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BEFORE SPECIAL MASTER BARTON H. THOMPSON, JR.

STATUS CONFERENCE

September 30, 2011

IN THE MATTER OF

MONTANA

VS.

WYOMING AND NORTH DAKOTA

NO. 220137 ORG

The above-entitled matter came on for hearing on September 30, 2011, at 11:34 AM at the Byron White US Courthouse, 1823 Stout Street, Denver, Colorado, before Martha Loomis, Certified Shorthand reporter and Colorado Notary Public, Court Reporting Office of Agren Blando Court Reporting & Video, Inc, 216 - 16th Street, Denver, Colorado 80202.

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1 P R O C E E D I N G S

2 SPECIAL MASTER THOMPSON: Okay. Let's start off
3 again.

4 So we're now moving into the status conference with
5 respect to this proceeding. And I circulated yesterday through
6 my assistant -- and I realize that you haven't had much time to
7 review this -- a draft case management plan.

8 And what I did was I took the case management plan
9 that Montana and Wyoming had agreed to, and I started putting
10 specific dates in. Once I started putting specific dates in I
11 ended up shortening the period for a variety of different parts
12 of the pretrial proceeding.

13 My goal very specifically was to try and get this case
14 on a time schedule so that at the very beginning of 2013, so in
15 other words a year from this January, we would be ready for any
16 dispositive motions. And then if we needed to move on to any
17 type of a trial liability phase we could do that in the spring
18 of 2013.

19 When I was doing this timeline I actually thought to
20 myself, Well, maybe I'm providing people with more time than
21 they think they will need. And that would be very troubling.

22 The more I thought about it the more I guessed that
23 probably you would feel exactly the opposite, and that I was
24 really trying to cram the discovery and pretrial process faster
25 down your throats.

1 But that's my goal, and that's what I want to do. And
2 I'm perfectly willing to have the two principal parties, Wyoming
3 and Montana, reallocate the time in that period in order to,
4 well, actually have the dates be something which work better
5 from your standpoint so long as we get to a stage where again,
6 at the very beginning of 2013, we're ready for dispositive
7 motions.

8 The way I set it up right now basically provides about
9 seven or eight months for various forms of discovery. And then
10 in rapid-fire succession disclosure of the expert reports and
11 hopefully time within there up until the November 30, last day
12 for depositions, to then depose those various experts.

13 So I realize it's tight, but I think it's doable. And
14 without talking to them, I know that all the justices on the
15 Supreme Court want me to get this proceeding finished as quickly
16 as possible. So that's why I've set out this particular
17 schedule.

18 I chose November 30 of next year as the last date for
19 depositions so that, number one, you weren't conducting
20 depositions during the December holiday season, and second of
21 all, so you could actually have some time to review everything
22 you've done at that point before we got to the stage of
23 dispositive motions.

24 So that's sort of the background on this. I realize
25 that your views on this could change depending upon how I rule

1 on the two matters that we were talking about earlier this
2 morning. And so you don't know my rulings on that yet, but I
3 wanted to at least get your general thoughts on this type of
4 schedule.

5 I guess maybe I should turn to Montana first since
6 you're the Plaintiff.

7 MR. DRAPER: Your Honor, you have tightened up the
8 timeframe that the states come up with. But we understand the
9 reasons that you've done so.

10 I think in general we will certainly conform to you
11 and live up to these deadlines. I don't think we have any
12 particular criticism or comment beyond that.

13 SPECIAL MASTER THOMPSON: Okay, Mr. Michael for
14 Wyoming.

15 MR. MICHAEL: Your Honor, the problem, you just made
16 the critical comment, which is how big is this case going to be.

17 And just if we go back to a 1952 V(B) claim and have
18 to try to determine what post 1950 diversions were, actual
19 diversions through given dates, not knowing any given dates that
20 Montana alleges Wyoming had gone over the percentage.

21 Now, that may not happen. Because as I said in my
22 argument earlier, the Compact drafters that were on the
23 commission that first ten years said there hasn't been enough
24 development in Wyoming to lead to any allocation problems under
25 V(B). And in fact I guess they said it up to almost the '80s

1 that there wasn't enough development.

