

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.	)	
_____	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONIC STATUS HEARING

November 13, 2008

Reported by: Dana Saruk, CSR No. 10653

1 APPEARANCES:

2 Special Master

3 BARTON H. THOMPSON, JR. 650-723-2465  
4 SUSAN CARTER, ASSISTANT 650-721-1488  
5 STANFORD LAW SCHOOL  
6 Crown Quadrangle  
7 559 Nathan Abbott Way  
8 Stanford, California 94305-8610  
9 buzzt@stanford.edu  
10 susan.carter@stanford.edu

11 Plaintiff State of Montana:

12 MONTANA ATTORNEY GENERAL'S OFFICE  
13 By: SARAH A. BOND  
14 JENNIFER ANDERS  
15 215 North Sanders  
16 P.O. Box 201401  
17 Helena, Montana 59620-1401  
18 406-444-5894  
19 sbond@mt.gov  
20 janders@mt.gov

21 MONTGOMERY & ANDREWS  
22 By: JOHN B. DRAPER  
23 325 Paseo de Peralta  
24 Santa Fe, New Mexico 87501  
25 505-986-2525  
jdraper@montand.com

Defendant Wyoming:

WYOMING ATTORNEY GENERAL'S OFFICE  
By: PETER MICHAEL, COUNSEL OF RECORD  
JAY JERDE  
DAVID J. WILLMS  
123 Capitol Building  
Cheyenne, Wyoming 82002  
307-777-6196  
pmicha@state.wy.us  
jjerde@state.wy.us  
dwillm@state.wy.us

1 Defendant North Dakota:

2 NORTH DAKOTA ATTORNEY GENERAL'S OFFICE  
3 By: TODD A. SATTLER, ESQ., COUNSEL OF RECORD  
4 500 North Ninth Street  
5 Bismarck, North Dakota 58501  
6 710-328-3640  
7 tsattler@nd.gov

8 For The United States:

9 UNITED STATES DEPARTMENT OF JUSTICE  
10 SOLICITOR GENERAL  
11 By: WILLIAM M. JAY  
12 JAMES DUBOIS  
13 950 Pennsylvania Avenue, N.W.  
14 Washington, D.C. 20530-0001  
15 202-514-8976 william.m.jay@usdoj.gov  
16 303-844-1375 james.dubois@usdoj.gov

17 For Anadarko

18 MICHAEL WIGMORE  
19 JAMES J. DRAGNA  
20 355 South Grand Avenue, Suite 4400  
21 Los Angeles, California 90071  
22 213-680-6436  
23 michael.wigmore@bingham.com

24 For N. Cheyenne  
25 WHITEING & SMITH  
By: Jeanne S. Whiteing (Not present)  
1136 Pearl Street, Suite 203  
Boulder, Colorado 80302  
303-444-2549  
jwhiteing@whiteingsmith.com

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1 THURSDAY, NOVEMBER 13, 2008; 8:30 A.M.

2

3 MR. THOMPSON: I think we can go ahead and  
4 begin. Thank you all for being present for this phone  
5 conference.

6 My name is Barton Thompson. As you know, I've  
7 been appointed the Special Master in this case, and I  
8 assume you've probably all Googled me and know more  
9 about me than I do at this particular point in time.

10 The court reporter has just introduced herself.  
11 At the end of this phone call I'll come back and see how  
12 many copies everyone needs and format for the  
13 transcript.

14 My assistant, who I think all of you have  
15 talked to at one point or another, Susan Carter, is also  
16 in the room here with me. I think you also all know  
17 Susan's phone number, but she is the person to talk to  
18 in this case about any type of scheduling issue.  
19 Susan's phone number is area code 650-721-1488, and her  
20 e-mail is susan.carter@stanford.edu.

21 So why don't we go around and list appearances.  
22 Why don't we start with the plaintiff in the case, State  
23 of Montana.

24 MS. BOND: Thank you, your Honor. I guess  
25 that's okay that I go into automatic pilot and call you

1 your Honor, if that's all right?

2 MR. THOMPSON: This is the first time I've  
3 served as a Special Master for the Supreme Court, so  
4 that's fine, but I'll probably also respond to several  
5 other things.

6 MS. BOND: I'll try and keep it simple.

7 This is Sarah Bond. I'm counsel of record for  
8 the State of Montana. With me here in Montana is  
9 Jennifer Anders, who is also with us. And then on the  
10 phone from a meeting is our house counsel, so to speak,  
11 John Draper.

12 MR. THOMPSON: It's probably useful for the  
13 court reporter to spell names.

14 MS. BOND: Sarah is S-a-r-a-h. Bond, like  
15 Bond, Sarah Bond. And Jennifer, J-e-n-n-i-f-e-r,  
16 Anders, A-n-d-e-r-s. And John, J-o-h-n, Draper,  
17 D-r-a-p-e-r. The names are correctly spelled on the  
18 pleadings of record. And you can call me if you have  
19 any questions at 406-444-5894.

20 MR. THOMPSON: Next, State of Wyoming.

21 MR. MICHAEL: This is Peter Michael, P-e-t-e-r  
22 M-i-c-h-a-e-l, senior assistant attorney general. With  
23 me is Jay Jerde, J-a-y, J-e-r-d-e. He is deputy  
24 attorney general. And David Willms. David is the  
25 normal spelling, and Willms is W-i-l-l-m-s. He is an

1 assistant attorney general. Our phone numbers are on  
2 the pleadings. I assume everyone has them except for  
3 perhaps Mr. Thompson.

4 MR. THOMPSON: Yeah. I actually have the  
5 service list. One of the things I will do in a minute  
6 is probably also ask the State of Montana if they could  
7 update the service list and include not only phone  
8 numbers but also e-mails. We can come back to that in a  
9 moment.

10 So the State of North Dakota?

11 MR. SATTTLER: This Todd Sattler, T-o-d-d,  
12 S-a-t-t-l-e-r, counsel of record and assist attorney  
13 general. My phone number is 701-328-3640.

