

NO. 137, ORIGINAL

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

STATUS CONFERENCE

OCTOBER 25, 2012

Reported by: Cynthia J. Vega, RMR, CSR 6640, CCRR 95

1 TELEPHONIC APPEARANCES

2

3 SPECIAL MASTER BARTON H. THOMPSON, JR.

4 STANFORD UNIVERSITY

5 JERRY YANG AND AKIKO YAMAZAKI

6 ENVIRONMENT & ENERGY BUILDING

7 473 Via Ortega, Mail Code 4205

8 Stanford, California 94305

9 T (650) 721-1488

10 buzzt@stanford.edu

11

12 For the State of Montana:

13 MONTGOMERY & ANDREWS, P.A.

14 BY: JOHN B. DRAPER

15 SPECIAL ASSISTANT ATTORNEY GENERAL

16 DONNA OMEROD, PARALEGAL

17 325 Paseo de Peralta

18 Santa Fe, New Mexico 87501

19 T (505) 982-3873 F (505) 982-4289

20 jdraper@montand.com

21

22

23

24

25

1 TELEPHONIC APPEARANCES

2
3 For the State of Montana:

4 MONTANA ATTORNEY GENERAL'S OFFICE

5 BY: JENNIFER ANDERS

6 ASSISTANT ATTORNEY GENERAL

7 215 North Sanders

8 Helena, Montana 59620-1401

9 T (406) 444-2026 F (406) 444-3549

10 janders@mt.gov

11
12 For the State of Wyoming:

13 WYOMING ATTORNEY GENERAL'S OFFICE

14 BY: PETER K. MICHAEL

15 CHIEF DEPUTY ATTORNEY GENERAL

16 DAVID J. WILLMS

17 CHRISTOPHER BROWN

18 JAMES KASTE

19 SENIOR ASSISTANT ATTORNEYS GENERAL

20 MATTHIAS SAYER, ESQUIRE

21 200 West 24th Street

22 123 Capitol Building

23 Cheyenne, Wyoming 82002

24 T (307) 777-7841 F (307) 777-6869

25 pmicha@state.wy.us

TELEPHONIC APPEARANCES

For the State of North Dakota:

NORTH DAKOTA ATTORNEY GENERAL'S OFFICE

BY: JENNIFER VERLEGER

ASSISTANT ATTORNEY GENERAL

500 North Ninth Street

Bismarck, North Dakota 58501-4509

T (701) 328-3640 F (701) 328-4300

jverleger@nd.gov

For Amicus The United States:

UNITED STATES DEPARTMENT OF JUSTICE

ENVIRONMENT & NATURAL RESOURCES

DIVISION OF NATURAL RESOURCES SECTION

BY: JAMES J. DUBOIS

1961 Stout Street, 8th Floor

Denver, Colorado 80294

T (303) 844-1375

james.dubois@usdoj.gov

1 TELEPHONIC APPEARANCES

2
3 For Amicus Anadarko Petroleum Company:

4 BINGHAM, McCUTCHEN, LLP

5 BY: MICHAEL B. WIGMORE

6 2020 K Street N.W.

7 Washington, D.C. 20006

8 T (202) 373-6000 F (202) 373-6001

9 michael.wigmore@bingham.com

10
11 * * * * *12
13
14
15
16
17 TELEPHONIC STATUS CONFERENCE taken on Thursday,
18 October 25, 2012, before me, Cynthia J. Vega, CSR
19 No. 6640, beginning at the hour of 11:04 a.m., at
20 401 West A Street, Suite 750, in the City of San Diego,
21 County of San Diego, State of California.
22
23
24
25

1 SAN DIEGO, CALIFORNIA, THURSDAY, OCTOBER 25, 2012

2 11:04 A.M.

3

4 SPECIAL MASTER THOMPSON: This is the Special
5 Master. I'm going to ask for the various parties to
6 identify themselves for the record, and I will begin
7 with Mr. Draper representing Montana.

8 MR. DRAPER: Thank you, your Honor. This is
9 John Draper, counsel of record for Montana. Also on the
10 phone are Jennifer Anders and my assistant Donna Omerod.

11 SPECIAL MASTER THOMPSON: Great. Thank you.
12 Next for Wyoming, Mr. Michael.

13 MR. MICHAEL: Yes, your Honor. This is Peter
14 Michael for Wyoming. I have four attorneys with me.
15 They are James Kaste, Chris Brown, Matthias Sayer and
16 David Willms. The last two are Matthias Sayer,
17 S-a-y-e-r, and David Willms, W-i-l-l-m-s.

18 SPECIAL MASTER THOMPSON: Next, do we have
19 counsel for North Dakota?

20 MS. VERLEGER: Yes, your Honor. This is
21 Jennifer Verleger. I'm by myself.

22 SPECIAL MASTER THOMPSON: Thank you.

23 And next will be counsel for the various Amici.
24 So first United States.

25 MR. DUBOIS: This is James Dubois. Good

1 morning, your Honor.

2 SPECIAL MASTER THOMPSON: Good morning.

3 And then I did receive notice from the Northern
4 Cheyenne tribe. Ms. Whiteing will not be joining us
5 this morning.

6 And so then finally, Anadarko Petroleum
7 Corporation, Mr. Wigmore.

8 MR. WIGMORE: Yes, your Honor. This is Michael
9 Wigmore, Bingham, McCutchen for Anadarko.

10 SPECIAL MASTER THOMPSON: Thank you.

11 So again, this is a status conference and there
12 are four things that are on my agenda.

13 First of all, I want to discuss the
14 September 28 memorandum opinion on Wyoming's renewed
15 motion for partial summary judgment.

