

IN THE SUPREME COURT OF THE UNITED STATES

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

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

Friday, September 17, 2010

1 TELEPHONIC APPEARANCES:
2 SPECIAL MASTER:
3 STANFORD LAW SCHOOL
4 HONORABLE BARTON H. THOMPSON, JR., ESQUIRE
5 Crown Quadrangle
6 559 Nathan Abbott Way
7 Stanford, California 94305
8 PHONE: 650.723.2465
9
10 FOR THE PLAINTIFF:
11 MONTANA ATTORNEY GENERAL'S OFFICE
12 BY: JOHN B. DRAPER
13 JEFFREY J. WECHSLER
14 325 Paseo de Peralta
15 Santa Fe, New Mexico 87501
16 PHONE: 406.444.5894
17
18 FOR PLAINTIFF:
19 MONTANA ATTORNEY GENERAL'S OFFICE
20 BY: JENNIFER ANDERS
21 ANDREW HUFF
22 215 North Sanders
23 P.O. Box 201401
24 Helena, Montana 59620
25 PHONE: 406.444.5894

1 TELEPHONIC APPEARANCES, continued
2
3 FOR THE DEFENDANT: STATE OF WYOMING
4 WYOMING ATTORNEY GENERAL'S OFFICE
5 BY: PETER MICHAEL
6 200 West 24th Street
7 123 Capitol Building
8 PHONE: 307.777.7841
9
10 FOR DEFENDANT STATE OF NORTH DAKOTA:
11 NORTH DAKOTA ATTORNEY GENERAL'S OFFICE
12 BY: TODD A. SATTLER
13 500 North Ninth Street
14 Bismarck, North Dakota 58501
15 PHONE: 710.328.2210
16
17 FOR UNITED STATES AS AMICUS CURIAE:
18 UNITED STATES DEPARTMENT OF JUSTICE
19 BY: WILLIAM M. JAY
20 950 Pennsylvania Aenue N.W.
21 Washington, D.C. 20530
22 PHONE: 202.514.8976
23
24
25

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25

TELEPHONIC APPEARANCES, continued

FOR ANADARKO PETROLEAM COMPANY AS AMICUS CURIAE:

BINGHAM, MCCUTCHEN, LLP

BY: MICHAEL B. WIGMORE

2020 K Street NW

Washington, D.C. 20006

PHONE: 202.373.6000

ALSO PRESENT:

JEANNE WHITEING, Northern Cheyenne Tribe

1 San Diego, Friday, September 17, 2010, 9:05 a.m.

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3 TRANSCRIPT OF TELEPHONIC PROCEEDINGS

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6 SPECIAL MASTER THOMPSON: This is a status
7 conference in Montana versus Wyoming and North Dakota
8 which is number 137 original, before the US Supreme
9 Court, and why don't we begin quickly with
10 identification of counsel. So why don't we start with
11 Montana.

12 MR. DRAPER: Good morning, Special Master.
13 This is John Draper. I have with me Jeffrey Wechsler
14 and I believe also that Jennifer Anders and Andy Huff
15 are on the line for Montana.

16 SPECIAL MASTER THOMPSON: Thank you. Next,
17 Wyoming?

18 MR. MICHAEL: Yeah. Peter Michael for Wyoming
19 and just me.

20 SPECIAL MASTER THOMPSON: And next North
21 Dakota.

22 MR. SATTLER: Morning, Judge. This is Todd
23 Sattler.

24 SPECIAL MASTER THOMPSON: Good morning. And
25 next the United States, which has been amicus throughout

1 this proceeding.

2 MR. JAY: William Jay of the Department of
3 Justice for the United States.

4 SPECIAL MASTER THOMPSON: And then finally
5 Ms. Whiteing.

6 MS. WHITEING: Yes, this is Jeanne Whiteing.
7 I'm representing the Northern Cheyenne tribe in an
8 amicus capacity.

9 SPECIAL MASTER THOMPSON: Thank you. So I
10 guess good morning to everybody. I appreciate your
11 taking the time to participate.

12 I did receive Mr. Draper's letter of September
13 3, which sets out what the States have agreed to after
14 meeting and conferring.