2 But if we think Montana has a case where they're going
3 to try to pursue a case back to 1952 about the percentage of
4 allocation on however many given dates that may be that they
5 select, basically what we're going to have to have, because
6 you've given us a month to designate experts after we get
7 Montana's designation, realistically that means that both states
8 are going to have to have parallel investigations of what water
9 diversions there were in Montana.

10 Wyoming, we may have pretty decent records from the
11 50's on up. But Montana, we're not going to know, we don't even
12 know who had post '50 water rights in Montana at that time. To
13 try to study that is going to be very very extensive.

14 What we have here is both sides doing that, the
15 Defendant studying that, because there's no way in a month we
16 can get that done. So we'd have to start immediately because we
17 don't know what Montana's report's going to be; we don't know
18 what they're going to say their study reveals, and whether it's
19 accurate or inaccurate.

20 We would have to be doing this extensive study on the
21 history of diversions in Montana, post '50 diversion points
22 under the V(B) claim.

23 So that was exactly what the states going forward
24 wanted to do with the \$100,000 apiece, do it jointly in both
25 states. That was rejected by Montana in 2006; Wyoming

1 appropriated the money.

2 The problem I'm seeing here is when the Defendant has
3 to designate experts a month after the Plaintiff in a case that
4 can require these kinds of studies -- and I haven't mentioned
5 groundwater yet, about doing a study about what the hydrology
6 was with the groundwater, where is the groundwater coming from
7 coalbed methane wells in Wyoming, post '50 wells, if we're going
8 to do a V(B) case and even a 5(a) case.

9 Basically that schedule puts the Defendant, doing a
10 full-blown examination of the case, we'd have to start
11 immediately even before we get routine disclosures from Montana
12 on December 2 of this year.

13 And those disclosures only have to be, to tell the
14 other side of the facts with no particularity; nothing has been
15 pled with particularity here. So we're not going to have
16 anything from that.

17 We're going to have to file discovery requests, and we
18 can't even do that December 2. Ask Montana the facts of the
19 case. What years do you think we violated V(B), you know, and
20 what years do you think that your pre '50s weren't getting
21 water? We'd have to gather that up.

22 Then, otherwise we start the study for every year
23 right now today if we're going to have enough time to get that
24 information, because it's going to be interviewing ranchers and
25 asking them, How much did your grandfather take at this head

1 gate in 1967? Really that's what that -- to prove this case
2 over that period of time or disprove it, that's where we would
3 be.

4 So I guess I'm circling around to the point I made at
5 the beginning, which is not knowing how limited the case is.

6 If this is a case about 2004 and 2006 based on the
7 allegations that were made with the data that we have -- and all
8 the witnesses are alive and here, many of them. Our key
9 witnesses are here in the courtroom, our state engineer and our
10 division superintendent. So, yes, that we can really move that,
11 especially if it's limited to a 5(a) case.

12 So it's so dependent, so difficult to say. But
13 generally in my experience, you know, in federal cases, one
14 month designation of experts when you haven't even had a
15 chance -- you maybe digested the other side's expert reports,
16 but you haven't had a chance to even depose the other side's
17 expert.

18 That gap is, and this is the change you made, the
19 major change you've made over the previous case management plan,
20 which was to get back together after Montana gave us their
21 reports. And at that point we decide how much, or at least beg
22 you for the time we think we need.

23 Now, the alternative that you've left in this case
24 management plan it says that Wyoming could object.

25 Well, if we wait till Montana's reports come in next

1 August and hope that if we object and ask for more time for you
2 to give to us, and then you don't, we can't take that risk.

3 We would have to go as the Defendant into this
4 exploration not only of groundwater issues but also all the
5 diversions, pre and post '50 diversions up and down the river
6 right now just as a study.

7 And I'm not talking about deposing witnesses to see if
8 they're lying about how much water their grandfather took or
9 not. I'm talking about just doing a study to try to get a
10 handle on it. That is a major problem. So the difference
11 between the expert designation deadlines is a real problem.

12 But I see a lot of these problems dissipating
13 depending on the ruling if we are limited in a timeframe.

14 Even if Montana says -- and I mentioned the asterisk I
15 put in my original argument about what about Montana doing
16 discovery for the sole purpose of their call issue.