16 Second of all, I wanted to get an update from
17 the parties on discovery and see how that is going. I
18 have been following and reading the updates that you
19 provided me and so I'm familiar with that. That all
20 made it sound like everything was going very well. I
21 just wanted to make sure that that was indeed all sides'
22 perception.

23 Third of all, I just wanted to begin the
24 process of setting a date for the trial next year.

25 And then, fourth of all, deal with any other

1 matters that any of the parties for Amici want to
2 discuss.

3 So let's start with the September 28, 2012
4 memorandum opinion. I will apologize at the very outset
5 for the fact that there are typos in the memorandum
6 opinion. Hopefully you got notice of that when it was
7 sent out to you. I was out of town. I wanted to get
8 that out to you, though, as quickly as possible. And
9 having gone through it, although I see there are a
10 number of typos, I hope that none of those caused any
11 ambiguity in the substance of the ruling.

12 After the hearing today, I will go back and
13 correct those and issue a final version of that. And I
14 want to have a chance to talk to you about the
15 memorandum opinion before then.

16 So at this stage, what I'm most interested in
17 is whether either Montana or Wyoming or any other
18 parties have any questions about the memorandum opinion
19 or what my ruling was.

20 Just to start out the discussion, I did, as you
21 know, rule for Wyoming on a number of the years,
22 including some of the years that were contested. And
23 for those years, I have concluded that there was not
24 sufficient evidence in the record to show a material --
25 regarding material fact and, therefore, for those

1 particular years, I have ruled in favor of Wyoming. I
2 do not plan to change my mind on any of those.

3 In the other years, as I said, I think that
4 Montana did provide enough evidence to defeat Wyoming's
5 motion for partial summary judgment, but as I also
6 expressed in the opinion, I feel that we -- that the
7 evidence there is frequently relatively vague, and I do
8 not want to get to trial without being more specific as
9 to what type of notice was provided, and by whom, as
10 close as we can tell, when, for all the years, with the
11 exception of 2004 and 2006, where I think the record is
12 fairly clear. And so that's why I have asked Montana to
13 provide the supplemental evidence by December 1st.

14 As I mentioned in the opinion, I realized that
15 for a lot of these years probably memories are fairly
16 vague and hazy, but hopefully by going back and looking
17 at some of the other paper evidence from those
18 particular years, people's memories will get better.
19 And it is Montana's burden ultimately to show that it
20 provided notice of those years.

21 So that's a very quick summary what the basis
22 of the opinion was.

23 So at this point, I'd be happy to answer any
24 questions or take any comments on it.

25 MR. MICHAEL: Your Honor, I will break the ice.

1 This is Peter Michael.

2 I don't have any comments or questions on the
3 opinion at this point. As you mentioned typos, but
4 presumably they will be handled.

5 SPECIAL MASTER THOMPSON: Okay. Thanks.

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

7 With regard to the December 1st deadline, I
8 wonder if we might be given some more time on that, say,
9 a month, given the fact that we're dealing with a lot of
10 other scheduling issues and depositions.

11 SPECIAL MASTER THOMPSON: So I realize that
12 you're concerned whether or not you would be able to
13 meet the various deadlines that we set out in the
14 revised case management order, Number 10, on April 17,
15 2012, but in those, Montana is supposed to disclose its
16 expert reports and other exhibits no later than Friday,
17 January 4. And presumably, before even then, you will
18 want to know whether there is any problem with the
19 information that you will provide with respect to the
20 notices, but I'm willing to give you a little bit of
21 leeway on this; but that strikes me as the major issue
22 at this point.

23 MR. DRAPER: Well, your Honor, that, I think,
24 fits -- and this is John Draper again, for the court
25 reporter.

1 That is related to the other issues that come
2 up under the next item with respect to depositions, so
3 it may be better to consider that after we've talked
4 about the status of discovery.

5 MR. MICHAEL: Your Honor, this is Peter
6 Michael.

7 May I comment on the request for more time?

8 SPECIAL MASTER THOMPSON: You certainly may.

9 MR. MICHAEL: We have heard that before. It
10 is, as you noted, and I think it is imperative, that
11 we've been at this for, I guess, almost going on two
12 years, this concept of eliminating the years that were
13 not -- where no notice was given. And it does impact
14 discovery, although you'll hear from us in a moment,
15 that we're ready, willing and able to keep discovery
16 moving without any difficulty. But we do -- all the
17 expert opinions and even discovery are impacted to some
18 degree with years, because you do have to work on years
19 if they're going to be in the case.

20 And so, seems to me, that December 1st, given
21 that we've been at this for a couple of years and
22 Montana has had a number of opportunities to come
23 forward, you know, last fall of 2011, then in June of
24 2012, had an opportunity to gather their evidence of
25 notice. So, seems to me, December 1st was very

1 generous, overly generous, actually, we think, but it is
2 what it is, and more time at this point seems -- we
3 don't think it is a good idea.

