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NO. 137, ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

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

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TRANSCRIPT OF TELEPHONIC PROCEEDINGS

STATUS CONFERENCE

November 3, 2011

Reported by: Antonia Sueoka, RPR, CSR No. 9007

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20 TELEPHONIC STATUS HEARING,

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23 8:31 a.m. before Antonia Sueoka, Certified Shorthand

24 Reporter, CSR No. 9007, RPR, in and for the state of

25 California.

1 SAN DIEGO, CALIFORNIA, NOVEMBER 3, 2011, 8:31 A.M.

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3 SPECIAL MASTER THOMPSON: Let's begin.

4 So why don't we start out by finding out who is  
5 on the line at the moment for the various parties.

6 So first of all, who is on the line right now for  
7 Montana?

8 MR. DRAPER: Your Honor, this is John Draper.  
9 I'm on the line with Jeffrey Wechsler and Laura Katz here  
10 in Santa Fe and Jennifer Anders is also on the line.

11 SPECIAL MASTER THOMPSON: Thank you.

12 (Michael Wigmore joined the meeting.)

13 THE REPORTER: Your Honor, if I may --

14 (Jeanne Whiteing joined the meeting.)

15 SPECIAL MASTER THOMPSON: My guess is that is  
16 probably close to everybody.

17 So the court reporter was saying something.

18 THE REPORTER: Yes. Thank you, Your Honor.

19 Mr. Draper, I am having trouble hearing you.

20 Please try to keep your voice up for me. Thank you.

21 SPECIAL MASTER THOMPSON: I'm sorry. The court  
22 reporter, your name is?

23 THE REPORTER: Antonia Sueoka.

24 SPECIAL MASTER THOMPSON: So, thank you, again  
25 Mr. Draper. And I assume as always you'll be the

1 principal counsel this morning for Montana?

2 MR. DRAPER: Yes, Your Honor.

3 SPECIAL MASTER THOMPSON: Okay. And then counsel  
4 for Wyoming, who is on the line?

5 MR. MICHAEL: Yes, Your Honor, Peter Michael  
6 here. Also with me is David Willms, W-i-l-l-m-s, Jay  
7 Jerde, and Matthias Sayer.

8 SPECIAL MASTER THOMPSON: Okay. Again, welcome  
9 all. And, again, Mr. Michael, you'll be the principal  
10 counsel this morning for Wyoming?

11 MR. MICHAEL: Yes, Your Honor.

12 SPECIAL MASTER THOMPSON: Is there anyone on the  
13 line representing North Dakota?

14 MS. VERLEGER: Jennifer Verleger, Your Honor.

15 SPECIAL MASTER THOMPSON: Thank you. Good  
16 morning.

17 And so next for the various Amici, start with the  
18 United States.

19 MR. DUBOIS: Good morning, Your Honor. This is  
20 Jim DuBois, and also William Jay is on.

21 SPECIAL MASTER THOMPSON: Thank you. And then  
22 for Anadarko Petroleum Corporation.

23 MR. WIGMORE: Yes, Your Honor, Michael Wigmore.

24 SPECIAL MASTER THOMPSON: Okay. And  
25 Ms. Whiteing, did I hear you come on the line?

1 MS. WHITEING: Yes, Your Honor. This is Jeanne  
2 Whiteing.

3 SPECIAL MASTER THOMPSON: Okay. So again,  
4 welcome. I hope it's warm or semi-warm for this time of  
5 the year wherever you are.

6 And why don't we start by talking about the two  
7 draft memorandum opinions that I circulated yesterday. I  
8 realize that I didn't give you very much time to review  
9 these, but I want to start out by giving everyone an  
10 opportunity to ask any questions that they have about  
11 these and to talk about what, if any, steps are next.

12 So maybe we should start with the draft  
13 memorandum opinion on Montana's claims under  
14 Article 5(b).

15 First thing is are there any questions?

16 MR. DRAPER: Your Honor, this is John Draper. My  
17 first question is whether the parties might be given  
18 further time to review the draft orders that you issued.  
19 We have had them for less than 24 hours, and  
20 unfortunately, I was not able to free myself up yesterday  
21 so I've not had sufficient opportunity to look at them.  
22 So I would request that at the end of the conversation, at  
23 least, we might be given further time to look them over,  
24 determine what clarifications we might need to request and  
25 make other points that we think would be helpful.



1           SPECIAL MASTER THOMPSON: That would be fine with  
2 me. What I would suggest with respect to -- well, both of  
3 the opinions -- and I realize I did not give you much time  
4 to, well, review them before the phone call this  
5 morning -- is if people have -- if any of the parties or  
6 the Amici have suggestions here, would like or believe  
7 that the opinions need to be clarified in any fashion or  
8 if they believe that there are either factual points that  
9 I got incorrect or there is something that needs to be  
10 corrected, if the parties or any of the Amici could submit  
11 those to me by next Friday, so that would be November the  
12 11th. Would that be fine with everybody?

13           MR. DRAPER: That would be fine with Montana.  
14 Thank you very much, Your Honor.

15           MR. MICHAEL: Same with Wyoming, Your Honor.  
16 That's fine with us.

17           SPECIAL MASTER THOMPSON: Okay. So let me  
18 just -- you know, I mean, having said that, if there's any  
19 questions that people want to ask right now, any comment?

20           MR. MICHAEL: Your Honor, this is Pete Michael.  
21 I had one question. Maybe it's something we can save. I  
22 can put it in writing, also. But on Page 8 -- well, I'm  
23 jumping to the 5(b) to the motion for partial summary  
24 judgment. Maybe you're not ready to do that yet. I don't  
25 know if we're talking about both yet or whether you want

1 to just --

2 SPECIAL MASTER THOMPSON: I'm perfectly happy to  
3 open it up to both.

4 MR. MICHAEL: Okay. I have just a general  
5 question on when we talk about who makes the calls, who is  
6 going to be in the universe. This will affect discovery  
7 of, you know, how broad we look for people that might have  
8 given some kind of notice.

9 On Page 8 you seem to be talking about  
10 information traveling from a water user to Montana  
11 officials to Wyoming, but then the language seemed to be  
12 more general elsewhere. And I don't know if you had a  
13 limit in mind where you expected notifications to come  
14 from officials of the state or is it at this point still  
15 unclear and you're going to decide that later; in other  
16 words, could an individual water user make a call on  
17 behalf of Montana that would be effective?

18 I guess -- I'm not sure whether you had a  
19 restriction in mind or not.

20 SPECIAL MASTER THOMPSON: So let me just go back  
21 and give a little bit of a sense of my philosophy with  
22 respect to the ruling on Wyoming's motion for partial  
23 summary judgment.

24 The key issue for me was and will be whether or  
25 not Wyoming had information upon which they would have

1 known that there were pre-1950 uses in Montana which were  
2 not being met in a given year. And one way, as the  
3 memorandum opinion notes, that that could happen would be  
4 through some type of call or notice from the State of  
5 Montana to the State of Wyoming.

6 As both of the two parties have emphasized over  
7 time, this is a compact between or among states, and as a  
8 result it is Montana that is acting on behalf of its  
9 pre-1950 uses. This is water that goes to Montana, but it  
10 goes to Montana specifically to ensure that those pre-1950  
11 uses can continue to be enjoyed. So that's one way.

