we could probably do it also early in the week of July
25 the 15th. I just need to be in Utah on July the -- by

1 July the 19th. And, similarly, we could do it the week
2 of July 22nd, but I would be coming -- I would be
3 flying -- if we did it that week, that Monday, July 22nd,
4 I'd be flying from Utah. But both of those two weeks are
5 possibilities for me, too.

6 So, anyway, I just wanted to give you those
7 dates because if we are going to do it in July or August
8 we need to be thinking about that sooner rather than
9 later.

10 MR. MICHAEL: Your Honor, this is Pete Michael.
11 I would add one other thing. If August became necessary,
12 certainly I know Montana has its various people that are
13 good tour guides for how the Tongue River operates there
14 that are either with the State or even a water user. And
15 we have our commissioner or our hydrologist or head of
16 the office in Sheridan that are probably the best tour
17 guides, really, to say this is what you're looking at.

18 So it's possible that, you know, attorneys -- I
19 would think an attorney from both Attorney General's
20 Office would probably be sufficient if, you know, it's
21 pretty limited to that, unless, you know, obviously other
22 people want to see with their own eyes what you see so
23 they can comment on it later. I guess that's another
24 idea.

25 SPECIAL MASTER THOMPSON: Yeah. And so I'll

1 leave that for a discussion between counsel for the
2 various parties.

3 Just thinking about the dates, however, what I
4 would suggest is that the parties try to reach at least a
5 tentative agreement within the next week or so as to
6 whether or not it makes sense to do a trip in July or
7 August and agree on some tentative dates that would work
8 for the parties. And then what I would then be able to
9 do is to put a hold on my calendar for those particular
10 dates because I'm just afraid otherwise that Susan Carter
11 will start scheduling things in the meantime.

12 You don't have to reach a final agreement, but
13 it will be nice to have at least a tentative agreement as
14 to whether or not we're going to try and do something in
15 July or August and the dates. Again, what I would
16 suggest at this point is let's go ahead and reserve three
17 dates if we can -- or three days in a row than a shorter
18 period of time. Again, that way at least it's set out in
19 my calendar.

20 MR. KASTE: We can do that. And I would say --
21 this is James -- that the last joint scheduling
22 submission that we made Mr. Wechsler drafted, so -- and
23 took the laboring more on that. So I think I owe them
24 the first crack at this order that we need to work on
25 together, and I can take the first crack at drafting

1 these things up and send them on to Montana.

2 MR. WIGMORE: Your Honor, this is Mike Wigmore
3 for Anadarko. Just real briefly, we've been talking
4 about the scheduling order among the parties, and I think
5 consistent with what we did last time I'd ask that the
6 Amici also be able to participate in those discussions.
7 I think we've all -- all Amici have taken an appropriate
8 role here and tried to be cooperative, you know,
9 understanding this is primarily an issue among the
10 parties. And so I'd ask that we be allowed to
11 participate as well.

12 SPECIAL MASTER THOMPSON: Any concerns about
13 that from States of Montana or Wyoming?

14 MR. DRAPER: Your Honor, no concerns from
15 Montana.

16 MR. KASTE: No, none from Wyoming.

17 SPECIAL MASTER THOMPSON: Okay. Great.

18 Okay. So then what we have, then, is first the
19 parties, in conjunction with Amici, will give thought as
20 to whether or not we could organize a tour of the
21 relevant area for July or August. And if the parties
22 could let Ms. Carter know by, I was going to say,
23 June 7th.

24 All right? So that's two weeks from today.
25 Do you think that will be enough time? It should be.

1 MR. DRAPER: Yes, Your Honor, that should be
2 enough.

3 MR. KASTE: It should be enough time for
4 Wyoming. We just need to check on the availability of
5 our hydrologist and commissioner to make sure when we
6 schedule this they will be there to take us to the
7 appropriate locations.

8 SPECIAL MASTER THOMPSON: Okay. Great. So if
9 you can then let Ms. Carter know by June 7th whether the
10 parties believe that we can schedule something for July
11 or August in the way of a tour.

12 The other thing, just in the goal of being
13 totally complete, you know, once we get at the very end
14 of August, that week of August 20 -- yeah, so just going
15 through again just on the various dates, it's possible I
16 could do something on the week of July 8, but that's
17 right now a week that's already pretty heavily scheduled.
18 So I'd have to change a variety of meetings around if I
19 did that.

20 Again, it looks to me as if there wouldn't be a
21 problem doing it the week of July 15th for me so long as
22 I can get to Utah by the evening of July the 18th. The
23 week of July 22nd, I would need that Monday to travel
24 from Utah, but otherwise that entire week is free for me.
25 Then I'm not available the week of July 29th, not

1 available the week of August 5th. That week of
2 August 12th, I'm available at the beginning of the week
3 and just need to be in Boulder, Colorado, by the evening
4 of August 14th for, actually, a conference -- a
5 retrospective on Arizona versus California.

6 And then the week of August 19th looks fine, but
7 I have surgery the morning of August the 22nd. So I
8 would just need to fly back the evening of August 21st
9 for that surgery. It's possible I'd be available the
10 week of August 26th. The surgery is just some hand
11 surgery, but I'd have to check with my doctor to find out
12 whether or not it's fine to fly that week.

13 Okay. So that's just for your purposes so that
14 you'll have a sense of my schedule. And so, again, if
15 you could just let Susan Carter know by June the 7th as
16 to whether or not a tour looks feasible in July or August
17 and then give her the dates, and she can set those aside.
18 And, you know, I'll even offer -- if at that point it
19 looks like maybe there are two dates that you want to
20 have set aside, feel free to tell her that, but,
21 obviously, it would be better if we narrowed it down to
22 one set of dates at that particular point.