4 SPECIAL MASTER THOMPSON: So before getting
5 into an argument on this, because I do think the issues
6 are all interlinked and I hear a request for changes to
7 some of the other dates coming in a minute, why don't we
8 move on to the discussion of discovery and also dates
9 that are coming up for disclosure of expert reports and
10 other exhibits.

11 So, Mr. Draper, since I have a feeling you're
12 going to be the one that has the most to say on this, do
13 you want to start?

14 MR. DRAPER: Yes, your Honor. This is John
15 Draper.

16 You're very perceptive there. We have
17 recently, a week or ten days ago, got free from the
18 post-trial briefing in the other case, and we have
19 turned our attention to the setting of depositions.
20 We've been in discussion with Wyoming about trying to
21 find dates. We've identified at this point, based on
22 the information we have available currently, something
23 in the neighborhood of 25 depositions that we need to
24 take, and they have a similar number that they want to
25 take of us.

1 And they've been -- as Mr. Michael suggested,
2 they've been willing to, as far as their schedules would
3 allow, accommodate us in getting those depositions done,
4 but they have not been able to completely accommodate us
5 in that regard. And we have a big number of depositions
6 to get through and, as a result of the help that those
7 depositions will provide us as we -- as our experts
8 finalize their reports, providing information that they
9 need to be aware of, and as we resolve some lingering
10 production issues with Wyoming, we need -- we need some
11 additional time before we submit our expert reports; and
12 I would so request.

13 As your Honor may recall, back when we first
14 learned that we were going to be forced into a trial in
15 the other case in August, we did ask for more time than
16 ultimately your Honor allowed us, but I believe it
17 was -- the order did recognize that, depending upon the
18 circumstances and the ability to show good cause, that
19 we could approach your Honor again about that. And we
20 are finding in this initial period where we're trying to
21 set these and get them done in a time that that
22 information can be available and helpful to our experts,
23 that really this time, across Thanksgiving and Christmas
24 here, is leading to the deadline of January 4th, is
25 insufficient.

1 We had -- back in, I think it was March or
2 April when we were discussing this before, we were not
3 sure exactly how things would work out with the other
4 trial and post-trial requirements.

5 It's turned out that there was something on the
6 order of 400 pages of briefing provided post-trial,
7 which we just finished a week or ten days ago. And so
8 we have been completely preoccupied by that, and we're
9 turning our -- we've turned our attention to the
10 additional discovery that's needed in this case just as
11 quickly as we could and trying to work that out with
12 Wyoming. As I say, they tried to be accommodating, but
13 they -- they're limited on how much they can do, and
14 given the time frame that we're under, given the
15 January 4th deadline, and that includes making their own
16 people available. They're, I think in good faith,
17 trying to do that. Still, it presents difficulties.

18 They said that, unlike us, providing the
19 non-State employee witnesses, that we're going to need
20 to track down the witnesses that we've identified that
21 they have listed as having knowledge of the matters
22 relevant to this case, that we're going to need to find
23 those people and arrange for those people to appear for
24 deposition. And it's just more than physically can be
25 done in the time frame that we have.

1 And so I would respectfully request that we be
2 allowed an additional two months in order to finalize
3 our expert reports and that the pretrial schedule would
4 be adjusted by two months.

5 So that's -- as you suspected, that's the
6 thought that I wanted to get across to you and I will
7 rest on that for the moment.

8 SPECIAL MASTER THOMPSON: Mr. Michael.

9 MR. MICHAEL: Your Honor, this is Peter
10 Michael.

11 I'm going to turn the mic over to James Kaste.
12 The reason is: He has been our lead over the last
13 two or three months in communications with Montana on
14 our depositions, what we wanted, what Montana has asked
15 for, and I think you'll benefit from his discussion, the
16 chronology, and where we stand on this, since specifics
17 are in order here, your Honor.

18 SPECIAL MASTER THOMPSON: Okay. Thank you.

19 Mr. Kaste.

20 MR. KASTE: Your Honor, I'm James Kaste. We
21 met at the hearing for the first time in July.

22 For the court reporter's benefit, my name is
23 spelled K-a-s-t-e.

24 Like Mr. Michael has said, I've been working
25 with the folks representing the State of Montana since I

1 entered my appearance in this case, attempting to
2 schedule depositions in this case. It would be helpful
3 for I think you to know that there hasn't been a
4 deposition taken in this case by the State of Montana
5 since the expiration of the stay, not because of the
6 lack of trying on the State of Wyoming's part. In fact,
7 through the months of August and September, we had
8 inquired several times about when we could set up the
9 depositions that Montana had requested. They gave us a
10 few names while the stay was in place.

11 Not hearing anything from them, finally in
12 October, I sent out some dates and set up -- made
13 arrangements for the depositions of the people on that
14 list and asked if that would work. I got back a thank
15 you, and then a request to take depositions of different
16 folks at different times. And we tried to work through
17 that. And when I said yes to that request, for the most
18 part, I got a new list a couple of days ago that added
19 another 17 people that had never been requested before,
20 and so I said yes to that list as well.

21 In fact, I've made myself available basically
22 every day in December and every day in November, that is
23 not a weekend or a holiday, to conduct the depositions
24 requested by the State of Montana.

