
NO. 137, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

State of Montana,)	
Plaintiff,)	No. 220137 ORG
v.)	
State of Wyoming and State of)	
North Dakota,)	
Defendants.)	
_____)	

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

AUGUST 19, 2014

Reported by Veronica S. Thompson, CSR 6056, RPR, CRR

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18 TRANSCRIPT OF TELEPHONIC PROCEEDINGS

19 taken at 401 West A Street, Suite 750, San Diego,
20 California 92101, commencing on Tuesday, August 19,
21 2014, at 11:33 a.m., before Veronica S. Thompson,
22 CSR 6056.

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1 SAN DIEGO, CALIFORNIA, AUGUST 19, 2014, 11:33 A.M.

2

3 SPECIAL MASTER THOMPSON: Let me just welcome
4 everybody. It's been a while since we've had a chance
5 to talk, so I thought we should. Since I'll be
6 releasing the draft of the report to the Supreme Court,
7 I wanted to make sure I had an opportunity to check in
8 with everybody.

9 And there were three things that I wanted to
10 talk about this morning. One was timing issues. The
11 second was how counsel would propose that we actually
12 handle the draft opinion from a confidentiality
13 standpoint. And then the third thing was I wanted to go
14 over very quickly what type of advice and feedback I was
15 hoping to get from counsel on the various elements of
16 the draft report.

17 So those were the three things that were on my
18 mind this morning, and we can obviously add additional
19 things later on, but is there anything else that people
20 definitely know at this point they want to be
21 discussing?

22 MR. KASTE: Nothing from Wyoming.

23 SPECIAL MASTER THOMPSON: Thank you,

24 Mr. Kaste.

25 MR. DRAPER: Nothing from Montana, your Honor.

1 This is John Draper.

2 SPECIAL MASTER THOMPSON: Okay. Thank you,
3 Mr. Draper.

4 So first of all, let me discuss timing. First
5 of all, I want to apologize I have not had the
6 opportunity to get the special report to the Supreme
7 Court out earlier than this, but the delay in getting
8 the transcripts out, which then pushed out the base for
9 all of the briefing and the -- as a posttrial hearing,
10 unfortunately, then put me in a position that I wasn't
11 able to immediately finish the report. I then was
12 overseas for a period of time. And so I've been working
13 diligently to finish the report. I am almost finished.

14 And where I am right now, I've basically
15 finished all of the special report up through the
16 discussions of notice and the pre-1950 use of water by
17 Montana. What I have not completely finished yet are
18 the sections on the post-1950 uses in Wyoming and the
19 question of causation and materiality. They're close,
20 but they're not quite there yet.

21 I will have the entire thing finished this
22 next weekend, and so one of the questions at the very
23 outset is whether or not you want to wait until first
24 thing on Monday morning to have the whole thing or
25 whether or not you would like me to release it in two

1 parts releasing the first portion of it probably first
2 thing tomorrow morning and then the remainder next week.

3 Ideally, you know, I think from my standpoint,
4 it probably makes more sense to release it altogether,
5 but at the same time, I also want to give you, you know,
6 the opportunity to look at it and give comments. And so
7 if you think there would be a value to having the first
8 part earlier, I can do that.

9 That brings us to the question of timing. At
10 this point from my standpoint, the key is obviously
11 getting this to the US Supreme Court as soon as I can so
12 that they can then ask for exceptions and schedule it
13 for a hearing. And so that's the key goal from my
14 standpoint. And so that basically means getting it to
15 the Supreme Court by the end of September so they can
16 consider it at one of their early conferences.

17 So, you know, maybe I should go ahead and also
18 talk about what I'm hoping to get from all of you on
19 this because that also might be relevant on the timing
20 question.

21 I am not going to be looking for people
22 searching for typographical errors or cite-checking
23 errors. I will make sure that that is done. There is
24 absolutely no reason you need to be spending your time
25 working on that portion.

1 The second thing is obviously I do not view
2 this as an opportunity to repeat arguments that counsel
3 on either side have already made.

4 At the same time, though, you will find in the
5 draft occasional places where I have actually asked
6 either Montana, Wyoming or both sides whether or not
7 there is any type of evidence on the record relevant to
8 a particular point or whether or not something I have
9 said is accurate. And so to the degree I have those
10 types of specific questions, I would like to get
11 people's feedback on that.

12 As you all know from having been even more
13 absorbed in this than I was at the beginning of this
14 year, the record is enormous and there are portions of
15 it that although I think I'm pretty familiar with the
16 whole thing by now, there may be some portions that I'm
17 not aware of, so that's why I had some of those
18 questions.