12 But as I also note in the draft memorandum  
13 opinion, it might very well be that Wyoming would have had  
14 other information available to it under which it should  
15 have known that pre-1950 uses in Montana were not being  
16 met, and therefore, under the compact, it would have had  
17 an obligation to provide additional water across the state  
18 line to meet those particular uses. And that information  
19 presumably could come from a variety of sources. And at  
20 this point in time I'm not ready to try to determine what  
21 type of information would have met that particular  
22 standard. You know, just -- and I hate to speculate, but  
23 just to sort of give an example.

24 If there were a group of water users in a local  
25 coffee shop and Wyoming -- you know, a manager for Wyoming

1     overheard somebody talking about they weren't getting  
2     their water, you know, it's not clear to me that that  
3     would be adequate. But if there was other information  
4     that, you know, Wyoming should have considered credible  
5     that, in fact, Montana was not receiving its water, then  
6     at that point it would not seem that Montana would need to  
7     issue a call or a notice to put Wyoming on alert that, in  
8     fact, the compact was being violated.

9             So in answer to your question, it's not clear to  
10     me that a call should have come from somebody other than  
11     Montana, the State of Montana, but that information might  
12     still be relevant in determining whether or not Montana  
13     can seek damages.

14            MR. MICHAEL: That's helpful, Your Honor,  
15     because, as I said, it would affect how far we reach in  
16     discovery on that issue.

17            SPECIAL MASTER THOMPSON: I understand that, and  
18     I understand that by making it something other than some  
19     type of a formal written call from the State of Montana,  
20     that that opens up discovery more. But looking at the  
21     compact in prior cases from the Supreme Court, I think  
22     that is the appropriate standard in this particular case  
23     even if it makes discovery a little bit broader.

24            MR. MICHAEL: Just so we know, that's all I  
25     ask -- the reason I asked.

1 I think everything else, Your Honor, from  
2 Wyoming's standpoint would be things that we could include  
3 in our comments and clarifications for next week in  
4 writing.

5 SPECIAL MASTER THOMPSON: Okay. So any other  
6 questions?

7 Okay. Let me go on, then, to the question of the  
8 next steps in the proceedings. If I think about the two  
9 draft memorandum opinions that I circulated yesterday,  
10 obviously, the motion on Wyoming's -- I'm sorry, the  
11 opinion on Wyoming's motion for partial summary judgment,  
12 at this stage leaves open the ultimate question of the  
13 particular years for which Montana can seek damages. And  
14 so one of the questions will be how long of a discovery  
15 period will be needed to actually resolve that particular  
16 question, so -- before we can reach a final determination  
17 on the particular years.

18 In addition to -- well, to that, I know these  
19 cases can frequently be complex, and therefore, take a  
20 lengthy period of time, but I'm also quite anxious to move  
21 the parties to a stage where they can be conducting  
22 discovery on the various other substantive issues in this  
23 particular case.

24 So I don't know whether either of the two parties  
25 are prepared to -- well, to think with me this morning

1 about what type of a period would be required and how we  
2 might move forward on discovery.

3 MR. DRAPER: Your Honor, this is John Draper.  
4 You indicated in your draft CMP some discovery periods  
5 starting with the initial disclosures, and while that had  
6 not been entered yet, it seemed to us that the period  
7 between the timing of the initial disclosures and the  
8 subsequent deadlines was -- at least from what we know now  
9 was workable. We think if we can maintain those periods,  
10 that at least at this point we think that that is  
11 practical.

12 I would mention in that regard, I think in your  
13 draft you have suggested that the initial disclosure occur  
14 on December 2nd. I'm wondering if there might be a  
15 possibility of a little bit of a dispensation from that.  
16 I'm having rotator cuff surgery the week before that. And  
17 if we could possibly indulge my situation a little bit,  
18 start the period a little bit later to be after the  
19 Christmas Holiday, something along those lines would be  
20 much more workable from my point of view.

21 And I think it's -- if we were able to do  
22 something like that and maintain the periods in between  
23 your discovery deadlines as you've outlined them, that  
24 that would be a -- that would be a relatively expeditious  
25 way of approaching the discovery and making a few

1 practical considerations.

2 SPECIAL MASTER THOMPSON: Let me actually just  
3 step back for a moment and try to get a better sense --  
4 because this will be helpful for me, a better sense of  
5 what type of discoveries people will be involved in.

6 And along those lines, let me just ask at the  
7 outset, I assume that there's -- at least there are three  
8 categories of factual information at the very outset that  
9 the parties will be trying to obtain: One is the nature  
10 of the water rights that currently exist in the two states  
11 in the Yellowstone River system. The second one is the  
12 actual water diversions for those years that are at issue,  
13 and then the third is presumably groundwater withdrawals.

14 Am I correct that at least those three things are  
15 going to be a focus of discovery?

16 MR. MICHAEL: I would agree with that, Your  
17 Honor. This is Pete Michael.

18 SPECIAL MASTER THOMPSON: And for those three,  
19 what information to people's knowledge right now is  
20 actually available?

21 MR. MICHAEL: Your Honor, I can speak to that.  
22 I'll go ahead and jump in. Pete Michael again.

23 SPECIAL MASTER THOMPSON: Thank you.

24 MR. MICHAEL: The nature of water rights that  
25 exist, I suspect Montana has got probably a copy of our

1 tab book, so I think that there's probably no discovery on  
2 Wyoming's rights on existing water rights. We have, you  
3 know, a document called the "Tabulation Book" that covers  
4 all existing water rights and permits -- permits and also  
5 adjudicated rights, so that's pretty much a known  
6 quantity. It has the details, the priority dates, the  
7 place of use, all the good stuff that we need to know,  
8 place of diversion. And --

9 SPECIAL MASTER THOMPSON: But --

10 MR. MICHAEL: Go ahead.

11 SPECIAL MASTER THOMPSON: I'm sorry. One of the  
12 problems with telephonic conferences is knowing when the  
13 other person is finished. I'll try to pause before.

14 MR. MICHAEL: I was finished. Go ahead.

15 SPECIAL MASTER THOMPSON: So the tabulation  
16 book -- is the tabulation book for both Montana and  
17 Wyoming or is that just Wyoming?

18 MR. MICHAEL: That's just Wyoming. I can't speak  
19 to Montana. They just recently adjudicated two streams at  
20 issue here, so I don't know how they have that compiled.  
21 I'm sure there's a decree.

22 MR. DUBOIS: This is Jim DuBois. They're still  
23 adjudicating some of those streams. On the Tongue, they  
24 are not -- the objections haven't been completed yet.

25 MR. MICHAEL: I think there's some grass



1 available maybe.

2 I'll speak again to Wyoming, Your Honor, to your  
3 number two point which is water diversions.

4 SPECIAL MASTER THOMPSON: Uh-huh.

5 MR. MICHAEL: Wyoming, when the stream goes into  
6 regulation, Wyoming keeps track of water diversions. We  
7 have, also, usually it's a weekly report, I believe, up in  
8 that area. The hydrographers put in weekly report, and we  
9 have records of when streams went into regulation. And  
10 then also deliveries from storage. There would be a lot  
11 of records involving deliveries from storage because  
12 typically that water is shepherded from storage to the  
13 point of diversion by the local hydrographer, and they  
14 keep a record of those dates. So we have really a large  
15 quantity of records year after year after year.

