

NO. 137, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,)
)
 Plaintiff,)
)
 vs.) No. 220137 ORG
)
 STATE OF WYOMING and)
)
 STATE OF NORTH DAKOTA,)
)
 Defendants.)
)

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

STATUS CONFERENCE

July 1, 2013

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

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1 MONDAY, JULY 1, 2013, 9:03 A.M.

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

5 This is a status conference in Montana vs.
6 Wyoming, which is Number 137 Original in the Supreme Court
7 of the United States.

8 Good morning, everybody, and why don't we begin
9 as always with identification of counsel, and we will
10 begin with the Plaintiff, the State of Montana.

11 MR. DRAPER: Good morning, Your Honor. This is
12 John Draper, Counsel of Record for Montana. We also have
13 on the phone with us this morning, Cory Swanson and Jay
14 Weiner from the Attorney General's Office in Montana, and
15 Anne Yates from the Montana Department of Natural Resource
16 and Conservation.

17 SPECIAL MASTER THOMPSON: Okay. Good morning,
18 Mr. Draper, and everybody else from Montana.

19 So we'll then go to the State of Wyoming.

20 MR. KASTE: Good morning, Your Honor, James Kaste
21 for the State of Wyoming. I'm here with Peter Michael and
22 Chris Brown.

23 SPECIAL MASTER THOMPSON: Okay. Good morning,
24 Mr. Kaste, and good morning Mr. Michael, Mr. Brown.

25 And then next State of North Dakota.

1 MS. VERLEGER: Jennifer Verleger for North
2 Dakota. I'm here by myself.

3 SPECIAL MASTER THOMPSON: Okay. Good morning,
4 Ms. Verleger, and I hope that you have more company later
5 in the day.

6 SPECIAL MASTER THOMPSON: And so next we'll go to
7 the Amicus, beginning with the United States.

8 MR. DUBOIS: This is James DuBois for the United
9 States. Good morning, Your Honor.

10 SPECIAL MASTER THOMPSON: Good Morning
11 Mr. DuBois.

12 Next the Northern Cheyenne Nation.

13 MS. WHITEING: Yes, Your Honor. This is Jeanne
14 Whiteing representing the Northern Cheyenne Tribe.

15 SPECIAL MASTER THOMPSON: Good morning,
16 Ms. Whiteing.

17 And then following -- I'm sorry, finally,
18 Anadarko Petroleum.

19 (No response.)

20 SPECIAL MASTER THOMPSON: It doesn't appear as if
21 Mr. Wigmore and others are on the line yet. I think we
22 can go ahead and proceed without them and they'll join us,
23 hopefully, as we proceed along this morning. I haven't
24 received any notice they weren't going to be
25 participating.

1 So I have at least four things on the calendar
2 for this morning. First, just very briefly, I want to
3 talk about the stipulated dismissal with prejudice of
4 Montana's Powder River Basin claim; second of all, I want
5 to talk about the proposed Case Management Order Number 11
6 dealing with various pretrial procedures and dates; third
7 of all, I'd like to talk about the field trip; and then
8 fourth of all, we have Wyoming's motion to compel.

9 Is there anything else that people want to add to
10 the calendar for this morning?

11 MR. KASTE: Nothing from Wyoming, Your Honor.

12 SPECIAL MASTER THOMPSON: Anything from Montana?

13 MR. DRAPER: Nothing, Your Honor. This is John
14 Draper.

15 SPECIAL MASTER THOMPSON: Okay. Great. Thank
16 you very much.

17 So let's start with the Stipulated Dismissal. I
18 just got the copy of it from Ms. Carter this morning. I
19 have taken a look at it. I assume that there are no
20 issues to address there, and since it's been signed off on
21 by all the parties, I can go ahead and sign it. Is that
22 correct?

23 MR. DRAPER: This is John Draper, Your Honor.

24 Yes, all parties have signed off on it, as
25 indicated, and it's ready to be reviewed and approved

1 hopefully by you and filed.

2 SPECIAL MASTER THOMPSON: Okay. Great. Thank
3 you very much. So I will go ahead, then, and sign that
4 right after this conference call is concluded.

5 So then let's go next to Case Management Order
6 Number 11. And I've reviewed it, and what I would like to
7 do is to start out by going through the various parts of
8 the document where there is any disagreement between the
9 two states of Montana and Wyoming.

10 So hopefully this will be paginated in the same
11 way that your copies of the document are, but the top of
12 Page 3, which is the second paragraph of Section 1.5,
13 "Witness List," there is -- the second sentence says:
14 "The opposing party shall not be required to subpoena
15 witnesses who," and then Montana would propose saying,
16 "may or," and then the language continues, "will be
17 produced by an opponent."

18 So, Mr. Draper, you want to start out by talking
19 about why you would like to add the words "may or," first.

20 MR. DRAPER: Yes. Thank you, Your Honor. This
21 is John Draper.

22 Our thought in proposing the additional words
23 there was that where either of us states is going to be --
24 if we're going to be participating in the trial actively,
25 have identified witnesses who will or may be called, that

1 at least as to those witnesses, no formal subpoena would
2 be required, but that the states would cooperate and make
3 the person available.

4 Of course, if one of the states is calling a
5 witness, they have the responsibility for arrangements and
6 paying costs, and so on, but in terms of whether it's just
7 a formal subpoena where a trial subpoena would be
8 required, we thought that with respect to this category of
9 witnesses the may list should be included with those for
10 whom subpoenas are not required.

11 SPECIAL MASTER THOMPSON: Okay. Thank you.

12 And, Mr. Kaste, Wyoming's view.

13 MR. KASTE: Well, this particular provision comes
14 from largely United States District Court, District of
15 Wyoming, Final Pretrial Conference Order which was the
16 basis for many of these things, and I put together for the
17 Case Management Plan, and in Wyoming, as in most
18 jurisdictions, there's a difference between a may call
19 witness and will call witness, and there's a reason that
20 you designate some witnesses will call and some may call.

21 The will call witnesses, you're responsible for
22 their attendance at trial. You make a representation when
23 designating a witness as "will call" that you will get
24 them there, and the other party is entitled to rely on
25 this representation.

1 Now, may call witnesses are different. You, when
2 you designate a "may call" witness, tell the other party,
3 "I may call this person, I might not." And if you --
4 other party -- would very much like to have them there,
5 you better make the arrangements. And I don't see
6 anything wrong with that system. And what it allows you
7 to do is identify those witnesses who you're certain
8 you're going to bring to trial, and the other party can
9 rely on that, and those other witnesses who you may or may
10 not need for trial, the other party bears the risk that
11 they don't show up if they don't make arrangements
12 themselves; gives us an opportunity to give full lists and
13 each party to make an assessment of who they do need to
14 make the appropriate arrangements for their attendance.
15 Pretty simple, pretty standard.

16 And if I'm on the hook to bring my may call
17 witnesses, it's going to make kind of a mess of things.
18 It's going to make it very difficult for me if everybody
19 on my list I'm responsible for bringing, because I may not
20 bring them. And essentially what you're doing is
21 converting all my may call witnesses into will calls, and
22 that's -- that doesn't leave me any flexibility to decide
23 not to bring a witness to trial.

24 SPECIAL MASTER THOMPSON: Okay. So I certainly
25 understand the difference between the two lists. I can

1 see why the Wyoming Court may distinguish there.

2 I guess my only concern is does this put
3 Montana's position of possibly having to duplicate then,
4 though, the work that you're going to be doing anyway,
5 so --

6 MR. KASTE: No.

7 SPECIAL MASTER THOMPSON: -- with both parties
8 having to subpoena the same witness?

9 MR. KASTE: No. And these things usually work
10 themselves out without too much fuss prior to trial. You
11 know, both parties will submit a will call list; for
12 example, you can imagine Montana's experts are going to be
13 on their will call list. There might be a couple of folks
14 here in Wyoming that Montana would like to see attend, and
15 there might be a couple of folks in Montana that Wyoming
16 would like to see attend, and if they're both on the
17 parties' may call list, the parties usually have a phone
18 call and say, "Are you going to bring this person or not
19 or do I need to subpoena them?"

20 And if the answer is, "You better subpoena them,"
21 then we do, but then we know who we do and don't need to
22 subpoena. I don't think it duplicates effort; I think it
23 eliminates effort.

24 SPECIAL MASTER THOMPSON: Okay.

25 MR. DRAPER: Your Honor --

1 SPECIAL MASTER THOMPSON: Yes, Mr. Draper.

2 MR. DRAPER: Thank you.

3 Your Honor, there's a clear distinction in what
4 we're suggesting here. This goes to whether a formal
5 subpoena needs to be prepared and served by a Sheriff or
6 other process server to secure the attendance and
7 cooperation of the witness. That's different from making
8 the arrangements for that witness to come out, and so on.

9 It simply means that that formal subpoena is --
10 and chasing the witness down and properly serving them is
11 not something that has to be done with a witness with
12 which the opposing state has a close enough relationship
13 to indicate they may call them, and the state that wants
14 to call them, the opposing state, is still responsible for
15 contacting that person, making the arrangements, but with
16 the cooperation of the opposing state.

17 MR. KASTE: Well, let me say this. This is James
18 Kaste. There could be people on my may call list that I
19 don't have a close relationship with, and I certainly
20 don't control most of these people that might be on my may
21 call list, unless they're employed by the State of
22 Wyoming, and for me to say that because I've listed them
23 on my may call list, you're somehow relieved of your
24 obligation to subpoena them is wrong because I don't
25 control them. I can't make sure they're there in the

1 absence of a subpoena, and that's -- I don't want anybody
2 to get the misunderstanding that by putting a person on a
3 list who I don't have functional control over, I'm
4 representing that they'll come voluntarily. I'm not.

5 A person on my may call list, I may have to
6 subpoena to secure their attendance because they may not
7 be my buddy. And there's a -- I think there's a real
8 distinction there, and it's important not to convert folks
9 on your may call list to the functional equivalent of
10 folks on your will call list. It invites uncertainty and
11 problems if the parties are not sure and haven't made
12 arrangements to get people where they need to be, and I
13 can't warrant that for folks that may be on my may call
14 list unless they get their check from the State of
15 Wyoming, and that may include a lot of people.

16 SPECIAL MASTER THOMPSON: All right. So what
17 about the following provision: That we start obviously
18 with the fact that opposing parties shall not be required
19 to subpoena witnesses who will be produce by an opponent,
20 so someone who is on the will call list; that if it is
21 somebody on the may call list who is under the State's
22 employ, then similarly, no reason to subpoena the
23 witnesses; and that third, the parties will confer at some
24 point, you know, because this is obviously going to be
25 fairly close to the trial, but say at some point within a

1 week after exchange of the list to discuss the may call
2 witnesses and to determine whether or not an opposing
3 party needs to subpoena people who are on either state's
4 may call list.

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

6 I think that approach would answer both my
7 concerns and Mr. Kaste's.

8 MR. KASTE: That would be fine with me, Your
9 Honor.

10 SPECIAL MASTER THOMPSON: Okay. Great. Then
11 we'll go in that direction with basically just a
12 three-part process.

13 So next, then, Section 1.6, which is the
14 exhibits. So, again, we have different language from
15 Montana and Wyoming.

16 And I'll start out by just saying that certainly
17 from this -- from the standpoint of the process that I'll
18 need to go through, Montana's approach seems more orderly
19 to me.

20 So why don't we start out, then, Mr. Kaste, you
21 want to talk about why Wyoming doesn't like Montana's
22 approach and prefers its own.

23 MR. KASTE: Yeah, because we're having a trial,
24 and I think we're entitled to a real trial, and
25 admissibility of exhibits is determined at the time

1 they're offered.