19 The second thing I'm going to be looking for
20 is to make sure that I am not making any clear factual
21 or legal errors.

22 Obviously, you might disagree with me in the
23 way in which I have interpreted the law or interpreted a
24 set of facts, but if you believe there is something in
25 the report which just mischaracterizes Montana or

1 Wyoming law or which says something where there is a
2 fact which is just clearly incorrect, those are things
3 that I would like to know now because I want to make
4 sure, obviously, that the Supreme Court receives as
5 clean a description of what the facts and laws and
6 disagreements are as I can get.

7 And then the third thing is that you'll
8 probably not be surprised to know that in some cases, I
9 have taken positions which are not necessarily the
10 position that Montana or Wyoming took in their briefs.
11 So there are some situations where I believe that either
12 the interpretation of the law or the way to look at a
13 particular issue is different than the parties set it
14 out. And on those particular points, you both -- or all
15 three of you, if North Dakota wants to comment -- both
16 sides are free, obviously, to tell me that the way that
17 I've set it up is wrong, because again, I don't want to
18 suggest to the Court that they can resolve an issue in a
19 particular fashion without knowing ahead of time that
20 there's just a fundamental problem which I've ignored.
21 So those are basically the three types of things I'm
22 looking for.

23 Again, No. 1, there are some specific
24 questions that I have. I would appreciate the comments
25 of counsel on those.

1 Second of all, to the degree that I have made
2 something which you believe is just a clear factual or
3 legal error, I'd like to know that.

4 And then third of all, on these areas where I
5 have taken an approach which is different than what you
6 already briefed, I think you have the right to briefly
7 comment on.

8 I do not expect anything lengthy here. I
9 certainly do not want the same length of documents as I
10 received on the posttrial briefs, things -- you know,
11 this does not have to be formal. It does not have to be
12 in the form of a formal brief. Although, obviously, you
13 know, to the degree it's more than about five or six
14 pages, if there's something that is in the nature of
15 contents and citations, that would be useful.

16 So that is the background, and what I'd love
17 to do is to get both your comments, Mr. Draper, for
18 Montana, and then your comments, Mr. Kaste, for Wyoming
19 on both what you think -- you know, what your
20 perspective is on timing from the standpoint of your
21 resources and then, in addition to that, thoughts as to
22 whether or not you'd like to receive the entire report
23 as a whole or go ahead and get a portion of it tomorrow.

24 MR. DRAPER: Your Honor, if it's my turn, this
25 is John Draper.

1 On the question of whether it should be
2 provided in two parts or one part, it sounds to me like
3 it might be better for it to be in one complete report.
4 That is the way special masters have done it in cases
5 where I've been involved before, and I think it ensures
6 that you're satisfied with it in that format as a whole
7 when you provide it to us.

8 And the other aspects of what you mentioned
9 sound perfectly fine. In terms of timing, I think you
10 were asking what amount of time would be appropriate. I
11 think if you could give the parties two weeks to look
12 things over and provide the kind of input that you're
13 asking for, I think that would work for us. So anyway,
14 that's my initial reaction.

15 SPECIAL MASTER THOMPSON: Okay. Thank you.

16 And as I said, my preference, I think, would
17 be to release it as a whole so that you understand the
18 entire report, but again, you know, I want to -- because
19 I know that you're probably anxious to begin work on
20 this, but if people wanted to, I could peel off the
21 first half.

22 The other thing I should just mention -- and
23 I'll come back to this in a moment -- is that, you know,
24 I feel pretty confident in the report and the
25 conclusions I'm reaching.

1 At the same time, though, I do view this still
2 as a draft, and so if either I have made an error in
3 reporting on a particular fact or on what the law of
4 Montana or Wyoming is or on a particular approach that
5 I've taken that may not have been briefed, if somebody
6 says, you know, "That ignores such-and-such case," then
7 I might still change my mind, so I'll come back to that
8 on the confidentiality point, but I do want to emphasize
9 that this will be a draft.

10 MR. DRAPER: Your Honor, this is John Draper.
11 Just a follow-up on one point that you made on the
12 timing.

13 I think during this period starting at the end
14 of September, the Court will be having weekly
15 conferences, and it usually takes about a month to get
16 on their conference schedule, in my experience. So
17 whether it's one week or the next week or two is not
18 going to be of tremendous significance in terms of the
19 timing of the consideration of the case by the Court.