15 The proposal with respect to a case management
16 plan sounds fine to me and I guess the only question
17 that I would have with respect to the timing, I'm just
18 looking at the Supreme Court --

19 (Michael Wigmore joins conference.)

20 SPECIAL MASTER THOMPSON: So Mr. Wigmore, we
21 were just getting started. We had the counsel identify
22 themselves and I was just saying I'd received
23 Mr. Draper's letter of September 3 and then first of
24 all, the proposal with respect to a case management plan
25 set out in paragraph one looks fine to me.

1 The only question I have just looking at the
2 Supreme Court calendar, and so it looks to me from that
3 as if we will by then presumably know whether or not the
4 Supreme Court is going to actually hear Montana's
5 exceptions to the first interim report, and so I guess
6 that would give you time, Mr. Draper, that this schedule
7 would probably -- it would be perfect if the Supreme
8 Court decides to hear it. If for any reason the Supreme
9 Court didn't, we would then probably want to go back and
10 revisit what's actually in the case management plan.

11 MR. DRAPER: That sounds correct, Your Honor.

12 SPECIAL MASTER THOMPSON: Okay. So while we'll
13 go with this calendar then, assuming that the Supreme
14 Court does grant a hearing. If the Supreme Court
15 doesn't, then what I would suggest is that what I will
16 do is I will get in touch with everybody right after
17 that and what we can do is to set a new calendar for the
18 case management plan that would include the various
19 elements that right now are excluded because you can't
20 put them in.

21 Does that sound reasonable?

22 MR. DRAPER: Yes, it does.

23 SPECIAL MASTER THOMPSON: Okay, great. Does
24 anyone have any objection to that? Okay.

25 Similarly with respect to Paragraph 3, it

1 sounds like the states are all agreed that it's
2 premature at this stage to proceed with any discovery
3 and I won't push the parties on that issue.

4 I do have a question with respect to paragraph
5 2 with respect to identification of legal and factual
6 issues.

7 When I originally raised that idea, my thought
8 had been that if you look at Montana's exceptions, at
9 the moment they deal with the question of the increased
10 consumption by Wyoming pre-1950 water users and also the
11 question of whether or not Montana would have to exhaust
12 any internal approaches to dealing with shortages of
13 water before technically making an interstate call.

14 But looking at that, it had appeared as if
15 there were a variety of other issues, for example, those
16 surrounding groundwater where it might be possible to
17 identify what the remaining legal and factual issues
18 were.

19 And so my thought was that we could at least
20 get a head start on the next phase of the proceedings by
21 at least taking those types of issues and seeing whether
22 or not the parties could come to an agreement as to what
23 the relevant legal and factual issues were.

24 But from your letter, Mr. Draper, it sounds
25 like the parties disagree with that and I just wanted to

1 get a better sense of what people's thinking had been
2 that led you to the conclusion that that was not a step
3 that made sense to take at this time.

4 MR. DRAPER: Well, Your Honor, I think the
5 thinking wasn't too long term, it was -- I think at
6 least in my case I had in mind the fact that the court
7 would be taking some kind of action in the near future
8 and that in ways that perhaps we couldn't predict that
9 that might change how we formulate or identify the legal
10 and factual issues.

11 But the general notion that at some fairly
12 early point in the case it makes sense to identify
13 outstanding legal and factual issues is something that
14 certainly makes sense to Montana and so in the near
15 future, perhaps not just in the next 30 days or so,
16 that -- I think that would be appropriate at some point.
17 But the other parties can address it from their points
18 of view.

19 SPECIAL MASTER THOMPSON: Mr. Michael, your
20 thoughts?

21 MR. MICHAEL: Well, one of my thoughts, Your
22 Honor, about that issue, groundwater, was that at least
23 part of the groundwater issues get tied up with the
24 issue -- of one of the issues that's before the court
25 which is whether Montana would have to avail itself of

1 its own -- try to solve its issues within Montana before
2 making a call on Wyoming, that second issue you
3 identified as before the court. And if that applies,
4 presumably that would apply just as much to groundwater
5 as it would to surface water issues.

6 So the factual and legal issues would not only
7 involve, you know, what's interconnected in Wyoming, but
8 also what would be interconnected groundwater in
9 Montana.

10 And so I guess what I'm saying is until that
11 issue is resolved, that's a fairly large portion of the
12 groundwater issues are influenced by what the court
13 decides to do with that recommendation that you've made.

