

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.)
)

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONIC HEARING

July 19, 2010

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

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

taken telephonically on Thursday, July 19, 2010, at 11:03
a.m. before Antonia Sueoka, Certified Shorthand Reporter,
CSR No. 9007, RPR.

1 Thursday, July 19, 2010, 11:03 a.m.

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3 SPECIAL MASTER THOMPSON: Why don't we go ahead
4 and start and begin with identifications of the people on
5 the line for the court reporter, so we'll start with the
6 State of Montana.

7 MR. DRAPER: Yes, Your Honor. This is John
8 Draper here for the State of Montana. With me in my
9 office I have Jeffrey Wechsler. Also on the line from
10 Montana are Chris Tweeten and Jennifer Anders.

11 SPECIAL MASTER THOMPSON: Thank you.

12 And State of Wyoming.

13 MR. MICHAEL: Yes, Your Honor. This is Peter
14 Michael from the State of Wyoming. With me is David
15 Willms, who has appeared previously in the case; our State
16 engineer Patrick Tyrrell, that is T-y-r-r-e-l-l, for the
17 court reporter; new attorney with our office Andrew
18 Kuhlmann, and that last name is spelled, K-u-h-l-m-a-n-n;
19 and we have a law student intern that is here just
20 observing for the summer Dean Hirt, last name is spelled
21 H-i-r-t.

22 SPECIAL MASTER THOMPSON: Okay. Thank you.

23 And then finally for the United States which is
24 not a party in this action but has participated as amicus
25 in most of the proceedings.

1 MR. DUBOIS: This is Jim Dubois on behalf of the
2 United States, and also on the phone is William Jay from
3 the Solicitor General's Office.

4 SPECIAL MASTER THOMPSON: Okay. Again, thank
5 you very much everyone for -- oh, I'm sorry, from North
6 Dakota, I almost forgot. Sorry about that.

7 MR. SATTLE: No problem. This is Todd Sattler
8 from North Dakota, and it's just me on the phone from
9 North Dakota.

10 SPECIAL MASTER THOMPSON: Okay. Thank you.

11 So, again, thank you everyone for participating
12 this morning. I thought that given that all of the briefs
13 have now been filed in connection with Montana's
14 exceptions to the First Interim Report that it would be a
15 good time to check in with everybody, and in particular, I
16 was interested in the parties from the United States views
17 on whether or not there are ways in which we could advance
18 the proceedings in this case pending the Supreme Court
19 taking action on the exceptions.

20 So I know that the Supreme Court has not decided
21 yet whether or not to actually hear the exceptions. If
22 they did, though, it looks to me as if we're probably
23 talking about oral argument in December, and so it could
24 be seven, eight, nine months before we would actually have
25 a decision and opinion from the Supreme Court.

1 Given that Wyoming did not file exceptions at
2 this stage, there are a number of issues that we know will
3 be with us no matter what the Supreme Court were to say in
4 connection with Montana's exceptions, so the question that
5 I'm interested in is whether or not there might be things
6 that we could be doing in the meantime so this case could
7 get further along at the point that it does come back from
8 the -- from the U.S. Supreme Court. And my current
9 thought pending your all comments would be to ask the
10 parties to meet and confer by -- did we lose somebody?

11 Is everybody still on the line, I guess I should
12 ask?

13 THE REPORTER: Court reporter is still on.

14 MR. MICHAEL: I am still here from Wyoming.

15 SPECIAL MASTER THOMPSON: Okay. Well, for the
16 moment we'll assume everybody is on the line. They'll
17 call back in a moment if they're not. I just wanted to
18 make sure I hadn't been dropped.

19 So, anyway, so I'll ask the parties to meet and
20 confer by telephone to talk about what proceedings might
21 take place, again, pending resolution of Montana's
22 exceptions, and there were three or four things in
23 particular that I thought that the parties might consider
24 in that regard.