16 Now, I can't tell you, you know -- there's --  
17 there probably be -- there may be some gaps as we get back  
18 towards 1950, maybe it wasn't as complete in those days.  
19 So I think there's been probably improvement over the  
20 years, but -- now, the other question is what happens when  
21 there's no regulation, when the stream is not in  
22 regulation. There will be situations where the  
23 hydrographer hasn't even swung into action. I know that  
24 is true in Montana. I think under their statute, too, the  
25 hydrographers don't necessarily go to work when there's

1 plenty of water roaring down the river.

2 So records of that kind of use would be a little  
3 more difficult, but I don't think that's a problem for us,  
4 unless the complaints are amended because 5(b) actually  
5 tries to -- you know, under 5(b) you actually keep track  
6 of quantities of diversions at post-'50 diversion points,  
7 but that's not part of the case now. So I don't think  
8 that's a big issue.

9 And as I say, at times when there's no regulation  
10 in Wyoming, I think generally our understanding is there  
11 is never a problem in Montana. They're getting all their  
12 pre-'50 water. So I don't think that is an issue for  
13 either side, probably. It would be these times when  
14 Wyoming goes into regulation. We have pretty extensive  
15 records on that; certainly in the last decade.

16 Groundwater withdrawals, I'll move to that topic,  
17 unless you have a question on the diversions.

18 SPECIAL MASTER THOMPSON: That's fine.

19 MR. MICHAEL: Groundwater withdrawals, Wyoming  
20 has records of pumping from coal bed methane wells. Most  
21 of groundwater withdrawals that would be involved in these  
22 two watersheds would be coal bed methane, and they would  
23 be pretty recent because CBM development didn't begin till  
24 the late '90s.

25 SPECIAL MASTER THOMPSON: Uh-huh.

1           MR. MICHAEL: So there's some records. Oil & Gas  
2 Conservation Commission of Wyoming, I think some of that  
3 is even available online, and also individual well logs  
4 that Wyoming requires records of actual water production.  
5 And, in fact, that's a copy that comes up about every year  
6 since I've been involved at the Yellowstone River Compact  
7 Commission meeting, so that is shared between the states  
8 and discussed at Yellowstone Compact Commission meetings  
9 every December. So I think there's pretty good records in  
10 Wyoming of groundwater withdrawals from coal bed methane  
11 wells.

12           When it comes to withdrawals from other wells for  
13 agricultural, there's not that many of them, but we have  
14 records of pumpage. I think the hydrographers have  
15 reports of withdrawals, at least when the stream is in  
16 regulation.

17           SPECIAL MASTER THOMPSON: Okay. And, Mr. Draper,  
18 or Jennifer Anders, if either of you wanted to add  
19 anything on the Montana side.

20           MR. DRAPER: Your Honor, this is John Draper. We  
21 do have an adjudication on the Powder River that is  
22 complete. And as Mr. DuBois mentioned, there is -- there  
23 is an adjudication that is getting close to completion on  
24 the Tongue River, but there is still -- there's still  
25 matters to be addressed in that adjudication, but it's

1 completely finished at this time. So we have the records  
2 generated by those proceedings.

3 I think we're going to be interested, in terms of  
4 areas -- it's been implied by Mr. Michael's comments --  
5 we're going to be looking at uses going back to 1950, and  
6 there will be state records of that, but there will also  
7 be information and data from the federal government with  
8 respect to uses that were occurring back at that time. So  
9 those -- those are areas that we would be getting into.

10 The groundwater that has been mentioned as an  
11 issue for discovery, there'll be facts and modeling issues  
12 that need to be investigated, many of which have a  
13 discovery aspect to them.

14 And as I think Mr. Michael has already stated, we  
15 would be looking at the operations for diversion, storage,  
16 and use of water over the years back to the timing,  
17 amount, and location of those uses.

18 So I think that's a general description of the  
19 type of information that we believe is available and would  
20 be subject to discovery. And I might ask Jennifer Anders  
21 if she has anything to add to that.

22 MS. ANDERS: I don't.

23 SPECIAL MASTER THOMPSON: So it sounds to me --  
24 and correct me if I'm wrong -- then, that we think about  
25 the major categories of discovery, first of all, there

1 will be the quantitative information regarding water  
2 rights, water diversions, groundwater use, the type of  
3 information we largely just have been talking about.

4 Second of all, there will be any discovery that  
5 is necessary into what type of notice or other information  
6 was provided to or received by Wyoming regarding the needs  
7 of pre-1950 appropriators in Montana. So those go to the  
8 partial summary judgment motion that Wyoming filed.

9 Third of all, there will be the expert reports  
10 and deposition of the expert witnesses, and I expect that  
11 that will be sort of a major aspect of discovery but  
12 towards the end of the discovery period.

13 So other than those three major categories of  
14 discovery -- and I'm not trying to preclude anyone from  
15 making any other discovery motions, but are there other  
16 large categories of discovery that I'm missing here?

17 MR. MICHAEL: Well, Your Honor, let me -- maybe  
18 this is a subset of the quantitative information, but --

19 SPECIAL MASTER THOMPSON: Uh-huh.

20 MR. MICHAEL: -- I think we have to keep in mind  
21 that, you know, we have a fairly, at this point, still  
22 indistinct, and the Supreme Court remitted it back to you,  
23 question of Montana's operations within Montana.

24 SPECIAL MASTER THOMPSON: Yes.

25 MR. MICHAEL: How did they -- what did they do in

1 a year, maybe their pre-'50s weren't getting water, how  
2 did they manage other resources, especially post-'50 uses,  
3 maybe groundwater, other things. That's a subset there.  
4 And if the quantitative information is vague or difficult  
5 to get, that may require some fairly extensive sleuthing,  
6 I guess. We have to certainly find some key witnesses  
7 that might know, and maybe a few Montana regulators would  
8 know most of the answers there. It might be simple, I  
9 don't know.

10 SPECIAL MASTER THOMPSON: Uh-huh.

11 MR. MICHAEL: But it's not too clear that we  
12 could just go to some public records and find it.

13 SPECIAL MASTER THOMPSON: Right. Okay.

14 MR. DRAPER: This is John Draper.

15 SPECIAL MASTER THOMPSON: Yes.

16 MR. DRAPER: Your Honor, this is John Draper. I  
17 did want to emphasize the point that you made that, as I  
18 understand it, you're asking us for our current thinking  
19 on this and are not intending to limit discovery by the  
20 statements we're making today.

21 SPECIAL MASTER THOMPSON: No, not at all. The  
22 reason I'm asking this is just trying to see whether or  
23 not there -- well, both to get a sense of how best to move  
24 forward with the discovery; second of all, to get a sense  
25 of what type of period is necessary for; and then, third

1 of all, to think about whether there's any processes that  
2 could be used to just reduce the overall burden of the  
3 discovery.