25 So I wholeheartedly object to the idea that

1 there is too much to do in this little bit amount of
2 time. I think it is worthwhile to know that while we
3 have about 20-some folks on our list of individuals we
4 would like to depose, I told the State of Montana
5 yesterday that we will forego taking any of those
6 depositions before the end of the year so that we can
7 accommodate all the depositions they'd like to
8 complete -- we'll do them all. We'll do them all before
9 the beginning of the year because this litigation needs
10 to stay on track.

11 The State of Wyoming objects to any extension
12 of the expert designation deadline. This has not been a
13 secret. This deadline has been in place for quite some
14 time, and Montana's failure to get depositions done up
15 to this point is their own concern, but we'll do
16 everything we can to finish what they want to get done
17 so that we can meet these deadlines.

18 Finally, with regard to this sort of bizarre
19 statement that we've turned them loose in the wilderness
20 to find certain witnesses that aren't State employees,
21 those witnesses' identities and phone numbers and things
22 like that were disclosed on our witness list. And if
23 you want me to provide them again, I'll be happy to do
24 that.

25 What I've done to facilitate scheduling these

1 depositions is authorized the State of Montana to
2 contact these witnesses directly, work with them without
3 an intermediary, to set up dates that work for them, and
4 I'll be there.

5 So I don't know what more the State of Wyoming
6 could possibly do to assist Montana in maintaining this
7 deadline. And there is, thus far, no evidence, in my
8 opinion, of good cause that would require an extension
9 of the current schedule.

10 SPECIAL MASTER THOMPSON: Let me just ask a
11 follow-up question. So I notice, at all of the various
12 hearings and status conferences, that Wyoming has had a
13 number of attorneys who are involved in this case. Have
14 the two sides discussed at all having simultaneous
15 depositions? Is that something that is possible?

16 MR. KASTE: This is James Kaste from the State
17 of Wyoming.

18 I believe that is something that has been
19 discussed in the past that hasn't been suggested for the
20 completion of the depositions that -- this list of 17 or
21 18 new witnesses I got on October 23rd, it hasn't been
22 discussed for those purposes, but we'd be happy to do
23 it. We've got five attorneys in this room who are
24 ready, willing and able to defend depositions.

25 SPECIAL MASTER THOMPSON: So that was exactly

1 what I wanted to know. So the bottom line is, you are
2 willing to put additional attorneys, other than yourself
3 and Mr. Michael, on to depositions, if necessary, and
4 one thing that you are willing to discuss is the
5 possibility of doing simultaneous depositions?

6 MR. KASTE: Yes.

7 MR. MICHAEL: Your Honor, this is Pete Michael.

8 I may add, we have -- one of the attorneys
9 here, Matthias Sayer, just became eligible to apply to
10 the court. He should be admitted in no time, within a
11 couple of weeks. All five of us will definitely be
12 available. I mentioned that possibility back at the
13 hearing in July, so that's, I think, where you recall
14 hearing that from.

15 SPECIAL MASTER THOMPSON: So Mr. Draper?

16 MR. DRAPER: Yes, your Honor. This is John
17 Draper.

18 I think the major basis for our request is
19 for -- is based on the exigencies that we were subjected
20 to because of the other case. As far as the
21 availability of attorneys, I think I heard that the
22 availability of attorneys, they were -- Wyoming is now
23 saying that they would not insist on certain attorneys
24 being at certain depositions. That has -- in our trying
25 to think through when we can do this has been a

1 limitation that has been a problem, but I hear that
2 that's being removed.

3 As far as simultaneous depositions, I think
4 that that is -- that is a possibility. We have some
5 capability of doing that. I think it's not unlimited,
6 but yes, we can do some of that.

7 MR. KASTE: This is James Kaste on behalf of
8 the State of Wyoming.

9 I'd really like to clear up the idea that the
10 State of Wyoming has ever insisted on the presence of a
11 particular attorney at a deposition. That's never been
12 stated and it's never been a limitation on the conduct
13 of discovery in this case.

14 MR. DRAPER: Well, your Honor -- this is John
15 Draper -- if you want me to cite the situation, I'll be
16 glad to, but if they're saying they're not going to do
17 that, that's good enough for me.

18 SPECIAL MASTER THOMPSON: Thanks.

19 Let me -- just putting aside for a moment the
20 question of dates, I would like to get both sides' view
21 on how discovery is currently going. Are there any
22 concerns or issues, other than the amount of time that
23 these deadlines currently provide?

24 MR. DRAPER: Your Honor, this is John Draper.
25 We do -- we do need to get back to Wyoming on

1 some concerns that we have about the sufficiency of the
2 production that they have made at this point, and we're
3 doing our best to marshal that set of issues and get
4 with them about that to see if we can't resolve that.

5 MR. KASTE: Your Honor, this is James Kaste on
6 behalf of the State of Wyoming.

7 I heard that same statement in July in my first
8 foray into this case and I've heard it at every status
9 report since, have not received any communications from
10 the State of Montana identifying what their particular
11 concerns are with regard to the State of Wyoming's
12 discovery production. When we finally get that, we'll
13 fix our discovery, if there was something lacking in it,
14 but without any information about what the concerns are
15 over the last four months, I can't really address how we
16 can fix this asserted problem.

17 I can tell you that the State of Wyoming served
18 some supplemental discovery requests on the State of
19 Montana at the conclusion of the stay. I don't expect
20 that we will receive satisfactory answers to that in
21 light of the specious objections that we got the other
22 day. And I fully anticipate filing a motion to compel
23 in the next few weeks when I receive answers to our
24 second set of interrogatories. And I think the court
25 ought to be aware that that's coming.