14 MR. THOMPSON: Thank you. Turning to amici and  
15 other non parties, is there somebody on the phone call  
16 for the United States?

17 MR. JAY: You have two of us. I am William  
18 Jay. William is spelled normally. The last name is  
19 J-a-y. I am assistant to the solicitor general at main  
20 Justice. With me on the phone is my colleague from the  
21 environment and natural resources division, Jim Dubois.  
22 I'll let him introduce himself.

23 MR. DUBOIS: The name is James Dubois,  
24 D-u-b-o-i-s. Kind of like if you were in Wyoming, it  
25 would be "due boyce."

1 MR. JAY: Willy Jay again. My phone number is  
2 202-514-8976, and it is not in the pleadings.

3 MR. THOMPSON: Thank you.

4 And then is there anyone on the phone today for  
5 the Northern Cheyenne tribes?

6 MS. BOND: This is Sarah Bond. I have talked  
7 with Jeanne Whiteing, who is the counsel of record for  
8 the tribes. She has indicated that she is involved in  
9 another meeting today and could not attend. The  
10 Northern Cheyenne has just had a tribal council election  
11 and they have a new president, presently Leroy Spang.  
12 She will be meeting with the new leadership of the  
13 tribe, and at this point is only tracking the case for  
14 informational purposes until she gets further  
15 instructions from her client.

16 MR. THOMPSON: Okay. Thank you.

17 And then finally, is there anyone on the phone  
18 for Anadarko Petroleum Corporation?

19 MR. WIGMORE: This is Michael Wigmore,  
20 M-i-c-h-a-e-l, W-i-g-m-o-r-e. I'm with Bingham  
21 McCutchen. It's on the pleadings also. It's  
22 B-i-n-g-h-a-m. My phone number is 202-373-6792.

23 MR. THOMPSON: Thank you. Did I pronounce that  
24 Anadarko correctly?

25 MR. WIGMORE: You did.

1 MR. THOMPSON: Is there anyone else? We have  
2 gone through everybody who is on the service list, but I  
3 want to make sure I catch anyone else. My main goal  
4 today is to develop an initial case management plan and  
5 I will embody that in a first case management order.

6 There are eight items that I hope we can cover  
7 in the next 45 minutes and I will just go down the eight  
8 items and then come back to -- I want to talk about  
9 filings and other formal communications; procedural  
10 rules; the motion to dismiss that's been referred to me,  
11 amicia, and in particular Anadarko's motion for leave to  
12 file an amicus brief in support of respondent State of  
13 Wyoming; other current management issues; fees and  
14 costs; potential settlement discussions; and then any  
15 other matters that any of you have.

16 So turning to the first of those eight items,  
17 the filings and other formal communications. As  
18 probably most of you know, I am responsible for  
19 maintaining the Court's docket. And when I ultimately  
20 file a final report with the Supreme Court, I will need  
21 to send hard copies of all the items in that docket to  
22 the U.S. Supreme Court clerk's office. But I would also  
23 like to maintain a Web-based document for the use of all  
24 of the parties. Most Special Masters are now doing  
25 that, and the parties seem to find that to be quite



1 useful.

2           So with that in mind, what I will request all  
3 parties to do is to serve all filings and other formal  
4 communications by both regular mail and e-mail. For  
5 regular mail, what I would ask is that you send me an  
6 original, plus three copies. And then I would also ask  
7 that you send everybody by e-mail a PDF of that  
8 document. And one of the things that I'll provide in  
9 the first case management order is what address you  
10 should be using for me for both the regular mail and  
11 also the e-mail. I'll probably set up a special e-mail  
12 account here, so that everything involved in this  
13 particular case goes to that e-mail account.

14           So I guess the first question I should ask is,  
15 is it going to be a problem for anyone to not only  
16 provide the hard copies but also a PDF?

17           MS. BOND: Not for Montana. That was going to  
18 be our suggestion if there was a question about it, but  
19 I think that's a good idea.

20           MR. THOMPSON: Okay. Great.

21           The other thing to know here as, again,  
22 probably most of you know, now that it's before me, now  
23 that the matter is before me, Supreme Court Rule 33 no  
24 longer applies. That means for any type of briefs or  
25 motions you no longer have to worry about Supreme Court

1 Rule 33 getting things printed up in the small booklets,  
2 worrying about exactly what color you are going to have  
3 to use. I will set out the format that I would ask that  
4 our documents be in, in the first case management order,  
5 but it's generally what you would expect to file in  
6 Federal District Court.

7 The next question is do all of the counsel have  
8 electronic copies of the documents that you've filed to  
9 date with the U.S. Supreme Court? Let me rephrase that.  
10 Is there anyone who doesn't have an electronic version  
11 in one form or another of the documents that you filed  
12 before the court?

13 MS. BOND: Montana has all of ours out with the  
14 only caveat that our maps, the maps that we appended to  
15 the original, the first motion for leave to file,  
16 because of their size are separate PDF. But we have all  
17 of that electronically. We don't have Wyoming's  
18 appendices electronically. I don't know if Wyoming does  
19 or not.

20 MR. MICHAEL: This is Steve Michael. We have  
21 all of our pleadings in PDF form available to be shared,  
22 if necessary.

23 MR. THOMPSON: And I would say that in the case  
24 of maps, since those are frequently difficult to reduce  
25 to a PDF format, I wouldn't worry about -- to the degree

1 either in the past or in the future you will use maps.  
2 I wouldn't worry about those on the PDF. But everything  
3 else, it would be great having the PDF format.

4 So if everybody could send to Susan Carter the  
5 documents that you have already filed in the court in  
6 PDF form, then we can go ahead and start the Web-based  
7 docket and we will put all those documents on it also so  
8 that everyone has easy access to them.

9 MS. BOND: This is Montana. I think I might  
10 need to correct myself. I think I do have all of the  
11 appendices that were included within the bound document  
12 filed with the court. What we didn't have are the  
13 documents from which those were excerpted.