17 If you were to decide Montana had a legal duty to make
18 a call and they still wanted to do some discovery to determine
19 whether they made a call and you felt they had a right to do
20 that, and it didn't have the capability of doing it yet, if we
21 set that aside, and still I think we've got a big problem as far
22 as getting that kind of -- we have to have some idea what years
23 they're talking about.

24 If they came up with a document tomorrow that said, In
25 1965 we made a call, great. We'd have 2004, 2006, and 1965.

1 But if you rule that there's no call required, then we're doing
2 the whole shooting match all the way back to 1952.

3 It's absolutely critical to know that. I think under
4 any way to handle this, we'd have to have more time after they
5 designated their experts for us to see unless the Defendant is
6 simply going to be, in a case like this, have to do full blown
7 everything in anticipation of what the other side's case might
8 be, given how little we know about their case right now.

9 It's a very difficult challenge you impose with the
10 order today. And I understand the Court's desire to move the
11 case; I know it's been five years.

12 And I guess the other question that comes up I guess
13 is, how do we deal with possible exceptions from what you
14 decide?

15 As I said, I think I said in my brief -- maybe it was
16 an earlier draft of one of my briefs -- we're at a fork in the
17 road. And this is a fork that's really vital to the depth of
18 discovery that goes on in this case to both sides and how much
19 money they spend and how much effort they put into this.

20 So if we go down one road and have to come back to the
21 fork, it's going to be a real problem. So my feeling on it is
22 that if you, how you decide on these issues should be embodied
23 in the report to the Court so that if a party is dissatisfied
24 they can take exception to it.

25 Especially Montana, because if we're going to go

1 through this whole case -- I'll just throw out a possibility.
2 If you were to rule in Wyoming's fair on both of these issues,
3 find that Montana can go forward on cases in 2004 and 2006, and
4 we do that under this schedule, we get to the end of the trial
5 and Montana then takes exception and says, We should have been
6 able to prove the case encompassing years we never made a call.
7 We should've been able to prove the V(B) case and do discovery
8 on it, we come all the way back and have to do that because the
9 case didn't get to the full Court.

10 So it seems to me if they were unsuccessful in this
11 motion they should at least have the opportunity to take
12 exception; otherwise, we go down that road and go back to that
13 fork in the road years later, it's going to be extremely
14 wasteful to have done that.

15 That's another issue I throw out there just for
16 everybody to think about I guess in terms of this ruling, the
17 effect of the possible exception on this schedule. That's
18 something we should build in.

19 And my feeling is that it should be built in because
20 of how vital these two issues are in trimming the case or
21 allowing a massive case.

22 Those are my thoughts.

23 SPECIAL MASTER THOMPSON: I understand both of the two
24 points.

25 One thing that I'll say with respect to the report at

1 this stage is that I'm very reluctant to go the report route if
2 that means that we don't proceed during that period of time
3 because we know from last time it will take time to issue -- you
4 know, basically if it proceeded on the same schedule we would be
5 back here again in a year and a half.

6 You know, my efforts have been the first time around
7 to try to get things to the stage where they can proceed forward
8 with discovery in this case. And obviously it's not worked out
9 in a way that I had anticipated.

10 I'm very reluctant to do that.

11 MR. MICHAEL: If I may respond, Your Honor.

12 SPECIAL MASTER THOMPSON: Yes.

13 MR. MICHAEL: I actually think that's correct. I
14 think that if we go the report route I'm not saying that we
15 wouldn't, that we couldn't proceed with discovery.

16 We'd know something about the case at that point.
17 We'd know or have some idea what you feel at least
18 preliminarily, depending on whether someone takes exception, how
19 narrow or how broad the case is. So there's certainly a target
20 for discovery.

21 It could be a huge target if our motion today is
22 denied and so forth, or it could be a smaller target experience.
23 I'm saying that's either; I'm not saying you wouldn't want to do
24 that as well, but I think it's a consideration.

25 SPECIAL MASTER THOMPSON: Thank you.

1 Mr. Draper?

2 MR. DRAPER: Your Honor, I think Mr. Michael is
3 overblowing the implication of the schedule and your setting a
4 time.