23 So that's Item No. 1. Any questions on that?

24 MR. DRAPER: This is John Draper. In your
25 schedule do you have any options for early September?

1 SPECIAL MASTER THOMPSON: Yes. Right now the
2 week of September the 2nd looks like it's available. I
3 could do September 9th and 10th, but I have a board
4 meeting back here on September 11th. So that would cut
5 that fairly close.

6 Again, the week of September 16th also looks
7 fine.

8 MR. KASTE: I'd just caution about that time
9 that irrigation is essentially over. This is
10 James Kaste. And with irrigation essentially over, there
11 will be quite a lot of information that you won't be able
12 to see.

13 SPECIAL MASTER THOMPSON: Mr. Kaste, you know, I
14 agree with you. To the degree that we can do this at a
15 period when, you know, people are still irrigating, I
16 think that would be the preferable period, but I also
17 wanted to provide Mr. Draper with those additional dates
18 if for any reason you can't work out dates in July or
19 August. Preferably it would be in July or August.

20 MR. SWANSON: Your Honor, this is Cory Swanson
21 from Montana. Do you have an objection to, say, a Sunday
22 fly-in and beginning a tour on a Monday? Just looking at
23 a lot of these dates, the tour may not start, say, on
24 Monday, but there's a travel day on the front end of it.

25 SPECIAL MASTER THOMPSON: No, I don't. As a

1 general matter, on the various dates that I have given
2 you so far, I don't see any problems immediately -- on
3 that Sunday immediately before except ones that I've
4 mentioned. So again, if it's the week of July 22nd, I
5 will be in Utah and wouldn't be available to fly out
6 until that Monday, July 22nd.

7 And let me just check. No. All the other
8 Sundays are free. So there would be no problem coming in
9 on Sunday. The dates I've given you are basically dates
10 that I could be there and ready at, you know, 7 a.m. in
11 the morning if you wanted me to go out.

12 Okay. So that's the first item. Then the
13 second item is the draft scheduling order. And, again,
14 we will have a deadline for the submission of that on
15 July -- I'm sorry -- June 27th.

16 And then I will have -- well, let me just ask
17 right now. What about my morning on July 1st, is there a
18 preference as to time? I would be happy to do it at
19 9 a.m. our time out here, which would be 10 a.m. your
20 time, or we could do it at 10, 11 a.m. your time. Any
21 preferences?

22 MR. DRAPER: Your Honor, this is John Draper.
23 Either one will work for us.

24 MR. KASTE: This is James. I prefer earlier so
25 we can get them out of the way given that you're already

1 an hour earlier on your end. Nine a.m. your time works
2 great for us.

3 SPECIAL MASTER THOMPSON: Okay. Why don't we
4 then -- unless we have any objection, then we will do it
5 on July 1st at 9 a.m. Pacific Time, 10 a.m. Mountain
6 Time, and let's reserve an hour and a half so that we
7 have plenty of time for that.

8 And we will also then be canceling the current
9 conference -- status conference call which is scheduled
10 for June 21st. So that will come off the calendar. And
11 the topics for that will be: the draft scheduling order;
12 second of all, we will also spend additional time at that
13 point talking about the location of the trial and the
14 question of, if the trial is here in the Bay Area,
15 whether or not the two parties would like to have a
16 provision for having either a portion of the trial in
17 Montana or Wyoming or, alternatively, to have the
18 opportunity for doing part of it by video.

19 And I think that covers everything that I have
20 on my sheet at the moment.

21 Anything else that we haven't discussed?

22 MR. DRAPER: This is John Draper, Your Honor.
23 That's all I have.

24 SPECIAL MASTER THOMPSON: Okay. Just going
25 back, I'm going to file fees and expenses with the Court

1 as soon as possible and, at the latest, probably early
2 next month. And I've given you the dates I'll be out of
3 town in June, but otherwise I will be here and available
4 for any type of issues that the parties want to raise.

5 And if you have any questions along the way as
6 to what to include in the scheduling order, again I would
7 err in favor of being inclusive. And if you have any
8 questions, just relay them to Ms. Carter, and I will
9 respond right away.

10 MR. KASTE: This is Mr. Kaste. I don't have
11 anything further on behalf of the State of Wyoming.

12 SPECIAL MASTER THOMPSON: Okay. Great. Then
13 unless any Amici or State of North Dakota have anything,
14 then we can go ahead and adjourn this call.

15 Okay. Thank you.

16 MR. DRAPER: Thank you.

17 MR. KASTE: Thank you, your Honor.

18 SPECIAL MASTER THOMPSON: Okay. Thank you. For
19 everyone, have a great weekend. Enjoy the three-day
20 holiday even in Wyoming where you work every day
21 apparently.

22 (The proceedings concluded at 11:09 a.m.)

23

24

25

1 STATE OF CALIFORNIA)
 2) ss
 3 COUNTY OF SAN DIEGO)
 4

5 I, LAURELLE A. SIMMS, Certified Shorthand Reporter
 6 No. 5762, State of California, do hereby certify:
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 8 place therein named and were reported by me in shorthand
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12 And I further certify that I am a disinterested
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 16 The dismantling, unsealing, or unbinding of the
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19 IN WITNESS WHEREOF, I have hereunto set my hand
 20 this 30th day of May, 2013.

21
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