14 MR. THOMPSON: That's fantastic. But I  
15 recognize that there might be some type of documents in  
16 the nature of maps or other large appendices that might  
17 be difficult sometimes to put in PDF format and I think  
18 that's totally appropriate and fine.

19 So, again, if I could ask all the parties then  
20 to send by PDF -- in PDF format or some other electronic  
21 format, Susan can always convert it then to PDF. If you  
22 could send prior documents to Susan.

23 As I mentioned a moment ago, if counsel for  
24 Montana would be willing to update the service list for  
25 this case, and since I am now asking that all parties

1 communicate by e-mail and send filings and other formal  
2 documents around by e-mail in addition to regular mail,  
3 if you could also include e-mail on that.

4 MS. BOND: I can do that with the possible  
5 exception of Mr. Wigmore. Then I have another question.  
6 I see from Anadarko's motion that on this one it says  
7 Mr. Dragna is counsel of record. So if I could get a  
8 clarification and the e-mail for that party or that  
9 requested amicus, I could send in the rest of them. I  
10 have the rest of the e-mails.

11 MR. WIGMORE: Sarah, this is Mike. I can send  
12 you my contact information. I think for the Special  
13 Master process, I'll be on the service list as counsel  
14 of record at the court.

15 MR. THOMPSON: Okay. So should both James  
16 Dragna and you then be listed?

17 MR. WIGMORE: Yeah, if that's okay. If you  
18 need one person, it will probably be me, assuming that  
19 that's acceptable to you, even though he is counsel of  
20 record at the -- he gets the asterisk at the Supreme  
21 Court, but I think I'll probably be doing most of the  
22 communication. However you would like it. If you can  
23 do two, that would be fine. If you want just a single  
24 name, it would be mine.

25 MR. THOMPSON: I guess my preference on this

1 would be generally if we can have one party per address  
2 and then just get multiple copies sent to that, it would  
3 probably be easier.

4 MR. WIGMORE: That's Fine. Sarah, then it  
5 would be me as the contact for the Special Master  
6 process. And Sarah, I will send you an updated virtual  
7 card so you have all of my information.

8 MS. BOND: Thanks very much, Mike.

9 MR. JAY: Sarah, this is Willy Jay. I think  
10 Jim is going to be our primary contact for the federal  
11 government, if you're just going to use one name.

12 MS. BOND: Should I send -- I have to ask the  
13 Special Master, should I send both, for example,  
14 Mr. Jay's and Mr. Dubois' e-mails to Susan?

15 MR. THOMPSON: Yes. I think we can go ahead  
16 and include everybody's e-mail. I'm just trying to hold  
17 down the total number of packages that need to be  
18 mailed.

19 MS. BOND: Okay. And I have all those. And I  
20 have Northern Cheyenne's counsel's e-mail also.

21 MR. THOMPSON: So just going around for hard  
22 copies, for Montana, how many for any types of  
23 pleadings, motions, filings? How many copies would you  
24 want?

25 MS. BOND: If we can, four would be good, but

1 three would be all right. Two would need to come to my  
2 office here in Montana and one to John Draper's office  
3 in Santa Fe, if that's possible. If not, just send us  
4 what you've got, send us one, and we will take care of  
5 the rest.

6 MR. THOMPSON: I think that should be fine. So  
7 what I'm going to do is go around and see how many  
8 copies each of the various folks on the service list  
9 would like.

10 So then, for Wyoming?

11 MR. MICHAEL: I guess I have a question. We  
12 haven't talked about discovery yet and I don't even know  
13 if we will today, but if we get voluminous discovery,  
14 that would be something different, I assume.

15 MR. THOMPSON: Yes. And we will talk about  
16 that after the motion to dismiss is resolved.

17 MR. MICHAEL: Okay. But for regular pleadings,  
18 four would be nice, if people don't mind that many.

19 MR. THOMPSON: Okay. And they can all go to  
20 you in Cheyenne?

21 MR. MICHAEL: Yeah. Four in Cheyenne, to me.

22 MR. THOMPSON: Okay. North Dakota?

23 MR. SATTLER: We will take two.

24 MR. THOMPSON: The United States?

25 MR. DUBOIS: Two should be sufficient, your

1 Honor. This is Jim Dubois.

2 MR. THOMPSON: Then for Anadarko?

3 MR. WIGMORE: Two should be fine for us as  
4 well. Thank you.

5 MR. THOMPSON: Thanks. So I think that takes  
6 care of the filings and other formal communications.

7 The next item is procedural rules. And, again,  
8 as you probably know, the only applicable Supreme Court  
9 rule, is Rule 17, which doesn't provide a great deal of  
10 guidance. We must follow the form of pleadings and  
11 motions set out in the Federal Rules of Civil Procedure.  
12 And in all other respects, the Rules of Civil Procedure  
13 and the Federal Rules of Evidence can be used as  
14 guidelines.

15 What I will be doing is incorporating slightly  
16 modified versions of the various civil procedure rules  
17 that seem to be relevant in the case management orders,  
18 as appropriate. But to the degree that the case  
19 management orders don't explicitly address an issue, you  
20 should look to the Rules of Civil Procedure for general  
21 guidance. I don't think there will be much difficulty.  
22 Most of the Rules of Civil Procedure are not directly  
23 relevant and some of them need slight modification for  
24 purposes of this type of an original matter. And so  
25 that's why, as I said, as they become appropriately

1 relevant, I would incorporate various of the Rules of  
2 Civil Procedure as they need to be modified into the  
3 case management orders. But if you ever have any  
4 questions, just look to the civil procedure rules.

5 MS. BOND: Okay. Thank you.

6 MR. THOMPSON: So the next item is the motion  
7 to dismiss by Wyoming. As you know, that's been  
8 referred to me now, and it would seem that that's the  
9 very first thing that I need to take up.

10 So what I would propose is that we set both a  
11 time and a date for a hearing on Wyoming's motion so  
12 that I can proceed forward and try to, well, resolve  
13 that motion.