2 I cannot fathom a situation where it makes sense
3 to stipulate to the admission of every exhibit in a case
4 in advance of trial when I don't know why they're being
5 offered and I cannot assess their relevance because it's
6 not being proffered at a specific time during the course
7 of the trial. I mean, this is probably on Page 2 of your
8 evidence book that admissibility is determined at the time
9 an exhibit is offered.

10 Now, I understand there are certain documents in
11 this case for which we probably will have joint
12 exhibits -- copy of the Compact; sure -- but the majority
13 of exhibits in this case, we might have objections to the
14 relevance and other elements of the Rules of Evidence at
15 the time they're offered, and I cannot sit here today or
16 at any time prior to trial and give you an accurate
17 assessment of what my objection is to an exhibit until I
18 see the witness who it is offered through and for what
19 purpose it is being offered.

20 It seems insane to me that we would do this in
21 advance of trial for every exhibit. I've never seen a
22 trial like that. I think we're entitled to reserve our
23 objections until the moment an exhibit is offered, and it
24 would be prejudicial to the parties to force them to
25 stipulate or to raise their objections in the absence of

1 context, in the absence of the moment and the witness'
2 testimony.

3 I'm sure it makes it easier for the Court, but
4 that's not really an important criteria here. To get all
5 these things swept aside in advance of trial is probably
6 easy, but it ain't right, and we object, and we reserve
7 our right to object on any grounds other than authenticity
8 at trial.

9 Now, I understand authenticity is important, that
10 we know that in advance so the other party knows, is on
11 notice that they have to bring the custodian of the
12 records to demonstrate the authenticity, and we're happy
13 to do that, but any other objection needs to be made in
14 context.

15 SPECIAL MASTER THOMPSON: Okay. So several
16 things. The first is that if I look at the two
17 alternative passages, there seems to be two different
18 issues involved here.

19 The first one is the question of whether or not
20 there is a consolidated exhibit list which is filed before
21 the proceeding, and then the second question is what, if
22 any, objections other than to authenticity need to be made
23 by the time of the pretrial conference.

24 And so, Mr. Kaste, let me just start out there.
25 Does Wyoming object to both of those parts, or is the

1 primary concern the one dealing with objection?

2 MR. KASTE: I'm primarily concerned with the
3 substantive part. I don't care what the list looks like.
4 We can do a consolidated list. The parties can put
5 whatever they want on that list, they can denominate what
6 is and is not a joint exhibit, and there will be a few.

7 The way the list works, I don't care about, so
8 long as it's easy for you and for the parties to track
9 what is an issue and what isn't, what has been offered,
10 what has been admitted, that kind of thing. I don't care
11 what the list looks like. I care about preserving my
12 right to object in the moment.

13 SPECIAL MASTER THOMPSON: Okay. So this it not
14 unprecedented -- Montana's language, I should be more
15 specific, is not unprecedented. Similar procedures have
16 been followed in other Original Jurisdiction matters,
17 including most recently in the Kansas vs. Nebraska
18 proceeding, although there might well be a distinction in
19 terms of the number of actual fact witnesses and the
20 number of exhibits that would be likely to be submitted.

21 So, Mr. Draper, if you want to talk about what
22 you see as -- well, I think obviously the advantage from
23 the Court's standpoint, I think everyone will acknowledge.
24 So what about Mr. Kaste's concerns?

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

1 You're correct, this approach is what was used in
2 the most recent Original Jurisdiction trial, and it seemed
3 to me that it worked very well. It was a -- it was a good
4 approach that kept the Court in good appraisal of what the
5 status of exhibits was, and the objection aspect of it,
6 which is the one that Mr. Kaste is concerned with, was
7 also very useful.

8 You'll notice that, as we've suggested it here,
9 there the exhibits are -- that are unobjected to at the
10 pretrial stage are only admitted de bene so that they're
11 subject to being struck or excluded from the evidence for,
12 as we put it, lack of reference or other reason. So I
13 think Mr. Kaste's concerns are protected, and this gives
14 the parties an opportunity to give each other notice as to
15 which exhibits they have a problem with and -- so that
16 parties are prepared to deal with that when an issue comes
17 up at trial.

18 So we found that actually worked quite well, and
19 that's why we're proposing it here.

20 SPECIAL MASTER THOMPSON: Let me just ask in the
21 Kansas vs. Nebraska case, so was that primarily testimony
22 by expert witnesses with very few percipient witnesses?

23 MR. DRAPER: I would say that most of the
24 witnesses were experts, engineering, scientific experts,
25 and then state officials who were involved with water

1 administration. And I should add there were some that
2 were not in that category, like water users.

3 SPECIAL MASTER THOMPSON: Right.

4 And I'm just going to ask for a very rough
5 estimate, if you have a sense on how many exhibits there
6 were in that case on the consolidated exhibit list?

7 MR. DRAPER: Your Honor, I can't be very
8 confident about this, but there were hundreds. Certainly,
9 you know, there could have been maybe 500, I don't know,
10 but there were hundreds that were ultimately, I think,
11 either admitted or at least lodged.

12 SPECIAL MASTER THOMPSON: Okay. Mr. Kaste, I'm
13 sure you want to respond.

14 MR. KASTE: Well, you know, I kind of want to say
15 I don't care what happened in that other case. If they
16 stipulated to that, great. But we are prejudiced by the
17 inability to object at the appropriate time.

18 This procedure is not how a trial is run, and if
19 other parties in the course of their case want to
20 prejudice their own rights by giving up that opportunity,
21 good for them, but Wyoming has the right to object in the
22 moment and for you to assess the evidence from the witness
23 that it's offered by for the purpose that it's offered for
24 and not in a vacuum, and I cannot object more strongly to
25 this procedure.

1 SPECIAL MASTER THOMPSON: Okay. So on this
2 particular issue, why don't we -- I'm going to have a
3 provision that does require a consolidated exhibit list
4 prepared by the parties prior to the -- prior to the
5 trial, and I'm going to take Wyoming's objection under
6 advisement. I want to talk to one or two of the prior
7 Special Masters, and then I'll decide on this particular
8 issue, but I certainly understand your concerns,
9 Mr. Kaste, and I'll take them under advisement.

10 So on Page 4 in the second paragraph, there's a
11 provision that says, "The parties shall provide ...," and
12 then I know it's left blank a certain number of the copies
13 of the proposed exhibits to the Special Master.

14 My guess is it will probably be five copies, but
15 I need to actually count up the number of copies I need to
16 ensure that we have the correct number of copies for the
17 Supreme Court, so I'll fill in the appropriate numbers
18 there, but then there's a difference on the two dates,
19 and, again, from a judicial perspective, the earlier date
20 looks appealing because I'd like to have a clear set of
21 exhibits before the trial commences rather than having a
22 stack the very first day.

23 Mr. Kaste, you want to explain why --

24 MR. KASTE: Well, because that's the way I've
25 always done it in every court I've ever been in. You show

1 up that morning with your exhibits and you hand the judge
2 his copies. It's just logistically easier for us to do
3 that, and given how many exhibits there might be, it's
4 probably cheaper to bring them all in one bunch with
5 everything else we have got to bring than to ship them
6 separately. And September 30th is relatively early.

7 I mean, people are going to be doing a lot of
8 work in preparation for these proceedings and getting the
9 exhibits out early adds to that. And it's just bizarre to
10 me that we would give you exhibits before the start of the
11 trial and that you'd start reading them before the trial
12 starts, before the witness testifies about them, and
13 before the evidence is open.

14 I recognize this is a bench trial, and so we're
15 not worried about, you know, a juror getting information
16 that they shouldn't get, but it does seem a bit out of
17 order for the finder of fact to start doing their homework
18 before the trial begins.

19 SPECIAL MASTER THOMPSON: Well, on that I'll say,
20 it's not so much to begin my homework early as it is to
21 have as much as possible an orderly set of exhibits that
22 are there and organized in a way that I and all parties
23 can easily access them.

24 MR. KASTE: Well, my position is you can have
25 that on the day of trial, and it will be just as orderly

1 as if you got them on September 30th. But until the
2 record is open, I just -- doesn't seem right to me that we
3 would hand you exhibits. And maybe I'm just goofy in that
4 regard and am a creature of habit, but in my mind in every
5 trial I've been in, the evidence opens at a specific point
6 and closes at a specific point, and the judge doesn't
7 really do much before or after that with regard to the
8 evidence.

9 SPECIAL MASTER THOMPSON: Mr. Draper.

10 MR. DRAPER: Your Honor, it seems this is, again,
11 consistent with the procedure we followed in the recent
12 case, and we thought it was -- would be helpful for the
13 Special Master to have those exhibits in case any of them
14 are subject to motions in limine, but that they can be
15 organized by the Special Master to his picking.

16 We will, I presume, involve Susan Carter to make
17 sure that when we parties do deliver the exhibits, they're
18 formatted as close as possible to what you think you will
19 want, but to have those ahead of time in case these are
20 involved in any issues that need to be decided before the
21 trial begins.

22 And I have -- I know the concern Mr. Kaste has
23 about providing the trier of fact with a document ahead of
24 trial, but that is a concern mostly when you're talking
25 about a jury not a professional finder of fact, such as a

1 Special Master, and so I think the concerns in those
2 regard -- in that regard is essentially nonexistent.

3 And so I think for purposes of orderly initiation
4 of the trial and to have those available with regard to
5 any pretrial activities makes sense for us to provide you
6 those exhibits ahead of time.

7 MR. KASTE: This is Mr. Kaste.

8 Let me just say with regard to motions in limine,
9 those ought to be self-contained. So if there's a motion
10 in limine about a particular exhibit, attaching that
11 exhibit to the motion in limine and discussing it in that
12 limited context is pretty typical, but to have the full
13 array of exhibits available to the decision-maker, again,
14 out of context and without the benefit of the proffering
15 witness, that just strikes me as widely inappropriate.

16 SPECIAL MASTER THOMPSON: Okay. On this one, I'm
17 inclined to have it before the trial commences, but not,
18 perhaps, on September 30th, although I realize that the in
19 limine, that that would eliminate the ability to just
20 refer to the proposed exhibits in the motion in limine.
21 So let me -- again, let me think about when the best date
22 for that would be.

23 One of the things that we'll need to discuss, and
24 we'll probably -- and I'll be coming back to it in a
25 moment is no matter where the trial begins, the setup

1 process for the trial itself. And so I think what I'd
2 like to do is to provide for the Court's exhibits as part
3 of that setup process.

4 (Joining the meeting, Kevin Peterson.)

5 SPECIAL MASTER THOMPSON: Good morning,
6 Mr. Peterson. You want to, since you just joined us,
7 identify yourself and who you represent.

8 MR. PETERSON: I'm with DNRC, State of Montana,
9 working with Mr. Draper.

10 SPECIAL MASTER THOMPSON: Okay. Thank you.

11 MR. KASTE: Your Honor, let me just suggest --
12 this is James Kaste -- that if we're going to do a --
13 provide copies of the exhibits at a time prior to trial,
14 that the final pretrial conference is probably a time that
15 makes sense.

16 SPECIAL MASTER THOMPSON: Yes, I agree. So
17 that's set for October 11, so the Friday before, correct?

18 MR. KASTE: That's correct.

19 SPECIAL MASTER THOMPSON: Yeah. And that would
20 also -- yeah. I think, again, as I said, I'm inclined to
21 provide for those exhibits ahead of time, but not to
22 require you, Mr. Kaste, to assemble them two weeks ahead.
23 And, again, I realize that that means that the in limine
24 motions will have to be self-contained. So I'm less
25 concerned about that than at least being prepared to start

1 first thing on the morning of October the 14th.