25 One was to see whether or not the parties could

1 identify the legal and factual issues that still need to
2 be resolved on those portions of Montana's complaint that
3 aren't currently the subject of exception, and in that
4 connection the nature of any discovery or evidentiary
5 proceedings that would -- are currently contemplated in
6 connection with those legal and factual issues.

7 Second, probably the easiest thing to do would
8 be to see if the parties could come to agreement on those
9 portions of the case management plan that aren't directly
10 related to the specific discovery that the parties would
11 want to pursue, so that would include rules governing
12 discovery, in particular expert discovery, privileged
13 logs, what all of the Rules of Civil Procedure should
14 apply, how to deal with confidentiality, resolution of
15 disputes, and the like.

16 A third possibility, and I know this might be
17 pushing things farther than the parties feel comfortable
18 going at this stage, but would be whether or not it would
19 be possible to bifurcate or phase discovery so that the
20 parties could begin discovery on some of the issues that
21 again aren't directly related to the exceptions.

22 And so those I think are the three things that
23 I'll throw out there for the moment, but I'd be interested
24 in the various parties' initial thoughts on whether or not
25 it might be possible to advance the case further pending

1 resolution of the exceptions and also the views of the
2 United States on that issue.

3 So why don't I start with Montana. Do you have
4 any initial thoughts on this?

5 MR. DRAPER: Your Honor, this is John Draper. I
6 think -- I think, the questions that you had there are
7 helpful, and of course, we would like to move things
8 forward if we can. I think based on discussions that the
9 states have had, we're -- we're doubtful that we can
10 really be efficient going forward with discovery at this
11 point, but I thought that the other items that you
12 mentioned, for instance, the case management plan, that
13 would be fruitful areas that the parties might well
14 discuss in anticipation of the Court's ruling.

15 SPECIAL MASTER THOMPSON: Any thoughts from
16 Wyoming?

17 MR. MICHAEL: Your Honor, it's Pete Michael. We
18 had a call last week, Mr. Tweeten and Ms. Anders gave me a
19 call and expressed what Mr. Draper just mentioned.
20 They're pretty skeptical about efficiency if discovery
21 begins immediately, and I didn't have any dispute with
22 that, so I guess that that was just kind of the general
23 thinking here. But I do think that discussion of case
24 management would be useful.

25 Bifurcating discovery, that's a little difficult

1 given, I think, the parameters of where we might end up,
2 depending on what the Supreme Court does with the issues.
3 It makes our discovery difficult. So I think that it's
4 hard to state a position on that without probably until we
5 hear for sure what issues are in the case and what aren't.

6 But, again, as you said earlier, we do know that
7 groundwater would be in the case, some kind of groundwater
8 analysis, something involving groundwater would typically
9 be in the case, so we can check into that, and so there
10 might be -- we might be able to do something with that,
11 but I don't know that bifurcating it would be
12 advantageous, but we can discuss that between ourselves if
13 that's what you had in mind before pending maybe
14 another -- another conference about the possibility of
15 some kind of bifurcation. That would be --

16 SPECIAL MASTER THOMPSON: That -- I'm sorry.

17 MR. MICHAEL: That would be the area. I guess
18 groundwater is the one that comes to mind as something
19 that surely is going to be in the case if we were going to
20 bifurcate maybe potentially. Although, again, Montana I
21 think was pretty skeptical about moving forward on any
22 discovery on any issues I take from their phone call we
23 had last week.

24 SPECIAL MASTER THOMPSON: I understand. And
25 that is the -- my thought as to how -- or the issues that

1 would be discussed. As I mentioned earlier, I think at
2 least putting the sort of the basic guts of a case
3 management plan together would be something that would be
4 possible at this stage, although, again, you wouldn't be
5 able to actually set out a schedule for discovery and
6 other proceedings.