14 On the location, I think the location needs to  
15 be in a neutral site. I have two possible sites. One  
16 is that we can use the courtroom here at Stanford Law  
17 School. It's the courtroom that both the Ninth Circuit  
18 and the California Supreme Court use occasion. The  
19 other possibility would be I can check to see whether or  
20 not I could get a courtroom in the Tenth Circuit  
21 building in Denver. There is also a possibility I could  
22 try Salt Lake City, but what a lot of the other special  
23 Masters have found is that it's fairly difficult to get  
24 district court courtrooms. So I would appreciate the  
25 parties' thoughts on that. Obviously, Stanford is



1 convenient for me, but there are more of you than there  
2 are of me.

3 MS. BOND: Your Honor, I appreciate the  
4 consideration. We are good with either Denver or  
5 Stanford. I suppose Denver is a little closer for me,  
6 but Stanford is just fine and --

7 MR. DUBOIS: Warmer.

8 MR. THOMPSON: We are going to be starting to  
9 talk about January or February in a moment.

10 MS. BOND: I'm guessing that Stanford might be  
11 a little bit more acceptable in the blizzard season, but  
12 either way is fine with use.

13 MR. THOMPSON: So other thoughts? And I really  
14 am interested in making sure that this is convenient for  
15 all parties. So other people's reaction?

16 MR. MICHAEL: This is Pete Michael speaking  
17 from Cheyenne. Obviously, Denver is quite convenient  
18 for us. We can drive to Denver. So I guess that's  
19 somewhat of a preference, although Sarah is right,  
20 weatherwise, you know, you never know whether the DIA  
21 will be open or closed. So we would be amenable to  
22 Stanford if the balance of considerations went to that.

23 MS. BOND: It makes sense to me, Pete.

24 MR. SATTLER: Your Honor, this is Todd Sattler  
25 in North Dakota. We would be fine with either location.

1 I wonder whether you have thought about allowing  
2 appearances telephonically or if you are set up for  
3 that?

4 MR. THOMPSON: I think we can probably do that  
5 here at Stanford. I would need to check on the Byron  
6 White building in Denver as to whether or not they can  
7 do that easily also.

8 MR. SATTLER: I'm not certain what we will do,  
9 but if that option is available, that would be helpful  
10 to know.

11 MR. THOMPSON: I understand that North Dakota  
12 is in a slightly different position than either Wyoming  
13 or Montana in this case.

14 And I assume for both the United States and for  
15 Anadarko that both is probably equally convenient?

16 MR. DUBOIS: This is Jim Dubois for the United  
17 States. Actually, Denver is about as convenient as you  
18 can get because I'm staring at the Tenth Circuit  
19 building out of my window, but I can also get an  
20 airplane and make it to Stanford. It's not a problem.

21 MR. THOMPSON: So you are in Denver?

22 MR. DUBOIS: I am in Denver, yes.

23 MR. THOMPSON: This is --

24 MR. WIGMORE: Whatever the parties work out,  
25 would be fine with us. We don't really have a say in

1 it.

2 MR. THOMPSON: Then in terms of dates. I don't  
3 know whether or not you have your calendars in front of  
4 you. My guess is that given that we only have about a  
5 month before the holiday season, and I'm actually  
6 leaving the United States for three weeks as of  
7 December 12, that it would be very difficult to schedule  
8 something before then. So I have looked at my calendar  
9 and found three dates. They, unfortunately, are all  
10 Tuesdays. So I don't know whether or not that will work  
11 for everybody.

12 Let me throw out three possible dates and see  
13 whether or not we can get agreement over the telephone.  
14 And if not, I'll give the responsibility to Susan to try  
15 to find a date that works. But they are January 6th,  
16 February 3rd, and February 17th. The easiest way is to  
17 have people tell me if they have conflicts on any of  
18 those dates at the moment.

19 MS. BOND: Sarah, from Montana. The 3rd and  
20 17th of February would be the best for us, preferably  
21 the 17th.

22 MR. MICHAEL: This is Pete Michael. I have got  
23 a conflict on January 6th, but the other two dates are  
24 okay.

25 MR. SATTLER: This is Todd Sattler. All three

1 dates will work.

2 MR. DUBOIS: This is Jim Dubois. All three  
3 dates would work for me.

4 MS. BOND: John, do you have a conflict on any  
5 of those dates?

6 MR. DRAPER: January 6th is difficult.  
7 February 3rd or 17th would be fine.

8 MR. THOMPSON: Why don't I then -- what I will  
9 do is I will ask Susan to check on availability, both at  
10 the courtroom here at Stanford Law School and also in  
11 Denver on those two dates. We will decide on a location  
12 and a date and get that out to people as quickly as  
13 possible.

14 I guess also on the motion to dismiss -- so I  
15 know that obviously both Montana and Wyoming will want  
16 to make arguments at that hearing. Would the United  
17 States like to have some oral time at that? I will tell  
18 you as the Special Master I would find it valuable.

19 MR. DUBOIS: If you would find it valuable,  
20 your Honor, I suspect the answer then is yes.

21 MR. THOMPSON: Okay. Also as part of the first  
22 management order, I'll also set out the times for the  
23 various argument. I assume probably morning is better  
24 for people?

25 MS. BOND: We are good either way, your

1 Honor.

2 MR. THOMPSON: Okay. The next thing is on the  
3 motion of Anadarko for leave to file the amicus brief.  
4 What I will do is I will address that motion in the  
5 first case management order. I haven't looked at it  
6 yet, so I will do that, and as I say, rule on that in  
7 the first case management order.

8 And so I as understand, the Northern Cheyenne  
9 tribe has filed a motion but, Ms. Bond, what you have  
10 told me is basically, at the moment, they will just sit  
11 back and watch?

12 MS. BOND: I believe that's correct. I think  
13 the difference between the two amici is we objected to  
14 the participation of Anadarko, and I think their motion  
15 is just to participate in the motion to dismiss, which  
16 is the only motion.

17 MR. WIGMORE: That's right.

18 MR. THOMPSON: The amicus brief, as I  
19 understand it, is not a motion to intervene or to  
20 otherwise participate in the moment.

