

No. 137, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

TRANSCRIPT OF STATUS CONFERENCE

The Byron White United States Courthouse
1823 Stout Street, 1st Floor Courtroom
Denver, Colorado 80257

October 8, 2009 - 11:42 a.m.

1 A P P E A R A N C E S

2 SPECIAL MASTER:

3 BARTON H. THOMPSON, JR.
4 Jerry Yang & Akiko Yamazaki Environment
5 & Energy Building, MC-4205
6 473 via Ortega
7 Stanford, California 94305
8 (650) 723-2518

9 For the Movant Anadarko Petroleum Corporation:

10 MICHAEL B. WIGMORE, ESQ.
11 DAVID B. SALMONS, ESQ.
12 Bingham McCutchen, LLP
13 2020 K Street NW
14 Washington, DC 20006-1806
15 (202) 373-6792

16 For the Plaintiff:

17 JOHN B. DRAPER, ESQ.
18 JEFFREY J. WECHSLER, ESQ.
19 Montgomery & Andrews
20 325 Paseo de Peralta
21 Santa Fe, New Mexico 87501
22 (505) 982-3873

23 JENNIFER M. ANDERS, ESQ.
24 Assistant Attorney General
25 Montana Attorney General's Office
26 215 North Sanders
27 Helena, Montana 59601
28 (406) 444-2026

29 For the Defendant State of Wyoming:

30 PETER K. MICHAEL, ESQ.
31 Senior Assistant Attorney General
32 DAVID WILLMS, ESQ.
33 Assistant Attorney General
34 Wyoming Attorney General's Office
35 123 Capitol Avenue
36 Cheyenne, Wyoming 82002
37 (307) 777-6196

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1 A P P E A R A N C E S (Continued)

2 For the Defendant State of North Dakota:
3 TODD A. SATTLER, ESQ.
4 Assistant Attorney General
5 North Dakota Attorney General's Office
6 500 North 9th Street
7 Bismarck, North Dakota 58501-4509
8 (701) 328-3640

9 For the United States as Amicus Curiae:
10 JAMES J. DUBOIS, ESQ.
11 United States Department of Justice
12 Environment & Natural Resources Division
13 1961 Stout Street, 8th Floor
14 Denver, Colorado 80294
15 (303) 844-1375

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

2 SPECIAL MASTER: So what I would like to do
3 is just have a brief status conference and unless
4 anyone has any objection I see no reason not to just
5 do it in this particular setting. The court reporter
6 is here and that way we can have it all on the record.

7 What I am hoping is that I can issue a
8 memorandum opinion on this motion sometime by the end
9 of next week, and I know I've been optimistic in my
10 estimates in the past, largely because when I have
11 started writing some of the opinions they have even
12 turned out to be more complicated than I originally
13 expected, but I am aiming as I said to come out with a
14 memorandum opinion sometime next week on this
15 particular motion.

16 I have already begun to take the two
17 memorandum opinions that I've issued earlier and
18 pulled those together into my first interim report to
19 the Supreme Court, so as soon as I issue a memorandum
20 opinion on this particular motion then I will
21 integrate that in also so that I can go to the Court
22 with a report both on Wyoming's motion to dismiss and
23 on Anadarko's motion to intervene.

24 I would like to get that to the Court as
25 quickly as possible so that the Court hopefully will

1 be able to decide -- assuming any of you file
2 exceptions, will be able to decide whether or not it
3 wants to hear those exceptions and then resolve them
4 during this particular term.

5 And I know that we're running probably
6 somewhat short on time, so my hope will be that if I
7 can get the memorandum opinion on Anadarko's motion to
8 intervene done next week that the following week I can
9 circulate to all of the parties a draft of that first
10 interim report, and I plan to circulate it to all of
11 the parties.

12 And Anadarko, if I decide not to grant your
13 motion to intervene I would still circulate a copy to
14 you because obviously it would be relevant to your
15 particular motion. I will also send a copy to the
16 United States, because I would love to have you review
17 it, make sure that I have not made any errors in terms
18 of stating your arguments or any obvious errors in
19 actually stating what a particular State law or case
20 provides. Obviously you might very well disagree with
21 my conclusions in reading those, but again I just want
22 to make sure that that first report is as accurate as
23 possible.