5 My understanding is he's claimed he's got the records;
6 it's all set to go, and now it's a big problem.

7 They have got the hydrographer records we understand.
8 And it's a matter of us obtaining the discovery of those. They
9 are in possession of most of the operative data here that's
10 going to be important. So this massive description seems a
11 little bit overblown.

12 These kinds of investigation are typical in this kind
13 of case. They have got the records, you know, having a span
14 here like we're talking about, depending on how you rule on the
15 call question.

16 I mean, if it were scoped down to, if you limited us
17 to two years, well, that would be an amazingly narrow scope
18 compared to most cases. In the Arkansas case we were looking at
19 years from 1950 until after the year 2000.

20 Experts know how to deal with those; they have
21 records. It's a matter of getting those and putting them in the
22 hands of parties' experts to give us the analysis.

23 It's not an insurmountable thing which Mr. Michael is
24 suggesting. I think it's workable. The parties do work
25 together fairly well on a number of topics. And if we got into

1 problems I'm sure we could get through a lot of this through
2 agreement, or perhaps coming back to you jointly.

3 SPECIAL MASTER THOMPSON: As I understand one of
4 Mr. Michael's concerns is what type of records may exist with
5 respect to Montana pre 1950 appropriations in the early years.
6 Is that correct?

7 MR. MICHAEL: Your Honor, both pre and post, depending
8 on how you rule. In the V(B) case we've got it on both.
9 Diversions, actually on diversions.

10 SPECIAL MASTER THOMPSON: Basically records of what
11 water was received and utilized in those early years.

12 I guess one of my questions is, what do we know about
13 what Montana's records are right now in terms of what years are
14 covered?

15 MR. DRAPER: Well, I'm not prepared to give you --

16 SPECIAL MASTER THOMPSON: I understand. I'm just
17 looking for --

18 MR. DRAPER: -- right now.

19 But I think we're going to be looking at, I would
20 agree, at pre '50 and post '50 rights.

21 In fact, one of the key things is what were the rights
22 at the time of the Compact. That's really a starting point for
23 both sides.

24 And we have been adjudicating those rights on the
25 Powder River, and on the Tongue River in Montana is progressing.

1 So we're making headway on that.

2 We have court documentation that the adjudication is
3 either in final or provisional form. So I think that's going to
4 be pretty accessible to the parties.

5 SPECIAL MASTER THOMPSON: So again, I know I haven't
6 made a ruling, Mr. Michael. If you want to say something first.

7 No? Okay.

8 MR. MICHAEL: Oh, I just wanted to say that, I just
9 want to make it very clear I didn't say "rights."

10 SPECIAL MASTER THOMPSON: Right.

11 MR. MICHAEL: I said actual use, actual diversions.
12 That's a whole different question.

13 SPECIAL MASTER THOMPSON: Yes, I understand. Okay.

14 So do you know anything about when Montana had use
15 records for? No one has any information on that?

16 MR. MICHAEL: I don't know, Your Honor, Montana's use
17 records.

18 SPECIAL MASTER THOMPSON: So let me ask another
19 question, and just get your initial thoughts now. You might
20 want to think about it more.

21 Obviously in the liability phase, the preferable route
22 would be to be able to resolve it all at once, bring it all
23 together at one time but particularly if, you know, there's an
24 early period where there's less likely that there are going to
25 be shortages and where records might be more difficult to

1 locate, whether it would make any sense to proceed forward with
2 -- and again, I'm making no judgment right now as to what
3 periods we're going to be looking at. Maybe it is just 2004 and
4 2006 because of Wyoming's motion.

5 But even if it's a broader category, whether there
6 would be any sense of taking a later period when we actually
7 have some of the use records for example with respect to
8 groundwater and the like, and actually proceed forward on those,
9 that would give the opportunity to actually resolve any
10 questions about what, if any, groundwater are we talking about
11 as being hydrologically interconnected with the surface water,
12 and resolving any of those types of issues that then might make
13 it easier and give a little more time to then go back and look
14 at that earlier period where records might be more difficult to
15 find, but where the issue is really more, you know, we just need
16 the records than it is actually applying law to specific facts.