2 So then moving on to Section 1.7, "Other Pretrial
3 Motions." The question is on reply of briefing.

4 And, again, Mr. Kaste, what is your rationale for
5 not -- if I understand it here, you're saying that you
6 can't reply --

7 MR. KASTE: Let me tell you --

8 SPECIAL MASTER THOMPSON: -- or is it something
9 else there?

10 MR. KASTE: Yes, I am saying that --

11 SPECIAL MASTER THOMPSON: Okay.

12 MR. KASTE: -- in a way.

13 This -- the original Case Management Plan that I
14 had drafted -- and I don't know that it made it -- that
15 language made its way into this draft, as we worked back
16 and forth -- indicated that at the final pretrial
17 conference the Court would hear the motions in limine.
18 And, you know, I think it makes good sense where the Court
19 is going to have oral argument on a motion, to eliminate
20 the reply. It entails a bunch of work for no good reason
21 and you're going to say that same stuff again at oral
22 argument.

23 And since my hope would be that we're going to
24 have oral argument on the motions in limine, and my
25 expectation would be that it would be probably at the time

1 of the final pretrial conference, which is generally
2 pretty consistent with how most courts do things, is that
3 we could eliminate a whole bunch of reply briefs, just
4 have the oral argument, and get a ruling. It's a much
5 more efficient process.

6 My guess is you're going to let us give a --
7 we're going to have an oral hearing on these motions
8 anyway, and so why don't we save everybody the work of
9 putting together reply briefs.

10 More than that, it's going to be awfully darn
11 close to the date that you hear oral argument, you might
12 not have time to process reply briefs in and amongst all
13 the other things that you're going to be doing. It's just
14 a lot less paper, and I think a lot of wasted effort where
15 there's going to be oral argument.

16 Now, if there's not going to be oral argument, if
17 your position is that, "You know what? I'm going to
18 decide these motions in limine on the briefs at some point
19 prior to the pretrial conference," I would hope, so we've
20 got to know, at least by the pretrial conference what the
21 rules are going to be with regard to the various issues
22 raised in the motions in limine, then if that's the case,
23 then I think the reply brief does make some sense, but I
24 sure think it would be a lot quicker and easier just to
25 have an oral hearing and get an oral ruling and get on our

1 way.

2 SPECIAL MASTER THOMPSON: Okay. So let me
3 address this one as follows: What I'm going to do is
4 include language that basically provides that any reply in
5 support of motions in limine shall be filed by
6 October 10th.

7 I'll advise all counsel right now that as a
8 general matter, I do not find reply briefs to be that
9 helpful, and therefore, since -- to the degree I have any
10 questions that need to be addressed or anyone has anything
11 that they would like to say in response to the opposition,
12 that they will have that opportunity during the pretrial
13 conference on October 11th, that there's no reason to file
14 a reply brief unless -- and this is the one place that
15 it's helpful -- is if there's any reference to anything in
16 the way of case law or anything in the record that it
17 would be useful for me to look at ahead of time or to have
18 those citations or references readily available when I'm
19 ruling, then that would be -- that would be the time to
20 have a reply, but as a general matter, I doubt whether the
21 replies will be that useful here. But if any party does
22 want to file one, then it needs to be filed by
23 October 10th, so I'll include that language.

24 Okay. Then one of the major issues is obviously
25 the one that is set out at the bottom of Page 5, and --

1 MR. KASTE: Your Honor, can I stop you there and
2 preempt you and make us go back up to Section 1.10 related
3 to the final pretrial conference?

4 I just want to say, in light of what you just
5 said about the motions in limine, it might be helpful in
6 this order to establish a time for the final pretrial
7 conference, and then it sounds to me like we're probably
8 going to want the better part of a day for that
9 conference. And I just think it might be good to set that
10 out in this order how we're going to do that final
11 pretrial, whether that is going to be an in-person
12 hearing, a telephone hearing, and how much time we're
13 going to have allotted for those -- for that proceeding.

14 SPECIAL MASTER THOMPSON: Yes. I would propose
15 that we basically do have an entire day set aside for the
16 pretrial conference, so I would propose that that start at
17 9 a.m. Actually, let me look at my calendar.

18 Yeah. So I would suggest, then, that we start
19 that at 9 a.m. on October 11th.

20 And so then moving to the trial itself. So
21 there's the two or three aspects of this. So there's
22 first the question again of whether or not the trial takes
23 place entirely in Billings, which, Mr. Kaste, I understand
24 is still Wyoming's strong preference, correct?

25 MR. KASTE: That's correct. That's why you have

1 all that language in italics there, as I asked them to
2 cross it out because I hold out hope that we'll be
3 permitted to do this in Billings, or I've been thinking
4 about it, and if the facilities in Billings are not
5 available, you know, even Denver makes more sense to me
6 than California, but go ahead.

7 SPECIAL MASTER THOMPSON: Okay. Well, I'll tell
8 you right now, the facilities in Billings are available.
9 So we checked on that right after the last conference
10 call, and we do have a courtroom for as long as we need it
11 in Billings.

12 So -- but there's, again, the two options. One
13 is Billings; the other is to start out at Stanford and
14 then move to Billings for witnesses who are local and who
15 will be difficult to get them out to Stanford.

16 So, Mr. Draper, let me ask you: I very much
17 appreciate Montana's willingness to try to accommodate the
18 scheduling problems that the Special Master has on this,
19 and therefore, my own preference for having part of it at
20 Stanford, but other than that, would you have any
21 objection to it being entirely in Billings?

22 In other words, are you trying to help
23 accommodate my interests and to basically -- are you
24 basically saying, "We can do it partly at Stanford and
25 partly in Billings," or do you -- I assume you don't have

1 any problem with it being entirely in Billings if I decide
2 I'm able to do that?

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

4 That's essentially correct. We're supporting the
5 Stanford choice because we think it will be much more
6 convenient for the Special Master. It's how we've done
7 these cases in the past. We've had them entirely at the
8 location most convenient to the Special Master. As far as
9 having the trial in Billings, we don't have any objection
10 to that at all.

11 SPECIAL MASTER THOMPSON: Okay. And then the
12 second part of this is that to the degree that we did it
13 for four or five weeks in Billings, then my guess is that
14 I would probably be doing the proceedings four days a week
15 rather than five days a week, because there would be --
16 there are various reasons I would have to be coming back
17 here on a regular basis. So probably what we would do is
18 hold trial on Monday through Thursday, but be off on
19 Friday.

20 So does that change the way that -- first of all,
21 Mr. Kaste, does that change the way Wyoming would view the
22 balance between the two places?

23 MR. KASTE: No. I think that we're still very
24 happy with Billings. If we lose a trial day per week in
25 order to accommodate your needs, that's okay. It makes

1 life so much easier for the witnesses and much, much, much
2 more cost-effective for us.

3 We've been starting to run the numbers, and
4 they're -- there's a significant difference between those
5 numbers in Billings and in Stanford.

6 SPECIAL MASTER THOMPSON: And, Mr. Draper, does
7 it change the balance of your thinking?

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

9 And, no, I don't think that is any problem. And
10 if you're considering having trial in Billings, a proper
11 balance may be to have some of the trial in Stanford and
12 then reserve enough time in Billings to accommodate the
13 witnesses for which it's particularly convenient for them
14 to appear there.

15 SPECIAL MASTER THOMPSON: And let me also ask in
16 connection with this, and I'm interested in the views of
17 both parties, and we'll start with you, Mr. Kaste.

18 Is your expectation right now that your expert
19 witnesses will be -- or may well be presented interspersed
20 among percipient witnesses rather than all at one point
21 either at the beginning or the ending of your case?

22 MR. KASTE: Well, you know, I guess I haven't
23 really given a whole lot of thought to particular order of
24 witnesses. I think as with almost every trial I've ever
25 been in, I never get the order that I want. I get the

1 order that my witnesses can accommodate, and that's
2 usually somewhat out of order, and my guess is that we're
3 going to accommodate the schedules of a whole bunch of
4 people, and it means that we're going to do some of each
5 and not all of it in the order we'd like.

6 So without knowing specifically anything about
7 anybody's schedule, I'm going to say they're going to be
8 interspersed as a matter of necessity, because everybody
9 that we try to get into this trial has a life, and they're
10 going to yell at me about their life, and I'm going to do
11 my best to try and get everybody in at a time that is
12 least and convenient for them and still works for our
13 schedule. And, you know, our overarching expert lives
14 here in Sheridan, so he'll be there whenever we can fit
15 him in, and, you know, he may be our guy that we use to
16 plug holes in the schedules of other people.

17 SPECIAL MASTER THOMPSON: Okay.

18 MR. KASTE: And our other two experts, one lives
19 in Laramie, Wyoming, and the other one in Boulder,
20 Colorado. So they're going to be relatively easy to get
21 to Billings at times that makes sense for our other folks.
22 And since I'm paying them, they usually show up when I
23 ask. The other folks who I'm not paying, are a little bit
24 tougher to deal with sometimes.

25 SPECIAL MASTER THOMPSON: Okay. And, Mr. Draper,

1 do you have any sense yet?

2 MR. DRAPER: Your Honor, I think we do deal with
3 some issues about witness schedules, but to the extent
4 that we have a choice, we're likely to be putting on our
5 expert witnesses in the early phase of our case, followed
6 by percipient witnesses.

7 SPECIAL MASTER THOMPSON: Okay. So, again, I'm
8 not going to make a decision on this issue today. And
9 what I want to do is I want to talk to the Supreme Court's
10 clerk about this. And then in addition to that -- and
11 this gets back to the field trip -- take a look also at
12 the facilities in Billings when we're there, and then I
13 can -- I'll make a final decision if it's not going to
14 prejudice the parties to wait another two weeks or so at
15 the end of that field trip.

16 MR. KASTE: Well --

17 SPECIAL MASTER THOMPSON: Is that a problem,
18 Mr. Kaste? I think you're about to say it is.

19 MR. KASTE: Well, it's not a problem, but it's
20 going to burn a lot of time. You know, Billings in
21 relation to the river, is a little bit of a distance. So
22 your tour of the Tongue River is going to take you sort of
23 in a northeasterly direction, and at some point you're
24 going to have to go back west a couple hours to get to
25 Billings. Billings just happens to be the most central

1 location of any real size that could accommodate all the
2 parties and those kind of things. You know, the main
3 towns there on the Tongue River are little dinky little
4 farming communities, and it's about -- what? -- a two-hour
5 drive from Miles City over?

6 UNIDENTIFIED SPEAKER: About an hour and a half.

7 MR. KASTE: Hour and a half from Miles City over
8 to Billings.

9 Now, we can do that. We can make the time to do
10 that, but it may make us rush some other aspects of the
11 field trip, you know. We may have to cut out a little bit
12 here and there, probably the -- we're always thinking
13 about eliminating any air tour of the basin. Just
14 logistically it's been a nightmare trying to find a
15 aircraft that can accommodate people, that can get you a
16 real good view, that can go slow enough, and that is
17 anywhere near reasonably priced. And certainly we can
18 eliminate that piece of the tour in favor of a trip over
19 to Billings to investigate their facilities. But just
20 know that it's going to take you a bit out of the way from
21 the river itself.

22 SPECIAL MASTER THOMPSON: Okay. I'm just looking
23 up one thing at the moment.

24 So in the -- so at the moment, hopefully I didn't
25 do anything wrong here, I'm scheduled to fly out of

1 Billings.

2 MR. KASTE: Do we have something in the morning?

3 SPECIAL MASTER THOMPSON: Yeah. We do have
4 something in the -- so this actually brings us to the
5 field trip. So let's -- I'm just thinking is there
6 anything else that are issues with respect to the Case
7 Management -- proposed Case Management Order Number 11?