24 So what I would like if possible would be
25 that people could review that and get comments back to

1 me within a week of when I give it to you. Again, I'm
2 not expecting any arguments in response to that draft.
3 I really just want you to review it and make sure that
4 I am providing the Court with an accurate picture of
5 your argument.

6 So hopefully no one is going to be out of
7 town or if they're going to be out of town somebody
8 else in their office can handle that particular
9 matter, and then what I'll do is I will make any
10 corrections that are necessary and have that printed
11 and filed with the Court.

12 So any questions or thoughts on the first
13 interim report?

14 So then the second thing as I mentioned, once
15 I file that first interim report to the Supreme Court
16 we won't have any further proceedings in this matter
17 during the period of time that it's up for the --
18 before the Court, but I would like as much as possible
19 to have you utilize that time so that -- assuming the
20 Supreme Court doesn't decide to dismiss the entire
21 matter, that when it comes back we're ready to proceed
22 forward with discovery, summary judgment motions and
23 the like.

24 So what I would ask is that during the period
25 of time this is before the Supreme Court that counsel

1 for all of the parties, and if I grant Anadarko's
2 motion to intervene I'll obviously include you, if the
3 parties could then confer during that period of time
4 and see whether or not you can at least begin to agree
5 on a process for moving forward once we get back.

6 So does that sound fine? When I mentioned
7 this on the telephone call before everyone seemed to
8 feel that that was something that you would be willing
9 and able to do. So I see a nod of heads. I assume
10 that's yes?

11 MR. MICHAEL: Yes.

12 SPECIAL MASTER: Montana, that's all right
13 with you too?

14 MR. DRAPER: Yes, Your Honor.

15 SPECIAL MASTER: Great. Depending on how
16 long it takes for the Supreme Court to resolve any
17 exceptions then I might just call a telephone
18 conference status during that sort of -- just again to
19 check on parties and see how you're doing on
20 conferring and coming up with a procedure for moving
21 forward once we come back. But otherwise I'll leave
22 it to the Court to address the case during that period
23 of time.

24 Yes, sir?

25 MR. DRAPER: Your Honor, the State of Montana

1 is planning to take up your invitation to file a
2 motion for summary judgment on the tributary issue,
3 and we expect to file that brief on Monday. So I
4 wanted to alert you to that and perhaps use this
5 occasion to determine a schedule for a briefing on
6 that. We do expect to file that on Monday, so I
7 wanted to alert the parties and the Court to that.

8 SPECIAL MASTER: All right. Okay, so this
9 complicates matters just a little bit, although I
10 certainly invited it, so I can't complain.

11 So let me start with you, Mr. DuBois. Do you
12 have any sense of what the Supreme Court's scheduling
13 is like at the moment as to how far ahead they're
14 scheduling hearings?

15 MR. DUBOIS: No, Your Honor, I don't. Sorry.

16 SPECIAL MASTER: Because I think there are
17 two things that I'm trying to balance. The first is
18 that to the degree that there are some preliminary
19 matters that can narrow the issues that need to be
20 resolved after the case comes back from the Supreme
21 Court I would like to do that, and it would be nice if
22 all of those issues were in front of the Court when I
23 file my first interim report so that they can rule on
24 those if there are exceptions that are filed.

25 But at the same time the last thing I want to

1 do is, for example, to get a first interim report up
2 there in January and find out the result of that is
3 that the Supreme Court is interested in hearing the
4 exceptions and they won't be able to do that until the
5 first Monday of the October term, so I have a little
6 bit of tension between those two goals.

7 What I am tempted to do is to call the clerk
8 of the court tomorrow and get a sense of when
9 arguments are being scheduled and if the Court were to
10 hear exceptions in this case what would be the latest
11 that I could get a first interim report to the Supreme
12 Court in this term, give them the opportunity to
13 invite exceptions, look at those exceptions, and if
14 they decide to hear them then to actually schedule a
15 hearing.

16 Mr. DuBois?

17 MR. DUBOIS: Just for a frame of reference,
18 Your Honor, the South Carolina first interim report I
19 think was November of 2008. The brief on the
20 exceptions was completed by February or March, and
21 they still weren't going to hear it until October 5th.