21 MR. WIGMORE: That's right. It's just a motion  
22 for leave because we didn't get consent of all the  
23 parties. So the amicus brief had to be submitted on  
24 motion for leave.

25 MR. THOMPSON: I understand.

1           Other current management issues. If the motion  
2 to dismiss is denied, we will obviously need to discuss  
3 broader issues of case management at that time,  
4 including how to proceed forward with discovery and  
5 resolution of the various legal issues. But it would  
6 not appear that there is any reason why we need to  
7 address those issues at this time until we have resolved  
8 the motion to dismiss. I wanted to get people's  
9 thoughts on that.

10           MS. BOND: That sounds right to us.

11           MR. MICHAEL: I agree with that as well. This  
12 is Pete Michael.

13           MR. THOMPSON: Great. The only thing then that  
14 I'll emphasize at this point is that my goal is to  
15 obviously resolve this carefully and appropriately, but  
16 also to resolve it as expeditiously as possible. There  
17 is some original jurisdiction cases that have lasted  
18 very lengthy periods of time and that's not what I want  
19 to see happen in this particular case. So one of the  
20 things I will be doing is trying to move this case  
21 forward.

22           MS. BOND: Thank you. We appreciate that.

23           MR. THOMPSON: Okay. The next thing is on fees  
24 and costs. So that you know in advance, my current  
25 hourly rate on private legal matters is \$550 an hour,

1 but I recognize that the parties in this case are states  
2 and that there is a public interest aspect to this job,  
3 so I am going to lower my rate for purposes of this to  
4 \$450 per hour. I may well employ a third year law year  
5 student as a clerk on some research issues, but at this  
6 point in time I don't expect to employ anything in the  
7 nature of a more senior clerk. I might need to do that  
8 at some point in the future, but I don't need to do that  
9 right now, and so hopefully that will keep the overall  
10 fees and costs down.

11           There will be a charge for normal expenses like  
12 this conference call line, travel, overnight delivery,  
13 but I would expect that the only substantial and in any  
14 sense unusual expense is likely to be the printing of  
15 any reports. Otherwise, I think the expenses will be  
16 fairly routine, and I will work to keep those expenses  
17 down to a minimum.

18           Some Special Masters in the past have required  
19 the establishment of escrow accounts for their fees and  
20 disbursements, but I don't see any reason to do that in  
21 this particular case. Instead, what I will plan to do  
22 is to submit periodic bills, probably once or at most  
23 twice a year. And what I will do with those, for those  
24 of you who have not been involved in original  
25 jurisdiction matters in the past, is I will send those

1 bills directly to the Court with copies to you. And  
2 then you will have 10 days to make any comments on those  
3 bills. And in the letter that accompanies the bill to  
4 you, I'll remind you of that 10-day period for comment.  
5 If you have any comments on the bills, you should send  
6 any of those comments directly to the Court. You  
7 shouldn't send your comments to me. That's purely a  
8 matter between you and the Court. If anyone is unhappy  
9 with the bill, I don't want to know about it. So that's  
10 sort of the first item.

11           The costs are generally assessed equally  
12 between the principal parties in these cases. This case  
13 is a little bit unusual in that it would appear that  
14 from everything I've read so far, the main parties are  
15 Montana and Wyoming, and that at the moment North Dakota  
16 is not seeking any relief nor is anyone seeking anything  
17 against North Dakota. So I assume that the costs would  
18 probably be split between Montana and Wyoming, but  
19 that's something I would appreciate the parties could  
20 discuss.

21           The Special Masters do have discretion if they  
22 want to, to suggest modification of the allocation if  
23 it's warranted by egregious behavior, but I don't expect  
24 to see anything of that nature here.

25           So, again, my expectation would be probably the



1 costs would be assessed equally between Montana or  
2 Wyoming.

3 MS. BOND: For Montana, equally is fine.

4 I guess I did have, if it's all right, one  
5 comment with respect to the procedure by which we pay  
6 costs. As much as I would like to, I don't have the  
7 checkbook for the State of Montana and I don't even know  
8 that the attorney general does. In terms of timing, if  
9 the Master is not wanting to set up an escrow account,  
10 that's fine. I don't know that I can get a check out of  
11 anybody from the state in 10 days, so I just wanted to  
12 alert somebody on the record that we have a bureaucracy  
13 to go through.

14 So in terms of the timing, the escrow account  
15 for some sort of prepayment works better for us because  
16 then you are not left without ability to disburse fees  
17 to -- fees that you've incurred and pay for costs that  
18 you've incurred, and I don't have that problem with the  
19 bureaucratic timing. And I don't know if you can send  
20 out a -- in a construction project you will often see an  
21 amount of money down, sort of, and I don't know if you  
22 want to do that or just be aware, please alert the  
23 Court, that I don't -- depending upon the timing, if we  
24 are relying on electronics, then we will get a bill  
25 pretty quickly. But given the security in Washington,

1 if the bill has to go from the Master to the Supreme  
2 Court, get logged in, get recorded and so forth, and  
3 then come back out to us, it's going to be a lot longer  
4 than 10 days before we can even see it and review it  
5 necessarily. Also, if that's 10 calendar days. And so  
6 just as something to think about, the logistics of that  
7 are such that I can't make a comment and/or pay within  
8 10 days. I don't think we are physically capable of  
9 doing that.

10 MR. THOMPSON: Let me clarify. The process is  
11 that I would submit a bill for fees and costs incurred.  
12 I will send a copy of that, which is actually in the  
13 form of an interim motion for costs to the Court. I  
14 will send that to all of the parties and then the  
15 clerk's office will wait for 10 days to receive any  
16 responses that you have to it.

17 MS. BOND: Okay.

18 MR. THOMPSON: For example, if you believe that  
19 there are cost items on it that you should not be  
20 assessed, then you would have 10 days in that to file a  
21 response. At that point the motion goes on the  
22 conference list for the Supreme Court and the Supreme  
23 Court would then issue an order, either granting,  
24 denying, or modifying the bill. And the Court's order  
25 then specifies the amount to be paid and how that amount

1 is to be apportioned between the parties.