14 And so some of my thinking was that the
15 groundwater does get kind of affected by that -- at
16 least that issue that's outstanding and so maybe it's
17 not -- maybe it wasn't really worth spending a lot of
18 time right now on identifying factual and legal
19 groundwater issues, that being a significant part of
20 it -- you know, how are we going to deal with Montana as
21 well. Then that was part of my thinking. I don't think
22 we really discussed it in our conference call on I think
23 it was September 2nd or so, but before the letter. Does
24 that make some sense?

25 SPECIAL MASTER THOMPSON: I understand your

1 comment. So any thought from anyone else on this?

2 So again, what I want to make sure of is that
3 when this case gets back from the Supreme Court and
4 given the limited nature of the exceptions, we can feel
5 pretty confident it will come back, that we don't have
6 to spend a lot of time ramping back up to speed and
7 accomplishing things that we might be able to do before
8 it gets back.

9 So why don't we -- why don't I propose this:
10 First of all, I'll put in an order later today the
11 schedule with respect to the case management plan as the
12 parties agreed to in paragraph 1 of Mr. Draper's letter.

13 Second of all, I won't require the parties to
14 file any type of identification of legal and factual
15 issues before the case gets back from the Supreme Court,
16 but what I would request would be that the parties do
17 confer before it gets back from the Supreme Court and
18 begin to see whether or not there can be agreed on what
19 the legal and factual issues are likely to be and also
20 the process by which we can most expeditiously address
21 those legal and factual issues so that when it does get
22 back from the Supreme Court, we can agree on that
23 relatively quickly. Does that make sense?

24 In other words, I'm not asking you to actually
25 reach agreement, file anything with me, but I would ask

1 because if the Supreme Court does decide to hear this,
2 it could be six months after that before it gets back,
3 that at least you begin working on seeing whether or not
4 you can agree to what the issues will be and how best to
5 resolve them.

6 MR. DRAPER: Your Honor, this is John Draper.
7 That sounds like a good approach to Montana.

8 SPECIAL MASTER THOMPSON: Okay. Mr. Michael?

9 MR. MICHAEL: Yeah, that's fine, Your Honor. I
10 think we can do that.

11 SPECIAL MASTER THOMPSON: Okay. And I guess
12 the other -- the sort of flip side of that is when it
13 does get back, what I'll be doing is pushing for a
14 relatively rapid resolution and finalization of that
15 issue and so again, the more you can talk among the
16 parties about that issue before it gets back, the easier
17 it will be for me to try and do that relatively quickly
18 and the less you'll complain about it. Okay?

19 Anything else? Because I think that resolves
20 all the various issues that I'd asked you to address and
21 again, I very much appreciate your meeting and
22 conferring and putting together the agreement that's set
23 out in the September 3rd letter.

24 MR. SATTLE: Your Honor, this is Todd Sattler
25 in North Dakota. Just in reference to Paragraph 4 of

1 the case management order and the attempt to find
2 anything that might be useful, one thing that we just
3 briefly discussed during our telephone conference was,
4 you know, I mentioned I didn't think that North Dakota
5 would be issuing discovery in this case and wondered
6 whether Montana or Wyoming might issue discovery and one
7 thing that was brought up was that maybe, you know, it
8 would be sufficient to just have North Dakota produce
9 documents related to the compact and try to find
10 everything we have and just give all that to the parties
11 and I've made some effort to at least locate those
12 documents. There are some that are in our state
13 engineer's office and there are some that are in our
14 archives, but I may be in a position in the meantime
15 here to be able to just send CDs out or in electronic
16 format send out, you know, a very, you know, broad
17 response, I guess, and so I don't know whether that's
18 helpful at this point.

19 It would take some time for us to do that and
20 then we'd probably want to Bate stamp them, but I guess
21 I just am looking for guidance whether that would be
22 helpful or if we should wait to identify issues and deal
23 with this in formal discovery.

24 MR. MICHAEL: Your Honor, this is Pete Michael,
25 if I might respond to that.

1 SPECIAL MASTER THOMPSON: Sure.

2 MR. MICHAEL: We, of course, went through that
3 process several years ago and identified quite a few
4 documents and we've got them on CD. So we kind of have
5 a fairly good notion of what we've got.