1 SPECIAL MASTER THOMPSON: Thank you.

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

3 Mr. Kaste cites the indications that we have
4 placed in the status reports to you, and that's quite
5 right. But as I think your Honor's aware, we've been
6 involved in a trial, post-trial briefing, during the
7 very period that he's complaining about and realize that
8 we need to get that to them. But you asked what
9 outstanding matters there were and that's definitely
10 outstanding.

11 SPECIAL MASTER THOMPSON: Okay. So at the
12 moment, I am not inclined to change the deadlines for
13 the disclosure of expert reports. Based on what I've
14 heard so far, I'm not willing to do that.

15 Instead, I want the parties to work together to
16 see whether or not the necessary discovery can be
17 conducted and the expert reports disclosed as currently
18 scheduled.

19 I am not foreclosing the possibility,
20 Mr. Draper, if you believe that, despite all best
21 efforts, that it is impossible to meet those deadlines,
22 you are certainly free to file a motion -- and it can be
23 in a relatively simple form, but a motion that would
24 request additional time, but I'm very serious about
25 these deadlines and I'm very loathe to extend them any

1 further than I already did.

2 And my hope is, is that given all of the
3 attorneys that Wyoming is willing to put on this matter
4 and the fact that Montana has both its in-house counsel
5 and its external counsel, that there would be enough
6 attorneys on the Montana side also to try to move the
7 discovery forward.

8 I realize that this is a very compressed period
9 of time. And so again, I'm not foreclosing another
10 motion, but at least -- I'm not going to extend the
11 deadlines.

12 Similarly, I'm more than happy, if you need,
13 for example, an additional week for the declarations
14 showing the dates of notices, I'm perfectly happy to
15 give Montana that period of time, but my view is any
16 further time than that, we get too close to the other
17 deadlines and, in addition to the fact, it gets into a
18 period where probably going to be even more difficult
19 for you to actually get those declarations produced and
20 signed.

21 So that's my -- that's what I would be willing
22 to do. As I say, about a week more, but that's it. If
23 that will be helpful, I will provide that.

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

25 We would appreciate the additional week.

1 Thank you very much.

2 MR. KASTE: Let me bring up an issue, your
3 Honor, if I may.

4 James Kaste. Sorry. I forget to do that.

5 I can tell you, with regard to the discovery
6 that I sent out at the conclusion of the stay, it
7 preceded your ruling on the renewed motion for summary
8 judgment, but at least one of the questions in the
9 interrogatories, it mirrors very much the additional
10 information that you have asked Montana to provide in
11 your most recent ruling. The answers to that discovery,
12 just by virtue of the deadlines that have been set by
13 preexisting case management order, are due before
14 December 1. And I'd kind of like them answered. I'd
15 hate to see an objection to answering the questions that
16 I've propounded on the basis that, "Well, my responses
17 aren't really due until December 7th or 8th." I think
18 it might be worthwhile to address that issue up front.

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

20 I think Mr. Kaste's discovery requests are due
21 before January 1st; in other words, trying to preempt
22 the December 1 deadline. And I have expected that we
23 would provide the answer that we're able to provide at
24 that time. And if I'm subject to that, those would
25 simply be updated as necessary when we submit the

1 response to your Honor's order.

2 SPECIAL MASTER THOMPSON: So I'm not sure that
3 responded to Mr. Kaste's question.

4 Mr. Kaste, you wanted -- I don't want to speak
5 for you.

6 MR. KASTE: Well, your Honor, if I had my
7 druthers, what I would like is for him to answer for --
8 or not him -- excuse me -- the State of Montana to
9 answer the interrogatories that I propounded in
10 conformity with the deadlines in the case management
11 orders and not put off responding to those discovery
12 requests with the excuse that, "Hey, I don't have to
13 provide this information until the week after
14 December 1st."

15 This information that I've requested, frankly,
16 is just fundamental, elemental information about the
17 nature of Montana's claims that we haven't been provided
18 to this point.

19 As you well know, the dates on which calls were
20 made is pretty darn important and not information
21 currently in my possession and fundamental to the
22 continuation of discovery in this case.

23 What am I really looking at? What should my
24 experts really be looking at? What years? What dates?
25 Those kinds of things. And I'd like to have that in

1 conformity with the case management orders.

2 SPECIAL MASTER THOMPSON: So when -- first of
3 all, when are the interrogatory answers due?

4 MR. KASTE: Next Friday.

5 SPECIAL MASTER THOMPSON: What are the specific
6 questions that were asked?

7 MR. KASTE: This is James Kaste.

8 I believe the interrogatory answers, if I
9 remember correctly, are due next Friday, so
10 November 2nd. They were propounded prior to the
11 issuance of your ruling, so they're not duplicative of
12 the ruling. They are -- serendipitously, we asked the
13 same questions, because the questions that really matter
14 in this case really aren't that hard. So I'd just like
15 to have straightforward answers to those questions in
16 conformity with the time frames that apply to
17 interrogatories.