2 So at that point, you would then be responsible  
3 for paying me. And what I will do is I will just incur  
4 all of the various costs myself and get reimbursed  
5 through that particular process.

6 So I think the real question at this stage is  
7 not the 10 days, but instead whether or not, just as a  
8 matter of being able to process the payment and not have  
9 any problems at that stage of processing, whether or not  
10 that's a fine procedure or whether or not you would  
11 actually prefer some type of an escrow account.

12 MS. BOND: The process you just outlined is  
13 fine. Actually, we would kind of prefer an escrow  
14 account because it gets it out of our hair first, but  
15 then that puts some accounting on you.

16 So the account that you just described is fine.  
17 I was hoping that nobody was expecting us to cut a check  
18 in 10 days. The one you outlined is fine. It will come  
19 to us, we'll have time to look at it and then we can pay  
20 it.

21 MR. THOMPSON: Okay. Willy, your thoughts on  
22 this?

23 MR. JAY: Our thoughts are that 50/50 seems  
24 fair considering North Dakota's lack of involvement  
25 here. And also that sounds fine as far as procedural.

1 MR. THOMPSON: Okay. And would you prefer to  
2 use the procedure of my simply submitting an interim  
3 motion for fees and costs once or twice a year rather  
4 than having an escrow account?

5 MR. JAY: Yeah. I think we would prefer  
6 that.

7 MR. THOMPSON: So, Montana, if you don't mind,  
8 I think that's probably the easiest.

9 MS. BOND: Sure. That's fine.

10 MR. THOMPSON: And so on the allocation of  
11 costs, as I said, at the moment we can move forward with  
12 the assumption it will be equally split between Montana  
13 and Wyoming, and obviously that can be changed in the  
14 future if it becomes appropriate.

15 So any other questions, concerns on the fees  
16 and costs?

17 MS. BOND: I don't think so.

18 MR. THOMPSON: Okay. Then the only other thing  
19 that I want to mention is simply the possibility of  
20 settlement. And I view it as one of my roles as Special  
21 Master is to encourage both sides to always consider  
22 settlement discussions at any stage of the proceedings  
23 that seem appropriate. And that doesn't mean I don't  
24 want to hear and resolve this matter, but I think  
25 settlement is always a useful option for parties.

1 I can't be involved in any settlement  
2 discussions. If you do at any point decide to go that  
3 route, and there is no reason why you need to inform me,  
4 but I also want to let you know that if at any point you  
5 want my assistance in helping to identify a mediator or  
6 the like, I would be happy to do so.

7 So, again, this isn't pushing you to settlement  
8 but it's just encouraging you, as I think any good judge  
9 or Special Master, too, to always consider that  
10 option.

11 MS. BOND: Thank you. I think from Montana's  
12 perspective our governors are actually pretty good  
13 friends and they have -- I think our feeling is that we  
14 are looking forward to settlement discussions after the  
15 legal issues that have separated the parties that are  
16 legitimate simple differences of the way we read the  
17 Compact. After those are decided, we expect there might  
18 be some possibility of settlement discussions.

19 MR. THOMPSON: Okay. So are there any other  
20 matters that people would like to discuss today? That  
21 exhausts my agenda.

22 MR. MICHAEL: This is Peter Michael speaking.  
23 I had one subject that I wanted to bring up and it kind  
24 of comes out of some comments you made earlier regarding  
25 the pleading format. When we filed our motion to

1 dismiss, of course we had to really trim down the  
2 various documents that we attached so they would fit in  
3 an appendix under Supreme Court procedure. And we were  
4 informed by the clerk that at some point in the process  
5 if the Court was going to consider the motion without  
6 appointing a Special Master, that if the Court wanted  
7 complete copies of any of documents, that the Court  
8 would ask for those or for additional copies.

9           Early in the process, right after we filed our  
10 motion, I know Sarah Bond called me up and said there is  
11 some documents we would like to see and we immediately  
12 sent them on up to Montana.

13           So I don't know if, given the fact that now  
14 it's before you and you have more leeway in terms of the  
15 way that things are presented, whether it would be  
16 beneficial to actually for you to have the documents,  
17 the complete documents. Because of course, again, we  
18 submit the trimmed-down version to comply with the  
19 Court's appendix requirements. And I just put that  
20 issue on the table. I don't know if that's beneficial  
21 to you or something you would want to do or maybe wait  
22 until the arguments and see if there is something you  
23 would like to have a more complete -- a copy of the  
24 original document versus the shortened appendix  
25 version.

1 MR. THOMPSON: No. I actually think it would  
2 be useful to have complete documents. Would Montana and  
3 Wyoming be able to get together and agree on a set of  
4 documents that could serve as an appendix for this  
5 motion?

6 MR. MICHAEL: Well, we have our appendices. I  
7 don't think it would be difficult for us to -- again, we  
8 sent documents already up to Montana once, but we could  
9 send -- gather a complete set of documents that were in  
10 our appendix and then send them up for review, and then  
11 Montana could decide if they have any concerns about  
12 authenticity or anything of that nature.

13 MR. THOMPSON: That would be great. That would  
14 be my preference. I would like, for purposes of this  
15 motion, to have in front of me all primary documents  
16 that Montana and Wyoming believe could be relevant to  
17 the resolution of the legal issues concerning the Yellow  
18 Stone River Compact. And if the two parties could agree  
19 on that set of documents, then that would be very  
20 valuable.

21 MR. JAY: This is Willy Jay. I just wanted to  
22 flag for you that the United States' amicus brief is at  
23 motion to dismiss stage also. It has a couple of  
24 documents bound at the end and those are from the same  
25 set that we understand the parties to be referring to.

1 But to the extent that the parties are putting together  
2 a set, an agreed upon set for you, we would like them to  
3 include those to the engineering committee report. And  
4 I think, and Michael can correct me if I'm wrong, I  
5 think are excerpted in Wyoming's set, but set forth at  
6 greater length than our brief.