8 MR. KASTE: The only thing that remains in
9 italics on there is with regards to the sequestration of
10 witnesses on Page 6. Montana's proposed language would
11 be, "We presume they will not be sequestered."

12 Wyoming's position at this time is that I'm -- I
13 don't know that I'm ready to make a decision on
14 sequestration. I'm entitled to make that motion at any
15 time, including up to the day of trial.

16 I think it would be helpful for all parties
17 involved to know what your position is with regard to what
18 does sequestration mean. Various judges think it means
19 different things, and that could help the parties identify
20 whether or not they want sequestration or not.

21 You know, some judges say it means everybody no
22 matter what, including your expert witnesses; some judges
23 will say sequestration applies to percipient witnesses and
24 not expert witnesses, so your experts can listen to the
25 testimony of other witnesses and then comment thereon when

1 they get an opportunity to testify. So I guess it would
2 be helpful for us before we make that decision to know
3 what you intend to delineate as the contours of a
4 sequestration order should one be requested.

5 SPECIAL MASTER THOMPSON: So certainly in all of
6 the proceedings in which I have been a litigator myself,
7 I've always benefited from having the ability of having my
8 expert witnesses there to help advise me, and I also view
9 expert witnesses as different from percipient witnesses in
10 the degree to which, you know, they can in any ways be
11 influenced by being in the courtroom. So I would view it
12 as a benefit and very little reason to sequester them. So
13 as a general matter, I would need to have more argument as
14 to why experts would need to be sequestered.

15 Having said that, my general view is that, you
16 know, that witnesses should -- we should not be
17 sequestering witnesses in a trial, particularly of this
18 nature, unless there is good cause for doing it. But if
19 the parties were to agree or if good cause was shown, then
20 I'm certainly willing to consider sequestration.

21 MR. KASTE: Well, so I guess what I'm hearing
22 from you is that if a party asks for sequestration, your
23 general intent at this point would be not to sequester
24 experts, but to give them the opportunity to listen in,
25 but that fact witnesses would be subject to the sequester

1 order.

2 And that's all I'm trying to ferret out is what
3 would be the effect of a request for sequestration.
4 Because the way I understand the rule it is not
5 discretionary; if someone asks for it, the Court must
6 grant it. That's the way I learned it, and that's why
7 it's helpful to know beforehand, before you make that
8 motion, what -- when you get what you ask for, what are
9 you getting? And so we'll need to give some thought to
10 whether or not we want to do that.

11 SPECIAL MASTER THOMPSON: Okay. Mr. Draper.

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

13 I think in these types of proceedings, where you
14 have evidence being presented on behalf of sovereign
15 states that the considerations about sequestration are
16 different than in a normal personal injury trial, for
17 instance, and that there is less justification for doing
18 that, and there are policy reasons for not doing it.
19 That's why we suggested this language, and I think, you
20 know, if there is a request for sequestration, that it
21 should be specific and that will determine, in part, how
22 specific the -- any order might be.

23 SPECIAL MASTER THOMPSON: To my knowledge, and it
24 might very well be that simply because no party asked for
25 it, but, again, I'm not bound by the Federal Rules of

1 Civil Procedure in this case. Are you aware of any
2 Original Jurisdiction matter involving sequestration of
3 witnesses on a blanket basis?

4 MR. DRAPER: No, absolutely not. I have never
5 heard of it, and I have never seen it in the many trial
6 days that I've been personally present for.

7 SPECIAL MASTER THOMPSON: Okay. Let's go, and
8 then we come back to this, because I'm aware of the time,
9 on the field trip.

10 So I think right now that -- just to let everyone
11 know, I'm going to be arriving in Sheridan on United
12 Airlines Flight at 12:05 p.m. on July 22nd. And from that
13 point forward, I am -- I'm available for whatever either
14 side wants to show me.

15 And right now when I -- when I made my
16 reservations, I hadn't heard back from the parties. I
17 made my reservation right now coming back from Billings at
18 1:30, which was sort of the early afternoon flight, but
19 there is a late afternoon flight. I'll have a change fee
20 on the ticket, but I don't think that's going to be
21 particularly large. And I must confess that I hadn't
22 realized that we were likely to be up in Miles City, so it
23 probably does make sense to do a later flight even if all
24 we're doing in the morning is doing the tour that was
25 originally proposed.

1 But I'm also now thinking, and this gets back to
2 our discussion a moment ago, Mr. Kaste, that if I schedule
3 myself for like a late afternoon flight, there might even
4 be the possibility of looking at the courtroom facility in
5 Billings on that same trip in the afternoon.

6 MR. BROWN: Your Honor, this is Chris Brown. And
7 I've been trying to work with Jeff Wechsler from Montana
8 trying to get some of these logistics taken care of, and
9 we apologize we weren't able to get back to you quicker
10 with regard to the suggested proper flight out of
11 Billings. But even if you weren't to want to look at any
12 of the facilities in Billings, I think the later flight
13 certainly makes sense. And if you do get the later
14 flight, I think there should be adequate time for you to
15 take a look at those facilities. So I would suggest, and
16 I think Montana would agree, the later flight makes a
17 whole lot more sense.

18 SPECIAL MASTER THOMPSON: Okay. Then unless
19 there's any objections from people, what I will do is I'll
20 go ahead and change my reservation to the flight later
21 that afternoon, and then we can see later whether or not
22 there's actually an opportunity to take a look at the
23 facility.

24 My thought was that, you know, no matter what I
25 end up doing in terms of the location of the trial, that

1 it will -- that both Montana and Wyoming might find it
2 beneficial to take a look at the facilities on that
3 trip.

4 MS. WHITEING: Your Honor, this is Jeanne
5 Whiteing. I need to leave the conference. I just wanted
6 to let you know.

7 SPECIAL MASTER THOMPSON: Okay. Thank you.

8 MS. WHITEING: Thank you.

9 MR. MICHAEL: Your Honor, this is Peter Michael,
10 I have one thought --

11 (Joining the meeting, Michael Wigmore.)

12 SPECIAL MASTER THOMPSON: Okay. Mr. Wigmore,
13 just real quickly, since you just joined the meeting -- I
14 don't know whether you got the time wrong, by the way, but
15 it started at 9 rather than 10.

16 MR. WIGMORE: I apologize. I think I did get the
17 time wrong.

18 SPECIAL MASTER THOMPSON: Don't worry about that.
19 I just figured when I looked at the clock and saw that you
20 were exactly on the dot for a 10 o'clock start that you
21 might have just gotten the time wrong.

22 So do you want to just identify yourself for the
23 record.

24 MR. WIGMORE: Sure, Your Honor. I apologize.

25 Michael Wigmore, Bingham, McCutchen, for

1 Anadarko.

2 SPECIAL MASTER THOMPSON: Okay. Thank you.

3 And, Mr. Michael, you were about to say
4 something.

5 MR. MICHAEL: Oh, I was just -- it seems to me in
6 terms of looking at the facility -- and this goes back to
7 the discussion about exhibits that, you know, I assume
8 that the idea here -- I know that we talked about this a
9 long time ago when we were talking about numbering
10 exhibits, that there's going to be some way that exhibits
11 are going to be shown on the computer screens, and if it's
12 a Federal courthouse, I'm sure they're all wired for that,
13 but I guess that is something that everybody is going to
14 want to look at as a big proponent of the facility.

15 SPECIAL MASTER THOMPSON: That's right. So,
16 again, I don't know who will be with me on that field trip
17 on that day, but what I would propose right now is go
18 ahead, set up the field trip as you were planning on. I
19 will advise you as soon as I have changed my flight as to
20 what time I will be leaving that afternoon. And then if
21 you could, once you set up the field trip, then I think
22 the question is will we have time also to drive in to
23 Billings and look at the courtroom facilities there; if
24 so, then let's schedule that for the second trip.

25 MR. KASTE: I think we can do that, Your Honor,

1 and I think we can do that without too much trouble if
2 your flight moves a little later in the day.

3 SPECIAL MASTER THOMPSON: Okay. I can't remember
4 the exact flight. I think it's at 5-something, but
5 there's another flight that will turn me down to Denver.

6 MR. DRAPER: That will work great, I think.

7 SPECIAL MASTER THOMPSON: Okay. So going back
8 just very quickly to the Case Management Order. The major
9 question -- there are two questions, basically, that are
10 open, I believe. One of them -- well, just going down
11 each of them. On the witness list, we agreed to this, the
12 three-part process I outlined earlier.

13 With respect to the Section 1.6 on the exhibits,
14 I will provide for a consolidated exhibit list to be
15 developed, and as I said, I'm taking under advisement the
16 question of whether or not there should be any pretrial
17 objections other than objections to authenticity. I'll
18 resolve that, if possible, within the next week. I just
19 need to talk to one or two of the prior Special Masters.

20 Then with respect to the provision of copies of
21 the proposed exhibits, there will be a requirement that
22 those be provided by the start of the pretrial conference
23 on October 11, 2013.

24 And then with respect to the Section 1.7, that
25 will provide that any replies that the parties want to

1 file will be filed by October 10. So people will be
2 permitted to do so, but, again, I would not encourage
3 people to file replies unless it provides information that
4 will help me and would be things that would be useful for
5 me to take a look at prior to the pretrial conference on
6 October 11th.

7 The pretrial conference on October 11th will
8 begin at 9 a.m. The trial schedule will provide that the
9 trial will begin on Monday, October 14th, and I will go
10 ahead and I will enter that part of the Case Management
11 Order now, but I reserve the question again as to where
12 until I've had an opportunity to talk to the court and
13 make sure that the facilities there in Billings are
14 adequate.

15 And then what I would suggest at the moment is
16 that with respect to the sequestration of the witnesses,
17 as things stand right now, obviously witnesses will not be
18 sequestered, but obviously either party can ask for
19 sequestration. And the question of what standard to use
20 for evaluating any such sequestration motion or whether or
21 not there is good argument for doing that as a matter of
22 right can be addressed if either side wants to request
23 sequestration of any nature.

24 And then I think that takes care of everything;
25 is that right?

1 Hopefully I can enter this order by beginning of
2 next week, but obviously I have no problem with any of the
3 various deadlines that are set out here.

4 I guess the other thing that I should warn you --
5 I was going to say, October -- even if I can do the entire
6 trial in Billings on October the -- starting on October
7 the 14th, it might be difficult for me to get to Billings
8 on October 11th. So why don't we deal with that question.
9 If, in fact, the trial starts in Billings, the pretrial
10 conference will be difficult for me to do that on
11 October 11th in Billings. We can deal with that when that
12 issue comes up, and I should know that again by the time
13 of the field trip. We can discuss that then.

14 Does that take care of everything on Case
15 Management Order Number 11 so that I can go ahead and get
16 you that once I have resolved those one or two additional
17 issues?

18 MR. KASTE: That's it for Wyoming.

19 MR. DRAPER: Your Honor, I think that takes care
20 it from our point of view as well.

21 SPECIAL MASTER THOMPSON: Let me just evaluate
22 time here on Montana's motion to compel. We had
23 originally provided that this telephone conference call
24 would end at 10:30 Pacific Coast, 11:30 Mountain Time.

25 Are people able to stay on the line until

1 11 o'clock Pacific coast and 12 o'clock Central? Is that
2 a problem for any of the parties?

3 MR. KASTE: It is not a problem for Wyoming.

4 MR. DRAPER: Not a problem for Montana, either,
5 Your Honor.

6 SPECIAL MASTER THOMPSON: Okay. Great. Why
7 don't we go ahead, then, and talk about the motion. I
8 want to make sure that there's -- that there is adequate
9 time on this.