4 So is there -- and obviously you're free to do  
5 some of these things on your own without me, but would it  
6 make sense at the very outset, just thinking about the  
7 information with respect to water rights, water  
8 diversions, groundwater use, to the degree that both sides  
9 do not have all of that data right now to put together a  
10 list of the data that both sides believe should be  
11 collected here, and then for me simply to put out an order  
12 that that will be exchanged?

13 MR. DRAPER: Your Honor, this is John Draper.  
14 That sounds like a very useful way to proceed.

15 SPECIAL MASTER THOMPSON: Mr. Michael?

16 MR. MICHAEL: Well, we can do it the  
17 old-fashioned way or we can do it your way, and I think  
18 that makes a lot of sense, actually.

19 SPECIAL MASTER THOMPSON: Yeah. It just strikes  
20 me it is going to save a lot of paper back and forth if I  
21 request that you and Mr. Draper confer, see whether or not  
22 you can agree on a list of the information that, to the  
23 degree it is available, that it will be provided to the --  
24 to the other side. To the degree that there are any  
25 disagreements over what data is relevant, we can resolve

1 that right away, and I can issue an order which at least  
2 means that all of the data information. We're obviously  
3 not talking about depositions and you might very well have  
4 a variety of other types of written discovery that you  
5 would want to engage in, but at least it gets that  
6 information determined and an order out there for both  
7 sides to provide it to the other.

8 MR. DRAPER: Your Honor, this is John Draper. I  
9 understand your thought there not to be suggesting that  
10 the parties would not be able to engage in other discovery  
11 if they felt they needed to, but this would be in addition  
12 to those procedures.

13 SPECIAL MASTER THOMPSON: That's correct. So  
14 again, it strikes me that the data is going to be a  
15 central element of what both sides want. And so it makes  
16 sense at the very outset to try to agree on what data, you  
17 know, both sides can agree is important.

18 To the degree that there's any disagreement over  
19 particular data, rather than leaving the question of its  
20 relevance to a later point, we can have a discussion of  
21 that at the outset. And then at that point, I can issue  
22 an order requiring that both Montana and Wyoming provide  
23 whatever information in the form of data that they have to  
24 the other side by a set date.

25 That hopefully will avoid, as Mr. Michael put it,



1 the old-fashioned way of having to do this with a lot more  
2 paper, and hopefully it can be just a blanket discovery  
3 order that provides both parties with all of the  
4 information -- all of the data information that seems  
5 relevant at that point in time that they need.

6 Obviously, if at a later point in time, there is  
7 additional information that comes to the attention of one  
8 party or the other and they want to request it, then they  
9 are free to -- well, to do that through a document request  
10 or whatever else might seem relevant, but at least it,  
11 hopefully, will speed the process up as a whole and  
12 front-load any of the disagreements that might exist  
13 regarding the relevance of particular data.

14 MR. MICHAEL: Your Honor, can I ask for a quick  
15 caveat? When we talk about the word "provide data," I  
16 think a fair amount of our data, certainly if we go back  
17 to 1951, is not going to be computerized. It's available.  
18 It's in, you know, storage or stored some in Sheridan,  
19 some in Cheyenne. Seems to me that, you know, that gets  
20 to be a costly thing.

21 If we're showing the other side that, look, we  
22 have this available, it seems to me we still provide it in  
23 the old-fashioned way in terms of come take a look, make  
24 copies of what you want as the way we provide it; in other  
25 words, it's not -- you're not going to rule and say,

1 Wyoming, you have to, you know, hire 25 people to  
2 computerize all this to hand deliver it to Montana or vice  
3 versa. I wouldn't think that's where we're going here,  
4 right?

5 SPECIAL MASTER THOMPSON: That was not my  
6 intent.

7 MR. MICHAEL: Okay. Good.

8 SPECIAL MASTER THOMPSON: Okay. And so in  
9 issuing the draft memorandum opinion with respect to --  
10 well, Wyoming's motion for partial summary judgment, I  
11 realized that this was going to be a potential problem,  
12 but if I think about the type of discovery that, for  
13 example, Montana might want to conduct in order to  
14 determine what years Wyoming had information that should  
15 have put them on notice that, in fact, there was a  
16 deficiency under Section 5(a) of the compact, I would  
17 expect that Montana would want to depose prior Wyoming  
18 water commissioners, for example, but it might very well  
19 be that Montana would also want to depose them in  
20 connection with other information regarding, for example,  
21 what information was available with respect to water  
22 diversions in a particular year.

23 And I'd like to avoid having to have everyone  
24 deposed twice, but I also recognize that, you know, to  
25 some degree what Wyoming's motion was trying to do was to

1 limit the number of years where we had to do any type of a  
2 full discovery.

3 So any suggestions on how to move forward with  
4 that?

5 It might very well be that we're talking about  
6 two sets of depositions; one at an early stage to try and  
7 determine the years for which Montana can claim damages,  
8 and then once we make that determination, then going back  
9 to conduct a second set of discovery or would it be  
10 possible to just go ahead and conduct the discovery with  
11 one deposition at the outset?

12 I guess the question is: How much more  
13 burdensome will it be if we do it in two phases rather  
14 than one phase?

15 MR. DRAPER: Your Honor, this is John Draper. My  
16 immediate response to your question is that we would want  
17 to consolidate things as much as possible so that in  
18 the type of situation you just suggested, we would try to  
19 time things and organize things in a way to minimize the  
20 need to have to come back to a person for a second  
21 deposition, unless that person later became an expert in  
22 the case and submitted an expert report, then you would  
23 have to come back. But to the extent that we can, with  
24 the opportunity that if it isn't possible to do it with  
25 just one, we would certainly hope that both states would

1 try to follow that line where we minimize the need to take  
2 depositions twice and try to cover all the subjects in one  
3 deposition.

4 SPECIAL MASTER THOMPSON: Mr. Michael, your  
5 thoughts?

6 MR. MICHAEL: Well, Your Honor, I guess the  
7 question that would also be posed here would be if we did  
8 do multiple depositions of particular witnesses, would we  
9 get the advantage of it by having a more definitive  
10 rule -- or a final ruling on our motion for partial  
11 summary judgment as far as what years are in play in time  
12 to do us some good in terms of efficiency. I guess that  
13 would be the question is how would we schedule that.

14 I don't think it's that difficult, certainly with  
15 telephones, if you're on a limited issue and people are  
16 willing to do telephone depositions to do pretty  
17 straightforward and pretty brief depositions on.

18 But we also have written discovery on the issue.  
19 I assume that Montana would want to send us some written  
20 discovery asking for any document that would look to be a  
21 notice. I don't think we have anything, except from 2004  
22 and 2006, but -- so I just don't know how long that would  
23 play out. But, you know, if we had -- you know, we'd have  
24 to be able to do the written discovery, I think, before  
25 the depositions.

1           And so when you -- by the time you do that, if  
2 you bifurcate, you're probably looking at, you know,  
3 finalizing that phase of discovery in late March, maybe.  
4 And the reason I say that is interrogatories, you have  
5 built into the current case management plan 45-day  
6 responses to interrogatories. So one set of  
7 interrogatories eats up a month and a half. So to get  
8 those out, identify the witnesses that the sides would be  
9 interested in talking to on that issue, I think we would  
10 be -- late March would be -- anything less than that would  
11 be really not enough.