20 SPECIAL MASTER THOMPSON: And the other thing
21 I will mention is that I am in contact with the clerk at
22 the Supreme Court, so they will know it's coming and
23 will know when to expect it.

24 I'm not sure that will help jump this to the
25 front of the queue, but it at least means they will be

1 alert to knowing that it will be coming for the docket.

2 Okay. Mr. Kaste?

3 MR. KASTE: Well, I agree that it probably
4 makes the most sense for this to come out as one
5 cohesive piece of work rather than bite-sized portions.
6 Plus, if you're going to make or ruin my day, I'd rather
7 you just did it once.

8 I think that it would be helpful in terms of
9 assessing how much time it will take to digest the
10 report and potentially respond to pieces of it to know
11 generally about how long a piece of work the report is
12 going to be. If it's 300 pages, maybe two weeks isn't
13 enough. If it's 100 pages, maybe it's more than enough.

14 SPECIAL MASTER THOMPSON: So I'm trying to
15 keep the length down. At this stage, it looks like it
16 will be about 120 pages.

17 MR. KASTE: I think at that length that two
18 weeks is probably more than enough time for us to digest
19 and put together a response on the issues you've
20 identified.

21 One of the things that we're curious about is
22 what would be your position with regard to silence by a
23 particular party? Not in response to particular
24 questions where you've identified you'd like to hear
25 from the state -- one state or the other or both, but in

1 those instances where perhaps you've taken a different
2 tack than either state or, you know, just in the
3 remainder of the report, if we have nothing to say, I
4 would be interested in how you would construe that.

5 SPECIAL MASTER THOMPSON: Yeah. So several
6 things. No. 1, by not saying anything, you won't be
7 waiving any rights to make any arguments that you want
8 to before the US Supreme Court. So do not fear that I
9 will either drop a footnote or say to the Court, "Well,
10 Wyoming didn't address this particular point, so they
11 must agree with it," and certainly I would not make that
12 assumption.

13 At the same time, though, you know, if you saw
14 something where, you know, I didn't -- you know, I don't
15 think this is the case, but if you saw something where
16 you just think I've blatantly misrepresented a case or
17 misrepresented, you know -- I have, for example, that
18 Wyoming does not follow a one-fill rule. If I said
19 that, I would expect you to say to me, "That's just
20 wrong, and," you know, "you should know it's wrong
21 because here are the cases" or "here are the points of
22 the record."

23 And, you know, at least personally, I would
24 probably be a little bit irritated if you didn't tell me
25 then, and then at the Supreme Court you said, "The

1 special master on this particular point said something
2 which is just contrary to every legal case that the
3 Wyoming Supreme Court has released in the last
4 10 years."

5 So that's where I would appreciate the
6 comments because again, my goal here is to -- I
7 obviously will be setting out the way in which I think
8 the Court should be thinking about this case, but I also
9 at the same time will be trying to set out what the
10 actual law is that the Courts have set out, what the
11 parties' contingents are, and what witnesses will
12 testify. And it's on that point that I don't want the
13 Court to receive a report which has any type of a major
14 error in it because that's then a disservice to the
15 Court when they're trying to resolve the case.

16 So again, you know, you should feel free to
17 disagree with me on the way in which I have interpreted
18 something and -- but where I really want the help is to
19 make sure that I have not misrepresented the record,
20 misrepresented your argument, misrepresented any of the
21 case law. And so that's a point where, as I said, I
22 particularly would appreciate your help.

23 And then the final thing, though, is on an
24 additional -- you know, where I might have taken a
25 different approach than either Montana or Wyoming, and

1 there again, my goal is to provide the Court with as
2 much guidance as possible, and as I think all of you
3 know, the Court does not have to defer to me in the same
4 way that they would defer to a trial court.

5 At the same time, though, I've been the one
6 that has sat through the trial, reviewed all of the
7 exhibits, reviewed all of the transcripts. And,
8 therefore, what I tell them will probably inevitably
9 have -- you know, will carry, you know, the level of
10 credibility that that deserves.

11 So as a result, to the degree that you think
12 that there is an argument that I'm making that it's
13 just -- is just, you know -- is wrong for a reason or
14 two that, you know, you think if you told me that, you
15 know, maybe I would modify the argument or change my
16 mind, then I think it would help you, and it would
17 certainly help the Court for me to know that now rather
18 than for you to make the argument to the Court at a
19 later point in time.