10 So I want to take it up in two parts. I want to
11 start out by discussing the standard for compelling
12 admission of request for admission, and then we can deal
13 with each of the individual requests of the -- or issues
14 that the State of Wyoming has raised.

15 So first of all, with respect to the standards.
16 So, Mr. Kaste, reviewing the case law in this, my
17 conclusion at the moment is that the only basis that I
18 would have for compelling an admission from Montana would
19 be if I find that Montana in denying a request for
20 admission is actually in bad faith. Are you aware of any
21 case law to the contrary?

22 MR. KASTE: Nope. And I think it's fair to
23 describe what -- what our motion says when it says Montana
24 should admit as much. It is as much a moral decision as a
25 rule for its decision. I think you have the ability to

1 recommit these answers to Montana in light of a finding
2 with regard to the request for production and
3 interrogatories, and that's really what we're after.

4 These all work together, of course. Our request
5 for admissions are tied to the interrogatories and request
6 for production. And to the extent that we got, well,
7 frankly, bogus and evasive answers from Montana in
8 response to those discussions, I think it makes sense to
9 say, "Either produce the documents, or why don't you
10 rethink your answer in response to our request for
11 admissions."

12 And if the answer continues to be "denied," fine.
13 We'll get to the end of this case and see if there's any
14 cost to be reimbursed for that sort of pugnacious
15 admission.

16 Now, our motion to compel is really designed to
17 do what I've been suggesting that we do all along, and
18 that's narrow this case down to the things that are really
19 at issue, and that does not include the years 1987 through
20 1989, the year 2000, and the year 2003, and it includes
21 the Tongue River Reservoir and not all the farmers
22 downstream. And that's what this case is about.
23 Everybody knows it.

24 The fact that we still have this basically
25 gobbledygook that remains in this case is -- is

1 just logistically a pain in the butt because we are
2 investigating and discovering claims that are probably
3 never going to be tried.

4 These references to years and to water rights
5 that don't show up in Montana's expert reports are a
6 nuisance. And what I'm trying to do with these discovery
7 requests is just get Montana to admit the obvious; that
8 these things really aren't an issue. And to the extent
9 they think they are, fine, show me the documents that
10 prove any of this stuff, and again do it.

11 And, you know, this part of the case is just
12 frustrating because it makes no sense to me that we're
13 still engaged in it. We have the expert reports. These
14 years are not an issue. These rights are not an issue.
15 Let them go, for God's sake, and let's focus on what
16 matters. And what matters here are the four years in the
17 expert report and the reservoir.

18 With regard to forcing them to make an admission,
19 no, you can't do that, but you can make them produce the
20 documents or rethink their answer. And that's what I'm
21 asking you to do.

22 SPECIAL MASTER THOMPSON: Okay. So I'm sure
23 after your comments that Mr. Draper would love to respond,
24 but what I think is going to be most productive is just to
25 walk down each of the various issues that you have raised

1 and discuss each one individually.

2 Although I certainly understand that you are
3 frustrated, Mr. Kaste, the more we stay specifically to,
4 you know, the specific things that you need and what
5 Montana can provide, probably the more fruitful this
6 hearing is going to be; in other words, I do not -- I do
7 not want to see this deteriorate into a discussion of the
8 way in which Montana has actually proceeded in its
9 development of its case to date.

10 Let's start with the --

11 MR. KASTE: Let me -- let me just propose a
12 different tact. I get the impression, and maybe I'm
13 wrong -- and let's let Mr. Draper talk about the issue --
14 that perhaps some of these years and rights aren't in
15 issue. And if they're not, I think it would be perfectly
16 appropriate for Montana to say so at this point in time,
17 in the same way that they did with regard to the Powder
18 River Basin.

19 If they are in issue, then, great, let's go down
20 point by point through my motion.

21 SPECIAL MASTER THOMPSON: Okay. I'm certainly
22 willing to let Mr. Draper respond.

23 MR. DRAPER: Thank you, Your Honor.

24 As Your Honor has noted, it is unprecedented, to
25 say the least, to file a motion to seek a motion -- an

1 order compelling an admission. We've outlined in our
2 responsive filing what the appropriate procedure is if
3 they don't like our answers about a disputed fact. It
4 seems to me that everything resolves -- revolves around
5 the request for admission that they're seeking to compel
6 to be admitted, and these are being used in a way that is
7 certainly not normal.

8 Request for admissions are useful when you have
9 facts that are not in dispute that you can simply dispose
10 of those and people don't have to worry about authenticity
11 of documents or other undisputed facts, but to take
12 central issues in the case that relate to Wyoming's theory
13 of the case which are disputed and to force -- try to
14 force an admission of facts related to their theory in the
15 case when we had -- are not withholding any documents and
16 we've fully answered these interrogatories, to on that
17 basis ask you to enter an order compelling us to admit
18 some of their requests for admission is totally out of
19 balance, I think. Requests for admission are not a
20 discovery device, as we pointed out in our brief.

21 I think there was some reference in the
22 discussion just now about the years 1987, '88 and '89.
23 They have clarified the request for admission, and we have
24 indicated in our responsive filing we're willing to relook
25 at that given that explanation.

1 So I think that's the, you know, general point
2 that we would make; that this is simply an effort by
3 Mr. Kaste to raise issues that are in dispute and to try
4 to prejudice the trier of fact ahead of trial through
5 ill-taken efforts under the pretrial procedures.

6 So I'll stop at that, and also refer everyone to
7 our recent filing.

8 SPECIAL MASTER THOMPSON: Okay. So two or three
9 thoughts about that.

10 The first one is, is at the moment I am working
11 on the assumptions that both Montana and Wyoming are
12 acting in good faith in terms of Montana's efforts to
13 answer some of these interrogatories, requests for
14 admission in Wyoming's desire to narrow this case as much
15 as possible.

16 What I hear Mr. Kaste saying is that there's
17 obviously a value of narrowing this case as much as
18 possible. We've narrowed it in terms of years so far.
19 Montana has voluntarily made an effort to narrow it
20 further by agreeing to dismiss its claims with respect to
21 the Powder River Basin. And I think what Mr. Kaste is
22 simply saying is to the degree that there are any
23 additional years or parts of those years where there is
24 not a dispute and trial will not be useful, the sooner
25 we're able to resolve that, the better.

1 There will be an opportunity for resolving those
2 on the summary judgment or other dispositive motions prior
3 to trial. There -- but to the degree it can be resolved
4 even sooner, then that saves everybody time and resources
5 and money.

6 But as I understand what you're saying,
7 Mr. Draper, in response to Wyoming's question is that from
8 Montana's standpoint, the years 1987, '88, '89 -- and what
9 are the other two years, Mr. Kaste?

10 MR. KASTE: 2000 and 2003 are also not addressed
11 by Montana's experts.

12 SPECIAL MASTER THOMPSON: Right.

13 -- that those are still part of Montana's case.
14 Is that correct, Mr. Draper?

15 MR. DRAPER: Yes, Your Honor. And we certainly
16 support the general idea of narrowing the issues to be
17 addressed at trial. That is a great goal to achieve, but
18 we don't think that it's appropriate to do what Wyoming is
19 trying to do, which is to address the issues that are in
20 dispute before trial, that that -- everybody gets their
21 chance at trial to resolve those.

22 We have indicated on Page 12 of our response that
23 with the clarification that was made with respect to the
24 years 1987, '88, and '89, we're not currently aware of any
25 documents that were created in those years relative to a

1 call, and so we're -- we're glad and will amend our
2 response on the request for admission on that.

3 But beyond those years, we believe there are
4 documents which we referred to in our responses to Wyoming
5 that state that there was in essence a call and that,
6 again, we should not be forced to admit anything to the
7 contrary ahead of trial.

8 SPECIAL MASTER THOMPSON: Is that --

9 MR. KASTE: Well, that answers my question.

10 SPECIAL MASTER THOMPSON: I was going to ask.

11 Mr. Kaste, is that your thought?

12 MR. KASTE: Yeah. That answers my question.

13 These things Montana contends remain an issue, that's
14 fine. And I think Wyoming has every right to then demand
15 through interrogatories and request for productions to
16 ask, "Great, what are you going to show up with at trial
17 to prove these things?" And that's what we've asked for.
18 "Show us the documents that explain to us how you're going
19 to prove these things."

20 And we're not asking them to adopt our theory of
21 the case. We're asking them for certain specific facts
22 that either do or don't exist regardless of either
23 parties' theory of the case.

24 With regard, for example, to the first matter in
25 issue: contemporaneous documents evidencing a call.

1 Those either do or do not exist, regardless of what either
2 party thinks the Compact means.

3 Now, great, 1987 through 1989, Montana will amend
4 its answers and admit that there were no such
5 contemporaneous documents in those years. Wonderful.

6 2000 and 2003, I think we're really entitled to
7 pretty much the same answer. The evidence that Montana
8 does point to is evidence of communications between a
9 Montana water user and the State of Montana, which is
10 wonderful. And it may show that Montana had every reason
11 to make a call on Wyoming, but the question asked: "Show
12 me a document that evidences that you did?"

13 And that means you need to show me a document
14 that communicates or memorialized a communication between
15 the states, not between a water user and the State of
16 Montana.

17 It's not a hard question, and the answer, if it
18 is, "There aren't any such documents, but we still contend
19 we made a call in that year," fine. But I think we're
20 entitled to a straight answer in response to a fairly
21 simple question. And what we got was, "Well, some water
22 user called our DNRC and told us that they're unhappy and
23 we ought to make a call."

24 Cool. Great. That doesn't show in any way that
25 anybody actually did ever. And that's all we're asking

1 for. "Is there a document that shows you made a call,
2 memorializes an interstate communication of any kind?"

3 I don't care if it is written on the back of a
4 napkin, or if it's enshrined on velum. That's all we're
5 asking for, and we didn't get it. And to the extent those
6 documents don't exist, then, frankly, Montana ought to
7 rethink its answer for the other years as well. I don't
8 think that's asking too much.

9 SPECIAL MASTER THOMPSON: So, Mr. Kaste, again,
10 what I'm going to do is go down each of these individually
11 and see what, if any, resolution is appropriate.

12 Before that, though, I just want to emphasize --
13 and this is, again, to both of the two parties -- to the
14 degree that the parties are able to narrow their claims
15 and argument prior to trial, even better prior to their
16 dispositive motions to their stronger -- to their
17 strongest one, then that's going to make their cases more
18 credible.

19 And so that's, again, just a message to -- well,
20 to both sides that there, you know, have been, I think,
21 good faith efforts in the past to narrow this case, and
22 those can be beneficial to the party that is actually able
23 to take those steps.

24 So with that as background, so on the first one,
25 so "documents evidencing a call on Wyoming." So that

1 language could mean a whole variety of things. And as I
2 understand Mr. Draper and what -- the way Montana is they
3 read that language very broadly to basically refer to any
4 document that they think could support the argument that,
5 in fact, a call was made. And if I were Montana, I
6 probably would have given as many documents I possibly
7 could that I think possibly evidence that.

8 But as I understand what you're saying,
9 Mr. Kaste, is that -- and here's the question. At a
10 minimum, one of the things that you're asking here is:
11 "Do you have any documents that actually constitute a
12 call, right, in the same way as the 2004 and 2006 letters
13 specifically make the call?"

14 So you could be asking for that. And are you
15 also in addition to that asking for any documents that
16 actually memorialize that a call was made?