18 The question that comes to mind is: Tell me
19 when you made calls and what portions of the year that
20 you made calls you claim the State of Wyoming is liable
21 to the State of Montana. That's -- I'm not reading it,
22 but that's the gist of the first or second question in
23 there. I think I only asked eight, and every one of
24 them goes to the elements of Montana's claims.

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

1 I don't think anything I said was inconsistent
2 with answering those interrogatories on time, that the
3 suggestion that we'll say, "Hey, we're not going to do
4 it until a week after December 1st."

5 We are under an obligation, we feel, to answer
6 questions, unless the time frame's extended, at the time
7 that those are due pursuant to the case management plan.
8 And if that information needs to be updated at a later
9 time, that's also provided for.

10 SPECIAL MASTER THOMPSON: Okay. So let me -- I
11 think this is consistent with what both parties are
12 saying, is that the requirements and the deadlines under
13 the case management plan, Number 1, remain in place and
14 are not superseded by my request for declarations in
15 support of Montana's notices to Wyoming that I've
16 requested in my September 28, 2012 memorandum opinion.
17 And if, after receiving the interrogatory answers,
18 Wyoming has any motions that it wants to make in
19 connection with those or any efforts to supplement them,
20 then it is free to do that at that time.

21 MR. KASTE: This is James Kaste.

22 Thank you, your Honor. I just wanted to try
23 and avoid any potential problem there.

24 SPECIAL MASTER THOMPSON: Understood.

25 MR. DRAPER: This is John Draper.

1 Thank you, your Honor. I think that's all
2 consistent with the case management plan.

3 SPECIAL MASTER THOMPSON: And consistent with
4 what you just told me. I appreciate your comments,
5 Mr. Draper.

6 Okay. So I think that, unless other people
7 have questions, resolves the questions with respect to
8 the supplemental opinion and the discovery.

9 And just to be clear on the record, I'm just
10 looking at the -- on the dates, and so it turns out that
11 December 1st was a Saturday, so December 8th is a
12 Saturday.

13 So, Mr. Draper, I propose the 7th, so you don't
14 have to be in there on a Saturday. I'm willing to make
15 it the 8th, if you want to be there on Saturday.

16 MR. DRAPER: The 7th will be fine, your Honor.
17 Thank you very much.

18 For the record, this is John Draper.

19 SPECIAL MASTER THOMPSON: Okay. And so the
20 next -- is there anything else with respect to discovery
21 at this point?

22 MR. KASTE: Nothing from the State of Wyoming.
23 This is James Kaste.

24 SPECIAL MASTER THOMPSON: Thank you.

25 So that brings us to the question of the

1 setting of the trial. So under the current deadline as
2 set out in our case management order, Number 10, the
3 date for -- the final date for motion would be May 10,
4 2013, and that can include dispositive motions. So my
5 guess is that we are talking about having a trial
6 somewhere probably in the second half of the summer.
7 And so, of course, that can all change. I recognize
8 that, but I'm just curious as to -- I recognize that
9 from the standpoint of both sides -- or let me take that
10 back.

11 From the standpoint of Montana, you still might
12 want more time, you might request it, but let's assume
13 for the moment that, in fact, these deadlines hold
14 current, that motions have to be filed by May 10.

15 Thoughts from both sides as to when trial
16 should be set. I'm not asking for specific dates. I'm
17 just talking about general time of the year.

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

19 The motion deadline of May 10 would lead to
20 certain responsive briefing, which presumably would
21 occur during June, so the latter part of the summer or
22 early fall may be an appropriate time to think about
23 setting the trial.

24 SPECIAL MASTER THOMPSON: Mr. Michael?

25 MR. MICHAEL: Yes, your Honor, Peter Michael.

1 I guess I agree with that to some extent. It
2 would be 21 -- three weeks in May for the responses.
3 The motions would actually be filed on May 10. So I
4 don't know how much of June actually gets chewed up with
5 that. But I think it is an important point to be made
6 that where we go with trial is heavily affected by
7 dispositive motions. So it is very helpful, especially
8 if you're going to call a lot of witnesses, to have an
9 idea how big the case is with some lead time before you
10 start the trial.

11 And I would add just one other point. I'm not
12 looking right at the case management order right now. I
13 should be, but I'm sorry, I'm not. We have last days
14 for motions and you say including dispositive motions,
15 but it is often, when it comes time to trial, motions,
16 such as motions in limine and stuff, a lot of times it
17 is beneficial to have those closer to the trial date
18 than with the dispositive motions. And I think -- you
19 know, you don't know which witnesses you're going to
20 bother to file a motion in limine on or what evidence
21 you might do that if you don't even know if you need the
22 witness or the evidence.

23 So I think splitting those is a normal thing,
24 and I would suggest you might think about that, keep
25 that in mind as a possible amendment if we need to, to

1 the case management plan, to push those trial-based
2 motions back from the dispositive motions. It just
3 saves people a lot of extra effort that may be
4 unnecessary.

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

6 I don't disagree with that. Motions in limine
7 may be appropriate and we should look at how we provide
8 for that. And there are probably other constituent
9 deadlines that we will want to discuss among the parties
10 and propose to you.

11 One other consideration that occurs to me in
12 this context is that the case that went to trial on the
13 Republican River in August, and that we just now
14 finished the post-trial briefing on, may be subject to
15 exceptions that would be briefed during the -- during
16 the spring and that would lead to an argument setting
17 probably in October.