6 I suspect Montana's got a decent notion of what
7 they have, but not knowing what North Dakota has, if
8 they were willing to start that process right now, that
9 would be some nice information for I think Montana and
10 Wyoming to have is just what the universe of North
11 Dakota's documents look like when we're making discovery
12 plans when this does come back from the Supreme Court.

13 So if they were willing to do that and it
14 wasn't too much trouble, I think it could be beneficial
15 to know what was there and we could -- if we wanted to
16 look at them, we could or whatever, but I think it might
17 be helpful.

18 MR. DRAPER: Your Honor, this is John Draper.
19 I'd like to second that statement. I think it would be
20 helpful if Mr. Sattler could pursue that along the lines
21 he mentioned. It would be helpful to the parties to a
22 very high degree.

23 MR. SATTLE: And so a question for you,
24 Mr. Draper, and a question for you, Mr. Michael, I
25 assume that even if the Supreme Court were to deny

1 Montana's two exceptions, that this would still be
2 information that you would want in connection with the
3 various other issues?

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

6 SPECIAL MASTER THOMPSON: So then Mr. Sattler,
7 that is a great offer and it sounds as if that would,
8 indeed, help move this case along and so if you would be
9 willing to -- well, to do that, that would be excellent.

10 MR. SATTLE: I will. Do you think -- one
11 thing that might take more time, certainly will take us
12 some time to put everything into electronic format, I
13 know some of it is, but, you know, I think it will be
14 helpful to Bate stamp documents and so I could probably
15 do it much quicker if I didn't have to do that because
16 there is a lot of them and I think it would just take
17 probably making hard copies of what we have in
18 electronic format, putting numbers on them and then
19 re-putting them into electronic format.

20 But does that sound -- I mean, when discovery
21 gets going here, I imagine we'll want to have Bate
22 stamped documents.

23 SPECIAL MASTER THOMPSON: I think so.
24 Mr. Michael, Mr. Sattler, do you have a different view?

25 MR. MICHAEL: Go ahead, John.

1 MR. DRAPER: Your Honor, this is John Draper.
2 I think they should be Bate's numbered and it probably
3 would be good for counsel to confer as Mr. Sattler gets
4 ready to do that, just so that we have a rational,
5 comprehensive Bate numbering scheme that would be
6 consistent with later Bate's numbering.

7 MR. SATTLER: This is Todd again. You know, I
8 can do that. Maybe if I get started right away, could
9 we put a ND in front of ours and just start numbering?

10 MR. DRAPER: This is John Draper again. I
11 don't really think of any reason why that won't work.
12 At the moment anyway, that sounds good.

13 MR. MICHAEL: I agree with that because we've
14 done a little bit of that already for the stipulated
15 record. I think we had, you know, WY in front of some
16 documents, so I would think that that would probably be
17 sufficient.

18 SPECIAL MASTER THOMPSON: Excellent.
19 Mr. Sattler, you have a sense of timing on completing
20 that task?

21 MR. SATTLER: I don't -- let me see whether I
22 can get it done within a month and if it's going to be
23 more than that or if I'm running into difficulties, I'll
24 let you know or let the parties know, I guess. Does
25 that sound like a plan?

1 SPECIAL MASTER THOMPSON: Yes. Why don't I do
2 this, I will put in my order that you'll be doing this,
3 but I won't put a specific date and to the degree that,
4 you know, there poses, you know, any problem at some
5 point, then you or the other parties can get back in
6 touch with me.

7 MR. SATTLER: You bet. That will work and I
8 hope -- I mean I don't know whether anything has to go
9 in the order. I hope this is with the understanding
10 that we aren't going to be very much at least involved
11 when there are -- when formal discovery starts.

12 MR. DRAPER: Your Honor, if the people are
13 looking for a comment on that, I think at least
14 Montana's position is that we do have the normal
15 discovery opportunities with respect to all the parties
16 and we would want to reserve that with respect to not
17 only Wyoming, but also North Dakota at this point.

18 This may turn out to be all that we believe we
19 need from North Dakota, but we certainly are not willing
20 to commit to that at this point.