17 MR. KASTE: Yes. A call is a communication
18 between two parties. All I'm asking for are any documents
19 that you have that evidence that communication, and to
20 recall as broadly as Montana is, I think is really
21 twisting that puppy quite a bit. I mean, it's just a
22 communication. Do you have evidence that communication
23 occurred or not?

24 And it could be as formal as the call letters
25 that we received in 2004 and 2006, and it could be a DNRC

1 employee writing on the back of his bar napkin, "I called
2 somebody in Wyoming today and told them thus and so."

3 SPECIAL MASTER THOMPSON: Okay.

4 MR. KASTE: Either of those things evidence a
5 communication between the states.

6 SPECIAL MASTER THOMPSON: Okay.

7 MR. KASTE: And that's all I'm asking for.

8 SPECIAL MASTER THOMPSON: Okay. So this is what
9 I would request Montana to do in response to this, which
10 is to identify for Montana any document that either
11 themselves constitute a call or that reference or
12 memorialize that a call was actually made at some prior
13 point in time.

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

15 SPECIAL MASTER THOMPSON: Would that be fine with
16 you?

17 MR. DRAPER: Well, certainly I believe that's
18 what we've already done. We're not withholding any
19 documents. The motion to compel on a request for
20 production is where people are withholding documents.
21 We're not withholding any documents. We produced the
22 documents we're aware of.

23 Mr. Kaste has his own particular interpretation
24 of those documents, and we're entitled to present that
25 evidence and related argument at trial and not be

1 browbeaten into some admission that he believes is
2 justified based on what we have produced.

3 SPECIAL MASTER THOMPSON: So, Mr. Draper, I
4 understand that entirely, and, you know, I understand that
5 from your standpoint a variety of the documents that you
6 have produced actually evidence a call in the sense that
7 they would support somebody's testimony, for example, that
8 they notified somebody. And -- but as I hear what
9 Mr. Kaste is asking for, what he is asking for is whether
10 or not Montana has any documents that, again, either
11 themselves constitute a call -- so even without any
12 testimony other than authentication of the document. You
13 can look at that document and say, this is a call -- or
14 that actually refer to or memorialize a call that was
15 previously made.

16 MR. DRAPER: I think that -- Your Honor, this is
17 John Draper.

18 I think that you've parsed it there in a way that
19 was not done in the request for discovery, and certainly
20 be glad to take a look at it given that formulation.

21 SPECIAL MASTER THOMPSON: Okay. Because, again,
22 I understand that you may very well argue that, you know,
23 based on somebody's testimony and maybe some documents
24 where maybe somebody asked them to complain to Wyoming
25 that they weren't getting their water, that, you know,

1 that document helps to support that testimony.

2 I certainly understand that. I'm not trying to
3 limit your ability to make that argument, but I do think
4 that Wyoming has a reasonable request to ask whether or
5 not there's an actual document that would constitute --
6 itself constitute a call or that actually refers to or
7 memorializes a call that was made prior to that particular
8 point in time.

9 MR. DRAPER: Very good, Your Honor.

10 SPECIAL MASTER THOMPSON: So the next one, which
11 is that Montana officials did not regulate -- the request
12 with respect to whether or not Montana officials or
13 employees regulated or curtailed the use of a post-1950
14 surface water right on the Tongue River in various prior
15 years.

16 So I actually have a question at a very outset
17 here, which is: As I understand Montana's responses,
18 Montana's responses are that no employee curtailed the use
19 of a post-1950 surface water right in 1987, '88, '89, and
20 2003, but presumably denied the curtailment for the years
21 2000, 2001, 2004, and 2006. That is fairly clear.

22 Was there also then -- do I read this that you're
23 also then, as Montana, denying for all the years that no
24 Montana officials regulated the use of post-1950 surface
25 water rights?

1 MR. DRAPER: Your Honor, we're essentially saying
2 that during the years in which water commissioners were
3 appointed that there was regulation, and that for other
4 years consistent with Montana law, the water
5 administration was carried out without the appointment of
6 commissioners.

7 SPECIAL MASTER THOMPSON: Okay. So other than
8 just the fact that all water rights are technically
9 regulated, what you're saying is that in the years 2000,
10 2001, 2004, 2006 there was regulation by the water
11 masters, but not in the years '87, '88, '89, and 2003; is
12 that correct?

13 MR. DRAPER: That's correct. I believe the years
14 in which they were appointed, the water commissioners were
15 2000, 2001, 2002, 2004, 2006.

16 SPECIAL MASTER THOMPSON: All right. Okay.

17 And so, again, I guess that, you know -- as I see
18 the dispute between the -- or the disagreement between the
19 parties on this particular one, I think one of the
20 questions is whether -- the claim is that -- what Montana
21 will be saying, and therefore, what it has evidence for at
22 the moment is that the commissioners were appointed; that
23 as a general matter, they regulated the post-1950 surface
24 water rights, exactly what you wrote in your brief,
25 Mr. Draper, but I think what Wyoming is asking is beyond

1 that: Is Montana claiming and does it have any facts at
2 the moment with respect to exactly what rights when and
3 why?

4 MR. KASTE: If I could, Your Honor. This is
5 Mr. Kaste.

6 I think you're right on. And all I'm asking for,
7 what we're trying to get at, is we understand that the
8 commissioners were appointed in these years, and we
9 understand that Montana intends to put their appointment
10 on the record and say that's diligent regulation. I think
11 that might be the word you used in one of your prior
12 rulings, and we are looking for some specifics.

13 We understand that we are entitled in advance of
14 a call from Montana to adequate interstate regulation,
15 which we believe means that there will be post-1950 rights
16 regulated or curtailed, and all I mean there is shut off,
17 for the benefit of the Montana pre-1950 rights. And so
18 we're looking for that specific information, which
19 post-1950 rights were turned off by these commissioners,
20 when and why.

21 It's makes it very difficult for us to evaluate
22 Montana's intrastate regulation and the adequacy of it if
23 we do not have an understanding of what it entailed. And
24 at this point, what we understand it to entail is that the
25 commissioners do not regulate post-1950 rights for the

1 benefit of pre-1950 rights, instead they're really more
2 like deliverymen from the Tongue River Reservoir; they
3 ensure that reservoir releases get to the water right
4 contract holders so that they get their stored water, and
5 that in I think it's in 2006 is the very first year that
6 the commissioners began looking at administration up to
7 the 1914 decree.

8 So my understanding, and I'm trying to ferret out
9 if there are facts that are just out there that we haven't
10 yet learned is that no commissioner ever shut off a
11 post-1950 water right for the benefit of a pre-1950 water
12 right, in a sense regulating the stream in priority to
13 ensure that the downstream seniors get their full amount
14 to the extent possible before Montana then comes a-calling
15 on Wyoming.

16 If those are the facts that are out there, I
17 think we're entitled to discover them before hearing them
18 for the first time at trial. And if they're not out
19 there, well, that's fine. I mean, if that's the truth of
20 the matter and the answer is it didn't happen, okay, you
21 know, we'll figure out what that means in due course.

22 SPECIAL MASTER THOMPSON: So let me just
23 intervene here for a second.

24 So, again, I think that the dispute here is over
25 sort of a level of specificity and perhaps that's also a

1 dispute over, you know, over the facts itself, that
2 reading Montana's answer to the Interrogatory Number 3-6,
3 what Montana has said is that in those years when the
4 water commissioners were appointed by the District Court,
5 that, and I'm quoting here, "The commissioners worked with
6 all Montana water users in the Tongue River Basin to
7 ensure that they were not taking more water than they were
8 entitled. The work of the water commissioners benefit all
9 water rights with the pre-1950 priority date."

10 So I could imagine that Montana in either a
11 response to a dispositive motion or at trial presents
12 testimony from the commissioners or others saying exactly
13 that, and perhaps even -- and, again, one of the problems
14 in all this is speculating, and I'm going to try to avoid
15 it as much as possible, but I think it's relevant to this
16 motion. You could imagine even saying, you know, "and
17 that shows that, in fact, that, you know, due diligence
18 was met."

19 But, Mr. Kaste, my concern for Wyoming would be
20 if at trial Montana is going to go beyond that and say,
21 "And by the way, here is testimony or evidence that, in
22 fact, the commissioners asked Mr. X, Mr. Y, and Ms. Z to
23 reduce their post-1950 water diversions in order to make
24 sure the pre-1950 appropriators receive as much water as
25 they could," that Wyoming's entitled to know that now.

1 MR. DRAPER: Your Honor, this is John Draper, if
2 I may.

3 SPECIAL MASTER THOMPSON: Yes, go ahead.

4 MR. DRAPER: I don't know if Your Honor is aware
5 but Wyoming has taken the depositions of all these water
6 commissioners and has had the chance to inquire in detail
7 to just the kind of things that you were positing there.
8 And so we're not withholding any information. They have
9 had full access to this. And this feigning of ignorance
10 or that there might be something else out there, we have
11 given them what we have, and they're now trying to use
12 this methodology to encrust you with their view of the
13 case and say that somehow there is an order to compel that
14 is appropriate under circumstances where there's simply a
15 dispute over facts.

16 SPECIAL MASTER THOMPSON: I understand your point
17 entirely, Mr. Draper. All I'm saying is that in my view,
18 you know, Montana does not need to supplement its
19 particular interrogatory answer in this particular case
20 unless there are additional specifics that have not come
21 out in the depositions or in your answers to the
22 interrogatories as to any specific requests that were made
23 to curtail particular post-1950 surface water rights in
24 the years in question, but if there are, then they better
25 be identified now.

1 MR. DRAPER: Very good, Your Honor.

2 SPECIAL MASTER THOMPSON: Okay. Mr. Kaste?

3 MR. KASTE: Thank you. That's all we're looking
4 for is to -- we want to know the specifics, and if there
5 are not any additional specifics, great, we know what
6 we're dealing with, and we'll be free to argue the
7 significance of those facts at trial.

8 SPECIAL MASTER THOMPSON: That's right. Because
9 again -- let me just take a step back also and say, I
10 realize that we're dealing, particularly when we're going
11 back to 1987, '88, '89, in years where there's probably
12 not a lot of records and where people don't have the best
13 memories, but to the degree that Montana is going to be
14 presenting any specifics with respect to the regulation or
15 curtailment of post-1950 water rights in those or the
16 other years that have not been revealed to date, then
17 that's the type of specifics that need to be provided to
18 Wyoming at this point.

19 MR. DRAPER: Your Honor --

20 SPECIAL MASTER THOMPSON: And -- yes,
21 Mr. Draper.

22 MR. DRAPER: If I may. That is our understanding
23 of our responsibility in responding to discovery, and we
24 believe we have done so. Given your comments, we'll take
25 another look at it, but we believe we have fully produced

1 documents and answered the questions about the information
2 they want, and that is the normal requirements for
3 discovery. We'll have a look at it given your comments,
4 but we believe we have already done so.

5 SPECIAL MASTER THOMPSON: Okay. And, again, I'm
6 not arguing with you on that, Mr. Draper. I'm just saying
7 that, you know, for me the important issue here is that to
8 the degree that there are more specifics that Montana will
9 be bringing up in trial or in response to a dispositive
10 motion that has not been revealed to date, then they need
11 to be revealed now, because -- otherwise, I'll, you
12 know -- we'll take that into account at the time that
13 Montana tries to proffer any such evidence.

14 MR. DRAPER: Very good, Your Honor.

15 SPECIAL MASTER THOMPSON: Okay. And I think in
16 many ways, it is similar on the various other issues that
17 Wyoming raises. So on the next one which is in respect to
18 pre-1950 water rights in Montana that were harmed.

19 So my understanding from your response,
20 Mr. Draper, on that is that during the years in question,
21 that all pre-1950 water rights in Montana were harmed; is
22 that correct?