7 It also struck me that it might be valuable and
8 certainly useful for me for the parties to look at the
9 various issues that we know will be in the case, and as
10 you point out, groundwater is one of them, see whether or
11 not they might be able to more precisely identify the
12 legal and factual issues that still need to be resolved in
13 connection with those portions of Montana's complaint.

14 And then as I mentioned, the final thought would
15 be to at least discuss whether or not it would be possible
16 to take some portions of the proceedings and efficiently
17 begin discovery on those. Groundwater strikes me as
18 probably the one that is most separable, but I also want
19 to make sure that discovery is efficient. And so if the
20 parties agree that there is enough overlap between the
21 various issues, that the -- that there really would not
22 make much sense to begin discovery at this stage, then I
23 certainly would understand that, but it would be helpful
24 for the parties to spend a little more time discussing
25 that, so that is my current thinking.

1 So North Dakota, I know that you have not been
2 active in the case, but do you have any thoughts?

3 MR. SATTLER: Thank you, Your Honor. We don't
4 anticipate issuing offensive discovery, and we don't
5 anticipate filing -- or receiving any discovery requests
6 given our limited involvement.

7 We would, I think, participate in a meet and
8 confer and want to be involved in the case management
9 order and in discussion with parties on that and I guess
10 also with regard to the identification of issues, but we
11 don't anticipate to be participating in discovery.

12 SPECIAL MASTER THOMPSON: Okay. Thank you.

13 And then finally, the United States. You've had
14 the greatest experience with a variety of different
15 additional actions before the Court. I don't know, number
16 one, whether you know whether or not there have been other
17 original matters that have been in this type of a
18 situation on what has been done there and also whether you
19 have any thoughts on my proposal.

20 MR. JAY: Your Honor, this is William Jay from
21 the Department of Justice. I think on most of these case
22 management issues, the United States doesn't have a
23 position or indeed much of a -- much of a stake. To the
24 extent that we can be useful to the parties and to the
25 Court by sharing any experience that we've had in previous

1 original actions, we're happy to do that.

2 I can't off the top of my head for an example of
3 a previous original action that has moved forward on a
4 parallel track while exceptions are pending, but United
5 States is usually an amicus rather than a party in
6 original actions, and we don't always participate as
7 actively in Special Master proceedings, at least before
8 there's a Supreme Court decision as we have in this case,
9 oh, and to the Supreme Court having asked for our views in
10 the case. So to the extent that we can be useful to the
11 Court and to the parties, we're happy to do so, but at
12 this point, I don't have much to add.

13 SPECIAL MASTER THOMPSON: Okay. Thank you.

14 And, Mr. Draper, I know that you've been
15 involved as counsel in a number of actions. Are you aware
16 of any other cases where a Special Master has confronted
17 this type of a situation where there are exceptions on a
18 limited portion of the case, but we know for sure that the
19 case will be coming back to the Special Master?

20 MR. DRAPER: Your Honor, this is John Draper.
21 My experience is that in every case I'm aware of that
22 the proceedings before the Special Master have essentially
23 been ended while the case is pending before the Court, at
24 least any formal activity before the Special Master, even
25 where the exceptions that they typically do address only

1 part of the case if it's going to be factual in nature.
2 So I don't think there's any hard and fast rule against
3 doing something while the case is pending. Just -- just
4 in terms of my experience, I have never -- I have never
5 seen it happen.

6 SPECIAL MASTER THOMPSON: Okay. I have looked
7 around and talked to some of the former Special Masters to
8 see whether or not I could find any good examples.
9 Unfortunately, there's none quite like this situation.

10 So again what I would propose, and I can put
11 this into an order, is that the parties meet and confer by
12 telephone and see whether or not they can agree on what,
13 if any, procedure can proceed pending resolution of
14 Montana's exceptions.