17 Does that make any sense to either side?

18 The first question is do you understand what I'm
19 suggesting in the very general sense?

20 MR. MICHAEL: I'm thinking of a date, Your Honor.
21 I'm trying to think in my mind, you know, what would be the date
22 when things changed.

23 From our standpoint they really didn't from Wyoming's
24 standpoint. We have better records I'm sure in the last
25 20 years than we had before, but we still had recordkeeping.

1 But from Montana's standpoint I know they adjudicated
2 over the last five years. And I'm sure there was some proof,
3 somebody had to prove what their water use was to get it right,
4 how much water their grandfather used or something.

5 I don't know that there's a simple cutoff date. There
6 are other issues here too, Your Honor. If we're not finding any
7 records I'm sure we're going to raise a defense -- I think in
8 the schedule, I recall in the prior schedule we talked about a
9 schedule for amendments to the pleadings. And we certainly
10 would think about amending defenses for things like laches
11 where Wyoming's not able to defend because we don't have any
12 information because Montana waited so long to bring a lawsuit.

13 That's something that maybe provides a breaking point.
14 I don't know.

15 SPECIAL MASTER THOMPSON: Mr. Draper?

16 MR. DRAPER: Well, I would think things like the
17 groundwater versus record location and provision, I think they
18 can go ahead simultaneously. And we wouldn't want to hold off
19 one for the other.

20 I think those are parallel things, that groundwater
21 analysis, hydrological connection, hydrological studies, and
22 potentially modeling should proceed immediately. And at the
23 same time other people with other skills can be looking at
24 records issues. Those can go in parallel.

25 SPECIAL MASTER THOMPSON: Well, as both of you have

1 pointed out and as you emphasize, Mr. Michael, it's difficult to
2 make a determination today before I've actually ruled on the two
3 issues that were before us earlier this morning.

4 So on this particular matter let me take your comments
5 into account. I'll also give some thought myself as to how this
6 might be structured in order to meet various concerns that have
7 been raised.

8 My goal, and it's one of the reasons I put you on a
9 real fast time schedule with respect to any additional documents
10 with respect to the Article V(B) claim is to try and have a
11 decision on both of the two issues within, say, three weeks.

12 And what I'm going to do is ask my assistant to set
13 another status conference for approximately a month from now, so
14 for example, the very first week in November.

15 And so as I say, what I need to do is decide these two
16 issues before that status conference so we can then at that
17 status conference make a final determination with respect to the
18 schedule and how to proceed forward. And what I would suggest
19 is that status conference, as we've been doing in the past, be
20 by telephone.

21 But as I say, what we will do is firm up the schedule
22 at that particular point time, and obviously after you see my
23 decision on those two issues you're free to raise other concerns
24 for issues with respect to the proposed scheduling.

25 Does that sound reasonable? As I say, I'm not sure --

1 I understand entirely your concerns, Mr. Michael. And I'm
2 somewhat assured by your comments, Mr. Draper, that maybe it's
3 not quite as bad a problem as Mr. Michael suggests.

4 But I realize, particularly when we're dealing with
5 60 years of records, that that's a lot of information to digest
6 and process.

7 So any other comments on it right now? Yes?

8 MR. WIGMORE: Can I approach?

9 SPECIAL MASTER THOMPSON: You certainly may. I assume
10 you're a party.

11 MR. WIGMORE: I am one of the counsel.

12 SPECIAL MASTER THOMPSON: I'm sorry, counsel for one
13 of the parties.

14 MR. WIGMORE: I am Michael Wigmore with Bingham
15 McCutchen on behalf of Anadarko.

16 I just want to say on the record that in the case
17 management plan Anadarko is participating as an amicus and in
18 doing so is trying to be helpful.

19 In the drafts we have proposed to waive some of the
20 rights that we would have in the context of discovery as a
21 nonparty. We moved for intervention that was not granted so
22 we're not a party to this case.

23 Notwithstanding, we have agreed preliminarily in the
24 context of negotiating a case management plan to waive certain
25 rights of that with respect to the issuance of subpoenas, with

1 respect to the hundred mile rule and that sort of thing.

2 That was done in anticipation of termination of the
3 scope of this case because as is clear, groundwater pumping is a
4 very significant issue in the context of this case.