23 MR. DRAPER: That's correct, Your Honor. Namely,
24 none of the rights in those years under the pre-'50 water
25 rights received their full allocation.

1 SPECIAL MASTER THOMPSON: Okay. So, Mr. Kaste.

2 MR. KASTE: Well --

3 SPECIAL MASTER THOMPSON: You might disagree with
4 it, but that's what Montana is saying.

5 MR. KASTE: Well, I do, too, and I'll tell you
6 where I'm coming from. We -- you know, we got -- we've
7 asked Montana up for a long time, "Tell us who didn't get
8 their water so we can evaluate that claim." And I've got
9 to tell you that this "all" really ticks me off, because
10 it has basically precluded our ability to evaluate our
11 defense of futility, which may be applicable in this case,
12 depending on where the calling right is and when the call
13 occurred. But this idea that we're on the hook for every
14 right in Montana all the time utterly precludes my ability
15 to investigate and develop a futility defense which I find
16 irritating.

17 But more than that, you know, we've asked just
18 tell us who it is, and then we'll figure out what was
19 going on on the river, and we'll figure out whether or not
20 there is any truth to that assertion or not, and we keep
21 sort of getting this "all" answer.

22 And, you know, I think, you know, we got the
23 expert reports, and I thought, "Okay. Now we're going to
24 get somewhere and we're going to find out what is going on
25 here," and when you look at the expert reports,

1 particularly the report submitted by Mr. Book -- and we're
2 going to develop this line of discussion in our summary
3 judgment motion, I think, at some length. But you look at
4 what he says in his report and he identifies certain
5 depletions that are occurring in Wyoming that he
6 attributes to post-1950 use, and he says, "Okay. There's
7 the bad conduct by Wyoming." And that's fine.

8 And he says, "Now, that water could have been
9 available to fill the Tongue River Reservoir," which is
10 fine. That's fine. "And so there's the causal link
11 between Wyoming's violative conduct and an injury in
12 Montana." Okay. Great.

13 Now, does he say that with regard to any of the
14 other rights in Montana? No. No, he does not. He does
15 not link together, there's no causal nexus between those
16 alleged violations in Wyoming and particular other water
17 rights in Montana.

18 So, we ask the question: "What are these other
19 water rights? Which ones are they? How does this work?
20 How is it that you are injured by our conduct?"

21 And we get the "all" answer, which to me proceeds
22 from this assumption that Wyoming is somehow on the hook
23 to satisfy all of Montana's rights as a block or as one
24 unit that was fixed in time in 1950 and not obligated to
25 deal with Montana based on the Doctrine of Appropriation

1 as the contract recants.

2 You know, our view is that the contract -- our
3 compact between the states is governed by the Doctrine of
4 Appropriation, and therefore, at any given point in time,
5 what happens on a river is somebody with a senior right
6 calls and shuts off the junior substream, and usually the
7 senior on the river gets some or even all of its water
8 right.

9 Now, you know, so we're asking Montana to sort of
10 give us the timeline and tell us which rights downstream
11 of the reservoir got hurt when Wyoming was mostly doing
12 something wrong. And it really can't be all of them.

13 In fact, we know that the biggest user
14 downstream, the TMY Canal, oftentimes doesn't even take
15 its full appropriation of water. In fact, many of the
16 irrigators, we know from the testimony, and you'll see
17 certainly in the summary judgment reports, they spend a
18 significant amount of time not irrigating, and therefore,
19 having no particular demand for water. They have to dry
20 their field in order to cut their hay, and during that
21 period of time, that senior right may have no need for the
22 water on which it is entitled.

23 And so as we all know, a river system is dynamic,
24 and the demands that might be made on the river and made
25 on Wyoming are changing over time, and we don't have a

1 real accounting for that demand and for who -- who
2 supposedly is injured at what particular point in time.

3 And that's okay. I don't have a problem with
4 that if Montana's claims are limited to, you know, "You
5 have harmed me by injuring my reservoir right." That's a
6 fine claim, and I don't have any problem with it, but if
7 there are other claims that are being made in this
8 litigation, I think we're entitled to know how they work,
9 and it can't be all. It really can't be all. That's a --
10 that's really a bizarre answer in response to our inquiry.
11 It's some subset of pre-1950 rights, and we'd just like to
12 know which ones they are.

13 And, in fact, Montana's response seems to imply
14 that it isn't all. You know, if you read through the
15 response to Interrogatory Number 8, it says, "As a result
16 of the shortage in Montana, Montana water users with
17 pre-1950 water rights were harmed and many were forced to
18 go an alternative supply of stored water."

19 Well, many isn't all, and I would expect
20 something more like many than all, and I just wanted to
21 identify who they are and when it was. And if they are
22 incapable of doing that, that's fine, just say so. And if
23 we're just talking about the reservoir, great, that's
24 fine. But I think we're entitled to a straight answer on
25 this. It's pretty late in the game not to have an answer

1 to this frankly.

2 MR. DRAPER: Your Honor --

3 SPECIAL MASTER THOMPSON: So, again, I'm aware of
4 the time, so let me say the following with respect to this
5 portion of the motion.

6 First of all, Mr. Kaste, I note the same language
7 as you had, that it seems to be a little more qualified
8 than Mr. Draper's reference to language from answers, I
9 guess, to other interrogatories in his response, and I
10 will be very interested if the argument is, in fact, that
11 all of Montana's pre-1950 users were injured, how that
12 works within what I assumed was the prior appropriation
13 system where some people were supposed to be at the very
14 top of the priority ladder, but at the same time, I don't
15 feel that in response to this particular motion that I can
16 dictate how Montana wants to present its case. And I
17 think there's, again, just in terms of speculation, there
18 are several possibilities here.

19 Number one is that Montana does believe that, in
20 fact, all water users -- all pre-1950 water users in those
21 years were injured, and if they believe that they can
22 prove that at trial, then Montana is entitled to do that.

23 A second possibility is that, you know, what
24 Montana plans to present is basically the argument that
25 there was insufficient water going over the border in

1 order to meet the needs of all pre-1950 appropriators,
2 that in at least some years there are not adequate records
3 to know exactly which ones didn't get their water, but
4 that the Court should, based on all the rest of the
5 evidence that is presented, still find that there was
6 injury to pre-1950 water users in Montana.

7 So there's a variety of different arguments that
8 Montana might make without naming specific Montana water
9 users that it can show were harmed.

10 And all I will request at this point in response
11 to this particular interrogatory answer is that Montana
12 modify its response in order to make clear whether or not,
13 in fact, they are claiming that all pre-1950 Montana water
14 users were harmed, in which case that language that you
15 cited, Mr. Kaste, needs to be modified to make that clear,
16 or if not, what their -- what they believe that there's a
17 factual basis for claiming at the moment.

18 And, again, if there is going to be claims with
19 respect to specific water users, so not everybody, but a
20 specific subset and there will be facts presented with
21 respect to that specific subset, then that should be
22 revealed to you so that you're knowing what you are
23 defending against.

24 MR. KASTE: Thank you, Your Honor.

25 I think that the exact same everything applies to

1 the very next one, and we can skip going into that one in
2 detail. It's essentially addressed to the same issue.

3 SPECIAL MASTER THOMPSON: Okay. Great. I agree.

4 And Mr. Draper or Mr. Kaste, any questions, then,
5 with respect to my rulings on these various matters?

6 MR. KASTE: Just with regard to the timing, when
7 would those supplemental responses be due?

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

9 Are you intending to issue an order on this?

10 SPECIAL MASTER THOMPSON: Let's, first of all,
11 talk about the deadline, then we can talk about the order.

12 So we have dispositive motions due in two days,
13 okay, which would make it somewhat difficult, unless the
14 amendments are very short, to do it by then. Let me ask
15 both parties, therefore, what they would propose.

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

17 As far as timing for the additional submittal?

18 SPECIAL MASTER THOMPSON: Yes.

19 MR. DRAPER: Maybe in a week's time would be
20 appropriate.

21 SPECIAL MASTER THOMPSON: Mr. Kaste.

22 MR. KASTE: Well, my preference, obviously, would
23 be tomorrow so I can review that before my --

24 SPECIAL MASTER THOMPSON: I understand that.

25 MR. KASTE: My summary judgment motion is due,

1 and some portion of our summary judgment motion does touch
2 on this, but --

3 SPECIAL MASTER THOMPSON: At this stage it's
4 going to be moot. You're not going to -- you've already,
5 you know, drafted it or you haven't, so ...

6 MR. KASTE: No, I'm starting tomorrow.

7 Well, I can -- here's what I can tell you
8 about our summary judgment motion. I believe that I
9 could, if the Court and Montana would just grant me just a
10 little bit of leniency as it relates to any reply briefing
11 that might incorporate these supplemental answers. You
12 know, if I feel like we need to address the contents of
13 those with our reply brief, although we haven't, you know,
14 touched on those answers specifically in our opening
15 brief, if that's okay with everybody, I'm perfectly fine
16 with it, giving Montana a week to address those things. I
17 am not super interested in changing my motion up now,
18 since it's over in the main office for review.

19 And I can tell you with regard to our summary
20 judgment motion, we have tried very hard to focus on
21 issues that we think are amenable to summary judgment, and
22 we've let a lot of the other issues -- we just left them
23 off the table to try to make it simple for everybody.
24 Those things that are clearly disputes of facts between
25 the parties, we've tried to stray away from, and it's

1 really not a terribly long motion, so ...

2 SPECIAL MASTER THOMPSON: Okay.

3 MR. DRAPER: Your Honor, this is John Draper, if
4 I may.

5 SPECIAL MASTER THOMPSON: Yes.

6 MR. DRAPER: Given the fact that we have part of
7 this week taken up in the July 4th holiday, something
8 towards the end of next week I think would make more
9 sense. And I don't have any objection to the request that
10 Mr. Kaste made concerning his reply.

11 SPECIAL MASTER THOMPSON: Okay. Mr. Kaste, how
12 would you feel about the possibility of having another
13 deadline? And I'm thinking something in the nature of two
14 weeks after the responses to -- to Montana's supplemental
15 responses, two weeks after they're due. Would it make
16 sense to give you an opportunity by that date to, if you
17 want to, supplement the initial motion papers?

18 You wouldn't have to revise them, but if you had
19 anything in addition to say at that point, or would you
20 rather do it in your reply?

21 MR. KASTE: I think it's as easy to do in the
22 reply, and then I don't have to draft two things. We'll
23 just draft one, and then Montana doesn't have to review
24 two things, and so forth. I can't imagine that the
25 content of their answers are going to be the focal point

1 of our reply brief. Frankly, when you get our summary
2 judgment motion, it will be fun. It will be interesting.
3 You'll like it. You'll be surprised.

4 MR. DRAPER: Your Honor.

5 SPECIAL MASTER THOMPSON: Mr. Draper.

6 MR. KASTE: You will --

7 MR. DRAPER: If I may break in, due to
8 Mr. Kaste's pre-argument on his summary judgment motion.

9 I think you're suggesting, Your Honor, that he --
10 that any supplementation that they wish to make be made
11 before we do our response to their motion for summary
12 judgment. It's much preferable if they simply put it in
13 their reply, and we have a response to their
14 characterization of that, then we're going to need to come
15 in with a separate request for some kind of sur-reply.
16 And I think it works better with the -- with the schedule
17 to ask them if there's some -- that Mr. Kaste admits, some
18 marginal addition that they want to make, they ought to
19 make it in time to give us a chance to response to it.

20 MR. KASTE: Well, we do have an oral argument
21 scheduled for two days in this -- on these summary
22 judgment motions. I suspect there will be plenty of time
23 at that juncture.