12           But then it could really make a difference -- it  
13 would seem to me it would make a difference, certainly to  
14 Montana, if the years were limited as to how much effort  
15 they have -- they would be putting into evaluating all the  
16 quantitative information and having to look into their own  
17 people and see who wasn't getting water in some of these  
18 other years because my understanding is they may not have  
19 very good records of what pre-'50 users were and were not  
20 getting water in past years, so they may have to be  
21 talking to irrigation districts and ranchers. And it  
22 would save them time, I would think, over time to  
23 bifurcate it in that fashion.

24           So I'm not necessarily opposed to -- you know, I  
25 think maybe a bifurcation would be useful if we, you know,

1 could do those -- identify those witnesses, ask those --  
2 that subset of questions on the call issue, notification  
3 issue, and wrap that up, say, by March. It could save  
4 some time in the long run. It's hard for me to tell  
5 whether overall that will save us -- can get us to trial  
6 faster or not, but it could save some appreciable  
7 investigation, certainly by Montana.

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

9 SPECIAL MASTER THOMPSON: Yes.

10 MR. DRAPER: I'm not sure that I fully understand  
11 what Mr. Michael is proposing there, but it seems further  
12 restrictions in there is -- at least as an initial matter,  
13 is not something that I would want to agree with. If you  
14 were going to lay that out in a little bit more detail,  
15 maybe we could respond to it, but to try to set now a  
16 deadline, it sounds like, for ruling on the motion for  
17 partial summary judgment seems a bit premature.

18 SPECIAL MASTER THOMPSON: So my instinct is that  
19 the major place where a ruling on the motion for partial  
20 summary judgment will help both sides will be on the  
21 expert testimony. I mean, presumably you do not want to  
22 have to prepare expert testimony on 60 years of  
23 administration of the compact if, in fact, there's only  
24 five years, say, in which Montana can actually claim  
25 damages for a violation of Article 5.

1           And so at a minimum I would think that it would  
2 be useful to have a final resolution of Wyoming's motion  
3 for partial summary judgment before that date and  
4 sufficiently before that you're not having experts until  
5 the very last moment look at every single year.

6           I'm also -- at this point in time, it's not clear  
7 to me, though, whether or not it will either be feasible  
8 or useful to try to actually move that time up any sooner.  
9 So my inclination here would be to set probably a  
10 tentative time, you know, something in the nature of two  
11 months or so before the first expert reports would need to  
12 be issued. And I'm not necessarily sticking with the time  
13 periods that are in the draft case management plan that I  
14 circulated earlier for this purpose.

15           But I'm just thinking if you want to get your  
16 experts prepared and under the case management plan you  
17 circulated and also the redraft that I did, Mr. Draper, I  
18 think you're the first one that would have to actually  
19 release your expert reports. I would think you would want  
20 to know at some point earlier than that whether or not  
21 your experts need to -- or what years your experts are  
22 going to need to be talking to.

23           MR. DRAPER: Your Honor, this is John Draper.  
24 It's not immediately clear just how that sorts out. I  
25 think I need to take a look at that with some expert input

1 and determine just how those would sort out, but I think  
2 those are issues that we should take a look at, and it  
3 may turn out just as you say. But there may be -- there  
4 may be -- there may be that there's no appreciable  
5 difference between 5 and 60 years when you've got data  
6 marshaled. And we've certainly dealt with a number of  
7 years together when -- we've dealt with these kinds of  
8 issues in other cases. And it may take expert analysis to  
9 determine which years are years that need further analysis  
10 and which are not. I think that issue needs a little bit  
11 more study before we can answer this definitively.

12 SPECIAL MASTER THOMPSON: Mr. Michael, your  
13 thoughts?

14 MR. MICHAEL: My thought is I think that you  
15 really hit on a good idea there. I think that, you know,  
16 the expert development is a big deal, and I'm sure it's  
17 going to be a large expense, so having years truncated or  
18 if they are going to be reduced would be really helpful,  
19 and that's -- I think that's a good touchdown for us to  
20 base our scheduling of trying to complete this motion for  
21 partial summary judgment.

22 A couple months seem fair. Under the current  
23 what you have there, as you said, is you have, you know,  
24 said it is going to be August for their experts yet, but  
25 if it were, that would be June. So we could probably get



1 it done what we need to get done on that preliminary issue  
2 by June to file something, supplemental briefs, and so  
3 forth, and the affidavits, et cetera.

4 I like the idea, though. I think that would be  
5 helpful.

6 SPECIAL MASTER THOMPSON: Okay. And, Mr. Draper,  
7 you've mentioned the surgery you're going to have to have  
8 on your rotator disk. I'm sorry to hear about that. So  
9 what was going to be your proposal for when the -- what --  
10 how the dates would be revised? From December 2nd until  
11 when would you want?

12 MR. DRAPER: Well, if it's sometime maybe a --  
13 more than a month later because that would be right  
14 after -- right after the New Year's, but, say,  
15 February 2nd or something like that would, I think -- if  
16 it could be adjusted along those lines, that would be very  
17 helpful to me and give all the parties a little bit of  
18 time after the Christmas/New Year holiday to marshal the  
19 initial disclosures.

20 SPECIAL MASTER THOMPSON: So I'm really hesitant  
21 to move it two months.

22 Mr. Michael, your thoughts? And I know you want  
23 to be -- you know, I realize you want to be helpful to  
24 Mr. Draper, as do I, but I'm just --

25 MR. MICHAEL: Yeah.

1           SPECIAL MASTER THOMPSON:  -- curious as to when  
2 you think that you would be ready to do them.

3           MR. MICHAEL:  Well, I think, you know, obviously,  
4 I think our task as defendant is not as significant for  
5 the first disclosure because, you know, there's just a  
6 larger universe the plaintiff has to cover in those first  
7 disclosures.  But we are pretty flexible.  I think if it  
8 was one month, that would be fine, too, January 3rd, 4th,  
9 something like that, if that's your preference, Your  
10 Honor.  We're fine any way you want to go.

11           SPECIAL MASTER THOMPSON:  Okay.  And -- okay.  
12 What I would -- I understand the problems of trying to --  
13 well, to actually get something filed over the holidays.  
14 And, Mr. Draper, you know, I don't, obviously, want to  
15 force you to try to recover even faster than hopefully you  
16 do.  At the same time, as I say, I'm hesitant to push  
17 things out two months.

18           And so what I will probably do is to -- well, I'm  
19 going to go back and take a look at the calendar -- but  
20 probably push it to -- well, you know, something in the  
21 nature of the second week and maybe the end of the second  
22 week in January.

23           In the meantime, what I would like to be able  
24 to -- well, to do, is to, number one, see if we can get an  
25 agreement before then as to the nature of the written --

1 the written information -- I'm sorry, the data, the  
2 written data that both sides believe would be relevant.  
3 Is that possible or do we need to use the same date for  
4 that?

5 MR. MICHAEL: Your Honor, this is Pete Michael.  
6 We're ready to work on that right away on the data  
7 gathering what would be relevant.