7 MR. THOMPSON: That would be fine. So counsel  
8 for Montana, would you be willing to take responsibility  
9 then for working with counsel for Wyoming and also  
10 consulting with the United States in putting together  
11 those documents?

12 MS. BOND: Yes, your Honor. I would, with the  
13 one caveat that Wyoming's attachments are quite a bit  
14 more voluminous and we do not agree that some of those  
15 are relevant and appropriate to be under consideration.  
16 But I think we could, if Pete will send us again the  
17 full set of what he wants to send to you, I think we can  
18 hopefully work through any authenticity or foundational  
19 kind of issues and then reserve any objection to whether  
20 or not it's something that the Court should consider in  
21 this kind of motion and preserve that particular  
22 argument for legal argument before you. In other words,  
23 we can agree that these are the documents and then argue  
24 about what they mean or whether you should even consider  
25 them later.



1           MR. THOMPSON: That's all I would ask for at  
2 this stage. And I understand entirely that by agreeing  
3 on the authenticity of the documents that you are not in  
4 the process also agreeing that those documents are  
5 relevant in interpreting the Compact.

6           MS. BOND: Thank you. We are fine with doing  
7 that.

8           MR. DUBOIS: Your Honor, this is Jim Dubois.  
9 Just so that I'm clear, are you wanting only the  
10 documents that were cited in the various briefs or are  
11 you inviting the parties to submit documents that were  
12 not referenced as well?

13          MR. THOMPSON: Thank you for that clarifying  
14 question.

15           First of all, my understanding from listening  
16 to counsel for Wyoming is that in some cases some of the  
17 documents might have been truncated. And I think it  
18 would be appropriate if any of the parties believe that  
19 additional portions of those documents should be before  
20 the Special Master in ruling on this motion, that the  
21 complete document be provided. But in addition to that,  
22 if there are additional documents that were not included  
23 at that point in time that one or more parties believe  
24 are relevant to the resolution of the legal issues in  
25 the motion, then I would invite those also to be

1 included in this larger appendix.

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

3 Just to further clarify the question, it's not just the  
4 truncated documents you would like in this compendium  
5 but the copies of the originals which were transcribed  
6 and reprinted in our briefs?

7 MR. THOMPSON: That's correct. I think it's  
8 useful to have one appendix that can serve as a complete  
9 appendix for this motion. And, again, the parties in  
10 agreeing on this appendix are simply agreeing to the  
11 authenticity of the documents.

12 MR. DRAPER: Thank you.

13 MS. BOND: Your Honor, just as another  
14 clarifying point. The parties are the only entities?

15 MR. THOMPSON: That's correct. The parties and  
16 the United States.

17 MS. BOND: The other thing is, just so we are  
18 really clear, I heard a discussion of documents that  
19 were cited and then I've heard a discussion of documents  
20 that were appended, and those may be different subsets.  
21 Can you just repeat what exactly you want us to put  
22 together? You are inviting us to add documents and see  
23 if we can agree that they are properly before the Court  
24 and then also put together a single set of what we would  
25 agree were the full documents from which both parties'

1 appendices were -- and the United States -- were  
2 redacted? And if there were any materials, for example,  
3 secondary sources that were cited in a brief but were  
4 not appended, are you also asking for copies of those?

5 MR. THOMPSON: No. So let me separate out.  
6 What I assume that the parties were thinking about were  
7 primary documents that would not otherwise be accessible  
8 to the Special Master. So those would be various  
9 documents concerning, for example, the original  
10 negotiation of the Compact or congressional approval of  
11 the Compact. I would think those would also include the  
12 type of congressional materials that were included. But  
13 to the degree that I have easy access to secondary  
14 materials, you don't need to include those.

15 MS. BOND: So you are thinking correspondence  
16 between the parties that would only be in the archives  
17 of the individual states, for example?

18 MR. THOMPSON: That's correct.

19 MS. BOND: We would have -- this appendix would  
20 have the full original documents from which the  
21 appendices were redacted as well as other primary  
22 materials that we want the Special Master to rely on; is  
23 that accurate?

24 MR. THOMPSON: That's correct. And obviously,  
25 I don't want you to put in materials simply to make it

1 longer. So, obviously, only include those materials  
2 that you consider to be relevant. But I do think it  
3 will be useful in resolving the motion to dismiss and  
4 also in resolving any other matters in the future that  
5 involve legal interpretation of the Compact to have that  
6 type of a comprehensive appendix. Then obviously in the  
7 future, if additional documents were to come to mind  
8 that in any future motion would be relevant, then those  
9 could be introduced at that point in time. But anything  
10 that you believe at this point that you would like to  
11 rely upon in arguing on the motion to dismiss, include  
12 that. And, again, we are only talking about primary  
13 materials that the Special Master would not otherwise  
14 have easy access to.

15 MS. BOND: All right. Thank you.

16 MR. THOMPSON: Any other questions on this?

17 MR. WIGMORE: This is Michael Wigmore again.

18 For what it's worth, as you may understand we just have  
19 one very narrow but important issue in the case. I'm  
20 sure we will attend the hearing on the motion to dismiss  
21 and I understand it's purely legal issues at that point.  
22 We are not a party to the Compact, but we will be there.  
23 And to the extent you have any questions, we will be  
24 happy to participate. And if you wouldn't find that  
25 helpful, we will sit quietly and take copious notes.

1 MR. THOMPSON: Let me resolve the motion first  
2 and then I'll consider that question.

3 MR. WIGMORE: Right. I'm sorry. Right,  
4 obviously. You said you were going to resolve the  
5 motion in the mention on our break.

6 MR. THOMPSON: Okay.

7 MS. BOND: I guess, your Honor, the only other  
8 question I have with respect to your resolution of the  
9 motion of Anadarko to participate, just for the record,  
10 our objection to their participation is because they are  
11 not a sovereign named in the Compact, and that we  
12 believe that Wyoming would speak to their interest as  
13 being negotiated in paren patria on behalf of their  
14 citizens, and that we didn't think their participation  
15 in amicus fit within Rule 37 for being helpful to the  
16 Court. But that hasn't been briefed, but we will  
17 defer.