15 And as I mentioned, I will set out the three
16 specific questions that I mentioned earlier. Number one,
17 whether or not the parties for -- come up with the guts
18 again of a proposed case management plan; second of all,
19 whether or not it would be useful, again, pending
20 resolution of Montana's exceptions, for the parties to see
21 whether or not they can agree on identification of the
22 legal and factual issues that will need to be resolved on
23 the other portions of Montana's disputes and whether or
24 not those will require discovery or evidentiary
25 proceedings; and third of all, a consideration of whether

1 or not it would make any sense and whether or not it would
2 be efficient to conduct any discovery pending, again, the
3 resolution of Montana's exceptions, and if so, what the
4 nature of that discovery would be. And then what I
5 propose is that the parties have about a month to do that,
6 and that the parties then submit letters to me setting out
7 any agreement they've reached, and to the degree that
8 there's disagreement, to include that also.

9 So, again, it would be the appropriateness of
10 any steps of that nature and whether or not the parties
11 agree that it would be efficient to do that so that the
12 case can be further along at the time that the Court
13 resolves the exceptions.

14 So does that -- any disagreement or dissent from
15 that?

16 MR. DRAPER: Your Honor, this is John Draper.
17 No dissent from that from Montana. If we could have until
18 the end of August given people's schedules that I'm aware
19 of, that would be helpful if you could allow us that.

20 And I think the way you just expressed it was
21 very helpful, and it reminded me of how Special Master
22 McKusick had handled matters in the Republican River
23 litigation when it was at that similar stage.

24 SPECIAL MASTER THOMPSON: Okay. Thank you,
25 that's very helpful. And I have no problem at all giving

1 people until the end of August, and what about if we say
2 September 3rd, that would be the Friday before Labor Day
3 weekend.

4 MR. MICHAEL: That would be fine with Wyoming, Your
5 Honor, September 3rd.

6 MR. DRAPER: That's fine -- I'm sorry, this is
7 Montana. That would be fine with us, Your Honor.

8 SPECIAL MASTER THOMPSON: Okay. Great.
9 And North Dakota?

10 MR. SATTLER: That would be fine with North
11 Dakota. Thank you.

12 SPECIAL MASTER THOMPSON: Okay. So as I said,
13 I'll put all of that in an order and get you that
14 tomorrow, and so again we would have then the letters due
15 on September 3rd of this year, and then the meet and
16 confer requirement would involve Montana, Wyoming, and
17 North Dakota, the three parties to the action.

18 So any other thoughts on that question?

19 That was the only thing on my agenda, but I also
20 want to give the parties an opportunity to raise anything
21 else that they think is appropriate.

22 MR. DRAPER: Your Honor, this is John Draper.
23 One housekeeping matter that I would like to suggest is
24 that on our contact list forward, it would be helpful to
25 continue to include Jeanne Whiteing who is counsel for the

1 amicus, the Northern Cheyenne Tribe, who has been
2 participating to some degree as the case is proceeding.

3 SPECIAL MASTER THOMPSON: All right. I will
4 make sure that is the case. She is not then consciously
5 removed. So if she didn't get one of the pleadings or
6 notices, that is my fault, and I'll correct that.

7 MR. DRAPER: Thank you very much.

8 SPECIAL MASTER THOMPSON: Any other issues?

9 MR. MICHAEL: Nothing further from Wyoming, Your
10 Honor.

11 SPECIAL MASTER THOMPSON: Okay. Under those
12 circumstances, then I think that we're concluded, so let's
13 go ahead and we'll conclude this particular session, and I
14 hope that all of you have a continued great time.

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16 (End of proceedings at 11:24 A.M.)

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STATE OF CALIFORNIA)
) ss
COUNTY OF SAN DIEGO)

I, ANTONIA SUEOKA, Certified Shorthand Reporter
No. 9007, State of California, do hereby certify:

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The dismantling, unsealing, or unbinding of the
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IN WITNESS WHEREOF, I have hereunto set my hand
this 29th day of July, 2010.

Antonia Sueoka, RPR, CSR NO. 9007