20 And so I don't think there's any advantage to
21 you if you think there is something that I have just
22 missed, that I haven't understood, then I would say that
23 it is worth raising it at this point in time. Again, I
24 think it benefits you, and I think it obviously will
25 benefit the Court to do that.

1 But in answer to your initial question,
2 Mr. Kaste, I will not view it as assent to my particular
3 position. And obviously you're free to make your
4 original arguments before the Supreme Court again or to
5 disagree with the way in which I've analyzed a question
6 before the Supreme Court. You know, that remains
7 something you're free to do, and I will not interpret
8 silence as assent or as your thinking that you couldn't
9 come up with a good counterargument.

10 MR. KASTE: Well, thank you. I can appreciate
11 your desire to make sure that this work product that
12 represents the culmination of this process be in as
13 perfect a form as possible when it goes to the Supreme
14 Court, and we're happy to help with that process, but I
15 suspect we intend to be very judicious about the things
16 we raise in the course of this process since I really
17 don't relish the opportunity to argue with you, which is
18 what you're asking me to do.

19 I mean, I might like it, but I'm frightened of
20 the prospect, actually, so -- but that leads me to my
21 next question.

22 As I said, we intend to be judicious and may
23 not take advantage of every opportunity to discuss the
24 contents of the report. I think at this point, I'd just
25 like to know what the recommendation is and move on, but

1 I do want to question whether there will be either an
2 opportunity or a bar on responses to the other party's
3 submissions.

4 I can tell you before you answer, my
5 preference would be, please, no more briefing, but
6 that's pre-reviewing the response of the other party.
7 And after reviewing it, both parties might say, "I want
8 to address that point."

9 And so what do you think in terms of responses
10 by either state to the submissions of the other?

11 SPECIAL MASTER THOMPSON: What I would say is
12 what we should probably plan is two weeks on the initial
13 submission, and then I am not asking for, I am not
14 seeking responses, and I think both of the -- both sides
15 should feel fairly confident now that I will obviously
16 review the case law that somebody cites. If somebody
17 says that -- actually, there's a fact here that I should
18 be including that I will take a look at the citation and
19 actually read the record before I include it.

20 So to the degree that you think that I might
21 be hoodwinked into including something that I shouldn't,
22 you don't have to worry about that, but if you think
23 there's some type of a subtlety or issue that needs to
24 be brought to my attention, what I would suggest is that
25 you just -- what we can do is, say, have a three-day

1 period in which you can submit anything that you believe
2 is necessary as a response.

3 I know that in some cases it's very difficult
4 for counsel to resist responding, but in this particular
5 case, you shouldn't feel as if you need to, but if you
6 think there is something that I might just not notice,
7 then I obviously want you to represent your states
8 appropriately, and you should feel free to bring those
9 to my attention.

10 MR. KASTE: Okay. Thank you. But you didn't
11 save us from ourselves by saying no.

12 SPECIAL MASTER THOMPSON: Yeah, I know, I
13 know. But again, I just -- you know, I think you should
14 have that opportunity, Mr. Kaste.

15 As you point out, when you receive the other
16 side, you might decide it's necessary, but I would not
17 urge you to do it. And as I said, I don't think it will
18 probably be necessary.

19 I did, though, actually -- one of your
20 comments, Mr. Kaste, just now reminded me of a fourth
21 thing that I would appreciate you doing in your comments
22 on the report, which is, if you want me to add something
23 to the report that is not in there already, then you
24 should feel free to say that you would very much
25 appreciate it if I could spend a paragraph addressing

1 the facts on X question, because again, I also want to
2 make sure that the report is complete from your
3 perspective. And there have been a lot of arguments.
4 There's been a lot of testimony. And so, you know, I
5 obviously am not trying to summarize everything that has
6 happened. And if you just know after you read the draft
7 report that there is something that you would like to
8 have in the draft report so that when the Court reads
9 it, it's in front of them, then feel free to ask me to
10 include it.

11 Again, that isn't to say that if you don't ask
12 it to be included that's a bar from your raising it in
13 exceptions or your briefing on exceptions. Obviously,
14 you'll have the opportunity to refer to the record as a
15 whole, but again, I just want to make sure if you want
16 me to include something in the report itself that it is
17 in there.

18 MR. KASTE: Okay. Thank you. I think that
19 that's all I had in response to your original inquiries
20 about timing.

21 SPECIAL MASTER THOMPSON: Okay. So,
22 Mr. Draper, was there anything you wanted to add based
23 on the discussion we just had?