18 MR. WIGMORE: I'm sorry. Is there going to be  
19 a hearing on that motion because I don't believe --  
20 while you did not consent, I do not believe that Montana  
21 filed an opposition.

22 MR. THOMPSON: I don't think we need to have a  
23 hearing, even over the telephone, on this particular  
24 motion. And so I think I have all of -- I have the  
25 motion itself of Anadarko to file the amicus brief and I

1 think that's sufficient for me to rule on it.

2 MS. BOND: All right. Thank you.

3 MR. WIGMORE: Thank you.

4 MR. THOMPSON: Okay. Anything else?

5 MS. BOND: Not from Montana.

6 MR. THOMPSON: Okay. So I guess the only other  
7 question then for the court reporter is she probably  
8 wants to know how many copies each of you would like.

9 MS. BOND: Of the transcript?

10 MR. THOMPSON: Yes. I'm sorry. What did I  
11 just say?

12 MS. BOND: I'm sorry. I just blanked.

13 MR. THOMPSON: I might have said something  
14 different, but the transcript, yes.

15 MS. BOND: One for Montana.

16 MR. MICHAEL: This is Pete Michael. We will  
17 take one, but can it be condensed?

18 MR. SATTLER: North Dakota does not need a  
19 transcript.

20 MR. THOMPSON: Does the United States want a  
21 transcript?

22 MR. WIGMORE: Of this, no, your Honor. I think  
23 that the case management order will cover anything.

24 MR. THOMPSON: Okay. Anadarko?

25 MR. WIGMORE: We don't need a copy of the

1 transcript, your Honor.

2 MR. THOMPSON: Okay. Well, thank you very  
3 much. And as I said, we'd sort of go down quickly the  
4 various action items. I will be determining the date  
5 and the location of the motion, the hearing on the  
6 motion and getting information out to you on that as  
7 soon as possible. And then I'll also be issuing a first  
8 case management order.

9 As part of that first case management order  
10 I'll also be ruling on the motion of Anadarko for leave  
11 to file an amicus brief.

12 The state of Montana, counsel for Montana, will  
13 produce an updated service list that also includes  
14 everybody's e-mail, addresses and we'll send that around  
15 to all parties and also to the Special Master.

16 In addition to that, counsel for Montana will  
17 take responsibility for working with Wyoming and also  
18 consulting with the United States in putting together an  
19 appendix for the motion to dismiss.

20 I guess the one thing we didn't talk about was  
21 how soon that appendix could be put together.

22 MS. BOND: I think the bulk of the documents  
23 are within Wyoming's possession. I don't know -- Pete,  
24 I don't know if you have electronic copies of the hard  
25 copy stuff you sent us.

1 MR. MICHAEL: I think we already do.

2 MS. BOND: Then we could do that pretty  
3 quickly. And I could get the e-mails today.

4 As a quick clarification, when you say notify  
5 the Special Master, I assume you mean through Susan  
6 Carter?

7 MR. THOMPSON: Yes.

8 MS. BOND: I can talk to Pete later today. Are  
9 you in this afternoon, Pete?

10 MR. MICHAEL: Yes.

11 MS. BOND: We can get right after that.

12 MR. THOMPSON: Okay. Should we set a date, say  
13 the end of this month to do some additional talking?

14 MS. BOND: Yeah. That would be great. It will  
15 give us time to coordinate with the United States and  
16 make sure all our ducks are in a row.

17 I will be sending to Susan the e-mails of  
18 everyone that I have today. Thereafter, would my  
19 communication with the Special Master be to a Web site  
20 or to a Web site and also Susan?

21 MR. THOMPSON: It will probably be through  
22 Susan.

23 Okay. Action items. Anything else on that  
24 list?

25 MR. MICHAEL: This is Pete Michael. How



1 many -- would you like three copies, hard copies of the  
2 appendix?

3 MR. THOMPSON: How many pages are we talking  
4 about, do you think?

5 MR. MICHAEL: I suspect it would be 220, 200  
6 pages, maybe.

7 MR. THOMPSON: Yeah. I would say on that  
8 probably, if you could, send three copies. That would  
9 be quite useful.

10 MR. MICHAEL: We will also send the PDF version  
11 so you can access it that way.

12 MR. THOMPSON: That's excellent.

13 MS. BOND: One more question from me. When we  
14 are sending -- I guess Montana won't be this round, but  
15 do you want those in a notebook or physically -- the  
16 physical copies, do you want those bound in three-ring  
17 binders?

18 MR. THOMPSON: Of which document?

19 MS. BOND: The appendices that we agree on.

20 MR. THOMPSON: In order to save money on the  
21 postage, why don't you just send the documents to me and  
22 then I can store them.

23 MS. BOND: Okay.

24 MR. THOMPSON: Don't worry about putting them  
25 in three-ring binders or doing anything fancy with

1 them.

2 MS. BOND: Okay. Thank you.

3 MR. THOMPSON: Okay. Thank you, very much.

4 Again, have a good day.

5 (Reporter's Transcript of Proceedings concluded  
6 at 9:30 a.m.)

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## 1 REPORTER'S CERTIFICATION

2  
3 I, Dana Saruk, CSR NO. 10653, hereby certify  
4 that I reported in shorthand the above proceedings on  
5 Thursday, November 13, 2008, at 2224 Third Avenue, in  
6 the City of San Diego, County of San Diego, State of  
7 California; and I do further certify that the above and  
8 foregoing pages contain a true and correct transcript of  
9 all of said proceedings.

10 And I further certify that I am a disinterested  
11 person and am in no way interested in the outcome of  
12 said action, or connected with or related to any of the  
13 parties in said action, or to their respective counsel.

14 Dated: November 29, 2008.

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19 Dana Saruk, CSR No. 10653  
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