22 SPECIAL MASTER: So we're already beyond that
23 time.

24 MR. SALMONS: Your Honor, I think it's
25 probably worth making the phone call to confirm. My

1 understanding is that the Court is currently -- still
2 has most of March and April of its calendar to fill
3 for this term and that the cutoff for having something
4 considered for the final conference, to have it be
5 heard for this term would probably be sometime mid
6 December, perhaps early January, and so all the
7 briefing would have to be completed a couple weeks
8 prior to that time. I'm 80 percent sure that's about
9 where they are.

10 SPECIAL MASTER: What I will do is I will, as
11 I said, call the clerk of the Supreme Court tomorrow
12 and talk about the timing issues here, and assuming
13 that hearing the motion for summary judgment does not
14 delay when the Supreme Court can resolve any
15 exceptions to the first report -- which would be
16 either they could hear it this year and I can still
17 get it to them or it might be that it's really too
18 late. It's already going to be in October of next
19 year and so we don't have to worry about the timing as
20 much.

21 But assuming that I can get a motion to
22 dismiss right now I would like to do that, and that
23 might be in a relatively expeditious time frame. If,
24 however, I don't feel as if I can actually hear that
25 motion and get an interim report to the Supreme Court

1 on a timely basis then I might put that motion off
2 until after the Supreme Court rules. It all depends
3 on what I hear. But I appreciate you letting me know
4 that you're planning on filing that motion on Monday.

5 So let me ask counsel for Wyoming, is
6 everyone planning on being around the office for the
7 next several weeks?

8 MR. MICHAEL: Yes, Your Honor.

9 SPECIAL MASTER: I appreciate that, and as I
10 said if I have to put this on a short calendar I
11 appreciate all the parties doing everything they can
12 to comply with that particular calendar. I don't plan
13 to do anything that would be much tougher than what
14 you would find in Federal District Court, so I promise
15 not to put people on too short of time frame.

16 Okay, any other matters to discuss this
17 morning in terms of the status of the matter?

18 Nothing. Okay, again thank you very much for
19 both the briefing and the oral arguments. As I said,
20 they were all very helpful. So we're adjourned.

21 (Proceedings concluded at 11:54 a.m.)

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1 REPORTER'S CERTIFICATE

2 I, Cheryl A. Palmer, a Registered
3 Professional Reporter and Notary Public within the
4 State of Colorado, appointed to take the foregoing
5 status conference, do hereby certify that the
6 proceedings were taken by me at 1823 Stout Street, 1st
7 Floor Courtroom, Denver, Colorado, on October 8, 2009;
8 that the proceedings were thereafter reduced to
9 typewritten form by means of computer-aided
10 transcription; that the foregoing is an accurate
11 transcript of the proceedings at that time.

12 I further certify that I am not related to
13 any party herein or their counsel and have no interest
14 in the result of this litigation.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my Notarial Seal this 13th day of
17 October, 2009.

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22 My commission expires October 23, 2010.

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CHERYL A. PALMER
Registered Professional Reporter

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PLEASE ATTACH TO YOUR COPY OF THE
STATUS CONFERENCE

Re: Montana v. Wyoming and North Dakota
No.137, Original - United States Supreme Court
Date of Status Conference: October 8, 2009

THIS TRANSCRIPT HAS BEEN FILED

- XXX Signature waived or not required
- _____ Reading and signing was not requested by the deponent
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- _____ Unsigned; signed signature page and change sheets, if any, to be filed at trial
- _____ Signed by the deponent with no changes
- _____ Signed by the deponent with changes, copy of which is enclosed
- _____ Unsigned, with changes, copy of which is enclosed

FILED WITH: SPECIAL MASTER BARTON H. THOMPSON, JR.

DATE FILED: _____

RECEIVED BY: _____

Enclosures: (As above noted)

- cc: Michael B. Wigmore, Esq.
- Jennifer M. Anders, Esq.
- John B. Draper, Esq.
- Peter K. Michael, Esq.
- James J. DuBois, Esq.
- Todd A. Sattler, Esq.