18 Typically, one needs essentially a month to get
19 ready for one of those Supreme Court arguments. And so
20 I would ask that we keep that in mind as we begin to
21 think about when trial would be set, and we may know
22 more about that as we get into the spring as to whether
23 there will be exceptions or not and on what schedule the
24 argument might be put.

25 MR. MICHAEL: Your Honor, this is Peter

1 Michael.

2 Just a quick response to that. There is a lot
3 of frustration here, as you probably can understand,
4 with -- from us, from us attorneys, and the State itself
5 with having a wagon hitched to the Republican River
6 horses, which we really didn't create that situation. I
7 think that's something that -- I don't want to be harsh,
8 but I understand counsel has to have more than one case
9 going, but we certainly feel at some point we're going
10 to have to get back on our own horse and not be hitched
11 to that horse.

12 SPECIAL MASTER THOMPSON: I understand the
13 positions of both sides on this issue. What I would
14 like to be able to do is to look over the next couple of
15 weeks at a tentative time frame for trial next year,
16 recognizing that it can change, but also hoping that by
17 setting a tentative time frame, we can at least avoid
18 vacations that could be scheduled at different times,
19 being scheduled in a way that makes it very difficult by
20 the time we get, for example, to late spring of next
21 year to actually find the date that works for everybody.

22 And so what I would like to ask is that if both
23 sides could, within the next week, say by a week from
24 tomorrow, which is November 2nd, if you could simply
25 provide Susan Carter by e-mail with any dates that you

1 know right now would be impossible for the lead counsel
2 on either side between, say, the beginning of August and
3 the end of October. And then what I can do is then take
4 a look to see what time periods might be remaining and
5 check potential courtroom availability and that will
6 then give us at least an initial date that we can all
7 try to keep free for next year.

8 And in responding to that, my view is that at
9 this point the only things that would prevent a trial
10 from being scheduled are weddings, anniversaries, things
11 that are -- or if you already have a vacation planned
12 and your tickets issued, that's what I want to know
13 about at this date.

14 MR. DRAPER: This is John Draper.

15 Very good, your Honor. Glad to do that.

16 SPECIAL MASTER THOMPSON: Thanks, John.

17 MR. DUBOIS: This is Jim Dubois.

18 I just was wondering as far as what the -- have
19 the parties tried to estimate how long the trial's going
20 to -- I mean, sort of thinking in terms of trial
21 scheduling, have the parties estimated how long the
22 trial is going to take and are -- is direct testimony --
23 is all testimony going to be live or is direct testimony
24 going to be written, things like that all affect sort of
25 how long you need to plan for and, therefore, where you

1 can slot things in.

2 SPECIAL MASTER THOMPSON: No. I agree with you
3 entirely. Thanks for bringing that up. I was about to
4 ask the two sides if they had any just rough estimate at
5 this point in time as to the likely length of the trial.
6 We have not discussed -- or at least I have not
7 discussed with the parties the question as to whether or
8 not all testimony will be live. And I don't think we're
9 really in a position to do that today, but we will need
10 to start doing that fairly soon. But at the moment, I
11 don't think that is necessary, but I would be interested
12 in the two parties' just very rough estimate, based on
13 any experience that you had before in these types of
14 cases, as to what you think the likely length of trial
15 will be. I know it is difficult, because we're still --
16 we still have discovery to conduct.

17 MR. DUBOIS: This is Jim Dubois again.

18 I will just point out that Mr. Draper's got a
19 variety of experiences that go from a couple of weeks
20 to -- what was Kansas versus Colorado, 200-some days,
21 John?

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

23 Yes, the extremes are out there, from two weeks
24 this past summer to 272 trial days in the Arkansas case
25 between Kansas and Colorado. That 272 days was spread

1 over 13 years.

2 But to then take the next step and answer your
3 Honor's question as to whether we have any even rough
4 estimate of the trial required for this case;
5 unfortunately, my answer is: No, I don't have an
6 estimate for you. I'm sorry.

7 MR. KASTE: Your Honor, this is James Kaste for
8 the State of Wyoming.

9 I agree, we are in a difficult position at this
10 point. We know so little about the plaintiff's case
11 that we -- it's impossible to identify how long it might
12 take to defend against it. I can tell you right now
13 that we are adamantly opposed to prepared testimony and
14 we would very much like to have all testimony be
15 presented live.

16 SPECIAL MASTER THOMPSON: So Mr. Draper and
17 Mr. Dubois, if you want to chime in here also. I could
18 obviously call around to some of the former Special
19 Masters. And again, I realize this is just impossible
20 to do any type of refined estimate at this point in
21 time, but in terms of the most -- of the various trials
22 that you've had, could you just give me sort of an
23 estimate about the amount of time that you've had for
24 each of them. I realize it is a range. I'm hoping it
25 is not in the 13-year, 270-plus-day range, but I would

1 be surprised if it is.

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

3 Those two examples that Mr. Dubois and I just
4 referred to are some of the more recent examples that we
5 have. I'm aware of some other cases. I can think, for
6 instance, the one over Ellis Island went to trial. I
7 think it was a month or two of trial in that case. I'd
8 have to run down the list of cases in my mind to see if
9 there were other trials that we might at least be able
10 to point to.