8 MR. DRAPER: Your Honor, we would be glad to do  
9 whatever you think is best. There's no reason to put it  
10 at the same time, and just how this initial list of data  
11 and so on will interact with the initial disclosures is  
12 something we need to take a look at, but certainly no  
13 later than that time. And if -- you know, if it's -- if  
14 it's your decision to do it before the holidays, say,  
15 mid-December, we certainly would conform ourselves to  
16 whatever you think is best.

17 SPECIAL MASTER THOMPSON: Okay. Okay. So then  
18 why don't we do the following: Why don't we -- I'll have  
19 Susan Carter phone around and set another status  
20 conference for later this month, recognizing that we have  
21 the Thanksgiving holiday in here. So, you know, it  
22 could -- you know, it would be later this month or the  
23 very beginning of December, but if we can do it later this  
24 month, that would be my ideal.

25 And what I would like the parties to -- well, to

1 do are, number one, if counsel for Montana and Wyoming  
2 could meet and confer and see if they can begin to agree  
3 on the data that I could include in an order -- or I  
4 should include in an order, that would be issued to both  
5 Montana and Wyoming for the production of data to the  
6 other side.

7           So, again, the concept behind this -- and I'll  
8 put this into a case management order. So the idea here  
9 is that there would be a blanket order for both sides to  
10 produce all data following into a set number of  
11 categories. And what I would like counsel for Montana and  
12 Wyoming to try to do before the next case management --  
13 I'm sorry, before the next status conference is to see how  
14 much agreement they can reach over what those categories  
15 would be.

16           And I would like counsel for both sides to see  
17 whether or not before the next status conference, I'd like  
18 to receive a letter that could be jointly from both sides.  
19 You both can write separate letters, but I would like you  
20 both to, well, report back to me on your progress in doing  
21 that, whatever agreement you've reached so far, and the  
22 degree to which there appears to be any emergent  
23 disagreements.

24           So at this point, I'm not asking you for the  
25 final list, although if you can do it by then, that would

1 be fantastic. But I at least want to see what progress  
2 you can make in agreeing what that list would be. So that  
3 would be the first thing I would ask.

4 The second thing I would ask would be that  
5 counsel for both Montana and Wyoming confer on how we  
6 might actually stage the discovery so that during the  
7 overall discovery period I could rule on the motion for  
8 partial summary judgment in time to permit both parties to  
9 have advance notice on what their experts would need to  
10 testify on; in other words, as I mentioned earlier, it  
11 seems to me that the major value of having a ruling on the  
12 motion for partial summary judgment will be in preparing  
13 those expert witness reports.

14 And so I'd like the two parties to confer and see  
15 whether or not they can agree on what that would then mean  
16 about when I would rule on Wyoming's motion for partial  
17 summary judgment and what that would mean about the  
18 discovery prior to my ruling.

19 My inclination at the moment is to assume that  
20 discovery would be totally open prior to the motion and  
21 that to the degree you can, you would just call a  
22 witness -- I mean, you would depose a witness once in  
23 order to get all the relevant information that you need  
24 from that witness, recognizing that you might need to  
25 depose the witness a second time for a small amount of

1 information, but, you know, that rather than calling  
2 somebody twice, you would try to -- well, to call the  
3 person only once.

4 But, again, I'm interested, after you confer, in  
5 your thoughts on the general question of discovery and its  
6 intersection with Wyoming's motion for partial summary  
7 judgment. So that would be the second issue that we would  
8 discuss at the next status conference.

9 Let me just stop there. Any thoughts or  
10 questions on that?

11 MR. MICHAEL: No, Your Honor. This is Pete  
12 Michael.

13 MR. DRAPER: This is John Draper. That sounds  
14 like a good approach.

15 SPECIAL MASTER THOMPSON: Okay. And then as I  
16 mentioned earlier, if by next Friday, if counsel for  
17 either side wishes to do so, they can submit a letter to  
18 me that would, number one, include any questions that they  
19 believe could and should be clarified in my final  
20 memorandum opinions on the two issues that I heard back at  
21 the end of September. So the first question is, again, is  
22 there anything I should be clarifying?

23 And then, second of all, if people notice any  
24 errors of fact that I need to correct before finalizing  
25 these two memoranda opinion, that would be useful, also.

1           And Amici are also free to do that, if they want,  
2 and I will then take that into account in finalizing the  
3 two memoranda opinion.

4           Okay. So anything else that people think we  
5 should address this morning?

6           MR. MICHAEL: This is Pete Michael. I guess  
7 there's one other question that has been hanging out there  
8 a little bit. And based on your decision on the 5(b)  
9 aspect of the case, Article 5(b), you had a lot of  
10 discussion there about the possibility of amendment of the  
11 complaint. And obviously, you know, as far as discovery  
12 goes, you haven't imposed the discovery schedule here, so  
13 we don't know. But it seems to me if there was an  
14 amendment and it was permitted at some point by the court,  
15 then that changes the scope of the case and could have  
16 impacts on the discovery plan.

17           So I don't know -- I guess I don't even -- I'm  
18 not quite sure even from your order whether you were  
19 anticipating that if Montana decides it wants to try to  
20 amend its complaint, whether it would do that in a motion  
21 to you that would then, you know, take the recommended  
22 decision up to the court or whether they would address  
23 that directly to the court itself.

24           But obviously that could throw a fairly large  
25 monkey wrench into our planning here, so I thought I would

1 just put that on the table. It's not something that is --  
2 well, that ball is not in our court, of course, but I  
3 think it's something that maybe is worth mentioning before  
4 we close.

5 SPECIAL MASTER THOMPSON: Yeah. Thank you for  
6 raising that. So let me give one or two thoughts on that,  
7 and then ask a question of Mr. Jay or Mr. DuBois or  
8 actually any of the counsel.

9 The first is that as I note in the memorandum  
10 opinion on Montana's claims under Article 5(b), you know,  
11 I've not concluded that the current complaint does not  
12 cover any alleged violations of the compact other than  
13 with respect to the pre-1950 uses.

14 Wyoming -- I'm sorry, Montana remains free to  
15 seek to amend its complaint. As I mentioned in the  
16 memorandum opinion, obviously that is a high standard. It  
17 is higher than it is in other types of proceedings, but  
18 it's not an impossible standard. And, in fact, there in a  
19 number of the prior original actions, the plaintiffs have  
20 been permitted to amend their complaints.

21 If Montana plans to amend its complaints, it  
22 should -- or as you point out, it's up to them, but I  
23 would think that the amendments would be much better -- or  
24 petition to amend would be much better received if it is  
25 filed as soon as Montana realizes that the -- that an



1 amendment would be in its view appropriate.

2 So, in other words, if there are particular  
3 allegations which Montana believes that it could add at  
4 this particular point in time; in other words, that it has  
5 the basis for doing so, then it should do so immediately  
6 because the longer it waits to seek to try to amend the  
7 complaint, I would think the less well received it would  
8 be.