24 MR. DRAPER: No. That sounds fine to me.
25 Thank you.

1 SPECIAL MASTER THOMPSON: Okay. Great. And
2 then the other question that I wanted to discuss was
3 on -- I'm not sure how to phrase it other than
4 confidentiality.

5 So again, I view this as a draft, and I don't
6 want to do anything that, you know -- if any -- if
7 either side points out something that you just think
8 I've missed that I don't feel that I have as much room
9 to change my mind.

10 So obviously, when I give you the draft
11 report, you're welcome to share it amongst all of the
12 attorneys as well as anyone who has been working with
13 you on the case. The one thing I want to avoid,
14 however, is the possibility of a draft report leaking to
15 the press and somebody saying that the special master is
16 planning on issuing a report that says X, so -- and I
17 don't have any -- I'm not going to make any particular
18 orders with respect to this. I don't know whether any
19 prior special masters have ever tried to address this
20 particular question, but again, I just want to -- I
21 would like assurance from lead counsel for both sides
22 that in distributing this, you would just advise any
23 lawyers or experts who you have working with you who you
24 are distributing it to that they should not share it
25 with the public generally but only with the working

1 team.

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

3 We're glad to give that assurance.

4 MR. KASTE: This is James Kaste.

5 I think we can give the same.

6 SPECIAL MASTER THOMPSON: Okay. Excellent.

7 So then with that in mind -- so looking at the
8 calendar, so -- looking at March of next year isn't
9 going to help very much.

10 So again, you will receive this on the 25th.
11 And so two weeks later is September 8. And so I would
12 propose then that comments are due on September 8. And
13 then if you have anything you want to say in response to
14 the comments, that would be on Thursday, September 11.
15 Okay?

16 And I'll tell you right now, as soon as I
17 receive your responses on September 8, I will almost
18 certainly begin working on a revision, and I'll complete
19 those revisions before the 11th so I'll have an
20 opportunity to take a look at any responses that you
21 have. Okay?

22 And I will write all of this down and
23 circulate it along with the draft of the report so that
24 you also have this in writing separate from the notes
25 and the transcript.

1 MR. KASTE: This is James Kaste.

2 I assume that what sounds like something in
3 the form of a case status order would not make its way
4 onto the website at this time so that folks who might be
5 watching don't start calling us and asking us to do what
6 we just promised not to?

7 SPECIAL MASTER THOMPSON: Absolutely.

8 MR. KASTE: Okay.

9 SPECIAL MASTER THOMPSON: In fact, to be
10 honest, I'm not sure I will make it even a case
11 management order.

12 MR. KASTE: I don't --

13 SPECIAL MASTER THOMPSON: I will probably have
14 Ms. Carter just send it around to you in the form of an
15 email.

16 MR. KASTE: Great. Thank you.

17 SPECIAL MASTER THOMPSON: Okay. So those are
18 all the various points that I have.

19 Anything else?

20 MR. KASTE: Nothing from Wyoming, your Honor.

21 MR. DRAPER: Nothing further from Montana
22 either, your Honor.

23 SPECIAL MASTER THOMPSON: Okay. And,
24 North Dakota, I assume you are satisfied?

25 MS. VERLEGER: Sure. Nothing from us.

1 SPECIAL MASTER THOMPSON: Okay. Well, thank
2 you very much, and I will look forward to your comments,
3 and it's been nice hearing all of your voices again.
4 Having, you know, spent three months with all of you in
5 Billings, Montana, last fall, you might not miss me, but
6 I actually miss all of you.

7 MR. DRAPER: The feeling is mutual,
8 your Honor.

9 MR. KASTE: In hindsight, we actually had a
10 good time.

11 SPECIAL MASTER THOMPSON: Okay. That's good
12 enough. Okay. Thank you very much. Have a great
13 remainder of the day. And again, the report will come
14 out next Monday.

15 MR. KASTE: Thank you.

16 MR. DRAPER: Thank you.

17 (The proceedings concluded at 12:08 p.m.)

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1 REPORTER'S CERTIFICATE

2
3 I, Veronica S. Thompson, Certified Shorthand
4 Reporter for the State of California, do hereby certify:

5 That the foregoing testimony taken and
6 proceedings had at the hearing were taken before me at
7 the time and place herein set forth; that the testimony
8 and proceedings were reported stenographically by me and
9 were transcribed through computerized transcription by
10 me; that the foregoing is a true record of the testimony
11 and proceedings taken at that time.

12 Witness my hand dated August 19, 2014.

13
14
15 _____
16 Veronica S. Thompson
17 CSR 6056, RPR, CRR
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