5 I just want to put on the record that, you know, if my
6 clients -- I'm going to need to think about that and discuss it
7 with my client. If this turns into a case of 60 years of
8 records involving everything, I'm not certain my client's going
9 to agree to waive those provisions subject to discovery.

10 SPECIAL MASTER THOMPSON: Okay. What I would simply
11 ask then is after you have seen my decisions you are welcome as
12 an amicus to participate in the status conference.

13 I will make sure that my assistant schedules it at a
14 time where not only the parties but also you can participate.
15 And you can simply be prepared by that date to say whether or
16 not you are still willing or no longer willing to waive those
17 various rights.

18 MR. WIGMORE: I appreciate that and will certainly be
19 in a position at that time.

20 SPECIAL MASTER THOMPSON: Okay.

21 MR. WIGMORE: If I may, the only other thing I would
22 raise in the context of the draft case management plan, there's
23 some -- I don't know whether it makes sense in advance of that
24 to just submit comments of other parties.

25 There are some, there's a number of different uses of

1 parties, states, persons, and other entities. And we do have
2 some concerns also with respect to, for instance, the provision
3 that says an amicus may not examine witnesses in depositions.

4 We certainly interpret that to mean that if one of our
5 witnesses is called that we would be able to redirect, answer
6 any questions from other parties, things like that.

7 Maybe over the course of the next month it may make
8 sense to try to provide comments on the first draft of the case
9 management plan.

10 SPECIAL MASTER THOMPSON: I understand your point. So
11 I actually understood that everybody, including the amicus, were
12 comfortable with the language of the case management plan draft
13 that parties had submitted earlier in the summer. I have not
14 changed any of the provisions with respect to amici.

15 What I would simply ask is that counsel for Montana
16 and Wyoming make sure that it has consulted with all the amici
17 who are listed in the case management plan draft; make sure that
18 they are comfortable with the current provisions.

19 And if they are not comfortable, either incorporate
20 whatever their requests are in the case management plan, or
21 identify for me a couple of days before the next status
22 conference what the issues are.

23 Is that fine with both sides?

24 MR. MICHAEL: Yes, Your Honor.

25 SPECIAL MASTER THOMPSON: We'll resolve those again at

1 the next status conference.

2 Okay. Any other issues for the status conference?

3 Okay, great.

4 So again, thank you very much. My goal really is to
5 move this forward. So I will make sure that the decisions get
6 made before the next status conference. That will be
7 approximately a month from now.

8 And I will have my assistant, Susan Carter, contact
9 counsel for all of the -- let me stop there.

10 What I've been doing in the past is finding a date
11 that works for all of the parties, and then invite the amici to
12 participate if they're available. So as a general matter that's
13 going to be my approach for all of the status conferences.

14 The more people that I have to coordinate with or my
15 assistant has to coordinate with, the more difficult it is to
16 schedule these.

17 But on this particular one, I'll also make sure that
18 Susan Carter makes sure that, Mr. Wigmore, that it's a date when
19 you are available. And if any of the other amici, we want to
20 make sure to set it for a date you're absolutely available for.
21 Please tell Ms. Carter.

22 MR. WIGMORE: I appreciate that, Your Honor. I don't
23 know that that's necessary. I think -- I don't want to burden
24 the states with our schedule.

25 SPECIAL MASTER THOMPSON: Hopefully either you or one

1 of your counsel will be available.

2 MR. WIGMORE: I appreciate that. I assure you we're
3 not going to --

4 SPECIAL MASTER THOMPSON: Okay. Sounds good.

5 Happy travels for those of you who have to go
6 someplace else. We will talk in approximately a month. And
7 I'll have homework in the meantime.

8 So we're adjourned.

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10 (Whereupon the within proceedings adjourned at
11 12:07 PM.)

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C E R T I F I C A T I O N

I, Martha Loomis, Certified Shorthand Reporter,
appointed to take the within proceedings hereby
certify that the proceedings was taken by me, then reduced to
typewritten form by means of computer-aided transcription; that
the foregoing is a true transcript of the proceedings had
subject to my ability to hear and understand, and that I have no
interest in the proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand
on October 11, 2011.

Martha Loomis
Certified Shorthand Reporter

Proofread by D. Drake