21 MR. MICHAEL: John Michael speaking. I think a
22 good thing for all of us to keep in mind as we go
23 through the case management process putting something
24 together to just remember that we may want to make
25 special provision was North Dakota on various topics.

1 MR. SATTLER: That's all I'm really asking for
2 at this point, and I'm more than happy to do what we've
3 been talking about with that understanding.

4 SPECIAL MASTER THOMPSON: Excellent.

5 MR. SATTLER: Just so we're clear, I mean my
6 hope would be to send out the CDs with everything on
7 them and send them to Wyoming and Montana.

8 MR. DRAPER: That would be much appreciated by
9 Montana.

10 MR. MICHAEL: I guess if the amici wanted to
11 comment on that, we certainly would like a set of that,
12 Wyoming.

13 MR. WIGMORE: Mike Wigmore for Anadarko. We
14 don't require it at this point.

15 MR. DRAPER: I assume the United States, do you
16 want a set at this time?

17 MR. JAY: I think to be safe, if it's no
18 trouble to duplicate another CD-ROM, then yes, we would.
19 We're not certain what our role will be going forward
20 and I don't anticipate that we would want the parties to
21 have to copy us on all discovery, but from what
22 Mr. Sattler has described, it sounds like for this round
23 at least we should be included in this round.

24 MR. WIGMORE: Your Honor, this is Mr. Wigmore
25 again. And Todd, if it's okay, if it's all electronic,

1 if it's not too much of a problem just to run another
2 DVD, I guess there is no reason not to look at it at
3 this point, because as you know, some of the groundwater
4 issues that we discussed at some point are some of the
5 issues that we're concerned about. If it's a DVD, it's
6 easy enough.

7 MR. SATTLER: It's fine with me to send it as
8 long as the Special Master is okay with proceeding that
9 way.

10 SPECIAL MASTER THOMPSON: I think this is
11 probably different than the other types of discovery in
12 that this is almost legislative material with respect to
13 the compact and given that you're going to be producing
14 it in electronic form, presumably it's not going to be
15 difficult to produce an additional copy. So I would
16 suggest sending it to the other two parties and then to
17 any of the amici that request a copy and if for any
18 reason producing another electronic copy is going to run
19 you any significant expense, then I think you can
20 certainly request that they reimburse you for that.

21 MR. SATTLER: Okay. Yeah. I don't think, you
22 know, running more copies will increase the expense.
23 And I don't want to worry at this point about the
24 expense of doing all of this. So, you know, maybe we
25 may want to deal with that later, but for now we'll get

1 going on this.

2 MS. WHITEING: This is Jeanne Whiteing. I
3 would request a copy on behalf of the Northern Cheyenne
4 tribe.

5 SPECIAL MASTER THOMPSON: So Mr. Sattler, it
6 sounds like you don't have to remember who wants it and
7 who doesn't. Everyone wants a copy. You're very
8 popular today.

9 MR. SATTLER: Very good. We'll get working on
10 that.

11 SPECIAL MASTER THOMPSON: Thank you very much.
12 You're popular with me also for suggesting another way
13 we can advance this while we're waiting for the Supreme
14 Court to decide on Montana exception.

15 MR. SATTLER: Okay.

16 SPECIAL MASTER THOMPSON: Anything else? Okay.
17 If not, then I think we can adjourn this conference and
18 we'll wait and see what the Supreme Court decides to do
19 with respect to Montana's exceptions at the beginning of
20 October.

21 MR. DRAPER: Very good, Your Honor. Thank you
22 very much.

23 SPECIAL MASTER THOMPSON: Thanks again to all
24 of you and have a great weekend.

25 (Whereupon, at 9:30 a.m., the conference was adjourned.)

1 STATE OF CALIFORNIA)
2 :
3 COUNTY OF SAN DIEGO)

4
5 I, Kathleen A. Powell, CSR No. 2778, hereby certify
6 that I reported in shorthand the above proceedings on
7 Friday, September 17, 2010, at 2224 Third Avenue, in the
8 City of San Diego, County of San Diego, State of
9 California; and I do further certify that the above and
10 foregoing pages, numbered from 5 to 20, inclusive,
11 contain a true and correct transcript of all said
12 proceedings.

13 DATED: September 25, 2010

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KATHLEEN A. POWELL
CSR NO. 2778