9 In other cases sometimes it has not been until  
10 some discovery has been conducted that a party has  
11 realized that there is a cause of action or violation that  
12 it should add. And so obviously, Montana cannot petition  
13 to try to amend the complaint to add any of those right  
14 now. But, again, if something like that came to Montana's  
15 attention, then I would think it advisable for Montana to  
16 petition to amend the complaint as soon as it can after  
17 that comes to its attention. So that is sort of my answer  
18 to the -- to the first part of your question, Mr. Michael.

19 The second part is that I have -- I have assumed  
20 that the correct procedure would be to ask the Supreme  
21 Court to amend the complaint, and that the court then, if  
22 it wishes to, could then refer that to me for additional  
23 resolution. But since this is the first time I've been  
24 involved in an original jurisdiction matter, I want to  
25 turn to Mr. Jay or Mr. Draper or others who have been

1 involved in prior original jurisdiction matters to correct  
2 me if I'm wrong about that.

3 MR. JAY: Your Honor, this is William Jay. Thank  
4 you for taking our view on that. I do think that in  
5 previous cases parties have asked the Supreme Court for  
6 leave to amend, and the court has routinely referred those  
7 to the Master.

8 I know that that was the case in Nebraska vs.  
9 Wyoming, the case that we all often cite about the  
10 standard for leave to amend an original -- in original  
11 cases. I don't know that it has been the court's  
12 invariable practice, but I certainly don't think that the  
13 court would look askance if the pleadings were filed with  
14 them rather than with you.

15 SPECIAL MASTER THOMPSON: Okay. Mr. Draper, do  
16 you have anything to add?

17 MR. DRAPER: Your Honor, this is John Draper. I  
18 don't think I have anything to add to what Mr. Jay said at  
19 this time. As I've mentioned at the outset, we need to  
20 take a look at your ruling and including the part of your  
21 order on that procedure, but certainly I'd agree with what  
22 Mr. Jay said.

23 SPECIAL MASTER THOMPSON: Okay. I guess the  
24 other thing which is hanging out there is the question --  
25 and this will be something that, Mr. Draper, you might be

1 ready to address by the next status conference is the  
2 question of whether or not Montana will want me to file  
3 with the Supreme Court an interim report with respect to  
4 my ruling on Montana's claims under Article 5(b).

5 I'm not asking you to address it right now, but  
6 it would be great if you could give me your thoughts on  
7 that at the next status conference.

8 As I indicated when we all assembled in Denver,  
9 one of the problems, of course, with the interim reports  
10 is that, you know, I file the interim report. After the  
11 Supreme Court receives it, they then ask for exceptions.  
12 Exceptions are filed. They then decide whether or not to  
13 actually hear the exceptions, and it can be a year to a  
14 year and a half before it gets back.

15 So my inclination would be that even if I filed  
16 an interim report on my rulings on Montana's claims under  
17 Article 5(b) to proceed with discovery on the pre-1950  
18 claims because I think that we can move forward with the  
19 discovery on that, and that if the Supreme Court were  
20 ultimately to conclude that I was wrong and that Montana  
21 has a much larger set of claims, I think a lot of the data  
22 and information that would be collected would be equally  
23 relevant to -- well, to both and that the whole process  
24 would have been significantly advanced.

25 So although I know it's a little bit unusual to

1 continue in these cases on a two-track process, that would  
2 be my inclination if it seemed appropriate to file an  
3 interim report on my ruling with respect to Montana's  
4 claims under Article 5(b).

5 The other aspect of this gets back to your  
6 question, Mr. Michael, about seeking an amendment. If  
7 Montana does want me to file an interim report, before  
8 filing that interim report, Montana might very well want  
9 to file any amendments -- or, I'm sorry, petition for  
10 leave to file any amendments so that I can also, you know,  
11 if those were referred to me, then rule on those simply so  
12 that if -- I'm just trying to think in terms of overall  
13 elapsed time.

14 I would hate to have a process where I filed an  
15 interim report on the Article 5(b) claims. The Supreme  
16 Court rejects any exception that Montana files to that.  
17 Montana then files a petition to amend their complaint. I  
18 rule on that, and then we go up to the Supreme Court yet  
19 again.

20 And so I'm thinking that it might make sense if  
21 Montana decided it was one of the things they want to do  
22 if I'm correct that the -- that the only violation of the  
23 compact alleged is the pre-1950 uses and they wanted a  
24 petition to amend to also include other issues. It might  
25 make sense to try to get a ruling on a petition to amend

1 and then have one interim report that presents all that  
2 issue to the Supreme Court.

3 I realize that's a little bit, again, unusual,  
4 and I would think that it would require an explicit  
5 understanding that Montana would be petitioning to amend  
6 its complaint without waiving its rights to object to my  
7 ruling that, in fact, those alleged violations aren't  
8 already in its complaint. But I think that would speed up  
9 the entire process.

10 So I state all of that just to get some thoughts  
11 out on the table, not to expect anyone to say how they  
12 plan to proceed at the moment, but just put that on the  
13 table, and then we can discuss that further at the next  
14 status conference.

15 So I guess the only question is: Is anyone  
16 totally confused by what I was just suggesting?

17 Okay. So any other thoughts, then, this morning?

18 MR. WIGMORE: Your Honor, this is Michael Wigmore  
19 for Anadarko. And I guess the other issue that I raised  
20 with the hearing in Denver that I'm not sure where we  
21 stand is how we move forward with which you've sent out as  
22 a proposed case management plan because as I mentioned,  
23 you know, my client is still concerned with some of the --  
24 how the case management plan would otherwise change its  
25 rights under Rule 45 for discovery against other party --

1 against nonparties.

2 And I mentioned that at the hearing, but I'm not  
3 sure where we stand on moving forward with the case  
4 management plan, whether it -- we're taking comment -- you  
5 know, whether you would like comments on it.

6 As I mentioned, you know, some of the comments  
7 that we had provided to the states were not incorporated  
8 into the final draft that was forwarded to you. And so I  
9 guess maybe it's just worth a little discussion on where  
10 we move with the case management plan.

11 SPECIAL MASTER THOMPSON: So what is the nature  
12 of those communications?

13 MR. WIGMORE: Well, what occurred is that, you  
14 know, the parties and all the Amici had a number of series  
15 of calls and each -- you know, everybody provided comments  
16 on the draft that was provided. Some of -- not all the  
17 comments were accepted. I mean, you know, in particular,  
18 we have some concerns about the limitations of our  
19 participating in depositions solely with respect to our  
20 own witnesses.

21 You know, I view this as -- from our standpoint,  
22 we are a nonparty, and the case management plan, you know,  
23 for my clients is more of a deal that we'd accept. You  
24 know, in exchange for being an enhanced Amicus, we would  
25 be in effect waiving some of the rights we would otherwise

1 have with respect to discovery against nonparties to a  
2 case under Rule 45. And I'm not sure that, you know,  
3 given the current draft that my clients are willing to  
4 accept that deal, frankly.

5 SPECIAL MASTER THOMPSON: Okay. Why --

6 MR. WIGMORE: Because I think it's just -- I  
7 guess the draft came out right at the end of September  
8 right before the last hearing, and I -- and, you know, it  
9 has not yet been entered. And we have some concerns with  
10 it, and I just wanted to discuss how we could possibly  
11 address those concerns.