24 SPECIAL MASTER THOMPSON: Yeah. I -- at this
25 stage, I'm inclined to agree with you on this, Mr. Kaste,

1 largely because I don't think it is going to make a huge
2 difference. I think we're arguing over something that is
3 not going to be that significant. If it was, I would have
4 more concern. And, in fact, if it does turn out to be a
5 major portion of Wyoming's reply, then Mr. Draper can
6 obviously ask for some type of a sur-reply opportunity.
7 But I think that to the degree that there's any need for
8 doing that, that it can probably be taken care of at the
9 hearing itself.

10 So let's -- we'll keep the dates as they are.
11 Wyoming does have the opportunity to refer to any
12 additional supplemental responses filed by Montana in that
13 reply. If it turns out to be a very significant matter,
14 Mr. Draper, I will not deny you the right to say something
15 on paper about it. But one of the reasons why I set aside
16 two weeks -- I'm sorry, two weeks -- two days, in order to
17 hear the summary judgment or other dispositive motions is
18 that, you know, I want to make sure that everyone has
19 every opportunity to say whatever is on their mind and to
20 reply to anything that has been raised.

21 And so in that connection, I'm actually going to
22 be very generous to you, Mr. Draper. I'll give you until
23 next Friday, the 12th.

24 MR. DRAPER: Okay. Very good, Your Honor. And
25 as I indicated earlier, I think that can include little or

1 nothing, so you're -- I don't disagree with your
2 scheduling inclination there.

3 SPECIAL MASTER THOMPSON: Okay. So that brings
4 up the other question of whether or not there is a need
5 for an order here. And I'm willing to prepare one,
6 although I think I was fairly clear on the record as to
7 what I believe was required.

8 MR. KASTE: Amazingly enough, I have no
9 preference. I think it makes good sense always when the
10 Court rules to formalize it in an order because it's often
11 difficult to go back in the transcript and search out the
12 relevant portions. Oftentimes they're spread over many
13 pages, and it just -- it just makes it tough on somebody
14 looking at this in the future and go back and reconstruct
15 what we could do in a short order.

16 I did want to raise, though, when we talked about
17 the dispositive motions hearing, one thing I had included
18 in the draft, and it sort of got dropped at some point, is
19 a location for that dispositive motions hearing. I don't
20 know that we've addressed that, and where do you want to
21 have the hearing?

22 SPECIAL MASTER THOMPSON: Our answer is Denver.

23 MR. KASTE: Denver.

24 SPECIAL MASTER THOMPSON: Denver, and I already
25 have the courtroom reserved.

1 MR. KASTE: Oh, excellent. So I'm the only one
2 that doesn't know that.

3 SPECIAL MASTER THOMPSON: I'm looking at
4 Ms. Carter to make sure. So yes, she is nodding her head.
5 We have the courtroom reserved.

6 MR. DRAPER: Yes, that's very clear.

7 SPECIAL MASTER THOMPSON: Okay. Well, now, I
8 will go ahead and embody what I just ruled in an order.
9 I'll get that out tomorrow, but I think, again, it's
10 fairly clear, and my hope is that the two parties can work
11 together on this to make sure that Wyoming's needs are
12 met.

13 And, again, I just want to emphasize that, you
14 know, there's really sort of two pieces of general
15 background to my rulings.

16 The first is that Montana obviously has the right
17 to present the case that it wishes to present and on which
18 it hopes it will prevail, but Wyoming's entitled to know
19 the specifics of any factual evidence that they have asked
20 for that will be part of that case. And so it's those two
21 parts of it that formulate the basis for my ruling.

22 Okay?

23 Ms. Carter is reminding me that I believe we
24 have --

25 MS. CARTER: July 24th.

1 SPECIAL MASTER THOMPSON: We have a July 24th --
2 (Discussion off the record.)

3 SPECIAL MASTER THOMPSON: We are moving
4 July 17th -- are the parties aware of this?

5 MS. CARTER: No.

6 (Discussion off the record.)

7 SPECIAL MASTER THOMPSON: Okay. So originally
8 what was going to be a status conference call on
9 July 24th, and that will be during the field trip. I
10 realize that not everybody will be on that field trip, and
11 so the question is would -- is it -- will it be valuable
12 to have another status conference this month? If so, we
13 are quite limited. I'm out of town the week of July 29th.

14 Basically, I'm out the week of July 29th and
15 August 5th. And so if we're going to have another status
16 conference call, we either need to schedule it for July --
17 for basically in about two weeks from now, or I guess the
18 other possibility would be July 26th right after the field
19 trip.

20 MR. KASTE: This is Mr. Kaste.

21 I'm not so sure we need an abundance of status
22 conferences interspersed with the other things that we
23 have going on. Certainly we're going to -- the parties,
24 at least, are going to be together during the field trip,
25 and then we're going to be together again at the end of

1 August.

2 The proceedings that are likely to take place
3 between now and the summary judgment hearing are going to
4 be limited to the briefings that are on those motions.
5 Montana and Wyoming still have a few depositions to wrap
6 up, the deposition of the rebuttal experts, and do we have
7 any fact witnesses left?

8 A couple. Chris is shaking his head at me saying
9 that there might be a couple.

10 We're working with Mr. Wechsler to try to get all
11 of that scheduled before the end of July, as to the Case
12 Management Order notes, then they all need to be done by
13 July 30th. And, you know, I don't foresee us having any
14 real problems that are going to require a status
15 conference, wrapping up those activities and working on
16 our briefs.

17 Certainly, we're going to be coordinating about
18 the contents of the field trip amongst ourselves, so I
19 don't know that we need to take up more of people's time
20 when we're going to be together so much in the coming
21 months.

22 SPECIAL MASTER THOMPSON: Okay. Mr. Draper, your
23 thoughts.

24 MR. DRAPER: Your Honor, I can say just a few
25 words. I think given the fact that we're going to be

1 together during the Basin tour, we don't really need to
2 have one. If somebody believes that a special one is
3 necessary, we can get in touch with you and find a time to
4 do it, but I think we're fine without that one since we'll
5 actually be together on the date that we were planning to
6 have that.

7 SPECIAL MASTER THOMPSON: So that all sounds
8 fine. You know, I can't right now see what might arise.
9 If there's any other discovery issues, obviously, I would
10 be available to schedule a phone call before I disappear
11 on July 29th.

12 So for the moment, then, we will cancel the
13 status conference call that was originally scheduled for
14 July 24th, and the next time then that we will actually
15 meet or talk together, other than on the field trip, is
16 for the hearings on the dispositive motions on August 29th
17 and 30th, and those, as I mentioned before, will be in
18 Denver. We have a full two days. I'm happy to start at
19 9 a.m., unless there are people who are likely to be
20 flying in that morning would like a later start date --
21 start time.

22 Hearing no one, I'm going to say 9 a.m., unless
23 someone objects.

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

25 That's fine from my point of view. My calendar

1 shows that we have a status conference scheduled for the
2 day before on the 28th as well.

3 SPECIAL MASTER THOMPSON: You're absolutely
4 right, and I don't see any reason to have that since we'll
5 all be together the next two days.

6 MR. DRAPER: Yes.

7 SPECIAL MASTER THOMPSON: And also once I see
8 the -- once I see the dispositive motions -- so can I just
9 ask both sides, and obviously you're not committed to this
10 if you change your mind over the next two days, but both
11 sides what their expectations right now are as to whether
12 you'll be filing dispositive motions, and if so, whether
13 it is one or multiple ones?

14 MR. KASTE: On behalf of the State of Wyoming,
15 yes, and one. And if that's the only motion pending, it
16 won't take two days.

17 SPECIAL MASTER THOMPSON: Okay. Mr. Draper.

18 MR. DRAPER: Your Honor, we're looking at two at
19 this point.

20 SPECIAL MASTER THOMPSON: Okay. And I
21 know neither of you -- so, Mr. Kaste, how long do you
22 think your motion is likely to take to argue?

23 MR. KASTE: Oh, 20, 30 minutes, probably an hour.
24 It's not complicated.

25 SPECIAL MASTER THOMPSON: Okay. Mr. Draper.

1 MR. DRAPER: Well, I think our argument can be
2 done in a half a day, so sounds like total it's more like
3 a day, rather than a few days.

4 SPECIAL MASTER THOMPSON: Yeah. So why don't we
5 do -- why don't we plan on -- let me ask the parties,
6 then, to do the following: Why don't -- once the
7 dispositive motions are filed and the parties have an
8 opportunity to review them, why don't we plan by, say,
9 next Tuesday, which is I think July the 9th, if by that
10 time Montana and Wyoming could have conferred by telephone
11 and determined whether or not they believe that the second
12 day is necessary.

13 MR. DRAPER: Very good.

14 SPECIAL MASTER THOMPSON: And if on any of the --
15 on any of the motions, if -- I'm trying to think of the
16 best way of doing this. If upon receiving the motions, if
17 any of the Amicus are going to request any opportunity to
18 say anything at the hearing, if they could notify the
19 relevant party right away on that.

20 So what I'd like is by Tuesday, July the 9th, if
21 the parties could have conferred and decide whether we
22 need the second day.

23 Both are on my calendar. I'm more than happy to
24 be there for two days, but I know that people would want
25 to make their plane reservations and their hotel

1 reservations. And so if, in fact, it looks like we only
2 need a day, then I'm also happy to shorten it to a day and
3 let everybody get back to their other work. Okay?

4 MR. DRAPER: Very good.

5 SPECIAL MASTER THOMPSON: We'll keep it at two
6 days, and the parties just need to let me know by, again,
7 July the 9th. It still gives people plenty of time to buy
8 their airplane tickets and to make their reservations.

9 Okay. Anything else?

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

11 Are you going to be available this week and next?

12 I think the parties are going to be working out the
13 itinerary for the Basin tour, and it may come down to some
14 preferences that you may have or resolving things that we
15 can't quite get there, and would there be an opportunity
16 for us to get your preferences if we need that input?

17 SPECIAL MASTER THOMPSON: Yeah. Other than over
18 the Fourth, I should be here both the two weeks. I'm in
19 Utah on July the 19th, but presumably by then the field
20 trip would have been set up.

21 So the answer is, yes, Mr. Draper, I will be
22 available.

23 MR. DRAPER: Very good. Thank you.

24 MR. KASTE: Thank you.

25 MS. VERLEGER: You Honor, this is Jennifer

1 Verleger.

2 I just wanted to let you know that I can't make
3 the field trip, so I won't be there.

4 SPECIAL MASTER THOMPSON: Okay. Well, we'll miss
5 you.

6 MS. VERLEGER: Well, I wish I could be there.

7 SPECIAL MASTER THOMPSON: Okay. So anything
8 else?

9 MR. KASTE: Nothing from Wyoming, Your Honor.

10 MR. DRAPER: That does it from Montana, Your
11 Honor.

12 SPECIAL MASTER THOMPSON: Okay. Thank you very
13 much. And I will draft the order on Montana's -- I'm
14 sorry, on Wyoming's motion to compel. I assume it's
15 actually not a proposed motion to compel. I will get
16 Wyoming's motion to compel order out by tomorrow, and I
17 will try and get the pretrial Case Management Order
18 Number 11 finalized with the issues that don't need to be
19 addressed immediately by next week, but, again, all of the
20 deadlines we can assume will remain firm.

21 So, again, thank you very much. Sorry to keep
22 you on the line for so long, but at least we're able to
23 resolve everything.

24 MR. KASTE: Thank you very much, Your Honor.

25 MR. DRAPER: Thank you.

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(End of proceedings at 11:19 A.M.)

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