11 The first time that the Republican River case
12 went through, it settled before trial, so there actually
13 was no trial in that first phase of that case. But I'd
14 be glad to think through the list of at least ones in
15 the last couple of decades that I might be aware of and
16 describe those in some kind of joint filing with the
17 other parties, but those are what I think of at the
18 moment.

19 SPECIAL MASTER THOMPSON: Okay. So based on
20 this, if you could give Ms. Carter the dates that you're
21 unavailable from August through the end of the year.

22 MR. MICHAEL: Your Honor, this is Peter
23 Michael.

24 We can give it to you now. We're fine.

25 SPECIAL MASTER THOMPSON: Okay.

1 MR. MICHAEL: So if that helps, but we can
2 follow up with an e-mail so you have it in writing.

3 SPECIAL MASTER THOMPSON: That would be great.
4 If you can just let Ms. Carter know.

5 Let me also ask: At the very end of the last
6 status conference, there was a little bit of discussion
7 about location.

8 And, Mr. Michael, you had suggested that maybe
9 it could be hosted by the two states.

10 And, Mr. Draper, you raised the concern that
11 that was -- that would not be a neutral location, and
12 the trials have been historically held in neutral
13 locations, although you go back to the dispute between
14 California and Arizona, I think that was actually tried
15 in San Francisco. But you're certainly right, in recent
16 decades, it's always been a neutral location.

17 Any other thoughts on that particular subject,
18 other than what was said before?

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

20 Typically, what we've seen, and I think it
21 would be fine with us, is the trials have been held
22 where the Special Master resides. That's what we did in
23 August. That trial was in Portland, Maine, before a
24 Special Master Kayatta, who is located there.

25 The Arkansas River litigation between Kansas

1 and Colorado was held in Pasadena. Special Master
2 Arthur Littleworth lives in that area.

3 So that has been a common practice in recent
4 times.

5 MR. KASTE: Your Honor, this is James Kaste.

6 On behalf of the State of Wyoming, I can tell
7 you, we will give up our home-field advantage and we'll
8 consent to do this in Billings. There are a whole bunch
9 of people from the state of Wyoming and the state of
10 Montana that probably need to come in and testify in
11 this case, and making them get their way all the way out
12 to California versus having you travel all the way out
13 to Wyoming, all by your lonesome, just doesn't make good
14 sense. And if that means that we have to try this case
15 in the state of Montana, in their backyard, we're happy
16 to do so. The imposition on our witnesses and the
17 additional cost of conducting this case in California
18 just makes no sense. So we suggest and strongly urge
19 you to have this case in Billings.

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

21 We feel that that needs to be -- that may be
22 fine, but it needs to be balanced against the
23 availability of the Special Master, and we're certainly
24 willing to accommodate anything that will make it easier
25 for the Master.

1 SPECIAL MASTER THOMPSON: Okay. Thanks.

2 So this is very helpful information and so we
3 don't -- we won't resolve that particular question right
4 now. I'm going to do a little bit of additional
5 research and thinking on that question, but I certainly
6 understand the issues on both sides, but if you could
7 send me that information or send Ms. Carter that
8 information, that would be very useful.

9 So are there any other matters for the
10 conference today?

11 MR. MICHAEL: Peter Michael from Wyoming.
12 None, your Honor, from Wyoming.

13 MR. DRAPER: Your Honor, John Draper.
14 Nothing from State of Montana.

15 SPECIAL MASTER THOMPSON: So what I'm going to
16 suggest is, moving forward, that we do have a conference
17 call once a month. I hate to put another thing on your
18 calendar, but I think we're getting close enough to all
19 of these various dates that it is going to be important
20 for me to be available if there are any concerns and
21 also for me to make sure that things are running
22 smoothly.

23 So what I will ask Ms. Carter to do is to try
24 to find a date, probably in mid-November, when we can
25 talk again.

1 The order and the case management plan, the
2 monthly updates will remain in effect. What I would
3 propose is that for the remainder of this pretrial
4 period, that we have a status conference a week or so
5 after each of those responses are due. And so that will
6 be mid-November and another one in mid-December of this
7 year. So expect that e-mail from Ms. Carter on that.

8 Okay. So unless there is anything else, I hope
9 everybody has a wonderful remainder of the day, and I
10 will look forward to talking to you all next month, if
11 not sooner.

12 I will, as I said, send out, at the beginning
13 of next week, a revised version of the September 28,
14 2012 opinion that corrects the typos, and I'll also
15 include a separate sheet with that that actually lists
16 where the various corrections have been made so that you
17 can look back and see what corrections were actually
18 made to the document itself. Okay.

19 MR. DRAPER: Your Honor, John Draper.

20 Thank you very much.

21 SPECIAL MASTER THOMPSON: Okay. Thank you all.

22 (Proceedings adjourned at 12:02 p.m.)

23 * * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, Cynthia J. Vega, a Certified Shorthand Reporter for the State of California, do hereby certify that the above-referenced proceedings were reported by me on Thursday, October 25, 2012, at 401 West A Street, Suite 750, San Diego, California; were taken by me stenographically and were transcribed through computerized transcription under my direction, and the foregoing is a true and correct record of the proceedings taken at that time.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceeding and caption named or in any way interested in the outcome of the cause in said caption.

IN WITNESS WHEREOF, I have subscribed my name this 6th day of November, 2012.

CYNTHIA J. VEGA, CSR NO. 6640