12 SPECIAL MASTER THOMPSON: Okay. If you could do  
13 this: If you could provide a letter to me that if it's  
14 easiest, you can simply attach any prior comments that you  
15 have provided to the parties or if you want to, well, do  
16 just a new letter that incorporates those and specifically  
17 addresses the draft case management plan that I circulated  
18 in September. If you could do that within the next week,  
19 say, if you can do that by next Friday, then I will take a  
20 look at that.

21 And what I will want to do at the next status  
22 conference is I will before that status conference -- now,  
23 let's see here. What I will want to do is immediately  
24 after that status conference finalize the case management  
25 plan. So if you can circulate -- if you can send me a

1 letter, then that will permit me to think about that prior  
2 to the next status conference, and we'll allow us to  
3 address that then.

4 Does that sound fine?

5 MR. WIGMORE: Yeah, that's fine with me. I don't  
6 mean to monopolize. I don't know if any of the other  
7 parties of the Amici had comments that were in the plan or  
8 not. That sounds fine with me.

9 SPECIAL MASTER THOMPSON: I think you're probably  
10 the only one in the -- well, go ahead. I'm sorry. I  
11 didn't mean to interrupt.

12 MR. DRAPER: Your Honor, this is John Draper. I  
13 was just going to say, I need to go back and take a look  
14 at that. My offhand recollection is that when we  
15 submitted that original case management plan to you, that  
16 we had worked out all the differences among the parties  
17 and the Amici. And I think the other parties need to also  
18 take a look at what Mr. Wigmore is asserting at this point  
19 and be given an opportunity to address those points either  
20 in writing or at the next status conference.

21 SPECIAL MASTER THOMPSON: That is fine.

22 And, in fact, I was about to say that either  
23 Montana or Wyoming, if it wishes to either, one, file a  
24 letter commenting on Mr. Wigmore's concerns prior to the  
25 next status conference or, two, be prepared to discuss it



1 at the status conference or both.

2 MR. WIGMORE: Thank you.

3 SPECIAL MASTER THOMPSON: Okay. So let me just  
4 try to summarize where we are.

5 The first thing is I just want to emphasize to  
6 the parties again that even though we will be delaying the  
7 December 2nd date for initial disclosures, and as I say,  
8 my inclination is to delay it until probably that second  
9 weekend in January so you don't have to do it the day  
10 after New Year's. But, hopefully, Mr. Draper, even though  
11 while you've been recovering, there will be other people  
12 in your firm and in Montana that can be working on that.  
13 Even though that will be delayed, I want to try and keep  
14 the original schedule that I had set out in that draft  
15 case management plan I circulated in September. I want to  
16 try and keep it as close to the dates that I originally  
17 set in it as possible.

18 I realize that, you know, there's always been  
19 more complexities here than we probably originally  
20 anticipated, but I really want to move on to discovery.  
21 So the parties should not assume that simply because the  
22 case management plan has not been filed yet, that that  
23 means that we'll keep adding an additional month on to the  
24 various dates each time that we have a status conference.

25 So people should be prepared to begin discovery

1 at the beginning of next year, and basically, we will try  
2 to complete it for this first phase over the course of the  
3 next year. So please keep that in mind, as you are  
4 allocating your resources.

5 The second thing is we will set another status  
6 conference for, hopefully, later this month. And at that  
7 status conference, as I said, there are several things  
8 I'll want to discuss. One, is how well the parties have  
9 proceeded in trying to, well, develop a list of categories  
10 of information and data that would be available in Montana  
11 and Wyoming that would then be produced to the other side.  
12 So that's the first thing.

13 The second thing is how to incorporate a final  
14 ruling on Wyoming's motion for partial summary judgment  
15 into the discovery schedule. And as I said, it strikes me  
16 that we will want to have a final ruling on that prior to  
17 the time that expert reports need to be disclosed and  
18 sufficiently ahead so that both sides will be able to save  
19 money and resources in the preparation of those reports.

20 Third of all, at that status conference, we  
21 should discuss, number one, whether or not Montana, given  
22 my ruling on their claims under Article 5(b), intends to  
23 petition at this point in time for any amendments to their  
24 complaint and whether or not they do -- whether or not  
25 Montana would like me to file an interim report with the

1 Supreme Court regarding my ruling on Montana's claims  
2 under Article 5(b).

3 Fourth of all, we will have a discussion of the  
4 concerns that Anadarko has raised with respect to my draft  
5 case management plan and Rule 45.

6 And then, finally, I think this is fifth on the  
7 list, any other final thoughts on the case -- on the draft  
8 case management plan that I circulated in September with,  
9 again, my goal being that after the next status conference  
10 that I will finalize that status conference; that we will  
11 have initial disclosures in the second week of January;  
12 and that we will also set up a schedule, if the parties  
13 haven't already agreed, for finalizing the terms of an  
14 order that would provide for the blanket production of  
15 data and other information regarding water rights, water  
16 diversions, groundwater use, whatever other categories you  
17 believe should be in that order for blanket production of  
18 information. Okay?

19 I think that was everything we talked about doing  
20 at the next status conference. Is there anything else  
21 that should be on the agenda for the next status  
22 conference?

23 MR. MICHAEL: Nothing from Wyoming, Your Honor.

24 MR. DRAPER: Nothing from Montana, Your Honor.

25 SPECIAL MASTER THOMPSON: Okay. And so anything

1 else that we need to discuss this morning?

2 I think that's everything.

3 Okay. If not, then I appreciate everybody's  
4 participation this morning. And Susan Carter will start  
5 phoning around this morning or this afternoon to find a  
6 time for that late November status conference.

7 MR. MICHAEL: Your Honor, this is Pete Michael.  
8 If I might mention to the court reporter, we would like a  
9 copy of today's status conference.

10 MR. DRAPER: Your Honor, this is John Draper. We  
11 would like a transcript, as we would like of every such  
12 conference.

13 SPECIAL MASTER THOMPSON: Okay. One of the  
14 things I'll do is -- would both Wyoming and Montana like  
15 that to be just a standing order unless you say otherwise  
16 because one of the things that Susan Carter can do is in  
17 arranging the court reporter in the future is just make  
18 clear that both of you would like a copy.

19 MR. MICHAEL: That would be great, Your Honor.

20 MR. DRAPER: Yes, Your Honor.

21 SPECIAL MASTER THOMPSON: I will do that. I will  
22 also incorporate everything I just said into an order so  
23 that you also have it in a short written form.

24 Okay. Thank you very much everybody. I hope you  
25 have a good day.

1 MR. DRAPER: Thank you, Your Honor.

2 MR. MICHAEL: Thank you, Your Honor.

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4 (End of proceedings at 9:57 A.M.)

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

4 I, ANTONIA SUEOKA, Certified Shorthand Reporter  
5 No. 9007, State of California, do hereby certify:

6 That said proceedings were taken at the time and  
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11 And I further certify that I am a disinterested  
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15 The dismantling, unsealing, or unbinding of the  
16 original transcript will render the reporter's certificate  
17 null and void.

18 IN WITNESS WHEREOF, I have hereunto set my hand  
19 this 11th day of November, 2011.

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25 Antonia Sueoka, RPR, CSR NO. 9007